THREE MODELS FOR REGULATING MULTIPLE PARENTHOOD

A Comparative Perspective

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1. INTRODUCTION

How many parents can a child have? This timeless family law question demands new answers in light of the rapid changes that family law has undergone in western jurisdictions over the years.[1] The current rules regulating parenthood across many European jurisdictions can be traced back to the same archetype: a married opposite-sex couple that raises their biological child under the same

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[1] Especially as it became increasingly child-centred, see J.M. SCHERPE, 'Breaking the existing paradigms of parent-child relationships' in G. DOUGLAS et al. (eds), *International and National Perspectives on Child and Family Law*, Intersentia, 2018, pp. 343–59, at p. 345. For an overview of these developments, see inter alia M. ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective*, Intersentia, 2006; J.M. SCHERPE, *The Present and Future of European Family Law*, EE, 2016; P. SERVAIS, 'Historical Insights – The historic evolution of the place of the child in his or her family' in J. SOSSON et al. (eds), *Adults and Children in Postmodern Societies*, Intersentia, 2019, pp. 625–40, at pp. 625, 634ff.

roof. Traditionally, maternity is assigned to the person who gives birth,[2] relying on the Roman maxim 'mater semper certa est'. On the other hand, ascribing paternity has been mediated by the father's relationship to the mother, with the most prominent example being the marital presumption of paternity.[3] However, that archetype is increasingly outdated, not only in the practices and realities of parenting on the ground, but also within the spectrum of family formats now recognized in the law.

In recent years, family law across Europe has undergone rapid developments that have challenged these traditional grounds for ascribing parenthood and contributed towards unpicking the constituent elements of this archetype. The introduction of divorce, which did not occur in certain jurisdictions until the late 20th and even early 21st century,[4] and the ensuing gradual liberalization of divorce laws[5] meant that an increasing number of children were now raised by separated parents or by a parent and their new partner. Coupled with rising social acceptance of divorce and a change in legal recognition and societal attitudes towards children born out of wedlock, marriage is no longer viewed as the bedrock of the family[6] – and thus, its central position in the framework of determining paternity is reconsidered.

At the same time, the advent of accurate DNA testing has led to a recalibration of the importance of the genetic connection between father and child and introduced a separate basis both for claiming and for denying paternity.[7] Working in the opposite direction, rapid medical advances in assisted reproduction have challenged the significance of a genetic or gestational connection for establishing parenthood. Gamete donation and surrogacy, both of which remain controversial and indeed not allowed in several European jurisdictions,[8] have nonetheless made it possible for someone to be the legal parent from birth to a biologically unrelated child. It is now possible for a person to carry a pregnancy

2 See e,g. in Germany – Bürgerliches Gesetzbuch (BGB) §1591: '*Mutterschaft. Mutter eines Kindes ist die Frau, die es geboren hat*'; in England – The Ampthill Peerage Case [1977] AC 547; in France – Code Civil Article 310-3: '*La filiation se prouve par l'acte de naissance de l'enfant, par l'acte de reconnaissance ou par l'acte de notoriété constatant la possession d'état*'; in Greece – Article 1463 Civil Code.

3 This again dates back to Roman law and the maxim 'pater is est quem nuptiae demonstrant' – the father is he whom the marriage demonstrates. See Dig. 2.4.5.

4 Divorce in Italy was introduced in the 1970s, in Spain in the 1980s, in Ireland in the 1990s, and in Malta only in 2011.

5 See M. Antokolskaia, 'Divorce law in a European perspective' in J.M. Scherpe (ed.), *European Family Law Volume III – Family Law in a European Perspective*, EE, 2016, pp. 41–81.

6 S. Day Sclater et al., 'Introduction' in A. Bainham et al. (eds), *What Is a Parent? A Socio-Legal Analysis*, Hart, 1999, pp. 1–22, at pp. 1, 15.

7 R. Mykitiuk, 'Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies' (2001) 39 *Osgoode Hall Law Journal* 771, 783.

8 See, e.g., C. Fenton-Glynn and J.M. Scherpe, 'Surrogacy in a Globalised World' in J.M. Scherpe et al. (eds), *Eastern and Western Perspectives on Surrogacy*, Intersentia, 2019, pp. 515–92.

and give birth using someone else's egg, challenging the unavoidability of the genetic connection between mother and child that arguably underlies the 'mater semper certa est' rule. It is also possible for a child to be born with a genetic connection to more than two persons, via mitochondrial donation,[9] which brings fresh challenges to the centrality of the genetic link for establishing parenthood.

Finally, increasing legal recognition of new family formats has diversified our conceptions of what a parent can look like in the eyes of the law. Same-sex relationships and parenthood have steadily gained recognition across Europe,[10] and along with recent legal debates on trans parenthood[11] and intersex[12] and non-binary individuals, they have challenged the importance of gender in determining parenthood. Emerging attention to other pathways to parenthood, such as co-parenting,[13] living apart together and polyamorous relationships, are bound to present their own unique challenges.

