THE INTERPLAY BETWEEN GENETICS, PROCREATIVE INTENT, AND PARENTAL CONDUCT IN DETERMINING LEGAL PARENTAGE

Deborah Wald, Esq., San Francisco, U.S.A.

Our communities are increasingly populated with children for whom legal parentage is unclear. The three primary factors influencing legislative and judicial determinations of legal parentage tend to be: genetics, procreative intent, and parental conduct. In the "traditional" family, all three factors generally coincide in the same adults: the genetic parents have intentionally conceived their children (or at least that's the theory), and will be acting in the role of parents with regard to those same children. The interesting legal and social policy issues arise when these three factors don't point to the same people.

This article will explore these issues with regard to two specific categories of children: (1) children conceived with the use of assisted reproductive technologies, including those born to same-sex couples; and (2) children born as a result of extra-marital affairs. With regard to these two groups of children, this article will examine how courts have determined who should be recognized as legal parents and will consider whether it is in the best interests of children to recognize more than two legal parents when the children are intentionally conceived and/or successfully parented by more than two people over a period of time such that full attachment occurs.

I. Establishing Parentage in Families of Choice:

A. Children Conceived Using Assisted Reproductive Technologies:

In the last twenty years, advances in modern medicine have made it possible for many people previously considered infertile to conceive and bear children. In the simplest case, this involves in vitro fertilization of a wife's egg with her husband's sperm, with the resulting embryo transferred back into the wife's womb for gestation. In this scenario, the husband and wife intentionally are procreating children conceived of their own genetic material and -- presumably
-- are going on to raise those children, posing few of the special problems involved in
determining parentage in the modern era. But families created with the use of Assisted
Reproductive Technologies (ART) can get much more complicated than this.

The importance of the ART cases is twofold. First, these cases have called the question
of how we value genetics in assigning parental rights, since many ART cases involve children
who are intentionally conceived on behalf of "parents" to whom they are not genetically related.
Second, these cases have highlighted the issue of procreative intent as a basis for establishing
legal parenthood. By doing so, ART cases have paved the way for many of the cutting edge
developments in family law, and they therefore serve as an important starting place for examining
issues of genetics, intentionality, and parental responsibility.

When a heterosexual, married couple conceives a child using the wife's egg, fertilized in
vitro with the husband's sperm, but the baby is carried to term by a "gestational surrogate," there
are two possible mothers: the genetic mother and the gestational mother.¹ Most states that have
ruled on this type of surrogacy arrangement have found that the husband and wife are the legal
parents of the child, and that the woman who carried the child is not a parent, based on one or
both of two theories: intentionality and genetics.

The lead cases in this area come from California and Ohio, and they resolve the issues in
different ways. In Johnson v. Calvert,² the California Supreme Court resolved a dispute between
a child’s genetic/intended mother and the gestational surrogate by placing dispositive weight on
the parties’ pre-birth intentions. The Court found that "although the [Uniform Parentage] Act
recognizes both genetic consanguinity and giving birth as a means of establishing a mother and
child relationship, when the two means do not coincide in one woman, she who intended to
procreate the child -- that is, she who intended to bring about the birth of a child that she intended
to raise as her own is the natural mother under California law."³

In Johnson v. Calvert, the American Civil Liberties Union filed an amicus brief
suggesting that the appropriate outcome where both the gestational mother and the genetic mother
desired a continued relationship with the child would be to find that the child had two legal
mothers -- i.e. that the child had three parents: the father, the genetic mother, and the gestational
mother. The court declined to follow this suggestion, finding that: "Even though rising divorce
rates have made multiple parent arrangements common in our society, we see no compelling
reason to recognize such a situation here…. To recognize parental rights in a third party with
whom the Calvert family has had little contact since shortly after the child's birth would diminish
[Mrs. Calvert's] role as mother."4 “[F]or any child,” the court concluded, “California law
recognizes only one natural mother, despite advances in reproductive technology rendering a
different outcome biologically possible.”5

Since Johnson was decided, however, California has acknowledged that a child can have
two natural mothers (using the term "natural" as a term of art referring to a non-adoptive legal
mother6), in the context of registered same-sex domestic partners who give birth during their
partnership.7 Since all the rights and responsibilities of married couples now apply to registered
domestic partners under California law, this presumably includes the marital presumptions
attaching to children born during a marriage. With California now recognizing, at least in this
limited context, that a child may have two natural mothers, query whether under the right
circumstances this same principle could not be applied in the context of a surrogacy case to find
that both the gestational and the genetic mothers are legal mothers with a right to shared custody
or, at the very least, continued contact through visitation.

The potential desirability of such a result is illustrated by a subsequent California
surrogacy case, Marriage of Moschetta, in which a surrogate gave birth to a child conceived from
the surrogate's own egg fertilized with the husband's sperm. (This is sometimes referred to as
"traditional surrogacy," as opposed to "gestational surrogacy" where the woman is carrying a
baby that is not genetically hers.) In that case, the court applied the rules of Johnson v. Calvert
and determined that where the surrogate was both the genetic and the gestational mother, she was
the natural and legal mother of the child. The court went on to rule that the wife was not a legal
parent, given that she had neither a genetic nor a gestational connection to the child, despite her procreative intent.  

