# THE LEGAL STRANGER: COLORADO'S TWO-LEGAL-PARENT LIMIT LEAVES NONTRADITIONAL FAMILIES BEHIND

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## INTRODUCTION

Within the last century, and even the last fifty years, concepts of parenthood in the United States have increasingly moved beyond the nuclear family[1] model. Take, for example, family comedy television series from two generations whose themes portray the decline in the importance of the nuclear family in American Society: *I Love Lucy* and *Modern Family*.[2] *I Love Lucy*, which aired in 1951, portrays the problem-free life of a middle-class, suburban family while expressly reenforcing the society values at the time of subordinate women and "traditional" household roles.[3] The show encapsulates the

1. The term "nuclear family" in this Note refers to a household consisting of two parents and their children, in which the two parents consist of one husband and one wife who are both the legal parents of the children. This term is used interchangeably with "traditional family" in this Note, though it's imperative to understand that the latter term is more outdated because the notion of one certain family being more "traditional" than another is an archaic reflection of cultural values rather than reality. Specifically, there never has been one overarching family structure in United States history; rather, both nuclear and nontraditional models have persisted in American culture. ALAN BROWN, WHAT IS THE FAMILY OF LAW? THE INFLUENCE OF THE NUCLEAR FAMILY 46, 175 (2019); *see generally* WHAT IS A PARENT: A SOCIO-LEGAL ANALYSIS (Andrew Bainham et al. eds., 1999). Thus, though this Note will also refer to "nuclear families" as "traditional" families, this is simply for simplicity and to remain consistent with the greater legal scholarship on this topic. *See* David T. Ellwood, *The Changing Structure of American Families: The Bigger Family Planning Issue*, 59 J. AM. PLAN. ASS'N 3, 3–4 (1993).

2. RICHARD NED LEBOW, THE POLITICS AND BUSINESS OF SELF-INTEREST FROM TOCQUEVILLE TO TRUMP 66 (Gary Browning ed., 2018).

3. *Id.* at 68–69.

nuclear family norm of the 1950s as the beloved housewife's rebellious attempts to redefine her traditional role always land her in trouble.[4] Sixty years after the premier of *I Love Lucy*, the hit sitcom *Modern Family* aired, shifting the focus to nontraditional gender and household roles in a non-nuclear extended family in deliberate defiance of the traditional values of *I Love Lucy*.[5] Thus, as each *Modern Family* character struggles to balance their individualism with their family role and their place in the greater society, they challenge the very notion of traditional families and illustrate the decline in the importance of the nuclear family model.[6]

Though the stark contrast between *I Love Lucy* and *Modern Family* captures the cultural shift away from the nuclear family model, the nuclear family has never actually represented American families. Various nontraditional families—such as LGBTQ+ families who conceive through assisted reproduction, multi-generational extended-family households, and stepparents or other parent-like figures—are not incorporated in the nuclear family model, as this Note will discuss at length in Part II. Legal limits on parentage do not serve these families. Notably, trans and nonbinary identities are often overlooked in the context of biological reproduction, such that the nuclear family model also fails to acknowledge or represent families with trans or gender nonconforming parental figures.

The mismatch between the nuclear family model and the growing cultural acceptance of nontraditional families[7] can also be explained through scientific advancements, which have shifted concepts of parenthood from prioritizing marital bonds to recognizing the role of biology and intentional caregiving. Primarily, these advancements include advanced genetic testing and assisted reproduction, both of which disrupt the prior focus on marriage in defining parenthood.[8] Further, over the past half-century, significant gains in legal equality for women and LGBTQ+ individuals have further challenged the nuclear family

4. *Id.* at 69.

5. *Id.* at 66–67.

6. *Id.* at 80, 84.

7. The term "nontraditional family" in this Note refers to all other family structures other than the nuclear model including, but not limited to, households with stepparents, unmarried cohabitating partners, extended family, same-sex partnerships and marriages, and nonrelative third parties.

8. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005).

model.[9] Progress in these arenas has led to the destigmatization of children born to unmarried and non-biological parents, leading to an increased acceptance of nontraditional family models.[10] As these familial concepts evolve, courts have grappled with how to define legal parenthood beyond notions of biology and marriage.[11] And, despite the nuclear family's declining importance in culture and society, this structure continues to be upheld as the predominant model for legal parenthood through court imposed two-legal-parent limits.[12]

The two-legal-parent model reenforces the nuclear family model by limiting legal parental status and rights to only two people: traditionally, the biological mother and father. Under these rules, nontraditional families face insurmountable challenges when multiple people seek legal parental status.[13] Consider, for example, a child raised by more than two parental figures such as a child with two biological parents and two stepparents, each of whom equally shares in the duties and responsibilities of parenting and raising the child. Or consider LGBTQ+ families who conceive through surrogacy or artificial insemination in which both the LGBTQ+ couple and the biological donor may have certain parenting claims to the child. And finally, consider children raised by psychological parents,[14] such as non-biological, nonadoptive parental figures who take on the role of the parent and all the responsibilities that come with it regardless of marital or biological ties.[15] For these and many other nontraditional families who live in states that apply two-legal-parent limits, integral parental figures are unrecognized and unprotected under the law. This exclusive, "all-or-nothing" approach to legal parenting, in which "one can either be a parent with vested rights and responsibilities or a legal stranger," leaves nontraditional families unprotected without the same

9. *See infra* Section I.A.

10. *See infra* Section I.A.

11. *See, e.g.*, People *ex rel.* K.L.W., 2021 COA 56, ¶¶ 36–37, 492 P.3d 392, 399, *cert. denied*, No. 21SC364, 2021 WL 3278184 (Colo. 2021).

12. *Id.*

13. *See infra* Section I.A.

14. For the purpose of this Note, a "psychological parent" refers to a party who functions as a parent but is unrelated by marriage or biology. U.P.A. Prefatory Note (Nat'l Conf. Comm'rs Unif. State L. 2017) [hereinafter 2017 UPA]. The term psychological parent is interchangeable with de facto parent and in loco parentis.

15. *See infra* Sections I.C–D.

rights and legal recognition as nuclear families.[16] For example, parents have the right and responsibility to make decisions about a child's upbringing, including religious, educational, and medical decisions.[17] These rights are exclusive in that they allow and protect the parent's right to parent without state or third-party interference, including nonlegal parental figures.[18]

And despite the growing acceptance and recognition of nontraditional family structures, courts continue to establish, enforce, and uphold two-legal-parent limits, which so heavily favor nuclear family structures.[19] From a broad lens, this Note argues that court-imposed, two-legal-parent limits are archaic remnants of the State's preference for the nuclear family model, neglecting nontraditional families and the best interests of the children. Though this Note intends its argument to apply across the board to each state that continues to impose such legal limits on parentage, its analysis focuses on one state, Colorado, due to the recent, extensive analysis of the issue in *People ex rel. K.L.W.*[20] Here, the Colorado Court of Appeals established a two-legal-parent limit through a strict textual reading of C.R.S. 19-4-105(2)(a),[21] which originally enacted section 4 of the Uniform Parentage Act (UPA).[22] This Note will discuss how the court in *People ex rel. K.L.W.* neglected the important context of the 1973 UPA's purpose and history and the policy considerations of the

16. Lauren Worsek, *It Really Does Take a Village: Recognizing the Total Caregiving Network by Moving Toward a Functional Perspective in Family Law After* Troxel v. Granville, 30 J. L. & POL'Y 589, 594 (2009).

17. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 884 (1984).

18. *Id.*

19. *See, e.g.*, People *ex rel.* K.L.W., 2021 COA 56, 492 P.3d 392, *cert. denied*, No. 21SC364, 2021 WL 3278184 (Colo. 2021).

20. *Id.*

21. *See infra* Section IV.B. To be further considered in Section I.C., COLO. REV. STAT. § 19-4-105(2)(a) (2022) discusses the process of resolving conflicting presumptions of parentage.

22. COLO. REV. STAT. § 19-4-105(2)(a) (2022) remains substantially similar to the 1973 UPA text even after numerous amendments. *Compare id. with* U.P.A. §§ 4, 25 (Nat'l Conf. Comm'rs Unif. State L. 1973) [hereinafter 1973 UPA]. The most recent amendment to the Colorado UPA was enacted through the Affirm Parentage Adoption In Assisted Reproduction Act, which allowed for a presumed parent under section 19-4-106 or married parents who conceived through surrogacy to establish legal parentage through an adoption proceeding. H.B. 22-1153, 73d Gen. Assemb., 2d. Reg. Sess., § 19-5-203.5(2)(a) (Colo. 2022). Another notable change, the law now specifies that the term "natural parent" includes any nonadoptive parent regardless of a biological connection to the child. *Id.* § 19-4-102.5(3).

best interest of the child, ultimately arguing that the court's holding was wrong.[23] Neither C.R.S. 19-4-105(2)(a) nor the 1973 UPA mandates a two-legal-parent limit as the court held. As such, Colorado courts should revisit this issue, rather than defer to the legislature, and abandon this outdated, court imposed two-legal-parent limit. Ultimately, eliminating blanket two-legal-parent limits provides legal status, protection, and recognition to nontraditional families, protects the interest and well-being of children, and remains consistent with the purpose and history of the UPA.[24]

First, Part I will define legal and cultural concepts of parenthood. Part II will consider recent cultural and legal progress which further disrupts the viability of two-legal-parent limits. Then, Part III will analyze how two-legal-parent limits interact with the various versions of the model UPA, which controls parentage disputes in states that enact it. Part IV will then analyze Colorado's two-legal-parent limit as established in *People ex rel. K.L.W.* in detail. Finally, Part V will propose an alternative to two-legal-parent limits for Colorado should the court reconsider *People ex rel. K.L.W.*

## I. DEFINING PARENTHOOD AS A CULTURAL AND LEGAL CONCEPT

What is parentage?[25] This question is deceptively complex because concepts of parentage are intrinsically connected to the social, cultural, and historical contexts of the time.[26] Defining parentage encompasses broader discussions of nature-versus-nurture and collective-versus-individual responsibility for child-rearing. In its broadest sense, parenthood can be defined as "a fluid set of social practices and expectations that are historically and culturally situated . . . contingent upon broader social, political, and economic exigencies."[27] Thus, the definition of parenthood is fluid as it evolves based on any given cultural and historical context, varying even from person to person.[28] Yet

23. *See infra* Section IV.B.

24. *See infra* Parts II–IV.

25. "Parenthood" and "parentage" are used interchangeably throughout this Note.

26. *See generally* WHAT IS A PARENT, *supra* note 1.

27. *See* Shelley Day Sclater et al., *Introduction*, *in* WHAT IS A PARENT, *supra* note 1, at 1.

28. *See id.*

societies' overall acceptance of one concept of parenthood over another ultimately determines how parenthood is defined in the law and how the law regulates, or chooses not to regulate, the parent-child relationship. For example, a society that chooses to define parenthood based on the nuclear family model, as the United States has, overemphasizes the role that marriage and biology play in the assumption of parental responsibilities and disregards families with more than two parental figures.[29]

This Part will discuss the nuclear family model and how U.S. parentage law has developed based on this family structure, which has effectively excluded other types of families. This Part will (1) introduce broad concepts of parenthood and the nuclear family model; (2) discuss the history of U.S. parentage laws; (3) introduce how courts adjudicate parentage disputes under the UPA; and lastly (4) discuss the rights and responsibilities associated with legal parentage.

### *A. Parentage Concepts: The Nuclear Family is the Prevailing Norm in the United States*

The broad notion of parentage largely revolves around the degree to which an individual or collective group is allowed to *act* as a parent through their community's defined norms, laws, and available resources.[30] The nuclear family model is just one such concept of parentage but has nonetheless dominated the historic, social, and legal concepts of parentage in the United States despite the prevalence of nontraditional family structures.[31] The nuclear family model is tied to a kinship concept of parenthood, prioritizing biology in defining the parent-child relationship.[32] From a biological perspective, the dominance of the nuclear family model in U.S. society makes sense—human reproduction requires one male and one female[33] who may then couple into nuclear family units.[34] Marriage then

29. Carbone, *supra* note 8, at 1297.

30. Stuart McNaughton, *Ways of Parenting and Cultural Identity*, 2 CULTURE & PSYCH. 173, 176, 179 (1996).

31. BROWN, *supra* note 1; *see generally* WHAT IS A PARENT, *supra* note 1.

32. *See* BROWN, *supra* note 1, at 50, 69–75.

33. In this context, "male" and "female" refer to people assigned male or female at birth who conceive children together without the assistance of reproductive technology or other outside intervention.

34. *See generally* FAITH ROBERTSON ELLIOT, THE FAMILY: CHANGE OR CONTINUITY? (1986).

reenforces the nuclear family by legally or socially joining two people together while excluding all others from the union.[35] Thus, marriage operates as a tool to further the nuclear family model and laws based on this parentage model, which in turn give legal protection and advantages to nuclear families.

Historically gendered social norms surrounding marriage, in which the mother is the nurturer and the father is the provider, have also propped up the prominence of the nuclear family model in U.S. society.[36] These gendered concepts of parenthood prevailed in the United States until the 1960s when growing social movements, including the sexual revolution and second-wave feminism, challenged familial gender roles and the nuclear family model altogether.[37] In particular, the increased social mobility of women influenced the growing prevalence of nontraditional family structures.[38] Second-wave feminists, while fighting for women's equal rights, criticized the prevailing concept of "family," including its restrictive roles of housewives and caregivers, as a primary vehicle for their oppression.[39] In addition, increased public awareness around child abuse and domestic violence within families at this time bolstered these criticisms of the gendered nature of the nuclear family model.[40] The struggle for equal rights during this civil rights era also corresponds with the growing acceptance and rise of nontraditional family structures in the United States along with the growing acceptance of children born to non-biological, nonmarital, non-heteronormative parents.[41]

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35. *Cf.* BROWN, *supra* note 1, at 24–46 (discussing the English law's definition of family as based on an idealized nuclear family unit consisting of a married couple with children) (quoting Johnathan Herring, *Family Law* (7th ed. 2015).

36. Sclater et al., *supra* note 27, at 4 (discussing the nuclear family as a "traditional" family structure which primarily encompasses gendered notions of the breadwinner father and the homemaker mother); *see also* NATALIA SARKISIAN & NAOMI GERSTEL, NUCLEAR FAMILY VALUES, EXTENDED FAMILY LIVES: THE POWER OF RACE, CLASS, AND GENDER 1–5 (2012) (ebook).

