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Non-Exclusive Adoption and Child Welfare

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NON-EXCLUSIVE ADOPTION AND CHILD WELFARE

*Josh Gupta-Kagan**

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ABSTRACT

This Article proposes that child welfare law permit the non-exclusive adoption of foster children who cannot reunify with their parents—that is, adoption by foster parents without severing children’s legal relationships with their biological parents. Present law imposes a choice: extended family members or other foster parents may adopt foster children exclusively—and terminate the legal relationship between the child and biological parents—or they may become guardians—which preserves parent–child relationships but denies foster parents the legal title of “parent,” even when they are long-term primary caretakers.

Non-exclusive adoption would respect the lived reality of many foster children by legally recognizing all parents in their lives. Biological parents, even those who cannot reunify with their children, retain an important role for many foster children. Foster parents serve as functional parents and often see themselves, and are seen by children, as parents. Moreover, creating an additional legal path for foster children to leave foster care to new permanent families may help many children and families find legal options that minimize unnecessary litigation.

Some courts and legislators have recognized multiple parenthood, especially for children conceived through assisted reproductive technology (ART) and raised by same-sex partners. Yet multiple parenthood faces a core challenge—multiplying the number of legally recognized parents can multiply legal conflicts over children. Non-exclusive adoption in child welfare has a compelling answer. Child welfare law’s experience with guardianship demonstrates one field where multiple parenthood is less radical than it appears at first. It also demonstrates that the law can effectively allocate parental authority to avoid such conflicts by granting the adoptive parent legal and primary physical custody. While a hierarchy of parental rights raises equality concerns in ART cases, it is appropriate in child welfare cases which, by definition, involve biological parents who have been found unfit and unable to reunify with their children.

I. INTRODUCTION

Darnell Jr. was born to his mother, Tameka, and his father, Darnell Sr., when they were fifteen and sixteen, respectively. Tameka’s mother had

physically abused her when she was a young child and became verbally abusive when she learned of Tameka's pregnancy, leading Tameka to run away. Meanwhile, Darnell Sr. was arrested for armed robbery and placed in juvenile detention while Tameka was pregnant.

Darnell Jr. was born premature and spent several weeks in the hospital after birth; Tameka had been discharged two days after the child's birth. When he was ready for discharge, Tameka panicked. She had no family to count on, no stable place to stay, and doubts about her ability to raise Darnell, so she did not go to the hospital to pick up her son. Hospital staff soon called child protection authorities who took Darnell from the hospital to a foster home. Upon discovering Tameka's situation, those authorities also placed Tameka in foster care. They soon identified Tameka's godparent, Terrence, who offered to have both Darnell and Tameka live with him. Darnell was placed there at the age of one month. Tameka was placed there for several months as well. She helped Terrence raise her son until he was eight months old, but repeated behavioral challenges led the foster care agency to place her in a group home.

Fast forward two years. Darnell Jr. has lived with Terrence since his discharge from the hospital. Tameka visits and has a relationship with her son, but has dropped out of school, and cycled through multiple foster homes and group homes. She sees herself as Darnell's mother but also recognizes that Terrence has raised her son and is closely bonded to him; she wants Terrence to continue to raise him because she believes that will give Darnell Jr. a better life. (She and Terrence, meanwhile, remain in friendly contact, but agree that Tameka should not live with Terrence again.) Darnell Sr. will soon be released from a juvenile detention facility. He has visited with his son every month. He does not think that he can raise Darnell Jr. well while also taking care of himself. He sees himself as Darnell Jr.'s father and wants to maintain his relationship, but is willing to allow Terrence to raise Darnell.¹

At this point, Terrence is Darnell Jr.'s primary caregiver; he is the sort of individual that in a prior generation would have been deemed a "psychological parent,"² and whom contemporary theorists would call a

1. This summary is based on a real case in which I was involved as a clinical instructor at the Washington University School of Law in St. Louis. Although based on a real case, I have changed names and other identifying details. I will refer to Missouri statutes throughout this Article both as an illustrative example of state adoption law and because this case, to which I will return throughout the Article, arose under those statutes.

2. See JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 11–13 (1996) (describing psychological parent concept and concluding that any caregiving person can assume that role); Susan Frelch Appleton, *Parents by the Numbers*, 37 *HOFSTRA L. REV.* 11, 28–29 (2008) (describing the ongoing impact of the psychological parent concept).

“functional parent.”³ Darnell Jr. calls him “Daddy.” Family law, and child welfare law especially, has moved towards respecting the actual caregiver relationships that children have,⁴ creating a strong impetus to grant Terrence and Darnell Jr.’s relationship a permanent legal status. At the same time, Darnell Jr. has a relationship with his biological parents; Darnell Jr. calls Tameka “Mommy” and calls Darnell Sr. “Papa.”⁵

The child welfare system will seek to provide Darnell Jr. with “permanency”—that is, a legally permanent relationship with his primary caregiver, which would transfer custody and decision-making authority to that caregiver, thus ending the state’s legal custody. Permanency is essential to child welfare law and practice, and for good reason: it is far better for a family with a legally permanent relationship with a child to raise that child than for the child to grow up in state custody.

The legal question becomes which legally permanent relationship is the best option for a particular child, a question which requires exploring the child’s relationship with both biological parents and the child’s potential caregivers. In Darnell Jr.’s case, if reunification with a parent is not possible, then the child welfare system will look to Terrence to become a permanent caregiver because only Terrence can provide the continuity of care that generally serves children’s interests.⁶ The law values this continuity via statutory preferences for existing foster parents as potential adoptive parents.⁷

Our present legal system in almost every state provides up to three options to create permanency between Terrence and Darnell Jr.: exclusive adoption without contact (closed adoption), exclusive adoption with contact, and guardianship.⁸ Not long ago there would be only one option—closed adoption. Now child welfare law offers other options which seek to better reflect children’s real-world relationships with both their new permanent caregiver and their birth parents. These options’ existence reflects significant progress in the child welfare field. It has led to tens of thousands more children leaving foster care to permanent families, while better respecting children’s ongoing relationships with birth families. These other options also give kinship and foster parents a choice between legal

3. See, e.g., Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 697 (2008).

4. See, e.g., Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 394 (2012).

5. The words children use to refer to adult caregivers are cited frequently in custody and adoption cases. E.g., *In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1252 (Ind. Ct. App. 2013) (“The record indicates that . . . the Child refers to Fiancée [adoptive mother] as ‘mom,’ . . .”).

6. See 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, 902 (1984) (noting the importance of continuity to children’s development).

7. See MO. ANN. STAT. § 453.070.7 (West 2014).

8. *Infra* Part II.

statutes that best reflect their identity and relationship with the child in question. Nonetheless, these options all structure parenthood as exclusive; if Terrence adopts Darnell Jr., then Tameka and Darnell Sr. cease to be his parents. If Terrence becomes Darnell Jr.'s guardian, he is not his parent, and Tameka and Darnell Sr. remain parents.

This Article argues that these options still exclude the most logical description of Darnell's family situation: he has three parents, and the law should permit recognition of all three. One parent, Terrence, should have primary custody and should have the bulk of decision-making rights. Two parents, Tameka and Darnell Sr., are parents—and are seen as such by Darnell Jr. They should visit frequently and be recognized as legal parents, but they should not be able to interfere with most of Terrence's day-to-day parenting choices. Recognizing this reality requires non-exclusive adoption, in which the law recognizes a third person (here, Terrence) as a child's parent without terminating the child's relationship with his biological parents.⁹ Such recognition would respect the lived reality of Darnell's relationships, providing a useful means of achieving permanency for Darnell while avoiding potentially harmful litigation.¹⁰

Non-exclusive adoption would challenge two ideas about adoption and parenthood that have formed the core of family law, and are tenets of existing child welfare and adoption law. First, the law has provided that no more than two people can have the legal identity of a "parent" of a particular child at the same time. Second, the law has required adoptive parents to have a marriage or marriage-like relationship with each other, replicating the norms of two-parent biological reproduction; if Terrence had a partner, she or he could adopt the child with him. Otherwise, existing statutes draw a bright line between Darnell's biological parents and Terrence; absent a marriage or marriage-like relationship, adoption statutes as presently understood preclude Terrence from adopting Darnell Jr. without terminating his legal relationship with Tameka and Darnell Sr.¹¹

9. One could easily change the hypothetical to involve only two parents—and thus not challenge the general rule against more than two parents—or as many as four parents. If one biological parent was deceased, or so abusive to the child or had such a negligible relationship with the child that a termination was appropriate, then a non-exclusive adoption would recognize only two parents—the adoptive parent and the remaining biological parent. If the foster parent had a spouse or partner, they could adopt as well, leading to four parents—two adoptive and two biological. To keep the core hypothetical simple without avoiding the challenge to the rule of two, I will limit the possible parents to three.

10. *Infra* Part III.

11. Missouri statutes, for instance, provide that adoption generally terminates the relationship between biological parents and children. MO. ANN. STAT. § 453.090 (West 2014). One clear exception exists—stepparent adoption, which requires the adoptive parent to be married to the biological parent. MO. ANN. STAT. §§ 453.090.1 & 453.010.4 (West 2014). Similar provisions exist in the Uniform Adoption Act (UAA): UAA § 1-105 provides that an adoption by one parent terminates the legal relationship between the biological parent and the child; the biological parent becomes known as the "former parent." The only exception is for stepparent adoption, which requires the stepparent to be

Non-exclusive adoption would change that, permitting both legal recognition of more than two parents, and joint parenthood without a marriage-like or sexual relationship of any sort between Darnell's biological parents and Terrence.

These traditional elements of legal parenthood—the rule of two, and the conjugal nature of parenthood—have come under increasing attack in recent years, especially as same-sex couples and assisted reproductive technology (ART) have challenged traditional family law norms. Those who have attacked these traditional pillars of family law are self-consciously “radical.”¹² Somewhat curiously, these attacks have rarely used child welfare cases to challenge these norms, even though child welfare has long given greater weight to the lived relationships between children and adult caregivers, not only the legal relationships between adults. Child welfare cases thus present examples where challenging the rule of two and the conjugal nature of parenthood is not nearly as radical as it may seem at first. Child welfare cases also provide compelling and ready answers to legitimate criticism of recognizing multiple parenthood—especially the concern that expanding the number of parents will expand the amount of conflict over children. Child welfare law regarding guardianship already establishes a hierarchy of caregivers, and has an empirical record of largely avoiding the feared conflict. While such a hierarchy could be problematic outside of child welfare—because it would challenge the law's commitment to equality among parents—it would naturally fit in child welfare law, especially cases involving a fit adoptive parent and a parent found to have abused or neglected a child in the past.¹³

This Article argues that non-exclusive adoption will better serve some children like Darnell Jr. and their parents (birth, foster, and adoptive) than other permanency options, and thus should be a permanency option in child welfare cases. Legislative and litigation-based reform strategies could make third-party adoption possible; indeed, in late 2013, California enacted legislation that will permit non-exclusive adoption, although this legislation is not without its problems.¹⁴ Non-exclusive adoption would be based on the consent of all parents; if all parties agree, Terrence should be able to adopt Darnell Jr., and thus adopt the legal identity of a parent without terminating Tameka and Darnell Sr.'s identity as Darnell Jr.'s parents. This

married to one of the child's parents. UNIF. ADOPTION ACT § 4-102(a) (1994). The UAA would limit the consequence of stepparent adoption slightly—preserving the former parent's right to visit and the child's right to inherit from the former parent. I explore possible chinks in this statutory armor, *infra* Part V.B.

12. E.g., Michele Goodwin & Naomi Duke, *Parent Civil Unions: Rethinking the Nature of Family*, 2013 U. ILL. L. REV. 1337, 1342 (2013) (“This Article urges a radical rethinking of family . . .”).

13. *Infra* Part III.

14. *Infra* Part V.A.1.

adoption should, like guardianship, provide Terrence with full legal custody, while reserving a right to visit (and other rights, such as the right to consent to any future adoption) to Tameka and Darnell Sr. Like guardianship, if circumstances change substantially, Tameka or Darnell Sr. could seek to regain custody; unlike guardianships in many states, they would not be entitled to any preference that parents receive in disputes with non-parents.¹⁵ Like adoption, and unlike guardianship, the adoption should not be subject to termination; Terrence would not be permitted to return Darnell to foster care without consequence, and if Tameka or Darnell regained custody, Terrence would retain a right to visit.¹⁶

II. EXISTING OPTIONS

In decades past, when a foster child could not reunify with a parent, exclusive adoption was the only legal option available for that child to have a new, permanent family. As explained below, child welfare law has evolved, and now offers permanency options on a spectrum in cases when foster children cannot return home. For a child like Darnell Jr., existing child welfare law offers up to three options for providing a new, legally permanent family:

First, Terrence could adopt Darnell Jr. through a traditional, exclusive adoption—one that terminates Tameka and Darnell Sr.’s relationship with and all parental rights over Darnell Jr. Terrence would become Darnell Jr.’s only legal parent, and Tameka and Darnell Sr. would become legal strangers to their son. This does not mean that they will have no relationship with their son; Terrence could permit Darnell Jr. to have as much contact with Tameka and Darnell Sr. as Terrence sees fit. Many adoptive parents permit significant contact.¹⁷ But, as a matter of law, Tameka and Darnell Sr. would not have any right to visit; Terrence would have been substituted for Tameka and Darnell Sr. as Darnell Jr.’s parent, endowed with the parental authority to determine who the child can see.

15. Case law in multiple states holds that a parent seeking to terminate a consensual guardianship that does not include a finding of unfitness is entitled to a presumption that termination serves the child’s best interests. *E.g.*, *Tourison v. Pepper*, 51 A.3d 470, 473 & n.11 (Del. 2012) (collecting cases and holding that fit parents are entitled to a presumption that they serve their children’s best interests when they seek to terminate a guardianship); *Troeskyn v. Herrington (In re Guardianship of S.H.)*, 409 S.W.3d 307, 316 (Ark. 2012) (collecting cases and adopting the “majority view . . . that parents who have not been found unfit do not relinquish their fundamental liberty interest . . . and, thus, they are entitled to the *Troxel* [v. Granville, 530 U.S. 57 (2000)] presumption [that they are fit and that, as fit parents, they act in the child’s best interests]”).

16. *Infra* Part IV.

17. Connections between adoptive and biological families have become increasingly common, with some asserting that there is now a “consensus . . . that greater openness offers an array of benefits for adoptees.” ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 4–5, 11 (2000).

Second, Terrence could adopt Darnell Jr. and agree to a post-adoption contact agreement with Tameka and Darnell Sr. This option is identical to the first except for the contact agreement, which gives Tameka and Darnell Sr. a right to continue their relationships with Darnell Jr. Such an agreement is legally enforceable—if a court finds that enforcement is in the child’s best interests—in at least twenty-six states plus the District of Columbia which have adopted post-adoption contact agreement statutes.¹⁸ While a post-adoption contract makes Terrence the parent of Darnell Jr., it gives Tameka and Darnell Sr. the right to visit with Darnell Jr.; this visitation right does not mean that they remain parents. The adoption would still terminate their parent–child relationship with Darnell Jr. and thus declare the child’s “Mommy” and “Papa” to no longer be his parents.