This case, above all other ART cases I have found, illustrates the downside of the position that children can have only two legal parents. Marissa Moschetta was intentionally conceived by a married couple, both of whom very much wanted her. However, the baby was the full biological child -- both genetically and gestationally -- of Elvira Jordan, and to find that Ms. Jordan had no legal rights would go against fundamental principals of parentage and adoption. Yet, because the child was only allowed two legal parents, when the Moschettas divorced she child lost all legal connection to Mrs. Moschetta, who had acted as her mother up to that point. Instead, custody was divided between the husband and the surrogate, the two of whom had no practical basis for sustaining a workable custody arrangement. 

I have spoken to the attorneys involved in the Moschetta case to learn the "story behind the story" and have been told that, after the court's ruling, Mr. Moschetta was able to take advantage of the class and education differences between himself and Elvira Jordan to ultimately force her out of the picture as well, with the child ending up in a different state with him as the only functional parent. Interestingly, the wife and the surrogate ended up as allies in trying to stop this from happening, but to no avail. 

How would young Marissa Moschetta's life have been different had the court ruled that she could have a legal relationship with Mr. Moschetta, Mrs. Moschetta, and the surrogate who was her genetic and gestational mother? It is, of course, impossible to know. But with the women having a cooperative relationship and the husband not, the chances certainly are much improved that Marissa would have ended up with a genuine family and not just one functional parent. And what would have been the harm in such a finding? An argument can be made that allowing more than two adults to petition the courts for custody or visitation increases the odds of litigation occurring in the first place, and adds to the complexity and contentiousness of whatever litigation does occur at the expense of the children. But not allowing all parties with a parental
interest in the child to participate in custody litigation creates a substantial risk that children will be left with some of their most important relationships unprotected by the courts. In my assessment, this risk outweighs any arguable benefits flowing from rigid adherence to a rule that only recognizes the possibility of two legal parents in a child's life.

Ohio has taken a completely different approach to determining parentage in the surrogacy context, explicitly rejecting California's intent-based analysis as too confusing and prone to uncertainty, but applying a much more rigid and inflexible approach in its stead. Ohio has chosen to rely exclusively on genetics, finding that: "The test to identify the natural parents should be, 'Who are the genetic parents?'" According to Ohio law, "when a child is delivered by a gestational surrogate who has been impregnated through the process of in vitro fertilization, the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child. If the individuals who have been identified as the genetic parents have not relinquished or waived their rights to assume the legal status of natural parents, they shall be considered the natural and legal parents of that child."

The Ohio approach may, at first glance, be attractive for its simplicity, but the issue of what constitutes a valid waiver of rights by a genetic parent in the context of ART cases can itself be complex. In a case currently pending before the California Supreme Court, a lesbian couple conceived twins using the eggs of one partner, which were fertilized in vitro with donor sperm and then implanted into the womb of the other partner. The partner providing the eggs signed a standardized "egg donor consent" form at the hospital where the procedure was done, but then brought the twins home -- along with her partner who had carried the twins -- and they raised the children together for five years. After dissolution of the partnership, the partner who carried the twins -- their gestational mother, whose name appears on their birth certificates as a result of her being the woman who gave birth to them -- alleged that the genetic mother was in fact only an egg donor, having waived her parental rights by signing the medical consent form. Whether the
signing of this standardized consent form constituted a valid, legal waiver of her rights as a genetic parent is one of the issues that the court is expected to decide when it rules on this case.\textsuperscript{12}

Further, a rule based solely on genetics seems inadequate to deal with the variety and complexity of real-life situations. For example, in a Pennsylvania case, an unmarried heterosexual couple arranged to conceive with the assistance of an egg donor and a gestational surrogate. However, the surrogacy contract failed to specify who the legal mother would be and was only signed by the biological father, the surrogate, the egg donor and the surrogate's husband. When the surrogate gave birth to triplets, the couple who had contracted for the babies failed to follow through on their obligations with regard to the care and custody of the premature newborns. The surrogate and her husband therefore stepped in, ultimately taking the babies home from the hospital and caring for them. The couple who had originally arranged for the surrogacy contested the surrogate's parental rights, based on her lack of a genetic connection to the triplets. The Court of Common Pleas of Pennsylvania found that the surrogate had assumed the status of legal mother -- despite having no genetic connection to the babies -- by her conduct in gestating and caring for the babies. As stated by the court: "A, B and C did not hatch, they were born…. D.B. [the surrogate] … like E.D. [the father's partner] is not genetically related to the triplets, but carried them in her womb and then gave birth to them. Her every decision prior to their birth has affected them -- health, nutrition, prenatal care, etc. In addition, she has not terminated any parental rights she may have to the triplets. She has instead taken the triplets into her home and cared for them along with her three other children. She is more a mother and a parent by her actions than by genetics."\textsuperscript{13}