Within this context, our conceptions of parenthood keep evolving in order to accommodate these new realities, albeit in a patchwork fashion. However, one key aspect of this traditional parenthood paradigm remains largely unquestioned: that of the maximum number of two parents. Yet in light of our evolving conceptions of who can be a parent, it is important to open up this pivotal question: can a child have more than two parents? And if so, how should this be regulated? This chapter aims to explain the topicality of recognizing

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9 See J. Miles et al., *Family Law: Text, Cases, and Materials*, OUP, 2019, p. 659; P-L. Chau and J. Herring, 'Three parents and a baby' (2015) *Family Law* 912. It is also possible to have three genetic parents via ooplasm transfer: see H. Abraham, 'A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents' (2017) 25(4) *Journal of Gender, Social Policy & the Law* 405, 417.

10 This has led to the expansion of current rules in order to accommodate same-sex couples, including the marital presumption of 'paternity' – or, in the case of same-sex couples, of second male or female parenthood. Two years after Obergefell, the US Supreme Court issued its judgment in *Pavan v. Smith* [137 S. Ct. 2075 (2017)], which held that same-sex spouses had the same right to be listed as parents on a child's birth certificate as opposite-sex spouses did, which means that states should either allow same-sex spouses to be listed on the child's birth certificate, or deprive opposite-sex couples of that right.

11 See A. Margaria, 'Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?' (2020) 43(3) *International Journal of Law, Policy and the Family* 225. In the context of England and Wales, see *Re TT and YY* [2019] EWHC 1823 (Fam) and the subsequent Court of Appeal judgment *R (McConnell and YY) v. Registrar General* [2020] EWCA Civ 559. For a critique of the controversial decision, see C. Fenton-Glynn, 'Deconstructing Parenthood: What Makes a "Mother"?' (2020) 79 *Cambridge Law Journal* 34. By contrast, see *X, Y and Z v. the United Kingdom* – 21830/93 [1997] ECHR 20 [GC], 17, where the European Court of Human Rights found that the UK's refusal to register a trans man as the father of the child born to his partner through artificial insemination by a donor, reasoning that 'only a biological man could be regarded as a father for the purposes of registration', did not violate the applicants' rights under Article 8 of the European Convention on Human Rights.

12 For an overview, see J.M. Scherpe et al. (eds.), *The Legal Status of Intersex Persons*, Intersentia, 2018.

13 As Abraham puts it, 'co-parenting does not only illustrate how "it takes a village to raise a child", but also that it sometimes creates the village': H. Abraham, above n. 9, p. 418.

multiple parenthood and explore the ways in which it can be regulated, identifying three models currently applied in law: the functional approach, the 'best interests' approach and the 'private autonomy' approach.

2. THE IMPORTANCE OF REGULATING MULTIPLE PARENTHOOD

2.1. PARENTAGE, PARENTHOOD AND PARENTAL RESPONSIBILITY

Before turning to cases where multiple claims to *parenthood* can arise, it is important to distinguish between three different concepts: parentage, parental responsibility and parenthood.[14] Parentage denotes a genetic or biological link to a child.[15] This usually means contributing the genetic material, which until recently included the egg and sperm, but can now include some genetic material passed on through mitochondrial donation. Importantly, the biological contribution of gestation can also be included in the scope of parentage, so that the surrogate birth parent in cases of full surrogacy can claim biological parentage.

Parental responsibility is usually defined as the bundle of rights and duties included in the day-to-day parenting of a child, although its exact scope and modes of exercising it (jointly or independently)[16] may differ across jurisdictions.[17] Parental responsibility typically includes daily acts of taking care and providing support for the child, both materially and emotionally, as well as making important decisions that can range from schooling or relocating the child to providing consent for medical treatment. It is important to note that parental responsibility has evolved over the years from the adult-centric parental (or, rather, paternal) *authority*, which reflected the Roman 'patria potestas' and focused on the rights of the parent over the child, to the child-centric notion of

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[14] A. Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A. Bainham et al. (eds), *What is a Parent? A Socio-Legal Analysis*, Hart, 1999, pp. 25–46; J.M. Scherpe, 'Breaking the existing paradigms of parent-child relationships', above n. 1.

[15] Note that in the US and Canadian jurisdictions examined in this chapter, the term 'parentage' is used rather than 'parenthood'. See, e.g., Connecticut, Sec. 46b-451. Definitions. (15) '"Parentage" or "parent-child relationship" means the legal relationship between a child and a parent of the child'; '"Parentage" means the legal relationship between a child and a parent as established in this chapter' Me. Stat. tit. 19-A §1832.

[16] J.M. Scherpe, 'Parental Responsibility – To Consult or Consent, is that the Question?' in J.M. Scherpe and S. Gilmore (eds), *Family Matters – Essays in Honour of John Eekelaar*, 2022, pp. 637–53.

[17] See Commission on European Family Law, *Principles of European Family Law Regarding Parental Responsibilities*, 'Chapter V: Content of Parental Responsibilities', Intersentia, 2007, pp. 119–63.

parental *responsibility*, which places emphasis on the best interests of the child at the core of the respective duties and rights of the parent.

