

# MULTIPARENTHOOD

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*Family law conventionally treats parenthood as binary: A child has two, and only two, parents. These two parents possess all parental rights and responsibilities, which cannot be shared with others. Their status as parents remains fixed throughout the child's life.*

*Today, legislatures are explicitly challenging this view. Ten jurisdictions now have multiparent statutes, i.e., laws that authorize courts to recognize more than two legal parents. Commentators tend to view this development as a radical change in the law intended to accommodate radical new family forms produced by assisted reproduction, LGBTQ family formation, and polyamory. But the accuracy of these assumptions—about the ways in which these statutes represent a break from the past and the types of families they capture—has remained unexamined.*

*This Article is the first to do so through an empirical study. Analyzing all publicly available judicial decisions issued pursuant to multiparent statutes, we show that the families they accommodate are not novel and rare family arrangements involving planned and well-resourced LGBTQ parents, but instead more familiar and common ones, emerging out of re-partnering and caregiving by extended family members and often resulting from challenges related to poverty. We also show that extending parental rights to more than two people is a longstanding practice in family law. Drawing on a second dataset consisting of all publicly available judicial decisions applying a functional parent doctrine over four decades, we find that courts long have accommodated multiparent families. For decades, courts have authorized the sharing of parental rights and responsibilities across more than two individuals, often recognizing people who come into children's lives long after their birth.*

*Our empirical study of multiparent recognition challenges conventional assumptions about the life and law of parenthood itself. Families commonly construct parent-child relationships in ways that are nonbinary—sharing parental rights with more than one other person and altering a child's parental unit over time. For their part, courts too have resisted a view of parenthood as binary. They have recognized that many children have more than two parents; that parental rights and responsibilities can be unbundled and shared; and that a child's parents may change over time.*

*Our empirical account also suggests that many of the concerns raised about multiparent recognition are inapposite or overstated. Imagining a planned multiparent*

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*family with three involved parents, commentators worry that laws allowing multiparent recognition will produce bitter custody litigation, complicated tri-custody orders, and ongoing conflict with three parents sharing legal rights and responsibilities. Yet, across both datasets, the children rarely have three parents assuming parental responsibilities. Legal recognition of more than two parents typically promotes security and stability for children, not by protecting relationships with multiple involved parents, but instead—and counterintuitively—by protecting children’s primary parental relationship. Accordingly, our study leads us to be less concerned with too much multiparent recognition and instead to be more concerned with too little multiparent recognition.*

- INTRODUCTION . . . . . 1244
- I. BINARY PARENTHOOD. . . . . 1251
  - A. *The Binary Nature of Parenthood: Dualistic, Exclusive, and Fixed* . . . . . 1252
  - B. *Multiparenthood: A Radical Challenge to the Law of Parenthood* . . . . . 1257
- II. FINDINGS ON MULTIPARENT STATUTES AND MULTIPARENT RECOGNITION . . . . . 1261
  - A. *The Multiparent Statute Dataset* . . . . . 1262
    - 1. *Cases* . . . . . 1262
    - 2. *Coding* . . . . . 1264
    - 3. *Limitations* . . . . . 1265
  - B. *Findings from the Multiparent Statute Dataset* . . . . . 1267
    - 1. *Who Are the Families?* . . . . . 1267
    - 2. *Parental Roles in Multiparent Families* . . . . . 1270
    - 3. *The Context of Litigation* . . . . . 1274
    - 4. *Adjudication* . . . . . 1275
- III. FINDINGS ON FUNCTIONAL PARENT DOCTRINES AND MULTIPARENT RECOGNITION . . . . . 1279
  - A. *Multiparent Decisions in the Functional Parent Dataset* . . . . . 1280
    - 1. *Identifying Multiparent Families* . . . . . 1280
    - 2. *Functional Parent Doctrines* . . . . . 1283
    - 3. *Coding* . . . . . 1286
    - 4. *Limitations* . . . . . 1287
  - B. *Findings from the Functional Parent Dataset* . . . . . 1289
    - 1. *Extending Parental Rights to an Additional Parent* . . . . . 1289
    - 2. *Who Are Multiparent Families?* . . . . . 1292
      - a. *Planned Multiparent Families* . . . . . 1292
      - b. *Same-Sex Partners* . . . . . 1294
      - c. *Different-Sex Partners/Spouses* . . . . . 1296

d. Relatives . . . . .	1296
e. Non-Relatives/Non-Intimate Partners . . . . .	1298
f. Kentucky, Pennsylvania, and California . . . . .	1298
3. <i>Parental Roles in Multiparent Families</i> . . . . .	1300
a. Legal/Biological Parents . . . . .	1300
b. Functional Parents . . . . .	1304
4. <i>The Context of Litigation</i> . . . . .	1306
IV. (MULTI)PARENTHOOD IN LIFE AND LAW . . . . .	1310
A. <i>(Multi)Parenthood on the Ground</i> . . . . .	1311
B. <i>The Law of (Multi)Parenthood</i> . . . . .	1316
V. REASSESSING MULTIPARENT RECOGNITION . . . . .	1322
A. <i>Addressing Concerns with (Too Much) Multiparent     Recognition</i> . . . . .	1323
1. <i>Consequences for Children</i> . . . . .	1323
2. <i>Consequences for Parents</i> . . . . .	1326
3. <i>Consequences for Courts</i> . . . . .	1328
B. <i>The Consequences for Children of (Too Little)     Multiparent Recognition</i> . . . . .	1329
1. <i>The Child-Protective Dimension of Multiparent       Recognition</i> . . . . .	1329
2. <i>Facilitating Multiparent Recognition</i> . . . . .	1331
CONCLUSION . . . . .	1334
APPENDIX . . . . .	1336

## INTRODUCTION

Law and culture have conventionally understood parenthood as binary in three related respects. First, a child has two, and only two, parents. Second, parenthood is all or nothing; a child's two parents possess all parental rights and responsibilities, none of which can be shared with others during the child's minority. Third, the line between those who are parents and those who are not is typically unmovable; a child's parents remain consistent and fixed throughout the child's life. This binary understanding of parenthood—as dualistic, exclusive, and fixed—is rooted in the biological, gender-differentiated, heterosexual family: A man and woman conceive a child through sexual intercourse and are the child's (only) legal parents.<sup>1</sup> The two parents—mother

<sup>1</sup> See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 11 (2008) (“Family law, as part of the larger prevailing culture, has enshrined the number two. By constructing links among sex, marriage, and procreation and conceptualizing each as a practice for two, family law takes as its paradigm the couple of the pair.”). While noting

and father—have complete and sole rights regarding the child, to the exclusion of all others. As Katharine Bartlett put it forty years ago, “Parenthood, with few exceptions, is an exclusive status [and a] fundamental premise of the law of exclusive parenthood is that parents raise their children in nuclear families.”<sup>2</sup>

Today, legislatures are explicitly challenging this conventional view of parenthood. In recent years, a growing number of states, from California to Connecticut, have enacted statutes authorizing a court to recognize more than two legal parents.<sup>3</sup> Under these laws, a child can have three (or more) parents, all of whom can claim the rights and responsibilities of parenthood.

Within the burgeoning debate on multiparenthood, proponents and critics of new laws expressly authorizing multiparent recognition agree on two things. First, they see a profound legal shift. They view recent multiparent statutes as unsettling the existing rules of parenthood, by allowing courts to extend parental rights and obligations to multiple individuals.<sup>4</sup> Second, they see a particular kind of family served by this shift in the law. They imagine that multiparent families accommodated by these statutes are primarily “new” family forms—those produced by recent developments around assisted reproduction,<sup>5</sup> LGBTQ family formation,<sup>6</sup> and polyamory.<sup>7</sup> Accordingly, they generally assume

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the presumed paradigm of the indivisible, binary unit, Appleton observed that some “disaggregation has already occurred.” *Id.* at 23.

<sup>2</sup> 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, 879 (1984). In her article, Bartlett made the important and prescient point that the experiences of many children did not fit this model.

<sup>3</sup> See *infra* Part III.

<sup>4</sup> See *infra* Part IV.

<sup>5</sup> See, e.g., 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, 175 (2018); Ann E. Kinsey, Note, *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, 303 (2014).

<sup>6</sup> See, e.g., Samantha Brennan & Bill Cameron, *How Many Parents Can a Child Have?: Philosophical Reflections on the ‘Three Parent Case’*, 54 DIALOGUE 45, 47 (2015); 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); 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/7RQD-KBDF>].

<sup>7</sup> See, e.g., Elisabeth Sheff, Kimberly Rhoten & Jonathan Lane, *A Whole Village: Polyamorous Families and the Best Interests of the Child Standard*, 31 CORNELL J.L. PUB. POL’Y 287, 326–27 (2021); 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>

that such statutes serve families that are, in the words of the relevant California legislative history, “rare.”<sup>8</sup>

From this perspective, the *planned* multiparent family becomes the paradigmatic subject of these new laws: Three or more well-resourced individuals, some of whom are LGBTQ, conceive, often through assisted reproduction, and agree from the outset that they will coparent.<sup>9</sup> Think, for example, of a family that has appeared in many media accounts: Ian, Jeremy, and Alan are a gay “throuple” in San Diego who had two children together through egg donation and surrogacy.<sup>10</sup> A law like California’s seems designed for this twenty-first century family form.<sup>11</sup> As Diana Adams, an attorney at the Chosen Family Law Center, explains, “tri-parenting” is a critical part of the “diversity and beauty of the queer community.”<sup>12</sup>

Through this lens, the multiparent family and its legal recognition represent a new era in which both the lives and the law of families

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[<https://perma.cc/6KM4-N6HZ>]; Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2086 (2015).

<sup>8</sup> See S.B. 274, 2013–2014 Reg. Sess. § 1(d) (Cal. 2013) (“[T]his Bill will only apply in the rare case where a child truly has more than two parents . . .”).

<sup>9</sup> See, e.g., Mallory Ullrich, *Tri-Parenting on the Rise: Paving the Way for Tri-Parenting Families to Receive Legal Recognition Through Preconception Agreements*, 71 RUTGERS L. REV. 909, 913–14 (2019) (“[S]ome same-sex couples have opted to ‘intentionally [form] three-parent families with a person of the opposite sex[,]’ a new family structure referred to as ‘tri-parenting.’ These three parent families generally form through a mutual agreement among the parents prior to the child’s conception.”); Angela Chen, *The Rise of the Three-Parent Family*, THE ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay/616421> [<https://perma.cc/CRM5-37R7>]; *Why One Married Couple And Their Friend Formed A 3-Parent Family*, WBUR (Nov. 6, 2017), <https://www.wbur.org/hereandnow/2017/11/06/three-parent-family> [<https://perma.cc/H3AE-FPAB>].

<sup>10</sup> See, e.g., Pam Kragan, *San Diego ‘Throuple’ Share Their Story of Three Dads and Two Babies*, SAN DIEGO UNION-TRIB. (Mar. 7, 2021), <https://www.sandiegouniontribune.com/entertainment/books/story/2021-03-07/san-diego-throuple-share-their-story-of-three-dads-and-two-babies> [<https://perma.cc/WN77-4LWS>]; Faith Karimi, *Three Dads, A Baby and the Legal Battle to Get Their Names Added to a Birth Certificate*, CNN (Mar. 6, 2021), <https://www.cnn.com/2021/03/06/us/throuple-three-dads-and-baby-trnd/index.html> [<https://perma.cc/UV7U-A46V>]; Rachel DeSantis & Amy Eskind, *Calif. Throuple Raising 2 Kids Say Their Unique Road to Parenthood Is ‘Like Winning the Lottery’*, PEOPLE (Mar. 21, 2021), <https://people.com/human-interest/calif-throuple-raising-2-kids-reveal-unique-road-to-parenthood-like-winning-the-lottery> [<https://perma.cc/FF6J-LK7T>].

<sup>11</sup> See, e.g., Raymond C. O’Brien, *Assessing Assisted Reproductive Technology*, 27 CATH. U. J.L. & TECH. 1, 28 (2018) (“[T]he possibility of a child with more than two parents . . . has arrived, prompting new issues.”). Not all scholars treat multiparent families as new and rare. See Appleton, *supra* note 1, at 15 (arguing against “characterizations of legally recognized multi-parentage as revolutionary”). See also Courtney G. Joslin & Douglas NeJaime, *The Next Normal: States Will Recognize Multiparent Families*, WASH. POST (Jan. 28, 2022) (“[M]ultiparenthood is hardly new.”).

<sup>12</sup> See Chen, *supra* note 9 (quoting Adams).

break from the past.<sup>13</sup> But the accuracy of these assumptions—about who multiparent families are, how they function, and how the law treats them—has rarely been examined. This Article is the first to do so through an empirical study.

Our findings show continuity where others have assumed “radical” change.<sup>14</sup> Parenting arrangements have long included more than two parents, and family law has long extended rights and responsibilities to more than two individuals. Even as today’s multiparent statutes represent an important legal development, we show that they grow out of well-worn legal doctrines and capture families that courts have confronted—and protected—for decades.

Our examination of multiparenthood challenges conventional assumptions about *parenthood* itself. The binary view of parenthood seems not simply unduly restrictive for contemporary times; it fails to reflect longstanding practices in family life and family law. Forging care arrangements in the face of challenging circumstances, families themselves have constructed parent-child relationships in ways that are nonbinary—sharing parental rights with more than one other person and altering a child’s parental unit over time.<sup>15</sup>

Crucially, the law has long respected these nonbinary arrangements. For decades, courts have recognized that a child can have more than two parents.<sup>16</sup> Courts have protected additional parents who come into

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<sup>13</sup> See, e.g., Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 310–11 (2022) (“Legal recognition of multi-parentage is a relatively new concept.”).

<sup>14</sup> See Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 44 (1997) (describing proposal that would “recogniz[e] multiple adults entitled to the bundle of rights associated with parental status” as “the most radical under existing law”). In more recent writing with Professor June Carbone, Professor Cahn observes that “recognition of three parents . . . is increasingly being done now.” Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399, 399 (2018) [hereinafter Cahn & Carbone, *Custody and Visitation*]. The challenge today, they suggest, is not the number of people who are given the title of parent, but instead the granting to all of these adults “equal rights to continuing a relationship with a child.” *Id.*

<sup>15</sup> See *infra* Section III.B.

<sup>16</sup> See *infra* Section III.B.1. We use the term “parent” to include individuals who are designated as parents by the law or are parenting the child and so may be treated as functional parents by the law. See Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513, 555 (2024) (arguing that, because “parenthood emerges from the consistent work of care and the assumption of responsibility . . . [.]” “we should call [functional parents] what they are: parents”). As described in Section III.A.2, *infra*, in some jurisdictions functional parents are treated as legal parents, while in other jurisdictions they are merely extended some parental rights and responsibilities. Throughout this Article, we use more specific terms, such as “birth parent,” “biological parent,” “legal parent,” and “functional parent,” to capture only one class included within the broader category of “parents.” At times, we refer to a “biological or legal parent.” While in most cases a child’s biological parent is a legal parent, some legal parents are not biological parents, and some biological parents are not legal parents—thus, the need for the more capacious term, “biological or legal parent.”

a child's life well after birth and outside of the parameters of adoption.<sup>17</sup> And courts have disaggregated parental rights and responsibilities, spreading them across multiple individuals, including those who are not legal parents.<sup>18</sup> Indeed, as both a family configuration and a legal status, multiparenthood appears almost ordinary.

In making this argument, we draw on original empirical research. In our first dataset, we collected and coded all electronically available judicial decisions issued pursuant to a multiparent statute.<sup>19</sup> Analyzing these sixty decisions, we find that the families captured by these statutes have structures that are neither new nor uncommon. Instead, these families largely emerge out of wide-ranging developments in the twentieth century: divorce and remarriage, nonmarital coupling and cohabitation, and an enduring tradition of caregiving by extended family members.<sup>20</sup>

Our empirical analysis reveals that none of these sixty cases involves the family configurations that tend to animate contemporary conversations about multiparenthood. Rather, we find families like Shawn's.<sup>21</sup> Shawn's biological father, David, lived with Shawn and his mother, Karlie, for the first two years of his life. After David and Karlie separated, she began living with Sebastian. Sebastian formed a parental relationship with Shawn. When seven-year-old Shawn was subject to a child welfare proceeding, he identified Sebastian as the "dad who actually takes care of me" and David as his "real dad" who "doesn't do anything."<sup>22</sup> The court found that Sebastian should be adjudicated Shawn's third legal parent, having acted as a parent in "every way."<sup>23</sup>

In a second, separate dataset, we show that for decades courts relied on functional parent doctrines to accommodate multiparent arrangements in vulnerable families like Shawn's—families contending with a range of challenges often related to or exacerbated by poverty.<sup>24</sup>

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<sup>17</sup> See *infra* Section III.B.1.

<sup>18</sup> See *infra* Section III.B.1.

<sup>19</sup> As discussed in more detail in note 105 *infra* and accompanying text, ten jurisdictions have such statutes, the first of which was enacted in 2005.

<sup>20</sup> See Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 53–58 (2007) (describing developments, including divorce, nonmarital cohabitation, and caregiving by grandparents, that have led children to have "significant family ties to *more than two* adults concurrently").

<sup>21</sup> *In re Shawn R.*, No. D069688, 2016 WL 5940937 (Cal. Ct. App. Oct. 13, 2016), as modified (Oct. 27, 2016).

<sup>22</sup> *Id.* at \*3.

<sup>23</sup> *Id.* at \*14.

<sup>24</sup> Some scholars have identified how multiparenthood can arise in other family forms and contexts. See Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715, 716–21 (2015) (attending to multiparent families in child welfare context); June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 17–20

Functional parent doctrines extend parental rights based on having parented and developed a parental relationship with a child. This dataset includes all electronically available judicial decisions since 1980 applying a functional parent doctrine, across all jurisdictions with such a doctrine. Of the 669 decisions in this dataset, we identified 479 as involving multiparent families.

Our analysis shows that *before multiparent statutes existed*, courts extended parental rights to a third person even when the child had two existing legal parents. Moreover, the legal recognition under these doctrines is often both fluid and partial. The person's status arises at some point after the child's birth and often results in the extension of only some of the rights and responsibilities of parenthood.

Seeing multiparent families and multiparent legal recognition as both more common and more longstanding leads us to intervene in the contemporary debate over multiparent recognition with fresh eyes. The current debate tends to treat *overrecognition* of more than two parents as the main danger. Envisioning planned multiparent families and three involved parents, commentators worry about bitter custody litigation.<sup>25</sup> And they fear tricustody orders that force a child to be “immersed in three different families.”<sup>26</sup> Conflict, they anticipate, will become a common feature of the child's life, as each of the three parents will seek to exercise decisionmaking authority (i.e., legal custody) and enjoy significant parenting time (i.e., physical custody). On this view, “the greater the number of adults holding parental status, the greater the potential for conflict.”<sup>27</sup> With this scene in mind, scholars worry that multiparent recognition may prove “profoundly destabilizing.”<sup>28</sup> Courts confronting these new situations, some fear, are hardly prepared.<sup>29</sup>

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(2017) [hereinafter Carbone & Cahn, *Parents*] (addressing “[s]tepparent [f]amilies” and “[u]nmarried [f]amilies”).

<sup>25</sup> See *infra* Section V.A. We use the term “planned” multiparent family to refer to families in which, *prior to the child's conception*, more than two people intended or planned that all of them would parent the child. As we show in Parts II and III, such families are barely present in our data. Instead, in almost all of the families in our datasets, the third (or fourth) parent was not initially intended to be a parent but stepped in to that role at some point after the child's birth. These families would therefore not fall within what we are describing as planned multiparent families. We do not mean to suggest, however, that there is no planning or rational decisionmaking in these families with regard to family structure and the allocation of caregiving responsibilities.

<sup>26</sup> Sara Alpert, *The Past and Future State of De Facto Parents in New York*, 55 FAM. CT. REV. 458, 464 (2017).

<sup>27</sup> Cahn & Carbone, *Custody and Visitation*, *supra* note 14, at 404.

<sup>28</sup> Malinda L. Seymore, *Inconceivable Families*, 100 N.C. L. REV. 1745, 1792 (2022).

<sup>29</sup> See Jessica Feinberg, *Multi-Parent Custody*, 108 MINN. L. REV. 1489, 1497 (2024) (addressing “novel questions relating to whether and how the current legal standards governing custody disputes between legal parents, which were adopted at a time when



Our empirical account suggests that many of these concerns are inapposite or overstated. The child in the multiparent families we observe rarely has three parents all of whom have been exercising parental responsibilities.<sup>30</sup> Indeed, in our data, the person treated as a third parent is often the child's primary—and sometimes their only—source of consistent parental care. From this perspective, legal recognition of more than two parents does not create disruption and conflict in a child's life, but instead typically contributes to the child's stability and security. It does so, not primarily by protecting relationships with three engaged parents, but instead, and counterintuitively, by protecting the child's primary parental relationship. Indeed, multiparent recognition is particularly important for children whose biological parents have been unable to provide them with consistent care due to a range of challenges; courts are able to safeguard the child's relationship with the person parenting them while preserving the legal status of the child's existing parents. Our findings also reveal that courts are generally prepared and capable; they have long recognized that parenthood can be shared among more than two people, and that the people who possess and exercise parental rights can change over the course of a child's life.

Our more accurate picture of the law and lives of multiparent families leads us to see underrecognition as the primary concern. From this new vantage point, we observe that the speculative, but inaccurate, concerns that dominate the current discourse are leading to well-intentioned but misguided doctrinal hurdles that limit, rather than facilitate, multiparent recognition.

This Article proceeds in five Parts. In Part I, we show how parenthood, rooted in the biological, gender-differentiated, heterosexual family, is conventionally understood as binary in three key dimensions: It is limited to two, it is an exclusive all-or-nothing status, and it is fixed, usually at the moment of birth. We show how, against this backdrop,

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children could have a maximum of only two legal parents, should be applied to multi-parent custody disputes”).

<sup>30</sup> As we explain in more detail in Section IV.B., *infra*, some families are multiparent families in law but not in life. The child may have two people who are recognized in law as legal parents, at least one of whom, however, has never been a part of the child's life, and an additional person serving as a parent. In these circumstances, multiparent recognition allows a court to protect the child's relationship with the person who is providing consistent parental care. In other families in which no more than two people have been actively involved in assuming parental responsibilities for the child, the families are properly described as multiparent families not only in law but also in life. In these families, even though there is one relatively uninvolved parent, the parties, including the children, still tend to view the relatively uninvolved parent as a parent. In these cases, the uninvolved parent retains their legal status as a parent even as a court may extend parental rights to a third individual.

multiparent families and their legal recognition are seen as radical challenges to existing practices.

In Part II, we present findings from the multiparent statute dataset. This dataset includes all electronically available cases decided under statutes that expressly authorize the recognition of more than two legal parents. From this dataset, we see that, rather than feature new and rare families emerging out of assisted reproduction, LGBTQ family formation, and polyamory, the cases typically involve different-sex partners or spouses of a biological parent. And we observe that the children in these cases rarely have more than two individuals consistently providing them with parental care.

In Part III, we present findings from a large empirical study of all electronically available functional parent decisions from states with a functional parent doctrine.<sup>31</sup> The functional parent dataset shows that multiparent families have existed for decades, and that almost all of these families include children conceived through sexual procreation by different-sex couples. Our study also reveals that the children in these families rarely have three actively involved parents. Importantly, we see that the law has long responded to this reality by allowing the vesting (often later in a child's life) of at least some parental rights in a third (or fourth) person.

In Part IV, we draw on our empirical findings to challenge deeply held intuitions and often repeated precepts about parenthood. First, we see that families have long been living in ways that do not treat parenthood as dualistic, exclusive, and fixed. Second, we show that, responding to these families, courts too have long resisted a view of parenthood as binary. Rather than break from the past, multiparent statutes build on this important tradition.

In Part V, we return to the debate over multiparent recognition. We explain how our study of the legal recognition of multiparent families suggests the current debate's preoccupation with too much recognition is misguided. The true concern, we argue, is too little multiparent recognition. Accordingly, we close by cautioning against increasingly common doctrinal hurdles that impede, rather than enable, multiparent recognition.

## I

### BINARY PARENTHOOD

In this Part, we set out conventional precepts about parenthood that multiparent families and laws recognizing them challenge. Legal

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<sup>31</sup> This dataset also informs other work. *See, e.g.*, Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023).

authorities typically assume that parenthood is binary in three key respects. First, a child is limited to a total of two parents. Second, a child's two parents possess all parental rights and responsibilities, none of which can be shared with others during the child's minority. Third, a child's parents remain fixed throughout the child's life, with the line between parent and nonparent being relatively consistent and unmovable. Against this backdrop, multiparent families and their legal recognition are cast as new, cutting-edge, and rare.

A. *The Binary Nature of Parenthood: Dualistic, Exclusive, and Fixed*

Reasoning from the paradigm of the biological, gender-differentiated, heterosexual family, parenthood is conventionally understood as dualistic. A child is assumed to have two, and only two, parents.<sup>32</sup> These two parents are assumed to be the child's mother and father. As Elizabeth Marquardt approvingly labels it, "the rule of two"<sup>33</sup> traditionally has meant that "a child cannot have more than one parent of each sex at one time."<sup>34</sup>

This view is perhaps most famously captured by Justice Scalia's plurality opinion in the 1989 case of *Michael H. v. Gerald D.*<sup>35</sup> Rejecting the child's claim that the mother's husband *and* the biological father—both of whom had formed parental relationships with the child—should be treated as legal parents, Scalia declared: "California law, like nature itself, makes no provision for dual fatherhood."<sup>36</sup> This view also shaped legal motherhood in an age of reproductive technology. In its pathbreaking 1993 decision on gestational surrogacy, *Johnson v. Calvert*, the California Supreme Court observed that, "for any child California law recognizes only one natural mother."<sup>37</sup> In both *Michael H.* and *Johnson*, the courts recognized the married different-sex spouses as the child's legal parents.

The views of these apex courts reflect a core proposition of family law. As Brian Bix observes, legislatures and courts tend to "assume or

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<sup>32</sup> See, e.g., BRIAN H. BIX, *THE OXFORD INTRODUCTIONS TO U.S. LAW: FAMILY LAW* 60 (2013) ("[T]he law states that a child can have no more than two legal parents."); Kessler, *supra* note 20, at 71 (referring to "the prevailing legal rule that a child shall not concurrently have more than two legal parents").

<sup>33</sup> Elizabeth Marquardt, Opinion, *When 3 Really Is a Crowd*, N.Y. TIMES, July 16, 2007, at A13.

<sup>34</sup> Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1101 (1996).

<sup>35</sup> 491 U.S. 110 (1989).

<sup>36</sup> *Id.* at 118.

<sup>37</sup> 851 P.2d 776, 782 (Cal. 1993) (finding, over the objection of the woman who acted as the gestational surrogate, that the genetic mother was the legal mother because she was also the intended mother).

assert that children have two, and no more than two, (legal) parents.”<sup>38</sup> Statutes routinely refer to “both” parents or “either” parent. For example, child custody laws instruct judges to consider “the benefit to the child in maximizing parenting time with *both parents* and the detriment to the child in limiting parenting time with *either parent*.”<sup>39</sup> Courts have explained that, in the absence of joint custody, “*one parent* receives physical or residential custody and *the other parent* receives visitation rights.”<sup>40</sup> Similarly, with regard to a key obligation of parents, courts have declared that “*both parents* have a duty to support their minor children.”<sup>41</sup> Child support guidelines begin from the premise that “[*both parents* shall share responsibility for [the] economic support of the[ir] children,”<sup>42</sup> and support calculations regularly “take into consideration the financial contributions of *both parents*.”<sup>43</sup>

While the dualistic nature of parenthood is usually taken for granted, at times courts have explicitly declared that “a child can have no more than two parents.”<sup>44</sup> Consider case law from New York, where the custody statute provides that “either parent” may seek custody.<sup>45</sup> “[B]y the use of the term ‘either,’” the New York high court remarked, “the plain language of [the custody statute] clearly limits a child to two parents, and no more than two, at any given time.”<sup>46</sup>

Even as the binary approach to parenthood grows out of the biological, gender-differentiated, heterosexual family, courts and legislatures have accommodated nonbiological and same-sex parents within this framework. For example, when individuals use donor gametes to conceive, the law increasingly has treated the nonbiological intended

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<sup>38</sup> BIX, *supra* note 32, at 72. Of course, law and society have tolerated deviation downward, increasingly accepting single-parent families. Women commonly raise children without a second legal parent. *See, e.g.*, Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents> [<https://perma.cc/YL4N-EYCH>] (reporting that, in 2017, about 81% of single-parent homes were headed by a mother).

<sup>39</sup> MINN. STAT. § 518.17 (2023) (emphasis added).

<sup>40</sup> *Holder v. Polanski*, 544 A.2d 852, 854 (N.J. 1988) (emphasis added).

<sup>41</sup> *Hopkins v. Hopkins*, 152 S.W.3d 447, 449 (Tenn. 2004) (emphasis added).

<sup>42</sup> N.H. REV. STAT. ANN. § 458-C:1 (emphasis added).

<sup>43</sup> W. VA. CODE § 48-13-103 (emphasis added).

<sup>44</sup> *In re Parentage of M.F.*, 228 P.3d 1270, 1274 (Wash. 2010) (Chambers, J., dissenting) (criticizing the majority for proceeding from this premise).

<sup>45</sup> N.Y. DOM. REL. LAW § 70(a) (McKinney 2023).

<sup>46</sup> *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 493 n.3 (N.Y. 2016). *See also In re Tomeka N.H. v. Jesus R.*, 122 N.Y.S.3d 461 (N.Y. App. Div. 2020); *People ex rel. K.L.W.*, 492 P.3d 392, 397 (Colo. App. 2021) (“These [parentage] provisions [regarding conflicting presumptions] mean that a child is limited to having just two legal parents.”).

parent as a legal parent.<sup>47</sup> The gamete donor, who might otherwise be regarded as a parent, is a legal stranger to the child.<sup>48</sup>

This approach has been critical to same-sex couples, protecting the nonbiological parent's relationship to her child.<sup>49</sup> Consider the reasoning of a Delaware Family Court in 2010. In *Bancroft v. Jameson*, the court surveyed family law developments nationwide and observed that “the concept of parent has expanded from two persons, male and female, creating a child through their biological union, to two persons of the same sex creating a child through their committed intentions and using assisted reproduction.”<sup>50</sup> Even under this more inclusive view, courts often assume that the child still can have two, and only two, parents. The court went on to explain:

The two individuals who in every case were involved in the creation of that child, whether intentionally as a same sex couple, or intentionally or accidentally as a result of a biological union of a male and female, are the only two persons who have been recognized as a parent to the child.<sup>51</sup>

The dualistic view is related to another binary assumption about parenthood—that it is an exclusive and comprehensive status.<sup>52</sup> As Katharine Bartlett explained in a foundational 1984 article, “The law recognizes only one set of parents for a child at any one time, and these parents are autonomous, possessing comprehensive privileges and duties that they share with no one else.”<sup>53</sup> Parenthood, on this view, “is an all-or-nothing proposition.”<sup>54</sup> In other words, parents have (all) parental rights and responsibilities, and people who are not parents do not.<sup>55</sup>

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<sup>47</sup> See, e.g., Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, 2367–69 (2017); Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 *FAM. L.Q.* 495, 505 (2014); see also Courtney G. Joslin, *(Not) Just Surrogacy*, 109 *CALIF. L. REV.* 401, 439–40 (2021) (describing such rules in the context of surrogacy arrangements).

<sup>48</sup> See, e.g., NeJaime, *supra* note 47, at 2367–69.

<sup>49</sup> See *id.* at 2346 (explaining how an intent-based approach can “remedy some of the inequalities that the biological framework governing nonmarital parenthood imposes specifically on same-sex couples”).

<sup>50</sup> 19 A.3d 730, 749 (Del. Fam. Ct. 2010).