37. *See generally* WHAT IS A PARENT, *supra* note 1, at 4–5. However, in many ways these movements only reenforced the nuclear family model through the development of the concept of "dual parenting" in which the father participates in child-rearing along with the mother, instead of the typical nuclear family roles of the providing husband and caregiving wife. This further reenforced heterosexual and biological norms surrounding familial concepts. *Id.* at 5.

38. Sclater et al., *supra* note 27, at 7.

39. *Id.*

40. *Id.* at 7–8.

41. Ellwood, *supra* note 1, at 3–4 (discussing various theories on the decline of the nuclear family); Worsek, *supra* note 16, at 595–96 (explaining that major advancements in civil rights, reproductive technology, and increased mobility in

Yet, U.S. family law was developed to support the nuclear family model and traditional marriage and continues to uphold these structures despite this social change.[42] The nuclear family was historically positioned as "the cornerstone of a stable and prosperous society," thus upholding those government objectives.[43] The theoretical concept of the nuclear family underpins how the law defines parenthood and how the law regulates the practice of parenting.[44] Given that the nuclear family is exclusive in nature when considering its connection to traditional marriage, the law follows with this exclusivity such that parentage is also exclusive under the law.[45] As a result, legal parentage in the United States concerns individual rather than collective rights to parent, resulting in an "all-or-nothing" approach in which "one can either be a parent with vested rights and responsibilities or a legal stranger."[46]

Today, the legal norm in parentage laws is to uphold parental autonomy, meaning that legal parents have the exclusive authority over decisions regarding the child without State interference.[47] Yet, children often form "extra-parental attachments" to their caregivers regardless of their legal relationship.[48] So when a child is raised by people other than or in addition to married biological parents, this legal framework fails to provide some parental figures with rights similar to that of a legal parent. Rather, these relationships exist at the will of the legal parent, who at any time can remove the child from the person to whom they are attached, regardless of whether this

"the past fifty years highlight how cultural, economic, gender, and historical factors interact, creating a wide range of caregiving relationships separate from the traditional nuclear family structure").

42. Sclater et al., *supra* note 27, at 6; Bartlett, *supra* note 17, at 879. Here, traditional marriage refers to heterosexual and monogamous marriages.

43. Sclater et al., *supra* note 27, at 4; *see also* Obergefell v. Hodges, 576 U.S. 644, at 657–59, 669 (2015) (suggesting that the nuclear family is central to the institution of marriage which "allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons" and noting how previous Supreme Court "cases and the Nation's traditions make clear that marriage is a keystone of our social order")

44. BROWN, *supra* note 1, at i.

45. Bartlett, *supra* note 17, at 879.

46. Worsek, *supra* note 16, at 594.

47. Bartlett, *supra* note 17, at 880.

48. *Id.* at 881.

removal benefits or harms the child.[49] Further, the law in many states will not recognize these relationships at all, unless the legal parents are unfit or the child is adjudicated as abandoned or abused and neglected.[50] It is within the state's interest, however, to help families maintain a child's most important relationships when it is in the best interest of the child or, to a greater extent, when it is to the harm and detriment of the child to do otherwise.[51]

### *B. The Development of U.S. Parentage Law:* Troxel *and the Best Interest of the Child*

In the United States, parentage law historically stems from family law and property law.[52] Prior to the development of genetic testing, marriage, rather than biology, established the legal, father-child relationship.[53] From a historical perspective, the law sought to resolve uncertainty around biological parentage since there was no certainty about whom the biological father was, and so the law identified a woman's husband as the legal father regardless of biology.[54] Remnants of this historical legal approach to parenthood still exist today; in many instances, parentage disputes yield to the marital presumption, or the idea that a child born during a marriage legally belongs to the people within that marriage regardless of other biological or emotional ties.[55]

Yet, this historic tie between marriage and legal parentage did not grant fathers and mothers equal rights to parent.[56] For centuries, married women were denied the legal status of personhood under the doctrine of coverture, in which "a married man and women were treated by the State as a single, male-dominated legal entity."[57] It was this oppression that

49. *See id.* at 879. Note, however, that courts could grant certain limited rights to nonlegal parents under third-party visitation statutes. *See* Worsek, *supra* note 16, at 606–08.

50. *See* Bartlett, *supra* note 17, at 881.

51. *See id.* at 882.

52. Worsek, *supra* note 16, at 591.

53. Sclater et al., *supra* note 27, at 8.

54. Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1493 (2018).

55. Sclater et al., *supra* note 27, at 8.

56. *Id.*

57. Obergefell v. Hodges, 576 U.S. 644, 660 (2015).

determined women's status (or lack thereof) as legal parents.[58] Since married women had no legal personhood status, they had no property rights, which meant that women also had little to no rights over their children.[59] Thus, historically, the sole legal parent of a child was the father.

As a result, "fathers' rights" underpinned much of family law doctrine.[60] Under this concept, courts upheld a father's right to the child regardless of his conduct towards the child or mother, including abuse and neglect.[61] However, states became concerned with the welfare of children in custody disputes under the "father's rights" doctrine and began stressing a state interest in the welfare of the child.[62] Courts regarded the state interest in the welfare of the child as a competing interest to the father's legal parenting rights.[63] Ultimately, the welfare principle can still be seen in custody disputes today through the best-interest-of-the-child and harm-and-detriment-to-the-child standards.[64]

Since much of U.S. parentage law throughout history revolved around marriage, nonmarital children historically had no legal parents.[65] Nonmarital children had "no legal relationship to either parent" and therefore neither the parent nor the child had rights or responsibilities related to their parent-child relationship.[66] The historic nonexistence of a legal relationship for nonmarital children further underscores the focus on marriage in parentage law. This context underpins the role of marriage, biology, and the State's interest in the welfare of the child, which continue to influence parentage laws today.

The exclusionary nature of the "father's rights" doctrine further influenced the development of parenting as a fundamental right exclusive to the legal parents. Under the Due Process Clause of the Fourteenth Amendment, legal parents have a fundamental liberty interest in raising their children without state interference.[67] *Troxel v. Granville* is the seminal

58. Sclater et al., *supra* note 27, at 8.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. Sclater et al., *supra* note 27, at 10.
65. Higdon, *supra* note 54, at 1493.
66. *Id.*
67. Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 875–79 (2003).

case determining the extent of legal parents' constitutional right to make parenting decisions.[68] In this case, after two unmarried parents separate, they split custody of their children until the father died unexpectedly.[69] When the mother sought to limit the children's visitation with their paternal grandparents, the paternal grandparents sued for visitation rights under a Washington grandparent's rights statute.[70] The lower court granted the grandparents visitation rights, but the decision was reversed on appeal and the Washington Supreme Court ultimately affirmed on different grounds.[71]

The U.S. Supreme Court affirmed the reversal, ultimately striking down the statute as unconstitutionally applied.[72] The Court found that the statute's "breathtakingly broad" language unnecessarily infringed on the rights of legal parents as it would leave any parental decision open to judicial review at the request of any third party.[73] This emphasizes the Court's focus on the exclusionary nature of parental rights. The Court took particular offense to the statute's use of the best-interest-of-the-child standard because it gave no deference to the parents.[74] Under this statute's structure, when a third party sued for custody or visitation, the legal parent would have to prove that granting visitation was not in the best interest of the child.[75] The Court considered this an unfavorable result, reasoning that parents, by nature of being parents, seek the best interest of their children.[76] The Court found that "[t]here is a presumption that fit parents act in their children's best interests" and "there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."[77] Thus, the

68. 530 U.S. 57, 63 (2000).
69. *Id.* at 60.
70. *Id.* at 60–61.
71. *Id.* at 61–63.
72. *Id.* at 63.
73. *Id.* at 67.
74. *See* Worsek, *supra* note 16, at 600. The competing interests referred to here are regarding those involved in legal parentage and custody disputes, including the interest of the parent, the child, the State, and any other interested third party. *See id.*
75. *Troxel*, 530 U.S. at 68–69.
76. *Id.*
77. *Id.* at 58.

Court found the statute's application unconstitutional in this instance.[78]

The Court further held that a legal parent's claim is not necessarily entitled to strict scrutiny when third parties seek custody.[79] Yet the Court declined to expand upon the constitutionality of nonparental visitation, including the Washington visitation statute, and provided little guidance to states on how to balance the interest of nonparents with those of legal parents.[80]

Though *Troxel* revolved around the third-party right to seek visitation rather than custody or legal parental status, state courts have since relied on *Troxel* in cases involving the establishment or termination of legal parental rights.[81] Notably, the Supreme Court has deferred to state courts in determining who constitutes a legal parent in parentage disputes and has provided no further guidance on how to resolve these disputes since *Troxel* was decided over twenty years ago.[82] This lack of guidance has resulted in some courts discriminating against nontraditional parents, such as same-sex parents or parents who conceive children through reproductive assistance.[83] Despite the possibility of discrimination in seeking legal parental status, it remains the only viable avenue for obtaining parental rights since *Troxel* put substantial limits on the rights of third parties to seek custody to avoid interfering with the fundamental liberty interest of already established legal parents.[84]

The best-interest-of-the-child[85] standard referenced in *Troxel* is the legal standard used throughout most family law doctrines regarding children, yet its applicability to parentage disputes is unclear.[86] In *Troxel*, the Court found that parents

78. *Id.* at 72.

79. *See* Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 COLO. L. REV. 941, 986 (2019).

80. Worsek, *supra* note 16, at 601–02.

81. Higdon, *supra* note 79, at 986–92.

82. Higdon, *supra* note 54, at 1486, 1489.

83. *Id.* at 1489–90.

84. *See* David D. Meyer, *The Constitutionality of Best Interests Parentage*, 14 WM. & MARY BILL RTS. J. 857, 867 (2006).

85. This standard generally arose from the State interest in protecting children and the resulting "welfare principle" in family law. Sclater et al., *supra* note 27, at 10.

86. Sclater et al., *supra* note 27, at 10.

naturally act with the best interest of the child in mind.[87] So even if this standard is applied in a parentage dispute, the legal parents themselves are given deference in determining what is actually in the best interest of the child.[88] Moreover, the Court set a policy, now followed by many states, in which the exclusive rights of the parents most often prevail over the best interest of the child.[89] Legal parents' exclusive rights typically can only be overcome upon a court finding of parental unfitness or abandonment.[90] So the applicability of the best interest of the child standard in parentage disputes remains uncertain.

Exacerbating the confusion, the Court in *Quilloin v. Walcott* suggested in dicta that the best-interest-of-the-child standard was perhaps generally unconstitutional.[91] Specifically, the Court noted that without a showing of unfitness, breaking up a nuclear family based on the best interest of the child would offend the legal parents' rights under the Due Process Clause.[92] Thus, when the child's wishes compete with the wishes of the parents, absent a showing of unfitness, the parents' interest will often prevail. Despite the continued uncertain constitutionality of the standard, some state courts, such as Colorado, continue to resolve noncustody parentage disputes by applying the best-interest-of-the-child standard.[93]

### *C. Establishing Legal Parental Status: The Uniform Parentage Act*

Due to the constitutional protections granted to legal parents, they can typically withhold their child from third parties even if a third party acted as a parent in the past or has a parent-like relationship with a child.[94] As a result, disputes

87. *See* Worsek, *supra* note 16, at 600.

88. Meyer, *supra* note 84, at 878.

89. *See* Bartlett, *supra* note 17, at 889.

90. *Id.* However, in cases of adoption involving court ordered termination of parental rights, many states still utilize the best-interest-of-the-child standard in part, along with some determination of unfitness or abandonment. *Id.* at 896–97.

91. 434 U.S. 246, 255 (1978).

92. *Id.*

93. N.A.H. v. S.L.S., 9 P.3d 354, at 362, 366 (Colo. 2000).

94. Worsek, *supra* note 16, at 591. Stanley v. Illinois, 405 U.S. 645 (1972), extended this fundamental parenting right to unmarried biological parents to seek custody of their children. Thus, the liberty interest of parents applies to all legal parents including married parents, unmarried biological parents, and adoptive parents.

arise when these third parties seek parenting rights to the child. Courts, then, are tasked with deciding between competing claims of parentage and must balance the constitutional rights of legal parents with the interests of the child and the State's interest in the welfare of the child.[95] The UPA was promulgated as a uniform law for states to enact in 1973 in part to address these disputes and to generally define the legal parent-child relationship.[96] The uniform law was later amended in two subsequent versions in 2002 and then in 2017 as concepts of legal parentage continued to change. Twenty-four states have introduced and enacted one version of the uniform law in full or in part, and two additional states have introduced the newest version in 2022.[97] This Note is primarily concerned with the UPA's procedures to establish and terminate parentage under section 4 of the uniform law.[98] Courts in states that enacted a version of the UPA look to these provisions to adjudicate legal parentage when an interested party sues for parenting rights or seeks to legally adopt the child.[99] Under the UPA, state courts are granted jurisdiction to adjudicate legal parentage when a party seeks to establish legal parentage and assume parental rights, which allows state courts to establish and terminate legal parenting rights.[100]

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95. Higdon, *supra* note 79, at 941; Higdon, *supra* note 54, at 1486; *see* Jeff Atkinson & Barbara Atwood, *Moving Beyond* Troxel*: The Uniform Nonparent Custody and Visitation Act*, 52 FAM. L.Q. 479, 480–82 (2019).

96. 1973 UPA, *supra* note 22, Prefatory Note.

97. *Parentage Act: Enactment History*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f#LegBillTrackingAnchor [https://perma.cc/8WRH-J7TC]; *see also* ANN HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES § 3:5 (3d ed. 2021).

98. The 1973 UPA and relevant case law referred to "presumptions of parentage" as "presumptions of paternity" since the law primarily sought to identify biological fathers. 1973 UPA, *supra* note 22, Prefatory Note. For the purpose of this Note, "presumptions of parentage" will refer to presumptions of paternity and maternity like the 2017 UPA. U.P.A. § 204 cmt. (Nat'l Conf. Comm'rs Unif. State L. 2017) [hereinafter 2017 UPA]. Here, "presumptions of parentage" can be defined as any competing claim to parentage based on relationship, biology, and intent. Merle H. Weiner, *When a Parent Is Not Apparent*, 80 U. PITT. L. REV. 533, 573 (2019).

99. 1973 UPA, *supra* note 22, Prefatory Note; Megan S. Calvo, *Uniform Parentage Act—Say Goodbye to Donna Reed: Recognizing Stepmothers' Rights*, 30 W. NEW ENG. L. REV. 773, 778 (2008).

100. Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 14 (1974).

Even prior to any dispute reaching the courts, the original UPA provided guidance on how the legal parent-child relationship is established.[101] First, it defined the parent-child relationship as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship."[102] It further clarified, however, that "the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."[103] Then, the uniform law further defined how the parent-child relationship is established by proving to be the "natural" parent or adoptive parent.[104] "Natural parent," however, is not solely tied to biology; the UPA instead recognized that multiple people may have a claim to natural parentage based on biological connections, marital connections, or through written acknowledgments of parentage.[105] Thus, from the very beginning, the writers of the UPA recognized that parentage is not tied solely to the nuclear family model. Rather, legal parentage disputes arise even when a child has two married parental figures because marriage into a nuclear family unit does not alone determine the assumption of parental responsibilities and the fostering of a parent-child relationship.

So the adjudication of these legal parentage disputes is based on these presumptions of parentage such that legal parentage can only be adjudicated to individuals who meet one of many possible statutorily defined relationships with the child, such as a biological or marital parent-child relationship.[106] Marriage in particular was the dominant presumption for much of U.S. history due to uncertainty of who the biological parents are, which only became predictable following genetic testing advancements in the 1960s and 1970s.[107] In *Michael H. v. Gerald D.*, the Supreme Court held that the marital

101. 1973 UPA, *supra* note 22, § 3.
102. *Id.* § 1.
103. *Id.* § 2.
104. *Id.* § 3.
105. *Id.* § 4.
106. *See* 2017 UPA, supra note 99, §§ 102, 201.
107. Carbone, *supra* note 8, at 1295. The "marital presumption" developed as the legal concept that a woman's husband was presumed the father of any child conceived during the marriage, regardless of whether the marital father was also the biological father. Traci Dallas, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 371 (1988).

presumption can only be rebutted by the husband or wife, emphasizing the Court's preference for nuclear family structures based in marriage.[108] The basis for establishing legal parenthood has since expanded to include biological and even psychological presumptions.[109] These additional presumptions have developed alongside the advancement of genetic technology, the waning stigma of illegitimacy for nonmarital children,[110] and the rise of divorce rates and decline of marital rates.[111]

Returning to the context of the second-wave feminist movement throughout the 1960s and 1970s discussed in Section I.A, the Supreme Court began to view the legal distinction between marital and nonmarital children as discriminatory against nonmarital children, suggesting that nonmarital children have the same rights as marital children.[112] This forced the courts and legislatures to reconsider who constitutes a legal parent given that marriage could no longer create the only legal parental status. For example, the Supreme Court in *Stanley v. Illinois* held that denying a hearing to an unmarried father seeking custody of his biological children was a violation of his due process rights and that a biological parent's interest must be given deference and protection by the State in the absence of a prevailing State interest, such as preventing harm and detriment to the child.[113] So, starting in the 1970s, the law began to recognize nonmarital biological fathers as presumed parents who could be adjudicated as legal parents over marital parents.[114] Thus, a second presumption of parentage was established for another category of parents based solely on their biological relationship to the child.[115] Biological parentage still, however, "may or may not correspond with the assumption of parental responsibilities;"[116] non-biological adults, like

108. 491 U.S. 110, 118–32 (1989).

109. Calvo, *supra* note 99, at 776–79.

110. "Illegitimacy" here refers to the stigma of children born to an unmarried mother and father or to a mother married to a man that is not the child's biological father.

111. Carbone, *supra* note 8, at 1295–96.

112. Higdon, *supra* note 54, at 1493; *see* cases cited *infra* note 198.

113. 405 U.S. 645, at 651, 658 (1972).

114. *See* 1973 UPA, *supra* note 22.

115. *Id.* § 4 (a); Troxel v. Granville, 530 U.S. 57 (2000). Notably, the marital and biological presumptions are the focus of the paternity provisions in the first iteration of the UPA. 1973 UPA, *supra* note 22, § 4; Carbone, *supra* note 8, at 1296.

116. Carbone, *supra* note 8, at 1297.

nonmarital adults, often create parent-child relationships and attachments to children anyways.[117] Thus, the concept of psychological parenthood gained traction to recognize individuals who voluntarily assume the role of a parent without a biological or marital connection to a child.[118]

A psychological parent can generally be defined as "a person not a legal parent who nonetheless has greater rights in a contest with the legal parent than does any other third party."[119] A psychological parent typically holds the child out as their own, resides with the child for a significant period of time, and acts as their parent.[120] Conflicts over psychological parenthood are at the crux of custody and parenthood cases involving nonmarital and non-biological third parties.[121] Though the Supreme Court has provided little guidance on the rights of third parties in parentage disputes, various states have recognized limited parental rights,[122] or full legal parental status, to psychological parents.[123] Even so, to establish legal parental status for a psychological parent, the consent of a legal parent is often required.[124] Thus, a significant barrier exists for the establishment of legal rights for psychological parents when a court already recognizes one or more legal parents of a child.

Though marriage, biology, and psychological connections are not the only bases for establishing parentage, these are the primary presumptions that courts consider when establishing legal parentage under the UPA.

### *D. Legal Parentage: Rights and Responsibilities*

Legal parentage is not just an honorary title; it grants parents a set of certain rights and responsibilities regarding their ability and interest in raising their children according to

117. *See infra* Section I.A.

118. *See generally* Higdon, *supra* note 79. Psychological parentage is referred to in the hold-out provisions of the UPA of 1973 and 2002 and de facto parent provisions of the UPA of 2017.

119. Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 458 (2007).

120. 2017 UPA, *supra* note 106, at § 609 cmt.; *see also* Calvo, *supra* note 99, at 787–93; *see generally* Higdon, *supra* note 85.

121. Higdon, *supra* note 79, at 944.

122. 2017 UPA, *supra* note 106, § 609 cmt.

123. *Id.*

124. *Id.*

their values.[125] Parental rights "exist to shield . . . [children] and the relationships they enjoy with one another from the sometimes corrosive effects of interference by the state or other outsiders."[126] Parental rights are vast and include, but are not limited to, the following:

> Parents have the right to custody of their child; to discipline the child; and to make decisions about education, medical treatment, and religious upbringing. Parents assign the child a name. They have a right to the child's earnings and services. They decide where the child shall live. Parents have a right to information gathered by others about the child and may exclude others from that information. They may speak for the child and may assert or waive the child's rights. Parents have the right to determine who may visit the child and to place their child in another's care.[127]

Further, these rights are exclusive in that they allow and protect the parent's exclusive right to parent without state or third-party interference.[128] This is the nature of exclusive legal parentage—legal parents alone hold all rights and responsibilities associated with parenthood.[129]

However, there are a few notable limits to these rights that parents must follow. Typically, these relate to the welfare of the child, such as in cases of abuse and neglect. These limits include, but are not limited to, the following:

> [I]n disciplining children, parents may not injure them severely. Parents may not, even for religious reasons, make unconventional decisions about their [children's] medical treatment if such treatment is likely to result in the child's death. A parental decision to commit a child to a mental institution is subject to review by professionals of the institution. Parents may not put their children to work in

125. *See generally* Eric G. Anderson, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935.

126. *Id.* at 943.

127. Bartlett, *supra* note 17, at 884.

128. *Id.* at 883.

129. *Id.*

> violation of child labor laws, and they do not have unlimited options in educating their children.[130]

Regarding related duties that the parent is also responsible for, a legal parent must care for the child by providing financial support, oversight of educational attainment, and any necessary medical care.[131] Yet, violating these duties and responsibilities does not necessarily mean an individual is an unfit parent. Courts are reluctant to terminate parental rights since parenting is viewed as a fundamental right, so the parent may instead be subject to a fine or an injunction for failing to fulfill their parental duties and responsibilities while still maintaining the status of legal parent.[132] So, although the rights granted to legal parents are tied to their responsibilities and duties to the child(ren), they fail to translate into meaningful limitations on exclusive legal parental status.

In contrast, a nonlegal parent has no such guaranteed interest or right. However, some courts grant nonlegal parents limited rights, such as granting visitation rights, if it is within the best interest of the child.[133] In this way, a nonlegal parent's rights are an extension of the child's rights since this interest is tied to the child's best interest and even the state's interest in the child's welfare, rather than the nonlegal parents owning a separate interest. In addition, some courts and legislatures give special weight to biological kin through grandparent rights statutes.[134] This type of right is likely a derivative of a biological or marital parent's legal rights based on an interest in continuing familial bonds.[135] Even so, these statutes are

130. *Id.* at 885.

131. *Id.*

132. *Id.* at 886. Typically, parental rights are only terminated upon child abandonment or a serious violation of these duties, such as child abuse. *Id.*

133. Anderson, *supra* note 125, at 945–46; Troxel v. Granville, 530 U.S. 57 (2000).

134. *See, e.g.*, COLO. REV. STAT. § 19-1-117 (2022). Colorado's grandparent rights statute is limited on constitutional grounds under *Troxel* such that a rebuttable presumption exists recognizing that "parental determinations about grandparent visitation are in the child's best interests." *In re* Adoption of C.A., 137 P.3d 318, 327 (Colo. 2006); *Troxel*, 530 U.S. at 57. In Colorado, a grandparent must articulate "facts in the petition and goes forward with clear and convincing evidence at a hearing that the parent is unfit to make the grandparent visitation decision, or that the visitation determination the parent has made is not in the best interests of the child to rebut the presumption. *In re Adoption of C.A.*, 137 P.3d at 327.

135. Anderson, *supra* note 125, at 946.

extremely limited as they usually only grant visitation rights.[136] Yet, they are often the only avenue for a child's nonlegal parents, grandparents, or other interested parties to obtain any legal right with respect to a child.[137] And, after *Troxel*,[138] the legal parent's interest can outweigh even the child's interest as courts remain wary of interfering with the fundamental rights of parents.[139]

## II. SOCIAL AND LEGAL RECOGNITION OF NONTRADITIONAL FAMILIES INCREASES, WHILE PARENTAGE LAWS TRAIL BEHIND

Within this historical context of the cultural and legal understanding of parenthood in the United States, which overwhelmingly emphasizes the nuclear family model, one may naturally assume that the assumption of parenting roles would also fall within the neat lines of the nuclear family model.[140] However, the evidence suggests otherwise: family structure in the United States has always been more complex than the simplistic nuclear family unit consisting of "mom," "dad," and "child."[141] Many families throughout history, even ones that appear to be nuclear families, have other adults assuming parental roles, such as grandparents, stepparents, or other parent-like adult figures in shared households across the country.[142] In fact, until 1850, around 75 percent of people over the age of sixty-five lived with their kids and grandkids.[143] Most Americans throughout the nation's history actually lived in sprawling households.[144] And though the presence of extended family or other adult figures in households does not necessarily

136. Worsek, *supra* note 16, at 598. Some parental rights advocates even consider these statutes as an "encroachment of parental rights" despite these limits. *Id.*

137. *See id.*

138. *See supra* Section I.B.

139. *See* Bartlett, *supra* note 17, at 879–86.

140. Sclater et al., *supra* note 27, at 4.

141. SARKISIAN & GERSTEL, *supra* note 36, at 1, 5, 11 (finding that the overwhelming focus on the nuclear family structure ignores widespread experience of family structure extending beyond the nuclear family to incorporate extended family members).

142. *Id.*

143. David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC (Mar. 2020), https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536 [https://perma.cc/76CK-QQ8R].

144. *Id.*

mean these adults are fostering parent-like relationships with the children in the household, neither does a marital or biological connection to the child. Rather, various adult figures in a child's life can assume the role of a parent regardless of a biological or marital connection.

This Part will first discuss the short-lived rise of the nuclear family model and its subsequent decline, then explore various examples of nontraditional families that may be hurt by lack of legal recognition under two-legal-parent limits, followed by a discussion of how nontraditional families have gained recognition in other areas of the law while parentage laws have been slow to adapt.

### *A. The Short-Lived Rise of the Nuclear Family Model*

Scholars previously believed that the extended family structures common through the 1800s started disappearing as a consequence of industrialization.[145] Yet the frequency of extended families actually doubled between 1750 and 1900.[146] Still, starting in the 1900s, a cultural shift emerged, which saw "the family less as an economic unit and more as an emotional and moral unit."[147] By the 1920s, the nuclear family replaced multigenerational families as the dominant and ideal family structure in the United States.[148] By 1960, 77.5 percent of children lived with two married parents and no extended family.[149] As the nuclear family rose to prominence, it became engraved in American minds as the ideal family model and the norm, even though for thousands of years this wasn't the way human family units were structured.[150] Yet, "nuclear families in this era were much more connected to other nuclear families than they are today—constituting a 'modified extended family.'"[151] Advancements in technology have allowed for the return to a modified extended family model in which the family

145. STEVEN RUGGLES, PROLONGED CONNECTIONS: THE RISE OF THE EXTENDED FAMILY IN THE NINETEENTH-CENTURY ENGLAND AND AMERICA 3 (Doris P. Slesinger et al. eds., 1987).

146. *Id.* at 5.

147. Brooks, *supra* note 143.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* (quoting Eugene Litwak & Stephen Kulis, *Technology, Proximity, and Measures of Kin Support*, 49 J. MARRIAGE & FAM. 649, 649 (1987)).

unit is made up of multiple "semi-autonomous household units" rather than one household consisting of either a nuclear family or extended family.[152] As such, the dominance of the nuclear family model only lasted about fifteen years, from 1950 to 1965.[153]

And since then, the nuclear family has continued to decline in the United States.[154] According to the 2020 census, since 1960, children living in two-parent households have steadily declined from over 85 percent to just over 70 percent.[155] In addition, children living in a household with a mother and no father have doubled from about 10 percent to over 20 percent of all households with children.[156] Interestingly, children living with only a father along with children living with adults other than their biological, marital, or adoptive parents have remained steady over time, accounting for about 5 percent each.[157] Though this data provides valuable insight on whether children live with one, two, or no parents, it does not account for the other people living in the household and their role in parenting the children. Thus, the true prevalence of nontraditional families in current and historic U.S. society is hard to measure. However, one study found that in just fourteen years, from 1996 to 2009, children living in various nontraditional households rose from 17.6 percent to 20.8 percent.[158] Unfortunately, this data does not extend back to the 1960s, when cultural and legal concepts of parenthood rapidly changed and the rapid decline of the dominant, but short-lived,

152. Litwak & Kulis, *supra* note 151. In fact, in a democratic and industrial society, both "empirical and theoretical evidence suggest that the modified extended family structure is the ideal kinship structure." *Id.*

153. Brooks, *supra* note 143.

154. *Id.*; Ellwood, *supra* note 1, at 3 (noting that by 1990, only 19 percent of U.S. families were two-parent households).