Third, Terrence could become Darnell Jr.’s guardian. Guardianship would also give Darnell Jr. permanency, by making Terrence his permanent guardian with full legal custody. It would respect Tameka and Darnell Sr.’s ongoing relationship with Darnell Jr. by maintaining both a right to visit and their identity as Darnell Jr.’s parents. Depending on the state, parents may retain other authority, such as the right to consent to a later adoption or to determine the child’s religion.¹⁹ Maintaining the legal parent–child relationship is a central element of guardianship and a core reason for its appeal.²⁰ Indeed, kinship caregivers often express reluctance to adopt (and thus a preference for guardianship over adoption) because they do not want to disrupt family relationships in the way that traditional adoption—and, especially, terminating parental rights—requires.²¹ What guardianship does not do is give Terrence the legal identity as Darnell Jr.’s parent; it would declare Darnell Jr.’s “Daddy” to be something other than a parent.

Guardianship is sometimes seen as a less permanent option than adoption and, for this reason, child welfare law prioritizes adoption over

18. Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 319 (2012). For an overview of state statutes, see CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES (May 2011), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf [hereinafter POSTADOPTION CONTACT AGREEMENTS]. On the enforceability being subject to a child’s best interests, see POSTADOPTION CONTACT AGREEMENTS at 4; D.C. CODE § 4-361(b)(1) (2001).

19. *E.g.*, D.C. CODE § 16-2389(c) (2001).

20. Mark F. Testa, *When Children Cannot Return Home: Adoption and Guardianship*, 14 THE FUTURE OF CHILDREN 115, 121 (2004) [hereinafter Testa, *When Children Cannot Return Home*]; Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 476–77 (1996).

21. Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 466–67 (2002).

guardianship.²² Indeed, guardianships can be terminated; if parents rehabilitate, they can petition to terminate a guardianship.²³ If they do so, they may even enjoy a legal preference for parental custody.²⁴ Guardians can also ask that a child be returned to foster care if they feel that they can no longer raise the child.²⁵

Empirically, however, guardianships appear functionally as permanent as adoptions. In a rigorous study with a large sample size and randomized control and experimental groups, Mark Testa found that only 67 of 1,275 children living with guardians had a placement disruption or otherwise had their guardianship terminated.²⁶ Offering guardianship to families does not affect the likelihood that a child's placement with a family will disrupt either while the child is formally a foster child or after a court enters a guardianship or adoption order.²⁷ Matching families in the experimental group who chose guardianship to similar families in the control group who pursued adoption, Testa found “no evidence of any adverse impact on the long-term stability of the living arrangement” from guardianship.²⁸ A California study reported slightly larger, but still small levels of guardianship disruptions—nothing to undermine the “substantially greater” permanency rates that guardianship catalyzed.²⁹

Under all three legal statuses—traditional adoption, adoption with contact, and guardianship—Terrence will be Darnell Jr.'s primary and permanent caretaker, and Tameka and Darnell Sr. may have some contact

22. Federal law requires states to rule out adoption before guardianship subsidies are available. 42 U.S.C. § 673(d)(3)(A)(ii) (2012). States have generally incorporated this requirement into their guardianship laws or procedures. *E.g.*, MO. DEP'T OF SOC. SERVS., CHILD WELFARE MANUAL § 4, ch. 22.2(2) (2013), available at <http://www.dss.mo.gov/cd/info/cwmanual/section4/ch22/sec4ch22.pdf> (requiring that “[a]doption is not an option” for a guardianship to proceed).

23. *E.g.*, MO. ANN. STAT. § 475.083.2(3) (West 2009).

24. *E.g.*, *Tourison v. Pepper*, 51 A.3d 470, 473 n.11 (Del. 2012); *Troeskyn v. Herrington* (*In re Guardianship of S.H.*), 409 S.W.3d 07, 313–16 (Ark. 2012).

25. In many jurisdictions, any party—including the guardian—can move to terminate the guardianship order. *E.g.*, D.C. CODE § 16-2395(a) (2001).

26. MARK F. TESTA ET AL., UNIV. OF ILL. AT URBANA-CHAMPAIGN & WESTAT, ILLINOIS SUBSIDIZED GUARDIANSHIP WAIVER DEMONSTRATION: FINAL EVALUATION REPORT 50 (2003), available at http://cfrc.illinois.edu/pubs/rp_20030701_IllinoisSubsidizedGuardianshipWaiverDemonstrationFinalEvaluationReport.pdf.

27. Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 526–27 (2005) [hereinafter Testa, *Quality of Permanence*].

28. MARK F. TESTA, CHILDREN & FAMILY RESEARCH CTR., UNIV. OF ILL. AT URBANA-CHAMPAIGN, SUBSIDIZED GUARDIANSHIP: TESTING THE EFFECTIVENESS OF AN IDEA WHOSE TIME HAS FINALLY COME 23–24, 25 (2008), available at [http://www.nrcpfc.org/is/downloads/SG_Testing%20Effectiveness%20\(Testa%202008\).pdf](http://www.nrcpfc.org/is/downloads/SG_Testing%20Effectiveness%20(Testa%202008).pdf).

29. CAL. DEP'T OF SOC. SERVS., REPORT TO THE LEGISLATURE ON THE KINSHIP GUARDIANSHIP ASSISTANCE PAYMENT (KIN-GAP) PROGRAM 5 (2005), [hereinafter CALIFORNIA KIN-GAP REPORT TO THE LEGISLATURE]. The study found that 5.9 percent of children who left foster care to subsidized guardianship subsequently re-entered foster care. The study cautioned that some of these re-entries might be “positive”—such as a re-entry to facilitate reunification with a parent. *Id.* at 15.

with the child. That multiple options exist—and specifically, options other than traditional adoption with no contact rights—represents a significant shift in child abuse and neglect law over the past generation, consistent with Katharine Bartlett’s path-breaking call a generation ago for non-exclusive parenthood and subsequent commentary.³⁰ Nonetheless, viewed in terms of the legal title of “parent,” all of these options remain exclusive. (California, through legislation enacted in October 2013, permits non-exclusive adoption and is thus the one state that permits an exception to this proposition.³¹) For Terrence, the choice between adoption and guardianship is a choice between becoming Darnell’s parent or his guardian. For Tameka and Darnell Sr., adoption would be the end of their legal identity as Darnell’s parents, while guardianship would maintain that identity. The question of identity—who of these three adults can claim to be the child’s legal parent—is important, and the legal options available to the parties render the status of legal parent exclusive. In guardianships, the guardian is explicitly not a parent; the biological parent(s) retains that status. In adoptions (with or without contact rights), the adoptive parent(s) obtains and the biological parent(s) loses that status.

III. NON-EXCLUSIVE ADOPTION’S SPECIAL BENEFITS IN CHILD WELFARE CASES

This Article argues that child welfare law should permit a fourth option—non-exclusive adoption, in which Terrence would adopt Darnell Jr. without terminating Tameka and Darnell Sr.’s parental rights.

Recognizing all three adults as parents is valuable for multiple reasons. First, normatively, the legal name attached to a particular status matters significantly to the individuals involved. If, on the facts of a family’s case, there are three (or four) parents and the parents agree to recognize each other’s status, then the law ought to so recognize too. The legal name helps establish individuals’ identities and shapes the relationship among all the principals. Whether one can claim the legal title of “parent” is particularly salient in the child welfare field, which has developed the permanency options of adoption and guardianship to manage this precise issue. The field’s experience with guardianship demonstrates the importance that parties place on the legal title granted an adult caregiver.

Second, instrumentally, offering an option for non-exclusive adoption can help more children leave foster care to permanent families, and to do so

30. See generally Bartlett, *supra* note 6. For examples of subsequent commentary, see Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835, 870–73 (2000); Schwartz, *supra* note 20, at 451–61.

31. *Infra* notes 177–179 and accompanying text.

through a legal status that best reflects their lives and imposes the least harm by unnecessary litigation between the most important adults in their lives.³² Again, the field's experience with guardianship is instructive, demonstrating that existing permanency options may force families into less than ideal situations and prevent some children from leaving foster care at all.

Third, permitting non-exclusive adoptions would also provide certain other benefits to foster children that depend upon the parent-child relationship. It would maintain their legal relationships with non-adopted siblings and other extended family members through biological parents and create such relationships through adoptive parents. Moreover, it would maximize various other legal rights that spring from a parent-child relationship.

A. Legal Names Matter

The terminology applied to a legal relationship—whether we call Terrence “guardian” or “parent” and whether we call Tameka and Darnell Sr. “parents” or remove that label—matters because it communicates society's view of the status of a relationship, and thus shapes the understanding of a relationship both among the adults and the children involved.³³

Family law has recognized in multiple contexts that, as Clare Huntington has put it, “[t]he names we use matter.”³⁴ In describing what relationship rights may exist between children and caregivers other than biological or adoptive parents, commentators and law reform efforts have adopted terms such as “functional” or “de facto parents” as a means of granting a legal title of “parent” to third-party caregivers.³⁵ Many states' family law codes now provide for presumptions in favor of joint legal and physical custody³⁶—so even a parent who functionally only has visitation

32. Child advocates and the academy have long recognized the “jurogenic” harms to children of litigation—defined as “harm to the child that flows from contact with the legal system.” Pamela Mohr, *Report of the Working Group on the Allocation of Decision Making*, 64 *FORDHAM L. REV.* 1325, 1327 (1996).

33. David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 *ARIZ. L. REV.* 753, 793 (1999).

34. Clare Huntington, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 130 (2014).

35. See Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 *GEO. MASON L. REV.* 419, 421, 422 n.10 (2013) (arguing for the use of a term like “de facto parent” rather than “third party” for certain caregivers). The American Law Institute has proposed the legal status of “de facto parent[.]” and “parent[.] by estoppel” for some caregivers. *Infra* notes 150–156 and accompanying text.

36. E.g., D.C. CODE §§ 16-914(a)(1)(B)(ii) & 16-914(a)(2) (2001 & Supp. 2014) (defining visitations rights as part of “physical custody” and establishing a presumption that “joint custody”

rights is a “custodial parent” in the eyes of the law, and can identify as such.

The importance of the name attached to a legal status is especially evident in debates over same-sex marriage. A tenet of the argument that states must legally recognize same-sex marriages is that granting same-sex couples all rights held by opposite-sex married couples but denying the same legal title (calling their relationship a civil union rather than a marriage) unlawfully discriminates between the two groups. When the state gives different names to different groups, the state suggests a hierarchy and discrimination between the two.³⁷ Providing the same legal name accords equal “dignity and respect” to all parties.³⁸ For children like Darnell Jr., legally recognizing three parents “legitimate[s] the lived experiences of the children in question,”³⁹ just as legally recognizing same-sex marriage legitimates the experiences of committed same-sex couples. Absent weighty countervailing considerations, the law should not impede children’s ability to “understand the integrity and closeness of their own family,”⁴⁰ a principle which requires the law to recognize the lived realities of children’s families.

Just as a legal hierarchy exists among adult relationships, with marriage higher than civil unions or domestic partnerships, a legal hierarchy exists among adult caregiver-child relationships, with parent higher than guardian, and certainly higher than former parent or legal

serves children’s best interests). *See also* Huntington, *supra* note 34, at 130 (describing some states use of “parenting time” to replace “custody” terminology).

37. *In re Marriage Cases*, 183 P.3d 384, 400–01 (Cal. 2008).

38. *Id.* at 400. One year later, the California Supreme Court upheld Proposition 8’s ban on same-sex marriage, explaining that it changed only “the official *designation* of the term ‘marriage’” without “*fundamentally alter[ing]*” same-sex couples’ constitutional rights. *Strauss v. Horton*, 207 P.3d 48, 61 (Cal. 2009) (emphases in original). The Court went on to reaffirm “the significance that the official designation of ‘marriage’ holds” and describe it as a “vital factor” in its original decision in favor of same-sex marriage. *Id.*

39. Appleton, *supra* note 2, at 68.

40. *United States v. Windsor*, 133 S.Ct. 2675, 2694 (2013). Justice Kennedy’s opinion striking down the Defense of Marriage Act’s definition of marriage for federal law purposes also stated that denying the marriage of a same-sex couple “humiliates” children raised by those couples. *Id.* Justice Kennedy followed earlier marriage equality cases espousing similar logic. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (“Excluding same-sex couples from civil marriage will . . . prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure . . .”) (citation and quotation omitted); *id.* at 972 (Greaney, J., concurring) (prohibiting same-sex marriage “creat[es] a system in which children of same-sex couples are unable to partake of legal protections and social benefits taken for granted by children in families whose parents are of the opposite sex.”). *See also* Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589 (2013) (arguing that same-sex marriage bans harm children of same-sex couples by “depriving children of a legal relationship with both of their parents”); Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1 (2012) (same). Post-*Windsor* marriage equality cases have continued making the point. *E.g.*, *Baskin v. Bogan*, 766 F.3d 648, 663–64 (7th Cir. 2014).

stranger—what a biological parent becomes after termination. That hierarchy is evident in child welfare law’s preference for adoption over guardianship,⁴¹ and in the law’s privileging of parents over guardians in guardianship modification fights.⁴² Thus, it should be no surprise if some foster parents, like Terrence, seek the term “parent” that adoption provides rather than “guardian,” and we should similarly expect parents like Tameka and Darnell Sr. to want to maintain their legal title of parent by avoiding termination of their rights.

The child welfare field’s experience with guardianship demonstrates that this hierarchy is not monolithic—parties to a single case do not always desire the same legal title. For instance, in many cases, it is important to biological parents to not become a legal stranger to their child,⁴³ for this reason some parents are willing to consent to a guardianship petition but not to an adoption petition (at least an adoption petition that would terminate their parental rights).⁴⁴ Some grandparents, aunts, uncles and others raising children want to “retain their extended family identities”⁴⁵ rather than become a “parent,” and becoming a guardian permits them to do so. This does not mean that the name “parent” or “guardian” affects other outcomes for children—Testa has shown that whether children were living with adoptive parents or guardians did not affect their sense of belonging to a family,⁴⁶ or the stability of a child’s living arrangement; the quality of the child’s relationship with the caregiver, and the degree of familial relationship (prior to any legal change) were far more important.⁴⁷

Whatever the precise legal title an individual desires, guardianship shows that different family members do place importance on the name of a legal relationship. Just as some families prefer the legal names accorded via guardianship, it is not hard to imagine individuals like Terrence, Darnell Sr., and Tameka preferring legal names that respect all three adults as parents. Indeed, given the “powerful legacy” of the concept of psychological parents throughout family law and especially in child welfare law,⁴⁸ we should expect that many long-term foster parents (both kinship and not) who wish to make a permanent commitment to raise a child will want to claim the legal title of parent. Absent data showing different

41. *Supra* note 22 and accompanying text. This hierarchy is subject to challenge. *Supra* notes 23–27 and accompanying text.

42. *Supra* note 15.

43. Sanger, *supra* note 18, at 321–22.

44. *Cf.* Schwartz, *supra* note 20, at 452–53 (describing situations in which a termination triggered opposition and much litigation and delay by a parent who sought only visitation rights).

45. Testa, *Quality of Permanence*, *supra* note 27, at 505; Jesse L. Thornton, *Special Report: Permanency Planning for Children in Kinship Foster Homes*, 70 CHILD WELFARE 593, 597 (1991).

