

# DOES IT TAKE THREE TO TANGO?



## MULTI-PARENT ARRANGEMENTS

by Helen Casale



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As time marches on, so does the make up of how a family is defined. No area of family law has changed more than the area of custody and how the court defines ‘family’ and ‘parent.’ Many factors have played a role in re-creating these definitions. Assisted reproductive technology (ART) has played a role. Divorces and remarriages have played a significant role. The opioid crisis has played a role. The passage of a law allowing same-sex marriage has played a role. These days, it is common to see polyamorous relationships and families with multi-parent arrangements.

As a family law practitioner, one must stay abreast of the latest trends as they relate to families. A practitioner needs to be aware of more than what is happening in his or her own jurisdiction. Decisions being made across the country, as they relate to custody and parenting time, directly impact the family law practice in New Jersey. And, there is no doubt, anyone who is serious about practicing family law these days must understand what a multi-parent arrangement is, what it means to stand *in loco parentis* and how such arrangements may arise in a case.

### A Multi-Parent Family Defined

With the use of ART to create families, as well as the addition of stepparents and other third parties into family structures, the definition of family has changed. Multi-parent families exist but they do not all look the same. Some of these families include a child who has been primarily raised by a family member, who is not his

or her biological parent. Examples of these individuals would be stepparents, grandparents, aunts, uncles or other family members.

Another example of a multi-parent family involves individuals who use a known donor to conceive a child and then request that the donor be a part of the child's life. Yet another example may be two same-sex couples entering into an arrangement wherein they all share parenting responsibilities for a child or children conceived by all of them. Additionally, a multi-parent family may include a grandparent who has raised the child since birth because the biological parents may have been unable to care for the child.

She attends the parent/teacher conferences with the husband and wife because she wants to understand how to better help the child with her homework. The new wife and mother and father have possibly created a multi-parent family arrangement.

The facts may seem far-fetched, but they are more common than one may think. In a New York case decided in 2016, the facts involved a husband and wife who lived in a New York apartment. The wife in the case met the downstairs neighbor, who was living with her boyfriend. The neighbor became good friends with the wife. She then broke up with her boyfriend and moved in with the husband and wife. The three

of yet. This, then, requires the family law practitioner to be knowledgeable, creative and thorough in handling multi-parent situations.

The New Jersey custody statute<sup>3</sup> provides little insight into how the courts should handle such matters. The New Jersey Legislature contends the word 'parent,' "when not otherwise described by the context, means a natural parent or parent by previous adoption."<sup>4</sup> While this is a narrow definition, it has been interpreted broadly in certain cases. For example, in *V.C.*<sup>5</sup> a biological mother's same-sex former domestic partner qualified as a statutory parent and, thus, the court had jurisdiction over the former partner's complaint seeking legal cus-

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A multi-parent family may be created with the express intent of starting such a family or by accident, simply by the actions of the individuals themselves. For example, many people are engaging in polyamorous relationships. A polyamorous relationship is one that consists of more than two people, which could mean both partners are allowed to see people on the side or there is actually a third member of the relationship altogether.<sup>1</sup> If this 'trouple' decides to start a family, then a multi-parent family is created by way of the parties' own actions. Such a family might be created simply because the mother and father divorced and one parent remarries. The new spouse may then begin to step into the shoes of a parent and begin to perform the actions of a parent. She cares for the child when her husband is not around. She picks the child up at school.

engaged in "intimate relations" and began to operate as a non-traditional family. The husband and wife wanted a child, but the wife could not conceive. The girlfriend and husband then decided to have intimate relations, and the girlfriend became pregnant. The court in this case found the three adults consented to the relationship, were acting as a family unit before the child was conceived and agreed to raise the child together. Another multi-parent relationship was created.<sup>2</sup>

### How the Courts Handle Such Matters

It is clear that multi-parent families and third-party custody rights is an emerging area of family law, but the courts and Legislature do not appear to be keeping up. While a few trial courts have addressed the issue in New Jersey, there is no appellate court guidance as

tody and visitation with the biological mother's children, even though the mother was fit and involved with the children.<sup>6</sup>

Understanding how third parties may have standing in custody is essential when it comes to dealing with multi-parent families. An individual who stands *in loco parentis* or, as described in case law in New Jersey, is a 'psychological parent,' has a psychological parent-child relationship with the legal parent's child that was voluntarily created by the legally recognized parent.<sup>7</sup> The fact that the third party did not participate in the legal parent's decision to have a child does not preclude the court from considering the third party's request to be considered a psychological parent.<sup>8</sup>