Finally, legal parenthood is the overarching legal position of being a parent to a child. This may or may not include parental responsibility, but it will routinely provide a pathway to it. Parenthood is an important and lifelong legal status which provides the highest degree of legally binding commitment for both parent and child. It determines lineage and can have significant consequences in other areas of law, which may include citizenship, immigration, succession, healthcare, tax, consent to adoption, participating in major decisions in a child's life such as relocating abroad etc. As such, it is hard to strip a parent of it – as a rule, a parent must lose parenthood before someone else can acquire it, as in the case of adoption. Therefore, making the leap to break the two-parent paradigm and recognize parenthood across more than two persons without requiring a determination of unfitness of an existing legal parent is a pivotal milestone for any jurisdiction, with an impact not only in family law but also in other areas of law.

2.2. MULTIPLICATION OF POTENTIAL PARENTAL TIES

The recent medical, social, and legal developments that have challenged the traditional grounds for assigning legal parenthood have given rise to competing claims to parenthood. These claims can rest on various sources across the currently recognized potential bases for ascribing parenthood, and can include one or more of them: a genetic or gestational/biological link, legal presumptions, social/psychological parenthood and intention. Intention has routinely been recognized as a potential basis for parenthood in the context of adoption, which dates back to Roman law,[18] but its scope was significantly expanded within the context of assisted reproduction, as it claims priority over a genetic or gestational contribution. As will be shown below, social parenthood and intention are particularly important in the context of multiple parenthood.

In contemporary realities of parenthood, it is not difficult to imagine case studies where more than two people can claim a parental status in a child's life.[19] Diverse pathways to parenthood have been practiced for a long time within the LGBTQ+ community, with same-sex couples often turning to a friend or same-sex couple of the opposite sex to produce a child, with or without a mutual understanding that everyone will be involved – sometimes to varying degrees – in raising the child. Yet multiple parenthood is hardly an issue that is exclusive

[18] T. Parkin, 'The Ancient Family and the Law' in L. Kassell et al. (eds), *Reproduction: Antiquity to the Present Day*, CUP, 2018, pp. 81–94, at p. 88.

[19] See also G. Motte, 'Multiplication of Potential Social and Emotional Ties' in J. Sosson et al. (eds), *Adults and Children in Postmodern Societies*, Intersentia, 2019, pp. 793–823.

to queer parents.[20] Both assisted reproduction and family reshuffling makes multiple parenthood particularly pertinent for both queer and 'traditional' families.

In assisted reproduction, claims to parenthood can rest on genetic contributions, gestation, legal presumptions and the intention to be a parent. Taking the example of surrogacy, any two of the following people can claim parenthood at birth, depending on the rules governing surrogacy in a specific jurisdiction: the surrogate and their spouse/partner, if they have one (based on gestation and legal presumption); the persons who provided the sperm and the eggs (based on their respective genetic contributions); and the intended parent or parents (based on intention). This immediately yields up to six potential parents for the child, depending on the legal basis that is prioritized.

Yet multiple parenthood can also easily arise in the case of natural reproduction. Take the example of a mixed-sex couple who split up and continue to raise their biological child amicably and cooperatively with each other. It is very common for a new partner or partners to enter the family landscape and participate in parenting the child – perhaps to a larger degree than one of the legal parents. Yet for that new partner to acquire parental status, a previous legal parent must lose it, which might go against both the social reality of more than two people parenting the child and be against the wishes of all parties involved.

Recognizing multiple parenthood can offer protection to the child as well as the non-legally recognized parent. While the relevant legal debates are often meddled with concerns about the potential for greater conflict when more than two people are recognized as parents, research has shown that recognizing multiple parenthood can help resolve conflict and introduce more stability and protection for the child by providing legal recognition for a situation that is already happening on the ground.[21] Imagine a case where a child has been exclusively cared for since birth by the maternal aunt, while both the mother and the father (who split up with the mother shortly after birth) have been absent. If the father returns when the child is already a few years old and wishes to take over exclusive parenting over the child, there is nothing the maternal aunt can do to avoid this, even though she has been the only 'parent' the child has ever known. She might be able to claim some limited contact rights, but not much else, absent a legal framework that can recognize her claim to parenthood on par with that of the father's.

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[20] See C. Joslin and D. Nejaime, 'Multi-Parent Families, Real and Imagined' (2022) 90 *Fordham Law Review* 2561, 2567ff.

[21] C. Joslin and D. Nejaime, above n. 20, p. 2582, who note that 'an examination of West Virginia case law shows that courts are confronted with families in which recognition of a third (or fourth) parent would promote, rather than undermine, children's interests. That is, multi-parent recognition can make the lives of the children in these cases more stable and less conflictual – exactly the opposite of what many commentators assume multi-parent recognition will yield'.