46. Testa, *Quality of Permanence*, *supra* note 27, at 524–25.

47. *Id.* at 525.

48. Appleton, *supra* note 2, at 28.

outcomes based on legal status, the law should defer to the preferences of the individuals whose family relationships are at issue.⁴⁹

Relatedly, the name of a legal relationship determines which adult can name children. Naming a child is a core parental authority,⁵⁰ so determining who has authority regarding a name change is crucial. Names are deeply personal, “arguably constitutive of our selves.”⁵¹ Children’s names identify their legal relationships. Darnell Jr.’s first name reflects his biological parentage—he carries his father’s first name, and his mother’s choice to grant him that name.⁵² And his given last name is his mother’s, identifying to the world the parent or parents to which that child is tied socially and legally, and tells children who their parents are.⁵³ The importance of names to children’s identity is already part of family law: adjudicating disputes between divorced parents about children’s names, at least one state has emphasized how the current and proposed name affect a child’s identity as core factors to consider.⁵⁴ Exclusive adoption could change this name; adoption, but not guardianship, generally provides a new caregiver the authority to change the child’s name assigned by birth parents at birth and even obtain a new birth certificate.⁵⁵ If Terrence becomes Darnell’s guardian, then Darnell’s last name will remain the same—a testament to his ongoing parental relationship with Darnell Sr. and Tameka.

49. Testa, *Quality of Permanence*, *supra* note 27, at 531 (concluding “that the preferences of children and kin” should shape decisions between adoption and guardianship).

50. See generally Carlton F.W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 GEO. WASH. L. REV. 159 (2011).

51. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 763 (2007).

52. When a child is born to unmarried parents, Missouri law provides that the father’s name and information will not be included on a birth certificate unless the father has signed an acknowledgment of paternity or a court has entered an order declaring the child’s paternity. MO. ANN. STAT. § 193.085.7 (West 2011). These exceptions were not met in Darnell Jr.’s case, as Darnell Sr. was incarcerated at the time of his birth, leaving Tameka as the only parent with authority to name him.

53. Emens writes that “naming regime . . . tells children about their selves and their parents.” *Supra* note 51 at 785. That point is in reference to marital name conventions—specifically, husbands not changing their names and wives often adopting their husbands’ names—on children, but surely applies to adopted children’s names as well.

54. The South Carolina Supreme Court has listed nine factors to consider in such cases, including “the effect of the [name] change on the preservation and development of the child’s relationship with each parent; . . . the identification of the child as part of a family unit; . . . and the possibility that the use of a different name will cause insecurity or a lack of identity.” *Wilson v. McDonald*, 713 S.E.2d 306, 308 (S.C. 2011) (quotation and citation omitted). I thank Marcia Zug and her student, Andrew Littlejohn Johnson, for noting this related naming issue.

55. *E.g.*, MO. ANN. STAT. § 453.100 (West 2014); UNIF. ADOPTION ACT § 1-103 (1994). Guardianship statutes lack similar provisions. See MO. ANN. STAT. § 475 (West 2009). Historically, granting an adopted child a new birth certificate seeks to replicate a two biological parent norm for an adopted child by printing a fictional document purporting to show that the child was born to the adoptive parents. Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361, 393. Such a legal fiction would be pointless in a non-exclusive adoption scenario, as neither the family nor the state would have any interest in hiding the child’s biological origins.

If Terrence adopts, and does not terminate Darnell Sr. and Tameka's rights, then a name change could be permitted, especially if all three parents agree. A last name blending Darnell's birth name with Terrence's last name might be appropriate; any of the parents might insist on it as a condition of agreeing to the non-exclusive adoption. If Darnell Jr. were older, he might do so as well. Because a name that blends Terrence's last name with Darnell Jr.'s birth name communicates both that Terrence is now Darnell Jr.'s parent, and that Tameka and Darnell Sr. remain his parents, non-exclusive adoption laws should presume that such a child has such a blended name unless the parents consent otherwise.⁵⁶

Just as children's names can shape their identity, the names that children use for adult caregivers reflect and shape those relationships. Children often call caregivers other than biological parents "mom" or "dad."⁵⁷ Darnell Jr. calls his foster parent "Daddy," and his biological parents "Mommy" and "Papa"—and he is one of many children I have encountered in foster care who utilize such naming devices for their various parent figures.

Darnell's naming devices provide a shorthand illustration of why legal titles should reflect the relationships between adults and children, even if it requires recognizing more than two individuals as parents. This vertical focus between generations differs from family law's frequent focus on horizontal relationships, especially marriage or marriage-like relationships between adults.⁵⁸ The general rule is that absent "the functional equivalent of the traditional husband-wife relationship," two people cannot become parents to the same child via adoption.⁵⁹ That is, courts will dismiss adoption petitions due to the absence of a marriage-like relationship between petitioners without any consideration of the relationship between those petitioners and the child.⁶⁰ But respecting the lived experiences of foster children requires a vertical focus. Foster children by definition have biological parents—from whom the state removed them and with whom they often maintain strong relationships—and foster parents—who provide

56. Cf. Emens, *supra* note 51, at 859–61 (proposing a default rule of hyphenating spouses' names at marriage).

57. E.g., Sacha M. Coupet, *Neither Dyad nor Triad: Children's Relationship Interests Within Kinship Caregiving Families*, 41 U. MICH. J.L. REFORM 77, 79 (2007) (describing such a situation).

58. I borrow Sacha Coupet's horizontal and vertical terminology, based on "how the family structure would be depicted within a family tree. A mother or father's spouse, quasi-spouse, or prescribed mating partner would be connected to her/him along a horizontal axis By contrast, a mother or father's ancestors . . . would be aligned vertically" Sacha M. Coupet, "Ain't I A Parent?": *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 601 n.10 (2010).

59. *In re Adoption of Garrett*, 841 N.Y.S.2d 731, 732 (N.Y. Surr. Ct. 2007).

60. See, e.g., *id.* (dismissing adoption petition filed by biological mother and her sibling without any discussion of the sibling's relationship with the child, other than a note that the mother, her sibling, and her child had been living together for "only" several months).

day-to-day care and often permanent homes.⁶¹ Biological and foster parents will not have a marriage or marriage-like relationship, but this is of no relevance to the real relationships that children have with both of them. The names that the law applies to both categories of adults should, therefore, follow a vertical focus.

Across history and various cultures, legal construction of parentage has been about constructing children's legal identity.⁶² The law's establishment of relationships between certain adults and children "is both an active agent in prescribing, proscribing, and attributing identity, and a public medium for choosing and enacting it."⁶³ Biological parent-child relationships hold a privileged place in our law and culture, and, as a result, play a powerful role in shaping individual identity, as many commentators have explored.⁶⁴ This norm is globally accepted; international law connects a child's family relationships to a child's right "to preserve his or her identity."⁶⁵

Consistent with that principle, empirical studies show both that foster children's ongoing relationships with their biological parents are important and often beneficial, and that terminating these relationships can be harmful. Ongoing relationships with biological parents and other family members is quite common, even when the child welfare system has deemed parents too problematic to ever reunify with their children during their childhoods. One study found 39% of all children adopted from foster care—whose parents' rights were therefore terminated—lived with adoptive parents who had agreements to ensure ongoing post-adoption contact with biological family members.⁶⁶ The growth of both informal and formal open adoption testifies to that fact.⁶⁷ Lawyers assigned to represent children have reported their clients' ongoing relationships with their parents, even after long court-mandated separations.⁶⁸ Ongoing contact with biological parents is so frequent that states have begun enacting

61. For a philosophical argument that day to day care should establish parental rights, see JONATHAN HERRING, *CARING AND THE LAW* 199–203 (2013).

62. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1332–34 (2005).

63. Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 111 (1995). See also Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 591–92 (2013) (noting how the law's definition of who is a parent will "often shape[] public images created through performance" of family roles).

64. E.g., Annette Ruth Appell, *The Myth of Separation*, 6 NW. J.L. & SOC. POL'Y 291, 292–97 (2011) (discussing biological connections' value and collecting sources).

65. Convention on the Rights of the Child, art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3.

66. SHARON VANDIVER ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., *ADOPTION U.S.A.: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS* 45 (2009), available at <http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf>. Significantly more children adopted are outside of foster care. *Id.* at 3.

67. See Appell, *supra* note 64, at 295 (describing growth of open adoption).

68. E.g., *id.* at 293.

statutes to permit re-establishment of parental rights after supposedly permanent termination of parental rights orders are entered.⁶⁹

Ongoing contact is particularly common among children who grow up in foster care, and only leave when they emancipate at age 18 or 21. A study of former foster youth who grew up in foster care after spending some significant time with their biological families showed that they maintained a “very close” or “somewhat close” relationship with their mothers—27% and 25%, respectively.⁷⁰ These are strikingly high numbers for parents who the child welfare system deemed too unfit to reunify at any point during their children’s childhood.

Conversely, terminating parents’ rights to their children—and thus terminating the legal relationship between parents and children—can have negative consequences when children have ongoing relationships with their parents. Such terminations are “upsetting” to children, and are a “loss” to be “cop[ed] with,” not a neutral legal action.⁷¹ Terminations can cause children to grieve and can injure their self-esteem, while maintaining parent–child relationships can prevent or mitigate these harms.⁷² Terminating biological parent–child relationships can harm children’s developing sense of identity, and even cause some children to develop behavior problems which threaten adoptive families.⁷³ And foster children, especially older foster children, often express hesitation about adoption because they seek to maintain strong connections with their biological family members, or because they retain hope of living with a biological parent, even a parent with whom they have never lived.⁷⁴

69. Richard Barth, *Adoption from Foster Care: A Chronicle of the Years After ASFA*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 64, 65–66 (2009), available at http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf; LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 318 (2010).

70. MARK E. COURTNEY ET AL., CHAPIN HALL AT UNIV. OF CHI., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 14 (2011), available at http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf. This study focused on youth who entered before turning 16 and were still in foster care at 17, and thus lacked a new permanent family, and likely spent some significant time living with their biological families before entering foster care. *Id.* at 3.

71. See Kerri M. Schneider & Vicky Phares, *Coping with Parental Loss Because of Termination of Parental Rights*, 84 CHILD WELFARE 819, 838 (2005).

72. Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 414 (1997).

73. Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 238 (1986).

74. For example, Davion Only—the Florida teenager who gained national attention when he publicly requested to be adopted, *infra* note 78 and accompanying text—only sought adoption after his biological mother died and he could “let go of the hope that she would come get him.” Lane DeGregory, *Amid Churchgoers, Orphan Davion Only Pleads for a Family*, TAMPA BAY TIMES, Oct. 7 2013, <http://www.tampabay.com/features/humaninterest/amid-churchgoers-orphan-pleads-for-a-family/2145907>. This loyalty to a biological parent existed even for a teenager who had been in foster

When meaningful parent–child relationships continue, even when parents are too unfit to have custody, then the legal relationship between parent and child continues to have significant value. The child welfare field has already adopted that position by using guardianship as a frequent path to legal permanency; a core purpose of guardianship is to maintain the legal name of “parent” and thus protect the legal relationship between a child and unfit parent. Guardianship permits children to know that their parent retains the legal identity of parent—a factor important to some children.⁷⁵

At the same time, we should expect that many foster children, who studies have shown are often quite attuned to the legal status of their primary relationships, will want a primary caregiving foster parent to become a legal parent.⁷⁶ Anecdotally, consider the statement of one former foster youth critiquing her former foster parents, who “loved us [and] wanted to keep us,” but who “felt that was enough” and saw adoption as “a bureaucratic step up from foster care with no deep meaning in and of itself. For me, nothing could have been further from the truth.”⁷⁷ Other foster children’s pleas for a legal parent have garnered significant publicity: one foster youth created a media storm when he made a plea for an adoptive family at church.⁷⁸ In some cases, this desire will far outweigh the value of an ongoing relationship with biological parents, making exclusive adoption appropriate. In other cases, foster children will have a strong connection with and identity from their biological parent, and a non-parent relationship with a foster parent, making guardianship most appropriate. And in yet other cases, like Darnell’s, children will wish for three legal parents. In all such situations, the legal titles accorded to the adults in a child’s life are of significant importance.

B. Offering More Permanency Options Can Help More Children Leave Foster Care to Permanent Families

When a foster child cannot reunify with either parent, child welfare law seeks to help that child leave foster care for a new, permanent family. Indeed, much of child welfare law involves procedures for determining if reunification is possible and if not, how to help a child leave foster care as soon as possible. Making non-exclusive adoption a permanency option can

care since birth and thus had never lived with his mother. *Id.* This phenomenon is common enough for practitioner guides to address it directly. *E.g.*, Gerald P. Mallon et al., *Adolescents’ Conflicting Feelings About Permanency*, in *ACHIEVING PERMANENCY FOR ADOLESCENTS IN FOSTER CARE: A GUIDE FOR LEGAL PROFESSIONALS* 45, 55 (Claire Sandt Chiamulera & Sally Small Inada eds., 2006).

75. Testa, *Quality of Permanence*, *supra* note 27, at 510.

76. Meyer, *supra*, note 33, at 811–12.

77. Goodwin & Duke, *supra* note 12, at 1368 (quoting Charlotte Lopez).

78. DeGregory, *supra* note 74.

help achieve this goal by providing a path out of foster care that currently does not exist. Moreover, it provides foster children and their families with a better option for leaving foster care and makes the process of leaving foster care faster and less conflicted—especially if litigation can be avoided.

1. *Guardianship's Lessons*

The child welfare field's experience with guardianship demonstrates the value of offering multiple permanency options to families. First, the experience of guardianship in expanding permanency and the large number of children who still grow up in foster care suggest the value of exploring further permanency options that may help more children leave foster care for permanent families. Guardianship has proven its ability to help many more children leave foster care. In a controlled experiment in Illinois, offering guardianship as an option increased permanency rates by 5.5%, substantially increasing the number of children who left foster care for permanent families because guardianship was an option.⁷⁹ Controlled experiments in Milwaukee, Wisconsin, and in Tennessee found even greater increases—offering subsidized guardianship increased the number of children who left foster care for permanent families by 19.9% and 12.8%, respectively.⁸⁰ Less rigorous studies of other jurisdictions found similar or greater increases in permanency rates after guardianship was introduced.⁸¹ The number of affected children is much larger beyond that experimental group: nationally, as guardianship has become used more frequently, more than 15,000 children leave foster care to guardianship annually (a roughly threefold increase since the 1990s),⁸² while the overall

79. Of experimental group children, 88.6% left foster care to a permanent home versus 83.1% of control group children. Mark F. Testa, *Evaluation of Child Welfare Interventions*, in *FOSTERING ACCOUNTABILITY: USING EVIDENCE TO GUIDE AND IMPROVE CHILD WELFARE POLICY* 195, 199 (Mark F. Testa & John Poertner eds., 2010).

80. Testa, *supra* note 28, at 10 (finding 19.9% increase in permanency in Milwaukee and 12.8% increase in Tennessee).

81. *E.g.*, CALIFORNIA KIN-GAP REPORT TO THE LEGISLATURE, *supra* note 29, at 5; CAROLINE DANIELSON & HELEN LEE, PUB. POL'Y INST. OF CAL., *FOSTER CARE IN CALIFORNIA: ACHIEVEMENTS AND CHALLENGES* 10 (2013) (finding that about 30,000 children left foster care to subsidized guardianship over a decade, contributing 20–50% of California's reduction in the foster care population).