In *V.C.*, the same-sex partner had lived in the same house, she performed day-to-day obligations of parenthood,

financially supported the family and developed a bond with the children in such a way that made it clear she was entitled to visitation, and that failing to grant her visitation would be contrary to the children's best interests.<sup>9</sup>

Once a third party has been determined to be a psychological parent to a child, he or she stands in parity with the legal parent in custody matters, and custody and parenting time issues between a parent and the psychological parent are to be determined on a best interests analysis or standard, giving weight to the statutory custody factors as set forth in N.J.S.A. 9:2-4.<sup>10</sup>

In *D.G.* a same-sex male couple, one of whom was the biological father to the child, filed a complaint for custody declaring the non-biological father to be the child's psychological and legal parent. The biological mother objected. The trial court ultimately determined that the biological father, his same-sex partner and the biological mother mutually agreed to begin a family and raise the child together. The biological father consented to, and fostered, the parent relationship with his partner, and the mother consented. It was determined they all agreed to a "tri-parent relationship."<sup>11</sup>

The fact that this case involved two biological parents and a third party did not seem to interrupt the trial court's ultimate determination to consider the third party a psychological parent. While this case is a non-precedential decision, it does seem to demonstrate that a third party is not necessarily precluded from seeking psychological parent status, even if the child has two legal parents. In fact, the New Jersey Appellate Division in *K.A.F.*<sup>12</sup> found that a person may have standing as a psychological parent where there are two legal parents, even where one parent did not consent to the formation of the relationship between the child and psychological parent. Again, however, the facts of each case are crucial. Outlining the 'obligations of parent-

hood' seems to be a recurring theme in third-party custody cases.

In April of this year, a New York family court judge also confronted the question of whether there can be a third parent. The case involved a gay male couple and the woman who agreed to have a child with them and share parenting. The judge concluded that the non-biological father in this triad had standing under New York domestic relations law to seek custody and visitation, but was not necessarily elevated to the status of "legal parent."<sup>13</sup> This case is not too dissimilar from the *D.G.* case noted above. In both cases, however, a written agreement was missing between the parties. If agreements had been memorialized in writing, outlining the intentions of the parties from the outset, the outcome and/or the extent of the litigation in these cases may have been different.

### What Happens From Here With the New Modern Family?

Neighbors, gay couples, family members and lovers, all play a part in the definition of the new modern family. As these new family structures become more common, they are beginning to land on the desks of family lawyers. At this time, however, there is little guidance outlined in New Jersey law, and the statute includes a narrow definition of the term 'parent.' There is ample case law that outlines the legal requirements of a psychological parent, but there is no case law about parents in polyamorous relationships.

It will be up to family lawyers to bring these matters to the court in the most effective way possible to establish clear guidance. Compiling all the facts will be important; even the smallest of details may matter. For example: Who was in the delivery room when the child was born? Who cut the umbilical cord? Who cared for the children in the middle of the night? If the answers to these questions lean towards an equal sharing

of all parenting responsibilities from the beginning, then when does the third party become more than a psychological parent? Does a psychological parent ever rise to the level of a legal parent?

Of course, when possible, having a written agreement outlining the parties' intentions prior to beginning these non-traditional parenting relationships will make answering these questions far easier. If, for example, there had been a written agreement stating all three of the litigants in the recent New York case were to be considered legal parents, the outcome of the case might have been different for the non-biological father.

The challenge for family lawyers as new family structures continue to evolve will be to present the best cases to the court and Legislature for clarity in the law as it relates to parenting. The other challenge is to educate prospective and current clients on the importance of written agreements when entering into relationships that may not be familiar to everyone. ☺

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### Endnotes

1. Providr Contributor, This Man Has Two Girlfriends and They Call Themselves a "Troupe," Providr Media (Jan. 1, 2015).
2. *Dawn M. v. Michael M.*, 2017 NY Slip Op. 27073 (March 8, 2017).
3. N.J.S.A. 9:2-4.
4. N.J.S.A. 9:2-13.
5. *V.C. v. M.J.B.*, 163 N.J. 200 (2000).
6. *Id.* at 206.
7. *Id.* at 206-207.
8. *Id.* at 207.
9. *Id.* at 206-209.
10. *D.G. and S.H. v. K.S.*, 44 N.J. Super. 423 (Ch. Div. 2015).
11. *Id.* at 434-435.
12. *K.A.F. v. D.L.M.*, 437 N.J. Super. 123 (App. Div. 2014).
13. Arthur S. Leonard, Can Three Parents Make a Family in New York, *Gay City News* (April 17, 2018).