An even greater level of complexity in determining legal parentage occurs when a couple has used both an egg donor and a sperm donor in their procreative process, and therefore are not in any way genetically related to the child. The most complex of these cases in the United States comes from California.\textsuperscript{14} In \textit{In re Marriage of Buzzanca}, John and Luanne Buzzanca wanted to have a child but both were infertile. They obtained the eggs of an anonymous egg donor, which
they had fertilized *in vitro* with the sperm of an anonymous sperm donor, and the resulting embryos were then implanted into the womb of a married surrogate. This child had six adults involved in her procreation: an egg donor, a sperm donor, the Buzzancas as “intended parents,” the surrogate, and the surrogate's husband. Then, while the surrogate was still pregnant, the Buzzancas filed for divorce. In the dissolution papers, Luanne Buzzanca indicated that the baby was a child of the marriage; John Buzzanca indicated that there were no children of the marriage, maintaining that he should not be held legally responsible for a child that was not genetically his and was not genetically his wife's and was not even being gestated by his wife. The trial court agreed with Mr. Buzzanca, finding that the baby had *no legal parents*. The Court of Appeal that heard the case disagreed, finding that when a married couple -- unable to procreate on their own -- causes the conception of a child by use of medical technology, with the intent to parent the child, they must be held to the status of legal parents regardless of genetics. (The court specifically declined to address whether its holding would apply equally to unmarried couples, and this issue is currently pending before the California Supreme Court in two cases involving same-sex couples.) This case is the ultimate illustration of why a purely genetic model, such as that adopted by Ohio, will not work in the age of modern reproductive technological advances.

The *Buzzanca* case elevated procreative intent to a new level of importance in determining legal parentage, finding that intent alone -- without any genetic or biological link -- can be enough to establish legal parentage. It has been cited by courts in other states wrestling with these issues, most recently and with most significance in Tennessee.\(^{15}\)

In the Tennessee case, an unmarried heterosexual couple in their forties decided to have children. The couple used eggs obtained from an anonymous egg donor, which were fertilized *in vitro* with the man's sperm and then implanted in the woman who subsequently delivered triplets. When the couple separated, the father asserted that he was the sole legal parent, since the woman had no genetic connection to the triplets. According to the man, she was merely a gestational surrogate. The trial court disagreed, held that the woman was the legal mother of the children,
and awarded the couple joint custody. The Court of Appeals affirmed, citing *Buzzanca*, and finding that the woman's intent to procreate created legal status as a parent.\textsuperscript{16}

In all of these cases, where the genetic parents were known and intended to raise the child, they were found to be legal parents; it is only where the genetic parents were unknown (being anonymous egg or sperm donors) that intent alone carried the day. And in all of these cases, the courts resolved all disputes by determining which *two* people involved would have legal, parental status. But the cases show a trend to factor intent into the parentage analysis in cases where procreation is the result of highly intentional conduct, such as in cases involving assisted reproductive technologies. This certainly opens the door to the possibility that where intents are murky, or where there is a clear intent to share parentage among more than two adults, the day may not be far off when courts begin to recognize three-parent families for children conceived through the use of reproductive technologies.

**B. Children Conceived by Same-Sex Couples:**

In the cases discussed above, heterosexual couples unable to conceive without medical assistance chose to use reproductive technologies to assist them in procreating. And, as noted, in each case only two persons intended to be parents. When same-sex couples choose to procreate, they necessarily need some assistance given the biological realities of conception.

Appellate courts in approximately twenty states have addressed the issue of whether the same-sex partner of a lesbian mother has a right to petition for joint custody and/or visitation, where the partner has lived with the family and stood in the role of a parent for a significant period of time but has not completed an adoption. At least 13 of those 20 states have awarded at least some degree of parental rights to non-biological lesbian mothers, relying on a variety of theories including psychological parenthood, *de facto* parenthood, *in loco parentis* and equitable parenthood.

The leading national standard for determining when a non-biological mother is a legal parent to a child born to a lesbian couple comes from Wisconsin.\textsuperscript{17} Under the test established by
the Wisconsin Supreme Court, "[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation…; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."\(^{18}\) This standard has been followed in a number of other states, most recently New Jersey.

In a lesbian custody dispute where the non-biological mother had not adopted the child, the New Jersey Supreme Court recognized the non-biological mother as a psychological parent, which the court defined as "one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult. This adult becomes an essential focus of the child's life, for he (sic) is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs." In concluding that courts must protect a child's relationship with a psychological parent, the New Jersey court cited what it termed the "thoughtful and inclusive definition of de facto parenthood" enunciated by Wisconsin. Similarly, in New Jersey, the court held that "the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged. We are satisfied that that test provides a good framework for determining psychological parenthood in cases where the third party has lived for a substantial period with the legal parent and her child."\(^{19}\)

More recently, a Colorado court of appeal found that the former domestic partner of a child's legal mother had standing to seek joint custody, based on her status as the child's
psychological parent, even though she had no legally recognized relationship with either the legal parent or the child. The court found that "proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights," and concluded that "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent...." The court went on to note that even though the legal mother had a constitutionally protected parental right and her ex-partner did not, the State of Colorado had a compelling state interest in protecting the child from the harm that would result from termination of her relationship with her psychological parent. 