82. For the most recent numbers of guardianships, see U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILDREN'S BUREAU, *THE AFCARS REPORT: PRELIMINARY FY 2013 ESTIMATES AS OF JULY 2014*, at 3 (2014), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf> [hereinafter *AFCARS*]. Testa reports the dramatic increase in the number of guardianships nationally—from 5,836 in fiscal year 1998 to more than 10,000 in fiscal year 2000. Testa, *When Children Cannot Return Home*, *supra* note 20, at 121 & 127 n.29.

number of adoptions has remained steady at around 50,000 annually.⁸³ Still, thousands more children remain in foster care, unlikely to reunify with their parents and in need of some legal path to permanency. The federal government counts more than 100,000 children who remain in foster care “waiting” for a permanent family.⁸⁴ That figure excludes roughly 20,000 older teenagers with a case goal of “emancipation”—that is, those who grow up in foster care, raised by the state.⁸⁵

Second, only offering adoption pushes families to pursue adoption when they would have preferred guardianship. The longest study—which followed families for ten years—showed that for nearly 15% of families, offering more options led them to choose a permanency option other than traditional, exclusive adoption. In the control group—in which a foster or kinship family could only choose adoption—74.9% of children were adopted.⁸⁶ But in the experimental group—in which families could choose either adoption or guardianship—only 60.2% of children were adopted.⁸⁷ One can infer that the converse is also true: providing fewer options pushes families into a legal option that they considered inferior—exclusive adoption.

The first effect of guardianship is widely viewed as good; helping children leave the impermanence of foster care and enter a permanent family is a central tenet of child welfare law and practice.⁸⁸ The second phenomenon is also good; if there is little difference in the outcomes for children,⁸⁹ then respecting the dignity of all individuals in these emotionally fraught cases requires respecting their choices among legal options.

Although non-exclusive adoption has not been subject to empirical study (and cannot be until it is offered as a permanency option), we should

83. In fiscal year 2013, 50,281 children left foster care to adoption. AFCARS, *supra* note 82, at 3. The annual number of adoptions spiked from roughly 25,000 in the 1990s to about 50,000 in the early 2000s and have remained roughly steady since. Barth, *supra* note 68, at 65.

84. AFCARS, *supra* note 82, at 4.

85. *Id.* at 4 n.3.

86. Testa *supra* note 79, at 204. *See also* Testa, *Quality of Permanence*, *supra* note 27, at 519–20.

87. Testa, *supra* note 79, at 204. Controlled experiments of other jurisdictions found conflicting results. Tennessee saw an even greater impact than Illinois, with 24.6% fewer adoptions in the group of families for whom guardianship was an option. *Id.* In Milwaukee, Wisconsin, the group offered guardianship had 2.4% more adoptions. *Id.* Though more study is warranted, three factors support a tentative conclusion that offering guardianship does displace some adoptions: the study that tracked families for the longest period of time (Illinois) found this result; two out of three states found this result; and these two states found a particularly large effect. Finally, the one jurisdiction that did not find this result did not offer guardianship to families already moving towards adoption—thus depriving those families of the information necessary to pursue a substitution effect. Testa, *supra* note 28, at 20.

88. *See, e.g.*, Goodwin & Duke, *supra* note 12, at 1363–65 (reciting bad life outcomes for youth who remain in foster care until they become adults).

89. Testa, *Quality of Permanence*, *supra* notes 46–47, and accompanying text.

expect modest but analogous results. Some families like Darnell's may prefer some option other than traditional adoption or guardianship and, under existing law, would be forced into a non-ideal option. Other such families may delay or resist seeking a non-ideal legal permanency option, leaving children to linger unnecessarily in foster care. A foster parent like Terrence might be both unwilling to seek exclusive adoption and thus terminate biological parents' rights and also unwilling to become a guardian because he sees himself as a parent. A foster care agency might reasonably resist pursuing termination litigation without the foster parent's commitment to file for adoption or out of respect for the child's remaining bond with a parent, while guardianship litigation could not commence without a foster parent willing to become a guardian; children would thus remain in foster care. The foster care agency might also reasonably wonder if it could meet its burden of proving that an involved biological parent is unfit and that the child's best interests require terminating the involved parent's rights. The real-life case on which I have based Darnell's fact pattern remained open for multiple years, likely through a combination of the above factors.⁹⁰ Offering non-exclusive adoption as an option would help foster and biological parents reach an agreement, which, at the very least, would lead to faster permanency for children and prevent some from remaining in foster care for years.

2. *More Options Can Avoid Unnecessary and Harmful Litigation*

Negotiating between permanency options can be analogized to plea bargaining.⁹¹ Under existing law, parents can agree to give up their right to a trial to defend their parental rights and rights to future custody, in exchange for adoptive parents agreeing to a post-adoption contact agreement or the state and foster parents seeking guardianship rather than a termination of parental rights through adoption. Such negotiated solutions—while fraught with many of the same challenges of criminal plea bargaining⁹²—can serve important instrumental goals. In cases like Darnell's, those goals include avoiding unnecessary litigation over Darnell's permanency arrangement—especially when such litigation would pit biological parents against foster parents, and particularly if those foster parents and biological parents (like Terrence and Tameka) have a personal relationship that pre-dates the child's foster care placement. Such litigation

90. I say "likely" because I cannot speak authoritatively regarding the motivation for clients I did not represent, including the state and the foster parent.

91. Sanger, *supra* note 18, at 331–39.

92. *Id.*

imposes stress on all parties, is quite lengthy, is inherently adversarial,⁹³ and the field has long recognized the risks inherent in it.⁹⁴ Such litigation is also costly to the state, which must pay court costs, lawyers' fees, and bear the costs of foster care during the pendency of the litigation.⁹⁵ Most importantly, litigation between Terrence, Tameka, and Darnell Sr. threatens Darnell Jr.'s well-being; all three adults have important relationships with him and should continue those relationships after the legal status is determined. The prospect of litigation threatens the relationship between the adults and thus threatens Darnell's ability to maintain a relationship with all of them.⁹⁶ Avoiding litigation and the emotional scars it can cause is an important goal, and a core reason for developing options such as guardianship, which is attractive to family members who want to avoid fighting with each other.⁹⁷

Offering non-exclusive adoption as an additional permanency option can similarly avoid unnecessary litigation in some cases by increasing the opportunities for biological parents and foster parents to agree on a legal permanency option. This point treats the permanency options instrumentally: permanency options that help children leave foster care faster, with less discord, and toward more stability between the adults who will have relationships that last well beyond the litigation are valuable because they lead to better results than ongoing foster care and continued litigation. Although some have described such agreements as "coerced" because of the state's essential role,⁹⁸ they come only after child protection agencies have removed children, courts have found that parents are unfit, and courts have subsequently found that children cannot reunify—usually repeatedly over some significant period of time—and that an alternative form of legal permanency would best serve the children's interests. The importance of making these decisions correctly cannot be overstated, and the risk of error should not be discounted.⁹⁹

93. Coupet, *supra* note 58, at 609.

94. E.g., Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in *FOSTER CHILDREN IN THE COURTS* 128, 134 (Mark Hardin ed., 1983) (describing how a "drawn-out legal battle can heighten tension within the child's foster home," induce anxiety in children, and implicitly pressure children to choose sides between biological and foster parents).

95. Sanger, *supra* note 18, at 334 (citing DEP'T OF LEGISLATIVE SERVS., FISCAL AND POLICY NOTE: REVISED, S. 710, 2005 Sess., at 5 (Md. 2005)).

96. This concern applies to family law more generally. See Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 *YALE L.J.* 2106, 2116 (2013).

97. Testa, *Quality of Permanence*, *supra* note 27, at 510–11.

98. Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 *J. LEGIS.* 239, 274 (2002).

99. I have elsewhere criticized existing child welfare procedures for increasing the risk of error. Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 *CONN. PUB. INT. L.J.* 13, 38 (2011).

Nonetheless, analyzing decisions at this juncture of a child welfare case requires acknowledging the long path that the case has already taken. In these cases, the odds of a child reunifying are relatively low and discussing alternative permanency options merely recognizes reality rather than imposes undue coercion. Finding a means for children in this category of cases to leave foster care to permanent families is an essential goal, and providing something to bargain over can induce agreed-upon solutions.¹⁰⁰ And given the scope of our child welfare system—in which about 85,000 children leave foster care annually to live with adoptive parents, guardians, or other relatives,¹⁰¹ and in which more than 100,000 children are “waiting” for a new permanent family¹⁰²—this normative value is particularly significant, easily affecting hundreds or thousands of children annually.

Offering this option may accommodate the interests of all parties, and is thus consistent with negotiation theory.¹⁰³ Terrence is interested in obtaining the legal status of a parent and legal custody of Darnell Jr. Tameka and Darnell Sr. are interested in retaining their legal status as parents and maintaining a right to visit Darnell Jr. Darnell Jr. has an interest in leaving foster care and having a stable and permanent legal connection. The state is interested in closing the case (which will save it money and permit its caseworker to turn her attention to other cases) and ensuring that it closes to permanency, without a significant risk of turning into a foster care case again. Non-exclusive adoption satisfies all of these interests and is thus consistent with interest-based or problem-solving negotiation theory. It expands the pie of parental status and parental authority as a means of helping parties agree on how to divide it up.¹⁰⁴ Current law limits the number of people who can claim the legal title of parent; in child welfare cases only the biological parents or new caregivers can claim that title.¹⁰⁵ If both sides want it, then current law requires one to win and one to lose—a scenario which can prevent negotiated agreement and lead to litigation that will be stressful for all parties. That stress may cause overt harm to the child or other parties. With non-exclusive adoption as an option, the legal title of parent is not something that only one side can claim. Expanding the pie in this manner may dilute the value of each proverbial slice of the pie—there is, after all, only one child, and permitting

100. See Baldwin, *supra* note 98, at 274–75 (describing parents who consent to an adoption because that is the only means to negotiate post-adoption contact).

101. For fiscal year 2013, the federal government reported 50,281 children leaving foster care for adoption, 19,385 to “liv[e] with other relative(s)”—via an unclear legal status—and 17,664 to guardianship. AFCARS, *supra* note 82, at 3.

102. *Id.* at 4.

103. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 42–57 (3d ed. 2011).

104. *Id.* at 58 (describing a successful negotiator: “He expands the pie before dividing it.”).

105. See Bartlett, *supra* note 6, at 881–82.

more than two parents may dilute the authority each parent holds over the child. Such dilution, however, has already occurred in child welfare, and is an accepted and well-functioning feature of the law governing guardianships of foster children.

Adoptive parents may have another legitimate reason to oppose non-exclusive adoption (just as foster parents may have legitimate reasons for favoring adoption over guardianship); avoiding the risk of future interference in their custodial decisions by biological parents. In the aggregate, the stability of guardianships suggests that this risk is slight. But it certainly exists in individual cases. If non-exclusive adoptions were possible, adoptive parents should consider whether the cost of a trial outweighs the risk of future interference. A negotiated settlement is certainly not always appropriate—the risk of future interference may make adoptive parents seek an exclusive adoption. Some parents are so harmful to the child that they should be entirely cut off and lose the legal title “parent.” Similarly, some children should reunify with their parents and no adoption or guardianship should occur. In other cases, however, offering non-exclusive adoption as an option can help provide the options necessary to obtain a negotiated settlement that will more promptly and less litigiously lead to permanency for children, consistent with an arrangement developed by family members rather than judges.

C. Maintaining Legal Relationship with Siblings and Other Extended Family Members

Like guardianship and unlike traditional adoption, non-exclusive adoption would offer children the benefit of maintaining their legal relationship with siblings and other extended family members. As a corollary to the rule providing that adoption generally terminates the legal relationship between children and parents, adoption typically cuts off children’s legal relationships with their siblings and other relatives.

Some jurisdictions provide for such severance explicitly.¹⁰⁶ Indeed, that rule is hornbook law: “An adoption decree terminates or ‘cuts off’ the legal relationship between the adoptee and all biological relatives and replaces it with ties to the adoptive family.”¹⁰⁷ By maintaining the legal relationship between the child and biological parents, non-exclusive adoption would also maintain the child’s legal relationships with other family members.

106. See, e.g., D.C. CODE § 16-312(a) (2001) (providing that adoption shall “cut off” all “rights and duties” between a child and “his natural parents, their issue, collateral relatives, and so forth”).

107. SUSAN FRELICH APPLETON & D. KELLY WEISBERG, ADOPTION AND ASSISTED REPRODUCTION: FAMILIES UNDER CONSTRUCTION 176 (2009). See also Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 908 (2012) (describing cases deeming a child’s ties to siblings as “completely severed” after an adoption).

Maintaining sibling relationships is important as a general matter; siblings are the only individuals that most people know from birth to death, and social science evidence describes the importance of sibling bonds.¹⁰⁸ Sibling relationships are even more important in child welfare cases, in which children have often endured the same or similar abuse and form particularly close relationships with each other in the absence of stable parental relationships.¹⁰⁹ Youth who grew up in foster care have been found to maintain particularly strong connections with siblings.¹¹⁰ And the loss of sibling relationships that occurs after many foster care adoptions is described by both adopted and un-adopted siblings as a significant emotional harm.¹¹¹

Some state courts have recognized the importance of sibling bonds and ruled that children's legal relationships to siblings and extended family members continue even after one child is adopted, at least in the foster care context. These cases apply statutory preferences for siblings removed from parents to be placed together¹¹² and for sibling visitation¹¹³ to situations in which the legal relationship between at least one sibling and his parent has been terminated. Similarly, at least one state supreme court has applied kinship placement preference to any person related by blood to a child—even if a court decision has severed the child's legal relationship to a parent.¹¹⁴

But those cases are the exception. As Jill Hasday has documented, the norm remains for adoption to terminate sibling relationships, with siblings losing a legal and often a social connection to each other when one is adopted, with no generally recognized right of children to maintain contact with siblings.¹¹⁵ And a review of federal child welfare law illustrates the weakness of existing law in protecting sibling relationships. Federal law expresses a preference for child welfare agencies to place siblings in the same home, but requires only "reasonable efforts" to do so.¹¹⁶ Moreover, it is not clear whether this federal provision applies to siblings after one has been adopted. Neither the federal statute nor regulations define the term "sibling."¹¹⁷ Federal guidance give states flexibility to define sibling, meaning states are free to decline to apply the sibling preference after an

108. Hasday, *supra* note 107, at 899–902 (summarizing research).

109. *See id.* at 901.

110. COURTNEY ET AL., *supra* note 70, at 14.

111. Hasday, *supra* note 107, at 903–05.

112. *In re Carol B.*, 550 S.E.2d 636, 642 (W. Va. 2001).

113. *Imperial Cnty. Dep't of Soc. Servs. v. Catherine A (In re Miguel A.)*, 67 Cal. Rptr. 3d 307, 309 (Cal. Ct. App. 2007).

114. *In re Adoption of J.E.F.*, 902 A.2d 402, 419 (Pa. 2006).

115. Hasday, *supra* note 107, at 903–12.

116. 42 U.S.C.A. § 671(a)(31) (2012); Hasday, *supra* note 107, at 906.