<sup>51</sup> *Id.*

<sup>52</sup> See Bartlett, *supra* note 2 (documenting and criticizing this view).

<sup>53</sup> *Id.* at 879.

<sup>54</sup> Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 *AM. U. J. GENDER & L.* 505, 506 (1998).

<sup>55</sup> Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 *GEO. MASON L. REV.* 419, 421 (2013) (“Parenthood is, for the most part, an all-or-nothing exclusive proposition.”).

As with numerosity, exclusive parenthood rests on a biological, gender-differentiated, heterosexual paradigm that justifies extending rights to two parents *and* limiting rights to two parents.<sup>56</sup> A child is assumed to have two, and only two, “natural” parents—the child’s biological mother and father. They are equally entitled to exercise parental authority. As the Mississippi Supreme Court declared, “Nature gives to parents that right to the custody of their children which the law merely recognizes and enforces.”<sup>57</sup> On this view, the rights and responsibilities of parenthood flow “naturally” from the biological tie, such that the legal treatment of parenthood follows from a pre-political state of affairs. From this perspective, sharing parental rights with one other person does not pose a problem because it reflects the “natural” order.<sup>58</sup> Thus, as the Massachusetts high court made clear, “*both parents* have *equal* rights and responsibilities with respect to the[ir] children.”<sup>59</sup>

Importantly, even as courts moved to recognize nonbiological and same-sex parents, they tended to assimilate this recognition within an exclusive view of parenthood. As the Delaware court asserted in *Bancroft*, “so long as those two [different-sex or same-sex] parents were willing to exercise their parental rights over their creation appropriately, other individuals could not usurp their authority.”<sup>60</sup> In other words, the couple possesses *all* of the parental rights and responsibilities, which they do not—and could not—share with others.<sup>61</sup>

Reasoning from the “natural” family, parenthood is understood to be not only an exclusive status but also relatively fixed. The line between parents and nonparents is clear and stable, and the parental unit is ordinarily unchanged over the course of a child’s minority. As Melissa Murray observes, “The law effectively has constructed a parent/stranger dichotomy in which one is either a parent, vested with the rights and responsibilities of caregiving, or one is a legal stranger without legal entitlements or obligations.”<sup>62</sup> Indeed, extension of rights to nonparents

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<sup>56</sup> See Bartlett, *supra* note 2, at 882 (explaining that the exclusive status of parenthood “warrant[s] the concentration of parental authority in natural parents at a child’s birth”).

<sup>57</sup> *Davis v. Vaughn*, 126 So. 3d 33, 37 (Miss. 2013) (quoting *Moore v. Christian*, 56 Miss. 408, 410 (1879)).

<sup>58</sup> See, e.g., TENN. CODE ANN. § 34-1-102 (“Each parent has equal powers, rights and duties with respect to the custody of each of their minor children.”).

<sup>59</sup> *Mason v. Coleman*, 850 N.E.2d 513, 519 (Mass. 2006) (emphasis added).

<sup>60</sup> 19 A.3d at 749.

<sup>61</sup> See, e.g., *People ex rel. K.L.W.*, 492 P.3d 392, 397 (Colo. App. 2021) (holding that Colorado law allows a child to have a total of two parents and provides that anyone else is “a nonparent who does not have the same rights as a parent to visit a child or to make decisions about the child’s education, health, or upbringing”).

<sup>62</sup> Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 398–99 (2008).

might violate the parents' constitutional rights to control the care and upbringing of their child.<sup>63</sup>

Parents are assigned their status upon or shortly after the child's birth. As Bix asserts, "Under U.S. law, when a child is born, it almost always has two legal parents, no more and no less."<sup>64</sup> Given its biological, gender-differentiated, and heterosexual foundation, parenthood is generally assumed to track a genetic connection. The major exception to this rule is adoption. Hence, statutory definitions of "parent" commonly refer to "a biological or an adoptive parent."<sup>65</sup> On this view, a nonbiological parent must adopt the child.<sup>66</sup>

Even as adoption appears to create a limited deviation from the fixed view of parenthood, it does not treat parenthood as fluid. Moreover, adoption preserves parenthood's dualistic and exclusive nature.<sup>67</sup> Bix explains that "the legal system generally does not allow one to gain a legal parent if one already has two, unless and until another legal parent loses his or her parental rights (through surrender or termination)."<sup>68</sup> For example, stepparent adoption requires termination of the noncustodial parent's rights. As Bix continues, "Through the process of adoption (including step-parent adoption), who the legal parents are can change, but the number usually does not."<sup>69</sup> "[A]dopted children," Marquardt states with approval, "still have only two legal parents."<sup>70</sup>

The conventional view of parenthood as binary—dualistic, exclusive, and fixed—permits little space for children to have more than

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<sup>63</sup> See Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 649 (2002) (arguing that "protection against state intervention to compel the child's contact with non-parents should be especially strong").

<sup>64</sup> Bix, *supra* note 32, at 71. Yet, at the moment of birth, a nonmarital child typically has only one legal parent—the birth parent. Nonmarital fathers ordinarily must establish parentage at some point after the child's birth. See NeJaime, *supra* note 47, at 2267 ("At the moment of birth, the nonmarital child—unlike the marital child—had one legal parent: the mother.").

<sup>65</sup> IND. CODE § 31-9-2-88(a) (2023); see also KAN. STAT. ANN. § 23-2205.

<sup>66</sup> The marital presumption can also capture nongenetic parents. Traditionally, the man married to the woman who gives birth can be treated as the father regardless of his genetic tie to the child, as the Court's decision in *Michael H.* makes clear. 491 U.S. 110 (1989). Nonetheless, evidence that the husband is not the biological father can sometimes rebut the presumption. See DOUGLAS NEJAIME, R. RICHARD BANKS, JOANNA L. GROSSMAN & SUZANNE A. KIM, *FAMILY LAW IN A CHANGING AMERICA* 682 (2d ed. 2024) (explaining that "biological evidence" can be "used to rebut the marital presumption").

<sup>67</sup> See David M. Wagner, *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1184 (arguing that de facto parenthood, unlike adoption, "sow[s] uncertainty and fluidity about the meaning of parenthood").

<sup>68</sup> Bix, *supra* note 32, at 71.

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

<sup>70</sup> Marquardt, *supra* note 33, at A13.

two parents, for parental rights and responsibilities to be unbundled and spread across multiple individuals, and for a person to be recognized as a parent later in a child's life and in addition to the child's existing parents.

*B. Multiparenthood: A Radical Challenge to the Law of Parenthood*

Against the backdrop of binary assumptions about parenthood, multiparenthood appears as a new and radical development. First, it defies parenthood's dualistic premise. "[T]he possibility of three or more parents," Connecticut's Judicial Branch testified in 2020 with respect to a bill that included a multiparent provision, simply cannot be harmonized with a "statutory framework [that] is based upon a two-parent model."<sup>71</sup> Second, multiparenthood complicates the exclusive conception of parenthood. When the Delaware Family Court balked at the possibility of three parents, it reasoned that "[e]xtending the sacred right of parenthood to more than two people dilutes the constitutional rights of the two parents."<sup>72</sup> Third, multiparenthood threatens the clear, mandatory division between parent and nonparent and, in so doing, unsettles the fixed nature of parenthood. Under the conventional view, a child is born with two "natural" parents who can and should be replaced only through adoption. Multiparent recognition produces the danger of "a new extended family . . . that can continue to grow" as parental claims arise, for example, based on being the "ex-partner of a biological parent."<sup>73</sup>

Reasoning from a view of parenthood as binary, multiparenthood is seen as a bold challenge to how parent-child relationships are formed and legally recognized. Accordingly, commentators tend to treat multiparent families, as a demographic reality and as a legal development, as "radical" breaks from the past.<sup>74</sup> They describe the multiparent family as a "new, lesser known family structure."<sup>75</sup> They

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<sup>71</sup> *Hearing on H.B. No. 5178 Before the H. Comm. on the Judiciary* (Conn. 2020) (testimony of the Judicial Branch) (expressing resistance to the Connecticut Parentage Act because of the apparent inconsistency between the multiparent provision and the existing family law statutes).

<sup>72</sup> *Bancroft v. Jameson*, 19 A.3d 730, 750 (Del. Fam. Ct. 2010).

<sup>73</sup> Gregory A. Loken, *The New "Extended Family" — "De Facto" Parenthood and Standing Under Chapter 2*, 2001 BYU L. REV. 1045, 1060, 1072.

<sup>74</sup> See Cahn, *supra* note 14, at 44.

<sup>75</sup> Noor Spanjer, *The Rise of Multi-Parenting: These Five People Are About to Have a Baby Together*, STUFF (Aug. 5, 2015, 5:32 PM), <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/8CNU-56NX>].



cast legal recognition of more than two parents as “a relatively recent phenomenon.”<sup>76</sup>

Commentators associate this “new frontier”<sup>77</sup> with LGBTQ family formation and assisted reproduction.<sup>78</sup> Both supporters and opponents of multiparent recognition cite the same developments. For example, attorney and legal commentator Ellen Trachman endorses “[l]egal [r]ecognition of 3-[p]lus-[p]arent [f]amilies” by focusing on queer family formation through assisted reproduction.<sup>79</sup> Entering the debate from the other end of the spectrum, social conservative critic Jennifer Roback Morse argues, “Once we started trying to normalize parenting by same-sex couples and redefine marriage to remove the dual-gender requirement, we had to end up with triple-parenting.”<sup>80</sup>

Even where commentary contemplates family forms beyond the LGBTQ family, the emphasis on cutting-edge arrangements persists. Legal scholarship increasingly attends to polyamorous families.<sup>81</sup> Media attention focuses on “polyfamory”<sup>82</sup>—multipartner relationships in which children are being raised.<sup>83</sup> These polyamorous families often

<sup>76</sup> Feinberg, *supra* note 29, at 1513.

<sup>77</sup> Quinn, *supra* note 5, at 175.

<sup>78</sup> See, e.g., Carbone & Cahn, *Parents*, *supra* note 24, at 16 (identifying “Lesbian, Gay, Bisexual and Transgender (LGBT) Families” as a “development[.]” that compels “recognition of three or more parents”). Carbone and Cahn clarify that multiparent families are not limited to this context. See, e.g., *id.* at 17–19 (discussing “Stepparent” and “Unmarried” families).

<sup>79</sup> Ellen Trachman, *Legal Recognition of 3-Plus-Parent Families Slowly Expanding*, ABOVE THE L. (Oct. 4, 2023, 2:48 PM), <https://abovethelaw.com/2023/10/legal-recognition-of-3-plus-parent-families-slowly-expanding> [<https://perma.cc/QDR5-Z88T>].

<sup>80</sup> Jennifer Roback Morse, *Why California's Three-Parent Law Was Inevitable*, PUB. DISCOURSE (Sept. 10, 2012), <https://www.thepublicdiscourse.com/2012/09/6197> [<https://perma.cc/62F2-K8NY>]. See also 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/UC8R-HW6X>] (discussing Canadian case with same-sex couple and sperm donor).

<sup>81</sup> See, e.g., Maria Pallotta-Chiarolli, Elisabeth Sheff & Ruby Mountford, *Polyamorous Parenting in Contemporary Research: Developments and Future Directions*, in LGBTQ-PARENT FAMILIES 171, 171–83 (A.E. Goldberg & K.R. Allen eds., 2020); Thomas M. Wall, Note, *The Pitfalls of Polyamorous Parenting in Rhode Island: The Crime of Adultery and the Best Interests of the Child Under the Uniform Parentage Act*, 26 ROGER WILLIAMS U. L. REV. 766 (2021).

<sup>82</sup> Danielle Campoamor, *Mom + Dad + Mom + Dad = One Big, Happy Family. Meet the Parents Practicing 'Polyfamory'*, TODAY (Jan. 23, 2023, 4:45 PM), <https://www.today.com/parents/parents/polyfamory-parents-believe-polyamory-raise-kids-together-rcna66186> [<https://perma.cc/9TQA-YNCS>].

<sup>83</sup> See Solomon, *supra* note 7; Rachel DeSantis & Amy Eskin, *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/TL72-JSTG>].

include LGBTQ parents and children conceived through assisted reproduction.<sup>84</sup>

Unsurprisingly, then, commentary on multiparent families, which exploded in recent years,<sup>85</sup> ordinarily begins from a supposedly paradigmatic scene: the *planned* multiparent family.<sup>86</sup> Three (or more) individuals, usually some of whom are LGBTQ and all of whom have adequate financial resources,<sup>87</sup> decide from the outset that they will have and raise a child together.<sup>88</sup> These individuals often turn to assisted reproduction, with some contributing genetic material and others not.<sup>89</sup>

If multiparent families are novel and cutting-edge—emerging out of LGBTQ family formation, assisted reproduction, and polyamory—then they are also relatively rare. In fact, when California’s legislature passed a multiparent law, it did so on the assumption that multiparent families arise infrequently, declaring that the law “will only apply in the rare case where a child truly has more than two parents.”<sup>90</sup> This makes sense if multiparent families are assumed to be a subset of LGBTQ families. Indeed, the California case that sparked the reform effort featured a same-sex couple and a biological father.<sup>91</sup> Williams Institute

<sup>84</sup> See Trachman, *supra* note 79; cf. Sheff, Rhoten & Lane, *supra* note 7, at 290 (discussing polyamory “particularly among LGB-identified persons”).

<sup>85</sup> We count nearly 300 law review articles addressing the topic in the last decade.

<sup>86</sup> See, e.g., Ullrich, *supra* note 9, at 913–14 (“[T]hree parent families generally form through a mutual agreement among the parents prior to the child’s conception.”). But see Carbone & Cahn, *Parents*, *supra* note 24, at 43–44 (“The reported cases in which three or more parents are involved in a child’s life rarely involve an explicit arrangement to assume responsibility for the child.”).

<sup>87</sup> See Trachman, *supra* note 79 (observing that the three gay men raising a child together are “an internal medicine doctor, a clinical psychologist, and a zookeeper”).

<sup>88</sup> See, e.g., 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, 75 (2016) (framing discussion around lesbian couples and known donors); Althouse, *supra* note 6 (focusing on same-sex couples who have children through assisted reproduction); Emanuel, *supra* note 6 (discussing three-parent family consisting of lesbian couple and sperm donor); Kinsey, *supra* note 5, at 296 & n.2 (discussing siblings raised by gay male couple and lesbian couple as a “not atypical” situation in which “same-sex couples sometimes choose to use a friend as a sperm donor or surrogate and intend the child to have a parent-child relationship with all three adults”).

<sup>89</sup> See, e.g., Melanie B. Jacobs, *Why Just Two?: Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 309 (2007) (“Children born through ART have more than two potential parents . . . .”); Quinn, *supra* note 5, at 175 (linking multiparenthood to “the increasing use of assisted reproductive technologies”); see also Judith Stacey, *Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331 (2003).

<sup>90</sup> 2013 Cal. Stat. 4628.

<sup>91</sup> *In re M.C.*, 123 Cal. Rptr. 3d 856, 861 (Cal. Ct. App. 2011). For analysis of this case, see 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).

researchers estimate that 5.5% of the U.S. adult population identifies as LGBT.<sup>92</sup> In 2016, an estimated 16.2% of same-sex couples were raising children.<sup>93</sup> These figures pale in comparison to the numbers of individuals raising children in different-sex couples.<sup>94</sup>

Flowing from these assumptions, legal recognition of more than two parents is viewed as a recent development.<sup>95</sup> Here too, scholars cite to cases featuring LGBTQ-parent families and assisted reproduction. For example, a popular family law casebook addresses multiparenthood through *Jacob v. Shultz-Jacob*,<sup>96</sup> which features a same-sex couple and an involved sperm donor who turn to court to settle issues of custody and support.<sup>97</sup> Lawmakers consider multiparent statutes as part of a package of reforms aimed at protecting LGBTQ families and families formed through assisted reproduction.<sup>98</sup> Many of the recently enacted multiparent statutes occurred as part of adoption of the 2017 version of the Uniform Parentage Act (UPA),<sup>99</sup> which was intended to ensure equal treatment of children born to same-sex couples and through assisted reproduction.<sup>100</sup>

Despite the burgeoning body of legal scholarship on multiparenthood, there has been no systematic examination of these families or their legal regulation. Instead, commentary typically relies on anecdotal evidence and speculation.<sup>101</sup> Drawing on a nationwide

<sup>92</sup> See ANDREW R. FLORES & KERITH J. CONRON, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Dec-2023.pdf> [<https://perma.cc/P4CJ-G7R7>].

<sup>93</sup> See SHOSHANA K. GOLDBERG & KERITH CONRON, WILLIAMS INST., HOW MANY SAME-SEX COUPLES IN THE U.S. ARE RAISING CHILDREN? 1 (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Same-Sex-Parents-Jul-2018.pdf> [<https://perma.cc/N99W-ZQKV>].

<sup>94</sup> See *id.* at 2 (estimating that in 2016, 39.3% of different-sex couples were raising children). There is little reliable data on polyamory. See Amy C. Moors, Amanda N. Gesselman & Justin R. Garcia, *Desire, Familiarity, and Engagement in Polyamory: Results from a National Sample of Single Adults in the United States*, 12 FRONTIERS PSYCH. 1, 7 (2021).

<sup>95</sup> See, e.g., Feinberg, *supra* note 29, at 1513 (describing multiparentage as “a relatively recent phenomenon”).

<sup>96</sup> 923 A.2d 473 (Pa. Super. Ct. 2007).

<sup>97</sup> D. KELLY WEISBERG, MODERN FAMILY LAW (7th ed. 2020).

<sup>98</sup> See, e.g., *Hearing on Raised B. No. 6321 Before Conn. J. Comm. on Judiciary* (Conn. 2021) (testimony of GLBTQ Legal Advocates & Defenders) (testifying in support of the Connecticut Parentage Act highlighting provisions that protect the children of “LGBTQ parents,” “protect[] all children born through assisted reproduction,” and “allow courts . . . to determine that a child can have more than two parents”).

<sup>99</sup> CONN. GEN. STAT. § 46b-475(c) (2022); VT. STAT. ANN. tit. 15C, § 206(b) (2022); WASH. REV. CODE § 26.26A.460(3) (2022).

<sup>100</sup> See, e.g., Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437, 444 (2018); Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589, 592 (2018).

<sup>101</sup> For example, some scholarship at least implicitly assumes that legal disputes involving multiparenthood will typically be custody disputes between three people who have been

study of electronically available judicial decisions, Parts II and III provide the first empirically grounded account of multiparent families and how courts treat them.

The insights generated by our study challenge not only views of multiparenthood as new, cutting-edge, and rare, but also views about parenthood itself as binary. Our findings point toward an existing and longstanding approach to parenthood in life and in law that is more open and flexible. Our study shows that multiparent arrangements have long been a common feature of family configurations *and* that legal recognition of multiparenthood has long been a common feature of family law.<sup>102</sup> Ultimately, our study suggests that parenthood, as a practice and as a legal status, has long failed to conform to the traditional assumptions reiterated by courts and embedded in statutes.

## II

### FINDINGS ON MULTIPARENT STATUTES AND MULTIPARENT RECOGNITION

This Article reports findings from two novel datasets. In this Part, we examine a dataset comprised of all electronically available judicial decisions issued through December 31, 2022, under statutes authorizing a court to find that a child has more than two legal parents.<sup>103</sup> This *multiparent statute dataset*, which we have made publicly available, includes sixty judicial decisions.<sup>104</sup> Our findings suggest that multiparent statutes are not primarily used to accommodate the planned, novel, and rare arrangements that are ordinarily envisioned. Instead, the statutes capture more familiar and longstanding family patterns, in which individuals become a child's parent well after the child's birth and often based on an intimate relationship with the child's biological parent. Moreover, the children protected under these statutes are rarely raised by three or more actively involved parents. Instead, typically at least one legal parent has neither assumed custody nor provided significant

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caring for the child. *See, e.g.,* Feinberg, *supra* note 29, at 1496 (examining whether presumptions of shared custody “should apply to multi-parent custody disputes”); 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. 2060 (2013) (worrying that with “too many parents, . . . no parent can effectively accomplish his or her task without being undercut by someone else”).

<sup>102</sup> *See infra* Section III.B.1.

<sup>103</sup> We used Westlaw to collect cases. Other databases may include additional cases. *Cf.* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1126 (2021) (showing variation across Westlaw and Lexis with respect to federal appellate decisions).

<sup>104</sup> *See* Courtney G. Joslin & Douglas NeJaime, *Replication Data for: Multiparenthood*, Yale Dataverse, V1 (2024), <https://doi.org/10.60600/YU/KKJ4NE> [<https://perma.cc/VJ63-W49C>] (providing database to download the full dataset).

financial support. At most, two parents have been undertaking the responsibilities of parenthood on a regular basis.

### A. *The Multiparent Statute Dataset*

Ten jurisdictions—California, Connecticut, Delaware, the District of Columbia, Louisiana, Maine, Massachusetts, Nevada, Vermont, and Washington—expressly authorize a court to adjudicate more than two legal parents for a child.<sup>105</sup> Louisiana’s statute, which dates to 2005 and allows a man to “institute an action to establish his paternity . . . [even] [i]f the child is presumed to be the child of another man,”<sup>106</sup> has been applied to recognize two legal fathers for a child who also has a legal mother.<sup>107</sup> Delaware and the District of Columbia, both of which allow more than two legal parents outside of simply dual paternity, enacted their statutes in 2009.<sup>108</sup> California’s statute, which gained the most attention and became a model for the 2017 UPA’s multiparent provision,<sup>109</sup> was enacted in 2013.<sup>110</sup> Other multiparent statutes were enacted more recently in Connecticut, Maine, Massachusetts, Nevada, Vermont, and Washington.<sup>111</sup>

#### I. *Cases*

Because multiparent statutes are of relatively recent vintage, the earliest case in the dataset was decided in 2010. As Figure 1 shows, the cases arise out of six jurisdictions: California (thirty-nine cases);

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<sup>105</sup> CAL. FAM. CODE § 7612(c) (West 2020); DEL. CODE ANN. tit. 13, § 8-201(c) (2013); D.C. CODE § 16-909(e) (2023); LA. CIV. CODE ANN. art. 198 (2005); CONN. GEN. STAT. § 46b-475(c) (2022); ME. STAT. tit. 19-A, § 1853(2) (2016); 2023 Mass. H.B. 4970 § 65 (subsec. 26(c)), 193d Gen. Cong. (Mass. 2024) (enacted and laid before the Gov’r, Aug. 1, 2024); NEV. REV. STAT. § 126.021(3) (2021); VT. STAT. ANN. tit. 15C, § 206(b) (2018); WASH. REV. CODE § 26.26A.460(3) (2019).

<sup>106</sup> See LA. CIV. CODE ANN. art. 198.

<sup>107</sup> See, e.g., *Dep’t of Soc. Servs. ex rel. P.B. v. Reed*, 52 So.3d 145, 147 (La. Ct. App. 2010) (applying precursor to article 198 and explaining that “this filiation proceeding does not illegitimate the child, but rather establishes both the child’s legal and biological father, which is referred to as ‘dual paternity,’” in addition to the child’s mother).

<sup>108</sup> DEL. CODE ANN. tit. 13, § 8-201(c) (2013); D.C. CODE § 16-909(e) (2023).

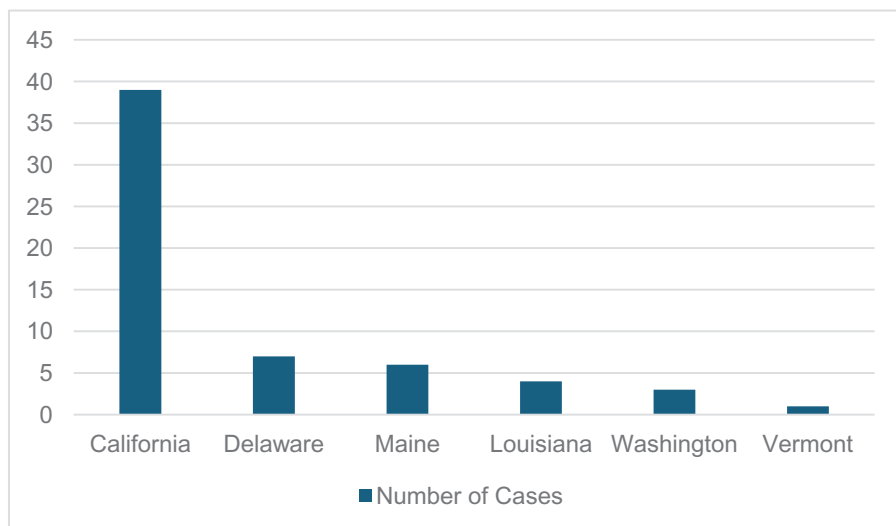
<sup>109</sup> UNIF. PARENTAGE ACT § 613 Alt. B (UNIF. L. COMM’N 2017) (“The court may adjudicate a child to have more than two parents under this [act] if the court finds that failure to recognize more than two parents would be detrimental to the child.”); see also *id.* § 613 cmt. (citing Cal. Fam. Code 7612(c) in explaining that “Alternative B is consistent with an emerging trend permitting courts to recognize more than two people as a child’s parents”).

<sup>110</sup> CAL. FAM. CODE § 7612(c) (West 2020) (signed into law 2013); 2013 CA A.B. 1403 (NS).

<sup>111</sup> CONN. GEN. STAT. § 46b-475(c) (2022) (signed into law 2021); ME. STAT. tit. 19-A, § 1853(2) (2016) (signed into law 2015); 2023 Mass. H.B. 4970 § 65 (subsec. 26(c)), 193d Gen. Cong. (Mass. 2024); NEV. REV. STAT. § 126.021(3) (2021) (signed into law 2021); VT. STAT. ANN. tit. 15C, § 206(b) (2018) (signed into law 2018); WASH. REV. CODE § 26.26A.460(3) (2019) (signed into law 2018).

Delaware (seven cases); Louisiana (four cases); Maine (six cases); Vermont (one case); and Washington (three cases). There are no electronically available decisions applying the relevant statute through 2022 from Connecticut, the District of Columbia, Massachusetts, or Nevada.<sup>112</sup> Given how California shapes the overall picture, we separately report findings from that state and also include California-specific figures in the Appendix.

FIGURE 1. MULTIPARENT CASES BY JURISDICTION



Cases in this dataset include only those in which more than two people are seeking to be recognized as legal parents under a statutory scheme that authorizes a court to find that more than two people are legal parents. The person seeking to be adjudicated a third (or fourth) parent must have a legal basis for establishing parentage. Accordingly, the cases feature claims by genetic parents, “presumed parents,” and people claiming protection under statutory *de facto* parent provisions.<sup>113</sup>

<sup>112</sup> The Connecticut statute became effective in 2022. The Massachusetts legislation was approved by the legislature on August 1, 2024. It is expected to be signed by the Governor. *See, e.g., Anjali Huynh, ‘Incredibly overdue’: Mass. Senate passes updated parentage law that would expand protections for LGBTQ. Parents*, BOSTON GLOBE (July 30, 2024), <https://www.bostonglobe.com/2024/07/30/metro/massachusetts-parentage-law-lgbtq-parents> [<https://perma.cc/UVW6-94RX>] (noting that Massachusetts Governor Maura Healey had “expressed her support for [the legislation] months ago”). The signed legislation will take effect on January 1, 2025. 2023 Mass. H.B. 4970 § 67, 193d Gen. Cong. (Mass. 2024).

<sup>113</sup> *See* Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at app. A at 423–27.

“Presumed parents” include individuals claiming parentage under the marital presumption, which treats the person married to the birth parent at the time of the child’s birth as a legal parent, or the “holding out” presumption, which treats the person who resided with the child and held the child out as their child as a legal parent.<sup>114</sup>

In some of these jurisdictions, including Delaware,<sup>115</sup> Louisiana,<sup>116</sup> Maine,<sup>117</sup> and Nevada,<sup>118</sup> a court may adjudicate more than two legal parents so long as more than two individuals have valid parentage claims. In other jurisdictions, the person seeking to be adjudicated a third parent must make an additional showing. For example, in California, a court must find not only that more than two individuals have valid statutory claims to parentage but also that failure to recognize more than two legal parents “would be detrimental to the child.”<sup>119</sup> In Vermont, the statute authorizes a court to find that more than two people with valid parentage claims are a child’s parents if that conclusion is “in the best interests of the child.”<sup>120</sup> In other words, in these states, a person who would be adjudicated a parent if the child only had one legal parent may be adjudicated a nonparent if the child has two legal parents.

## 2. Coding

After collecting the sixty electronically available decisions, each was hand coded along the following dimensions: (1) jurisdiction; (2) year; (3) published or unpublished; (4) legal basis (e.g., marital presumption, “holding out” presumption); (5) identity of the second, third, and, where applicable, fourth parent/alleged parent (e.g., biological parent, different-sex unmarried partner);<sup>121</sup> (6) legal status

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<sup>114</sup> In some states, the “holding out” presumption can be based on a period of “holding out” occurring at any point during the child’s minority, while in other states, the required conduct must occur during the first years of the child’s life. Compare CAL. FAM. CODE § 7611(d) (West 2020) (“The presumed parent receives the child into their home and openly holds out the child as their natural child.”), with VT. STAT. ANN. tit. 15C, § 401(a)(4) (2018) (“[T]he person resided in the same household with the child for the first two years of the life of the child . . . and the person and another parent of the child openly held out the child as the person’s child.”).

<sup>115</sup> DEL. CODE tit. 13, § 8-201(c) (2013).

<sup>116</sup> LA. CIV. CODE ANN. art. 198 (2005).

<sup>117</sup> ME. STAT. tit. 19-A, § 1853(2) (2016).

<sup>118</sup> NEV. REV. STAT. ANN. § 126.021 (LexisNexis 2021).

<sup>119</sup> See, e.g., CAL. FAM. CODE § 7612(c) (West 2020). See also CONN. GEN. STAT. § 46b-475(c) (2022); WASH. REV. CODE § 26.26A.460(3) (2022).

<sup>120</sup> VT. STAT. ANN. tit. 15C, § 206(b) (2022).

<sup>121</sup> Five cases in the dataset involve an alleged fourth parent: *In re Alexander D.*, No. A152436, 2018 WL 4042668 (Cal. Ct. App. Aug. 24, 2018); *In re Alexander P.*, 20 Cal. Rptr. 3d 130 (Cal. Ct. App. 2016); *In re C.P.*, No. E074636, 2020 WL 4691600 (Cal. Ct. App. Aug. 13, 2020); *In re Child of Philip S.*, 223 A.3d 114 (Me. 2020); *Martin v. MacMahan*, 264 A.3d 1224

or determination regarding the second, third, and, where applicable, fourth parent/alleged parent (e.g., merits decision adjudicating the person a parent, biological parent without establishing parentage); (7) affirmative (i.e., alleged parent seeking rights) or defensive (i.e., existing parent seeking to impose obligations on alleged third parent); (8) post-dissolution disputes (i.e., whether the claim is asserted after dissolution of an intimate relationship and for what purpose); (9) child welfare intervention (i.e., whether the litigation was instigated by child welfare intervention); (10) role of the second, third, and, where applicable, fourth parent/alleged parent (e.g., coprimary caregiver with biological parent); (11) role of the birth parent (e.g., primary caregiver); (12) appellate resolution (e.g., affirmed); (13) intended parents (i.e., whether case involves intended parents and, if so, how the child was conceived); and (14) parental death (i.e., whether a biological parent died). The decisions were integrated into a pivot table to combine various codes (e.g., cases in which the alleged third parent has been the child's primary caregiver and is adjudicated a legal parent).

### 3. *Limitations*

Our study of decisions arising out of multiparent statutes has limitations. Critically, we do not aim to describe the universe of multiparent families. Instead, we are primarily interested in the question of *legal recognition* of more than two legal parents. Accordingly, our dataset allows us to identify and analyze what multiparent families involved in publicly available legal disputes look like *and* how courts treat such families.