Other states have reached similar conclusions. In *T.B. v. L.R.M* 21, the Pennsylvania Supreme Court found that the lesbian former partner of a child's biological mother could seek partial custody and visitation based on her standing *in loco parentis* to the child. In that case, the biological mother argued that her ex-partner did not have standing to seek visitation because she had not adopted their child. The court responded that a biological parent's rights "do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." 22

Missouri has also granted visitation rights to the lesbian ex-partner of a biological mother, noting that: "An award of custody or visitation to a non-biological parent necessarily affects the biological parent's rights of control, but a child is a person and not chattel over which a biological parent has an absolute possessory interest." The court made numerous findings -- including a finding that "Courts must re-examine the theory that a child may have only biological parents and adopt a more flexible 'functional approach,' as opposed to the traditional, stricter, 'formal approach,' for defining family." On this basis the court adopted the doctrine of "equitable parent," which it found "analogous to the doctrine of 'equitable adoption.'" The court then applied this doctrine to the facts before it and found that the ex-partner had established herself as the equitable parent of the child, and was therefore entitled to shared custody and visitation. 23
In states such as those discussed above -- which have taken the step of recognizing a child's relationship with a functional or *de facto* parent even over the objections of the legal parent -- it is interesting to query what would happen in the case of the lesbian couple with a known sperm donor, who actively fostered a strong, parental bond between their child and the donor for a period of years such as to bring him within the bounds of the Wisconsin test. Granted, in most such cases the donor could not meet the "lived with the child" prong of the tests enunciated by Wisconsin and New Jersey, making his role distinguishable from that of the mother's partner. But in a case where the donor actually lived with the family, it seems that it would be appropriate to use these same standards to determine whether the child has two parents or three. If the donor could meet the Wisconsin test, I would argue that he should have the same degree of legal rights -- to custody and/or visitation, depending on the laws of the particular state in which the family resides -- as does the second parent.

In contrast to the majority trend, California appellate courts routinely have denied non-biological lesbian mothers any recognition, although the California Supreme Court currently has a trio of cases under review that may modernize California’s approach to this issue. Another exception to the majority approach is the Vermont case of *Titchenal v. Dexter*, which predates Vermont's Civil Union statute. In that case, a lesbian couple in a committed relationship adopted an infant after they were unable to conceive via artificial insemination. Based on their understanding of Vermont law at the time, only one of them legally adopted, and the other mother remained a non-legal parent; however, they gave the child a last name made up of their hyphenated last names, they held themselves out to the child and the world as equal parents, the child called each woman "Mama," and for the first 3 ½ years of the child's life her non-adoptive mom cared for her approximately 65% of the time. Following their separation, they shared custody for another five months before the adoptive mother started to cut back on visitation with the non-adoptive mother and started to refuse financial assistance from her. The non-adoptive mother then sued for shared custody and/or visitation as a *de facto* parent. The case wound its
way all the way to the Supreme Court of Vermont, which ultimately rejected her suit, finding no "underlying legal basis for plaintiff's cause of action that would allow the superior court to apply its equitable powers to adjudicate her claim…. Notwithstanding plaintiff's claims to the contrary, there is no common-law history of Vermont courts interfering with the rights and responsibilities of fit parents absent statutory authority to do so." Invoking the "slippery slope" argument that if the non-adoptive mother were allowed visitation through court intervention, this would open the door to "various relatives, foster parents, and even day-care providers" seeking visitation against a fit parent's wishes, or to abuse of the court system by third parties seeking court-ordered visitation as a means of harassing the legal parents or forcing continuation of an unwanted relationship, the Vermont court concluded that if the pool of persons who could seek court-ordered visitation was to be expanded, it was for the Legislature to make this choice and not the courts.

This is the same position consistently taken by the appellate courts of California -- a position now under review by the California Supreme Court. The issue of how best to protect the autonomy of fit parents while protecting children raised in non-traditional families from "parentectomies" when their sole legal parent decides to unilaterally terminate their relationship with another parent is complex, and there are no easy answers. However, it is clear that children need the courts to take a more functional approach to defining the parent-child relationship, so as to protect children from losing parents solely because the children were born into families the legislatures may not have previously envisioned.

In some of the same-sex cases that come through my law practice, lesbian couples are choosing to use friends as sperm donors for the purpose of making sure their children have a bonded, loving relationship with their biological father; and gay male couples are choosing to use friends as surrogates for the purpose of making sure their children have a bonded, loving relationship with their biological mother. In some of these cases, the intent of the couple is that the couple be sole legal parents, with an amicable relationship with the other biological parent.
But in others, it is the intent of all parties that the children have a genuine parent-child relationship with all three adults involved in their conception: the biological mother, the biological father, and the partner of the one who will be primary parent. Theoretically, there could be four parents under this model, if both the biological mother and the biological father are in committed relationships, and all four intend to be parents.