Although it is reasonable to assume that the current two-parent model will be able to sufficiently accommodate the realities of most families, these examples highlight the significance of a legal framework that allows the option of recognizing more than two legal parents. Across European jurisdictions, the law has so far prioritized the claims to legal parenthood of up to two people, at the expense of other potential parents.[22] Thus, different answers may be given in each jurisdiction. For example, when a female same-sex couple uses a friend's sperm to conceive, it will either be the female partner (who is not the birth mother) or the sperm donor who will be recognized in law as the second parent, but not both. Yet this is not the only way to deal with competing claims to parenthood. Several jurisdictions in the US and Canada have now introduced rules that allow recognition of legal parenthood across more than two people.[23] Employing a comparative approach to examine their respective legal frameworks can allow us to draw helpful conclusions about the different potential models on how to regulate multiple parenthood.[24] One key categorization is the rationale upon which recognition of multiple parenthood will rest. This can vary across three main strands: the functional approach, the 'best interests' approach and the 'private autonomy' approach.

3. THREE MODELS FOR REGULATING MULTIPLE PARENTHOOD

A comparative look into North American jurisdictions that regulate multiple parenthood in law[25] can lead us to identify three different approaches. The jurisdictions of Delaware and Maine in the US rely exclusively on the doctrine

22 See K. Baker, 'Bionormativity and the Construction of Parenthood' (2008) 42 *Georgia Law Review* 649, 671–91, for further arguments on why binary parenthood has prevailed in the US.

23 This chapter focuses on Delaware, Maine, California, Connecticut, Vermont and Washington in the US, and British Columbia and Ontario in Canada. It should also be noted that the 2017 Uniform Parentage Act includes an alternative that allows states to recognize multiple parents: see Uniform Parentage Act §609 (Unif. L. Comm'n 2017); S.B. 1133, 192d Gen. Ct. (Mass. 2021).

24 This chapter focuses on jurisdictions that regulate multiple *legal parenthood*. There is another way to deal with competing claims to parental status, which is to retain the two-parent paradigm, but recognize multiple holders of *parental responsibility*, as in the jurisdictions of England and Wales, and Finland. On the different conceptions of parental responsibility that allow English law to allocate it to more than two parties, see J.M. Scherpe, 'Parental Responsibility: To Consult or Consent, is that the Question?', above n. 16, pp. 637, 639–41. Abraham also distinguishes between 'egalitarian' (where 'all [multiparents] perceive themselves as having the same status, rights and obligations') and 'hierarchal' structures of multiple parenthood (where some individuals have a full parental status and others 'a more limited standing'): see H. Abraham, above n. 9, p. 407.

25 As opposed to those where more than two parents may be recognized by court decision: see, e.g., the case law examined by C. Joslin and D. Nejaime, above n. 20.

of 'de facto' parenthood to regulate multiple parenthood, which rests on a functional conception of parenthood.[26] This is close, but adequately distinct, to the approach adopted by the jurisdictions of California, Vermont, Washington and Connecticut, which focuses on the best interests of the child. Finally, the Canadian jurisdictions of British Columbia and Ontario have taken a completely different approach and introduced a multiple parenthood system that relies on private pre-conception agreements.

3.1. THE FUNCTIONAL APPROACH

The rationale of the functional approach is the recognition of an *existing parent-like relationship* between the child and a third party beyond the two legal parents. In that sense, this approach is retrospective, looking into the past and leading up to the present, in order to establish that a relationship exists which bears the hallmarks of a parent-child relationship. Whether or not that is the case is a substantial question that requires an evaluation of the facts, which is why a judicial determination is needed to confer de facto parenthood. In both Delaware[27] and Maine,[28] which are the two jurisdictions representative of this

[26] The jurisdiction of the District of Columbia also recognizes a de facto parent in addition to two parents, but this recognition affects specific areas regarding custody, alimony and maintenance, does not confer full parenthood. See Code of the District of Columbia, Chapter 8A, §16–831.03 (2022).

[27] Del. Code Ann. tit. 13, 8-201(c) (2021): 'De facto parent status is established if the Family Court determines that the de facto parent: (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent; (2) Has exercised parental responsibility for the child as that term is defined in §1101 of this title; and (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature'.

[28] Me. Stat. tit. 19-A §1853 (2) (2022): 'Preservation of parent-child relationship – Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents' and §1891 '1. De facto parentage. The court may adjudicate a person to be a de facto parent. 2. Standing to seek de facto parentage. … 3. Adjudication of de facto parent status. The court shall adjudicate a person to be a de facto parent if the court finds by clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life. Such a finding requires a determination by the court that: A. The person has resided with the child for a significant period of time; B. The person has engaged in consistent caretaking of the child; C. A bonded and dependent relationship has been established between the child and the person, the relationship was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child; D. The person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and E. The continuing relationship between the person and the child is in the best interest of the child. 4. Orders. … 5. Other parents. The adjudication of a person under this subchapter as a de facto parent does not disestablish the parentage of any other parent'.

approach, it is the court that will determine whether the requirements for de facto parenthood are met.

In contrast to the best interests approach, which will be outlined below, the functional approach sets out strict requirements that must be met for a person to be recognized as a de facto parent.[29] These requirements include *substantial* conditions related to the nature of the relationship and the exercise of care over the child; a *temporal* condition related to the amount of time for which the relationship has existed; a '*parental consent*' condition related to the stance of the existing legal parent or parents with regard to the formation of this relationship; and a requirement that this recognition is in the *best interests* of the child.