We do not capture families that are never involved in litigation. Importantly, though, the recognition of more than two legal parents in states with a multiparent statute *requires* an adjudication even when all parties agree on the person's status—meaning that any third parent would not be treated as a legal parent without a trial court proceeding. Accordingly, there is a critical difference between litigated cases, which can involve three legal parents, and cases that are not litigated, which cannot.

Still, we do not capture all litigated cases because our dataset only includes cases available through electronic databases, and the overwhelming majority of decisions are from state appellate courts. The only trial court cases come from Delaware. The full range of litigated cases includes more trial court decisions that are never appealed. We

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(Me. 2021). The cases are coded accordingly; all other cases are coded N/A for the alleged fourth parent fields.



expect such decisions to include more cases in which all parties agree that the child has more than two parents and seek such an adjudication.<sup>122</sup> The larger population of families with more than two legal parents is therefore likely to include more planned multiparent families.

Given the prevalence of appellate decisions, one might expect that parties with greater resources may be overrepresented as compared to their representation in the complete universe of litigated matters.<sup>123</sup> Yet, this expectation may be confounded by the fact that a majority of cases in the dataset arose out of child welfare intervention.<sup>124</sup> In such cases, the litigants may be entitled to appointed counsel, and so the lack of financial resources may be less of a barrier to appeal.

Finally, this dataset is limited to cases arising under multiparent statutes that permit a court to adjudicate more than two legal parents for a child. It does not capture cases involving multiparent families in which the multiparent issue arises under different legal doctrines. For example, we do not have data on adoptions by more than two individuals. Only California and Nevada expressly permit multiparent adoption,<sup>125</sup> but we know from practitioners that such adoptions have occurred in other states.<sup>126</sup> Without publicly available information, we are unable to gather data on multiparent adoptions. Just as with uncontested trial court petitions, we expect multiparent adoptions, which generally

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<sup>122</sup> When all parties are in agreement, we think it is more likely that the court would grant the request, and, in such cases, no appeal would be taken. Notably, however, none of the six trial court decisions from Delaware feature such a situation.

<sup>123</sup> While data on state court appeals is sparse, this might be true because in the many cases in which parties are not provided with court-appointed counsel, lower-income individuals would be less able to afford counsel and court fees associated with an appeal. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 41–42 (2010) (citing studies across state and federal courts reporting cost as a barrier to representation). Of course, litigants may proceed pro se, which is exceedingly common in family law matters. See Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts*, 1 *CALIF. L. REV. CIR.* 15, 16 (2010) (observing data suggesting 60% to 90% of family law cases involve a self-represented party); Jim Hilbert, *Educational Workshops on Settlement and Dispute Resolution: Another Tool for Self-Represented Litigants in a Family Court*, 43 *FAM. L.Q.* 545, 548 (2009) (“By the end of the last decade, there were more SRLs [Self-Represented Litigants] in family court than any other part of the legal system.”). Studies suggest that pro se litigants in civil cases are less likely to have successful outcomes than those represented by counsel. See Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 *SEATTLE J. SOC. JUST.* 51, 69–70 (2010) (conducting a meta-analysis of twelve distinct studies capturing over 70,000 adjudicated civil cases including tax appeals, asylum adjudications, evictions, and Social Security appeals).

<sup>124</sup> See *infra* text accompanying note 159.

<sup>125</sup> Cal. Fam. Code § 8617(b) (West 2020); Nev. Rev. Stat. Ann. § 127.030(7) (LexisNexis 2021).

<sup>126</sup> See, e.g., COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 5:12 (2023).

require consent of all the parties, to feature more *planned* multiparent families.<sup>127</sup>

## B. Findings from the Multiparent Statute Dataset

### 1. Who Are the Families?

While commentary on multiparenthood typically focuses on the planned multiparent family formed by LGBTQ individuals using assisted reproduction, our data paint a starkly different picture. None of the sixty cases features a situation in which more than two individuals planned to co-parent a child before conceiving.<sup>128</sup> There is, however, one case in the dataset—*Lanfear v. Ruggerio*<sup>129</sup>—in which the parties arguably decided after conception but prior to the birth of the child to be a multiparent family.<sup>130</sup> In that case, Megan began living with a married different-sex couple, Lisa and Jamie, at the time that Lisa was pregnant.<sup>131</sup> At some point during Lisa’s pregnancy, Megan began “a sexual relationship” with Jamie, and eventually Lisa “was invited into the relationship.”<sup>132</sup> When Lisa gave birth to J.F., both Megan and Jamie were present.<sup>133</sup> The three of them “agreed that J.F. would call [Lisa] ‘mommy,’ [Jamie] ‘daddy,’ and [Megan] by her first name.”<sup>134</sup> For a period of time the three lived together with the child. Megan and Jamie cared for J.F. when Lisa was at work, and otherwise Lisa “exclusively cared for J.F.”<sup>135</sup> Again, because the decision to form a multiparent

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<sup>127</sup> CAL. FAM. CODE § 8617(b) (West 2020) (“The termination of parental duties and responsibilities of the existing parent or parents . . . may be waived if both the existing parent or parents and the prospective adoptive parent or parents sign a waiver at any time prior to the finalization of the adoption.”).

<sup>128</sup> Again, the term “planned” refers to preconception intentions and is not meant to suggest a lack of deliberation in the multiparent families we observe.

<sup>129</sup> 254 A.3d 168 (Vt. 2020).

<sup>130</sup> The extent to which each of the three parties in *Lanfear* planned to all be parents of the child was contested, and the facts on this issue are unclear. Megan, the nonbirth female partner, was present at the child’s birth. This could suggest that all of the parties intended that Megan would be a parent to the child. *Id.* at 172. On the other hand, in its decision finding that Megan was not a parent, the Vermont Supreme Court observed that Megan “held herself out as a caretaker; and [that the child] referred to plaintiff in public and private by her first name.” *Id.* at 173.

<sup>131</sup> *Id.* at 171.

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

<sup>133</sup> *Id.* at 172.

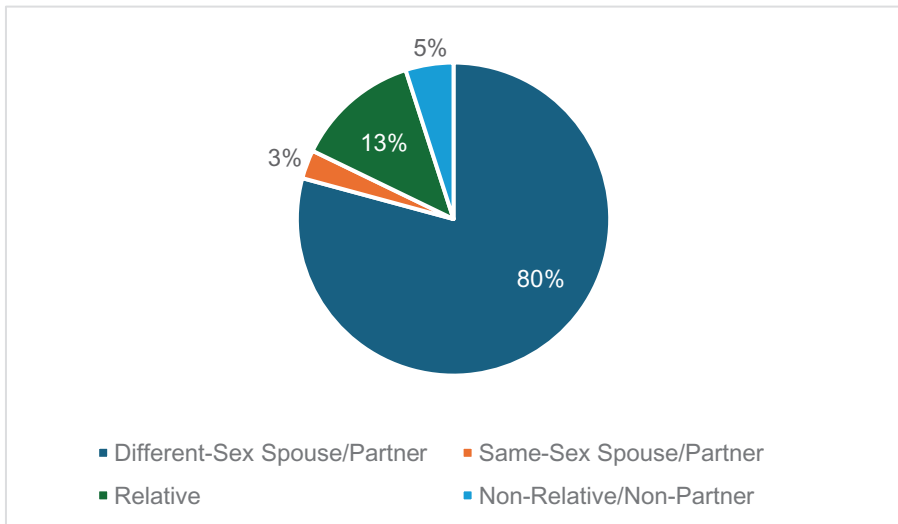
<sup>134</sup> *Id.*

<sup>135</sup> *Id.* After Lisa and Jamie divorced, Megan and Jamie continued “a committed, long-term relationship.” *Id.* at 173. When Lisa refused to allow Megan to spend time with J.F., Megan sought to establish parentage, claiming “she acted as a parental figure in a polyamorous relationship.” *Id.* at 174. The Vermont Supreme Court affirmed the trial court’s ruling that Megan was not J.F.’s de facto parent because she neither undertook “full and permanent responsibilities of a parent” nor “held out the child as [her] own.” *Id.* at 175–77.

family (if one was made) was made after conception, we do not code or count this case as a planned multiparent family. That said, we highlight it, as others may characterize the case differently. The critical point here is that in all cases in the dataset, including *Lanfear*, the person claiming status as a third parent assumed a parental role at some point after the child's conception. Again, however, given the greater likelihood that litigation involving planned multiparent families would feature uncontested requests, we might expect a greater share of the trial court cases to involve such families.

Families formed by same-sex partners and families formed through assisted reproduction are rare in our data. Only two of the sixty cases involve same-sex partners.<sup>136</sup> None of the sixty cases involves a child clearly conceived through assisted reproduction.

FIGURE 2. IDENTITY OF ALLEGED THIRD PARENT<sup>137</sup>



<sup>136</sup> *Id.* at 168; S.M. v. E.C., No. F065817, 2014 WL 2921905 (Cal. Ct. App. June 27, 2014). As explained, *Lanfear* features a polyamorous relationship involving a married couple and another woman, though the court observed that the “primary relationship remained between [the other woman] and [the husband].” 254 A.3d at 171.

<sup>137</sup> There are two cases that appear in more than one category. In *Martinez v. Vaziri*, the alleged third parent was both the mother's unmarried different-sex partner and the child's uncle, since the biological father was his half brother. 200 Cal. Rptr. 3d 884, 887 (Cal. Ct. App. 2016). In *Lanfear*, which involved a polyamorous relationship, the alleged third parent was the unmarried different-sex partner of the father and the unmarried same-sex partner of the mother. 254 A.3d at 171.

In the cases in our dataset, the third parent tends to emerge from an intimate relationship with one of the child's biological parents. As Figure 2 shows, approximately four-fifths of the cases involve different-sex partners claiming parentage. Typically, the parties are the two biological parents who conceived the child through sexual intercourse, and an intimate partner or former intimate partner of one of the biological parents.<sup>138</sup>

Fewer than ten cases involve relatives. This is likely due to the fact that 65% of the cases come from California, for which we supply state-specific data in the Appendix.<sup>139</sup> California applies parentage presumptions that tend to capture intimate partners.<sup>140</sup> Under the marital presumption, the person who is married to the birth parent at the time of the child's birth is presumed to be the legal parent.<sup>141</sup> Under the "holding out" presumption, the person who "receive[d] the child into their home and openly held out the child" *as their child* is presumed to be the legal parent.<sup>142</sup> Even when relatives are the primary source of parental care for a child, they are less likely than spouses and nonmarital partners to present the child as *their child*.<sup>143</sup>

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<sup>138</sup> While some cases feature facts explicitly explaining that conception occurred through sexual intercourse, in others it is simply assumed and not in issue. *Compare* J.W.S., Jr. v. E.M.S., Case No. CS11-01557, 2013 WL 6175814, at \*1 (Del. Fam. Ct. May 29, 2013) ("Mother testified that she was sexually active with both D. and J. at the approximate time of M's conception."), *with* A.L. v. D.L. & P.S., Case No. CK12-01390, 2012 WL 6765564, at \*1 (Del. Fam. Ct. Sept. 19, 2012) (observing only that "J was two years old and Mother was pregnant with G when Mother and Father married"). While there are no cases in the first dataset that appear to involve assisted reproduction, the second dataset features such cases. *See infra* note 246 and accompanying text. In cases where the child was conceived through assisted reproduction, that fact is typically mentioned in the decision. *See, e.g.*, D.G. v. K.S., 133 A.3d 703, 708 (N.J. Super. 2015) ("In order to conceive the child, the parties researched several methods and . . . purchased the requisite, recommended equipment to assist in conception and agreed to try it."). This is likely due at least in part to the fact that the use of assisted reproduction is often relevant to the parentage determination. *See, e.g.*, CAL. FAM. CODE § 7613(a) (West 2020) (setting forth a conclusive parentage rule regarding children born through assisted reproduction).

<sup>139</sup> *See infra* Appendix, Figure A1.

<sup>140</sup> *See* Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 339 n.131 (explaining that in the functional parent dataset, 90% of cases involving application of the "holding out" presumption to nonbiological parents, most of which are from California, involve intimate partners).

<sup>141</sup> *See, e.g.*, CAL. FAM. CODE § 7611(a) (West 2020) (creating a presumption of parentage if the person is the spouse of the birth parent and "the child is born during the marriage").

<sup>142</sup> *Id.* § 7611(d). The de facto parent statutes in Vermont and Washington, from which four additional cases come, also require that the person held out the child as their child. VT. STAT. ANN. tit. 15C, § 501(a)(1)(D) (2024); WASH. REV. CODE ANN. § 26.26A.440(4)(d) (West 2024).

<sup>143</sup> *See* Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 339 ("Doctrines that require the person to have 'held out' the child as their 'own' tend to exclude many

Consider grandparents, who typically present the child to the world as *their grandchild* even when they are acting as the child's primary parental figure.<sup>144</sup> A recent Washington decision, *Matter of Custody of R.C.*, illustrates this arrangement.<sup>145</sup> The father shared custody with the mother after their separation. During this period, the father lived with his mother, the child's grandmother.<sup>146</sup> After the father died, the grandmother sought recognition as a *de facto* parent.<sup>147</sup> The trial court "found six of the seven statutory factors for *de facto* parentage satisfied," but because the grandmother did not "hold out [the child] as her own,"<sup>148</sup> the court concluded she was not a *de facto* parent—a holding affirmed on appeal.<sup>149</sup>

## 2. Parental Roles in Multiparent Families

While commentators tend to imagine a family consisting of three engaged parents, usually all involved from the outset and all seeking to exercise parental rights and responsibilities,<sup>150</sup> the reality on the ground is decidedly different. Among electronically available cases decided under statutory multiparent provisions, the child typically has no more than two people consistently involved in parenting. In fact, in only 13% of the cases has each of the three recognized or alleged parents acted as a primary caregiver of the child *at some point*.<sup>151</sup>

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relatives, as relatives are less likely to identify the child as *their own child* even when they are providing primary caregiving for the child.").

<sup>144</sup> See Sacha M. Coupet, "Ain't I a Parent?": *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 600 (2010).

<sup>145</sup> No. 56930-2-II, 2023 WL 2660344 (Wash. Ct. App. Mar. 28, 2023). This case is not in our dataset, which runs through 2022.

<sup>146</sup> *Id.* at \*1.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

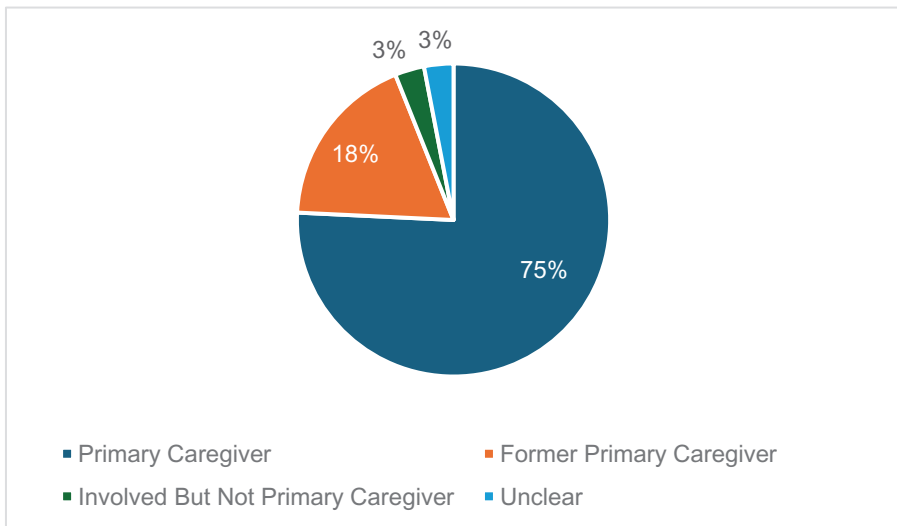
<sup>149</sup> *Id.* See also *L.V. v. E.C.*, No. D080046, 2023 WL 2230880, at \*7 (Cal. Ct. App. Feb. 27, 2023), *reh'g denied* (Mar. 21, 2023), *review denied* (June 14, 2023) (finding that grandmother was not a parent under the holding out presumption based in part on "[t]he fact that [grandmother] referred to [the child] as her granddaughter on public social media posts").

<sup>150</sup> See, e.g., Feinberg, *supra* note 29, at 1539–55 (devoting bulk of analysis of custody in multiparent context to whether presumptions of joint legal and/or physical custody should apply to multiparent families, thus assuming three parents who seek to exercise parental rights and undertake parental responsibilities).

<sup>151</sup> We determined whether a person should be coded as a primary caregiver based on the facts presented in the decision and the court's assessment of the record. We considered, among other things, who cared for the child on a consistent basis, who made decisions about the child, and where the child lived. When faced with insufficient or conflicting evidence, we erred on the side of coding biological or legal parents as primary caregivers and not coding alleged third parents as primary caregivers. Importantly, a child can have more than one primary caregiver.

The birth parent—that is, the person who gave birth to the child—ordinarily is an involved parent. As Figure 3 shows, in 75% of cases in the dataset, the birth parent was serving as a primary caregiver at the time of the action. (This is true in 79% of the California cases.<sup>152</sup>) In another 18% of cases, the birth parent had previously acted as a primary caregiver. (This is also true in 18% of the California cases.<sup>153</sup>)

FIGURE 3. BIRTH PARENT’S ROLE IN CHILD’S LIFE



Looking to the role of the second biological parent (i.e., the biological father), in fewer than 20% of cases is it clear that he ever served as a primary caregiver at some point during the child’s life.<sup>154</sup> In 12% of cases, the second biological parent had no involvement in the

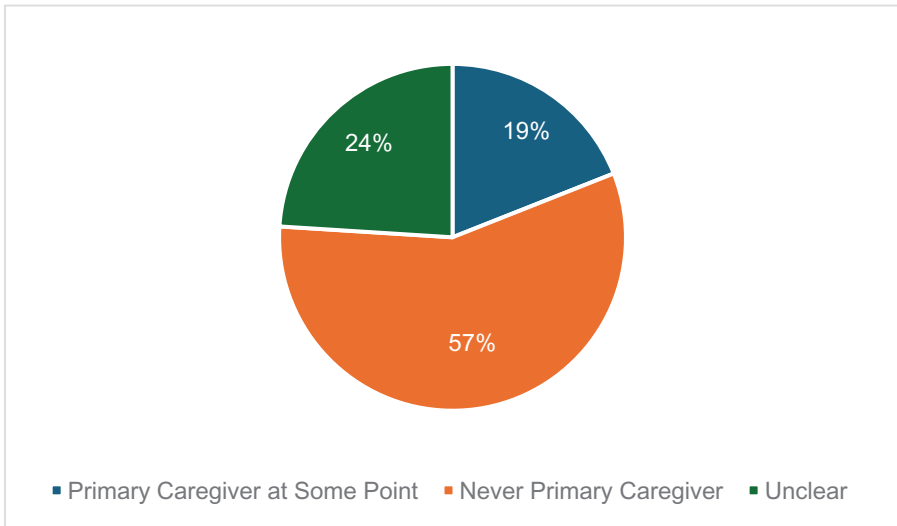
<sup>152</sup> See *infra* Appendix, Figure A2.

<sup>153</sup> See *id.*

<sup>154</sup> In all but two of the sixty cases in the dataset, the court identifies the second biological parent. In each of these cases, this person is the biological father. While some cases feature genetic testing, in most cases no party is contesting the man’s biological parentage. In the two remaining cases, both of which are from California, no second biological parent is named or involved; these cases obviously are not included in the analysis of the second biological parent’s role. For California-specific data, see *infra* Appendix, Figure A3.

child's life at any point. As Figure 4 shows, in more than half of cases, the second biological parent appears to have never been a primary caregiver for the child. This is true in almost two-thirds of the California cases.<sup>155</sup> In other words, many of the cases raise the question of a third parent when the biological father may be a legal parent but has had little, if any, role in the child's life. He has neither exercised parenting time nor provided significant financial support.

FIGURE 4. SECOND BIOLOGICAL PARENT'S ROLE IN CHILD'S LIFE



As Figure 5 shows, in more than 60% of cases, the third alleged parent (i.e., the nonbiological parent) appears to have served as a primary caregiver at some point in the child's life.<sup>156</sup> This is true in two-thirds of the California cases.<sup>157</sup> Thus, as our data reveal, even in the absence of adjudication as a legal parent, the third parental figure often has been a major source of parental care and support.<sup>158</sup>

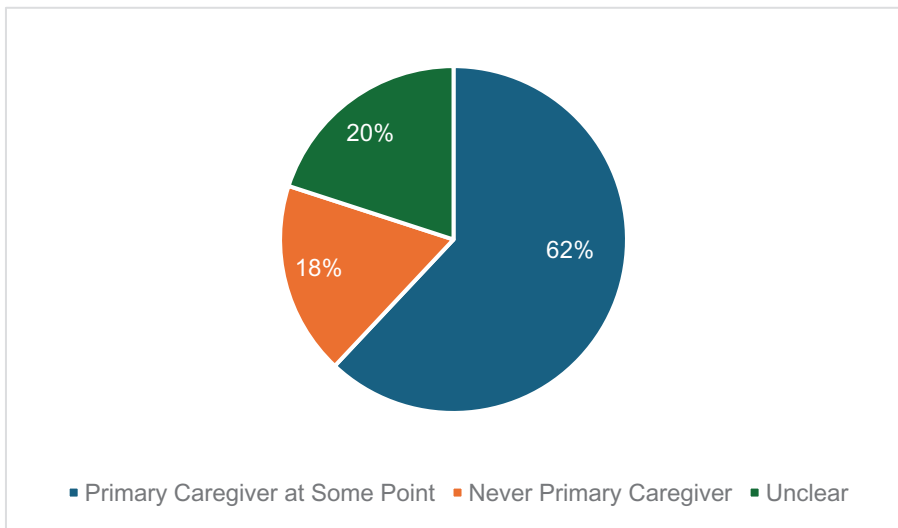
<sup>155</sup> *See id.*

<sup>156</sup> While the alleged third parent did not serve as a primary caregiver in eleven cases, the person's role is unclear in the remaining twelve cases.

<sup>157</sup> *See infra* Appendix, Figure A4.

<sup>158</sup> *See infra* Figure 5.

FIGURE 5. ALLEGED THIRD PARENT'S ROLE IN CHILD'S LIFE



More than half of the cases in the dataset arose out of child welfare intervention.<sup>159</sup> Overall, and in California specifically, the alleged third parent appeared to be a primary caregiver in nearly two-thirds of cases initiated by an abuse or neglect petition. In cases arising out of child welfare intervention, a person who has not been caring for the child but has a basis on which to claim parentage may seek to become a party to the action. The person may do so to seek custody of the child so as to prevent the state from placing the child in foster care or, at a minimum, to establish the person's right to reunification with the child.<sup>160</sup>

Ultimately, in cases decided under multiparent statutes, it is very uncommon to see three individuals sharing parenting rights and responsibilities roughly evenly. Instead, we see one or two individuals

<sup>159</sup> Scholars and advocates increasingly reject the term “child welfare.” Dorothy E. Roberts uses the term “family policing.” Dorothy E. Roberts, *How I Became a Family Policing Abolitionist*, Keynote Address at the Columbia Journal of Race and Law 11th Annual Symposium July 2021 in 11 COLUM. J. RACE & L. 455, 461–63 (2021). Others use “family regulation.” See, e.g., S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1103–09 (2022); Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 269 (2021); 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, 431–32 (2021). We share concerns raised by these scholars but use the term that tracks the case law.

<sup>160</sup> See, e.g., *In re C.P.*, No. E074636, 2020 WL 4691600, at \*1 (Cal. Ct. App. Aug. 13, 2020) (involving claim brought by mother's former husband after the child was placed in foster care).



raising the child, and a third person who has a less significant role, if any, in the child's life.<sup>161</sup>

### 3. *The Context of Litigation*

Given that the dataset includes mostly appellate decisions, the cases tend to arise out of conflict (although not always conflict instigated by parents, as child welfare intervention is a feature of many cases). Cases in which the parties agree on the third parent's status would likely be more common at the trial court level. In many cases in the dataset, the families are struggling with a range of challenges that seem to lead, or at least contribute, to the legal proceeding. Parents in many cases were contending with incarceration,<sup>162</sup> substance use disorders,<sup>163</sup> and poverty.<sup>164</sup>

As noted above, in 60% of the cases—and 80% of the California cases—the proceeding was instigated by child welfare intervention. While we are not able to identify the race of the parties, parents in the child welfare system—the other “system of family law”<sup>165</sup>—are disproportionately parents of color and low-income.<sup>166</sup>

<sup>161</sup> See, e.g., *supra* notes 21–23 and accompanying text (discussing *In re Shawn R.*, 2016 WL 5940937 (Cal. App. Oct. 27, 2016)).

<sup>162</sup> See, e.g., *In re L.L.*, 220 Cal. Rptr. 3d 904, 907 (Ct. App. 2017) (noting that the mother was “arrested for probation violations and placed in custody”).

<sup>163</sup> See, e.g., *In re E.G.*, No. E076796, 2022 WL 130090, at \*1 (Cal. Ct. App. Jan. 14, 2022), review denied (Apr. 27, 2022) (noting that the mother “had a substance abuse problem”); *In re I.R.*, No. H044622, 2018 WL 1224747, at \*1 (Cal. Ct. App. Mar. 9, 2018) (noting that the mother was “found under the influence of methamphetamine”); *In re Ivy D.*, No. G057418, 2019 WL 4316526, at \*1 (Cal. Ct. App. Sept. 12, 2019) (petition alleged that mother and father had long-term and unresolved substance use disorders); *In re J.P.*, 269 Cal. Rptr. 3d 395, 397 (Ct. App. 2020) (involving mother who “had been arrested for driving under the influence”); *In re K.F.*, No. F077085, 2019 WL 168987, at \*1 (Cal. Ct. App. Jan. 11, 2019) (noting that the child was removed due in part to mother’s “substance abuse”); *In re L.M.*, No. C076973, 2015 WL 2091294, at \*1 (Cal. Ct. App. May 1, 2015) (involving mother who admitted “that she used Norco, Xanax, Klonopin, methadone, and marijuana prior to driving”); *In re M.Z.*, 209 Cal. Rptr. 3d 397, 401 (Ct. App. 2016) (alleging that mother and third parent were unable “to provide regular care due to substance abuse”).

<sup>164</sup> See, e.g., *In re J.R.*, No. H045127, 2018 WL 2426039, at \*1 (Cal. Ct. App. May 30, 2018) (noting that the child began living with the functional parent “after her biological parents . . . became homeless”).

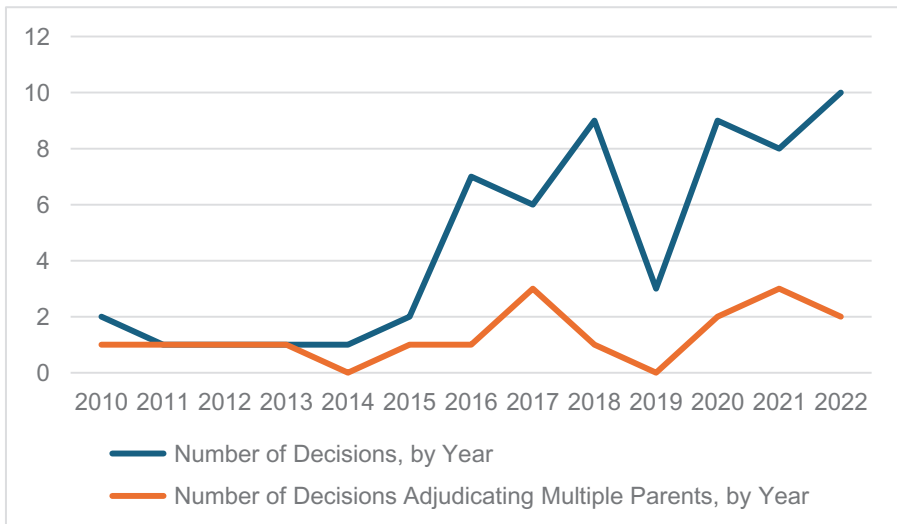
<sup>165</sup> Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. I), 16 STAN. L. REV. 257, 257–58 (1964) (“[W]e have two systems of family law in California . . . One is for underprivileged . . . families; the other for the more comfortable and fortunate.”).

<sup>166</sup> See AM. C. L. UNION & HUMAN RTS. WATCH, “IF I WASN’T POOR, I WOULDN’T BE UNFIT” 3 (2022), <https://www.aclu.org/publications/if-i-wasnt-poor-i-wouldnt-be-unfit-family-separation-crisis-us-child-welfare-system> [<https://perma.cc/3DZ4-L45V>] (noting that “Black and Indigenous people and those living in poverty are disproportionately affected” by the U.S. child welfare system). For analysis of the race- and class-based inequalities in the system, see generally DOROTHY E. ROBERTS, *TORN APART: HOW THE CHILD WELFARE*

#### 4. Adjudication

Cases decided under multiparent statutes, which are of recent vintage, do not appear until 2010, as Figure 6 shows. That is also the first year in the data with a decision adjudicating a third legal parent under these laws.<sup>167</sup> The number of cases generally rises as more jurisdictions adopt a multiparent statute. Still, the number of cases appears to rise at a greater rate than the number of decisions adjudicating a third (or fourth) legal parent.

FIGURE 6. MULTIPARENT DECISIONS PER YEAR IN MULTIPARENT STATUTE DATASET



In most cases, the court declined to find that the child had more than two legal parents. The court adjudicated an additional parent in 28% of cases in the dataset. This relatively low rate of recognition is not surprising. As discussed above, some multiparent statutes set a high substantive bar.<sup>168</sup> Specifically, under the statutes in three jurisdictions, including California, the court must find that failure to recognize more

SYSTEM DESTROYS BLACK FAMILIES— AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2001).

<sup>167</sup> See *Dep't of Soc. Serv. ex rel. P.B. v. Reed*, 52 So. 3d 145, 147 (La. App. 2010) (finding “dual paternity” for presumed father and biological father, in a case in which the child had a legal mother).

<sup>168</sup> See *supra* note 119 and accompanying text.

than two parents would “be detrimental to the child.”<sup>169</sup> In just over a fifth of the California cases, the court adjudicated a third legal parent. Three California decisions, two of which involved the same child,<sup>170</sup> featured a potential fourth parent. In none did the court adjudicate a fourth parent.<sup>171</sup>

Under the detriment standard, some courts rejected the party’s claim despite undisputed evidence demonstrating a strong parent-child bond. For example, in *A. W. v. S.S.*,<sup>172</sup> the child was conceived as the result of an affair during the wife’s marriage. The mother’s husband, whom the court found “‘love[s]’ [the] Child and [to whom the child] is ‘bonded . . . to a significant extent,’”<sup>173</sup> sought to establish his parentage. In refusing to adjudicate him to be a third parent, the court largely relied on the assumption that denying his claim would not result in termination of his relationship with the child because, at least during his continued marriage to the child’s mother, “there [wa]s every indication that . . . that bond will continue throughout Child’s minority.”<sup>174</sup> The court noted that the situation might be different if the “Mother predeceases Stepfather or they divorce,” and its opinion would not preclude subsequent litigation over stepfather’s “third-parent status” if that were to happen.<sup>175</sup>

Eighteen cases in the dataset arise out of jurisdictions in which the statute does not expressly set forth a “detriment” standard.<sup>176</sup> In approximately 40% of those cases, the court found that the child had three legal parents. This suggests that multiparent recognition is more likely when the relevant statute includes no additional requirement or sets the standard at best-interest-of-the-child rather than detriment. Two cases from Maine, which does not expressly set forth a standard for multiparent adjudication, featured four potential parents, with the court adjudicating four parents in one of those cases.<sup>177</sup>

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<sup>169</sup> See CAL. FAM. CODE § 7612(c) (West 2020); CONN. GEN. STAT. ANN. § 46b-475(c); WASH. REV. CODE ANN. § 26.26A.460(3).