117. 42 U.S.C.A. § 671(a)(31); 45 C.F.R. § 1355.20 (2013).

adoption occurs.¹¹⁸ State law on the subject is “sparse,” suggesting states have largely not considered the issue, and what does exist varies significantly.¹¹⁹

D. Maintaining Miscellaneous Rights and Duties that Depend on the Parent–Child Relationship

A full accounting of the legal rights that depend on a parent–child relationship is well beyond this Article. Two examples suffice to illustrate the wide and lifelong scope of those relationships. First, consider inheritance rights. Generally, severing a parent–child relationship ends the child’s right to inherit from their parents, including the right to obtain Social Security survivors’ benefits. Severing that relationship also generally ends children’s right to inherit from other family members.¹²⁰ Similarly, severing a parent–child relationship eliminates any ability for a child to recover in tort for the wrongful death of their parent or siblings to whom they are related through that parent.¹²¹

Second, consider employment-related rights that stem from a parent–child relationship. Suppose that, in ten years, Darnell Jr. develops a serious health problem and Tameka wishes to take off of work for a month to help Terrence take care of him. Or in thirty or forty years Tameka is ailing and Darnell Jr. wishes to take off of work to help her. The Family and Medical Leave Act permits family leave to take care of a spouse, child, or parent—but nobody else.¹²² Darnell and Tameka’s ability to take this leave depends on legal recognition of their parent–child relationship.

Some scholars have argued forcefully for expanding the type of family relationships that trigger legal rights to better account for the multitude of close family relationships that exist.¹²³ However, the existing practice of limiting rights to certain relationships—especially spousal or domestic partner relationships, and parent–child relationships—has the value of applying reasonably clear lines and thus reducing uncertainty and litigation, and policymakers have shown little appetite for adding new categories of relationships. Accordingly, reforming definitions of existing relationships—especially the parent–child relationship—is the most likely

118. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., ACYF0CB-PI-10-11, PROGRAM INSTRUCTION: GUIDANCE ON FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008, at 22 (2010).

119. Hasday, *supra* note 107, at 907, 923.

120. *In re Accounting by Fleet Bank*, 884 N.E.2d 1040, 1044 (N.Y. 2008).

121. *See* Smith, *supra* note 40, at 1605.

122. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C.A. § 2612(a)(1)(C) (2012).

123. *E.g.*, Hasday, *supra* note 107; Coupet, *supra* note 58.

method of preserving the rights that spring from a parent–child relationship.

IV. CHILD WELFARE CASES CAN RESOLVE CONCERNS THAT MULTIPLE PARENTHOOD RAISES

Non-exclusive adoption challenges two norms in family law: that no more than two people can be parents at any time, and that parenthood is defined by relationships between adults (traditionally, that the parents could conceive a baby through heterosexual sex, and now expanding to include parents involved in a marriage or marriage-like relationship regardless of sexual orientation or biological parenthood). The challenge to the first norm is obvious in how I have constructed Darnell’s hypothetical—an adoption by Terrence without terminating biological parents’ rights would identify three legal parents of Darnell. The challenge to the second norm exists regardless of the number of parents. Even if, for instance, Darnell Sr. relinquished his parental rights or died, Terrence could not adopt without terminating Tameka’s rights because Terrence and Tameka do not have a marriage or marriage-like relationship.¹²⁴ This norm reflects the “continued assumption that sexual relationships between adults are relevant to parenting.”¹²⁵ This norm may be weakening somewhat—a recent case approved the adoption by two friends who lived apart and who had no romantic or sexual relationship.¹²⁶ But this ruling required holding that the two friends were “intimate partners,” and, indeed, they co-parented the child and worked together intimately.¹²⁷ This logic would likely not apply to Darnell Jr.’s case because Terrence and Tameka do not and would not share the day-to-day details of parenting as the co-parenting friends do.

These norms have been challenged in recent years as ART and same-sex parenting have grown in frequency and in social and legal acceptance. Academics and a few courts and legislators have argued for recognition of more than two parents as a means of recognizing all the adults with a core parenting relationship with children.¹²⁸ The existing discourse reflects the

124. If they petitioned to adopt jointly, a court would likely rule as a New York court did when a mother’s adult sibling sought to adopt the child with her—without “the functional equivalent of the traditional husband-wife relationship,” two people cannot become parents to the same child via adoption. *In re Adoption of Garrett*, 841 N.Y.S.2d 731, 732 (N.Y. Surr. Ct. 2007).

125. Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 57 (2012).

126. *In re Adoption of G.*, 978 N.Y.S.2d 622 (N.Y. Surr. Ct. 2013).

127. *Id.* at 626–29.

128. See Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 232 (2007); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 338–39 (2007); Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 133 (2014).

concern that identifying more than two parents will increase the possibility of conflict among the adults that will harm children. The discourse has also focused on private family law, especially cases involving ART and same-sex couples, generally excluding child welfare.

This Part will analyze those efforts and criticisms of them, and argue that child welfare cases like Darnell's present stronger examples for recognizing more than two parents, including those who do not have a sexual relationship. Child welfare law already recognizes that the relationship between adults and children matters most—not the relationship among adults. The child welfare field has ready responses for concerns raised regarding recognition of multiple parents—child welfare has already recognized more than two parent-like figures and allocated authority among them effectively—that is precisely what occurs in guardianships, with the core difference being the legal name attached to the status.

The conversation regarding multiple parents should expand beyond ART cases and include child welfare for several reasons. The former attract attention because of the contentious nature of ART, especially when applied to same-sex parenting. Children and families involved in child welfare cases are, of course, equally worthy of attention.¹²⁹ Their numbers are significant, with about 87,000 children annually leaving foster care to live with adoptive parents, guardians, or to otherwise live with relatives, with many more lingering in foster care until child welfare agencies can identify prospective adoptive parents or guardians.¹³⁰ Broadening the conversation also serves goals of class and racial equality. ART cases, almost by definition, involve families with significant means because ART costs significant sums,¹³¹ so limiting multiple parenthood law to ART cases unjustifiably creates “middle class family law,” rather than applying legal principles more equally.¹³² Child welfare cases, by contrast, involve

129. I do not accuse anyone of suggesting otherwise. Rather, I am only observing that the bulk of writing about multiple parenthood has focused on ART and not child welfare cases. A notable exception, Sacha M. Coupet's “*Ain't I A Parent?*”: *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, *supra* note 58, focuses on adults caring for extended family member children but does not focus directly on foster care cases. Michele Goodwin and Naomi Duke have focused on child welfare cases, emphasizing the need for more parents for foster children who would otherwise grow up in state custody, and proposing a means for a group of adults other than biological parents to form “parent civil unions.” See Goodwin & Duke, *supra* note 12, at 1375 (describing “parent civil union” examples which exclude biological parents). A clear focus on the common fact pattern like Darnell Jr.'s in which children are primarily cared for by foster parents while maintaining a strong relationship with at least one biological parent remains lacking in the literature.

130. AFCARS, *supra* note 82, at 3.

131. See Cahn, *supra* note 4, at 379 (noting the correlation between women's class and access to assisted reproductive technology).

132. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 2* (2011) (distinguishing “middle-class family law” from poor people's family law); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002).

families facing significant poverty. Federal data shows that children in impoverished families face significantly more abuse and neglect.¹³³ And the financial concerns of foster families (especially kinship foster families) are so great that state and federal governments offer subsidies to adoptive parents and guardians to help them with the cost of raising foster children, and to incentivize foster parents to become adoptive parents or guardians.¹³⁴ Child welfare cases also involve disproportionately high numbers of black and Latino children,¹³⁵ and the problem of youth who remain in foster care without a permanent family is disproportionately found among black and Latino children.¹³⁶

The discourse in the child welfare literature has embraced multiple parenthood through guardianship but has not yet endorsed non-exclusive adoption. Katharine Bartlett's article challenging the exclusivity of legal parenthood discusses options like adoption with contact and guardianship, but without suggesting that the law could recognize more than two parents.¹³⁷ In addition, Susan Mangold, writing several years before multiple parenthood emerged in the case law or the literature, recommended only open (but exclusive) adoption and guardianship as tools to recognize multiple parenting.¹³⁸ More recently, Cynthia Mabry proposed removing the requirement for a sexual or marriage-like relationship as a condition of adopting, proposing that siblings, for instance, be able to adopt their niece or nephew jointly.¹³⁹ This proposal would not, however, permit an aunt (or two aunts) to adopt her (or their) sister's child without terminating her sister's rights; rather, the argument is that "two parents are better than none," without recognizing the biological parents as part of the equation and potentially entitled to legal parent status.¹⁴⁰

133. ANDREA J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 5-11-5-12 (2010).

134. 42 U.S.C. § 673 (2012).

135. Similarly, Sacha Coupet argues that multiple parenthood should include kinship caregivers—disproportionately black—and not only assisted reproductive technology cases. Coupet, *supra* note 58, at 597–98.

136. Goodwin & Duke, *supra* note 12, at 1347–49.

137. Bartlett, *supra* note 6, at 945.

138. Mangold, *supra* note 30, at 869–73.

139. Cynthia R. Mabry, *Joint and Shared Parenting: Valuing All Families and All Children in the Adoption Process with an Expanded Notion of Family*, 17 AM. U. J. GENDER SOC. POL'Y & L. 659, 680 (2009). Mabry frames her argument around the needs of foster children awaiting adoption. *Id.* at 661–62.

140. Angela Mae Kupenda, *Two Parents Are Better than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1997). Kupenda acknowledges biological parents' role in their children's lives in a footnote. *Id.* at 704 n.2. She does not, however, propose third parent adoption—without terminating parental rights—as a means of respecting that role. I do not fault Kupenda for that omission; she wrote her article about one decade before the concept of three or more parents gained any

A. The Law's Limited Recognition of Three Parents

Certain areas of the law have begun recognizing the potential for more than two legal parents. It is important not to overstate this recognition. Multiple parenthood remains an emerging concept in the law. The Supreme Court has decided family law cases on the assumption that the law could recognize only two parents.¹⁴¹ Most famously, in *Michael H. v. Gerald D.*, the Court rejected a claim that the Constitution required recognition of three parents: a child's mother; her mother's husband with whom she and her mother had lived off and on and who contributed to her upbringing; and her biological father with whom her mother had had an extra-marital affair and with whom the child and her mother had lived on and off and who had contributed to her upbringing.¹⁴² Justice Scalia's plurality opinion described the claim for multiple parenthood dismissively, stating that "California law, like nature itself, makes no provision for dual fatherhood."¹⁴³ But even that case did not foreclose applying some constitutional protections to non-traditional family situations which might involve multiple parent figures.¹⁴⁴ The Supreme Court only spoke regarding the Constitution; state legislatures and courts remained free to reach different conclusions regarding state statutes and case law than Justice Scalia reached regarding the Constitution.¹⁴⁵

It should not be terribly surprising for legislatures to recognize more than two parents because the trend in family law generally is towards respecting the autonomy of individuals to order their family rights. The law now respects pre-nuptial agreements (and even post-nuptial agreements), and respects and enforces surrogacy agreements in many states. The Supreme Court has cast doubt on laws that seek to enforce a particular

legal or academic traction. Similarly, Jessica Feinberg proposes permitting close platonic friends to adopt children, arguing that such adoptions can provide more stability than the alternative of foster children remaining in foster care. Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799 (2009). Feinberg notes the many foster children "waiting for a family to adopt them," but does not discuss biological parents as individuals who could maintain a legal parent status. *Id.* at 801.

141. Bartlett, *supra* note 6, at 926 (describing the Court's analysis in *Quilloin v. Walcott*, 434 U.S. 246 (1978), rejecting a biological father's objection to a stepparent adoption, as ignoring the possibility that two men—the biological and adoptive father—might both have some parental rights).

142. 491 U.S. 110 (1989).

143. *Id.* at 118. *See also id.* at 130–31 (stating that child's guardian *ad litem*'s argument that she had "a due process right to maintain filial relationships with both Michael and Gerald . . . merits little discussion, for . . . the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country").

144. Indeed, five Justices explicitly declined to foreclose the possibility of according constitutional protections to the relationship between a child and his/her biological father, even when the child's mother was married to another man, who enjoyed a statutory presumption of paternity due to the marriage. *Id.* at 133 (Stevens, J., concurring), 136 (Brennan, J., dissenting). Moreover, absent a marriage between two potential parents, the historical "protect[ion of] the marital family" which animated the *Michael H.* plurality is absent. *Id.* at 124 (Scalia, J., plurality opinion).

145. *See id.*

vision of a proper family life in favor of family arrangements that develop for sociological reasons,¹⁴⁶ and has more broadly cautioned “against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”¹⁴⁷ Over time, “family law follows family life,” and as multiple parenthood arrangements become more frequent, we should expect the law to evolve to provide some form of recognition to such arrangements.¹⁴⁸

Indeed, one state legislature and several state courts have offered some limited recognition of multiple parenthood.¹⁴⁹ These cases and legislative efforts have two themes in common. First, they address situations that arise due to ART and same-sex parenting, not from the need to find permanent families for foster children. Second, they reflect anxiety about the consequences of recognizing more than one parent and thus implicitly or explicitly suggest how to prevent multiple parenthood from causing increased litigation over children.

The American Law Institute’s (ALI) *Principles of the Law of Family Dissolution* has recognized for more than a decade that some situations should lead to the recognition of more than one parent. The ALI proposed a definition of a parent by estoppel,¹⁵⁰ with such parents having standing to file custody actions.¹⁵¹ Under the ALI’s definition, a man who is not the biological father of a child, but who has a good faith belief that he is, and contributes to raising the child, would be deemed “[a] parent by estoppel” in certain circumstances.¹⁵² These *Principles* are now family law casebook mainstays, providing ample room for classroom hypotheticals,¹⁵³ and some state legislatures have adopted statutes consistent with the ALI *Principles*.¹⁵⁴

The ALI’s proposal remains limited; the presence of a vertical parent-like relationship with a child is not enough to make an adult a parent by estoppel. The proposal requires a horizontal marriage or marriage-like

146. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

147. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

148. GROSSMAN & FRIEDMAN, *supra* note 132, at 2.

149. See D.C. Code §§ 16-831.01(1), 16-831.03 (2001); State *ex rel.* J.R. v. Mendoza, 481 N.W.2d 165 (Neb. 1992), *superseded by statute*, 1994 Neb. Laws 1224 § 58 & 1997 Neb. Laws 752 § 101, *as recognized in* Cesar C. v. Alicia L., 800 N.W.2d 249 (2011); *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007).

150. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 (2002) [hereinafter ALI FAMILY DISSOLUTION].

151. *Id.* § 2.04.

152. *Id.* § 2.03.