The first set of requirements relates to the nature of the relationship developed between the parent and the child, which according to both jurisdictions must be 'bonded and dependent', echoing the law's understanding of what it means to be a parent. The Delaware code further requires that this bonded and dependent relationship be 'parental in nature', while the Maine statute goes further into detail in its wording, requiring that that the de facto parent 'has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life'. The de facto parent must have cared for the child – a requirement that is framed in terms of exercising parental responsibility over the child in the Delaware code. In that same vein, the Maine statute requires that the de facto parent must have engaged in 'consistent caretaking' of the child and must have 'accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation'.

A second important condition is a temporal requirement that the relationship must have existed for a 'significant' or 'sufficient' amount of time. It is noteworthy that neither jurisdiction provides for a specific threshold, for example one year. Instead, they leave this evaluation to the court. This might better reflect the realities of de facto parenthood, where the de facto parent gradually assumes an increasingly parental role, making it difficult to pinpoint a specific date when the relationship transformed into a parental one. However, under the Maine statute there is a specific point of reference: the de facto parent must have *resided* with the child for a significant period of time. Under the Delaware code, which includes no such requirement, the temporal element is instead framed in terms of *acting in a parental role* for a length of time sufficient to establish a bonded, dependent and parental relationship with the child.

Finally, a third condition, and one that again sets the functional approach apart from the 'best interests' approach, is that this parent-child relationship must have been formed with the consent and support of another parent of the

[29] See, e.g., the wording of the Maine statute: 'The court shall adjudicate a person to be a de facto parent if the court finds *by clear and convincing evidence* that …' (emphasis added).

child.[30] This requirement puts the existing parent in a powerful position, as they are in charge of who can be allowed to develop a parental relationship with their child, presumably adding a protective layer for the child. However, this is again formulated as a retrospective requirement, meaning that the parent might have now changed their mind and oppose the recognition of the de facto parent. It is notable that while this is an important requirement, it is the only one where the existence of a de facto parental relationship is mediated through the relationship of the de facto parent with another parent. There are no further requirements in either jurisdiction that the de facto parent be a partner or a relative of the parent, nor are there any limitations on who *cannot* be a de facto parent, for example relatives of the parent(s) who already have kinship to the child. There is also no explicit maximum number of parents that can be recognized by the court.

One issue that is handled differently in these two jurisdictions is the matter of shared residence between the de facto parent and the child. While the Maine statute requires that the de facto parent has *resided* with the child for a significant period of time, the Delaware code makes no such mention, allowing the courts to be more flexible in their determination. Finally, the Maine statute explicitly requires the courts to take into account the best interests of the child, while the Delaware code does not include such a provision.[31] Unlike within the 'best interests' approach, in the functional approach the best interests of the child is simply one of the elements considered by the court, rather than being the overarching consideration.

The functional approach focuses firmly on the reality on the ground, paying equal attention to all three parties involved: the de facto parent, the child and the existing legal parent(s). In order to establish functional parenthood, requirements that are related to all three must be met, including the exercise of functional parenthood by the de facto parent (and its constituent elements, notably a bonded and dependent relationship, and the exercise of care over the child); the best interests of the child; and the consent/support of the other parent(s). The functional approach affords the courts flexibility and increases protection for both child and de facto parent. However, while its inherently

[30] The Delaware code states that the de facto parent must have had 'the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent'. The Maine statute requires that 'the relationship was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child'. The consent of one parent suffices, as the Maine statute provides for the opportunity for an 'adverse party, parent or legal guardian' to oppose the person who petitioned the court for recognition of their de facto parenthood.

[31] By contrast, the Delaware code makes explicit mention to the best interests of the child as a guiding principle for the court in the context of legal custody and residential arrangements – see Del. Code Ann. tit. 13, §722 (2021).

comparative nature can allow the courts the flexibility needed to recognize new ways to parent a child that are *similar enough* to those already recognized in law, it can also conversely serve to gatekeep and restrict our conceptions of parenthood *only to those that are already similar* to parenthood as we already know it.[32]

3.2. THE BEST INTERESTS APPROACH

The best interests approach is not conceptually completely unrelated to the functional approach. As was mentioned, the best interests of the child form part of the court's determination under the functional approach. However, in the best interests approach, this element is brought to the forefront and forms the single most important determination by the court. Therefore, one important distinction between the two approaches is that the various elements considered by the court are not strict requirements – as in the functional approach – but mere indicators to determine where the child's welfare lies. This includes the support and consent of the other parent(s), which means that under the best interests approach the existing legal parent(s) is no longer in such a powerful position as in the functional approach: they might have opposed the development of a parental relationship between the potential parent and the child from the start, but this is something that the court may simply take into account, and its ruling on whether to recognize parenthood will not rest on this. In fact, in none of the jurisdictions examined here as representative of the best interests approach is the consent or support of an existing parent explicitly required in order to establish multiple parenthood, albeit in the jurisdictions of Washington,[33] Vermont[34]

[32] See A. Diduck, 'If Only We Can Find the Appropriate Terms to Use the Issue Will Be Solved: Law, Identity and Parenthood' (2007) 19 *Child and Family Law Quarterly* 458, for arguments on the risk of assimilation and normalization in the context of lesbian couples, which could also be applied to the case of multi-parent families. For example, she notes that 'lesbian parent families emphasise their normality, but while courts interpret that emphasis and claim to normality by promoting their formal equality with heterosexual families, they normalise them, pre-empting innovations in the legal imagination and inhibiting the possibility of forging new constructs' (at p. 480).