I have encountered few published cases from around the country where courts have recognized more than two legal parents. But select trial courts in the San Francisco Bay Area have allowed what we refer to as "third parent adoptions" in the circumstances described above, where the child is at least five years of age and where the parties can show full bonding plus a good co-parenting arrangement among the adults. And a trial court in Pennsylvania recently granted "de facto" parent status and the accompanying rights to visitation and shared custody to the lesbian ex-partner of a woman who had married after leaving the partnership, and whose husband had adopted the child, providing that child with a legally protected relationship with her biological mother, her biological mother's husband, and her biological mother's ex-partner with whom the child had a substantial, well-established, parent-child relationship.

Interestingly, courts examining the legality of "second parent" adoptions -- where the same-sex partner of a legal parent adopts the child they are raising together without termination of the legal parent's rights -- have used the danger of these adoptions opening the door to families with more than two parents as a basis for denying or restricting the adoptions. The Supreme Court of Wisconsin raised the issue in 1994, when it denied a lesbian co-parent the right to adopt her partner's child despite acknowledging that the adoption would be in the child's best interests. The issue before the court was whether the legal rights of one or both of the birth parents had to be terminated before an adoption could occur. The petitioner in that case argued that she should be allowed to adopt with only the father's rights being terminated (who, in that case, was in full consent). In rejecting this argument, the court noted that: "If we … accept this interpretation, then [a] husband and wife could jointly adopt [a] minor without severing the ties between the
remaining birth parent and the minor. The minor would then have three parents. Subsequently, a
court could terminate the rights of one of the three parents and a second husband and wife could
jointly adopt the minor, giving the minor four parents. This process could go on ad infinitum.
Obviously, the petitioners' interpretations of [the relevant statutes] … could lead to absurd results.
This court will not construe a statute so as to work absurd or unreasonable results. In a dissent
to the California Supreme Court decision validating the "second parent" adoption procedure for
California, two of the justices of that court raised a similar concern, noting that: "Under the
majority's approach, [the relevant statute's] termination of the birth parents rights in any type of
adoption -- not merely those that seek to add a second parent -- can be waived by mutual
agreement, thus permitting a child to have three or more parents…. I cannot fathom why the
majority has deliberately chosen a rationale that is unnecessary to the disposition of this case and
that has been avoided by other jurisdictions, but I do understand and fear the effect of the
majority's additional holding: to put at risk fundamental understandings of family and parentage.
Tomorrow, the question may be: How many legal parents may a child have in California? And
the answer, according to the majority opinion, will be: As many parents as a single family court
judge, in the exercise of the broadest discretion in our law, deems to be in the child's best
interest."30

What is clear from these cases is that fear of children ending up with more than two
parents is coloring the decision-making processes in courts and legislatures around the country.
But as courts take a long, hard look at new ways of defining the parent-child relationship, it must
be recognized that children could end up with more than two legal parents using either the intent-
based approach of Johnson or the functional family approach adopted by the Wisconsin Supreme
Court. Where more than two people jointly use assisted reproductive technologies to procreate,
with the explicit intent that all of them be legal parents, there is no empirical reason why they
could not all end up with full legal, parental status. In the same way, when children are actively
and successfully parented over a period of years by more than two adults, I would argue that it is
in their best interests to provide legal protection to these multiple parental relationships on which they rely.

II. Establishing Parentage for Children Born As A Result of Extra-Marital Affairs:

Another series of cases that cries out for solutions that acknowledge the possibility of children having more than two parents are the cases involving children born as a result of extra-marital affairs. In many of these cases, children live with and are encouraged to bond with a functional father -- who may or may not be the genetic father -- for some period of time before their mothers reunite with the mothers' husbands, who then want to claim the children as their own based on traditional marital presumptions. The public policy issues are complex: do we support the child's right to a relationship with its functional and/or genetic father at the expense of the marital family, or do we support the married couple who wants to live as a nuclear family at the expense of the child having a relationship with its functional and/or genetic father?

As opposed to the other areas discussed in this article, there are United States Supreme Court cases to look to in weighing these issues. The Supreme Court has indicated, in more than one case, that an unwed father has a constitutional right to maintain a legal relationship with his child if the man has taken responsibility for the child and has an actual "substantial" relationship with the child. In other words, for unwed fathers genetics is not enough -- for the man to have a parental claim he must show genetics plus parental conduct. The Court has also approved the conclusive presumption that a child born into a marital home is a child of the marriage, whether or not the husband actually is the genetic father.