155. Living Arrangements of Children: 1960 to Present, U.S. CENSUS BUREAU, https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ch-1.pdf [https://perma.cc/Q93M-JBLC]. It's important to note that the U.S. census only began tracking this information in 1960 and that this statistic does not account for adults living in the household. Thus, this statistic is overinclusive for nuclear families living without any extended family. The true decline is likely much greater. *See* Brooks, *supra* note 143.

156. U.S. CENSUS BUREAU, *supra* note 155.

157. *Id.*

158. Natasha V. Pilkauskas & Christina Cross, *Beyond the Nuclear Family: Trends in Children Living in Shared Households*, 2018 DEMOGRAPHY 2283, 2287. Note that this study does not account for children living with a stepparent or cohabitating partner of a parent.

nuclear family structure began.[159] This exposes a huge gap in available research regarding the growth and prevalence of nontraditional families in U.S. society.

Today, the decline of the nuclear family is often discussed in terms of the increasing rate of divorce since the 1970s, since many divorced parents with children remarry, cohabitate with unmarried partners, or live with extended family, thus contributing to the prevalence of nontraditional families.[160] These changing concepts of marital and gender roles, alongside the declining prevalence of the nuclear family model, indicate that a judicial focus on the nuclear family is outdated and underscore how the nuclear family model is unrepresentative of many families in the United States.[161] Even the Supreme Court in *Troxel* recognized the pervasiveness of these changes in family structure and how this "make[s] it difficult to speak of an average American family."[162] Further, "the period from 1950 to 1965 demonstrated that a stable society can be built around nuclear families . . . so long as women are relegated to the household."[163]

### *B. The Prevalence of Nontraditional Family Structures*

The harsh reality is that the nuclear family is by no means the only parenting model, yet it is the only model that parentage laws recognize.[164] In fact, even the very concept of the "traditional family" is an "ahistorical amalgam of structures, values, and behaviors that never coexisted in the same time and place."[165] So when children raised in nontraditional homes form a parent-like relationship with more than two adults, the law leaves them behind.[166] There is an assumption that multiparent

159. *See* U.S. CENSUS BUREAU, *supra* note 155.

160. Bartlett, *supra* note 17, at 880–81.

161. Ellwood, *supra* note 1, at 3–4.

162. Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 743–44 (2016) (quoting Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion)).

163. Brooks, *supra* note 143.

164. *See* Bartlett, *supra* note 17, at 879–86; *supra* Section I.B.

165. STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 9 (1992).

166. Bartlett, *supra* note 17, at 991.

families are rare or even a new concept.[167] Even reform initiatives aimed at recognizing nontraditional families tend to only focus on accommodating a small subset of nontraditional families, including LGBTQ+ families, families created through assisted reproduction, and polyamorous families.[168] The overwhelming emphasis in prior scholarship focused on LGBTQ+ families, and assisted reproduction alone leads to the assumption that nontraditional families are rare.[169] Yet, nontraditional families with more than two parents "have existed for decades in families with children conceived through sexual procreation by" monogamous heterosexual couples too.[170] For example, one empirical study on West Virginia case law involving more than two parental figures decided under the state's psychological parent doctrines found that only one out of twenty-seven cases involved an LGBTQ+ family.[171] While it is integral to recognize LGBTQ+ families, families conceiving children through assisted reproduction, and polyamorous families, it is also necessary to point out that more-than-two-parent households are not some novel and rare concept. Two-legal-parent limits are also a detriment and disservice to stepparent families, unmarried families, adoptive families, and close-knit extended families.[172]

Taking a step back to the often-discussed LGBTQ+ families and other families that conceive through assisted reproduction, in some of these cases, even "intended nonbiological parents treat a third person—for example, the individual who contributed genetic material—as a parent."[173] Further, with the technological advancements allowing for "mitochondrial replacement therapy (sometimes termed "'three-person IVF'"), multi-parent families may now consist of three genetic

167. Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561, 2563 (2022).

168. *Id.* at 2564

169. *Id.* at 2567.

170. *Id.*

171. *Id.* at 2578. Note, however, that this study only looked at cases in which one already established legal parent had died. However, the study found that the most common situation involved children who had more than two parental figures even before the death of one of their legal parents. *Id.* at 2579.

172. *See* June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 17–19 (2017); Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. PUB. L. 289, 301–02 (2008).

173. Joslin & NeJaime, *supra* note 167, at 2563.

parents."[174] So what are courts to do when three parent-figures are biologically connected to a child under the judicial policy of two-legal-parent limits? Ultimately, such courts will only legally recognize two of the three parents, leaving the third a legal stranger with no rights to the child. While this parent may be able to be in the child's life in meaningful ways, the legal parents can, at any time, limit their role in the child's life without their own legal status. Further, take for example lesbian couples who seek out a known sperm donor to be a third parental figure for their child.[175] Or gay male couples who desire their egg donor or surrogate to play an active role in the child's life as well.[176] Under two-legal-parent limits, these family structures are unenforceable under the law regardless of each parent's wishes.[177]

Stepparent families are another common example of nontraditional family structures which two-legal-parent limits fail to benefit. Historically, the law has treated stepparents as legal strangers unless and until they formally adopt the child.[178] And when a stepparent's relationship with a child's legal parent ends, they may not receive any parental rights regardless of the parent-child bond they fostered.[179] Similar to families with marital stepparents, families with unmarried parents often include more than two adults in parental roles.[180] With divorce and remarriage more common and parents having children prior to marriage or choosing not to marry at all, more and more families are left unrecognized under two-legal-parent limits.[181] Also, adoption laws are heteronormative and exclusionary, reinforcing the nuclear family model in which a family has only

174. *Id.*

175. *See* Carbone & Cahn, *supra* note 172, at 16–17.

176. *Id.* at 17.

177. *See id.* Other LGBTQ+ couples who seek to limit the role of the donor parent may benefit from two-legal-parent limits if the intended parents gain legal parental status. *Id.* However, when parentage laws like the UPA overemphasize biology and marriage as discussed, the non-biological intended parents may also have a hard time gaining legal parental status when a biological donor parent seeks parenting status. *See supra* Section I.B. Ultimately, this point illustrates how two-legal-parent limits create barriers for LGBTQ+ families' legal parentage status regardless of whether they seek to have more than two legal parents recognized under the law.

178. *See* Carbone & Cahn, *supra* note 172, at 18.

179. *Id.*

180. *Id.* at 19.

181. *See* Bartlett, *supra* note 17, at 891.

two parents who are heterosexual and married.[182] Specifically, two people can often only adopt children together if they are married.[183] In addition, formal "adoption terminates the parental rights of the biological parents," thus ending the legal parental status of biological parents even in the case of open adoptions.[184] And while courts and legislatures are allowing same-sex couples to adopt children, two-legal-parent limits restrict adoptive children from maintaining multiple legal parental relationships beyond their adoptive parents.[185]

Beyond these specific nontraditional family structures, extended families make up a greater proportion of U.S. society than previously thought.[186] Regarding close-knit extended families with multiple parental figures, the highest recorded figure for the prevalence of these households was 20 percent during the late 1800s.[187] Even further, the view that the nuclear family was preferred over other family structures prior to the nineteenth century is misleading, and instead, it may be the case that people actually preferred to live in extended families but were unable to do so.[188] Specifically, "late marriage and early death" at this time actually restricted the ability to form extended families, which could account for the prevailing view that the nuclear family model was representative of U.S. society and parentage ideals.[189] As U.S. demographics changed, with life expectancy increasing and marriage rates declining through the 1900s, more people were able to again live in extended family households.[190] Families are simply far more complicated than the nuclear family "ideal" that is reflected in court imposed two-legal-parent limits.

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182. Appell, *supra* note 172, at 301–02.

183. *Id.*

184. *Id.*

185. *Id.* at 302.

186. *See* RUGGLES, *supra* note 145, at xviii; COONTZ, *supra* note 165, at 12; SARKISIAN & GERSTEL, *supra* note 36, at 1, 5, 11 (finding that the overwhelming focus on the nuclear family structure ignores widespread experience of family structure extending beyond the nuclear family to incorporate extended family members).

187. COONTZ, *supra* note 165, at 12.

188. RUGGLES, *supra* note 145, at 3–6. In his research, Ruggles found that the median age of marriage for females rose from around eighteen years of age pre-1900s to twenty-five years of age post-1900s. *Id.* at 191.

189. *See id.* at 68, 113.

190. *Id.* at xviii.

### *C. Other Laws Recognize Nontraditional Families, So Why Hasn't Parentage Law?*

Legal adjudications in state courts further illustrate how parentage disputes for nontraditional families are handled with two-legal-parent limits. Such cases often show how vastly diverse family structures are in the United States, which emphasizes the benefit of legal recognition beyond marriage, biology, and a two-legal-parent limit for children in nontraditional families.[191] As previously discussed, many courts have determined that the "legal paradigm is that of two," referring to a two-legal-parent limit consisting of only a mother and a father.[192] This limit upholds historic concepts of parentage, which prioritize nuclear family structures and establish legal parentage primarily through marriage and biology. Yet many courts have since abandoned policies prioritizing legitimacy, marriage, and biology in other areas of family law related to parentage.[193] Parentage law, on the other hand, lags, and prioritizing two-legal-parent limits is outdated and unnecessary in the context of these legal developments.

For example, the Supreme Court's rulings recognizing same-sex couples' rights to marry and enjoy the benefits of marriage specifically implicate two-legal-parent limits.[194] *Obergefell v. Hodges* legalized marriage for same-sex couples, establishing marriage as a fundamental right accessible to both same-sex and opposite-sex couples under the Due Process and the Equal Protection Clauses of the Fourteenth Amendment.[195] The Court referred to the "stigma" that children of unmarried parents may face in justifying its ruling.[196] Thus, even with this progressive shift towards accepting more nontraditional families, the Court continues to emphasize the role of marriage

191. *See* Troxel v. Granville, 530 U.S. 57 (1972); N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2000) (en banc); People *ex rel.* K.L.W., 2021 COA 56, 492 P.3d 392 (2021); *In re* Parental Resps. Of A.R.L., 2013 COA 170, 318 P.3d 581; *In re* S.N.V., 284 P.3d 147 (Colo. App. 2011); Amy G. v. M.W., 47 Cal. Rptr. 3d 297 (Ct. App. 2006); Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); County of Los Angeles v. Sheldon P., 126 Cal. Rptr. 2d 350, 352 (Ct. App. 2002); Conover v. Conover, 146 A.3d 433, 447 (Md. 2016); V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000).

192. *See* Calvo, *supra* note 99, at 779–85.

193. Carbone, *supra* note 8, at 1305–09.

194. Obergefell v. Hodges, 576 U.S. 644, 658–59 (2015); Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

195. *Obergefell*, 576 U.S. at 635.

196. *Id.* at 668.

in parenting, following the Court's historic preference for the nuclear family structure and the two-legal-parent limit.[197] The Court further recognized how allowing parents to marry without discrimination is within the best interest of the child, again emphasizing the role of marriage in family life.[198] Though this ruling expanded the rights of same-sex couples to legally marry, it left numerous questions for states regarding what rights and responsibilities accompanied the right to marry, including questions surrounding legal parenthood. For example, given that many same-sex couples cannot have children that are biologically connected to both individuals in the adult relationship, conceiving a child biologically often creates additional possible parents, such as a surrogate, egg donor, or sperm donor, which courts must adjudicate to establish legal parenting rights.

The Court ultimately provided some guidance on this issue in *Pavan v. Smith*, where two same-sex couples conceived children through sperm donation, and the Court held that the fundamental right to parent extends to same-sex couples too.[199] In both cases, upon issuance of the birth certificates, the State only listed the biological mother and refused to list her same-sex spouse, the non-biological mother.[200] The Court reasoned that the State must have had some motivation other than maintaining accurate biological birth records (which was the State's argument), since in other instances the State lists the adult males of opposite-sex marriages on birth certificates even when the child is conceived through sperm donation.[201] Thus, for heterosexual couples, the male, non-biological parent would be listed on the birth certificate while, for lesbian couples, such as these plaintiffs, the female, non-biological parent would remain unlisted. As a result, the Supreme Court ultimately extended *Obergefell* in favor of the same-sex plaintiffs, holding that married same-sex parents are entitled to the same parental rights as married opposite-sex parents, such as listing both spouses on the birth certificate.[202] This ruling provided necessary recognition and legitimacy for LGBTQ+ families in

197. *See* Stanley v. Illinois, 405 U.S. 645 (1972).
198. *Obergefell*, 576 U.S. at 668.
199. 137 S. Ct. at 2077.
200. *Id.*
201. *Id.* at 2077–78.
202. *Id.* at 2077.

addition to further acceptance for the rights of non-biological and nontraditional parents.

But what if the sperm donor was not anonymous, and instead was involved in the child's life acting as a presumed psychological parent? Or what if one lesbian spouse carries the child and the other donates an egg—then which is the biological parent? *Obergefell* and *Pavan* both suggest that the marital presumption continues to supersede the biological presumption in the case of sperm donation or surrogacy. Thus, families that utilize sperm or egg donation and wish to include the donor as a third parent continue to face challenges in establishing legal parenting rights. Court imposed two-legal-parent limits only further these challenges by continuing to prioritize the notion of the nuclear family model, which fails to recognize the reality of many LGBTQ+ relationships.

As family law continues to validate and accept more and more types of nontraditional families, so should parentage laws. Court imposed two-legal-parent limits are vestiges of a time when family law recognized only the nuclear family model as valid and simply do not reflect many nontraditional families today, especially LGBTQ+ families.

## III. TWO-LEGAL-PARENT LIMITS AND THE UPA

Originally referred to as the "Uniform Legitimacy Act," the UPA was first drafted in 1973 and was primarily concerned with identifying unwed biological fathers—largely due to advancements in genetic testing technology at this time—and adjudicating their parental rights.[203] Following a series of Supreme Court cases establishing equal treatment for children born to marital and nonmarital relationships,[204] the 1973 UPA

203. Krause, *supra* note 100, at 1. Note that the UPA does allow for what it calls "the rare case" of identifying maternal descent when there is uncertainty regarding the mother. 1973 UPA, *supra* note 22, Prefatory Note.