<sup>170</sup> See *In re C.P.*, No. E074636, 2020 WL 4691600 (Cal. Ct. App. Aug. 13, 2020); *In re Alexander D.*, No. A152436, 2018 WL 4042668 (Cal. Ct. App. Aug. 24, 2018) (rejecting alleged fourth parent’s claim); *In re Alexander P.*, 4 Cal. App. 5th 475 (2017) (adjudicating third parent and not deciding alleged fourth parent’s claim).

<sup>171</sup> *In re C.P.*, 2020 WL 4691600; *Alexander D.*, No. A152436, 2018 WL 4042668; *Alexander P.*, 4 Cal. App. 5th 475.

<sup>172</sup> No. D078199, 2021 WL 5984615, at \*4 (Cal. Ct. App. Dec. 17, 2021).

<sup>173</sup> *Id.*

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

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

<sup>176</sup> These cases come from Delaware, Louisiana, Maine, and Vermont.

<sup>177</sup> See *Martin v. MacMahan*, 264 A.3d 1224 (Me. 2021) (affirming judgment establishing de facto parentage for parent’s “lifelong friend” and her husband); *In re Child of Philip S.*, 223 A.3d 114, 116 (Me. 2020) (affirming holding that aunt and uncle lacked standing to seek de facto parent adjudication).

While the cases in which courts found a child to have more than two parents feature a range of fact patterns, courts typically use the multiparent statute to protect the child's relationship with a person who has assumed parental responsibilities, either from the child's birth or at some later point. In more than 80% of the cases in which the court adjudicates a third legal parent, that person appeared to serve, typically alongside a biological parent, as a primary caregiver. That was true in *In re Shawn R.*, discussed in the Introduction.<sup>178</sup> While Shawn described his biological father as his “dad who doesn't do anything,” he described his mother's subsequent partner, Sebastian, as the “dad who actually takes care of me.”<sup>179</sup> By recognizing Sebastian as a third parent, the court protected Shawn's relationship with the man who was in fact assuming the responsibilities of parenting Shawn.

Similarly, in *Adam T. v. Jennifer S.*,<sup>180</sup> Jennifer had a child with another man during her marriage to her husband, Ilya. Even though the biological father established parentage, Ilya, with Jennifer's support, acted as the child's father.<sup>181</sup> Even after Jennifer and Ilya separated, Ilya continued to parent, ultimately seeking to be adjudicated the third parent when the child was ten years old. Jennifer, who supported Ilya's petition, testified that Ilya “does everything a father should do and above and beyond.”<sup>182</sup> Recognizing Ilya's assumption of parental responsibilities, the trial court found Ilya to be a third legal parent.<sup>183</sup>

It is important to note that there are three California cases in which the court did not adjudicate a third parent under California's multiparent statute but nonetheless appears to have left the child with three parents.<sup>184</sup> These cases were initiated by child welfare authorities. In California dependency cases, being a legal parent is not sufficient to entitle one to reunification services. Instead, the person must be determined to be a presumed parent—that is, a person who lived with the child and held the child out as their child or a spouse of the birth parent at the time of the child's birth.<sup>185</sup> In these three cases, the court concluded that the alleged third parent was a presumed parent and that

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<sup>178</sup> No. D069688, 2016 WL 5940937, at \*3 (Cal. App. Oct. 13, 2016).

<sup>179</sup> *Id.* at \*3.

<sup>180</sup> No. H045578, 2020 WL 6281636, at \*1 (Cal. Ct. App. Oct. 27, 2020).

<sup>181</sup> *Id.* at \*3.

<sup>182</sup> *Id.* at \*6.

<sup>183</sup> Adam subsequently dismissed his appeal. *Id.* at \*8.

<sup>184</sup> *In re E.G.*, No. E076796, 2022 WL 130090 (Cal. App. Jan. 14, 2022); *In re B.G.*, No. B308221, 2021 WL 4349094 (Cal. App. Sept. 25, 2021); *In re Ivy D.*, No. G057418, 2019 WL 4316526 (Cal. App. Sept. 12, 2019).

<sup>185</sup> 16 WITKIN, SUMMARY 11TH JUVENILE § 376 (2023) (“As a general rule, only a presumed father, not a mere biological father, is entitled to reunification services.” (citing *In re Zacharia D.*, 862 P.2d 751 (Cal. 1993))).

the second parent (i.e., the biological father) was not a presumed parent, even though the second parent previously was determined to be, and continues to be, a legal parent. Because there was only one presumed parent, the court was not faced with competing claims to parentage and, therefore, did not need to determine whether the statutory multiparent standard was satisfied. For this reason, these cases are not coded as featuring multiparent adjudication.

Nonetheless, these dependency cases illustrate how parental rights can be unbundled and distributed unevenly across more than two parents—even in states that allow for the recognition of more than two legal parents. While the child in these cases had three legal parents, only two were treated as parents for purposes of the child welfare proceeding. In that way, two parents enjoyed superior rights to the other parent—a biological father who had been recognized as a legal parent but who seems not to have actively parented or financially supported the child. Notably, this outcome—where a child has three parents, only two of whom are entitled to reunification services—could have resulted even before California’s multiparent statute went into effect.<sup>186</sup>

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Ultimately, data on cases decided under multiparent statutes suggest that while the statutes are relatively new, the families captured by them are not. Statutes expressly authorizing courts to recognize more than two legal parents appear to have the greatest impact in family configurations that have resulted from longstanding patterns of divorce, remarriage, and nonmarital cohabitation. Seemingly all of the children in these cases are conceived through sexual intercourse, not assisted reproduction.<sup>187</sup> Most often, the child ends up with more than two parents, not because more than two people planned ahead of time to have and parent a child together, but instead because an intimate partner of a biological parent forms a parental relationship with the child after birth. Typically, no more than two people are consistently involved in parenting the child.

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<sup>186</sup> See, e.g., *In re Brianna M.*, 163 Cal. Rptr. 3d 665, 669 (Cal. App. 2013) (finding that, in addition to child’s mother, father of child’s half-sibling qualified as presumed parent and, “for dependency purposes, a voluntary declaration of paternity executed by [the child’s biological father and which establishes the man’s legal parentage] does not, as a matter of law, extinguish another man’s presumed father status”). California’s multiparent statute—CAL. FAM. CODE § 7612(c)—went into effect on January 1, 2014. See A.B. 274, 2013–2014 Leg. Sess. § 8(a) (Cal. 2013).

<sup>187</sup> See *supra* note 138 and accompanying text.

While the multiparent statutes give courts newfound statutory authority to recognize more than two legal parents for a child, the families captured by the laws are familiar ones. Did these newly enacted statutes bring about legal recognition for these familiar-looking multiparent families? Or does multiparent recognition predate these statutes? That is the question to which we turn next.

### III

#### FINDINGS ON FUNCTIONAL PARENT DOCTRINES AND MULTIPARENT RECOGNITION

In this Part, we draw on a separate dataset to show not only that multiparent families have been a feature of family life for decades but also that the law has long protected the parent-child relationships in these families. Looking at doctrines that precede multiparent statutes, we see that courts have regularly confronted situations in which a person seeks parental rights or responsibilities *even when the child already has two legal parents*. We find that courts have long applied functional parent doctrines in ways that extend parental rights to a third (or fourth) parent without disturbing the parental status of the child's existing parents—that is, without terminating the rights of an existing parent. Given that the recognition of multiparent families under these doctrines goes back decades,<sup>188</sup> it is perhaps unsurprising that the families do not appear novel. Still, it is striking that even the families protected more recently are more common and familiar than typically assumed.<sup>189</sup> In this way, we see that functional parent doctrines are doing some of the same work that the multiparent statutes we examined in Part II are doing.

As we show, many of these functional parent doctrines do not yield legal parentage.<sup>190</sup> Instead, they authorize courts to extend *some* parental rights and/or responsibilities to a person who has been parenting the child. In this way, courts, for decades, have treated parenthood as nonbinary. They have unbundled parental rights and responsibilities and spread them across more than two individuals. Rather than treat parenthood as an all-encompassing and fixed status, courts have protected children's relationships with individuals who function as parents later in the child's minority. Often, these third parents are extended *some* parental rights but are not treated as legal parents with all of the rights and responsibilities that accompany that status. At the

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<sup>188</sup> See *infra* Figure 8.

<sup>189</sup> See *infra* Section III.B.2.

<sup>190</sup> See *infra* Section III.A.2.

same time, courts commonly extend particularly important parental rights—namely, legal and/or physical custody—to these third parents while leaving at least one legal parent without custody.

### A. *Multiparent Decisions in the Functional Parent Dataset*

The dataset from which we draw in this Part comes from our larger empirical study of functional parent decisions issued between 1980 and October 2021 from jurisdictions with a functional parent doctrine<sup>191</sup>—that is, a doctrine that extends parental rights and/or responsibilities based on the conduct of forming a parental relationship with a child and parenting the child. Thirty-four jurisdictions currently have one or more functional parent doctrines.<sup>192</sup> This *functional parent dataset*, which is publicly available, includes all electronically available functional parent decisions from these jurisdictions<sup>193</sup>—a total of 669 decisions.<sup>194</sup> For purposes of this Article, we identified the decisions within this full dataset that involve what we define as multiparent families. This process yielded 479 decisions.<sup>195</sup>

Some but not all of the cases from the multiparent statute dataset appear in the functional parent dataset. The multiparent statute dataset includes cases regardless of the parentage doctrine invoked by the additional alleged parent. Accordingly, cases arising under the marital presumption are captured in the multiparent statute dataset, but do not appear in the functional parent dataset.<sup>196</sup> In addition, some states included in the multiparent statute dataset are not included in the functional parent dataset. For example, the multiparent statute dataset includes cases from Louisiana, a state that does not have a functional parent doctrine but has a statute permitting dual paternity.<sup>197</sup> Finally, the multiparent statute dataset, which runs through 2022, includes cases decided after the functional parent dataset's end date.

#### 1. *Identifying Multiparent Families*

In the first dataset, we treat all families involved in cases arising under a multiparent statute as multiparent families. We do so because

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<sup>191</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 345.

<sup>192</sup> See *id.* at 346.

<sup>193</sup> Because we relied primarily on Westlaw, some additional cases may be available on other databases. Cf. McAlister, *supra* note 103, at 1126.

<sup>194</sup> See Joslin & NeJaime, *Replication Data for: Multiparenthood*, *supra* note 104.

<sup>195</sup> See *id.* Accordingly, 72% of the cases in the functional parent dataset involve multiparent families as we define them.

<sup>196</sup> Under the marital presumption, which exists in some form in all states, the spouse of the birth parent is presumed to be the child's legal parent. See, e.g., Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 *YALE L.J.F.* 589, 608 (2018).

<sup>197</sup> LA. CIV. CODE ANN. art. 198 (2023).

the fact that the statute is implicated—a statute that allows the court to recognize more than two people as a child’s legal parent—clearly establishes that there are more than two people with claims to legal parentage. In contrast, cases arising under functional parent doctrines do not always involve more than two people with claims to legal parentage or parental rights.<sup>198</sup> Accordingly, we had to make judgments about what constitutes a multiparent family for purposes of this dataset. We define multiparent families as families in which more than two individuals possess or claim parental rights and/or responsibilities. Our definition includes families in which there are more than two legal parents or individuals claiming legal parentage. Our definition also includes families in which there are more than two people who have been or could be accorded parental rights under parentage rules or under functional parent doctrines, including doctrines that accord only *some* parental rights. This includes: (1) families in which there are two legal parents and at least one individual seeking or accorded parental rights under a functional parent doctrine; (2) families in which there is one legal parent and at least two individuals seeking or accorded parental rights under a functional parent doctrine; and (3) families in which there is one legal parent, one identifiable individual who may at some future date be adjudicated a legal parent (e.g., a known biological father of a nonmarital child), and at least one individual seeking or accorded parental rights under a functional parent doctrine.

With respect to this last category, we count as multiparent cases situations in which someone is seeking recognition under a functional parent doctrine with regard to a child who has two identified biological parents who either are legal parents or could claim to be recognized as legal parents. We include such cases even when one of those individuals has not yet established parentage. For nonmarital children, the nonbirth parent would in most cases need to establish parentage after the child’s birth, either through an acknowledgment of parentage or a formal adjudication, to be treated as a legal parent. We include these cases because the identified biological parent has a claim to be recognized as a legal parent and typically would be recognized as the child’s legal parent if the issue were adjudicated.<sup>199</sup>

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<sup>198</sup> This would be true, for example, if the child was born through assisted reproduction under circumstances in which the gamete donor is clearly treated as a nonparent, and there are only two people with claims to parentage or parental rights—the birth parent and the functional parent.

<sup>199</sup> For example, under the Uniform Parentage Act, if the “woman who gave birth to the child is the only other individual with a claim to parentage of the child[,] [t]he court shall adjudicate an alleged genetic parent to be a parent of the child if the alleged genetic parent



We exclude cases—that is, we do not count as multiparent cases—situations in which one of the biological parents has had no contact with the child and there is either no information about the person or not enough information to enable them to be found.<sup>200</sup> For example, we exclude cases in which there is a birth parent and a functional parent for a nonmarital child and there is no reference to the child’s biological father. Even in these situations, a second biological parent may emerge and seek parentage at some later point.<sup>201</sup> Still, we do not treat these situations as involving multiparent families because there are not three identified people in the child’s life and the possibility of legal recognition of more than two parents appears remote.

We also exclude cases in which the second biological parent is not considered a legal parent under the relevant parentage law. This category includes cases involving children born to same-sex couples conceived through assisted reproduction using either unknown gamete (usually sperm) providers, or known gamete providers under circumstances where the gamete provider would not be treated as a legal parent.<sup>202</sup> Consistent with one of the grounds for inclusion, that also means we count cases involving known gamete providers when the individual who provided gametes for use in assisted reproduction was considered a legal parent or could be adjudicated a legal parent under the state’s law.<sup>203</sup> For example, in a state that treats a provider of sperm as a nonparent only in situations when the sperm is used by a married woman, the known provider of sperm could be adjudicated to be a legal parent when the sperm was provided for use in assisted reproduction by an unmarried woman and her partner.<sup>204</sup>

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is identified . . . as a genetic parent” through genetic testing. UNIF. PARENTAGE ACT § 607(b)(1) (UNIF. L. COMM’N 2017). *See also* 42 U.S.C. § 666(a)(5)(G).

<sup>200</sup> *See, e.g., In re Jerry P.*, 116 Cal. Rptr. 2d 123, 125–26 (Ct. App. 2002); *In re Karen C.*, 124 Cal. Rptr. 2d 677, 678 (Cal. Ct. App. 2002); *Guardianship of K.N.*, 73 N.E.3d 271, 273 (Mass. 2017); *Hawkins v. Murphy*, 565 N.W.2d 674, 676 (Mich. Ct. App. 1997); *Monmouth Cnty. Div. of Soc. Servs. v. R.K.*, 757 A.2d 319, 327 (N.J. Super. Ct. Ch. Div. 2000).

<sup>201</sup> If the biological father later comes forward, he may be able to establish his parentage based on genetic evidence. *See, e.g., N.C. GEN. STAT. § 49-14* (“The paternity of a child born out of wedlock may be established by civil action at any time prior to such child’s eighteenth birthday.”).

<sup>202</sup> *See, e.g., CONN. GEN. STAT. ANN. § 46b-510* (providing that a gamete donor is not a parent “by virtue of the donor’s genetic connection”).

<sup>203</sup> For example, in states with donor-insemination statutes that apply only to married couples, a known donor who provides semen to an unmarried woman could be treated as a legal parent based on genetic evidence. *See, e.g., Bethany v. Jones*, 378 S.W.3d 731, 735–36 (Ark. 2011); *ARK. CODE ANN. § 9-10-201* (treating birth mother’s husband, rather than sperm donor, as legal parent but not addressing the status of sperm donors when the sperm was provided to an unmarried couple).

<sup>204</sup> Many of these cases have complicated facts. Moreover, all relevant facts may not be reported in the electronically available decision. Accordingly, coding of some cases required judgments with which some may disagree. Again, our data is public such that others can observe our judgments.

Finally, we include cases involving parental death where at least one legal parent has died and a person who was initially not treated as a legal parent but was parenting the child is seeking functional parent status. We include such cases because ordinarily the deceased parent would still be considered the child's parent in the eyes of the law,<sup>205</sup> and, thus, in the absence of a functional parent doctrine, a third person generally would have to complete an adoption to be recognized as a parent.

Importantly, our definition of multiparent families does not hinge on whether more than two individuals were actively parenting the child. Instead, because we are concerned with *the law's* treatment of multiparenthood—that is, courts' capacity and willingness to extend parental rights to more than two individuals—we focus on situations in which more than two individuals claim or can claim parental rights with respect to a child under the law of the jurisdiction. Even in families where the child has only one or two involved parents, the extension of parental rights to more than two people may be necessary to protect the child's relationship with a person who is consistently providing parental care.

## 2. *Functional Parent Doctrines*

We provide a more detailed description of the doctrines' varying requirements and legal effects elsewhere.<sup>206</sup> Here, we briefly identify the functional parent doctrines we include in this dataset. In some states, the relevant doctrine is a common law or equitable doctrine. These include *de facto* parent,<sup>207</sup> psychological parent,<sup>208</sup> *in loco*

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<sup>205</sup> See, e.g., *A.W. v. S.S.*, No. D078199, 2021 WL 5984615, at \*5 (Cal. Ct. App. Dec. 17, 2021) (explaining that, “[i]f during Child’s minority Mother predeceases Stepfather,” a court would be authorized to consider the stepfather’s “third-parent status” under California’s multiparent statute). See also Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 AM. COLL. TR. & EST. COUNS. J. 171, 174–75 (2008) (explaining how family law governing parentage generally applies to intestacy law, even as intestacy law may include additional paths for establishing parent-child relationships for inheritance purposes).

<sup>206</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 330–42.

<sup>207</sup> See, e.g., *Conover v. Conover*, 146 A.3d 433, 439 (Md. 2016) (stating that a “*de facto* parent” is . . . ‘a party who claims custody or visitation rights based upon the party’s relationship, in fact, with a non-biological, non-adopted child’”); *In re Parentage of L.B.*, 122 P.3d 161, 167–68 n.7 (Wash. 2005) (explaining that a *de facto* parent is “an individual who, in all respects functions as a child’s actual parent”).

<sup>208</sup> See, e.g., *In re K.H.*, 773 S.E.2d 20, 26 (W. Va. 2015) (“A psychological parent is 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.”); *V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000) (For a person to qualify as a psychological parent, “the legal parent must consent to and foster the relationship between the [person] and the child; the [person] must have lived with the child; the [person] must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.”).

*parentis*,<sup>209</sup> equitable parent,<sup>210</sup> and parent by estoppel,<sup>211</sup> among others. There are other doctrines in this category. For example, in some states, courts enforce agreements of legal parents to shift custody to another person.<sup>212</sup> In other states, a court may find that the legal parent waived their superior right to custody.<sup>213</sup>

In some states, the available doctrine is codified. We include cases decided under the “holding out” presumption when, and only to the extent that, courts in that jurisdiction apply the presumption to individuals known not to be the child’s biological parent.<sup>214</sup> Some jurisdictions have codified *de facto* parentage provisions.<sup>215</sup> Still other jurisdictions have statutes that allow for the recognition of individuals who can establish they stand *in loco parentis* or are “*de facto* custodians.”<sup>216</sup>

Different doctrines have different legal consequences.<sup>217</sup> There is a trend in favor of recognizing functional parents as legal

<sup>209</sup> See *T.B. v. L.R.M.*, 786 A.2d 913, 916 (Pa. 2001) (“The phrase ‘*in loco parentis*’ refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption.”); *Hickenbottom v. Hickenbottom*, 477 N.W.2d 8, 17 (Neb. 1991) (same).

<sup>210</sup> See, e.g., *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. App. 1987) (adopting “the doctrine of ‘equitable parent’” for “a husband who is not the biological father of a child born or conceived during the marriage . . . where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship . . . , (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support”).

<sup>211</sup> See, e.g., *Matter of L. v. P.*, 880 N.Y.S.2d 874, 2008 WL 5549446, at \*1 (Fam. Ct. Nov. 14, 2008) (“[T]o protect the state interests of a child in an already recognized and operative parent-child relationship, . . . the estoppel doctrine precludes a putative father . . . from denying paternity.”); *Gulla v. Fitzpatrick*, 596 A.2d 851, 855 (Pa. Super. Ct. 1991) (explaining that the legislature codified the equitable doctrine of paternity by estoppel, which applies to a man who “openly holds out the child to be his and receives the child into his home, or openly holds the child out to be his and provides support for the child”).

<sup>212</sup> See, e.g., *Overfield v. Collins*, 483 S.E.2d 27, 36 (W. Va. 1996).

<sup>213</sup> See, e.g., *Boseman v. Jarrell*, 704 S.E.2d 494, 504–05 (N.C. 2010).

<sup>214</sup> See *Joslin & NeJaime, How Parenthood Functions*, *supra* note 31, at 337 (reflecting on how “holding out” presumptions under various UPA versions recognize nonbiological parents based on their parent-child relationship rather than genetic ties).

<sup>215</sup> See CONN. GEN. STAT. ANN. § 46b-490; DEL. CODE ANN., tit. 13, § 8-201(c); ME. REV. STAT., tit. 19-a, § 1891; 15 R.I. GEN. LAWS ANN. § 15-8.1-502; VT. STAT. ANN. tit. 15C, § 201(6); WASH. REV. CODE ANN. § 26.26A.440(4).

<sup>216</sup> See, e.g., 23 PA. STAT. & CONS. ANN. § 5324 (2018) (allowing a “person who stands in loco parentis to the child” to petition for “any form of physical custody or legal custody”); KY. REV. STAT. § 403.270(1)(a) (providing that “‘*de facto* custodian’ means a person who has been shown . . . to have been the primary caregiver for, and financial supporter of, a child” for a prescribed time period).

<sup>217</sup> See *NeJaime, Parents in Fact*, *supra* note 16, at 518–33 (tracing the evolving status of functional parents).

parents—indistinguishable from any other legal parent.<sup>218</sup> Some doctrines that do not yield legal parentage nonetheless give rise to “[t]he rights and liabilities . . . as between parent and child.”<sup>219</sup> Other doctrines, however, give rise to only some parental rights and obligations.<sup>220</sup> For example, various common law and equitable doctrines yield only standing to seek custody or visitation under a best interest of the child standard.<sup>221</sup> Some doctrines clearly give rise to an obligation to support the child financially.<sup>222</sup> The existence of such an obligation may be unclear under other doctrines. And, in some jurisdictions, functional parents have no such obligation.<sup>223</sup>

In other work, we explain in more detail which kinds of doctrines we exclude from our study.<sup>224</sup> Briefly, we do not consider doctrines that turn on a person’s status in relationship to the legal parent to be functional parent doctrines. Accordingly, we exclude grandparent and stepparent visitation statutes.<sup>225</sup> We also generally do not treat third-party custody and visitation statutes as functional parent doctrines.<sup>226</sup>

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<sup>218</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 340–41 (discussing doctrines treating functional parents as legal parents). See also *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) (“We thus hold that henceforth in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”).

<sup>219</sup> *Peters v. Costello*, 891 A.2d 705, 710 (Pa. 2005). The lack of legal parentage may mean, for example, that the relationship does not qualify for government benefits. See, e.g., Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1216 (2010) (“[W]ithout a legally recognized parent-child relationship, many nonmarital children born through alternative insemination have no right to crucial financial protections—such as child support and children’s Social Security benefits—from and through their functional parents.”).

<sup>220</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 339–42.

<sup>221</sup> See, e.g., *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995) (holding that functional parent doctrine gives rise only to the right to seek visitation).

<sup>222</sup> This is the effect, for example, under doctrines that yield legal parentage. See, e.g., WASH. REV. CODE ANN. § 26.26A.110 (providing that a “parent-child relationship established under this chapter applies for all purposes”). In addition, there are some decisions imposing this obligation under functional parent doctrines that do not clearly yield legal parentage. See, e.g., *L.S.K. v. H.A.N.*, 813 A.2d 872, 876 (Pa. Super. Ct. 2002) (holding that a woman who was found to stand *in loco parentis* could be ordered to pay child support).

<sup>223</sup> See, e.g., *In re* A.M.K., 838 N.W.2d 865, at \*3 (Wis. Ct. App. 2013) (“[T]here is no statutory basis upon which a court may order a non-parent to pay child support to the biological parent.”).

<sup>224</sup> Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 342–44.

<sup>225</sup> See *id.* at 342.

<sup>226</sup> *Id.* at 343–44. We are focused on doctrines that turn on a parent-child relationship, but we note that third-party custody and visitation statutes, including grandparent visitation statutes, authorize unbundling and sharing some parental rights with individuals who are not legal parents. See, e.g., 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) (describing grandparent visitation statutes, and noting that “[t]he 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

### 3. *Coding*

After compiling a dataset of 669 functional parent decisions (some of which we do not count as multiparent cases), each case was hand coded along the following dimensions: (1) jurisdiction; (2) year; (3) published or unpublished; (4) legal basis (e.g., de facto parent, “holding out” presumption); (5) functional parent’s identity (e.g., same-sex unmarried partner, grandparent); (6) affirmative (i.e., alleged functional parent seeking rights) or defensive (i.e., existing legal parent seeking to impose obligations on alleged functional parent); (7) post-dissolution disputes (i.e., whether the claim is asserted after the dissolution of an intimate relationship and for what purpose); (8) functional parent’s role (e.g., co-primary caregiver with biological/legal parent); (9) role of the most involved biological/legal parent (e.g., primary caregiver); (10) judicial determination (e.g., merits decision recognizing functional parent); (11) appellate resolution (e.g., affirmed); (12) intended parents (i.e., whether the case involves intended parents and, if so, how the child was conceived); (13) parental death (i.e., whether a biological/legal parent died); (14) allegations of domestic violence and/or child abuse or neglect and the identity of the individual(s) against whom allegations are made; and (15) child welfare involvement (i.e., whether child welfare authorities were involved in any capacity with respect to the child at issue).

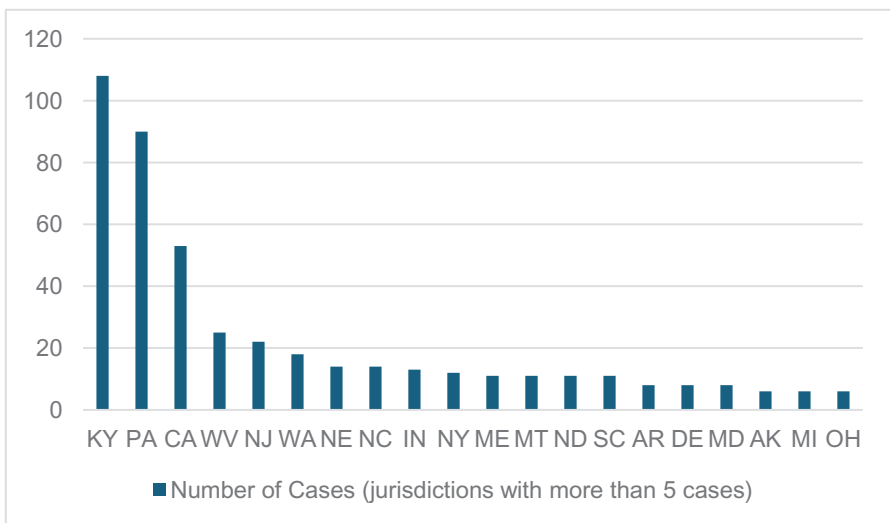
To identify and analyze multiparent cases, each case was also hand coded for the following: (1) multiparent family (i.e., whether the case involves a multiparent family); and (2) multiparent recognition (e.g., adjudication of more than two individuals with at least some parental rights and/or obligations). All cases were integrated into a pivot table to combine various coding categories (e.g., multiparent cases in which a grandparent who is the child’s primary caregiver is recognized as a functional parent).

Our coding produced 479 cases that feature multiparent families. As Figure 7 shows, twenty jurisdictions had more than five multiparent cases in the dataset.

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grandparent is related (thirty states)”). *See also* UNIF. NONPARENT CUSTODY AND VISITATION ACT § 3(a) (UNIF. L. COMM’N 2018) (authorizing and governing a “proceeding in which a nonparent seeks custody or visitation”).

FIGURE 7. NUMBER OF MULTIPARENT CASES BY JURISDICTION



Three jurisdictions—Kentucky, Pennsylvania, and California—account for slightly more than half of all multiparent cases in the dataset. These jurisdictions represent 43% of cases in the larger functional parent dataset. The 479 multiparent cases include 108 from Kentucky, 90 from Pennsylvania, and 53 from California. Given how these cases shape the overall picture, we separately report findings from these three jurisdictions.

#### 4. *Limitations*

Like all empirical studies, ours has limitations. The dataset includes only judicial decisions publicly available on electronic databases. The vast majority of these cases are from state appellate courts. The larger universe of multiparent disputes arising under functional parent doctrines may look materially different. For example, multiparent families that are never involved in litigation likely include more planned multiparent families. Such families may be more likely to raise the child together without conflict that necessitates legal action. Moreover, litigation can be expensive, and alleged parents are generally not eligible for appointed counsel in family court.<sup>227</sup> Appeals only add expense.

<sup>227</sup> Some states bar appointment of counsel for putative parents in parentage proceedings. See LAURA K. ABEL & MAX RETTIG, BRENNAN CTR. FOR JUST., STATE STATUTES PROVIDING FOR A RIGHT TO COUNSEL IN CIVIL CASES 248 n.30 (2006), [https://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_39169.pdf](https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39169.pdf) [<https://perma.cc/V494-CXDZ>] (citing New

Accordingly, we might expect that parties with greater resources are overrepresented in our dataset.

Even when disputes arise within multiparent families, only some claims would result in legal action. Models of the litigation process predict that the strongest and weakest claims are less likely to produce litigation.<sup>228</sup> As we explain elsewhere, the disputes we are studying may depart from predicted patterns.<sup>229</sup> Parentage cases are especially weighty and emotional, which may, as compared to money disputes, lead to a greater proportion of disputes resulting in litigation.<sup>230</sup> Yet, at the same time, meritorious claims may not produce litigation, given the deeply personal relationships at stake. For example, a grandparent may avoid litigation against her own child for custody of her grandchild.

Still, because we are focused on *legal recognition* of more than two individuals with parental rights or obligations, our dataset allows us to identify and analyze what multiparent families involved in a large number of litigated disputes look like *and* how courts treat them. Of course, the dataset includes only cases decided under a functional parent doctrine. It does not capture cases decided under doctrines that turn on pre-conception intent, rather than postbirth parenting.<sup>231</sup> This means that some multiparent families formed through assisted reproduction are not captured.<sup>232</sup> We expect the universe of such cases to be small, given that most jurisdictions do not maintain intended parent doctrines that permit more than two parents for a child.<sup>233</sup>

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Hampshire, West Virginia, and Wisconsin). The rule, however, may be different in dependency proceedings.

<sup>228</sup> See, e.g., George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984).

<sup>229</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 348–49 & n.176.

<sup>230</sup> Cf. Kathie Nichols & Patrick Nichols, *Psychological Obstacles and Barriers to Settlement in Family Law Cases*, 24 AM. J. FAM. L. 140, 140 (2010) (“As emotional issues increase, management of rational decision making becomes more difficult. This is compounded by intangible, noneconomic factors which are present in many types of matters, certainly including family law.”).

<sup>231</sup> See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 501 (N.Y. 2016) (holding that a person has standing to seek custody if they can “prove[] by clear and convincing evidence . . . that a pre-conception agreement [to parent] existed”).