153. See DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 171–75 (4th ed. 2010).

154. See D.C. CODE §§ 16-831.01(1), 16-831.03 (2001) (defining “de facto parent” and permitting a de facto parent to seek custody of a child on the same legal status as any other parent).

relationship between adults—for instance, situations in which the non-biological father thought a couple were monogamous but was in fact raising the child of another man, or in which an adult lives with the child from birth, “holding out and accepting full and permanent responsibilities as [a] parent” with the agreement of a biological parent.¹⁵⁵ These scenarios replicate a two-parent norm with a modest expansion to include situations other than monogamous heterosexual marriage, but including a requirement of some significant horizontal relationship between parents. The ALI is thus not a more dramatic departure that would permit claims to parenthood based on a vertical relationship alone.¹⁵⁶

1. Case Law Recognizing Multiple Parenthood and ART

Two 2007 cases, one American and one Canadian, recognized multiple parenthood in a more dramatic break from the norm than the ALI proposal. Both considered similar facts: a lesbian couple uses a known sperm donor to start a family; the two women live with and jointly raise the child, and the male sperm donor remains involved and takes on a parent-like role. The cases thus involve one woman who is a biological and functional parent, one woman who is a functional parent, and one man who is a biological parent and arguably a functional parent—though (like Tameka and Darnell Sr.) with an explicitly less involved role than both women. Both cases recognized all three as legal parents—at least to a limited degree. In different ways, both implied that such recognition carried the risk of custody fights with greater conflicts and decided in a manner that permitted future courts to mitigate this concern.

The American case, *Jacob v. Shultz-Jacob*, involved a custody case between former partners who had jointly raised children—Jodilynn Jacob and Jennifer Shultz-Jacob. Jacob became pregnant via sperm donated by a friend, Carl Frampton, who never lived with Jacob or Shultz-Jacob, but was involved with the children.¹⁵⁷

155. ALI FAMILY DISSOLUTION, *supra* note 150, § 2.03(1)(b).

156. The ALI *Principles* would also recognize the somewhat broader category of “de facto parent,” which would include many primary caregivers. *Id.* § 2.03(1)(c). But the ALI would create a hierarchy, placing de facto parents lower than biological parents and parents by estoppel; granting custody to a “de facto parent” would be akin to granting custody to a third party who has served as a primary caretaker, such as a grandparent, and who still must overcome a presumption in favor of parental custody. This proposed hierarchy has generated legitimate criticism for favoring men—who are more likely to qualify as a parent by estoppel if they raise another man’s biological child they think is their own—over women—who are more likely to qualify as de facto parents by serving as primary caregivers. Appleton, *supra* note 2, at 29–30.

157. 923 A.2d 473, 476 (Pa. Super. Ct. 2007). The case also involved two children adopted by Jodilynn Jacob; I focus only on the children conceived with Frampton’s sperm—the children who potentially could have three legal parents.

Jacob's status was most clear-cut: she was both a biological parent and a functional parent. Shultz-Jacob's was less so—she was a functional parent but not a biological parent; the parties stipulated that she had *in loco parentis* standing to seek custody.¹⁵⁸ This status gave Shultz-Jacob a forum to argue her case, but the court did not treat her as an equal party—she faced strong legal presumptions in favor of the biological parent, Jacob,¹⁵⁹ and the court's analysis flowed from Shultz-Jacob's inability "to override the presumption in favor of the biological parent."¹⁶⁰ One can easily critique this approach—relegating Shultz-Jacob to a lower legal status despite her functional parenthood and otherwise equal relationship with Jacob—and thus suggesting less-than-equal legal respect for same-sex couples and their parenting decisions.¹⁶¹

Frampton's status was also less than clear—he was a biological parent and had some relationship, but he had less of a caregiving role than Shultz-Jacob, who was granted only a secondary status. The trial court granted him visitation rights, and he did not challenge Jacob's primary custody—making any comparison between his status and hers moot. Based on his parental role, the court did require him to pay child support.¹⁶²

Jacob reveals a cautious approach to multiple parenthood. The headline-grabbing result is the court's recognition of three people as each having some parental rights and duties. But the court assigned these rights and duties in a way that maximizes financial support for the children—a possible benefit of multiple parenthood—while reducing the risk of ongoing custody battles—a risk of multiple parenthood. Granting Shultz-Jacob a lower legal status than Jacob effectively resolved the legal dispute over custody and reduces the risk of future fights; facing a high burden of proof, Shultz-Jacob can no longer fight effectively, and Frampton had never shown an interest in contesting custody, making his relatively higher legal status unlikely to induce litigation. This result did not respect the parties' intentions when the children were conceived and born; at that time, Jacob and Shultz-Jacob planned to raise the child together in their home with Frampton as a non-resident father. If asked at this point, the trio would likely have said that all three should be treated as equals or that Frampton, not Shultz-Jacob, be seen as lower in the parental hierarchy than either resident parent.

Similarly cautious results are apparent in several earlier cases involving coital reproduction; courts recognized "dual paternity" to obtain more child

158. *Id.* at 477.

159. *Id.*

160. *Id.* at 478.

161. Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 187–88 (2008).

162. *Jacob*, 923 A.2d at 482.

support payments, while leaving mechanisms to prevent the second father from causing more fights over custody. *State ex rel. J.R. v. Mendoza*, a 1992 Nebraska case, is illustrative.¹⁶³ The state sought child support from a biological father to recoup costs of welfare payments to the child's mother, who had custody.¹⁶⁴ The mother's new husband had sought to be listed as the child's father on the birth certificate, and the biological father argued that this action prevented the state from seeking support from him.¹⁶⁵ The Nebraska Supreme Court disagreed, thus permitting the recognition of a third parent (the biological father) for purposes of obtaining child support. The Court made clear, however, that this decision had no impact on the custody or visitation rights regarding the child, and that the mother and her husband could argue that he had no legal standing to seek custody.¹⁶⁶ Louisiana courts have ruled similarly, finding that biological fathers were responsible for child support even when children lived with their mothers and their mothers' husbands, who were legally presumed to be their fathers. The court made clear that its recognition of dual paternity served the children's interests in obtaining support and did not interfere with the husbands' claim of legal paternity.¹⁶⁷ There is only one case in which a Louisiana court recognized a biological father as a third parent—in addition to the child's mother and her husband at the time of the birth, the legal father—and permitted him to seek custody of the child.¹⁶⁸ But in that case, the child had lived with his legal father his entire life, and the court found no reason to disrupt that arrangement.¹⁶⁹ Recognizing the third parent, therefore, came with an implied caution that such recognition does not indicate a custody change.¹⁷⁰

The Canadian case was more enthusiastic than the American cases about multiple parenthood but still left room for future courts to avoid conflict among multiple parents in future cases. The Ontario Court of

163. 481 N.W.2d 165, *superseded by statute*, 1994 Neb. Laws 1224 § 58 & 1997 Neb. Laws 752 § 101, *as recognized in* *Cesar C. v. Alicia L.*, 800 N.W.2d 249 (2011)

164. *Id.* at 167. This fact pattern shows the state's interest in expanding the pool of parents from whom child support can be collected.

165. *Id.* at 168–70.

166. *Id.* at 169–70.

167. *Smith v. Cole*, 553 So. 2d 847, 854–55 (La. 1989), *superseded by statute*, 2004 La. Acts 530, *as recognized in* *Miller v. Thibeaux*, 2015 WL 403199 (La. Jan. 28, 2015).

168. *Geen v. Geen*, 666 So. 2d 1192, 1195–96 (La. Ct. App. 1995), *superseded by statute*, 2004 La. Acts 530, *as recognized in* *Miller v. Thibeaux*, 2015 WL 403199 (La. Jan. 28, 2015).

169. *Id.* at 1196.

170. Other approaches exist that do not recognize dual paternity. The Texas legislature enacted a law that permits a man who discovers that he is not the biological father of a child to file suit to terminate any child support obligations he may have while simultaneously requesting visitation rights as a means of protecting the child's bonds with the man. TEX. FAM. CODE ANN. § 161.005(l) (West 2008). Such a man would not be a legal parent but could have visitation rights comparable to a non-custodial parent after a divorce.

Appeals declared in *A.A. v. B.B.* that the child “has three parents,” without *Jacob’s in loco parentis* hierarchy.¹⁷¹ The functional but non-biological parent, known as A.A., sued for a declaration that she was the child’s mother. The court adopted the child’s lawyer’s argument that recognizing all three parents served the child’s best interests, noting the value of a “lifelong immutable declaration of status,” inheritance rights, right to consent to adoption, and other important rights.¹⁷² Most importantly, the court concluded that recognizing all parental figures as legal parents normalizes the child’s experience.¹⁷³ Intriguingly, the court explicitly noted that adoption was not an option, because the adoption statute required termination of one parent’s rights, thus making a declaration of parentage the requested result.¹⁷⁴ The same result could have been reached through non-exclusive adoption.

Happily for all involved in this case, and unlike in *Jacob v. Shultz-Jacob*, A.A. was supported by the two biological parents, the couple with primary custody remained intact, and the reported opinion does not suggest that the adults fought over custody or child support.¹⁷⁵ Still, any future custody dispute would place all three parents on equal legal footing—raising the prospect of a particularly difficult custody battle. The Canadian court did not consider this possibility explicitly. But, the agreement between the adults presented well-chosen facts to avoid that scenario. And, the court recognized the functional mother as a legal mother based on the undisputed finding that recognizing a third parent served the child’s best interests.¹⁷⁶ A future court, presumably, would be free to determine that recognizing a third parent would exacerbate an existing custody dispute or risk such a dispute, contrary to the child’s best interests. Thus, even without explicitly addressing the concern that multiple parenthood could exacerbate conflict, the Canadian court ruled in a manner that permitted such consideration in future cases.

2. *Legislation to Recognize Multiple Parenthood*

In fall 2013, California enacted legislation to recognize more than two parents, and thus abrogate state case law to the contrary.¹⁷⁷ This legislation

171. 2007 ONCA 2, para. 1 (Can. Ont. C.A.).

172. *Id.* para. 14.

173. *Id.* para. 15.

174. *Id.* para. 13.

175. *Id.* paras. 4, 14.

176. *Id.* para. 37.

177. S.B. 274, § 1(a), 2013–2014 Reg. Sess. (Cal. 2013) (enacted), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0251-0300/sb_274_bill_20131004_chaptered.pdf. A similar bill (lacking the non-exclusive adoption provision) was passed by the California legislature in 2012, but vetoed by the Governor. S.B. 1476, 2011–2012 Reg. Sess. (Cal. 2012) (vetoed), available at

goes further than the American case law discussed above and, like *A.A.*, explicitly permits recognition of three parents, all of whom could seek custody on equal footing. The legislation directs a court to determine what custodial arrangement would serve the best interests of the child, which in three-parent cases would include “addressing the child’s need for continuity and stability by preserving established patterns of care and emotional bonds.”¹⁷⁸ Notably, this legislation also permits non-exclusive adoption; when adoptive and biological parents agreed, an adoption would no longer relieve biological parents of all rights and responsibilities regarding the child.¹⁷⁹ This legislation took effect on January 1, 2014;¹⁸⁰ as of this writing, I am not aware of any reported cases applying the non-exclusive adoption provision.¹⁸¹

The California legislative effort appeared focused on same-sex couples and their families far more than child welfare. When the governor vetoed a similar bill in 2012, reactions followed predictable fault lines in ongoing debates about LGBT individuals and families; LGBT rights organizations announced their goal of working to enact a bill in the future,¹⁸² while conservative religious organizations expressed their unequivocal opposition to the bill.¹⁸³ Ironically, the legislation seeks to overturn a case which arose in the child welfare context: a child was removed from his biological mother after her arrest as an accomplice to the attempted murder of her ex-wife, the child’s presumed, but not biological, parent. Both the ex-wife and the child’s biological father sought status as parents; the court ruled that the lower court had to determine which of these two individuals could claim to be legal parents.¹⁸⁴ Under the new legislation, the court could have

http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_bill_20120831_enrolled.pdf. Governor Jerry Brown’s veto message stated that “the bill’s ambiguities may have unintended consequences,” possibly suggesting a concern that this legislation could cause additional custody fights. Veto Message, S.B. 1476 (Sept. 30, 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_vt_20120930.html. Brown nonetheless declared himself “sympathetic” to the bill’s goals, *id.*, and signed the similar bill which the Legislature passed in 2013.

178. S.B. 274, § 2, 2013–2014 Reg. Sess. (Cal. 2013).

179. *Id.* § 7.

180. See CAL. FAM. CODE § 8617 (West Supp. 2015) (“Effective: January 1, 2014”).

181. A Westlaw search performed on February 26, 2015, revealed no cases citing the non-exclusive adoption provisions of California Family Code § 8617(b) decided since the non-exclusive adoption provision took effect on January 1, 2014.

182. *E.g.*, Press Release, Nat’l Ctr. for Lesbian Rights, California Governor Brown Vetoes Bill that Would Protect Children with More than Two Parents (Sept. 30, 2012), <http://www.nclrights.org/press-room/press-release/ca-governor-brown-vetoes-bill-that-would-protect-children-with-more-than-two-parents/>.

183. *E.g.*, Michael Gryboski, *California Governor Vetoes Bill Stating Child Can Have More Than Two Parents*, CHRISTIAN POST, Oct. 1, 2012, <http://www.christianpost.com/news/calif-governor-vetoes-bill-stating-child-can-have-more-than-two-parents-82519/>.

184. *In re M.C.*, 124 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011); S.B. 274, § 1(b), 2013–2014 Reg. Sess. (Cal. 2013) (stating intention to abrogate *In re M.C.*).

determined that the child's best interests permitted it to recognize both as parents.

Canadian legislators have also begun work to codify the rule developed in *A.A.* A proposed "Uniform Child Status Act" permits application for recognition as an "additional parent"—that is, for more than two legally recognized parents—if all parties agreed in writing.¹⁸⁵ British Columbia is the only province thus far that has adopted similar legislation.¹⁸⁶ Both the uniform law and the British Columbia statute are expressly limited to children conceived through ART and are designed to permit recognition of sperm donors or surrogate mothers as parents; child welfare situations are omitted.¹⁸⁷

B. Issues in the Multiple Parent Literature—and Child Welfare's Relatively Clean Resolution

Courts' reluctance to permit multiple parents to fight over child custody and visitation, even when recognizing multiple parenthood for child support purposes, and Governor Brown's initial veto of legislation to recognize three parents reflect a core concern in the three-parent literature: that recognizing multiple parents will increase opportunities for conflict detrimental to children. Indeed, some calls for multiple parenthood fail to analyze this argument. This section will explore that and related concerns, and argue that, while legitimate, child welfare law can resolve this concern relatively cleanly.

1. Concerns about Multiple Parents Which Are Absent or Mitigated in Child Welfare Cases

As the case law discussed above implies, multiple parenthood raises the potential risks of more fighting over children; the more parental authority is diffused, the more opportunities for conflict may arise. Avoiding such conflict should be a core goal of family law and has animated proposals for concentrating parental authority.¹⁸⁸ Indeed, it is fair

185. UNIF. CHILD STATUS ACT § 9 (Uniform Law Conference of Can. 2010) (Can.), available at <http://ulcc.ca/en/uniform-acts-en-gb-1/86-child-status-act/1371-child-status-act-2010>.

186. BRITISH COLUMBIA FAMILY LAW ACT ch. 25, pt. 3, div. 1 § 30, available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/LOC/freeside/—%20F%20—/Family%20Law%20Act%20SBC%202011%20c.%2025/00_Act/11025_03.xml#section30.

187. *Id.*; UNIF. CHILD STATUS ACT § 9(2).