The Supreme Court wrestled with the issue of what to do when the mother is married but the child also has a "substantial" relationship with the genetic father in Michael H. v. Gerald D., and decided that it was constitutional for a state (California) to determine that the marital presumption precluded a genetic father who had lived with and parented a child for some period of time from establishing legal parentage. However, the fact that this case was decided by a
plurality of the Court, with five separate opinions filed by the nine Justices, indicates how unsettled the law is in this area.

California has two interesting Court of Appeal decisions on this issue, both of which point out the complexities involved in resolving these disputes, and both of which were ultimately decided based on the extent of bonding and the best interests of the child. In Steven W. v. Matthew S., Julie was married to Matthew. In 1986, she moved out of their marital home and moved in with Steven. She told Steven she was divorcing Matthew, but she secretly maintained an intimate relationship with Matthew on the side. In 1987, she talked with both Steven and Matthew about having a child. In May, 1987, she became pregnant while on a weekend tryst with Matthew (her husband). However, she continued to live with Steven, and she told both men that they were the father. Steven went through the pregnancy and childbirth with Julie, and fed, bathed and cared for the baby -- Michael -- after he was born. Matthew never even saw Michael until he was several months old. Julie, Steven, and Michael lived together as a family until 1990, when Steven discovered that Julie was still seeing Matthew. Steven moved out, but continued to share custody and support of Michael, and in December, 1990 he filed a court action asserting his legal paternity. Julie responded, admitting Steven's paternity of Michael. Matthew defaulted. However, Matthew subsequently moved for relief from default and, in April, 1992, the judgment was set aside. Blood tests at that time showed Matthew (the husband) to be Michael's biological father.

In this case, both Matthew and Steven qualified as presumed fathers under the Uniform Parentage Act -- Matthew because he was married to the child's mother at the time of birth; and Steven, because he received the child into his home and held him out as his natural child. The Court of Appeal resolved these conflicting presumptions in favor of preserving the extant father-child relationship between Steven and Michael. As stated by the court: "[I]n the case of an older child [over two years of age] the familial relationship between the child and the man purporting to be the child's father is considerably more palpable than the biological relationship of actual
paternity. A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved…. This social relationship is much more important, to the child at least, than a biological relationship of actual paternity." In other words, in a victory for the functional approach to defining parentage, Julie's boyfriend was found to be the legal father, in preference to Julie's husband who was the actual biological father of the child.

In the second case, Craig L. v. Sandy S., Sandy was married to Brian and Craig was a close family friend. During the spring of 2001, Sandy and Craig had a brief sexual relationship. Sandy became pregnant, and delivered a baby she and Brian named Jeffrey in February 2001. Everyone believed that Brian was Jeffrey's father until routine neonatal blood tests showed that Jeffrey was "Rh negative." Because both Sandy and Brian were "Rh positive," this discovery eliminated Brian as a possible biological father for Jeffrey. At this point, Sandy admitted the affair to Brian and explained that Craig was the only other possible biological father. The disclosure led to a brief separation, but the couple and baby were eventually reunited as a family in the marital home. However, Craig and his wife, Kathryn, participated in Jeffrey's life in the following ways: Craig signed a support agreement and made support payments to Sandy; when Sandy returned to work, Kathryn took care of Jeffrey 3-4 days per week in her and Craig's home; and when Jeffrey was a few months old the families initiated one overnight visit per week between Jeffrey, Craig, and Kathryn. Although disputed by Sandy and Brian, Craig asserts that he has held Jeffrey out to his family and friends as his natural son. Then, on March 31, 2003, Sandy sent Craig an e-mail advising him that she and Brian no longer needed the "childcare services" that Craig and Kathryn had been providing.

Craig filed a petition with the court to establish his status as Jeffrey's father based on his having brought Jeffrey into his home and held Jeffrey out as his natural child; Brian responded that because he was Sandy's husband at the time of Jeffrey's conception and birth, he was Jeffrey's presumed father under the marital presumption. The trial court ruled in favor of Brian,
noting that: "There is a strong public policy in California to maintain the integrity of the unitary
family and the welfare of Jeffrey requires a concern for Jeffrey's perceived legitimacy. The court
finds that pursuant to Statute, Decisional Law, and California's strong public policy to maintain
the integrity of a child's legitimacy, Craig does not have standing to establish a paternal
relationship." The trial court also refused Craig's motion for DNA testing to establish his genetic
link to Jeffrey, and Craig appealed.

On review, the Court of Appeal found that Craig had standing to pursue his claim of
paternity, based on his factual assertion that he meets the definitions of a presumed father under
the "holding out" provisions of the Uniform Parentage Act. Brian also has standing to pursue a
paternity claim based on the marital presumptions. There is no statutory preference between
these two claims. As stated by the Court of Appeal, "we have found no case which holds that …
the state's interest in marriage will always outweigh the interests of a man and a child with whom
the man has established a paternal relationship…." The case was then remanded to the trial court
for it to engage in a fact-finding process to determine the nature of Craig's actual relationship
with Jeffrey, and to weigh that relationship against the interests embodied in Brian's status as
Sandy's husband and his relationship with Jeffrey. "[I]n weighing the conflicting interests … the
trial court must in the end make a determination which gives the greatest weight to Jeffrey's well
being."