204. 1973 UPA, *supra* note 22, Prefatory Note; Levy v. Louisiana, 391 U.S. 68 (1968) (declaring a Louisiana wrongful death statute unconstitutional under the Equal Protection Clause by denying nonmarital children to recover for the wrongful death of their mother); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968) (declaring a Louisiana wrongful death statute unconstitutional under the Equal Protection Clause by denying mothers recovery for the wrongful death of her nonmarital child); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (declaring a workers' compensation statute unconstitutional by discriminating based on legitimacy of the child or, in other words, based on whether the parents were married); Gomez v. Perez, 409 U.S. 535 (1973) (holding the denial of a nonmarital

sought to protect the rights of nonmarital children.[205] In three decisions in 1972, the Court addressed the issue of a biological father's right to custody of their nonmarital children, ruling that a biological father has an interest in the custody and adoption of his nonmarital children.[206] This complicated adoption proceedings because various courts interpreted this interest to require notice of adoptions to biological fathers.[207] Thus, the 1973 UPA sought to identify the biological father and define processes for establishing or terminating their parental rights for adoptions to proceed.

The first few sections of the 1973 UPA contain substantive provisions that define the "parent and child relationship" and the establishment of the legal parent-child relationship, explicitly stating that this parent-child relationship extends equally to every child and parent regardless of marital status.[208] The 1973 UPA then lists presumptions of paternity to determine which of the possible fathers is the "probable father" by examining marriage, a signed acknowledgment of paternity, and holding the child out as their own.[209] Notably, the last of these—the hold-out provision—is the only one that applies to biological and psychological parents under this first draft of the UPA. Each presumption is rebuttable under certain circumstances by clear and convincing evidence; in practice, courts weigh each presumption against each other to adjudicate the legal parents.[210]

To address the uncertainty of adoption procedures in the wake of the 1972 Supreme Court decisions on the rights of biological fathers, the 1973 UPA provided a procedure to terminate the parental rights of a disinterested, unmarried biological father.[211] The procedure required the biological mother or custodian of the child to file a petition to terminate

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child the right to child support from their biological, nonmarital father unconstitutional).

205. Calvo, *supra* note 99, at 776.

206. Krause, *supra* note 100, at 6; Stanley v. Illinois, 405 U.S. 645 (1972); Rothstein v. Lutheran Soc. Servs. of Wis. & Upper Mich., 405 U.S. 1051 (1972); Vanderlaan v. Vanderlaan, 262 N.E.2d 717 (Ill. App. Ct. 1970), *vacated*, 405 U.S. 1051 (1972).

207. 1973 UPA, *supra* note 22, Prefatory Note.

208. *Id.* §§ 1–3.

209. 1973 UPA, *supra* note 22, § 4.

210. *Id.* § 4(b); Krause, *supra* note 100, at 9.

211. 1973 UPA, *supra* note 22, at § 25(a); Krause, *supra* note 100, at 14; *see* cases cited *supra* note 198.

the parental rights of the father before an adoption could proceed.[212] This addressed the challenges faced by the 1972 Supreme Court cases regarding a biological father's rights[213] by mandating that the mother or the person seeking adoption file a petition to terminate parental rights of an unknown or otherwise disinterested biological father for an adoption to proceed. The comments attached to the model statute indicate that the purpose of this section is to terminate the rights of *disinterested*, unwed biological fathers more easily to help speed along adoption proceedings involving the relinquished children of single mothers.[214]

The 1973 UPA, then, requires that all identified possible fathers be given notice of the proceeding.[215] Failure to appear or claim custodial rights to the child will result in the termination of parental rights for each possible father individually.[216] If a possible father holds himself out to be the father and claims custodial rights, the court can proceed to determine custodial rights.[217] If no possible father is identified after the court's inquiry or no person claims to be the biological father claiming custodial rights, then the court will terminate the unknown biological father's parental rights.[218] Termination of parental rights of an unknown father is then subject to a six-month appeal after which the order cannot be questioned by any person on any grounds.[219] Thus, the termination of all possible fathers' parental rights was seen as a safeguard for speedy adoption proceedings.[220]

### *A. Applying the 1973 UPA to Parentage Disputes*

In states that enacted the 1973 UPA, when an interested party sues for parenting rights, the provisions involving the establishment of legal parentage and the termination of parental rights are applied.[221] Yet, the 1973 UPA never

212. 1973 UPA, *supra* note 22, § 25(a) cmt. The 1973 UPA also lists factors to identify the biological father to terminate their parental rights. *Id.* § 25(b).

213. *See* cases cited *supra* note 198.

214. Krause, *supra* note 100, at 14.

215. 1973 UPA, *supra* note 22, § 25.

216. *Id.* § 25(c).

217. *Id.*

218. *Id.* § 25(d).

219. *Id.*

220. Krause, *supra* note 100, at 14.

221. *See* 1973 UPA, *supra* note 22, § 6.

addressed cases in which multiple interested parties seek parenting rights; the primary purpose of the original uniform law was to address instability in adoption proceedings in the wake of the 1972 Supreme Court rulings protecting biological fathers' rights to seek parenting rights or custody of their children, since some states interpreted this as requiring notice to all possible fathers in all adoption proceedings.[222] So the 1973 UPA primarily sought to facilitate speedy adoptions for children with *disinterested* fathers by providing guidelines on how to terminate their parental rights.[223] The distinction between disinterested and interested parties is key; a disinterested party is one which does not and likely never did assume the role and responsibilities of a parent, while an interested party is one who seeks to assume that role as the legal parent and accept the accompanying responsibilities. Further, the 1973 UPA does not address, even implicitly, cases involving more than two individuals *interested* in establishing parenting rights.[224] Since the 1973 UPA does not even contemplate these cases, there is no express two-legal-parent limit, and an implied two-legal-parent limit should not be read into this version of the UPA. Rather, in states that enacted the 1973 UPA, a two-legal-parent limit might be viewed as a separate, judicially crafted public policy.

Even given the statute's clear purpose to facilitate adoptions and its lack of explicit or implicit reference to adjudicating cases involving multiple interested parents, courts have interpreted the 1973 UPA to require that courts decide between competing presumptions of paternity resulting in no more than two legal parents, thus requiring the termination of parental rights for any additional presumptive parents.[225] Yet the 1973 UPA states only that "[i]f two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."[226] Courts justify two-legal-parent limits through a plain reading of this

222. 1973 UPA, *supra* note 22, Prefatory Note, § 25 cmt.

223. 1973 UPA, *supra* note 22, Prefatory Note; Krause, *supra* note 100, at 14; *see* cases cited *supra* note 198.

224. 1973 UPA, *supra* note 22, Prefatory Note, § 25 cmt.; Krause, *supra* note 100, at 14.

225. *See, e.g.*, People *ex rel.* K.L.W., 2021 COA 56, 492 P.3d 392.

226. 1973 UPA, *supra* note 22, § 4(b). Notably, the 2002 UPA removed this section entirely, opting not to guide courts on how to adjudicate parentage among competing presumptions. U.P.A. (Nat'l Conf. Comm'rs Unif. State L. 2002) [hereinafter 2002 UPA].

language, reasoning that this provision mandates that courts must choose between competing presumptions, rather than grant more than two presumed parents their legal rights.[227] This neglects the context and purpose of this section entirely. In addition, the statute never defines what makes one presumption "conflict" with another presumption. Consider, for example, a case involving three presumptive parents who co-parent equally and who each want parenting rights established for all three possible parents. Is this a "conflict" under the statute? For courts that read a two-legal-parent limit into the statute, the answer is likely yes. However, the word "conflict" may instead suggest that the termination provision is mandated only when there is a dispute among parties over legal parenting rights.

Further, the text of the 1973 UPA's termination provisions does not clearly mandate the termination of parental rights in cases in which more than two interested parties *seek* parenting rights given that the drafter's intent is clearly expressed in the comment to this provision such that the purpose was to facilitate adoption proceedings by terminating parental rights of *disinterested* fathers.[228] It is further possible that the 1973 UPA drafters never even envisioned this application given that nontraditional families were less accepted and prevalent at the time the model statute was drafted. So, when courts read a two-legal-parent limit into the 1973 statute based on the termination provisions, they do so beyond the purpose of this provision.

Since the 1973 UPA does not expressly limit legal parentage to two parents, court imposed two-legal-parent doctrines are just that—judicially enacted policies based on social prioritization of and bias for nuclear family structures without express, or maybe even implicit, statutory basis.

### *B. The UPA Revisited: 2002 and 2017*

The next version of the UPA was promulgated in 2002 to address growing concern over state differences in adjudicating parentage under the 1973 UPA and to adapt to significant scientific advancements in genetic testing and assisted

227. Calvo, *supra* note 99, at 785; *see Ex rel. K.L.W.*, 2021 COA 56, 492 P.3d 392.

228. Krause, *supra* note 100, at 14.

reproduction.[229] The 2002 UPA's goal, like the 1973 UPA, was still primarily to facilitate adoption proceedings regarding relinquished children.[230] The 2002 amendment also capitalized on growing acceptance of nonmarital children and the custody claims of their unwed biological fathers by expanding the paternity presumptions to more readily allow unwed biological fathers to seek parental rights.[231]

The bulk of the changes in the 2002 UPA concern the establishment of the legal parent-child relationship.[232] The 2002 UPA states that all provisions regarding paternity also apply to determinations of maternity.[233] Further, once a court establishes legal parentage, the 2002 UPA clearly states that only the formal termination of parental rights can cause a party to cease being a legal parent.[234] It also enumerates additional presumptions of paternity explicitly allowing biological and psychological parents to seek status as legal parents.[235] These amendments acknowledge the role that many stepparents and psychological parents play in the upbringing of a child. All presumptions are rebuttable in an adjudication of legal parentage under this version of the UPA.[236]

The 2002 UPA also sought to resolve a disagreement that arose between states in construing the 1973 UPA regarding who has standing to sue for parenting rights.[237] For example, prior to the 2002 amendment, California courts held that a nonmarital, biological father does not have standing to sue an "intact" married family to claim parenting rights, while in Colorado and Texas, this interpretation was declared unconstitutional.[238] The 2002 amendment gives standing to many parties who seek a court ordered parentage determination, including a child, a mother, a man whose

229. 2002 UPA, *supra* note 221. The UPA of 2002 is the amendment to the UPA of 2000, which received criticism quickly after it was released for recommendation for state enactment. These objections considered the UPA of 2000 to inadequately treat marital and nonmarital children equally, a key component of the UPA of 1973. *Id.*

230. *Id.*

231. *Id.* at Prefatory Note.

232. *Id.* arts. 2–3.

233. *Id.* § 106.

234. *Id.* § 203.

235. *Id.* § 204(a).

236. *Id.* § 204(b).

237. *Id.* at Prefatory Note.

238. *Id.*

paternity is to be adjudicated, and an "intended parent" with a surrogacy arrangement.[239] However, the 2002 UPA limits this standing if the child already has a presumed father such that the proceeding must be commenced prior to the child turning two years old.[240] This limit reflects a middle ground by allowing third parties limited standing without overly burdening a presumed parent under the statute.[241] There is one other situation in which a presumption may be challenged at any time under the 2002 UPA: when the presumed father and the mother did not cohabitate, did not engage in intercourse during the probable conception period, and the presumed father did not hold out the child as his own.[242] In short, this important addition allows a third party to have standing to seek legal parenting rights in the instance of an absent presumed father.

Even with all of these added protections for third party petitioners, the 2002 UPA still places heavy emphasis on biological fatherhood, such that all presumptions are overcome by genetic testing results proving one man as the biological father.[243] Under the 2002 UPA, the biological presumption controls, and courts must adjudicate a biological father as a legal parent.[244] However, to avoid this outcome, the court has the authority to deny a motion for genetic testing if the court determines that another party's conduct[245] estops them from denying parentage, such that the outcome of the test could produce an inequitable result.[246] In making this determination, the 2002 UPA lists various factors and implores the court to consider the best interest of the child, but, ultimately, the court has discretion here.[247]

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239. *Id.* § 602.
240. *Id.* § 607 cmt.
241. *See id.*
242. *Id.* § 607(b) cmt.
243. *Id.* § 631.
244. *Id.*
245. This refers to the doctrine of parentage by estoppel, which references parties who know they are not the biological parent but continue to act as the parent (i.e., they act as a psychological parent despite knowing they are not a biological parent). This conduct estops them from denying that they are a parent. Even the mother can be estopped from denying a third party's parentage if the party relies on the mother's acceptance of that party as the other parent of the child. Thus, the parentage by estoppel doctrine places an important limit on the exclusive rights of legal parents. *Id.* § 608 cmt.
246. *Id.* § 608(a).
247. *Id.* § 608(b).

The 2017 amendment to the UPA makes a few key changes to the 1973 and 2002 versions to address their gendered nature. In the wake of *Obergefell* and *Pavan*, the Supreme Court made it clear that same-sex couples could not be denied the right to marry, nor could they be denied the various benefits that accompany marriage between heterosexual couples.[248] Thus, the 2017 UPA addresses the equal treatment of children born to same-sex couples by making the statute's language gender neutral to the greatest extent possible.[249] For example, references to "presumptions of paternity" were changed to "presumptions of parentage" using the gender neutral identifier "individual" to distinguish each presumed parent.[250]

The statute also adds to the concept of psychological parentage, expressly allowing for the establishment of legal status for this category of presumed parents.[251] Here, a psychological parent can gain legal parenting status by clear and convincing evidence showing that they resided with the child as a regular member of the household for a significant time period, acted as a consistent caregiver, permanently undertook all parental responsibilities, held the child out as their own, and established a "bonded and dependent" relationship with the child that is parental in nature.[252] However, the psychological parent must have had the support of another parent in acting as a psychological parent and the continued relationship must be within the best interest of the child.[253] This is a notable limitation for third party petitioners under the 2017 UPA, because it indicates that psychological parents still yield to the exclusive rights of other parents, like those with a biological or marital connection to the child. For example, a biological parent could stop a psychological parent from obtaining legal status if they simply do not support their psychological parent-child relationship. However, providing evidence of past support would suffice under this section of the 2017 UPA. Further, the court

248. Obergefell v. Hodges, 576 U.S. 644, 675 (2015); Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

249. 2017 UPA, *supra* note 14, Prefatory Note. Notably, the 2017 UPA also specifies that if the child was conceived because of sexual assault, this amendment precludes the predator from establishing a legal parent-child relationship. *Id.*

250. *Id.* § 204.