<sup>232</sup> See *Raymond T. v. Samantha G.*, 74 N.Y.S.3d 730 (N.Y. Fam. Ct. 2018); *Renee P.F. v. Frank G.*, 79 N.Y.S.3d 45 (N.Y. App. Div. 2018); *Frank G. v. Renee P.F.*, 37 N.Y.S.3d 155 (N.Y. App. Div. 2016).

<sup>233</sup> In fact, assisted reproduction statutes in many states remain limited to married couples. See NeJaime, *The Nature of Parenthood*, *supra* note 47, at 2367–69; Joslin, *(Not) Just Surrogacy*, *supra* note 47, at 433.

*B. Findings from the Functional Parent Dataset*

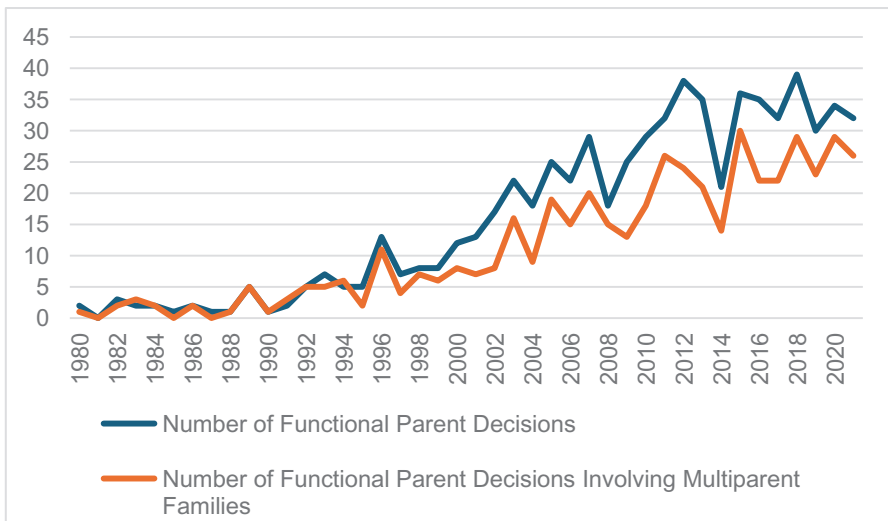
We begin by looking at the question of adjudication, seeing first that courts have long extended parental rights to more than two individuals under functional parent doctrines. After establishing this, we examine who these multiparent families are, how they function, and how they end up in court.

*1. Extending Parental Rights to an Additional Parent*

As Figure 8 shows, multiparent families are common among and appear throughout the functional parent decisions in our dataset. The number of multiparent cases generally rises as more jurisdictions adopt a functional parent doctrine. The critical point, though, is that multiparent families are observable in the case law decades before jurisdictions expressly permitted multiparent recognition.

The number of cases featuring multiparent families rises roughly in proportion to the number of functional parent decisions overall. In fact, multiparent cases appear to rise *and fall* as the number of functional parent cases rises and falls. In this sense, multiparent families seem to be an ordinary feature of functional parent caselaw.

FIGURE 8. MULTIPARENT DECISIONS PER YEAR IN FUNCTIONAL PARENT DATASET

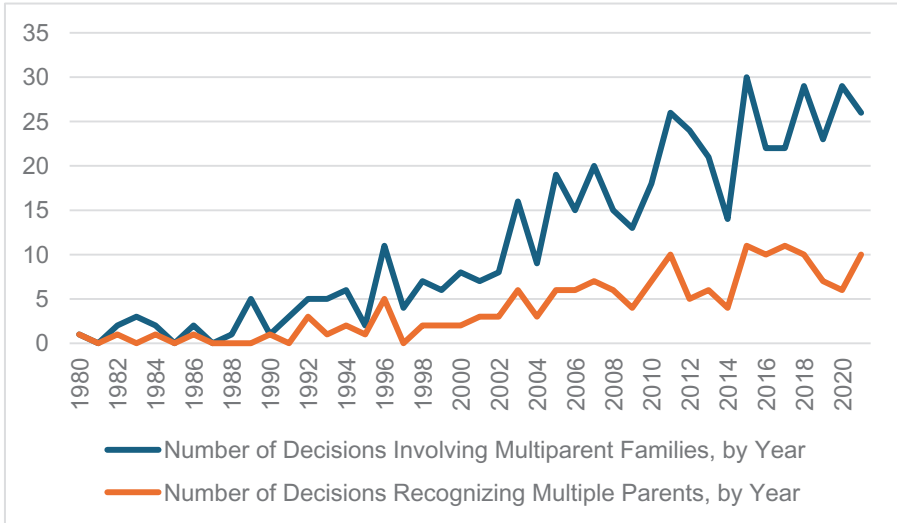


Courts appear comfortable extending parental rights to a third parent under a functional parent doctrine. As Figure 9 shows, a court



extended parental rights to a third parent in 1980—the very first year we include. We observe a greater number of decisions extending parental rights to a third (or fourth) person in recent years—a trend which is, in part, a function of more jurisdictions adopting functional parent doctrines. Importantly, though, judicial recognition of multiparent families occurred throughout the 1980s and 1990s.

FIGURE 9. MULTIPARENT RECOGNITION PER YEAR IN FUNCTIONAL PARENT DATASET



The dataset includes 385 cases in which a court is being asked to recognize a person as a functional parent under a doctrine that does not yield legal parentage—that is, a doctrine that extends partial parental rights and/or responsibilities. Among these cases, the court recognized the person as a functional parent in 40%. This is only slightly lower than the overall rate of recognition in the functional parent dataset (47%), suggesting that courts are not reluctant to rule in ways that produce more than two individuals who possess some parental rights, even if the courts do not typically acknowledge this result explicitly.

Two of the three states with the most cases in the dataset—Kentucky and Pennsylvania<sup>234</sup>—have doctrines that do not yield legal parentage. Under these doctrines, courts can extend some parental rights to people even though they are not legal parents. In Kentucky, the

<sup>234</sup> As discussed in more detail below, Pennsylvania has two different functional parent doctrines—*in loco parentis* and paternity by estoppel. The first doctrine does not yield legal parentage while the second one does.

relevant doctrine applies to a person who has been the child's primary caregiver and financial provider for a statutorily prescribed time period.<sup>235</sup> Where it applies, the person is not recognized as a legal parent but is accorded the "same standing in custody matters that is given to each parent."<sup>236</sup> Among the 108 multiparent cases from Kentucky in the dataset, parental rights were extended to more than two individuals in 46%. In these cases, the de facto custodian was commonly awarded custody of the child over the legal parents. In Pennsylvania, the relevant doctrine extends the "rights and liabilities . . . as between parent and child"<sup>237</sup> to an individual who stands *in loco parentis* (i.e., in the place of a parent). Of the 84 relevant cases in the dataset, the court extended parental rights to more than two individuals in 34%.

Two of the three states with the most cases in the dataset—California and Pennsylvania—have doctrines that do yield legal parentage. Pennsylvania falls into both categories. Like some other states, Pennsylvania has more than one functional parent doctrine. The two Pennsylvania doctrines have different criteria and give rise to different rights and responsibilities.<sup>238</sup> While the *in loco parentis* doctrine predominates in the Pennsylvania cases, the state also has a statutory paternity by estoppel doctrine, under which a man who held the child out as his child is treated as a legal parent.<sup>239</sup> Even though Pennsylvania law does not explicitly authorize more than two legal parents, two of the six paternity by estoppel cases in our data appear to have produced such a result.<sup>240</sup>

As we have seen, a person is treated as a legal parent under California's "holding out" presumption.<sup>241</sup> Adjudication of three legal parents was not expressly authorized in California before the state's multiparent statute became effective in 2014.<sup>242</sup> Accordingly, the forty-three California cases before that time technically could not yield

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<sup>235</sup> KY. REV. STAT. ANN. § 403.270(1)(a) (West 2022).

<sup>236</sup> *Id.*

<sup>237</sup> *Peters v. Costello*, 891 A.2d 705, 710 (Pa. 2005).

<sup>238</sup> A few other states also maintain two functional parent doctrines that have different criteria and give rise to different rights. See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 341–42.

<sup>239</sup> 23 PA. STAT. AND CONS. STAT. ANN. § 5102 ("[P]aternity shall be determined . . . [i]f, during the lifetime of the child, it is determined by clear and convincing evidence that the father openly holds out the child to be his and either receives the child into his home or provides support for the child.")

<sup>240</sup> See *A.S. v. I.S.*, 130 A.3d 763 (Pa. 2015); *Tregoning v. Wiltschek*, 782 A.2d 1001 (Pa. Super. Ct. 2001). A New York court produced a similar result. See *Matter of Marshall P. v. Latifah H.*, 154 A.D.3d 709 (N.Y. App. Div. 2017).

<sup>241</sup> See *supra* note 140 and accompanying text.

<sup>242</sup> CAL. FAM. CODE § 7612(c) (West 2020); 2013 Cal. Legis. Serv. Ch. 564 (S.B. 274) (West) (stating that bill would "become effective January 1, 2014").

multipartent recognition. Recall, though, that children in dependency cases, both before and after the law's enactment, may have three legal parents, a result not captured by our functional parent data.<sup>243</sup>

Overall, findings from the functional parent dataset make clear that, for several decades, courts have recognized and protected multipartent families. In this way, courts have functionally done what newly enacted multipartent statutes purport to authorize. Many of the functional parent doctrines, however, do not yield *legal* parentage (as the multipartent statutes do). Under these doctrines, courts extend *partial* parental rights and responsibilities to a third person, the functional parent. We now examine whether the multipartent families captured by functional parent doctrines resemble the families captured by multipartent statutes.

## 2. *Who Are Multipartent Families?*

Of the 669 decisions in the functional parent dataset, 72% involve multipartent families as we describe them.<sup>244</sup> How do these families form, and who are the people parenting the child?

### a. *Planned Multipartent Families*

Perhaps the most striking feature about our data is the almost complete absence of planned multipartent families formed through assisted reproduction. While this type of family captures the public imagination,<sup>245</sup> it is barely present in our data. Only two of the 479 multipartent cases involve situations where more than two people intended before conception to parent a child conceived through assisted reproduction.<sup>246</sup>

More generally, as Figure 10 shows, conception through assisted reproduction is rare among cases in the dataset. In only fifteen cases is it clear that the child was conceived through assisted reproduction. The two planned multipartent families formed through assisted reproduction are two of only three cases<sup>247</sup> in the entire dataset in which there was

<sup>243</sup> See *supra* notes 184–86 and accompanying text.

<sup>244</sup> See *supra* note 195 and accompanying text.

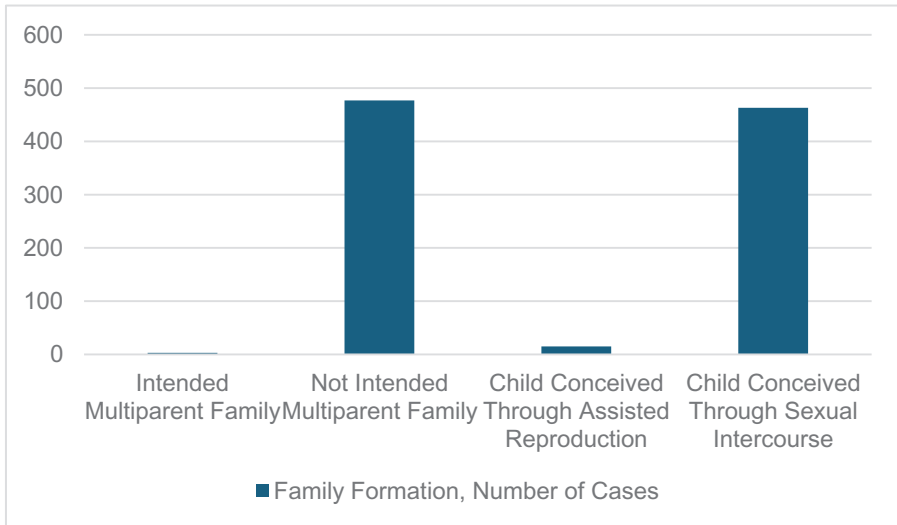
<sup>245</sup> See, e.g., *supra* note 10 and accompanying text.

<sup>246</sup> Both cases involve LGBTQ people. See *D.G. v. K.S.*, 133 A.3d 703 (N.J. Super. Ct. Ch. Div. 2015) (involving an intended triparent family consisting of a married gay male couple and the birth mother); *LaChappelle v. Mitten*, 607 N.W.2d 151, 157 (Minn. App. Ct. 2000) (involving lesbian intended parents who did not intend sperm donor to be a parent but did intend him to have a “significant relationship” with the child).

<sup>247</sup> As explained in notes 129–35 *supra* and accompanying text, there is one additional case where the parties arguably made a decision after conception but prior to the birth of the child to form a multipartent family. See *Lanfear v. Ruggerio*, 254 A.3d 168 (Vt. 2020). The extent to which each of the three parties in *Lanfear* planned to all be parents of the child was contested, and the court did not find the third person to be a parent. As we explain elsewhere,

a claim that more than two individuals intended from the outset (that is, prior to conception) to parent a child. In the third case, the child was conceived through sexual intercourse.<sup>248</sup> While here too we might expect more planned multiparent families at the trial court level, it is striking that in practically all of the almost 500 multiparent cases in this dataset, the multiparent configuration emerged at some point after the child's conception or birth.

FIGURE 10. FAMILY FORMATION<sup>249</sup>



As explained above, intended multiparent families may be recognized under other doctrines not captured by our study. This may be possible through adoption as well as through other parentage doctrines. For example, before New York codified an intended parent doctrine in 2020,<sup>250</sup> a common law doctrine governed. In *Brooke S.B. v. Elizabeth A.C.C.*, New York's high court ruled that a person can qualify as a parent for purposes of New York's custody law if the

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even assuming that the parties all had this intention, we do not code or classify the case as involving a planned multiparent family because that intention (if it existed) was formed after conception. Others, however, may disagree with our decision.

<sup>248</sup> See *Dawn M. v. Michael M.*, 47 N.Y.S.3d 898 (N.Y. Sup. Ct. 2017) (involving a married different-sex couple and another woman, all of whom intended to parent together a child conceived through sexual intercourse).

<sup>249</sup> Two cases in which the method of conception was unclear are excluded from the third and fourth categories on this chart.

<sup>250</sup> See, e.g., N.Y. FAM. CT. ACT § 581-303(a) ("An individual who . . . consents to, assisted reproduction . . . is a parent of the resulting child . . .").

person can show a preconception agreement to have and raise the child together.<sup>251</sup> This doctrine resulted in at least two multiparent decisions in cases involving male same-sex couples who had children through assisted reproduction at a time when New York prohibited surrogacy.<sup>252</sup> In other cases, New York courts rejected the possibility of triparent custody under this doctrine.<sup>253</sup> In 2020, New York enacted a parentage law codifying an intended parent doctrine and allowing gestational surrogacy arrangements.<sup>254</sup> As of January 2024, we have not located any electronically available cases applying the new statutory intended parent provisions to recognize multiple parents. Accordingly, we do not expect a significant number of cases outside of our datasets involving intended multiparent families.

### b. Same-Sex Partners

While multiparenthood is often associated with LGBTQ families formed through assisted reproduction, cases involving same-sex partners appear in a very small fraction of the multiparent decisions in the dataset. As Figure 11 shows, just thirty of the 479 multiparent cases involve same-sex partners (either married or unmarried).

This represents just over 6% of the multiparent cases, a significantly lower percentage (17%) than in the full functional parent dataset. This is not surprising for two reasons. First, at least with respect to same-sex parent families formed through assisted reproduction, in most cases, only two people intended to be and did in fact function as parents of the child, and in many cases any third-party gamete provider is not treated either socially or legally as a parent. Second, conversely, same-sex parent families are overrepresented in the functional parent dataset because their continued exclusion from other parentage rules forces nonbiological intended parents in same-sex couples to rely on functional parent doctrines to secure legal protection.<sup>255</sup> Figure 11 shows the number of multiparent cases in the dataset by family type, including families featuring same-sex partners.

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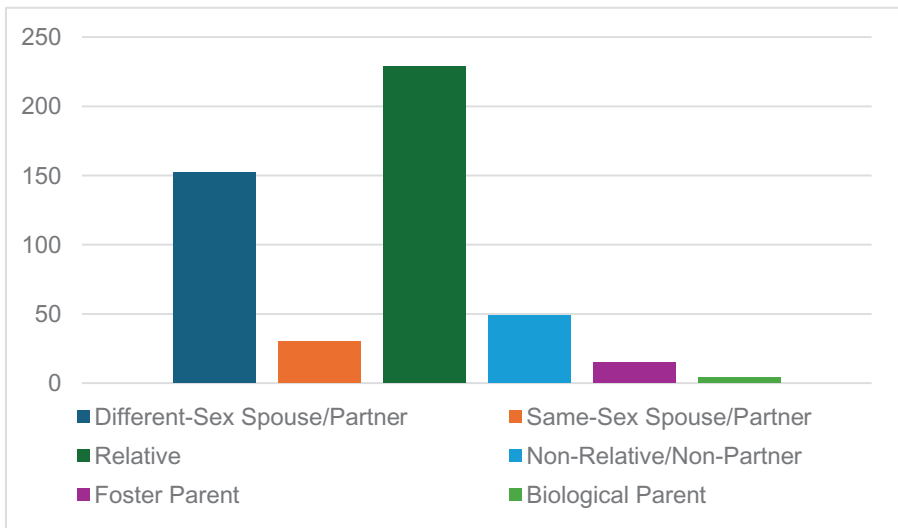
<sup>251</sup> 61 N.E.3d 488, 500 (N.Y. 2016).

<sup>252</sup> See, e.g., *Frank G. v. Renee P.F.*, 37 N.Y.S.3d 155, 157–58 (N.Y. App. Div. 2016) (involving a gay male couple and a person acting as a surrogate); *Raymond T. v. Samantha G.*, 74 N.Y.S.3d 730, 731 (N.Y. Fam. Ct. 2018) (involving “three parties—the biological mother, the biological father and the father’s husband—[who] agreed to conceive and raise a child together in a tri-parent arrangement”).

<sup>253</sup> See, e.g., *Tomeka N.H. v. Jesus R.*, 122 N.Y.S.3d 461 (N.Y. App. Div. 2020).

<sup>254</sup> N.Y. FAM. CT. ACT § 581-202 (2023).

<sup>255</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 387.

FIGURE 11. IDENTITY OF ALLEGED FUNCTIONAL/THIRD PARENT<sup>256</sup>

Within the relatively small number of cases involving same-sex partners, roughly half involve children conceived through assisted reproduction. In the remaining cases involving same-sex partners, the children were conceived through sexual intercourse. In a few of these cases, the birth parent became pregnant as the result of sex with a man while she was in a relationship with a same-sex partner.<sup>257</sup> But in most cases, the birth parent began a relationship with the same-sex partner after becoming pregnant or having the child. In some of these cases, the birth parent was in a committed relationship with the biological father at the time of conception.<sup>258</sup> In other cases, the pregnancy occurred in the context of a more fleeting relationship with the biological father,

<sup>256</sup> Some cases appear in more than one category—for example, the case may involve a relative who is also a foster parent. See *K.C. v. L.A.*, 128 A.3d 774, 776 (Pa. 2015) (maternal aunt, who also served as child’s foster parent, seeking *in loco parentis* status). In addition, four cases are not included in any category because the decision does not provide sufficient facts to identify how the alleged functional/third parent is related to the child or biological parent.

<sup>257</sup> See *Foust v. Montez-Torres*, 456 S.W.3d 736 (Ark. 2015); *McMullin v. Kirch*, 468 P.3d 342 (Kan. App. 2020); *A.J.B. v. A.G.B.*, 180 A.3d 1263 (Pa. Super. Ct. 2018); *In re A.R.L.*, 318 P.3d 581 (Colo. App. 2013).

<sup>258</sup> See, e.g., *Chavez v. Wadlington*, 821 S.E.2d 289, 291 (N.C. Ct. App. 2018), *aff’d*, 832 S.E.2d 692 (N.C. 2019).

and the birth parent subsequently entered into a relationship with a same-sex partner.<sup>259</sup>

### c. Different-Sex Partners/Spouses

In 152 of the 479 multiparent cases, the alleged third parent is the different-sex spouse or partner of an existing legal parent. Unmarried different-sex partners appear in 14% of the 479 multiparent cases—a smaller percentage than in the full functional parent dataset (18%).<sup>260</sup> Married different-sex stepparents (functional parents married to a legal parent but not at the time of the child’s birth) appear in 18% of the 479 multiparent cases—similar to the percentage in the full functional parent dataset.<sup>261</sup>

### d. Relatives

In the multiparent statute dataset, different-sex partners predominated. In the functional parent dataset, relatives are more common. While roughly a third of the 479 multiparent cases in the functional parent dataset involve different-sex partners, a plurality of the cases feature relatives acting in a parental role. This difference is likely because the parentage doctrines in the multiparent statute dataset typically require the person to either be married to the birth parent at the time of the child’s birth or to have held out the child as *their child*<sup>262</sup>—something relatives appear less likely to do. In contrast, some of the doctrines implicated most frequently in the functional parent dataset focus simply on the parental caregiving provided by the person, regardless of how the person described their relationship to the child.<sup>263</sup>

As Figure 11 shows, 229 cases—almost half of multiparent cases in the dataset—involve functional parents who are relatives. In the full functional parent dataset, 36% of cases involved relatives.<sup>264</sup> While the cases do not supply data on race, caregiving by extended family members is, and has been, more common in communities of color.<sup>265</sup> Black

<sup>259</sup> See, e.g., *Valore v. Bronicki*, 77 Pa. D. & C.4th 259, 260–61 (Pa. Ct. C.P. 2005), *aff’d*, 905 A.2d 1057 (Pa. Super. Ct. 2006) (noting that “Petitioner became pregnant with Child during a very brief relationship”).

<sup>260</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 356, fig.5.

<sup>261</sup> *Id.*

<sup>262</sup> See, e.g., CAL. FAM. CODE § 7611(a) (marital presumption); CAL. FAM. CODE § 7611(d) (“holding out” presumption).

<sup>263</sup> See, e.g., KY. REV. STAT. ANN. § 403.270(1)(a) (“de facto custodian” statute).

<sup>264</sup> *Id.*

<sup>265</sup> See PAUL TAYLOR, JEFFREY PASSEL, RICHARD FRY, RICHARD MORIN, WENDY WANG, GABRIEL VELASCO & DANIEL DOCKTERMAN, PEW RSCH. CTR., THE RETURN OF THE MULTI-GENERATIONAL FAMILY HOUSEHOLD 8–9 (2010), <https://www.pewresearch.org/wp-content/uploads/sites/3/2010/10/752-multi-generational-families.pdf> [https://perma.cc/FK43-RK5Q]

grandparents, for example, are more likely than other grandparents to become primary caregivers of their grandchildren.<sup>266</sup>

Relatives in these cases often serve as the child's primary source of parental care. In almost two-thirds of cases involving relatives, one or more relatives parented the child in the absence of both biological parents. For example, in *Glodo v. Evans*,<sup>267</sup> the paternal grandparents, who already had been living with the children, parented them after each biological parent was incarcerated.

In at least 15% of the relative cases in the functional parent dataset, one or more relatives had been parenting the child alongside a biological or legal parent. This was true, for instance, in a case from Maine, *In re Child of Philip S.*<sup>268</sup> The child was first removed from the custody of his parents when he was less than six months old due to the father's substance use disorder, among other things.<sup>269</sup> At that time, the child was placed in non-kinship foster care.<sup>270</sup> About a year later, he was returned to the father's custody.<sup>271</sup> Around this time, the child's uncle and aunt moved to the state.<sup>272</sup> Initially, they resided "with the father and the child at the child's grandparents' house."<sup>273</sup> Shortly thereafter, they moved into their own home, and soon after that, the father and the child "moved in with them."<sup>274</sup> Within a few months, the father's substance use resumed and his "mental health suffered."<sup>275</sup> "The uncle and aunt increasingly provided care for the child when the father was absent,"<sup>276</sup> and even had a kinship placement after the child was again removed from the father's care.<sup>277</sup>

In other cases involving functional parents who are relatives, one or both of the biological or legal parents were present in the home along with the child and the functional parent, but the functional parent appeared to be the child's primary caregiver. Consider a case from New

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("Hispanics (22%), [B]lacks (23%) and Asians (25%) are all significantly more likely than whites (13%) to live in a multi-generational family household.").

<sup>266</sup> See Esme Fuller-Thomson, Meredith Minkler & Diane Driver, *A Profile of Grandparents Raising Grandchildren in the United States*, 37 GERONTOLOGIST 406, 409 (1997) (compared to other racial groups, Black grandparents "had twice the odds of becoming caregiving grandparents").

<sup>267</sup> 474 S.W.3d 550 (Ky. Ct. App. 2015).

<sup>268</sup> 223 A.3d 114 (Me. 2020).

<sup>269</sup> *Id.* at 116.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 116–17.

<sup>277</sup> *Id.* at 117.



Jersey, *J.R. v. R.M.*<sup>278</sup> Scott, the child at issue in the case, was born in 2007.<sup>279</sup> At the time, Sue, the child's mother, was 15 years old.<sup>280</sup> Starting a week after the child's birth, the child and the mother lived with Joan, the mother's grandmother and the child's great-grandmother.<sup>281</sup> At times, Sue lived elsewhere, but whenever "Sue left Joan's home, Scott remained with Joan."<sup>282</sup> Scott "lived with [Joan] for his entire life."<sup>283</sup> As a result, "Joan ha[d] become a parental figure to Scott."<sup>284</sup> The father, Robert, had no contact with the child until a child support action was initiated against him when the child was four.<sup>285</sup>

#### e. Non-Relatives/Non-Intimate Partners

About 10% of the multiparent cases in the functional parent dataset—nearly 50 of the 479 cases—involve people who are neither relatives nor intimate partners of legal parents. In many of these cases, the child's legal parents are not providing consistent care for the child. In some cases, the parents have chosen not to provide this consistent care;<sup>286</sup> in other cases, they are facing challenges that lead them to be unable to provide consistent care for the child. As a result, someone else—sometimes a family friend, sometimes an intimate partner of a family member—steps in to parent the child. For example, in *Allen v. Devine*,<sup>287</sup> the children had been cared for by a couple who had rented a house to the mother and the biological father of one of the children after the mother indicated "she could not take care of the children."<sup>288</sup>

#### f. Kentucky, Pennsylvania, and California

Because three states—Kentucky, Pennsylvania, and California—make up approximately half of all multiparent cases in the dataset, state-specific data can be informative. Figure 12 shows the percentage

<sup>278</sup> No. A-5360-13T2, 2014 WL 7793407, at \*1 (N.J. Super. Ct. App. Div. Feb. 11, 2015).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at \*2.

<sup>285</sup> *Id.* at \*1.

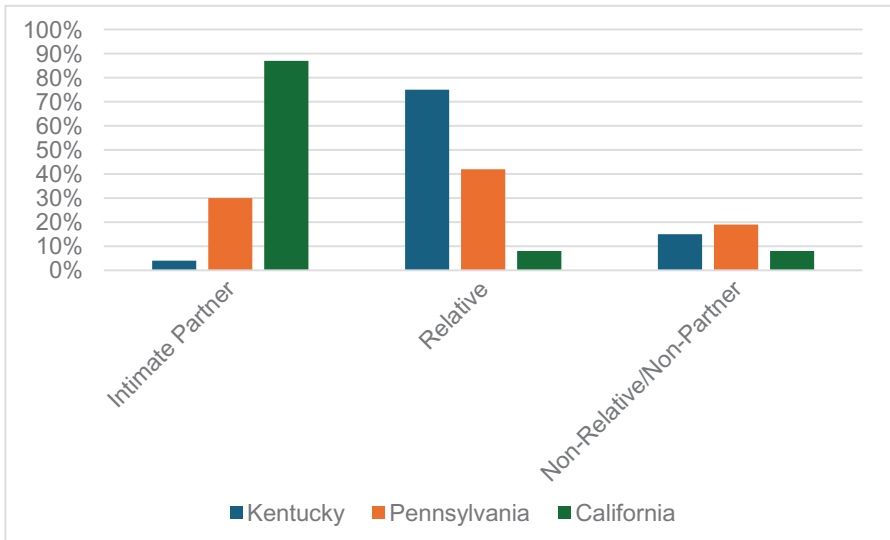
<sup>286</sup> We recognize that in many cases, the parents' actions arise out of difficult and constraining circumstances that typically relate to poverty.

<sup>287</sup> 178 S.W.3d 517 (Ky. Ct. App. 2005).

<sup>288</sup> *Id.* at 520. See also, e.g., *KI. v. KO.*, No. 913, 2019 WL 1311130, at \*1 (Md. Ct. Spec. App. Mar. 22, 2019) (involving children who were cared for by a number of different adults, including relatives and partners of relatives, after the mother died from a drug overdose and the biological father of one of the children was incarcerated); *Stiffey v. Curtis*, No. 2004-CA-000450-MR, 2004 WL 2486243, at \*1 (Ky. Ct. App. Nov. 5, 2004) (involving a child who was cared for by "acquaintances" of the mother after the mother's incarceration).

of each state's multiparent cases featuring intimate partners, relatives, and non-relatives/non-intimate partners.

FIGURE 12. IDENTITY OF FUNCTIONAL/THIRD PARENT, PERCENTAGE OF CASES BY STATE



All three groups are relatively well represented in Pennsylvania, even as relatives constitute a plurality of the cases. In contrast, intimate partners account for almost nine in ten of the California multiparent cases in the functional parent dataset, whereas relatives make up three-quarters of the Kentucky multiparent cases. This seems to be partly a consequence of the relevant doctrines' requirements. California's "holding out" presumption requires that the person resided with the child and held out the child as *their child*.<sup>289</sup> Again, intimate partners are more likely to hold out a child they are parenting as *their child* compared to relatives. Kentucky's de facto custodian doctrine, in contrast, does not require "holding out" but does require that the person be the child's primary caregiver and financial provider for a specific time period.<sup>290</sup> Intimate partners are more likely to be parenting alongside an existing legal parent, whereas relatives are more likely to step in to parent when

<sup>289</sup> See CAL. FAM. CODE § 7611(d) (West 2020) ("The presumed parent receives the child into their home and openly holds out the child as their natural child.").

<sup>290</sup> See KY. REV. STAT. ANN. § 403.270(1)(a) (West 2024) (defining a de facto custodian as "a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child").

the existing parents are unable to do so, and thus appear more likely to satisfy Kentucky's requirements.

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Overall, as with the multiparent statute dataset, multiparent families look more familiar and common than usually assumed. The population of multiparent families in the functional parent dataset includes many relatives raising children, often when legal parents are unable to do so. It also includes individuals who become a child's parent after forming an intimate relationship with the child's legal parent. The population in our dataset includes very few of the planned multiparent families that tend to dominate conversations about multiparenthood. Instead, our data show that multiparent configurations tend to arise after a child's birth, often in the face of challenging circumstances, including poverty, housing insecurity, physical and mental health struggles, substance use disorders, parental incarceration, and parental death.

### 3. *Parental Roles in Multiparent Families*

As was true of the cases in the multiparent statute dataset, multiparent families in which the child has three or more involved parents are uncommon in the functional parent dataset. The burdens of parental care are rarely distributed evenly in the families we observe. Typically, only one or two individuals are actively parenting and financially supporting the child. Another person, often a legal parent, may be neither caring for nor supporting the child on a consistent basis.