The importance of assigning legal paternity to someone becomes particularly clear in
cases where men who believed themselves to be the genetic fathers of the children they raised
later turn out not to be. There are many such cases, from around the country, and they are
becoming increasingly controversial as some of these men fight to be relieved of support
obligations for children who turn out not to be genetically theirs. However, many men who are
determined not to be genetic fathers want to continue in the paternal role, and most states
reviewing these cases have supported them. For example, in Atkinson v. Atkinson, the Court of
Appeals of Michigan found that a husband who was proven during divorce proceedings not to be
the biological father of his wife's minor child, whom he had parented for over three years, could nevertheless be found to be the child's full, legal parent over the mother's objection on a theory of equitable parenthood. As stated by the Michigan court: "a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child 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 over a period of time prior to the filing of the complaint for divorce, (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."

In a comparable case, Wisconsin reached a similar result while explicitly rejecting the doctrine of "equitable" parenthood. That case involved a child (Selena) born to a married Wisconsin woman as the result of an on-going affair she was having in the state of Illinois during supposed business trips to Chicago. The child was raised in Wisconsin by the woman and her husband -- Norma and Randy -- and Randy only found out that he was not Selena's biological father during divorce proceedings he instituted after Norma's incarceration for embezzlement. As recited by the Wisconsin Supreme Court: "Randy and Norma lived together as husband and wife when Selena was born. Randy has provided for Selena since her birth, emotionally and financially. He has made a home for her and provided her with the status of a marital child for six years, while [the biological father] has been uninvolved in providing for her daily needs. Accordingly, we conclude that [the biological father] has not demonstrated a constitutionally protected liberty interest in his putative paternity because he has failed to establish a substantial relationship with Selena." The court went on to find that Randy was Selena's legal father, based on Wisconsin's marital presumptions, but declined to adopt the "equitable parent" doctrine as many other states have done "because its parameters are too indistinct, permitting its use to create uncertainties in the law."
All of these cases turned on the best interests of the children involved. By way of contrast, see *Petition of Ash*, where the Iowa Supreme Court found that a man who -- along with the child's mother -- had lived with and raised a child, bathing and feeding the child and changing her diapers when she was a baby, and providing on-going psychological, emotional and financial support including paying school tuition and providing health and dental insurance for the child as she matured, was nevertheless a legal stranger to the child, with no right to custody or visitation. As stated by that court: "[I]n the legal sense, James is a stranger to the child. He is an interested third party. He is not the child's biological father. He is not her adopted father. He is not her stepfather. He is not her foster parent. He never married the child's mother. He is merely a man who lived with -- and cared for -- her mother, and who, understandably, became smitten with fatherhood after the child's birth…. It is apparent that James loves the child. He treats her like his daughter. He has, since her birth, assumed the responsibilities and -- until his visitation was cut off -- enjoyed the privileges of fatherhood. Up to the time visitation was interrupted, James and the child unquestionably enjoyed an appropriate, nurturing, father-daughter relationship. Nevertheless, James has no legal basis for asserting parental status." James therefore was denied any future contact with the child, except at the whim of the mother.\(^{38}\)

There are many court decisions such as the ones cited above, from states around the country, which offer examples of the complexities found when children are conceived during extra-marital affairs. When read together, it is clear that the purely genetic approach of states such as Iowa cannot adequately protect children who only have two parents, much less protect children in more complicated situations. In other states, where courts take intention and conduct into account along with genetics, children's needs are more likely to be met. This includes children with two functional parents, and also includes children who may have more than two parents through intent and/or parental conduct.

I have found only one published case where the court reviewing a conflict between two potential fathers found that the solution that best met the needs of the child was to legally protect
the child's relationship with both men. In *McDaniels v. Carson*, the Supreme Court of Washington reviewed a paternity action brought in the context of a case where a child's mother had alternatively cohabited with two men, to one of whom she had been married for some of the time, and either of whom could be the child's biological father. The child had a substantial, parent-child relationship with each man. In resolving the case, the court allowed the paternity action by the non-husband, but stated: "[I]n light of [the child's] strong relationship with both appellant and respondent and the genuineness of their affection, we accept the recommendation of the guardian ad litem that it would be in [the child's] best interest to preserve her relationship with each. Regardless of the outcome of the paternity determination, either party will be entitled to petition the trial court for visitation rights."  

What I conclude from my survey of the cases is that much of the danger to children engendered by the present system involves the insistence of courts on clutching at overly rigid approaches to determining parentage that do not allow for the full range of human procreative and parental conduct. And one basis for this rigidity is an almost obsessive fear of recognizing what is an undeniable reality of our society: that some children have more than two parents. The inflexible position of our state courts that where there are three people standing in a clear, parental role -- each with valid claims to parentage based on either genetics plus parental conduct or membership in an intact marital family -- there nevertheless can be only two legal parents is based on a historical perspective that may no longer be valid. The children in *Michael H.* and *Craig L.* would have been well-served by a finding that they had more than two parents. In *Michael H.*, the child formally joined with the genetic father in requesting that his relationship with her be legally recognized; and the court could have done this without undermining the public policy of supporting the marital family by acknowledging the factual reality that this child had three parents. In *Craig L.* the facts strongly suggest that the child had been encouraged to form a bonded, parental relationship with four adults, given that Craig's wife was the one who actually
stayed home with the child during the days when Craig, Sandy and Brian were all at work -- thus, that child arguably should be found to have four legal parents.