188. Perhaps most famously, Joseph Goldstein, Albert Solnit, Sonja Goldstein, and Anna Freud proposed that the law should not force custodial parents to permit non-custodial parents to visit with their children. GOLDSTEIN ET AL., *supra* note 2, at 23–27. When two parents could not agree, they would have a court determine which parent obtains custody and then defer to that parent's decision as a means of giving children the "opportunity to settle down in the privacy of their reorganized family, with

to worry that recognizing more parents and disaggregating parental authority among multiple individuals will increase the likelihood of disputes among the adults. These disputes can harm children directly, and disaggregated parental authority can deny children the benefits of clear decision-making authority that the parental rights doctrine provides.¹⁸⁹ As Adam Pertman has written regarding open adoption:

Open adoption is not co-parenting. Members of the triad [adoptive parents, birth parents, child] should repeat that like a mantra, and explain it to their friends and relatives, because its acceptance will not only alleviate some of their own stresses but also will help everyone in our society feel more comfortable about this curious concept as it takes hold and grows more visible.¹⁹⁰

Because of the potential for more disagreement among all parents, recognizing more than two parents thus invites “a fresh look at the special challenges of shared decisionmaking.”¹⁹¹ Existing academic calls for multiple parenthood decline to fully explore these challenges. Michele Goodwin and Naomi Duke, for instance, propose “parent civil unions” as a positive alternative to extended foster care.¹⁹² Goodwin and Duke acknowledge the “fragility of family,” but do not address the increased possibility for conflicts that comes with an increasing number of parents.¹⁹³ In addition, Sacha Coupet makes a compelling argument for providing greater legal recognition to kinship caregivers and proposes “kinship adoption,” in which kinship caregivers could adopt a child without

one person in authority upon whom they can rely for answers to their questions and for protection from external interference.” *Id.* at 24.

189. Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2063 (2014); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 683, 707–08 (2008); Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 643–44 (2002); Bartlett, *supra* note 6, at 945.

I do not intend to criticize disaggregation of parental authority more broadly. Parenting plans that require parents to divide up parental authority and “parenting time” with precise detail, *see, e.g.*, Petition for Child Custody Forms (July 2010), available at <http://www.selfrepresent.mo.gov/file.jsp?id=38348>, in contrast to earlier calls to concentrate parental authority in only one individual. *E.g.*, GOLDSTEIN ET AL., *supra* note 2, at 23–27. I focus on disaggregation of parental authority across more than two legal parents; disaggregation among two parents is beyond the scope of this Article.

190. PERTMAN, *supra* note 17, at 10–11.

191. Appleton, *supra* note 2, at 44–45.

192. Goodwin & Duke, *supra* note 12.

193. *Id.* at 1377. This criticism does not mean Goodwin and Duke’s proposal should be rejected; multiple parenthood, even with increased risks of conflicts among parents, may still be preferable to children living in foster care, and its associated bad outcomes. By focusing on multiple parents other than biological parents, it would make little sense for Goodwin and Duke to address a hierarchy of parenthood—a solution that becomes apparent when focusing on cases like Darnell Jr. *Infra* notes 200–203 and accompanying text.

terminating biological parents' rights.¹⁹⁴ Coupet's focus is on the normative argument; she does not claim to provide a "roadmap" for how this legal option would work or how the law could govern shared decisionmaking among more than two people.¹⁹⁵ Nor does Coupet examine whether non-exclusive adoption should extend beyond kinship situations to include any foster parent or other caregiver who has a strong bond with the child and who agrees with the biological parents that non-exclusive adoption would best serve the child.

The child welfare field provides vivid illustrations of both the need to manage shared decision-making authority and the experience for how to do so. The law's strong push to achieve permanency for foster children serves to reduce the risks posed by disaggregating parental rights. When a child is in foster care, parental rights are divided among various individuals and entities: a state child protection agency has legal custody and entrusts foster parents with physical custody. Biological parents retain the right to visit and other decision-making rights. Biological parents, for instance, retain the right to make special education decisions (unless a court orders otherwise),¹⁹⁶ and in some jurisdictions, neither the foster parent nor child welfare agency has the authority to obtain certain medical or mental health care for a foster child without a biological parent's consent or a court order.¹⁹⁷ A core value of reaching permanency—in any form—is reversing this disaggregation and giving the individuals most familiar with a child's needs the authority to meet those needs.

Perhaps because child welfare law addresses the concerns of disaggregating parental rights in every case, it has developed significant experience with allocating parental authority among multiple individuals. This allocation is precisely what guardianship accomplishes—the guardian obtains day-to-day decision-making authority and physical custody. Several discrete authorities are reserved for parents—the right to visit, and for instance, the right to consent to a child's marriage or adoption.

Moreover, allocating parental authority in this manner poses significantly less risk for future conflicts than allocating authority equally. Child welfare cases resolved through means other than reunification are very likely to concentrate parental authority in the individual other than the biological parent, Terrence, in this Article's ongoing hypothetical. Not only will that individual have primary physical custody of the child, but the child's parents will have been found unfit—their abuse or neglect is what led to the child coming into foster care to begin with. Moreover, that parent

194. Coupet, *supra* note 58, at 653.

195. *Id.* at 601; *see also id.* at 653–54 (describing briefly how such adoptions would work).

196. 34 C.F.R. § 300.30 (2014).

197. *See In re G.K.*, 993 A.2d 558 (D.C. 2010).

has been unable to rehabilitate in the months or years that followed—otherwise the case would have lead to reunification rather than adoption or guardianship. Thus, in child welfare cases, shared decisionmaking is not truly on the table, and non-exclusive adoption would not be an invitation to co-parent.¹⁹⁸ In contrast, multiple parent cases outside of child welfare would not likely involve allegations of abuse or neglect, and authority would be divided among three fit parents. Thus each non-custodial parent would likely have more authority than the non-custodial parents would have in a child welfare case, and that relative increase in authority would increase the possibilities for conflict.

Susan Appleton has identified one option for managing multiple parenthood's potential for conflict—establishing a hierarchy of parents, in which one parent has greater decision-making authority than others. Appleton recognizes the downside to this option—such a hierarchy threatens the law's commitment to equality among parents, an especially important point for a legal reform designed to establish equality for non-traditional families.¹⁹⁹ But a hierarchy of parents is a natural fit for child welfare cases because these cases involve findings of parental unfitness and a failure to rectify that unfitness.

Moreover, in child welfare cases, something has already gone awry to disrupt the two-parent norm and permitted multiple individuals, both biological parents and otherwise, to develop close bonds with children.²⁰⁰ By the time a court can determine that reunification is not likely to occur and thus must choose between alternative permanency options, multiple parent-like relationships already exist in many cases. That bell cannot be un-rung. Accordingly, any adoption of foster children would respect the principle that “the law should not allow nonparents to exercise parental status unless the child's relationship with his legal or natural parent has been interrupted.”²⁰¹ This reality contrasts with cases, especially ART

198. Cf. PERTMAN, *supra* note 17 and accompanying text.

199. Appleton, *supra* note 2, at 59. The threat to equality is evident in David Meyer's 1999 proposal for “non-consensual open adoption” as a means to resolve contested adoption cases such as the well-publicized “Baby Jessica” and “Baby Richard” cases. Meyer, *supra* note 33, at 817, 823. In those cases, courts ordered the children transferred from the custody of prospective adoptive parents who had raised them from infancy to their biological fathers who had been thwarted in their efforts to raise their children. Meyer's proposal would have kept the children with adoptive parents but let the fathers maintain a legal status as parent. But the fathers could only seek custody under “extraordinary circumstances” and the adoptive parents—not the fit father—would have “full decision-making authority in matters of child-rearing.” *Id.* at 818, 821. This hierarchy might limit legal conflicts between parents, but at the cost of treating a fit parent unequally.

200. Similar analyses apply to many kinship caregiving situations in which extended family raise children without the child welfare system's involvement. Sacha Coupet offers an example of grandparents raising a grandchild because the child's mother battles a drug addiction and “is an infrequent presence in her son's life.” Coupet, *supra* note 58, at 600–01. In such cases, a hierarchy of parents would also be appropriate.

201. Bartlett, *supra* note 6, at 946.

cases, which ask whether to recognize multiple parents at the outset of a child's life, without knowing what type of relationship the child will develop with each adult, and when each adult would be a fit parent. The law could allocate responsibilities between such parents at the same time that the law recognizes multiple parents, as one commentator has suggested.²⁰² This solution may be workable, but it provides a less compelling resolution to the shared decision-making challenge than exists in child welfare. It invites all potential parents to fight over parental roles and responsibilities at the outset. In child welfare, however, the child's removal and placement in foster care, and the absence of subsequent reunification, has created a need for a third parent to be the primary caregiver.²⁰³ And recognizing multiple parenthood at the beginning of a child's life does little to deter future fights—if a parent seeks to modify the allocation of parental authority, the parents would litigate on equal footing. In contrast, in a child welfare case, a biological parent seeking to modify custody arrangements after a non-exclusive adoption would have to establish his or her rehabilitation from previous findings of unfitness.

If the concern about multiple parenthood is that it could harm children (and adults) by incentivizing additional litigation, then child welfare cases present a different and particularly strong response: a foster child is by definition already subject to litigation, and the goal of protecting children from unnecessary litigation requires ending that child welfare litigation. As argued above,²⁰⁴ if offering non-exclusive adoption in child welfare cases can help avoid unnecessary and harmful litigation, then offering that option serves the policy goal of avoiding harmful litigation. At worst, it would provide the benefit of avoiding litigation in the present while creating the risk of more litigation in the future—a trade worth making. At best, it would avoid litigation in the present and, as described in the preceding paragraphs, greatly diminish the likelihood of future litigation.

In addition, child welfare cases do not invoke the most politically controversial elements of calls for recognizing multiple parenthood. Multiple parenthood advocates seek to challenge the heteronormative, conjugal focus of family law,²⁰⁵ and opponents of multiple parenthood may

202. Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 326 (2007).

203. Ensuring that all children removed from their families and placed in foster care must truly be removed is a distinct question, which is beyond the scope of this Article. Similarly, it is essential that decisions about the possibility of reunification and whether to pursue that or the creation of a new permanent family follow rigorous procedures, as I have argued elsewhere. Gupta-Kagan, *supra* note 99.

204. See *supra* Part II.b.

205. Laura T. Kessler, for instance, asserts “the potential of community parenting to undermine traditional gender roles and intensive mothering standards.” *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 52 (2007).

seek to retain traditional limits on the definition of marriage.²⁰⁶ Child welfare cases do not raise those debates to the same degree. Even when child welfare cases involve same-sex couples seeking to become parents, it is possible to separate the issues involved in third-party adoption from issues involved in LGBT individuals or couples adopting foster children.²⁰⁷

Recognizing three adults like Terrence, Tameka, and Darnell Sr., as parents does challenge the continuing legal assumption that a past or present sexual relationship between adults is an essential element of joint parenthood,²⁰⁸ and thus joins other calls for multiple parenthood in challenging the two heterosexual parent model of parenthood.²⁰⁹ But in the child welfare field, this challenge is not as “radical” as it may appear at first, or in other factual scenarios.²¹⁰ Indeed, it is not radical at all. The child welfare field has already accepted implicit challenges to this assumption through its prevalent use of guardianship; guardianship cases involve platonic relationships between guardians and parents. There is no reason why platonic relationships between adoptive and biological parents should raise any concerns when guardianship cases do not.

Foster care cases also involve a stronger claim on state recognition to multiple parenthood because state action created the multiple parent-like relationships. The state removes foster children from their biological parents and places them with foster parents. Emotional bonds between foster parents and foster children “have their origins in an arrangement in which the State has been a partner from the outset.”²¹¹ The state-mediated nature of foster care limits foster parents’ claim to a due process right to continued custody.²¹² But as a matter of policy, it does provide an argument unique to foster care: the state should not preclude recognition of all parent–child relationships that exist, especially when the state itself helped create those relationships. Claims for recognition of multiple parenthood of

206. Appleton, *supra* note 2, at 53 (identifying “this same challenge to gender norms at the root of the opposing view as well”).

207. This is not to say that LGBT individuals or couples do not seek to adopt foster children; just the contrary—they do so in disproportionate numbers. And certain state efforts to prevent LGBT individuals or couples from adopting children has been litigated in child welfare contexts. For instance, Florida’s statute banning adoption by homosexual individuals, FLA. STAT. ANN. § 63.042(3) (West 2012), was declared unconstitutional in 2010 when a gay foster parent successfully petitioned to adopt his foster children. *Fla. Dep’t of Children & Families v. X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010). Previously, the Eleventh Circuit had dismissed a constitutional challenge to the statute. *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

208. Kim, *supra* note 125, at 57.

209. See Goodwin & Duke, *supra* note 12, at 1372 (“By articulating an alternative family paradigm, we urge reconsideration of the two-parent, married, heterosexual unit as the foundation for family.”).

210. Goodwin and Duke, for instance, repeatedly label their challenge as “a radical rethinking of family.” *Id.* at 1342, 1388.

211. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977).

212. *Id.*

children conceived through ART—however powerful they may be—do not involve state action in a comparable way.

2. *Child Welfare Cases are Particularly Strong Examples for Core Multiple Parenthood Arguments*

In other respects, child welfare law provides an apt forum to carry the challenge that multiple parenthood represents to traditional family law. Limiting legal recognition to two parents serves “to naturalize a normative family in which only enduringly monogamous heterosexual couples reproduce.”²¹³ There is much appropriate focus on changing key elements of that sentence—so homosexual couples can be parents, so other families using ART (especially same-sex couples) can be recognized, and so all of a child’s most important relationships with caregivers and decision makers, regardless of whether adults’ relationships prove to be enduringly monogamous, can be maintained. All of these examples focus on the relationship status of the parents, and the fights over their status reflect society’s ongoing conflicts over adult relationships. A core argument for advocates of multiple parenthood is about respecting relationships adults have with children.

That argument is particularly salient in child welfare cases, because child welfare law has long focused on factors of functional parenthood and each adult’s relationship with the child instead of the existence of a stable, two-parent, heterosexual bond.

3. *Maximizing Child Support*

The few court cases to recognize multiple parenthood do so, at least in part, to maximize child support, which they recognize as important to children’s interests.²¹⁴ Non-exclusive adoption is fully consistent with that goal. Adoptive parents would become liable for child support. If, for instance, Terrence has a partner and they both adopt Darnell Jr., and some time later Terrence and his partner separate, then the adoption would ensure that the non-custodial adoptive parent has an ongoing child support obligation.²¹⁵ This feature is another that would make non-exclusive adoption seem more permanent than guardianship—guardianship would not trigger a permanent child support obligation while adoption would.²¹⁶

213. Appleton, *supra* note 2, at 21.

214. *Supra* notes 157–169 and accompanying text.

215. Mabry, *supra* note 139, at 676–77.

216. See Testa, *Quality of Permanence*, *supra* note 27, at 505 (comparing financial responsibility in guardianship and adoption).

At the same time, non-exclusive adoption would maintain biological parents' child support obligations. In theory, the law could impose an ongoing child support duty on biological parents even after termination of parental rights.²¹⁷ Nonetheless, parental rights and responsibilities are generally created or destroyed together, and terminating parental rights generally terminates parents' child support obligations.²¹⁸

V. HOW TO GET THERE

Despite not being discussed much by policymakers or commentators, non-exclusive adoption in child welfare is an achievable outcome through both legislative advocacy and litigation. Indeed, California enacted legislation to permit non-exclusive adoption in all cases.²¹⁹ If such broad legislation can be enacted, then surely narrower legislation limited to child welfare situations should stand a chance of enactment. Moreover, the recent history of litigation to permit second-parent adoptions by same-sex partners suggests that creative arguments exist to convince courts to permit non-exclusive adoption in child welfare cases. This section outlines ideal components of non-exclusive adoption statutes for child welfare cases and possible arguments that courts should interpret existing statutes to permit non-exclusive adoption.