251. *Id.* § 204(2). Though the statute doesn't use the words "psychological parent," the hold-out provision is understood as psychological parentage for the purpose of this Note.

252. *Id.* § 609.

253. *Id.*

must also consider the best interest of the child under this version, which further safeguards psychological parents.

Most notably for the purpose of this Note, however, the 2017 UPA addresses the issue of two-legal-parent limits directly by providing states two alternative provisions to adjudicate legal parentage when there are three or more presumptive parents seeking legal status: one expressly allows courts to adjudicate legal parentage to more than two individuals, and the other expressly limits legal parentage to two individuals only.[254] This choice suggests that the two-legal-parent debate is ongoing, despite the growing trend of accepting legal parenthood beyond two parents.[255] Even so, under both provisions, courts must adjudicate parentage in the best interest of the child.[256] However, for a court to adjudicate parentage to more than two parents, an additional and higher burden must be overcome such that legal parentage can only be adjudicated to more than two individuals if the "failure to recognize more than two parents would be detrimental to the child."[257] The harm-and-detriment-to-the-child standard here is a much higher burden than the traditional best-interests standard.

The 2017 UPA or a substantially similar law has already been enacted in seven states and introduced in an additional three.[258] Notably, six states that have enacted the 2017 UPA expressly allow courts to adjudicate legal parentage to more than two parents. Colorado, notably, is the only state that did not address the two-legal-parent question at all in its new statute, which substantively addressed only parentage by artificial insemination.[259] Legislatures in Washington, California, Maine, and Connecticut chose to enact the higher burden with a harm-and-detriment-to-the-child standard, striking a balance between protecting the constitutional rights of the already-identified legal parents and the State interest in protecting the welfare of the child.[260] Interestingly, the Vermont

254. *Id.* § 613.
255. *Id.* § 613 cmt.
256. *Id.* § 613(a).
257. *Id.* § 613(c) (Alternative B), cmt.
258. *Parentage Act: Enactment History*, *supra* note 97.
259. H.B. 22-1153, *supra* note 22 and accompanying text.
260. WASH. REV. CODE § 26.26A.460(3) (2019); CAL. FAM. CODE § 7612(c) (West 2020); ME. STAT. tit. 19-A, §1653(2)(c) (2021); *Connecticut Parentage Act: FAQ*, GLBTQ LEGAL ADVOCS. & DEFS. (Sep. 2021), https://www.glad.org/cpa-faq [https://perma.cc/ZFZ6-L38C].

and Rhode Island legislatures adapted the language to only require the courts to consider the best interest of the child.[261] This lighter burden allows courts to adjudicate legal parentage if it benefits the child, which may encompass a greater number of families since the harm-and-detriment-to-the-child standard, in comparison, is such a high burden to meet.

The three versions of the UPA exemplify the changing nature of parentage law over the past fifty years, especially as it relates to the concept of parentage presumptions. As enacted, courts are limited by the given model statute that their state's legislature chooses. And since the 2017 UPA is the only version of the UPA to expressly address the issue of establishing legal parentage rights for more than two parents, the courts of states that have only enacted the 1973 or the 2002 UPA are then left with the difficult task of determining whether their individual state's statute forbids or allows more than two legal parents.

## IV. COLORADO'S TWO-LEGAL-PARENT LIMIT

Colorado generally has progressive parenthood laws that utilize the best-interest-of-the-child standard in paternity disputes[262] and validate the psychological parent presumption as equal to biological and marital presumptions;[263] however, Colorado courts have a long history of limiting legal parenthood as well.[264] Of particular concern, the Colorado Court of Appeals held in *People ex rel. K.L.W.* that the two-legal-parent limit controls in Colorado based on a statutory analysis of the 1973 UPA, which is the only version the Colorado state legislature has ever enacted.[265] Since the Colorado Supreme Court denied certiorari on appeal, this newly established two-legal-parent limit is the law in Colorado. This Part analyzes the court's interpretation of the termination provision of the 1973 UPA, which the court suggested mandated a two-legal-parent limit in Colorado. First, Section A analyzes Colorado parenthood case

261. VT. STAT. ANN. tit. 15C, § 206(b) (2021); 15 R.I. GEN. LAWS § 8.1–206(a) (2021).

262. N.A.H. v. S.L.S., 9 P.3d 354, 362 (Colo. 2000); *In re* S.N.V., 284 P.3d 147, 150 (Colo. App. 2011).

263. *In re* Parental Resps. of A.R.L., 2013 COA 170, ¶ 19, 318 P.3d 581, 584.

264. *N.A.H.*, 9 P.3d at 360; People *ex rel.* K.L.W., 2021 COA 56, ¶ 21, 492 P.3d 392, 397.

265. *Ex rel. K.L.W.*, 2021 COA 56, ¶ 21, 492 P.3d at 397.

law leading up to *People ex rel. K.L.W.*, and then Section B analyzes the court's decision in *People ex rel. K.L.W.*

### *A. Case Law Leading up to* People ex rel. K.L.W.

Since the early 2000s, Colorado courts began grappling with two-legal-parent limits and nontraditional families in three notable cases leading up to *People ex rel. K.L.W.*: *N.A.H. v. S.L.S.*, *In re S.N.V.*, and *In re Parental Responsibilities of A.R.L.* In *N.A.H. v. S.L.S.*, an alleged father sued to establish parenting rights based on a biological presumption, even though the child was born when the mother was married to another man.[266] The husband was listed as the child's father on the birth certificate, but genetic testing proved that the alleged biological father was in fact the actual biological father of the child.[267] On appeal, the Colorado Supreme Court was tasked with deciding whether the mother's husband and the biological father could obtain legal fatherhood under the marital and biological presumptions respectively. The Colorado Supreme Court reasoned that the Colorado UPA, which is based on the 1973 UPA (which has remained substantially similar to the model statute despite numerous amendments),[268] specifies a method for deciding among competing presumptions such that "courts should look to the weight of policy and logic in settling the conflict and adjudicating paternity."[269] Based on this statement alone, the court stated conclusively that a "child can have only one legal father"[270] and never considered the possibility that Colorado courts could actually adjudicate two legal fathers and still be consistent with the statute's language. Though the court in *N.A.H.* established a policy of limiting legal *fatherhood* to one individual, it did not expressly set a two-legal-parent limit until nearly two decades later in *People ex rel. K.L.W.*[271]

As discussed in Part III, the 1973 UPA does not mandate a two-legal-parent limit, and the termination guidelines, which the court referred to as support for its ruling, were aimed at

266. *N.A.H.*, 9 P.3d at 357.

267. *Id.*

268. *See* H.B. 22-1153, *supra* note 23 and accompanying text for recent notable amendments to the statute.

269. *Id.*

270. *Id.*

271. *N.A.H.*, 9 P.3d at 357; People *ex rel.* K.L.W., 2021 COA 56, ¶ 21, 492 P.3d 392, 397; *see infra* Section IV.B.

terminating the parental rights of *disinterested* fathers to facilitate speedy adoption proceedings—not at deciding between two presumed fathers who each have parenting relationships with the child and seek legal parental status. However, the court focused heavily on the UPA's language of resolving conflicting presumptions to justify the finding that a child can only have one legal father.[272] Yet the statute never defines what constitutes a conflicting presumption other than to suggest that two or more presumptions can arise and be in conflict.[273] A natural question central to this Note arises: Does the statute's language necessarily mean that all presumptions are inherently in conflict? Perhaps the statute's phrasing may instead suggest that a court's role is to weigh policy and logic in adjudicating parentage among two or more presumptions when, and only when, they are in conflict, without further limiting the court to the number of legal parents the statute allows.

Like the drafters of the 2017 UPA, the court also held that within the policy and logic analysis, genetic testing results do not automatically resolve the question of paternity because the best interest of the child is "of paramount concern throughout a paternity proceeding" and must be considered throughout.[274] Instead of listing out factors for courts to apply in a test of "best interest," the court left this to the discretion of the adjudicator to take the facts and circumstances of a particular case into account.[275] The court reasoned that the Colorado legislature intended for the best interest of the child to be considered throughout the entire parentage proceeding.[276] It also noted how the outcome of a parentage dispute affects the child most significantly, and so their "welfare should be paramount at every stage of the proceedings."[277]

Yet, the court neglected to even consider that declaring two individuals as legal fathers of the child may in fact be in the best interest of the child. A two-legal-parent limit will ultimately conflict with the best-interest-of-the-child standard for many

272. Note that this ruling was decided in 2000, prior to the passage of same-sex marriage, so the courts reasoning does not consider whether a gay couple's child would be limited to only one legal father.

273. COLO. REV. STAT. § 19-4-105(2) (2022).

274. *N.A.H.*, 9 P.3d at 357.

275. *Id.* at 364–65.

276. *Id.* at 363.

277. *Id.* at 364.

nontraditional families.[278] The outcome of this case suggests that the best interest of the child *must* be considered in all aspects of a parentage proceeding *except* when the best interest of the child would require the court to establish more than two legal fathers alongside the legal mother. This creates a confusing result that only benefits nuclear families. Since the Colorado UPA does not expressly require courts to limit the adjudication of legal parentage to two people, the court in these instances should consider the best interest of the child in adjudicating legal parentage to more than two parents rather than establishing a blanket limit on legal parentage.

The court's one-legal-father-only logic in *N.A.H. v. S.L.S.* was later extended to non-biological maternity determinations in the Court of Appeals decision *In re S.N.V.* in 2011.[279] In this case, there were two possible mothers of the child: the wife of the child's biological father and the biological mother.[280] The parentage dispute began when the biological mother sued to obtain an allocation of parental responsibilities.[281] In this initial proceeding, the husband and wife argued that the biological mother was a surrogate and that the husband and wife were the sole caregivers of the child.[282] The biological mother denied that there was a surrogacy agreement and argued that the child's conception resulted from her "intimate personal relationship with the husband."[283] She also stated that she participated in the caregiving of the child for the first two years of the child's life until the husband ended her contact with the child.[284] The biological husband's wife then sued separately to establish herself as a legal parent under the UPA.[285] The wife specifically asserted a presumption of maternity under the marital and hold-out provisions of the UPA.[286] In response, the birth mother filed a motion to dismiss the wife's parentage action, and the magistrate court ruled in favor of the birth mother, finding that

278. *See* Section II.B.

279. *In re* S.N.V., 284 P.3d 147, 150 (Colo. App. 2011).

280. *Id.* at 147.

281. *Id.* An "allocation of parental responsibilities" is Colorado's term for a custody agreement and involves a court adjudication to divide parenting duties, such as parenting time and decision-making including educational, medical, and religious decisions and upbringing. COLO. REV. STAT. § 14-10-123 (2022).

282. *In re S.N.V.*, 284 P.3d at 148.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 149.

the birth mother "must prevail as a matter of law because she is the biological mother."[287] The district court affirmed on different grounds, ruling that the wife did not have capacity to seek status as a legal parent since she was not the biological mother.[288]

The court of appeals reversed, finding that the wife, even as a woman, had capacity to sue under the UPA's provision on presumptions of paternity.[289] The court confirmed that the Colorado UPA can be read as gender neutral to allow any individual to sue to establish parenting rights as a presumed mother, father, or other parent.[290] Through this ruling, the court ultimately extended *N.A.H. v. S.L.S.* so that a biological mother's presumption does not conclusively outweigh any other maternal presumption.[291] Further, the court affirmed that lower courts must consider the best interest of the child in adjudicating a legal mother-child relationship.[292] In contrast with the one-legal-father-only logic in *N.A.H. v. S.L.S.*, the court did not consider whether a child could have more than one legal mother. Thus, it did not explicitly expand on the implied policy of a two-legal-parent limit either. It could be inferred, however, that trial courts must decide between presumptive mothers and establish legal parentage for only one.

In *In re Parental Responsibilities of A.R.L.*, the Colorado Court of Appeals further clarified that the Colorado UPA applies to same-sex couples in that a child could in fact have two legal parents of the same sex.[293] Decided prior to *Obergefell*, this case provided same-sex parents state-specific protections in Colorado parentage disputes. In *A.R.L.*, a lesbian couple conceived a child through an informal agreement with a male friend through sexual intercourse, as opposed to artificial insemination under the supervision of a doctor.[294] The UPA was not addressed, since the child's birth predated the Colorado Civil Union Act, which would later grant same-sex couples in a civil union the same rights as opposite-sex married couples under the UPA.[295] When

287. *Id.* at 148–49.
288. *Id.* at 149.
289. *Id.*; COLO. REV. STAT. §§ 19-4-107, 123, 125 (2022).
290. *In re S.N.V.*, 284 P.3d at 149.; COLO. REV. STAT. §§ 19-4-107, 123, 125 (2022).
291. *In re S.N.V.*, 284 P.3d at 150.
292. *Id.* at 150–51.
293. *In re Parental Resps. of A.R.L.*, 2013 COA 170, ¶ 2, 318 P.3d 581, 582.
294. *Id.* ¶ 3, 318 P.3d at 582.
295. *Id.* ¶ 5, 318 P.3d at 583 n.1.

the couple later split, the non-biological mother filed for a second parent adoption, which the court ultimately dismissed.[296] The non-biological mother later attempted to file a petition for allocation of parental responsibilities followed by a petition to establish herself as a legal parent—specifically as a psychological parent—under the hold-out provision of the Colorado UPA.[297] The male friend and sperm donor also filed a sworn statement stating that he was not the child's legal parent, never intended to be the child's parent, was only a sperm donor, and did not seek to establish parental rights.[298] The trial court dismissed the non-biological mother's presumption, ruling that the case was not a sperm donor case since the lesbian couple did not use artificial insemination and the court was unwilling to "create a new legal category."[299] Ironically, less than two weeks later, the court separately granted the male sperm donor's request to terminate his parental rights, which left the child with only one legal parent.[300]

On appeal, the Colorado Court of Appeals ruled that the trial court erred by denying the non-biological mother's petition without considering the merits of her case.[301] The court first held that the non-biological mother had the right to sue as an interested party under the UPA.[302] The court reasoned that the male sperm donor was "at most, an alleged father" given that no presumption including the biological presumption is conclusive and there was no admitted genetic test confirming his biological connection to the child.[303] The court further noted that the biological presumption requires an admissible genetic test result.[304] And, even if the sperm donor had presented a presumption, the court stated that *N.A.H. v. S.L.S.* would

296. *Id.* ¶ 7, 318 P.3d at 583.