Understanding that legal parentage does not guarantee custodial parentage, assigning legal status to all the functional parents in a child's life would not necessarily require that a child be moved around among multiple homes for custody purposes. Instead, what it would accomplish would be to allow courts to engage in a best interests analysis that is never reached when some parties who have acted as parents are denied any legal recognition. It thereby would ensure that many more children would have continued access to all the people with whom they have formed significant, parental attachments; and both the public policies of respecting genetic connections and supporting marital families could still be served. The current insistence on resolving all parentage disputes in favor of a child having only two legally recognized parents is a "lose-lose" proposition in these cases, and should be reexamined.

III. Conclusion:

When courts and/or legislatures seek to define legal parentage outside the context of "traditional" families, many factors come into play. Clearly, there are competing public policy concerns that have to be addressed. However, using the three basic factors of genetics, procreative intent, and parental conduct as guides, it is worth looking at whether limiting children to only two legal parents in each and every circumstance is in fact in their best interests. While recognition of more than two legal parents should be limited to cases where the specific facts regarding genetics, procreative intent, and parental conduct clearly encourage this result -- so as to avoid unnecessarily exposing children to the risk of overly complex and contentious custody disputes -- where the facts support a finding that there are three functional parents, at least two of whom are the genetic and/or intended parents, the courts should be open to considering this option.
1 The most recent version of the Uniform Parentage Act, approved by the American Bar Association in 2003 and now being circulated by the National Conference of Commissioners on Uniform State Laws, has abandoned use of the term "surrogate" in favor of the term "gestational mother." As explained in their Comment to Section 102: "For purposes of this Act, a woman giving birth to her own genetic child, a.k.a. 'birth mother,' is distinguished from a 'gestational mother.' The former is both a gestational and genetic mother, while the latter also gives birth to a child, who may or may not be her genetic child. In the Act the term 'gestational mother' is narrowly defined to restrict it to a situation in which a woman gives birth to a child pursuant to a gestational agreement….”


3 Id. at 94.

4 Id. at 92, fn. 8.

5 Id. at 92.

6 The issue of what, exactly, the California Supreme Court meant by the use of the term "natural mother" in Johnson v. Calvert was raised in a trio of lesbian custody cases now pending before that court. During oral arguments, counsel for the biological mother on one of the current cases argued that by "natural" the court meant "biological," while most other attorneys appearing in the cases agreed that the term "natural parent" -- as used by the California courts and legislature -- simply means a non-adoptive legal parent, whether genetically related to the child or not. See K.M. v. E.G. (2004) previously published at 118 Cal.App.4th 477; Elisa Maria B. v. Superior Court (2004) previously published at 118 Cal.App.4th 966; and Kristine Renee H. v. Lisa Ann R. (2004) previously published at 120 Cal.App.4th 143.

7 See the Domestic Partner Rights and Responsibilities Act of 2003 (AB 205), codified at Family Code section 297.5, which provides in part (a) that: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses. Part (d) goes on to expressly provide that: "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."

8 In re Marriage of Moschetta (1994) 25 Cal.App.4th 1218. See also Matter of Baby M. (1988) 109 NJ 396 where the New Jersey Supreme Court reached a similar decision, determining that the husband/genetic father and the surrogate were the child's legal parents and awarding custody to the genetic father but providing visitation to the surrogate based on her genetic and gestational relationship with the child

9 Id. at 1222.


11 Id. at 767.


16 See also McDonald v. McDonald (N.Y.App.Div. 1994) 196 A.D.2d 7, where New York reached a similar conclusion.


18 Id. at 421, footnote omitted.


27 Other courts, however, have declined to do so on the grounds that they just would be setting children up for uglier, more complex custody litigation in the occasion of a disagreement among the various parents.

28 See, KDP v. TPW, Court of Common Pleas of Montour County, Pennsylvania, No. 192 of 2004, Opinion of June 25, 2004, where the court found that the lesbian ex-partner of a child's biological mother -- who had not been given notice or an opportunity to be heard at the proceeding where the mother's new husband adopted the child -- had standing to proceed with a custody action for the child, with whom she had resided in a parent-child relationship for over four years, based on her in loco parentis relationship with the child.

29 In the Interest of Angel Lace M. (1994) 184 Wis.2d 492, 513, 516 N.W.2d 678, 684.


34 See California Family Code §§ 7611(a), 7611(d).


38 Petition of Ash (1993) 507 N.W.2d 400.