A. Statutory Reform

1. California Legislation and Child Welfare-Specific Provisions

As noted above,²²⁰ California has adopted legislation to permit adoptive and biological parents to agree that the adoption will not terminate the biological parent's parental duties and responsibilities. This provision would permit same-sex couples using ART to recognize three parents. Consider, for instance, two married or otherwise partnered gay men who arranged with a woman to conceive a child using that woman's egg and one of the men's sperm. The non-biological father could then adopt the child, and the three adults could agree whether or not that action should terminate a parent-child relationship that might exist between the child and biological mother. But the new law appears broader—its plain language

217. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 167–68 (2006).

218. The Uniform Adoption Act provides that a termination ends all aspects of a parent-child relationship; only arrearages incurred before the termination are excepted. UNIF. ADOPTION ACT § 3-505(a) (1994). Even that modest step is beyond many state statutes. *See, e.g.*, MO. ANN. STAT. § 453.090.1 (West 2014), declaring that an adoption ends “all rights and duties” of a biological parent).

219. *Supra* notes 177–179 and accompanying text.

220. *Supra* note 179 and accompanying text.

seems clear that it would permit non-exclusive adoptions in all situations, including child welfare adoptions.

Under the California legislation, the relative authority of three parents would not necessarily be adjudicated; the three hypothetical parents in the above scenario would have equal legal claim to the child. Such an arrangement would not likely be appropriate in child welfare cases in which the law creates a new parent or guardian relationship because the biological parents have been declared unfit in the past and subsequently declared unable to reunify.

Any child welfare-specific, non-exclusive adoption statute should include a parenting plan that gives full legal and primary physical custody to the adoptive parent(s). Biological parents would have rights to visit and other residual rights provided for in guardianship statutes, plus the legal identity of a parent. These parents could seek to modify the parenting plan, but they would face a high burden for doing so; adopting such parenting plans would thus mitigate the risk that multiple parenthood would multiply conflict. California should consider child welfare-specific reforms to its new, non-exclusive adoption statute, and other states should consider implementing non-exclusive adoption provisions at least for child welfare cases. Such statutes should include express provisions permitting, if not requiring, the parties to submit a joint parenting plan to be included with the adoption order. Such parenting plans would usually, if not always, provide the adoptive parent with at least the powers granted to legal guardians.

Such a statute should also make clear provisions for the following situations:

First, legislation should require consent of all parents as a condition of granting a non-exclusive adoption. Present disagreements between potential parents regarding their respective legal statuses suggests too high of a risk of future conflicts—the precise concern regarding multiple parenthood that any non-exclusive adoption statute should attempt to avoid. A consent requirement thus requires a focus on the horizontal relationship between biological and adoptive parents; if these adults cannot agree on a non-exclusive adoption, then the risk of future conflicts would be too great to proceed. Although this Article generally urges a focus on vertical relationships between children and caregivers, this limited horizontal focus acknowledges the impact that disagreements between adults can have on children.

Second, legislation should encourage succession planning to avoid disputes regarding who will raise the child if the adoptive parent dies or becomes incapacitated. In some cases, a biological parent would be the appropriate choice. But the bulk of cases are likely to involve biological parents who cannot serve as primary custodians, at least at the time of the

adoption. In such situations, identifying a successor guardian—a person who would become guardian upon the adoptive parent's death or incapacity—may be appropriate. Similar provisions exist in state guardianship statutes²²¹ and should apply to non-exclusive adoption cases.

Third, legislation should provide clear standards for motions to modify. A child welfare-focused, non-exclusive adoption statute should provide that any party seeking to modify the parenting plan, presumably one of the biological parents, would have the burden of proving a substantial and material change in circumstances and that the modification serves the child's best interests. Such a provision would clarify that the biological parents cannot claim a higher legal status than the adoptive parent in such a proceeding—unlike many state court decisions in guardianship modification cases.²²² Moreover, parents who have been found unfit—a prerequisite to having their children removed from them—would have to establish rehabilitation. These provisions would create a relatively clear burden on biological parents who seek to modify custody arrangements without the consent of the adoptive parent and thus deter unnecessary and harmful litigation.

Fourth, legislation should include provisions to preserve the adoption in case of future disputes. Like many post-adoption contact statutes, non-exclusive adoption statutes should provide that any later litigation to enforce a visitation arrangement or modify a parenting plan cannot serve to reverse or abrogate the adoption itself.²²³ The adoptive parent-child relationship should be as permanent as any parent-child relationship.

2. *More Modest Statutory Reforms*

The above proposals describe legislation that would be a dramatic break from existing law and practice. While California has adopted a non-exclusive adoption statute, it is unclear whether other states would as well. It is, therefore, worth considering more modest statutory reforms. Here are three possibilities:

First, adoption statutes could be amended to provide, at least in certain cases, that former foster children retain the right to inherit from their biological parents. Such a provision would be akin to § 4-103(b)(3) of the Uniform Adoption Act, which provides for an ongoing right to inheritance in step-parent adoptions. Like post-adoption contact or non-exclusive

221. *E.g.*, D.C. CODE § 16-2398 (2001).

222. *Supra* note 15 and accompanying text.

223. *E.g.*, D.C. CODE § 4-361 (2010). The absence of such provisions has permitted litigation in which birth parents seek to revoke their consent to their children's adoptions. Sanger, *supra* note 18, at 324-31.

adoption, such a provision should be based on the consent of adoptive and biological parents.

Second, state statutes should provide that adoptions—at least adoptions of foster children—should have no effect on the legal relationship between siblings or extended family members. Such statutes would codify the results in certain cases which currently reflect exceptions to the normal practice.²²⁴

Relatedly, the federal government should clarify via regulations that siblings are defined to include siblings by blood, regardless of any adoption that has affected the siblings' legal relationship. The federal child welfare statute's rebuttable preference for siblings to be placed in the same home or, if not, to have visits²²⁵ should apply fully to adopted children and their not-adopted siblings. Case-specific facts might, of course, overcome that preference, but the analysis should begin with respecting the sibling relationships that do exist.

Third, the federal government should require states to report the number of closed adoptions, adoptions with enforceable contact agreements, non-exclusive adoptions, and guardianships to the federal government.²²⁶ Federal child welfare law already requires detailed data reporting from the states as a condition of federal funding.²²⁷ Whether through legislation, regulation, or other administrative action, the federal government should require more specific information about the types of adoptions that occur in state courts every year.²²⁸ Such data would provide essential information to guide policymakers in the future; for instance, all states could observe how any California legislation affects foster care adoptions and guardianships and then make policy decisions accordingly.

B. Test Cases

Lawyers should also consider developing test cases to attempt to establish third-party adoption via litigation. Such litigation could lead to victories in court, and even litigation losses can inspire calls for legislative

224. *Supra* notes 112–114 and accompanying text.

225. 42 U.S.C. § 671(a)(31) (2012).

226. Federal law could also require states to permit non-exclusive adoption of foster children as a condition of federal funding, just as features are required. 42 U.S.C. § 671(a). The federal government, however, has not led much child welfare reform and has more frequently codified reforms that have taken hold across many states. I am thus more concerned about federal law not imposing any obstacles to state laws permitting non-exclusive adoption than with federal law requiring states to adopt such laws. *Cf. Vivek S. Sankaran, Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281 (2007).

227. 42 U.S.C. § 679a, b (2012).

228. Legislation may be unnecessary as the statutory text directs the Secretary of Health and Human Services to develop, and promulgate regulations regarding, the data-reporting system. 42 U.S.C. § 679a(1); 45 C.F.R. § 1356.81–83 (2013).

change, as occurred in California.²²⁹ Such litigation would have to face statutes that, as discussed above, seem to require that any adoption terminates biological parents' rights with only the narrow exception of stepparent adoption, in which the adoptive parent is married to the biological parent. Plausible—though certainly not foolproof—arguments to the contrary can be made.

The history of same-sex couples seeking equal rights to parent—a key motivator in the broader multiple parenthood movement—suggests that such arguments could succeed.²³⁰ Adoption statutes used to be understood to require a marriage between a stepparent and a biological parent for stepparent (or second parent) adoption statutes to apply. In the days before same-sex couples were permitted to marry in any state, these statutes seemed to preclude those couples from pursuing second-parent adoption. The statutes were also understood to provide that a child could only have one parent of a particular gender. Yet, motivated by the strong equities involved, state courts adopted statutory arguments that permitted such adoptions.²³¹ Similar results may be possible in child welfare cases with particularly sympathetic facts.

Indeed, at least one recent case has applied the logic of cases permitting second-parent adoption by a same-sex partner to different fact patterns and eliminated the need for a marriage between opposite sex partners. An Indiana appellate court, for instance, permitted a parent's fiancé to adopt the child without terminating the parent's parental rights.²³² The statute provided that the adoptive parent had to be "married to a biological parent of the child,"²³³ but prior case law had permitted same-sex partners to adopt even without a marriage.²³⁴ The logic of that case applied in full force beyond same-sex partners' second-parent adoptions, despite the ability of heterosexual couples to become married: the statute exists to serve children's best interests, and avoid "instability and uncertainty arising from unwanted intrusions by the child's biological family."²³⁵

Applying this logic to a non-exclusive adoption of a foster child would require the analysis to go a step further, and include an individual who is not living with the adoptive parent, and to permit legal recognition of more

229. *Supra* note 184 and accompanying text.

230. I thank Susan Appleton for suggesting this argument.

231. *E.g.*, *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (permitting a mother's unmarried partner, regardless of the couple's sexual orientation, to adopt the mother's child without terminating her rights); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (ruling that unmarried cohabitants, one of whom is the child's biological parent, may jointly petition to adopt and that granting the adoption does not terminate the biological parent's rights).

232. *R.S.P. v. S.S.* (*In re Adoption of J.T.A.*), 988 N.E.2d 1250, 1254 (Ind. Ct. App. 2013).

233. IND. CODE ANN. § 31-19-15-2 (West 2008).

234. *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1259–60 (Ind. Ct. App. 2004).

235. *Id.* at 1257 (cited in *In re J.T.A.*, 988 N.E.2d at 1253).

than two parents. This would arguably make the adoption different than “the creation of a legal family unit identical to the actual [cohabiting] family setup.”²³⁶ Yet the same argument would apply. A non-exclusive adoption would not reflect an existing “intra-family adoption,”²³⁷ at least in the sense that no existing legal bonds tie Terrence to Tameka or Darnell Sr. But those three individuals are tied to Darnell Jr., and each acts as a parent to him. All three are “in fact acting as parents,” and so a “destructive choice” about who should lose the legal title of “parent” is not required.²³⁸ When sought with the consent of all parents and with the submission of a parenting plan granting the adoptive parent legal and primary physical custody, there is a lesser need to “shield the adoptive family from unnecessary instability and uncertainty arising from unwanted intrusions by the child’s biological family.”²³⁹

The statutory argument to be made in any case would depend, of course, on the specific statute that applies. A particularly appealing argument exists under the Uniform Adoption Act—though the UAA has not been widely adopted.²⁴⁰ The Uniform Adoption Act provides:

For good cause shown, a court may allow an individual who does not meet the requirements of subsection (a) [i.e., is not married to the parent], but has the consent of the custodial parent of a minor to file a petition for adoption under this [article]. A petition allowed under this subsection must be treated as if the petitioner were a stepparent.²⁴¹

The UAA thus would not terminate the biological parent’s rights. The plain language of this provision would seem to apply to Darnell Jr. Terrence could file with Tameka and Darnell Sr.’s consent. The hardest provision of this statutory language would be whether Tameka and Darnell Sr. count as “custodial parents”—though their intact parental rights and the fact that they were the most recent parents to have legal custody counsels in favor of treating them as custodial parents. The UAA comments suggest that this provision was intended for someone “who is a de facto stepparent” but has not married the parent,²⁴² but the plain language of the statute is written more broadly and should make resort to those comments unnecessary.

236. *In re Adoption of Evan*, 583 N.Y.S.2d 997, 1000 (N.Y. Surr. Ct. 1992) (cited in *In re K.S.P.*, 804 N.E.2d at 1258).

237. *In re J.T.A.*, 988 N.E.2d at 1253.

238. *In re K.S.P.*, 804 N.E.2d at 1260 (cited in *In re J.T.A.*, 988 N.E.2d at 1253).

239. *Id.* at 1257 (cited in *In re J.T.A.*, 988 N.E.2d at 1253).

240. The relevant provision has been adopted in Vermont. VT. STAT. ANN. tit. 15A, § 4-101 (2010).

241. UNIF. ADOPTION ACT § 4-102(b) (1994) (alterations in original).

242. *Id.* § 4-102 cmt. at 99.

The statutory argument would be different in the vast majority of states which have not adopted the UAA. Nonetheless, possibilities exist. For instance, Missouri law exempts “a natural parent who joins in the petition for adoption as provided in section 453.010” from the rule that adoption terminates a biological parent’s legal relationship with a child.²⁴³ Section 453.010, in turn makes reference to a spouse joining a petition,²⁴⁴ but nothing in the statute explicitly permits or prohibits a parent who is not married to a parent from joining a petition. A test case would thus involve a parent like Tameka or Darnell Sr. joining the petition of a foster parent like Terrence.

Any such test case would depend heavily on the equities involved. Most adoption statutes include best interest of the child language such as Missouri’s, which directs courts to grant adoption petitions “as the welfare of the person sought to be adopted may, in the opinion of the court, demand.”²⁴⁵ And any lawyer litigating such a case should develop as many facts as possible to establish how the equities support granting a non-exclusive adoption.

VI. CONCLUSION

Much has been written about breaking down family law’s traditional rules regarding exclusive parenthood limited to two parents who have, or have had, a sexual relationship. This conversation should more prominently include child welfare adoption cases. At the very least, child welfare cases and the child welfare field’s experience with multiple parenthood provides important lessons for family law more broadly. In particular, a core concern regarding multiple parenthood is the risk of multiplying opportunities for adult conflicts to lead to harmful litigation. For skeptics of multiple parenthood, child welfare should represent an exception—a field in which ready legal mechanisms exist which can significantly mitigate if not entirely resolve these concerns. For advocates of multiple parenthood, child welfare could represent an initial entry point to demonstrate that multiple parenthood has existed in fact in many cases and should be recognized in law—and that such recognition does not have to threaten family stability.

Non-exclusive parenthood has significant value in its own right in the child welfare field. Cases like Darnell Jr.’s—and thousands like it—call out for a permanency option that respects children’s lived reality of multiple parents. Providing that legal option will provide permanency options that better fit children’s real lives and which provide children with more rights

243. MO. ANN. STAT. § 453.090.1 (West 2014).

244. *Id.* § 453.010.4.

245. *Id.* § 453.030.1.

that depend on a parent–child relationship, will help more children leave foster care to permanent families, and will help avoid unnecessary and harmful litigation in termination of parental rights cases.