297. *Id.* ¶¶ 8–10, 318 P.3d at 583.

298. *Id.* ¶ 10, 318 P.3d at 583.

299. *Id.* ¶¶ 11–12, 318 P.3d at 583 (quoting trial court decision). Under the recently enacted bill, titled "Affirm Parentage Adoption In Assisted Reproduction," the requirement for assisted reproduction to be performed under the supervision of a licensed physician was removed to only require consent to become pregnant by artificial insemination. COLO. REV. STAT. §19-4-106(1). Thus, had the lesbian couple in *A.R.L.* conceived their child in the same manner today, the fact that they conceived by consent rather than under doctor supervision would not be an issue for the legal parentage determination.

300. *In re Parental Resps. of A.R.L.*, ¶ 13, 318 P.3d at 583.

301. *Id.* ¶ 15, 318 P.3d at 584.

302. *Id.* ¶ 17, 318 P.3d at 584.

303. *Id.* ¶ 24, 318 P.3d at 585.

304. *Id.*

control, such that the court would be tasked with deciding between the two conflicting presumptions to avoid the child having three parents.[305] Yet the sperm donor never sought status as a legal parent, so the court "was never faced with three parentage claims or the possibility of finding the existence of three legal parents."[306] The biological mother argued that this would open the floodgates for "unending claims of [] parentage [presumptions] by any person remotely involved in the child's life."[307] The floodgates argument is a common concern among those who favor two-legal-parent limits, but it is easily refuted.[308] Here, the court disagreed with the floodgates concern, arguing that "a presumed parent is someone who demonstrates an enduring commitment to a child and can present evidence of a familial relationship with a child . . . . It is not a showing that a casual friend, a fond relative, or even a parent's significant other can necessarily satisfy."[309] Thus, the floodgates argument considers a situation that is exceedingly rare, if not entirely nonexistent, because only those who have established a serious parent-like connection to the child will ever be considered a presumed parent.

The court ultimately held that a child could have two legal mothers under the UPA.[310] Interestingly, the court noted that should the legislature have wanted to limit parentage to one father and one mother, it could have done so, but that the court refused to read such a limit into the statute.[311] The court failed to consider that the same logic is true for the two-legal-parent limit—if the legislature wanted to limit parentage to two parents, they could have done so expressly. Instead, the court read a two-legal-parent limit into the statute without express language supporting such a result. The court reasoned that allowing for a child to have two legal parents supports a compelling interest of the State for children to have love and support and to be cared for by two parents rather than just one.[312] But under this logic, why not allow children to have the love and support of more than two parents? Why is it necessary

305. *Id.* ¶ 27, 318 P.3d at 586.
306. *Id.* ¶ 28, 318 P.3d at 586.
307. *Id.* ¶ 28, 318 P.3d at 586 n.4.
308. *See, e.g.*, People *ex rel.* K.L.W., 2021 COA 56, 492 P.3d 392.
309. *In re* Parental Resps. of A.R.L., 2013 COA 170, ¶ 28, 318 P.3d at 586 n.4.
310. *In re* Parental Resps. of A.R.L, 2013 COA 170, ¶ 33, 318 P.3d at 586.
311. *Id.* ¶ 34, 318 P.3d at 586.
312. *Id.* ¶ 35, 318 P.3d at 587.

to limit parenthood to two, if the compelling interest is to have children be loved and supported? If, instead, the court's central interest was not the welfare of the child, but rather to uphold the nuclear family ideal, then the court's stated reasoning would make more sense. Even if the court is unintentionally preferencing the nuclear family model here, the court is clearly still concerned with the welfare and best interest of the child and sees the value in declaring legal status for same-sex families.

Though the court was wary of allowing for more than two legal parents, its own logic for allowing multiple presumptive parents can also be applied to adjudicating more than two legal parents to further the court's interest in the welfare of the child. The floodgate argument here may suggest that a two-legal-parent limit is preferential in the interest of judicial economy to avoid an obscene number of claims for legal parenthood. Critics of more than two-legal-parent systems often make this slippery slope argument suggesting that there will be "too many cooks in the kitchen."[313] However, it is unconvincing to suggest that a person with a parent-like attachment is more likely to sue for parentage without a two-legal-parent limit since a strong parent-like attachment already brings third parties to the courts under these limits. Given that the court is truly concerned with the best interest of the child in these cases, the court can instead implement a high burden in these cases such as the best-interest-of-the-child or harm-and-detriment standards. For example, courts could adjudicate more than two legal parents only if it is within the best interests of the child when three or more presumptive parents demonstrate "an enduring commitment to the child and can present evidence of a familial relationship with a child."[314] This would be more consistent with the court's well-established judicial policy surrounding the best-interest-of-the-child standard, which suggests that the standard is integral to *all* aspects of Colorado parentage proceedings.[315] Moving beyond the two-legal-parent limit thus helps with the establishment of legal parentage within the best interest of *all* children of *all* Colorado families, not just those belonging to a nuclear structure.

These three cases show that Colorado, though progressive in accepting all presumptions as rebuttable, utilizing the best

313. Joslin & NeJaime, *supra* note 167, at 2563.
314. *In re* Parental Resps. of A.R.L., 2013 COA 170, ¶ 28, 318 P.3d at 586 n.4.
315. *N.A.H.*, 9 P.3d at 357, 363–65; *In re S.N.V.*, 284 P.3d at 150–51.

interest of the child standard in most aspects of parentage disputes, and treating same-sex parents equally, had an implicit two-legal-parent rule even prior to *People ex rel. K.L.W.* Yet none of these three cases analyzed the legality of two-legal-parent limits under the UPA in detail, nor did they consider whether a two-legal-parent limit would usurp the judicial policy of using the best-interest-of-the-child standard in *all* aspects of parentage proceedings.

### *B.* People ex rel. K.L.W.*: The Two-Legal-Parent Rule in Colorado*

The recent ruling in *People ex rel. K.L.W.* held that legal parentage is limited to two people based on a plain-language reading of the Colorado UPA, which follows the UPA of 1973.[316] Even if Colorado had an implicit two-legal-parent limit in prior caselaw, this ruling stands in stark contrast to Colorado's trend of accepting evolving notions of parenthood.[317]

#### 1. The Court's Interpretation of the Colorado UPA Misses the Purpose of the Statute

In *People ex rel. K.L.W.*, Colorado's two-legal-parent limit was analyzed in detail and ultimately upheld. [318] The court of appeals ruled that the Colorado UPA mandates that conflicting presumptions of paternity be resolved so that a child has no more than two legal parents through the termination of all other potential parental rights.[319] In contrast to other notable parenthood case law in Colorado, the legal parenthood dispute in *People ex rel. K.L.W.* arose through a dependency and neglect case.[320] The interested parties included the biological mother; the biological father; and a presumptive mother who was the biological mother's former partner, was listed on the birth certificates, and held the children out as her own.[321] After the court granted custody to the maternal grandmother and adjudicated the kids as dependent and neglected, the

316. 2021 COA 56, ¶¶ 20–21, 492 P.3d 392, 396–97.
317. *See* N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2000).
318. 2021 COA 56, ¶ 2, 492 P.3d 392, 394.
319. *Id.* ¶ 21, 492 P.3d at 397.
320. *Id.* ¶ 1, 492 P.3d at 394.
321. *Id.* ¶ 1, 492 P.3d at 395.

presumptive mother petitioned to establish her legal parental rights.[322] Throughout this time, the presumptive mother cared for the children alongside the maternal grandmother, and the father was granted visitation.[323] On the parentage issue, the trial court declared the father as a presumptive biological parent due to genetic testing results, and ultimately declared him as the children's only other legal parent to the biological mother.[324] The presumptive mother appealed, arguing that the court erred by imposing a two-legal-parent rule.[325]

The Colorado Court of Appeals engaged in a lengthy statutory analysis of this issue.[326] First, the court explained that when construing a statute, the court must apply the words and phrases according to their plain and ordinary meanings to avoid rendering any part of the statute meaningless.[327] Also, the court stated that "if the statute's language is clear and [the court] can discern the legislature's intent with certainty, [the court does] not resort to other rules of statutory interpretation."[328] The court stated that the purpose of the UPA is to establish and protect the parent-child relationship.[329] While this is the *function* of the UPA, it is not the *purpose* of the statute. Rather, the primary purpose of the 1973 UPA, which was substantially adopted in Colorado, was to provide equal protection for the rights of marital and nonmarital children and their parents and to safeguard adoption processes.[330] From the very start of its statutory analysis, the court neglected this key context to and purpose of the statute.

Next, the court importantly confirmed that the UPA "does not contain express language prohibiting a child from having more than two legal parents."[331] But the court then countered this point, stating that the UPA does still mandate "specific procedures that must be followed when a party seeks to establish parentage."[332] It noted that the statute states that a "parentage

322. *Id.* ¶¶ 4–7, 492 P.3d at 395.
323. *Id.* ¶ 8, 492 P.3d at 395.
324. *Id.* ¶ 9, 492 P.3d at 395.
325. *Id.* ¶¶ 10–11, 492 P.3d at 395–96.
326. *Id.* ¶¶ 12–38, 492 P.3d at 396–399.
327. *Id.* ¶ 13, 492 P.3d at 396 (quoting People *ex rel* L.M., 2018 CO 34, ¶ 13, 416 P.3d 875, 879).
328. *Id.*
329. *Id.* ¶ 15, 492 P.3d at 396.
330. *See infr*a Section I.C; *infra* Part III.
331. *Ex rel. K.L.W.*, 2021 COA 56, ¶ 18, 492 P.3d at 396.
332. *Id.*

presumption is rebutted by a court decree establishing parentage of the child by another person."[333] One might argue that the use of the word "is" in this portion of the statute mandates rebuttal and thus supports the establishment of a two-legal-parent limit. However, the statute also says that a presumption "may" be rebutted—not that it "must" be rebutted.[334] At the time of the court's' decision, the statute further stated that if two presumptions "conflict with each other, the [one] which on the facts is founded on the weightier considerations of policy and logic controls."[335] The process for deciding between conflicting parental presumptions is what the court references here.[336] However, the statute never states that all presumptions conflict or that having more than two presumptions means that at least one interested party's parental rights must be terminated. Even still, the court read this into the statute by suggesting that the statute's inclusion of a process to decide between competing presumptions requires courts to determine which presumption controls.[337] The court also emphasized the implied and informal two-legal-parent policy established in *N.A.H. v. S.L.S.*, even though that case never engaged in an analysis of the two-legal-parent issue.[338] Ultimately, the court held that since the conflicting presumption procedure is mandated in the statute requiring the termination of parental rights for rebutted presumptions, "a child is limited to having just two legal parents."[339] Despite this holding, the court never substantively engaged in an analysis of whether these provisions could plausibly be read to allow for more than two legal parents.

The court then looked to the legislative intent, reasoning that if "the legislature had intended to allow the possibility of a child having more than two legal parents, section 19-4-105(2)(a) would not require the court to always determine which

333. *Id.* ¶ 19, 492 P.3d at 396.

334. COLO. REV. STAT. § 19-4-105(2)(a) (2021).

335. *Id.* This language was later updated from "[i]f two or more presumptions arise, which conflict with each other" to "if two or more conflicting presumptions arise." H.B. 22-1153, 73d Gen. Assemb., 2d. Reg. Sess., § 19-5-203.5(2)(a) (Colo. 2022). This change does not appear to materially alter the courts analysis here, nor does it clarify whether all presumptions are in conflict or expressly add a two-legal-parent limit to the statute.

336. *Ex rel. K.L.W.*, 2021 COA 56, ¶¶ 19–20, 492 P.3d at 396–97.

337. *Id.*

338. *See infra* Section IV.A.

339. *Ex rel. K.L.W.*, 2021 COA 56, ¶¶ 20–21, 492 P.3d at 396–97.

competing parentage presumption should control."[340] However, this misinterprets the purpose of the statute, especially the parentage establishment and termination provisions.[341] These provisions of the 1973 UPA—which can most readily determine the purpose of these provisions since the comments to the UPA are so explicit as to its purpose—were primarily concerned with cases involving a single mother giving up her child for adoption.[342] Further, the UPA mandated that the mother or the person seeking adoption file a petition to terminate parental rights for an unknown or disinterested biological father, thus requiring notice, in order to help speed along adoption proceedings.[343] Yet, the court in *K.L.W.* missed the purpose entirely because the UPA was not concerned with whether more than two *interested* presumptive parents sought parental rights, but rather intended to provide courts a process to terminate parental rights of *disinterested* presumptive parents. Even so, the UPA governs all parentage determinations, and so this provision is all the court had in terms of guidance. One could argue that reading a two-legal-parent limit into this termination provision prevents presently interested presumptive parents from losing parental rights down the road. This argument still doesn't account for cases when more than two interested parents exist at the time of adjudication. Regardless, it is simply false to say that the Colorado UPA's process for deciding between competing presumptions *mandates* this two-legal-parent limit, yet the court ultimately established this rule based on this interpretation of the UPA.[344]

The court next compared the language of the Colorado UPA to the 2017 UPA to support this holding.[345] The 2017 UPA provides an optional provision that authorizes courts to adjudicate more than two individuals as legal parents of a child if failure to do so would be detrimental to the child.[346] The court

340. *Id.* ¶ 22, 492 P.3d at 397.

341. *See infra* Section I.C; *infra* Part III.

342. 1973 UPA, *supra* note 22, § 25 cmt. Though the UPA does not show the Colorado legislature's intent in enacting these provisions, the fact that they were not substantially altered from the UPA and that the Colorado legislature had these comments available to them, since they are attached to the UPA, may suggest that the Colorado legislature agreed, or at least did not disagree with the UPA drafters' intent as to these provisions.

343. *Id.* § 25(a); Krause, *supra* note 100, at 14.

344. *Ex rel. K.L.W.*, 2021 COA 56, ¶¶ 20–21, 492 P.3d at 396–97.

345. *Id.* ¶ 23, 492 P.3d at 397.

346. 2017 UPA, *supra* note 14, § 613(c) (Alternative B).

suggested that because the Colorado UPA does not contain these provisions, it does not envision or allow the possibility of three legal parents.[347] But the same logic also supports an opposite conclusion—the 2017 UPA provides an optional provision that explicitly limits courts to adjudicating no more than two legal parents, and since the Colorado UPA contains no such provision, it does not mandate a two-legal-parent limit.