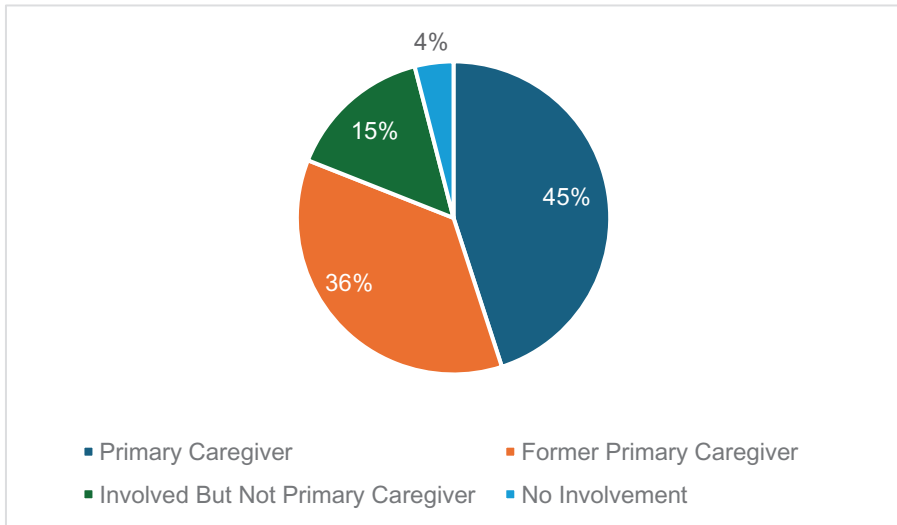
#### a. *Legal/Biological Parents*

As Figure 13 shows, in fewer than half of the multiparent cases, a biological or legal parent appears to have been a primary caregiver at the time of the legal action addressing the status of the functional parent.<sup>291</sup> In approximately a third of the multiparent cases, a biological or legal parent appears to have been a primary caregiver in the past but was not at the time of the action. We are reporting the role of the *most involved* biological or legal parent. Accordingly, if one biological parent was a primary caregiver and the other never played a role in the child's life, we coded the case as featuring a biological parent as a primary caregiver.

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<sup>291</sup> As explained in note 151 *supra*, we coded a person's parental role based on, among other things, who cared for the child on a consistent basis, who made decisions about the child, and where the child lived. We erred on the side of coding biological or legal parents as primary caregivers.

FIGURE 13. ROLE OF MOST INVOLVED BIOLOGICAL OR LEGAL PARENT,  
PERCENTAGE OF CASES



In more than half of the cases, no biological or legal parent appears to have been acting as a primary caregiver at the time of the action. Consider, for example, the facts of a Maryland case, *E.N. v. T.R.*<sup>292</sup> The biological parents had two children and lived together as a family until the father was incarcerated.<sup>293</sup> Thereafter, the children lived with their mother and maternal grandmother.<sup>294</sup> During at least some of this period, however, the mother “was not an involved parent and demonstrated little parental responsibility for the children.”<sup>295</sup> About two years after the father was released from prison, the children moved in with the father and his new girlfriend.<sup>296</sup> They lived together as a family for the next two years, until the father was incarcerated again.<sup>297</sup> The children continued to live with the father’s girlfriend.<sup>298</sup> After about a year without contact with her children, the mother filed an action seeking sole legal and physical custody.<sup>299</sup>

<sup>292</sup> 255 A.3d 1 (Md. 2021).

<sup>293</sup> *Id.* at 5.

<sup>294</sup> *Id.* at 7.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 7–8. The court held that the father’s girlfriend was not a de facto parent because the mother had not consented to the girlfriend’s parental relationship with the children. See *id.* at 30 (explaining that, “although D.D. may have consented to and fostered T.R.’s

Consider another Maryland case, *KI. v. KO.*,<sup>300</sup> which involved two siblings. At the time both children were born, the mother was married to Ko., who was the biological father of the older child. The biological father of the younger child was unknown; Ko. was incarcerated at the time of that child's conception. When the children were eight and three, respectively, the mother died "as the result of a heroin overdose."<sup>301</sup> At the time of the proceeding, the late mother's husband "acknowledged that he could not care for the children."<sup>302</sup> The question before the court was whether to award custody to the husband's former wife, who previously had been designated the legal and physical custodian of the children and was thereafter adjudicated a de facto parent, or to the children's grandparents.<sup>303</sup>

In almost a fifth of the multiparent decisions in the dataset, one or both of the biological or legal parents appears to have had little to no role in the child's life. That means that in a significant number of cases, at least one person who was a legal parent did not care for or financially support the child. Typically in these cases, the functional parent had been providing parental care to the child prior to the court action.

For example, in the Kentucky case of *White v. Gemmer*,<sup>304</sup> the child's paternal grandfather and the grandfather's same-sex partner had provided almost all of the child's care. "The biological parents provided little or no emotional, financial, or other support for the minor child."<sup>305</sup> They had "little or no contact with the child from the age of 8 months onward."<sup>306</sup> When the child was approximately five years old, the paternal grandfather died. When his surviving partner sought custody of the child, neither biological parent responded or objected to the petition.<sup>307</sup>

The role of the most involved biological or legal parent varies across the three jurisdictions with the largest share of cases in the dataset. As Figure 14 shows, a biological or legal parent was much more likely to be a primary caregiver at the time of the action in California than in Kentucky or Pennsylvania. As compared to California, the cases from Kentucky and Pennsylvania were more likely to include children for

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formation and establishment of a parent-like relationship with G.D. and B.D., E.N. has not expressly or impliedly consented to and fostered the relationship").

<sup>300</sup> No. 913, 2019 WL 1311130, at \*1 (Md. Ct. Spec. App. Mar. 22, 2019).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 2.

<sup>303</sup> *Id.*

<sup>304</sup> No. 2002-CA-001735-MR, 2003 WL 22025925, at \*1 (Ky. Ct. App. Aug. 29, 2003).

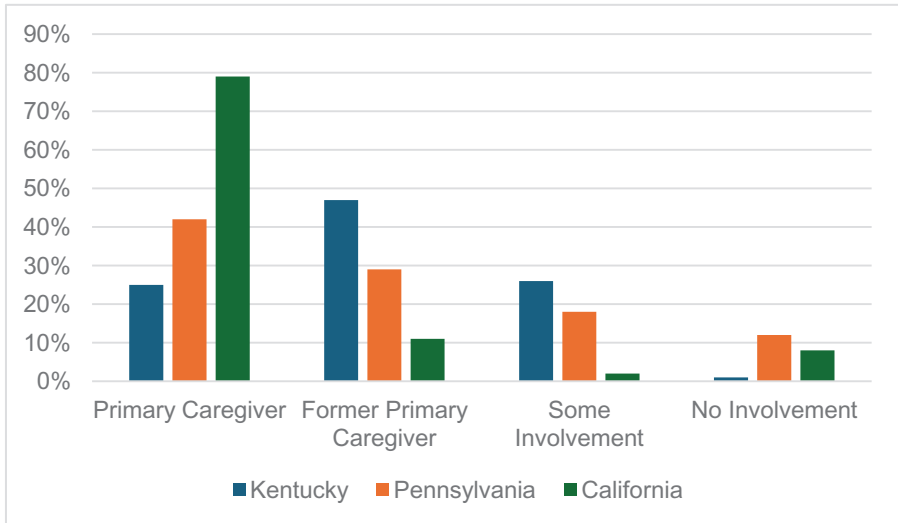
<sup>305</sup> *Id.* at 2.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 3. Though after the de facto custodian sought child support from the biological father, he responded by seeking custody. *Id.*

whom no biological or legal parent appears to have served as a primary caregiver.

FIGURE 14. ROLE OF MOST INVOLVED BIOLOGICAL OR LEGAL PARENT, PERCENTAGE OF CASES BY STATE



Again, these variances likely relate to doctrinal differences. California’s “holding out” presumption captures more cases featuring an intimate partner coparenting with a biological parent. In such situations, that biological parent is almost always a primary caregiver. In contrast, the main doctrines in Pennsylvania (*in loco parentis*)<sup>308</sup> and Kentucky (*de facto custodian*)<sup>309</sup> do not impose a “holding out” requirement and thus appear less likely to yield cases involving intimate partners coparenting. Moreover, Kentucky’s doctrine explicitly requires that the person be the child’s primary caregiver for a specific time period,<sup>310</sup> thus making it more likely to yield cases in which another individual has stepped in to parent a child in the absence of an existing legal parent serving as a primary caregiver.

<sup>308</sup> See, e.g., *T.B. v. L.R.M.*, 786 A.2d 913, 916–17 (Pa. 2001) (“The status of *in loco parentis* embodies two ideas; first, the assumption of a parental status, and, second, the discharge of parental duties.”).

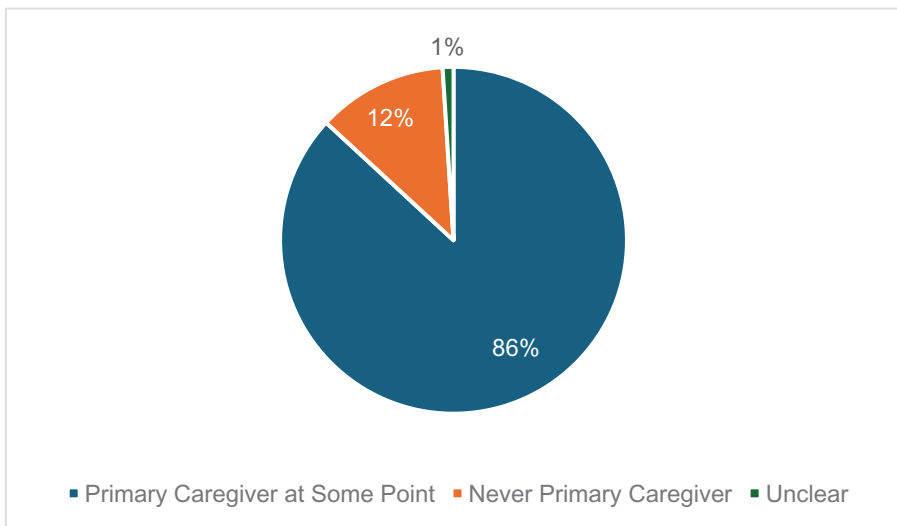
<sup>309</sup> KY. REV. STAT. ANN. § 403.270(1)(a) (West 2024).

<sup>310</sup> See *id.* (explaining that the length of time required varies based on the child’s age).

### b. Functional Parents

As Figure 15 shows, in the overwhelming share of the cases, the functional (or third) parent appears to have acted as a primary caregiver at some point—living with the child and providing for the child’s daily needs.<sup>311</sup>

FIGURE 15. ROLE OF FUNCTIONAL/THIRD PARENT, PERCENTAGE OF CASES



In just over a third of the cases, the functional parent seems to have acted as a primary caregiver alongside a legal or biological parent who was also providing some amount of care for the child.<sup>312</sup> For example, in *Paul v. Kimmell*,<sup>313</sup> “[f]rom the time of [the child’s birth],

<sup>311</sup> Again, as explained *supra* in note 151, taking into account the facts presented in the decision and the court’s assessment of the record, we determined whether the functional parent served as a primary caregiver based on, among other things, whether the person cared for the child on a consistent basis, made decisions about the child, and lived with the child. As noted above, while we erred on the side of coding *biological or legal parents* as primary caregivers, when faced with insufficient or conflicting facts *about the alleged functional parent*, we erred on the side of not coding the functional parent as a primary caregiver.

<sup>312</sup> This appears to be the situation in 166 of the 479 multiparent cases.

<sup>313</sup> No. 2004-CA-000355-MR, 2004 WL 2260602, at \*1 (Ky. Ct. App. Oct. 8, 2004).

Hannah[, the mother,] and her parents collaborated to physically and financially provide for him.”<sup>314</sup> At one point, for example, the parties agreed to a schedule where the child “spent most nights” with his maternal grandmother and her husband, “one weekend a month with his mother . . . , and the remaining weekends with [the maternal grandfather], who lived on the same street as [the maternal grandmother and her husband].”<sup>315</sup> Consider, too, *Murphy v. Crouch*.<sup>316</sup> The child, Katlyn, lived “alternatively” with her mother and her maternal grandmother, and sometimes with both of them.<sup>317</sup> When Katlyn was nine years old, her mother was killed as the result of a shooting.<sup>318</sup> After her mother’s death, Katlyn lived primarily with her maternal grandmother. Katlyn never lived with her father, although she “would, on occasion, visit [him].”<sup>319</sup>

In nearly a fifth of the cases, the functional parent appears to have been the only person providing consistent care for the child.<sup>320</sup> In *Adams v. Cook*, for example, the four-year-old child’s great aunt, Adams, was her “primary caregiver and financial supporter” from shortly after her birth.<sup>321</sup> The mother, Wright, “ha[d] expressed no interest in caring for the child.”<sup>322</sup> At some point, the father began “exercising visitation with his daughter.”<sup>323</sup> The proceeding was initiated by the state after the mother tested positive for oxycodone during the birth of a subsequent child.<sup>324</sup>

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<sup>314</sup> *Id.*

<sup>315</sup> *Id.* The child’s father, Ross, “had minimal involvement in Zachary’s life.” *Id.*

<sup>316</sup> No. 2006-CA-000921-ME, 2007 WL 706869, at \*1 (Ky. Ct. App. Mar. 9, 2007).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> This appears to be the situation in at least 94 of the 479 multiparent cases.

<sup>321</sup> No. 2011-CA-001541-ME, 2012 WL 3629017, at \*1 (Ky. Ct. App. Aug. 24, 2012).

<sup>322</sup> *Id.*

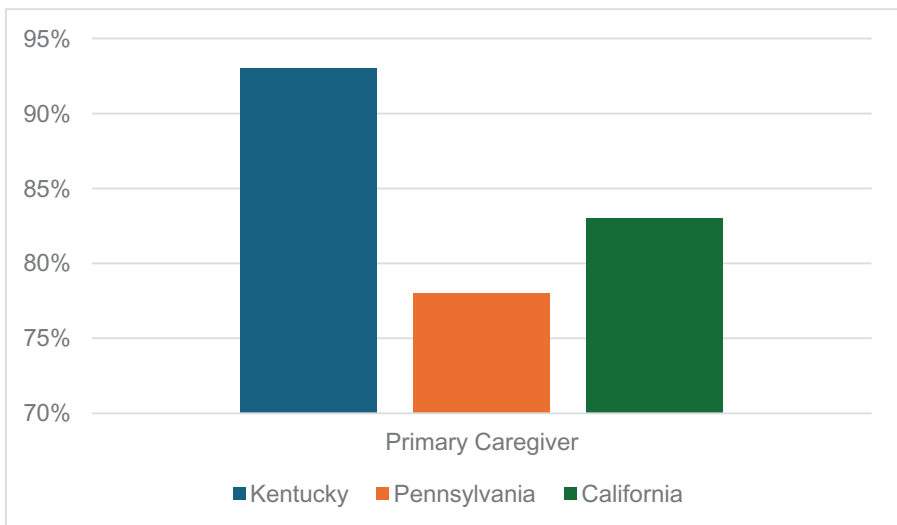
<sup>323</sup> *Id.*

<sup>324</sup> *Id.*



Figure 16 shows the functional parent's role in cases from the three states with the largest share of cases in the dataset. Because Kentucky's doctrine expressly requires primary caregiving, it is unsurprising that more than 90% of claimants appeared to act as the child's primary caregiver. Even though the relevant doctrines in Pennsylvania and California impose no such requirement, the functional parent appeared to serve in that role in roughly 80% of cases.

FIGURE 16. ROLE OF FUNCTIONAL/THIRD PARENT, PERCENTAGE OF CASES BY STATE



Overall, our data indicate that functional parents in multiparent cases are often serving as the child's primary caregiver. In a significant number of cases, the functional parent is the only person providing consistent care. In other cases, the functional parent coparents with one of the child's legal parents. In many such cases, the functional parent is parenting the child in the absence of consistent care from at least one of the child's legal parents.

#### 4. *The Context of Litigation*

How does litigation implicating recognition of a third parent arise? About 35% of the multiparent cases arise in the context of disputes between a functional parent and a former intimate partner who is an existing legal parent. More than 90% of these disputes involve a functional parent's claim for custody. The remaining cases

in this category feature a child-support claim against the functional parent.

A significant share of multiparent cases in the dataset, however, do not arise as a dispute between former intimate partners. Just over a third (35%) of multiparent decisions in the functional parent dataset feature child welfare involvement.<sup>325</sup> This is roughly the same as the percentage in the full functional parent dataset but much smaller than the percentage in the multiparent statute dataset.<sup>326</sup>

Compared to the overall rate, a slightly higher percentage (39%) of the cases involving relatives, and a lower percentage (25%) of the cases involving intimate partners, feature child welfare involvement. There are striking disparities across jurisdictions. In Kentucky, where relatives predominate, 43% of multiparent cases feature child welfare involvement. In Pennsylvania, where the population of functional parents is more varied, 20% of multiparent cases feature child welfare involvement. In California, where intimate partners make up nearly 90% of the multiparent cases, 74% feature child welfare involvement.<sup>327</sup>

To be clear, in cases featuring child welfare involvement, the state does not always initiate the litigation. For example, in some cases involving relative functional parents, the relative filed the dependency petition.<sup>328</sup> Further, roughly 80% of multiparent cases involving former intimate partners are post-dissolution custody disputes, and more than a quarter of those cases include facts demonstrating child welfare

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<sup>325</sup> We are not making determinations about whether state intervention was warranted but rather reporting on the circumstances that gave rise to the litigation. As noted above, we are not able to capture data about the race of the parties in these cases. However, other studies have shown that families of color, particularly Black and Native American families, are disproportionately likely to be subjected to the child welfare intervention. For more discussion of these issues, see *supra* note 166.

<sup>326</sup> We hypothesize that a much larger percentage of the cases in the multiparent statute dataset feature child welfare involvement because of the requirement of dependency law in California, the jurisdiction from which most of the cases in this dataset arise. Under California law, a person is entitled to reunification services in a dependency proceeding only if they are a presumed parent; it is not sufficient to be a legal parent. See *supra* note 185 and accompanying text. As a result, courts in this context are required to grapple with the application of the parentage presumptions and, often, the multiparent provision, even in cases where the child's legal parentage had already been determined.

<sup>327</sup> These figures are roughly consistent with the percentage of cases featuring child welfare involvement in the larger set of functional parent cases from each state: 39% of Kentucky cases, 25% of Pennsylvania cases, and 71% of California cases.

<sup>328</sup> See, e.g., *Lambert v. Lambert*, 475 S.W.3d 646, 648 (Ky. Ct. App. 2015) (reporting that “in an effort to get the children the dental work and medical attention they needed, [grandfather] filed dependency, neglect and abuse petitions”); *Spreacker v. Vaughn*, 397 S.W.3d 419, 420 (Ky. Ct. App. 2012) (reporting that great-aunt “filed a petition for juvenile dependency, neglect, and abuse”).

involvement.<sup>329</sup> Nonetheless, this still means that a large number of cases featuring child welfare involvement were initiated by the state through an abuse or neglect petition.

In these cases, the parents are often facing a range of challenges. Some have experienced incarceration.<sup>330</sup> Some are struggling with substance use disorders.<sup>331</sup> Some are grappling with poverty and challenges associated with poverty, including unstable or inadequate housing,<sup>332</sup> as well as food insecurity.<sup>333</sup> In some cases, one of the parents was a minor at the time the child was born.<sup>334</sup> Typically, the functional parent has been living with and parenting the child. This person seeks to have the court recognize the parent-child relationship that exists, usually for the purpose of allowing the functional parent to maintain

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<sup>329</sup> In these cases, allegations of abuse or neglect may be directed at the functional parent, the biological parent who was in a relationship with the functional parent, the other biological parent, and/or another individual. *See, e.g., Thorndike v. Lisio*, 154 A.3d 624, 626 (Me. 2017) (report made to state after child “revealed to [de facto parent, who was biological parent’s former partner] that [biological parent] had been hitting him”); *S.R. v. D.N.*, No. 2010-CA-000743-ME, 2011 WL 2496239, at \*1 (Ky. Ct. App. June 24, 2011) (stepfather, who was de facto custodian, was awarded permanent custody after “a dependency, neglect, and abuse petition [was filed] against mother alleging that child had been neglected due to her exposure to substance abuse and domestic violence in mother’s home”).

<sup>330</sup> *See, e.g., Cherry v. Carroll*, 507 S.W.3d 23, 24 (Ky. Ct. App. 2016) (noting that the father “was incarcerated during a portion of this time”); *Girard v. Williams*, 966 P.2d 1155, 1156 (Mont. 1998) (noting that the biological father “was arrested . . . and subsequently incarcerated”); *In re Int. of Enyce J.*, 870 N.W.2d 413, 417 (Neb. 2015) (noting that the mother “was sentenced to 60 to 100 years’ imprisonment”).

<sup>331</sup> *See, e.g., Cherry*, 507 S.W.3d at 24 (noting that “drugs were a problem for both [parents]”); *Jefferson v. Pittman*, No. 2018-CA-000313-ME, 2018 WL 6600224, at \*2 (Ky. Ct. App. Dec. 14, 2018) (noting an investigative finding that the children “were exposed to repeated instances of drug abuse”); *Irons v. Sims*, No. 2018-CA-000539-ME, 2019 WL 5290529, at \*1 (Ky. Ct. App. Oct. 18, 2019) (noting that the child “was drug dependent at birth”); *In re A.C.*, 786 S.E.2d 728, 731 (N.C. Ct. App. 2016) (noting that the father had a history of Department of Social Services involvement stemming from, among other things, “substance abuse”).

<sup>332</sup> *See, e.g., Adoption of Garret*, 91 N.E.3d 1139, 1144 (Mass. App. Ct. 2018) (noting that children were removed from mother’s custody due to, among other things, “lack of suitable housing”); *In re F.B.*, 927 A.2d 268, 270 (Pa. Super. Ct. 2007) (“Parents had a history of unstable housing and were evicted from their home in August 2005.”); *Jefferson v. Pittman*, No. 2018-CA-000313-ME, 2018 WL 6600224, at \*2 (Ky. Ct. App. Dec. 14, 2018) (noting testimony that the house was “infested” and “in total disarray”).

<sup>333</sup> *See, e.g., N.J. Div. of Youth & Fam. Servs. v. V.W.*, No. A-5196-08T4, 2010 WL 4075325, at \*2 (N.J. Super. Ct. App. Div. July 12, 2010) (noting concerns “that the mother could not provide baby formula”).

<sup>334</sup> *See, e.g., Chadwick v. Flora*, 488 S.W.3d 640, 644–45 (Ky. Ct. App. 2016) (“Mother was 15 years old when she gave birth to Child.”); *Adoption of Garret*, 91 N.E.3d at 1144 (noting that parents got together when the mother was “thirteen years old” and that she “became pregnant shortly” thereafter); *V.W.*, 2010 WL 4075325, at \*1 (noting that the mother was pregnant at sixteen); *E.B.S. v. K.M.*, No. A-5645-11T1, 2014 WL 1316149, at \*1 (N.J. Super. Ct. App. Div. Apr. 3, 2014) (noting that the mother was sixteen when she gave birth).

custody and thereby avoid the child's removal into state custody or placement with another person.

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Ultimately, the functional parent dataset supplies a new and important account of the life and the law of multiparent families—one that reinforces and supplements the account provided by the multiparent statute dataset. These families are not the cutting-edge families that pervade the commentary.<sup>335</sup> They are not primarily LGBTQ families or polyamorous families. They do not typically feature children conceived through assisted reproduction. Instead, as in the multiparent statute dataset, the families are familiar and common, featuring intimate partners and relatives. The multiparent families are much more vulnerable than the well-resourced families discussed in media accounts and scholarly treatments. In almost all cases, the multiparent configuration arises after the child's birth, often in light of challenging circumstances facing parents and their children. Commonly, functional parents—often relatives—end up becoming the child's primary parent. Through this lens, multiparent arrangements appear as a matter of necessity more than choice or planning.

The functional parent dataset offers something that the multiparent statute dataset cannot. It shows that for decades, courts have recognized that parenthood can be nonbinary. In the absence of laws expressly allowing for the possibility, courts have recognized a third parent in these familiar multiparent family formations even when the child has two existing legal parents. Often in these cases, the functional parent is not treated as a *legal* parent. Instead, courts accord them *partial* parental rights, such as standing to seek custody under a best-interests-of-the-child standard, and sometimes *some* parental responsibilities, such as a child support obligation. The court protects the child's relationship with the functional parent without replacing, but instead adding to, the existing parents.

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<sup>335</sup> To be clear, our point is not that such families do not exist, or that they are not important constituencies for multiparent recognition. Instead, our point is that centering the multiparent discussion on planned multiparent families when they comprise only a small share of the total multiparent families in our dataset results in analyses that fail to account for the majority of cases in which multiparent recognition is at issue. As we explain in more detail below, centering planned multiparent families also skews the understanding of how these doctrines operate, as well as the overall assessment of them.

#### IV (MULTI)PARENTHOOD IN LIFE AND LAW

We began, in Part I, by contrasting conventional accounts of binary parenthood with the radical new frontier that multiparenthood is seen to present. Our study complicates both the conventional view of parenthood and the ways in which multiparenthood purportedly challenges that conventional view. Understandings of parenthood as binary—the very understandings that shape, and at times impede, the embrace of multiparenthood—appear both inaccurate and outmoded. They fail to reflect how families themselves function and how courts treat them.

In this Part, we first focus on how parenthood is lived on nonbinary terms—that is, how children end up with more than two parents and what role the third parent typically plays in the child’s life. The reality of multiparenthood is quite different than the scene that animates extant discussions. Planned multiparent families, including those formed by LGBTQ parents and through assisted reproduction, constitute an important population worthy of academic study and of legal recognition. But directing our attention primarily to these developments produces inaccurate premises about multiparenthood that distort academic and policy consideration of the issue.<sup>336</sup> In what follows, we explain how, in the face of challenging circumstances and shifting household configurations, families forge care arrangements in ways that lead children to have more than two individuals sharing parental rights and responsibilities.

We then turn to how the law regulates parenthood in nonbinary ways. Using functional parent doctrines, courts have unbundled parental rights and responsibilities and spread them across multiple individuals. They have done so at various points in a child’s minority and without terminating the rights of existing parents. Through this lens, recent multiparent statutes do not represent a radical break from traditional practices but instead build on, and make more explicit, a longstanding approach to parenthood observable in judicial decisions dating back at least to the late twentieth century. To be sure, that these new laws expressly authorize courts to recognize more than two *legal* parents is an important development. But, in our view, it is an incremental step in an evolving practice.

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<sup>336</sup> As Melissa Murray argues, “silence as to *how* families actually function has impeded [family law’s] progress toward a more accurate account of family life, and has made it harder for the law to support and enable caregiving.” Murray, *supra* note 62, at 438.

### A. (Multi)Parenthood on the Ground

Our data suggest that multiparent families are more common, longstanding, and varied than commentary assumes. In many cases in our data, more than two individuals undertake parental roles in a child's life—to varying degrees and at different points. Existing legal parents openly share parental rights and responsibilities with others. As new parent-child relationships form, the child's parental unit changes over the course of their minority. Our findings therefore challenge the position that parenthood, as a social practice, is necessarily dualistic, exclusive, and fixed.

First, we see that many families have resisted a dualistic approach to parenthood. Our data suggest that families with more than two parents are, and have been, a relatively common feature of family life. More than 70% of cases in our functional parent dataset feature multiparent families,<sup>337</sup> and these cases appear across the years over which the dataset runs.

The children in these multiparent families, however, ordinarily do not have three active parents. In many of the cases in the datasets, one or both of the biological or legal parents is not actively parenting the child.<sup>338</sup> Recall that in the functional parent dataset, more than half of multiparent cases feature a child for whom no biological or legal parent appears to be serving as a primary caregiver at the time of the action.<sup>339</sup> In about a fifth of cases, no biological or legal parent appears to have ever served as a primary caregiver.<sup>340</sup> Similarly, in the multiparent statute dataset, nearly half of the cases feature a child who has at least one biological or legal parent who appears to have never acted as a primary caregiver.<sup>341</sup>

Often the additional parent—that is, the person claiming parental rights in addition to the existing parents—is the child's primary caregiver. In nearly 90% of the multiparent cases in the functional parent dataset, the functional parent appears to have been the child's primary caregiver

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<sup>337</sup> See *supra* note 195 and accompanying text.

<sup>338</sup> See, e.g., J.R. v. R.M., No. A-5360-13T2, 2014 WL 7793407, at \*1 (N.J. Super. Ct. App. Div. Feb. 11, 2015) (involving a child born to parents who were minors, where the father had no contact with the child until a child-support action was initiated against him when the child was four); T.C. v. S.S., No. 16-32447, 2011 WL 11546684, at \*1 (Del. Fam. Ct. Nov. 22, 2011) (case in which biological father “has no desire to have a relationship with [the child] and . . . consents to [de facto parent’s] petition to be [child’s] *de facto* parent”); White v. Gemmer, No. 2002-CA-001735-MR, 2003 WL 22025925, at \*1 (Ky. Ct. App. Aug. 29, 2003) (case in which both biological parents had “little or no contact with the child from the age of 8 months onward”).

<sup>339</sup> See *supra* Figure 13.

<sup>340</sup> See *id.*

<sup>341</sup> See *supra* Figures 3 & 4.

at some point.<sup>342</sup> In more than 60% of the multiparent statute cases, the alleged third parent appears to have been a primary caregiver.<sup>343</sup>

What emerges from this data, then, is not the imagined scene of multiple caregivers equally sharing parental responsibilities.<sup>344</sup> Instead, we see families in which the third parent is commonly the most consistent caregiver for the child, often when at least one of the child's existing parents is not exercising the rights or assuming the obligations of parenthood at all, much less consistently doing so.<sup>345</sup>

Some might posit that these families are not practicing parenthood on the ground in ways that challenge a key binary premise. One might say this, for example, about cases in which no more than two people are involved in raising the child; one person—often the child's biological father—plays practically no role in the child's life.<sup>346</sup> Consider a case from Delaware, *A.L. v. D.L.*<sup>347</sup> The wife and husband had two children together during their marriage, and the wife had one child, J, two years before the couple married.<sup>348</sup> When they separated almost a decade later, the husband sought to establish *de facto* parentage with respect to J.<sup>349</sup> While J's biological father had been ordered "to provide J with medical insurance," he otherwise played no role in J's life.<sup>350</sup> The biological father testified that the husband "has been J's father for the past ten years. [J] hasn't known any other father."<sup>351</sup> The biological father "did not wish to 'take that away' from J."<sup>352</sup> But even in these cases where the child is not and never has been parented by more than two people, these families often are multiparent families *in law*. That is, in these cases, multiparent recognition was needed to legally protect the child's relationship with the person who was in fact parenting him. The court explained that its conclusion that the husband "is J's *de facto* parent puts this family in

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<sup>342</sup> See *supra* Figure 15.

<sup>343</sup> *Id.*

<sup>344</sup> See, e.g., Feinberg, *supra* note 29, at 1540 (focusing on questions of joint custody, i.e., "providing multiple parents with decision-making rights").

<sup>345</sup> While we are relating caregiving to *parental* roles, Melissa Murray has argued against "characterizing caregiving as the exclusive province of parents" and accordingly has urged greater recognition of *nonparental* caregiving. See Murray, *supra* note 62, at 388.

<sup>346</sup> See, e.g., *In re N.M.V.*, 385 P.3d 564, 565 (Mont. 2016) (observing in dispute between mother and mother's boyfriend that "N.M.V.'s biological father, Roger Gonzales, has had no contact with N.M.V."); T.C. v. S.S., 2011 WL 11546684, at \*4 (Del. Fam. Ct. Nov. 22, 2011) ("Mr. P. testified that, although he is the biological father of M.W.S., he has not had any role in M.W.S.'s life since he was born.").

<sup>347</sup> No. CK12-01390, 2012 WL 6765564 (Del. Fam. Ct. Sept. 19, 2012).

<sup>348</sup> *Id.* at \*1.

<sup>349</sup> See *id.* at \*2 (noting that the parents married in 2002 and separated in 2011).

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at \*3.