[33] Wash. Rev. Code §26.26A.440(4)(f) (2022) 'In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by a preponderance of the evidence that: … (f) Another parent of the child fostered or supported the bonded and dependent relationship required under (e) of this subsection …'.

[34] Vt. Stat. Ann. tit. 15C, §501 (2022) '(a)(1) In a proceeding to adjudicate the parentage of a person who claims to be a de facto parent of the child, if there is only one other person who is a parent or has a claim to parentage of the child, the court shall adjudicate the person who claims to be a de facto parent to be a parent of the child if the person demonstrates by clear and convincing evidence that … (F) the person and another parent of the child fostered or supported the bonded and dependent relationship required under subdivision (E) of this

and Connecticut[35] it is needed under the separate provisions that regulate de facto parenthood specifically. Rather than an equal consideration of all three parties under the functional approach, in the best interests approach it is the child and its welfare that is elevated above all else. Therefore, while in the jurisdictions examined here de facto parenthood can be one pathway to multiple parenthood[36] and relevant laws demonstrate similarities across the functional and the best interests approaches, it is feasible to categorize a specific jurisdiction as falling within one rather than the other.

The jurisdictions chosen here as representative of the best interests approach are California,[37] Vermont,[38] Connecticut[39] and Washington.[40] Out of those, California is the most clear example of the best interests approach, while Vermont, Connecticut and Washington can also be viewed as having mixed elements: all three regulate de facto parenthood in the same vein as under the functional approach, but have also introduced a broader provision that allows the courts to recognize more than two parents based on the best interests of the child, which does not refer exclusively to de facto parenthood.

The question of the best interests of the child is again left to the court, which may find that a child has more than two parents if that is in the best interests of the child (Vermont) or if recognizing only two parents would be detrimental to the child (California, Washington, Connecticut). Thus, the court under this

subdivision (1) … (b) In a proceeding to adjudicate the parentage of a person who claims to be a de facto parent of the child, if there is more than one other person who is a parent or has a claim to parentage of the child and the court determines that the requirements of subsection (a) of this section are met by clear and convincing evidence, the court shall adjudicate parentage under section 206 of this title, subject to other applicable limitations in this title'.

35 Connecticut Parentage Act Ch 818, §46b-490 (2022) 'Adjudicating claim of de facto parentage of child. (a) In a proceeding to adjudicate parentage of a person who claims to be a de facto parent of the child, if there is only one other person who is a parent or has a claim to parentage of the child, the court shall adjudicate the person who claims to be a de facto parent to be a parent of the child if the person demonstrates by clear and convincing evidence that: … (6) Another parent of the child fostered or supported the bonded and dependent relationship required under subdivision (5) of this subsection … (c) Subject to other limitations set forth in this section and section 46b-491, if, in a proceeding to adjudicate parentage of a person who claims to be a de facto parent of the child, there is more than one other person who is a parent or has a claim to parentage of the child and the court determines that the requirements of subsection (a) of this section are satisfied, the court shall adjudicate parentage under section 46b-475, provided the adjudication of a person as a de facto parent under this section shall not disestablish the parentage of any other parent, nor limit any other parent's rights under the laws of this state'.

36 See the very similar wording between regulating de facto parenthood under the Washington, Vermont and Connecticut laws, and the de facto parenthood provisions of Maine and Delaware.

37 California Code, Family Code – FAM §7612 (c) (2021).

38 Vt. Stat. Ann. tit. 15C, §206(b) (2022).

39 Connecticut Parentage Act Ch 818, §46b-475 (2022).

40 Wash. Rev. Code §26.26A.501 (2022).

approach has increased leeway, as it does not need to establish that specific requirements are met.[41] Instead, it must consider 'all relevant factors', which include the harm to the child 'if it is removed from a stable placement with an individual who has fulfilled the child's physical needs and psychological needs for care and affection and has assumed the role for a substantial period' (California, Washington, Connecticut).[42] The factors considered here are reminiscent of the functional approach, as the court will examine whether a stable caring relationship exists and whether the temporal aspect ('for a substantial period') is satisfied. However, the threshold is more flexible than under the functional approach, as this relationship is not explicitly framed in terms of being parent-like and is only considered as one factor in determining the child's welfare. Indeed, the court must follow a two-step test: first, whether not recognizing parenthood would mean removing the child from this stable caring relationship, and second, whether that would be harmful to the child.

The court does not, however, need to determine that any other existing parent(s) are unfit in order to find that removing the child would be to its detriment. This affirms the departure from the two-parent paradigm, where in order to establish parenthood of a third person, one of the existing parents would have to be stripped of that status, which would usually involve a determination of unfitness. Furthermore, as in the functional approach, no limitations are introduced as to who can be recognized as a parent, nor is there a maximum number of parents set out in law.