Under the Colorado UPA, the court could have just as easily decided not to impose such a limit and instead utilize the best-interest-of-the-child standard (or a higher burden standard such as the harm-and-detriment standard) to adjudicate legal parentage in these cases. This is because nothing in the UPA *mandates* a two-legal-parent limit.

### 2. The Court's Analysis of Secondary Case Law

Beyond its interpretation of the UPA in *K.L.W.*, the court also distinguished this ruling from other out-of-state authority, which the presumptive mother relied on in her arguments.[348] The court first analyzed *LaChapelle v. Mitten*, a case involving a lesbian couple and their sperm donor.[349] There, the Minnesota Court of Appeals addressed whether the non-biological ex-partner of the biological mother could seek custody of the child.[350] The court in *K.L.W.* distinguished this case as a custody dispute, rather than a parentage dispute.[351] It noted that the Minnesota Court of Appeals described the ex-partner as a nonparent, and reasoned that this description "clearly indicates that [the court] was not in fact recognizing a third parent-child legal relationship."[352] However, the ex-partner was a nonparent because she was not seeking to establish legal parentage; she only sought custody. So while the Colorado court was accurate in distinguishing these cases, the Minnesota Court of Appeals never considered the two-legal-parent issue. Thus, the Minnesota ex-partner's nonparent status is not the result of a two-legal-parent limit, but rather is due to the type of case she filed.

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347. *Ex rel. K.L.W.*, 2021 COA 56, ¶ 25, 492 P.3d at 397.
348. *Id.* ¶¶ 26–35, 492 P.3d at 397–99.
349. 607 N.W.2d 151, 157 (Minn. Ct. App. 2000).
350. *Id.* at 158.
351. *Ex rel. K.L.W.*, 2021 COA 56, ¶ 26, 492 P.3d at 397.
352. *Id.*

The court similarly distinguished another custody case, *Jacob v. Shultz-Jacob*, which held that a third party has standing to seek custody, but that their in loco parentis status does not elevate the party to the level of a "natural parent."[353] Again, *Shultz-Jacob* was a custody dispute, and the two-legal-parent issue was not analyzed.

Next, the court distinguished cases in which the Delaware and California parentage statutes grant courts the authority to adjudicate legal parentage to more than two people.[354] However, the court failed to note that while California's statute explicitly authorized courts to adjudicate legal parentage to more than two people, the Delaware statute did no such thing and still allowed there to be more than two parents.[355] Notably, Delaware found other statutory grounds for allowing a child to have more than two legal parents under the statute's de facto parent provisions.[356] While Colorado's UPA only recognizes de facto parents (who are colloquially referred to as psychological parents in Colorado) as presumptive under the UPA's hold-out presumption until they are established as a legal parent, Delaware's statute grants de facto parents legal parentage through a separate determination such that an alleged de facto parent is a legal parent when the individual exercises parental responsibility for the child and fostered a parent-like relationship with the support and consent of the child's other parents.[357]

The Delaware court held that, even though the statute did not expressly allow for a child to have more than two legal parents, the statute did not prohibit this outcome.[358] The

353. 2007 PA Super 118, ¶ 10, 923 A.2d 473, 477.

354. Jw.S. v. Em.S., No. CS11-01557, 2013 WL 6174814, at *5 (Del. Fam. Ct. May 29, 2013); *In re* Donovan L., 198 Cal. Rptr. 3d 550, 559 (Ct. App. 2016).

355. DEL. CODE ANN. tit. 13, § 8-201(c) (2022); CAL. FAM. CODE § 7612(c) (2022).

356. *Jw.S.*, 2013 WL 6174814, at *5; DEL. CODE ANN. tit. 13, § 8-201(c) (2022). A de facto parent is often synonymous with a psychological parent. *See generally* Higdon, *supra* note 79.

357. tit. 13, § 8-201(c). A de facto parent is a legal parent when the individual "(1) [h]as 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) [h]as exercised parental responsibility for the child . . .; and (3) [h]as 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." *Id.*

358. *Jw.S*, 2013 WL 6174814, at *5; tit. 13 § 8-201(c); A.L. v. D.L., No. CK12-01390, 2012 WL 6765564, at *5 (Del. Fam. Ct. Sep. 19, 2012).

Colorado statute, like Delaware's, does not expressly prohibit a court from adjudicating more than two legal parents.[359] The Colorado Court of Appeals, however, distinguished this case on the grounds that "a court may recognize a third parent relationship when express statutory authority authorizes such a result," even though the Delaware statute does not do so.[360] Though the Delaware statute allowed for another process of establishing legal parentage to de facto parents, the statute does not expressly allow a third legal parent.

So, though the court in *People ex rel. K.L.W.* distinguished these cases and others on various grounds, no cited case supports the court's holding that the Colorado UPA mandates a two-legal-parent limit in the absence of express statutory language. Despite its holding, the court did recognize that the Colorado UPA does not account for nontraditional families who would benefit from abandoning the two-legal-parent limit, even noting that recognizing a third legal parent would be within the best interest of the child in some cases.[361] And since this best interest test was established based on legislative intent for the best interest of the child to be considered throughout the entire paternity proceeding, the court should have considered how a two-legal-parent limit would conflict with this well-established and expressly indicated judicial policy.[362] In contrast, rather than upholding well-established judicial policy to apply the best-interest standard in every part of the parentage proceeding, the court instead established *for the first time* a two-legal-parent limit based on prior case laws which never expressly established the policy or analyzed the issue at large.

Despite its claims to the contrary, the Colorado Court of Appeals could have allowed judges to adjudicate more than two legal parents on a case-by-case basis if it was within the best interest of the child. And given that the Colorado UPA does not expressly mandate a two-legal-parent rule, this would have been more consistent with the language of the Colorado UPA, legislative intent, and the court's own policy to consider the best interest of the child. However, the court ultimately held that abandoning a two-legal-parent limit is a task for the legislature,

359. COLO. REV. STAT. §§ 19-4-104 to 105 (2022).
360. People *ex rel.* K.L.W., 2021 COA 56, ¶ 35, 492 P.3d 392, 399.
361. *Id.* ¶ 38, 492 P.3d at 399.
362. N.A.H. v. S.L.S., 9 P.3d 354, at 357, 363 (Colo. 2000).

mischaracterizing this decision as upholding its responsibility not to "rewrite[]" the statute judicially.[363]

After the Court of Appeals decision in *People ex rel. K.L.W.*, the Petition for Writ of Certiorari to the Colorado Supreme Court was denied, thus further cementing this decision into Colorado law.[364] Ultimately, this decision is detrimental to nontraditional families, especially those fighting for legal recognition, rights, and responsibilities. From the LGBTQIA+ family who conceives a child with multiple parties and wants all parental figures to be in the child's life in a meaningful way, to the multigenerational families in which a grandparent's parent-like relationship is just as integral to the child as that of perhaps a biological mother and father, nontraditional families seeking recognition and protection as adjudicated legal parents are left behind. And as nontraditional families continue to grow and gain social and legal acceptance in the United States,[365] Colorado's two-legal-parent limit will relegate some parental figures to be legal strangers.

## V. MOVING BEYOND THE TWO-LEGAL-PARENT LIMIT IN COLORADO

Looking past *People ex rel. K.L.W.*, the question becomes, where do we go from here in seeking protections for nontraditional families who want legal parentage status for more than two parental figures? There are unfortunately few options without legislative intervention based on the court's ruling. It is unlikely that the Colorado Supreme Court will reconsider and overturn *People ex rel. K.L.W.* since the ruling was so recent. If the court did reconsider this case, the court could simply expand the best-interest-of-the-child test or adopt a harm-and-detriment-to-the-child test to adjudicate these types of disputes. This Part will consider a few notable options other than judicial reconsideration, including enacting the 2017 UPA and recognizing other forms of establishing legal parentage, such as through parenthood contracts.

363. *Ex rel. K.L.W.*, 2021 COA 56, ¶ 38, 492 P.3d at 399.

364. C. L. F. v. People In Interest of K. L. W., 21SC364, 2021 WL 3278184 (Colo. 2021).

365. *See infra* Part II.

### *A. Efforts to Enact the 2017 UPA*

Prior to the decision in *People ex rel. K.L.W.*, in February 2020, the 2017 UPA was introduced in the Colorado House of Representatives to amend the Colorado UPA to recognize that more than two adults can be a legal parent (among other changes to the statute).[366] However, the bill was postponed indefinitely just one month after its introduction.[367] Ultimately, given the failure of this bill and the more recent passage of other progressive family law bills,[368] it appears that a similar bill is unlikely to pass in the near future, especially since it has yet to be reintroduced. It's interesting to note that in one of these recent law passages, the legislature did adjust the language in the conflicting presumption provisions and did not explicitly answer the questions surrounding their intent for or against a two-legal-parent limit.[369] Yet, the legislature's failure to address the two-legal-parent limit in these amendments perhaps suggests that they do in fact agree with the decision in *People ex rel. K.L.W.* So, without further legislative intervention, it appears the two-legal-parent limit is here to stay for the moment.

### *B. Contracting Parenthood and Other Nonlegislative Solutions*

One alternative that would act as a "work around" to the two-legal-parent limit is for individuals to "contract" parenthood.[370] This option is not as radical as it seems—interested couples can establish preemptive co-parenting agreements like they do prenuptial agreements. Prenuptial and postnuptial agreements are contracts which terms come into effect in the event of divorce. A co-parenting contract similarly will come into effect if parents separate or seek a defined co-parenting agreement with all interested parties.

366. H.B. 20-1292, 72d Gen. Assemb., 2d. Reg. Sess. (Colo. 2020).

367. Memorandum, *Intent to Postpone Indefinitely House Bill 20-1292*, LEGISLATIVE COUNCIL STAFF (March 6, 2020).

368. H.B. 22-1153, 73d Gen. Assemb., 2d. Reg. Sess. (Colo. 2022); *see also* S.B. 22-224, 73d Gen. Assemb., 2d. Reg. Sess. (Colo. 2022).

369. H.B. 22-1153, 73d Gen. Assemb., 2d. Reg. Sess., § 19-5-203.5 (2)(a) (Colo. 2022).

370. *See* Frazier v. Goudschaal, 295 P.3d 542, 545 (Kan. 2013).

In *Frazier v. Goudschaal*, the Kansas Supreme Court upheld this type of parenting contract, though it did not adjudicate legal parentage and ultimately left that issue to the trial court on remand.[371] Here, a lesbian couple conceived two children through artificial insemination.[372] "In conjunction with the birth of each child, the couple executed a coparenting agreement that, among other provisions, addressed the contingency of a separation."[373] Upon the parties' separation and the resulting property and custody dispute, the biological mother argued that the contract was unenforceable.[374] The Kansas Supreme Court ultimately held that a co-parenting agreement was not unenforceable as a matter of public policy "so long as the intent, and effect, of the arrangement was to promote the welfare and best interests of the children,"[375] which parallels Colorado's best-interest-of-the-child standard.[376] The court went even further to state that the biological mother was asserting "her due process right to decide upon the care, custody, and control of her children" by entering into a co-parenting agreement.[377]

Parenting agreements like these, though not often preemptive, may be enforceable.[378] Since the court did not adjudicate legal parentage and left this issue to the lower court on remand, the question remains, however, whether a parenting agreement could establish legal parentage in and of itself, and further, whether more than two parents could contract legal parentage. According to the Kansas Supreme Court, this outcome is possible and may be enforceable so long as it is within the best interests of the child, the parties intended this outcome,

371. *Id.* at 558.
372. *Id.* at 545.
373. *Id.*
374. *Id.* at 552.
375. *Id.* at 555–56.
376. The Kansas Supreme Court's holding mirrors Colorado in many instances. First, the Court held that the non-biological mother had standing as an interested party under the Kansas UPA, which mirrors Colorado's UPA. *Id.* at 553. Further, Kansas had also established that as a matter of public policy, courts are required to act in the best interest of the child in parentage disputes. *Id.*; *In re* Marriage of Ross, 783 P.2d 331, 337–339 (Kan. 1989). Though Colorado's policy is that courts must *consider* rather than *act* in the best interest of the children in parentage disputes, both states utilize a best interest test in some capacity. N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000).
377. *Frazier*, 295 P.3d at 557.
378. *Id.* at 556.

and the contract was free of outside or government influence.[379] Regardless, parenting contracts may provide parents in nontraditional families some peace of mind in having their wishes for parent-child relationships and custody arrangements predetermined.

It's important to note that, though this type of parental contracting could establish legal parentage, if it were applied in Colorado, a parenting contract may not be able to overcome Colorado's two-legal-parent limit. Since Colorado has interpreted the Colorado UPA to mandate a two-legal-parent limit, such a contract would likely be unenforceable on statutory and public policy grounds. So though contracting legal parentage is an interesting idea, it is unlikely that a third legal parent could be established in this way without additional judicial or legislative action to overturn Colorado's two-legal-parent limit. However, even if Colorado ruled that parenting contracts cannot establish legal parentage to more than two people to remain consistent with *People ex rel. K.L.W.*, parenting contracts could still be upheld to grant multiple parents' rights and protections without that legal status. This type of rule could establish a spectrum of parentage that protects parent-child relationships that are legal and others that are nonlegal. Though this would not be ideal for those parents who want the legal status, it would at least provide some status and protection to those other parents that are currently left in the dust under the two-legal-parent limit.

## CONCLUSION

The simple truth is that two-legal-parent limits overly favor the nuclear family model, which is unrepresentative of a large portion of families in the United States both presently and historically—the nuclear family ideal portrayed in *I Love Lucy* that dominates U.S. parentage laws never actually represented American families. Colorado's recent decision to uphold a two-legal-parent limit means that these families lack legal recognition and the accompanying legal rights which only legal parents enjoy. Simply put, the court's reasoning for upholding a two-legal-parent limit was flawed. A plain reading of the Colorado UPA, in conjunction with a review of the statute's

379. *Id.*

purpose stemming from the UPA and the legislative intent, does not mandate a two-legal-parent limit. Colorado's ruling is thus not mandated by the Colorado UPA. Even so, this is now the law of the land in Colorado unless there is judicial or legislative intervention. Under the current rule, nontraditional families will continue to face challenges in gaining legal status and acceptance. Given how recent the *K.L.W.* ruling was and Colorado's recent failed attempt to enact the 2017 UPA in 2020, the law is unlikely to change any time soon. Ultimately, the law in Colorado, however unjust, is clear: a child can only have two legal parents.