<sup>352</sup> *Id.*

the unique situation of a child having three legal parents.”<sup>353</sup> There were three parents in law but seemingly only two parents in life.

In other cases in which the child has only one or two consistent caregivers, the arrangement nonetheless may involve a multiparent family both legally and practically. For example, in some situations, a biological or legal parent who is not providing daily care at the time of the action previously had significant involvement at some earlier point in the child’s life, often as the primary caregiver.<sup>354</sup> And here too, multiparent recognition allows the law to protect all of the child’s parental relationships. In other situations, a biological or legal parent has not meaningfully provided care but is nonetheless regarded as a parent by the parties, even after the other biological or legal parent has turned to an additional person to fill a parental role.<sup>355</sup> Consider an Arkansas case, *Wills v. Wills*.<sup>356</sup> Shane, the biological father, and Theresa, the stepmother who stood *in loco parentis*, shared custody of the child after their divorce.<sup>357</sup> Shane had been married to Cherokee, the child’s biological mother, when the child was born.<sup>358</sup> At the time of the proceeding, the court explained that Cherokee “has been largely absent from [the child’s] life” and Theresa “has been the child’s mother figure since he was an infant.”<sup>359</sup> Still, Cherokee made “child-support payments,” which were to be split between Shane and Theresa.<sup>360</sup>

Even in these cases where the child receives consistent parental care from no more than two people, the parties—including the children—often do not view parenthood as dualistic. Recall in *Shawn R.* that the child identified his “real dad [who] doesn’t do anything” and the “dad who actually takes care of me.”<sup>361</sup> In another case, the child was raised by her mother and her mother’s husband “since day one,” but she was “gradually introduce[d]” to her biological father when she was four.<sup>362</sup>

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<sup>353</sup> *Id.*

<sup>354</sup> For example, in *Sherfey v. Sherfey*, a case from Kentucky, the child lived with his parents for several years before moving in with his grandparents. 74 S.W.3d 777, 779 (Ky. Ct. App. 2002). The parents moved to another state, “voluntarily leaving [the child] behind,” and the grandparents raised the child, who had little contact with his parents. *Id.*

<sup>355</sup> See, e.g., *In re Custody of S.A.-M.*, 489 P.3d 259, 261–62 (Wash. Ct. App. 2021) (mother and her fiancé raised child, who called fiancé “dad,” and biological father, who lived in another state, “engaged in periodic phone calls every three to four months”).

<sup>356</sup> No. CV-15-639, 2016 WL 1039795 (Ark. App. Mar. 16, 2016).

<sup>357</sup> *Id.* at \*1.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *In re Shawn R.*, No. D069688, 2016 WL 5940937, at \*14 (Cal. App. Oct. 27, 2016).

<sup>362</sup> *J.W.S. Jr. v. E.M.S.*, No. CS11-01557, 2013 WL 6174814, at \*1–2 (Del. Fam. Ct. May 29, 2013).



Soon, she “believe[d] that she ha[d] two fathers, and call[ed] both . . . ‘Dad.’”<sup>363</sup>

While the multiparent families we observe do not practice parenthood as if it is dualistic, the number of parents is still limited. Some commentators anticipate, and resist the prospect of, children with *more than three* parents.<sup>364</sup> We note that only five of the sixty cases in the multiparent statute dataset feature more than three alleged parents, and none involve a planned multiparent family.<sup>365</sup> Given how multiparent recognition typically protects children’s primary attachment relationships, it is unsurprising that most cases present the prospect of three parents, and no more.

Second, our data suggest that parents do not treat parenthood as an exclusive status. Given their needs and vulnerabilities, they may deliberately share parental rights and obligations with another person. Emerging out of necessity more than choice, multiparent configurations arise in families contending with a range of challenges. Grandparents become parents when the child’s biological parent’s substance use disorder impedes their ability to parent. Stepparents become parents when a biological parent (the stepparent’s spouse) has died. Unmarried partners become parents when the child’s biological father has not been involved in the child’s life. Aunts and uncles become parents when the child’s father is incarcerated, and the mother’s mental health struggles render her unable to care for the child. From this perspective, multiparent arrangements represent not a dramatic break from the past but instead a longstanding practice in which families share parental rights and obligations in the face of hardship and changing life circumstances.

This sharing of parental rights is readily apparent not only in the fact patterns we encounter but also in the posture of litigation. In some cases, an existing legal parent joins or supports the third parent’s

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<sup>363</sup> *Id.* at \*2.

<sup>364</sup> See, e.g., Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1114 (2010) (raising concern about recognition of “five or six different adults as entitled to share time with the child”); Loken, *supra* note 73, at 1072 (worrying about “a family that can continue to grow as the custodial parent moves on to other loves”).

<sup>365</sup> See *In re Child of Philip S.*, 223 A.3d 114, 116 (Me. 2020) (holding that the child’s aunt and uncle lacked standing to seek de facto parent adjudication); *Martin v. MacMahan*, 264 A.3d 1224, 1227 (Me. 2021) (adjudicating parent’s “lifelong friend” and her husband as de facto parents); *In re C.P.*, No. E074636, 2020 WL 4691600 (Cal. Ct. App. Aug. 13, 2020) (in addition to biological father, the child’s stepfather and the mother’s husband at the time of the child’s birth sought status as presumed parents); *In re Alexander P.*, 4 Cal. App. 5th 475, 480 (Cal. Ct. App. 2017) (affirming presumed parentage of biological father and stepfather while vacating order finding unmarried partner to be presumed parent); *In re Alexander D.*, No. A152436, 2018 WL 4042668, at \*1–2 (Cal. Ct. App. Aug. 24, 2018) (rejecting unmarried partner’s claim to be fourth parent in case involving same child from *Alexander P.*).

petition. For example, in *Adam T. v. Jennifer S.*, the functional parent was supported in the litigation by the birth parent.<sup>366</sup> In other cases, an existing legal parent does nothing to contest the adjudication of the third parent's status. In *White v. Gemmer*, a case discussed above, the child had been parented for most of her life by her grandfather and her grandfather's partner.<sup>367</sup> When the surviving partner sought custody after the grandfather's death, neither biological parent responded, much less objected, to the petition.<sup>368</sup> In cases of this kind, the existing legal parents appear to willingly share, or at least acquiesce in sharing, parental rights and responsibilities with non-legal parents who have assumed custodial responsibility for the child.

Third, we see that many families do not treat parenthood as a fixed status.<sup>369</sup> The line between parent and nonparent can shift over time. In almost all of the cases in our data, the multiparent arrangement is not planned *ex ante*.<sup>370</sup> The third parent almost always assumes a parental role *after* the child's birth—typically changing the child's parental configuration at some point during their minority.

About 80% of the cases in the multiparent statute dataset implicate the parental status of an intimate partner or former intimate partner of one of the biological parents. In many of these cases, the person becomes the birth parent's partner after the birth of the child and then assumes a parental role. For example, in a California case, *R.M. v. J.J.*, one of the claimants, R.M., had known the birth parent when they were younger.<sup>371</sup> The mother and R.M. reconnected when the mother was seven months pregnant. They began dating shortly after the birth of the child, E.S., and married just over a year later. Thereafter, the mother and

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<sup>366</sup> No. H045578, 2020 WL 6281636, at \*2 (Cal. Ct. App. Oct. 27, 2020) (explaining that, when the third parent, who was the mother's ex-husband, "filed a petition to establish [his] parental relationship," the mother "offered declarations and other pleadings in support of the relief sought").

<sup>367</sup> *White v. Gemmer*, No. 2002-CA-001735-MR, 2003 WL 22025925, at \*2 (Ky. Ct. App. Aug. 29, 2003).

<sup>368</sup> *Id.* Eventually, the biological father sought custody when the functional parent sought child support. *Id.*

<sup>369</sup> Chris Gottlieb makes a similar point in the child welfare context, arguing against current practices of terminating parental rights in favor of an approach in which the biological parents' rights are "transferred" to the adoptive parents with visitation rights retained by the biological parents. Chris Gottlieb, *A Path to Eliminating the Civil Death Penalty: Unbundling and Transferring Parental Rights*, 19 HARV. L. & POL'Y REV. (forthcoming 2024) (manuscript at 6–7). This approach, Gottlieb argues, "would allow courts to treat parent-child relationships in line with how they are experienced—as complex bonds with various threads that change over time—and would forgo the legal fiction that such relationships can be entirely excised." *Id.* (manuscript at 7).

<sup>370</sup> See *supra* notes 246–47 and accompanying text.

<sup>371</sup> See No. C090018, 2022 WL 1301801, at \*2 (Cal. Ct. App. Apr. 29, 2022) (stating that they met in elementary school).

R.M. had two other biological children together. “They held themselves out as a family and did not identify E.S. as a stepchild.”<sup>372</sup> After the parties separated, R.M. sought to have his parentage established. At the time, E.S. was six years old.<sup>373</sup> One month later, the biological father, who had not previously met E.S., signed a voluntary acknowledgment establishing his parentage.<sup>374</sup> R.M., the nonbiological father, would have to be a third parent.

In the functional parent dataset, a more common scenario involves parental roles assumed by extended family members—a group hardly present in the literature on parenthood.<sup>375</sup> Almost half of multiparent cases in the functional parent dataset involve relatives.<sup>376</sup> Often, a relative becomes a child’s primary caregiver because the child’s legal parents are unable or unwilling to provide consistent care.<sup>377</sup>

Having seen that families regularly practice parenthood in ways that depart from binary assumptions, we now turn to how the law treats these families.

### B. *The Law of (Multi)Parenthood*

Legal parenthood has been assumed to be binary in three key respects: It is limited to a total of two people; the two parents hold all parental rights and responsibilities, to the exclusion of all other individuals; and the two parents are fixed at the time of the child’s birth and remain the child’s (only) parents. Our study paints a starkly different picture of the law of parental recognition. To varying degrees, courts, for decades, departed from these assumed precepts, taking a more open and flexible approach to parenthood.

First, courts have not adhered to a two-parent limit. Multiparent statutes are explicit in moving beyond an approach to parenthood in which two, and only two, individuals can be legal parents.<sup>378</sup> But as our functional parent data reveal, courts have long extended parental rights to a third parent under existing functional parent doctrines.<sup>379</sup>

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<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *But see* Coupet, *supra* note 144 (highlighting how contemporary debates over parenthood tend to exclude extended family members who assume parental roles).

<sup>376</sup> *See supra* Figure 11.

<sup>377</sup> *See, e.g.,* Windham v. Griffin, 887 N.W.2d 710, 712 (Neb. 2016) (noting that the mother’s cousin “agreed to care for [the child] until [the mother] was able to care for her child”).

<sup>378</sup> *See supra* note 105 and accompanying text (explaining that ten jurisdictions have statutes authorizing courts to find that a child has more than two legal parents).

<sup>379</sup> *See supra* Section III.B. Even in jurisdictions in which the formal law maintains a two-parent limit, courts regularly rely on equitable functional parent doctrines to extend parental rights to a third person—a person who is in fact parenting the child. This observation

In this sense, the dualistic nature of parenthood is weaker than scholars tend to acknowledge.<sup>380</sup> For example, in advocating for multiparent recognition, Melanie Jacobs remarks that, in light of functional parent doctrines, “more than two people may have legitimate claims of parenthood yet current law adheres to a two-parent paradigm.”<sup>381</sup> Indeed, she notes that “cases in which courts have protected a child’s relationship with more than two parental figures . . . are sparse.”<sup>382</sup> Similarly, in a more general discussion of parenthood, Melissa Murray observes that, “[i]n recognizing ‘functional’ parents, most courts have remained fixed on the concept that parenthood is exclusive and may only be shared by two people.”<sup>383</sup> Yet, our study shows that recognition of more than two parents in functional parent cases is common.

Of course, courts have generally refused to find three *legal* parents for a child in the absence of statutory authority permitting such a result (even so, our data include cases with this result<sup>384</sup>). Yet courts have long extended at least some parental rights to more than two individuals for a child.<sup>385</sup> In doing so, courts in our functional parent data rarely address the family as a multiparent family per se. Instead, the multiparent nature of the cases typically goes unstated. This perhaps explains why the recent adoption of multiparent statutes is treated as a groundbreaking development.

Second, courts have not treated parenthood as an exclusive status. Instead, they have unbundled parental rights and obligations and spread them across multiple individuals. In the functional parent dataset, three or more individuals regularly end up possessing at least some parental rights and responsibilities.

From this perspective, scholars appear to have overestimated the exclusive and comprehensive nature of parenthood. For example, in arguing for multiparent recognition, Jacobs posits that accommodation

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resonates with Henry Smith’s view of equity as “meta-law,” seeing “law and equity as distinct and standing in a special relationship.” See Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1100 (2021). As Smith argues, “[l]aw provides general guidance over many cases in a simpler way. Equity bores in on specific problems and identified actors ex post, employing a great deal of contextual information.” *Id.*

<sup>380</sup> But see Cahn & Carbone, *Custody and Visitation*, *supra* note 14, at 402–03 (explaining how courts use functional parent doctrines to “recognize[] more than two parents”).

<sup>381</sup> Jacobs, *supra* note 89, at 314.

<sup>382</sup> *Id.* at 327.

<sup>383</sup> Murray, *supra* note 62, at 442.

<sup>384</sup> See *supra* note 240 and accompanying text.

<sup>385</sup> Katharine Baker has pointed to functional parent doctrines’ capacity to create not only “more parents” but also “different levels of parenthood.” Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 708 (2008) [hereinafter Baker, *Bionormativity*].

of multiparenthood would require a shift; it would require courts to “(when appropriate) disaggregate the many aspects of parenthood to permit all of the relevant adults to participate in a child’s life.”<sup>386</sup> In response, other scholars have acknowledged that, in the post-dissolution context, “family law already routinely practices disaggregation of parental rights and responsibilities.”<sup>387</sup> For example, Allison Young explains that, by “recogniz[ing] different forms of joint custody, the law recognizes that the parents may share in different ways.”<sup>388</sup> The fact that family law has operationalized this disaggregation suggests, at least theoretically, that parental rights can be unbundled and shared across more than two parents. Indeed, Susan Appleton observes that post-dissolution parenting plans, which treat parenthood “as a mosaic capable of division and subdivision even in the ordinary case, . . . could easily accommodate two, three, or more parents.”<sup>389</sup> Our study shows that courts do in fact disaggregate parental rights and responsibilities and spread them *across more than two parents*. From this perspective, rather than require a significant shift in the law, multiparent statutes seem to reflect a logical extension of existing law.<sup>390</sup>

Again, recent multiparent statutes render the third parent a *legal parent*.<sup>391</sup> This may seem sufficiently different than what came before them. Extending legal parentage to three individuals disturbs the dualistic and exclusive dimensions of parenthood but nonetheless maintains its comprehensive nature. Yet, our study dispels this attempt to draw a sharp demarcation.

The difference between legal parents and functional non-legal parents is not as stark as assumed. Some of the common law and equitable functional parent doctrines come strikingly close to conferring legal parentage. For example, “[t]he rights and liabilities arising out of an *in loco parentis* relationship,” the Pennsylvania Supreme Court has explained, “are, as the words imply, exactly the same as between parent

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<sup>386</sup> Jacobs, *supra* note 89, at 312.

<sup>387</sup> Appleton, *supra* note 1, at 26.

<sup>388</sup> Young, *supra* note 54, at 534.

<sup>389</sup> Appleton, *supra* note 1, at 25.

<sup>390</sup> Our study generates findings that seem to be similar in effect to what Chris Gottlieb proposes in the child welfare context. Gottlieb proposes that parents subject to a child welfare proceeding should be permitted to transfer parental rights to adoptive parents, while preserving at least some of their parental rights and, specifically, a right to visitation. See Gottlieb, *supra* note 369, at 63 (“[A]ll the other parental rights could transfer to the adoptive parent while visitation rights remain with the birth parent.”). On Gottlieb’s model, a child would have more than two parents, even as the adoptive parents would assume custodial rights and support obligations. This approach, Gottlieb argues, would “serve the interests of children in maintaining bonds with multiple parent figures.” *Id.*

<sup>391</sup> See *supra* note 105 and accompanying text.

and child.”<sup>392</sup> In some jurisdictions that now have statutes expressly allowing for more than two legal parents, courts had previously extended comprehensive legal protections to de facto parents when the child had, or could have, two legal parents. For instance, Washington’s common law doctrine provided that the de facto parent “stands in legal parity with an otherwise legal parent.”<sup>393</sup> Similarly, under Maine’s equitable doctrine, a de facto parent “is a parent for all purposes.”<sup>394</sup> From this perspective, the codification of multiparent recognition follows from existing practices.

Moreover, there are significant similarities between the legal arrangements arising under multiparent statutes and those arising under functional parent doctrines that do not yield legal parentage. Our study shows that in both sets of cases—those featuring three legal parents *and* those featuring two legal parents and one or more functional non-legal parents—the parents often are not all exercising the rights and responsibilities of parenthood.

Legal parents may lack some of the rights of parenthood, as a practical and legal matter. In many cases, at least one legal parent is neither exercising the rights of parenthood, such as the right to make decisions about the child’s education or healthcare, nor assuming the responsibilities of parenthood, such as caring for the child or financially supporting the child. Further, in some states, a legal parent can lack key legal entitlements typically associated with parentage. For example, in California, a child may have three legal parents, one of whom is not entitled to reunification services in a dependency action because the person is not also a presumed parent.<sup>395</sup>

Functional parents may lack legal parentage but may nonetheless possess more significant parental rights than the legal parents. Under many doctrines, functional parents are not treated as legal parents and are entitled only to some parental rights and responsibilities.<sup>396</sup> Yet, the functional parent is often granted custodial responsibility while an existing legal parent is not.<sup>397</sup> Thus, in cases with three legal parents *and* in cases with two legal parents and one or more functional non-legal parents, courts unbundle parental rights and responsibilities.

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<sup>392</sup> *Peters v. Costello*, 891 A.2d 705, 710 (Pa. 2005).

<sup>393</sup> *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005).

<sup>394</sup> *Pitts v. Moore*, 90 A.3d 1169, 1182 (Me. 2014).

<sup>395</sup> See *supra* note 185 and accompanying text.

<sup>396</sup> See, e.g., *In re H.S.H.-K.*, 533 N.W.2d 419, 435–36 (Wis. 1995) (giving rise only to the right to seek visitation).

<sup>397</sup> See, e.g., *State ex rel. Combs v. O’Neal*, 662 N.W.2d 231 (Neb. Ct. App. 2003) (awarding custody to grandmother and visitation to child’s father).

In this sense, courts in multiparent cases often do not treat all of the parents as having an equal status. That is, even as courts recognize more than two parents, in most cases they do not regard each parent as equally entitled to the rights of parenthood.<sup>398</sup> This pushes against some impulses in family law.<sup>399</sup> When married parents divorce, state family law systems emphasize the continued involvement of both parents in the child's life.<sup>400</sup> Although states vary in their approaches to joint custody, every state permits a court to order joint legal and physical custody.<sup>401</sup> Even as states generally condition presumptions in favor of joint custody on the parents' agreement, courts are largely empowered to order joint custody—including decisionmaking authority and parenting time—if they find that doing so is in the child's best interest.<sup>402</sup>

In states that do not treat the functional parent as a legal parent, the functional parent is not automatically entitled to parenting time with the child. Instead, the person merely has *standing to seek* custody based on the child's best interest. Yet, in cases of this kind in the dataset, the functional parent typically is the child's primary caregiver and maintains custody of the child. Although we do not have subsequent orders in these cases, it appears that at least one, and sometimes both, of the legal parents is not granted custody. The legal parents enjoy a status that is superior to the functional parent as a formal matter, but the functional parent possesses greater parental rights in reality. The legal result tracks the conduct of the parties; the person who is in fact parenting the child is awarded custodial responsibility, while the individuals who have not undertaken parental responsibilities to the same extent are not.

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<sup>398</sup> This aligns with the expectations of some scholars. More than fifteen years ago, Katharine Baker observed that functional parent doctrines may create “not just a regime that contemplates more parents, but a regime that contemplates different levels of parenthood—greater and lesser.” Baker, *Bionormativity*, *supra* note 385, at 708. More recently, June Carbone and Naomi Cahn explained that they “expect the norm in . . . cases extending recognition to three adults to be hierarchical, rather than equal, relationships.” Carbone & Cahn, *Parents*, *supra* note 24, at 46.

<sup>399</sup> See Baker, *Bionormativity*, *supra* note 385, at 709 (observing that “a movement to recognize more parents—which is almost certainly a movement to recognize different classes of parents—exists in some tension with movements to equalize parental status”). See also Carbone & Cahn, *Parents*, *supra* note 24, at 11 (“The idea of equal parental standing is a central tenet of modern family law.”).

<sup>400</sup> See Carbone & Cahn, *Parents*, *supra* note 24, at 43 (observing that “fathers have become much more likely to receive shared custody awards at divorce”). As Deborah Dinner documents, fathers' rights advocates in the second half of the twentieth century argued that, if divorced men were made to pay child support, they should also receive custodial rights. See Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016).

<sup>401</sup> See NEJAIME, BANKS, GROSSMAN & KIM, *supra* note 66, at 821.

<sup>402</sup> See *id.* at 821–22.

In states in which the functional parent is treated as a legal parent, the “idea of equal parental standing”<sup>403</sup> would suggest that all three should be involved in decisionmaking and enjoy a strong presumption in favor of equal parenting time. Yet, our data show a different reality on the ground. Although we lack subsequent orders, it appears that cases with three legal parents do not tend to feature arrangements in which all three have, or even seek to have, decisionmaking authority or significant parenting time. Instead, typically, no more than two individuals are parenting the child. Even in cases in which a legal parent is contributing to the child’s financial support, that person (commonly, the child’s biological father) may otherwise be uninvolved in the child’s life.<sup>404</sup> In this way, courts in multiparent cases do not appear to treat parenthood as an equal status in practice. Instead, as June Carbone and Naomi Cahn urge with respect to multiparent cases, courts seem to act on the intuition that “the child’s interests lie with the strength of the child’s relationship to their primary parent and that the other parents’ custodial rights should be structured to avoid interference with the strength of that bond.”<sup>405</sup>

Third, courts have not treated parenthood—and the line between parent and nonparent—as fixed and stable. Our data suggest that courts have long recognized that a child’s parental configuration can change over time, even in the absence of an adoption. A person who at one point may have been a nonparent can become a parent. To see this, we must look beyond statutory dictates and instead examine how courts apply the law in practice. In almost all cases in our data recognizing multiple parents, the child begins with two (or sometimes one<sup>406</sup>) legal parents, and the third parent is not recognized until some point after (often long after) the child’s birth.

From this perspective, scholars seem to treat the legal status of parenthood as more stable and unmoving than it actually is. While commentators regularly assume that an existing parent-child relationship must be terminated for a new one to begin,<sup>407</sup> the functional parent

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<sup>403</sup> Carbone & Cahn, *Parents*, *supra* note 24, at 11.

<sup>404</sup> See, e.g., *Wills v. Wills*, No. CV–15–639, 2016 WL 1039795, at \*1 (Ark. App. Mar. 16, 2016) (involving a mother who made child support payments but was otherwise not involved in child’s life); *A.L. v. D.L.*, No. CK12-01390, 2012 WL 6765564, at \*2 (Del. Fam. Ct. Sept. 19, 2012) (involving a father who provided health insurance for child but was otherwise not involved in child’s life).

<sup>405</sup> Carbone & Cahn, *Parents*, *supra* note 24, at 12.

<sup>406</sup> Nonmarital children typically have one legal parent at birth. See NeJaime, *supra* note 47.

<sup>407</sup> See, e.g., *Bix*, *supra* note 32, at 71 (explaining that “the legal system generally does not allow one to gain a legal parent if one already has two, unless and until another legal parent loses his or her parental rights (through surrender or termination)”). See also Marquardt,



dataset shows that, across many jurisdictions, courts have recognized a third parent for a child even when the child has two existing parents who maintain that status.

Ultimately, it seems inaccurate to view the law's longstanding approach to parenthood as binary—that is, limited to two, exclusive, and fixed. Even as these assumptions about parenthood continue to dominate popular thinking and legal debates and to structure major family law doctrines, our study uncovers a powerful counternarrative—one in which family law's approach to parenthood has been more open, flexible, and fluid.

The counternarrative we uncover leads us to see recent legislative efforts to authorize multiparent recognition as less groundbreaking than assumed. Instead, multiparent statutes seem to follow, rather than break, from well-worn practices of family courts—practices that resist conventional assumptions about parenthood and the nuclear family. As we next show, our findings about both how multiparenthood operates on the ground and how courts have long accommodated multiparenthood allow us to assess concerns about multiparent recognition with fresh eyes, ultimately viewing such concerns as inapposite or overstated.

## V

### REASSESSING MULTIPARENT RECOGNITION

In this Part, we return to the ongoing debate over multiparent recognition. Given the brave new world seemingly presented by multiparent families and their legal recognition, much of the existing legal scholarship proceeds as if the possibility of multiparent recognition is new and untested. Yet our data show that courts have long been accommodating multiparent families. Relying on our findings about who multiparent families are, how they function, and how courts treat them, we first show that concerns scholars raise about multiparent recognition are overstated. Second, we explain how multiparent recognition serves the important family law objective of protecting children's parental relationships, not primarily by securing legal ties to three involved parents, but instead (and counterintuitively) by safeguarding children's primary attachment relationships. Given this, we close by explaining how family law could make multiparent recognition more, rather than less, possible.

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*supra* note 33 (noting that “adopted children still have only two legal parents”). In proposing in the child welfare context that the parental rights of biological parents be transferred to adoptive parents rather than terminated, Chris Gottlieb challenges the “entrenched” belief that termination of parental rights must be “a necessary antecedent to adoption.” Gottlieb, *supra* note 369, at 3, 48.

### A. *Addressing Concerns with (Too Much) Multiparent Recognition*

In this Section, we address three sets of concerns that frequently arise in commentary on multiparenthood: harm to children, harm to parents, and judicial shortcomings. Our findings lead us to be relatively unconcerned with the speculative fears that dominate the legal debate. The imagined harms to children and to parents are largely animated by an envisioned scene that our study suggests is relatively uncommon—a bitter custody dispute between three active and involved parents. Given that courts around the country have accommodated multiparent families for decades, we do not anticipate that courts will face a voluminous set of new problems as they adjudicate claims under new multiparent statutes. Of course, multiparent statutes mean that a child can have three *legal* parents. Still, these legal arrangements tend to look like the legal arrangements courts have long sanctioned under functional parent doctrines.

#### 1. *Consequences for Children*

A major set of concerns relates to the impact of multiparent recognition on the wellbeing of children. Because multiparent recognition is viewed as a new and emergent legal possibility, it is imagined to be largely untested. Our study allows us to see that courts have a track record of allocating parental rights in multiparent families in ways that do not produce the problems that dominate the literature.

First, commentators anticipate that multiparent recognition will typically result in three-way custody litigation, which they assume to be more adversarial than the standard two-way dispute.<sup>408</sup> Yet, our data provide little support for this concern. Typically, at least one parent is not seeking to exercise custodial responsibility for the child. As a result, cases in the data that involve custody litigation more often feature two competing parents, just as one would see in ordinary custody actions. Further, in some cases, one of the existing parents is aligned with the person seeking parental status, together attempting to safeguard the child's primary caregiving relationship.<sup>409</sup> Often, one or both of the existing legal parents takes no position in the litigation.<sup>410</sup>

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<sup>408</sup> Baker, *Bionormativity*, *supra* note 385, at 708 (noting the increased likelihood of litigation with more people claiming rights over a child).

<sup>409</sup> See, e.g., *T.C. v. S.S.*, 2011 WL 11546684, at \*1 (Del. Fam. Ct. Nov. 22, 2011) (describing how the biological father “consents to [the de facto parent’s] petition to be [the child’s] *de facto* parent”).

<sup>410</sup> See, e.g., *White v. Gemmer*, No. 2002-CA-001735-MR, 2003 WL 22025925, at \*1 (Ky. Ct. App. Aug. 29, 2003) (noting that neither parent responded nor objected to petition for

Many cases in our data are not custody cases at all. Instead, often the claim to be treated as a third parent arises in response to state intervention in a child welfare proceeding. In these cases, the third parent typically is asking that the child remain or be placed with them rather than removed into state custody; or the third parent may seek reunification services from the state. Typically, the issue is not that the child has too many parents willing and able to care for them, but too few. In this setting, multiparent recognition emerges as a way to protect children's relationships with the people who are parenting them while also preserving the legal rights of existing parents. In other words, in the absence of multiparent recognition, the result in some of these cases might be to remove the child from the legal custody of the biological parents and to move towards termination of parental rights.

Reasoning from the three-way custody contest, commentators imagine judicial orders vesting parental rights and responsibilities in multiple individuals.<sup>411</sup> They worry about the effect on children when three or more parents equally possess and exercise legal custody. “[T]he greater the number of adults holding parental status, the greater the potential for conflict.”<sup>412</sup> Children will “lack . . . a centralized authority figure,”<sup>413</sup> and instead be at the mercy of warring adults. As Elizabeth Marquardt puts it, “[c]onflicts will undoubtedly arise when three parents confront the sticky, conflict-ridden reality of child-raising.”<sup>414</sup>

Yet, our data paint a starkly different picture. Among the multiparent cases in our study, it is rare for more than two parents to exercise legal custodial rights. Instead, there is often at least one parent who does not seek to participate in major or minor decisions in the child's life. In many cases, there is only one parent—often the third parent—who is the primary decisionmaker for the child.<sup>415</sup> And the judicial decision usually vests this person with decisionmaking authority.<sup>416</sup> In this

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custody by deceased grandfather's former partner, but biological father eventually responded when petitioner sought child support from him).

<sup>411</sup> See Murray, *supra* note 62, at 445 (“[C]ritics fear that distributing parental rights equally among those recognized as parents may compromise efficient parental decisionmaking by vesting multiple persons with the authority to make (possibly conflicting) decisions about the welfare of children.”).

<sup>412</sup> Cahn & Carbone, *Custody and Visitation*, *supra* note 14, at 404.

<sup>413</sup> Jacqueline V. Gaines, *The Legal Quicksand 2+ Parents: The Need for a National Definition of a Legal Parent*, 46 U. DAYTON L. REV. 105, 123 (2021).

<sup>414</sup> Marquardt, *supra* note 33, at A13.

<sup>415</sup> See *supra* Sections II.A.2, II.B.2.

<sup>416</sup> See, e.g., Lambert v. Lambert, 475 S.W.3d 646, 652–53 (Ky. Ct. App. 2015) (affirming award of custody to grandfather, who had been raising children, with visitation to the children's mother).

sense, courts do not typically approach multiparent families as if each parent has “equal status with each other.”<sup>417</sup>

Of course, we do not have data on how the families fare after judgment. Nor do we have data on the precise custodial arrangements that eventually govern these families. But our data show that families in which three individuals exercise legal decisionmaking authority are very uncommon. Accordingly, conflict generally would be no more bitter or complicated than the conflict that arises in conventional two-parent custodial arrangements. Indeed, given the prevalence of a single primary caregiver in our functional parent data and the number of cases in which neither biological parent is a consistent caregiver, we might expect *less conflict* than we would see in shared parenting arrangements between divorced parents.

Commentators worry about not only shared legal custody but also shared physical custody. If three or more individuals have significant parenting time, children “will get shuffled between homes”<sup>418</sup> and “will be caught in three or four worlds.”<sup>419</sup> How, skeptics of multiparent recognition wonder, “could children be immersed in three different families”?<sup>420</sup> Even supporters of multiparent statutes posit that children’s “attachments to adults may be stretched too thin by the legal recognition of additional [parents].”<sup>421</sup>

Yet, court decisions featuring multiparent families, under both multiparent statutes and functional parent doctrines, rarely feature three or more individuals meaningfully sharing residential custody. The children in the cases often live primarily with the person seeking to be adjudicated the third parent. When that person is not living with one of the child’s legal parents, recognition of the third parent commonly secures the child’s residential placement. The third parent, whether adjudicated a legal parent or a functional non-legal parent, is frequently awarded physical custody.<sup>422</sup>

<sup>417</sup> Cahn & Carbone, *Custody and Visitation*, *supra* note 14, at 399.