California law stops here, allowing courts a high degree of discretion. In contrast, the Vermont, Connecticut, and Washington jurisdictions include a checklist of further relevant factors that the court shall consider when adjudicating competing claims of parentage based on the best interests of the child. These factors include elements considered under the functional approach, albeit framed in broader terms: the nature of the relationship between the child and every individual; the harm to the child if the relationship is not recognized; and the length of time during which each individual assumed the role of parent of the child. Under the best interests approach, the age of the child, as well as 'other equitable factors' that would arise from the disruption of this relationship or the likelihood of *other* harm to the child are explicitly taken into account, which affirms the focus of this model on the child itself.[43] Finally, under the checklist, the basis of each individual's claim to parentage is also considered when deciding the best interests of the child. This confirms that, unlike under

41 Apart from those outlined in the respective provisions regulating a specific pathway to parenthood, e.g., the requirements to establish de facto parenthood referred to above.

42 By contrast, Vermont does not include such wording.

43 Adding emphasis, the Connecticut law repeats 'any other factor the court deems relevant to the child's best interests' as a further, separate factor.

the functional approach, de facto parenthood is not the only pathway to multiple parenthood under the best interests model.

3.3. THE PRIVATE AUTONOMY APPROACH

The third approach to regulating multiple parenthood examined in this chapter is drastically different to both the functional and the best interests approach, as it shifts the focus to private pre-conception parenthood agreements. Despite their differences, the jurisdictions of British Columbia[44] and of Ontario[45] in Canada are representative of this approach. Unlike the functional and best interests models, which were retrospective, the private autonomy approach outlined here is *prospective*, looking into the future of who will be a parent to the child in question. Under this approach, future parenthood is determined *before* conception of the child, and therefore there is no existing parenting reality to take into account. The parties draw up a private agreement which outlines who will be the legal parents of the child to be born. This agreement can include parties who agree to *not* be a legal parent, as in the case of Ontario law, where the person giving birth must be party to the agreement, agreeing either to *be* a legal parent together with the other parties or to *not be* a legal parent.

This highlights an important aspect of the private autonomy approach: while private autonomy lies at its core, it is not left unchecked. Limitations and safeguards are introduced to protect all parties, which extend to who can be party to the agreement, the maximum number of parents, and the scope of application of relevant provisions. Importantly, there are limitations on who can enter into a parental agreement. Yet instead of *negative* limitations on who *cannot* be part of the agreement, these are framed as *positive* limitations, i.e., requiring that certain persons *must* be parties to the agreement for it to be valid. Notably, this includes the birth parent under both jurisdictions. Under British Columbia law, the agreement must be made between the birth mother and an intended parent or parents, or between the birth mother, her spouse or spouse-like partner, and a donor, thus introducing a maximum number of up to three potential parents. While in the second case these limitations also conversely regulate who *can* be party to the agreement, in the first case there are no further limitations on who could be the intended parent(s).

Ontario law also deals with two distinct cases of pre-conception parenthood agreements by virtue of which more than two parents can be established, distinguishing between non-surrogacy[46] and surrogacy cases.[47] In both cases,

[44] Family Law Act [SBC 2011] Ch. 25, Section 30.

[45] All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016, S.O. 2016, c. 23 – Bill 28, Sections 9–11.

[46] All Families Are Equal Act, Section 9.

[47] All Families Are Equal Act, Sections 10–11.

the birth parent must be party to the agreement, agreeing *to be* a legal parent in non-surrogacy cases and agreeing *to not be* a legal parent in surrogacy cases.[48] Ontario law introduces a limit of up to four potential parents, which means that in surrogacy cases there are up to five parties to the agreement. However, in surrogacy cases the surrogate is still a parent at birth and must provide written consent relinquishing parenthood after the child is seven days old, thus providing a reflection period of one week within which the surrogate can change their mind. Therefore, during the first seven days the child effectively has five parents, and if the surrogate does not provide that consent, then the court can adjudicate parenthood according to the best interests of the child, which can include more than four parents.[49]

The law in both jurisdictions further regulates the scope of the agreement by introducing other limitations and safeguards, notably that the agreement must be made *before conception*. Yet one important difference is that, under British Columbia law, the private autonomy approach is only applied when a child is conceived through assisted reproduction. Thus, cases of natural reproduction or other pathways to parenthood such as adoption are excluded. By contrast, under Ontario law, pre-conception agreements can also be valid in natural reproduction cases.

A distinctive feature of the private autonomy approach is the process through which parenthood is established. The focus shifts from a substantive evaluation of an existing parent-child relationship under the functional and the best interests models, which should be undertaken by a judicial authority, to recognition of private agreements after checking that certain formalities laid out in law are met, which can be carried out by administrative authorities. If these formalities are not met or in case of unforeseen developments, the matter can be taken up before the courts.[50]

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48 In non-surrogacy cases, the person providing the sperm in case of natural reproduction or the spouse of the birth parent in cases on assisted reproduction or artificial insemination must also be parties to the agreement. The birth parent's spouse may also provide written confirmation before the child is conceived that they do not wish to be a parent, in which case they do not need to be party to the agreement.

49 A surrogacy agreement is unenforceable under Ontario law, but can be used as evidence of the parties' intentions.

50 As Leckey points out with regard to Ontario's All Families Are Equal Act, while Ontario's law intended to provide administrative, non-judicial paths to multiple parenthood, families might still turn to courts when the new requirements for automatic recognition of a parental agreement are not met. In that case, given the pre-reform practice of judicial activism in recognizing diverse family forms in the absence of a statute that would regulate multiple parenthood, Ontario judges might still be inclined to recognize multiple parenthood outside the statute, taking the parental agreement that does not meet the law's requirements as proof of relevant intention to be a parent. Leckey advises against this, warning that 'Once the legislature replaces a framework "hostile to lived forms of family" with one opening accessible paths to law's recognition for diverse family forms, it may be advisable for judges to temper their creativity. Even judges committed to being antihomophobic, queer-affirmative,

4. CONCLUSIONS

The differences between the three models, and especially between the functional and the best interests approach on one hand, and the party autonomy approach on the other hand, raise interesting questions about the principles guiding the regulation of multiple parenthood, which also reveal different underlying conceptions of parenthood more generally. The first two approaches aim to align legal recognition with the social reality of an existing parental relationship on the ground, either by focusing on de facto parenthood or the best interests of the child. By contrast, in the party autonomy approach, no parental ties have formed yet, as legal parenthood is left up to the parties that draw up the pre-conception agreement. This highlights two levels of tension: one between regulation and regularization (or paternalism/interventionism and private autonomy), and one between predictability and flexibility.

The opposing terms of 'regulation' vs. 'regularization'[51] were introduced by John Eekelaar in the context of divorce law.[52] Under the 'regularization' approach, the law accepts that relationship breakdown will occur regardless of whether the legal process for divorce is more or less strict, and aims to regulate the process in a way that does not add to the harms involved and largely leaves it up to the parties to settle its consequences. By contrast, under the 'regulation' approach, divorce law assumes a more paternalistic role in the process by imposing stricter requirements and restrictions that reflect the state's view on the importance of marriage.

If we apply that same dichotomy in the context of the laws regulating multiple parenthood, then we could come up with a spectrum that reflects the law's understanding of what it means to be a parent. The functional approach would reflect the most intense form of regulation, as the law imposes a checklist of strict requirement to be met, and thus a substantial judicial determination is necessary. The best interests approach would still fall under regulation, albeit one where the courts are given more leeway by following the overarching guiding principle of the child's best interests. Finally, the private autonomy approach would reflect 'regularization', where the law largely leaves it up to the parties to determine who will be the legal parents, and introduces limited restrictions and safeguards.

Where each jurisdiction chooses to position its rules on regulating multiple parenthood within that spectrum will reflect its underlying assumptions about

and alert to feminist concerns may wisely channel these commitments through the legislative text'. See R. Leckey, 'One Parent, Three Parents: Judges and Ontario's All Families Are Equal Act, 2016' (2019) 33(3) *International Journal of Law, Policy and the Family* 298.

[51] Abraham describes a similar dichotomy by using the terms 'regulation' and 'recognition': see H. Abraham, above n. 9, 408.

[52] See J. Eekelaar, *Regulating Divorce*, Clarendon Press, 1991, p. 142ff.

parenthood: is legal parenthood a matter that can in large part be left up to private agreement and intention, or should the state play a substantial role in outlining what a legal parent looks like in practice? This will also determine the degree to which the state will intervene in the process, which will be reflected in the capacity of the state authority designated to deal with the issue – judicial (in jurisdictions that lean towards 'regulation') or administrative (in jurisdictions that lean towards 'regularization'). Framing the issue in terms of regulation vs regularization also highlights that regardless of where the law stands, individuals can develop *parental* relationships to children without being recognized as legal parents, as the lived experiences of queer parents have unequivocally demonstrated.

The second, related level of tension is that between predictability and flexibility. The private autonomy approach lends itself to more predictable and thus more secure outcomes with respect to who will be the legal parents of the child to be born. However, it cannot accommodate developments that happen further down the road in a child's life, and allow for the recognition of new parental relationships that come into play. Conversely, jurisdictions that favour regulation can be seen as providing more security for the child, by limiting and regulating who can be recognized as a legal parent, as opposed to jurisdictions that rely on private autonomy, which can provide more flexibility in that respect. The dilemma between security and flexibility can thus be seen as a false one in many respects, as relevant considerations can vary according to the perspective prioritized.

What remains essential, however, is that the approach adopted to recognize multiple parenthood caters to both security and flexibility – not only for the child, but for all parties involved. While the jurisdictions examined in this chapter demonstrate different ways to regulate multiple parenthood, laws can combine elements from all three: for example, by both honouring pre-conception agreements and recognizing de facto parenthood. The choice will ultimately reflect the current conceptions of parenthood that underlie family law in each jurisdiction.