<sup>418</sup> Marquardt, *supra* note 33, at A13.

<sup>419</sup> Gaines, *supra* note 413, at 122.

<sup>420</sup> Sara Alpert, *The Past and Future State of De Facto Parents in New York*, 55 FAM. CT. REV. 458, 464 (2017).

<sup>421</sup> Joanna L. Grossman, *California Allows Children to Have More than Two Legal Parents*, VERDICT (Oct. 15, 2013), <https://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents> [<https://perma.cc/H979-FWMA>].

<sup>422</sup> See, e.g., *Andra F. v. Antony H.*, No. 15-0445, 2016 WL 700585, at \*1–2 (W. Va. Feb. 16, 2016) (affirming award of primary residential custody to psychological parents, with whom child had been living and who had been the child’s primary caregivers); *J.F. v. R.M.*, No. A-5360-13T2, 2014 WL 7793407, at \*1 (N.J. Super. Ct. App. Div. Feb. 11, 2015) (affirming award of residential custody to psychological parent, with whom the child “has lived . . . for his entire life”); *Lanham v. Sanders*, No. 2005-CA-001482-ME, 2006 WL 891432, at \*1 (Ky. Ct.

Through this lens, we see that multiparent recognition tends not to reflect assumptions of “parental equality” that have gained currency in the context of divorce proceedings between two parents.<sup>423</sup> Instead of treating each parent as equally entitled to legal rights and responsibilities, courts in multiparent cases tend to issue orders that reflect the realities of the parenting arrangements that the parties created. A legal judgment often simply affirms, rather than produces, a custodial arrangement. The adjudication typically allows the child to continue living with the third parent. Even in the less common situation in which the child is being consistently cared for by more than two parents, it is the family’s existing arrangement, rather than a court decision, that splits the child’s time across households. The legal judgment stabilizes the existing living situation.<sup>424</sup>

## 2. *Consequences for Parents*

A second set of concerns centers on how multiparent recognition threatens the authority of the existing legal or biological parents.<sup>425</sup> Drawing on an understanding of parenthood as an exclusive status, critics argue that multiparent recognition undermines “the constitutional presumption that the parent knows what is best for the child and will make decisions for the child accordingly.”<sup>426</sup> They assert that recognition of additional parents will lead to “diminished” rights for biological parents.<sup>427</sup> And they worry about empowering the state to intervene in families in ways that usurp parental authority and result in the state “becom[ing] involved in the day-to-day business of parenting.”<sup>428</sup>

First, these concerns assume that the existing legal parents are in fact consistently exercising parental authority over the child. Yet,

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App. Apr. 7, 2006) (affirming award of custody to de facto custodians, with whom child had been living practically all of her life).

<sup>423</sup> Cahn & Carbone, *Custody and Visitation*, *supra* note 14, at 400.

<sup>424</sup> See, e.g., *D.G. v. K.S.*, 133 A.3d 703, 706 (N.J. Super. Ct. Ch. Div. 2015) (ordering joint legal and physical custody for three parents who had engaged in “tri-parenting” arrangement with child sharing time with male same-sex couple and biological mother).

<sup>425</sup> See, e.g., Murray, *supra* note 62, at 444 (identifying the “fear that expanding legal parenthood might allow nonparents to claim parental rights and status over the objections of biological and adoptive parents”).

<sup>426</sup> Pfenson, *supra* note 101, at 2062–63.

<sup>427</sup> Loken, *supra* note 73, at 1058.

<sup>428</sup> Baker, *Bionormativity*, *supra* note 385, at 675. See also Carbone & Cahn, *Parents*, *supra* note 24, at 39–40 (worrying about how legal recognition of multiple parties “with comparable authority in the child’s life increase[s] the need for judicial intervention to manage disputes”).

the reality is that, in many of these families, one (or both) of the legal parents has not been providing consistent care for the child.<sup>429</sup>

Second, these concerns fail to appreciate the ways in which legal decisions recognizing more than two parents can *protect* biological parents' relationships with their children. In some cases, a biological parent seeks to gain (or regain) custody of their child after being largely absent from the child's life.<sup>430</sup> Without multiparent recognition, a court might recognize someone else as the child's parent, rather than the child's biological parent.<sup>431</sup> This could be true, for example, if a man who is not the biological father has been parenting the child for most of the child's life.<sup>432</sup> But where multiparent recognition is possible, the court has authority to recognize the biological parent's legal status while also protecting the child's relationship with the person who has been parenting them.<sup>433</sup>

Third, concerns about state interference with parental rights are premised on an assumption that the action is a custody dispute between the alleged third parent and one or more of the biological or legal parents.<sup>434</sup> But this is often not the case. As we report in Section II.B.3, among the cases in the multiparent statute dataset, 60% were initiated by child welfare authorities.<sup>435</sup> In these cases, the state is already involved.

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<sup>429</sup> See, e.g., *E.B.S. v. K.M.*, No. A-5645-11T1, 2014 WL 1316149, at \*1 (N.J. Super. Ct. App. Div. Apr. 3, 2014) (biological mother had not parented the child and biological father had never been present); *White v. Gemmer*, No. 2002-CA-001735-MR, 2003 WL 22025925, at \*1 (Ky. Ct. App. Aug. 29, 2003) (neither legal parent had parented the child).

<sup>430</sup> See, e.g., *J.F. v. R.M.*, No. A-5360-13T2, 2014 WL 7793407, at \*1–2 (N.J. Super. Ct. App. Div. Feb. 11, 2015) (involving case in which father, who was “not involved in [the child’s] life” until four years after his birth, sought custody over great-grandmother, with whom child had lived “for his entire life”); *In re K.H.*, 773 S.E.2d 20, 22–23 (W. Va. 2015) (involving case in which father, who “had no contact with the child during the first year of her life,” sought custody when child was two over grandmother, who was psychological parent).

<sup>431</sup> Cf. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (affirming recognition of husband as the only legal father over the involved biological father’s objection).

<sup>432</sup> For example, if both a biological father and a nonbiological father have claims to parentage, a court might be required to adjudicate “competing claims” and may determine that only the nonbiological father should be treated as a legal parent. See, e.g., *Steven W. v. Matthew S.*, 39 Cal. Rptr. 2d 535, 539 (Cal. Ct. App. 1995) (affirming trial court ruling weighing competing presumptions in favor of “hold[ing] out” father over biological father, who had been mother’s husband).

<sup>433</sup> See, e.g., *C.A. v. C.P.*, 240 Cal. Rptr. 3d 38, 40 (Cal. Ct. App. 2018) (holding that biological father was a third legal parent of a child born to a married woman during her marriage to a man who treated the child as his child).

<sup>434</sup> See, e.g., Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412, 440 (2022) [hereinafter Baker, *Equality and Family Autonomy*] (expressing concern about functional parent doctrines and arguing that “[w]hen parents can work out custody arrangements on their own, they keep the family—albeit in a reconfigured form—autonomous, free from state interference”).

<sup>435</sup> See *supra* Section II.B.3.

Moreover, particularly in this context, multiparent recognition can serve as a shield against further state intervention. It can allow the court to protect a child's relationship with someone who has been a—if not *the*—source of consistent parental care. In such cases, recognizing a third parent can allow the child to remain in a stable placement and, potentially, to avoid becoming a ward of the state where the biological or legal parents have been deemed unable to safely care for the child.<sup>436</sup> Moreover, multiparent recognition can allow the court to secure the child's relationship with a person who has been parenting them, and to do so without terminating or legally destroying the child's relationships with their biological or legal parents.

### 3. *Consequences for Courts*

A final set of concerns centers on courts themselves. Because multiparent families are seen as new and rare, their legal recognition, it is said, poses novel issues that courts hardly seem prepared to confront.<sup>437</sup> Given a system of parental rights and obligations that treats parenthood as dualistic, exclusive, and fixed, how can courts manage custody and child support among more than two individuals?<sup>438</sup>

Yet, our data show that courts have been presented with multiparent families for decades. These families, we have seen, rarely feature more than two parents who will share legal or physical custody. Instead, these families often present the same kinds of issues posed by the single- and two-parent families that judges confront on a daily basis. Moreover, as compared to two-parent disputes commonly arising between spouses at divorce, courts do not appear to work from a presumption of parental equality when ruling in multiparent cases.<sup>439</sup> Instead of giving equal custodial rights to more than two parents, courts seemingly attempt to reflect the realities of the parenting arrangements forged by the parties

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<sup>436</sup> Again, we are not claiming state intervention is warranted; we are only reporting what might transpire in the absence of multiparent recognition.

<sup>437</sup> See, e.g., Baker, *Equality and Family Autonomy*, *supra* note 434, at 440; Feinberg, *supra* note 29, at 1497.

<sup>438</sup> See, e.g., *Hearing on House Bill No. 5178 Before the Conn. Comm. on the Judiciary* (Conn. 2020) (testimony of the Judicial Branch) (raising concerns about legislation authorizing multiparentage on the ground that “the bill necessitates changes beyond our reach,” including the application of “the Child Support Guidelines . . . [which] currently provides for no deviation criteria for three parents”); cf. Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 *CARDOZO J.L. & GENDER* 217 (2010).

<sup>439</sup> In this sense, courts seem to appreciate, at least implicitly, the concerns that scholars such as June Carbone and Naomi Cahn raise about parents’ “equal status” and instead make decisions that aim to protect the child’s primary parental relationship. See Carbone & Cahn, *Parents*, *supra* note 24, at 12.

themselves. Even where the family involves multiple involved parents, courts have proven themselves capable of managing these disputes under existing doctrines.<sup>440</sup>

Perhaps, then, it is unsurprising that even as jurisdictions have adopted multiparent statutes, they have been slow to adopt new laws to regulate multiparent custody or child support determinations.<sup>441</sup> Instead, even when the issue is addressed in statute, states have largely assimilated multiparent cases into existing legal frameworks.<sup>442</sup>

## B. *The Consequences for Children of (Too Little) Multiparent Recognition*

The concerns raised by scholars suggest that the main problem is potential *overrecognition* of more than two parents. In contrast, our study leads us to be more worried about *underrecognition*. In this Section, we explain why we see multiparent recognition as critical to children who typically have one, or at most two, primary caregivers, and we identify the implications of this observation for the relevant doctrine.

### 1. *The Child-Protective Dimension of Multiparent Recognition*

As we have seen, a key set of concerns in the scholarly debate over multiparent recognition focuses (appropriately, in our view) on the impact on children. Skeptics argue that multiparent recognition

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<sup>440</sup> Susan Appleton presciently made this point over fifteen years ago. *See* Appleton, *supra* note 1, at 15 (noting that “family law is already equipped to recognize multi-parentage”).

<sup>441</sup> Most of the states with statutes permitting more than two legal parents make no mention of multiparent families in their custody or support statutes. *See, e.g.*, VT. STAT. ANN. tit. 15, § 665(c) (2023) (custody statute referring to “one parent” and “the other” parent); VT. STAT. ANN. tit. 15, § 659(a) (2023) (child support statute instructing the court to “consider the following factors in respect to both parents”).

<sup>442</sup> *See, e.g.*, CAL. FAM. CODE § 4052.5 (West 2017) (“The statewide uniform guideline . . . shall apply in any case in which a child has more than two parents. The court shall apply the guideline by dividing child support obligations among the parents based on income and amount of time spent with the child by each parent[.]”); CONN. GEN. STAT. § 46b-475(d) (2022) (“If a court has adjudicated a child to have more than two parents . . . the law of this state other than [this act] applies to determinations of legal and physical custody of, or visitation with, such child, and to obligations to support such child.”). To be clear, though, the multiparent cases we examine overwhelmingly present questions regarding custody rather than child support. For example, in the large share of child welfare proceedings in the datasets, the court typically addresses only custodial placements. Further, some courts charged with ordering child support are not empowered to issue custody orders. For instance, in a significant number of cases in Connecticut, custody and support are handled by different courts. *See, e.g.*, CONN. GEN. STAT. § 46b-231(b)(6) (2023) (“‘Family Support Magistrate Division’ means a division of the Superior Court created by this section for the purpose of establishing and enforcing child and spousal support in IV-D cases . . . .”); CONN. GEN. STAT. § 46b-1(a) (2022) (“Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting . . . custody of a minor child . . . .”).



will produce instability and conflict in children's lives. Supporters of multiparenthood routinely credit these concerns but generally find that the benefits to children outweigh the costs.<sup>443</sup> Envisioning planned LGBTQ and polyamorous families, supporters point to the importance of protecting children's relationships with each of their three (or more) intended parents.<sup>444</sup>

Our study confirms the child-centered benefits of multiparent recognition, but it does so on different grounds. Of course, a child's relationships with three (or more) actively engaged parents should be protected. And existing multiparent laws make this result possible. But in our account, this is not the primary role of multiparent recognition.

Instead, multiparent recognition frequently allows a court to protect a child's relationship with the only person providing consistent parental care. Even outside these situations, multiparent recognition commonly protects the child's relationship with a second person who has assumed parental responsibilities. The children in these cases usually emerge, not with three or more parents raising them, but with one or two parents regularly exercising parental rights and responsibilities. The other parent may play a parental role in the child's life but is not seeking to raise the child on a day-to-day basis.

In many cases, the third parent is not only the head of the child's household, but also the person the child has been living with exclusively. For example, in *R.M. v. J.J.*,<sup>445</sup> the third parent, R.M., had lived with and functioned as the child's parent for almost all of her life.<sup>446</sup> R.M. held her out as his child and as a sibling to the two other children that he had with the child's mother.<sup>447</sup> In contrast, the child's biological father met her for the first time when she was six years old, the point at which he established his parentage by completing an acknowledgment of parentage with the child's mother.<sup>448</sup> In situations of this kind, the person alleging themselves to be a third parent may need to establish their parental status to preserve the child's current living arrangement.

In the absence of multiparent recognition, protecting the child's relationship with the person who has assumed parental responsibilities and is meeting the child's needs may be difficult to do when the child

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<sup>443</sup> For example, while Melinda Seymore posits that multiparent recognition may prove "profoundly destabilizing" by introducing "too much change in a child's life," she nonetheless is generally supportive of multiparent recognition. See Seymore, *supra* note 28, at 1792.

<sup>444</sup> See, e.g., Trachman, *supra* note 79.

<sup>445</sup> No. C090018, 2022 WL 1301801, at \*1 (Cal. Ct. App. Apr. 29, 2022), *reh'g denied* (May 25, 2022), *review denied* (July 27, 2022).

<sup>446</sup> *Id.* at \*2.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* at \*1.

already has two legal parents. In such cases, the court may be required to sever the child's relationship with their primary caregiver, a decision which would often require the removal of the child from their current placement in favor of placement with a person who has not been a consistent presence, much less a consistent caregiver, in the child's life.<sup>449</sup>

Alternatively, the court may terminate the rights of an existing parent if grounds for such termination can be shown. In some cases, this could allow the child to be adopted by the person who is parenting them. In our view, this approach threatens to undermine children's interests in at least two ways. First, it unnecessarily terminates the rights of existing parents.<sup>450</sup> As Chris Gottlieb observes in the child welfare context, courts "routinely sever parent-child relationships" when the parents have remained part of the child's life and "when the emotional bonds are meaningful to both parents and children."<sup>451</sup> Second, this approach makes protection of the child's primary parental relationship hinge on formalities that are unlikely to track actual parent-child bonds. Children should not suffer merely because the people parenting them have not completed an adoption—or some similar formal process, such as a guardianship. Further, many functional parents, especially relatives, may resist any proceeding that erodes, much less legally terminates, the rights of existing parents, who may be the functional parents' children or siblings. Of course, in many situations, adoption is simply not possible given that the child has two fit parents.<sup>452</sup>

Ultimately, a system without the possibility of multiparent recognition, whether through explicit statutory authority or through functional parent doctrines, produces outcomes that undermine the interests of children. It requires children's primary parental relationships to be severed in some circumstances, and it aggressively terminates the rights of existing parents in other circumstances. Such a system fails to promote the interests of children, particularly children in marginalized families facing challenging poverty-related circumstances.

## 2. *Facilitating Multiparent Recognition*

Having uncovered how multiparent recognition may be necessary to protect a child's relationship with their primary parent, we are

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<sup>449</sup> For further discussion, see Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 409–13.

<sup>450</sup> See, e.g., Gottlieb, *supra* note 369, at 15–18.

<sup>451</sup> See Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Reassessing the Concept of Termination of Parental Rights in Light of its History, Purposes, and Current Efficacy*, 45 CARDOZO L. REV. (forthcoming 2024).

<sup>452</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 413–16.

concerned that the issues on which commentators focus may lead to less, rather than more, multiparent recognition. If legislatures and courts worry primarily about *harms* to children resulting from multiparent recognition and view the benefits as accruing primarily to the rare and cutting-edge families in which a child has three involved parents, they may retreat from existing practices by designing new doctrines in ways that make multiparent recognition less likely.

Indeed, functional parent doctrines adopted alongside explicit multiparent statutes tend to have more stringent requirements than other functional parent doctrines that were not built with multiparent recognition specifically in mind.<sup>453</sup> Relatedly, we note that some multiparent statutes include an additional, very demanding substantive standard—a detriment standard—before a court can declare a person to be a child’s third parent.<sup>454</sup> In contrast, courts extending parental rights to more than two people in the absence of a multiparent statute typically do so when the third parent simply satisfies the relevant functional parent criteria. The additional statutory hurdles we identify may grow out of well-meaning, but overstated, concerns about the harms to children from multiparent recognition.

Instead, we urge legislatures to focus on the benefits to children. If lawmakers proceed from the assumption, borne out by our data, that the child’s relationship with the third parent is typically the child’s primary parent-child relationship and that the child rarely has three active parents, they would want to make multiparent recognition more, rather than less, likely. We end with two important doctrinal recommendations animated by this observation.

First, we caution against substantive criteria in functional parent doctrines that are too onerous. Under the 2017 UPA, both *de facto* parentage and the “holding out” presumption require that the person show that they *held the child out as their child*.<sup>455</sup> We recognize the limiting work that this requirement performs. For example, it may appropriately restrict the number of claims brought by stepparents who provided care for a child but did not see themselves as the child’s parent. Nonetheless, our findings lead us to be concerned about imposing this requirement.

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<sup>453</sup> For example, the statutory *de facto* parent provision in a number of states requires the person to have held the child out “as the individual’s child.” *See, e.g.*, WASH. REV. CODE § 26.26A.440(4)(d) (2024).

<sup>454</sup> *See supra* note 169 and accompanying text. *See also, e.g.*, Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437, 461 (2018) (describing such an approach as “narrow [and] limited” and, thus, that it would be “only in rare cases that this standard would be met”).

<sup>455</sup> UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017) (“holding out” presumption); *id.* § 609(d)(4) (*de facto* parent provision).

Of particular concern is this requirement's impact on relatives, such as grandparents. Even when they are serving as the child's primary or sole caregiver, they may not present the child to the world as *their child*.<sup>456</sup> Indeed, they may avoid representing the child in this way to show respect to the child's biological parents. Our study of functional parent doctrines clearly demonstrates the important role that the doctrines play in protecting children's relationships with grandparents who are serving as their primary caregivers.<sup>457</sup> We observe even greater representation of these parent-child relationships in multiparent families.<sup>458</sup> Grandparents are underrepresented in jurisdictions, such as California, in which the relevant doctrine requires "holding out."<sup>459</sup> Accordingly, we see a distinct need for doctrines that do not impose such a requirement.

Second, we caution against a substantive standard for multiparent recognition that places additional hurdles on adjudication of a third parent. The 2017 UPA's multiparent provision requires a court to find that not recognizing a person as a third parent would be "detrimental" to the child.<sup>460</sup> This standard, which reflects California's approach,<sup>461</sup> is especially demanding and is analogous to a harm standard.

Given the number of families in our study in which the third parent is the child's primary caregiver,<sup>462</sup> we are concerned about imposing this additional detriment standard. Recall that in the multiparent statute dataset, the court adjudicated an additional parent in only 21% of the California cases.<sup>463</sup> By contrast, in the cases in which multiparent recognition was not subject to a detriment standard, the court recognized an additional parent in 40%.<sup>464</sup> This suggests that the "detriment" standard may be limiting multiparent recognition.

When viewed in relation to multiparent recognition in the functional parent dataset, we see the detriment standard as a significant departure from existing practices. Under these existing doctrines, the person is treated as a functional parent once they satisfy the relevant doctrinal requirements. Given the prevalence of primary caregivers

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<sup>456</sup> See *supra* notes 145–49 and accompanying text.

<sup>457</sup> See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 31, at 398.

<sup>458</sup> See *supra* Section III.B.

<sup>459</sup> See *supra* Section II.A.

<sup>460</sup> UNIF. PARENTAGE ACT § 613 Alt. B (UNIF. L. COMM'N 2017). Some states have statutes that likewise impose the detriment standard. See, e.g., CAL. FAM. CODE § 7612(c) (West 2020); CONN. GEN. STAT. § 46b-475(c) (2023); WASH. REV. CODE § 26.26A.460(3) (2024).

<sup>461</sup> CAL. FAM. CODE § 7612(c) (West 2020).

<sup>462</sup> See *supra* Figures 4 & 10 and accompanying text.

<sup>463</sup> *Supra* Section II.B.4.

<sup>464</sup> *Id.*

among the population of functional parents seeking rights as a third parent, an additional hurdle seems inappropriate.

Accordingly, we caution against adopting a detriment standard. Vermont's multiparent statute requires an additional showing but only under a best-interest-of-the-child standard.<sup>465</sup> Other states, such as Maine, allow a court to recognize a third parent without imposing any substantive standard beyond satisfaction of the statutory requirements for recognition as a de facto parent.<sup>466</sup> In our view, a best-interest-of-the-child standard or statutory silence appears better suited to actual multiparent families.<sup>467</sup> With the latter approach, the third parent, who is likely to be a primary caregiver for the child, can be recognized as a parent *based simply on meeting the relevant parentage criteria*.<sup>468</sup> This seems especially important if, as is the case under some multiparent statutory schemes, the person claiming to be a third parent cannot disestablish—that is, replace—an existing legal parent.<sup>469</sup>

From the perspective of our study, multiparent recognition is often as important to protecting children's primary parental relationships as parental recognition in two-parent or single-parent families. Accordingly, multiparent recognition should not be viewed as exceptional, or as creating a set of new and special problems. Instead, it should be viewed as a necessary way to protect children's existing parent-child relationships while allowing children's other but less central parental relationships to remain intact. The relevant substantive criteria should reflect this insight.

## CONCLUSION

Based on a novel empirical study, this Article provides a more accurate account of the life and law not only of multiparenthood but of parenthood itself. Our findings lead us to see that, rather than viewing parentage as a fixed and exclusive status, courts have long applied a functional approach to parenthood. People who have engaged in the important work of caregiving can be recognized as parents, even if the

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<sup>465</sup> VT. STAT. ANN. tit. 15C, § 206(b) (2023).

<sup>466</sup> ME. STAT. tit. 19-A, § 1853(2) (2024). *See also* NEV. REV. STAT. ANN. § 126.021 (LexisNexis 2023).

<sup>467</sup> We also recognize reasons to prefer statutory silence over a best-interest-of-the-child standard. *See* Akshat Agarwal, *New Parents and the Best Interests Principle*, YALE J.L. & FEMINISM (forthcoming 2024) (arguing against best interest standards in parentage determinations by distinguishing the permanent and relational nature of parentage from the more temporary determination of custody).

<sup>468</sup> *See supra* notes 115–18 and accompanying text.

<sup>469</sup> *See* CONN. GEN. STAT. § 46b-490(c) (2023) (“[T]he adjudication of a person as a de facto parent under this section shall not disestablish the parentage of any other parent . . .”).

child already has two parents. This functional approach serves critical family law objectives. Most importantly, it allows courts to protect children by securing their primary parental relationships.

This approach also vindicates a range of equality interests. By extending parental rights and responsibilities to individuals who have undertaken the critical and difficult work of parenting, a functional approach values the work of care. This is work that is disproportionately performed by women and is traditionally undervalued in our legal order. By valuing conventionally gender-based domestic work—even as it does so on a formally gender-neutral basis—multiparent recognition advances gender-based equality.

While the law has traditionally appealed to the nuclear family to structure its system of family-based rights and responsibilities, multiparent recognition—which typically features functional parents—centers nonnuclear forms of family. In doing so, multiparent recognition respects care arrangements in families marginalized on account of race and class—including families in which extended family members, such as grandparents, assume parental roles; families in which parent-child relationships form in the face of poverty-related circumstances; and families subject to child welfare intervention.

Ultimately, multiparent recognition serves important aims on which the existing debate has not focused. By shifting the conversation away from the stories of well-resourced, planned multiparent families and toward vulnerable families affected by dissolution, poverty, incarceration, substance use disorders, and housing insecurity, this Article advances legal recognition of multiparent families on grounds that are not only more accurate but also more pressing.

APPENDIX: SELECT CALIFORNIA DATA FROM MULTIPARENT STATUTE DATASET

FIGURE A1. IDENTITY OF ALLEGED THIRD PARENT<sup>470</sup>

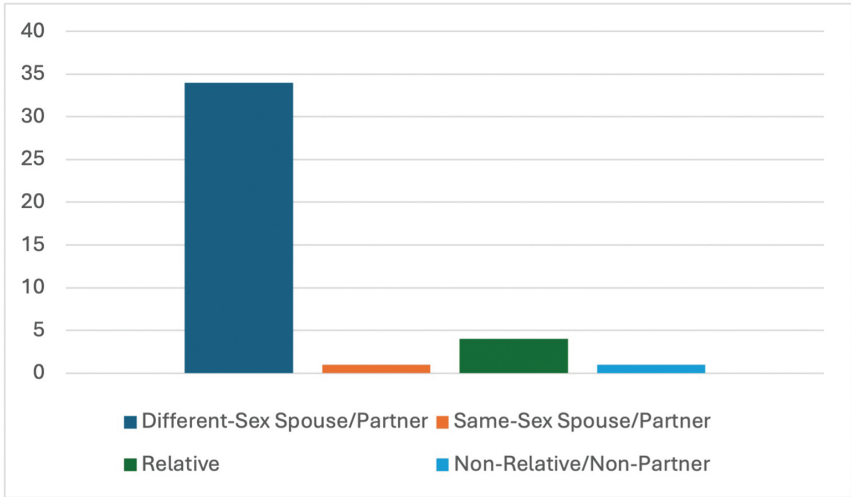
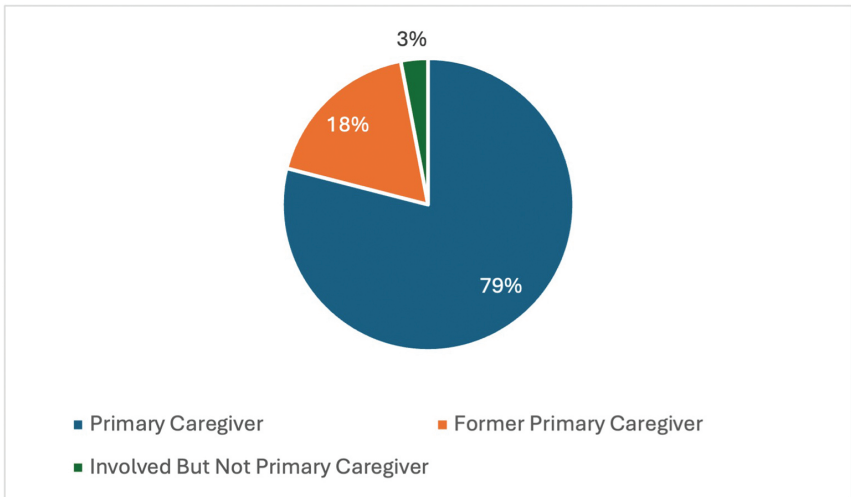


FIGURE A2. BIRTH PARENT’S ROLE IN CHILD’S LIFE



<sup>470</sup> *Martinez v. Vaziri* appears in two categories: The alleged third parent was both the mother’s unmarried different-sex partner and the child’s uncle, since the biological father was his half-brother. 200 Cal. Rptr. 3d 884, 887 (Cal. App. 2016).

FIGURE A3. SECOND BIOLOGICAL PARENT’S ROLE IN CHILD’S LIFE<sup>471</sup>

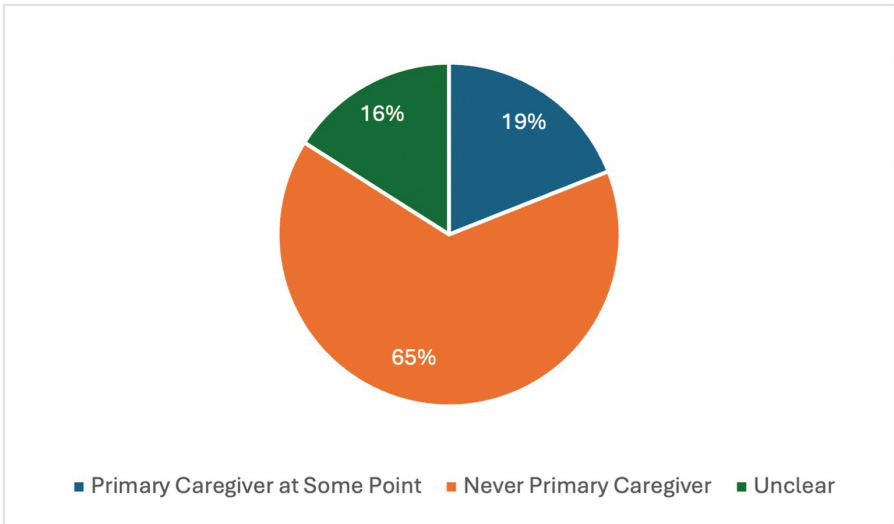
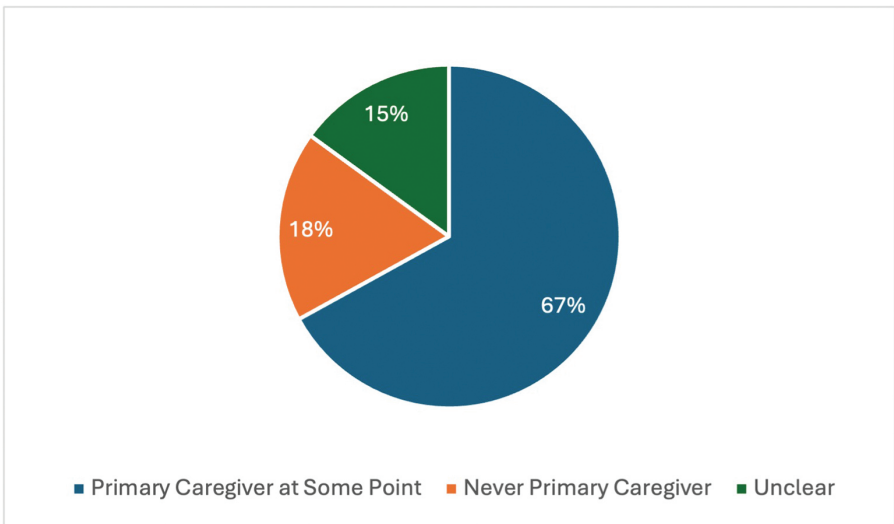


FIGURE A4. ALLEGED THIRD PARENT’S ROLE IN CHILD’S LIFE



<sup>471</sup> In all but two of the California cases, the court identifies the second parent as the biological father. The two cases in which no second biological parent is named or involved are excluded from the analysis reflected in Figure A3.