

Thesis International Children's Rights



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Children and the Changing Picture of the Family:

A Child-Centered and Rights-Based Approach to Multiple Parent Families.

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examination of the Advanced
LL.M of International Children's
Rights.



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I would like to dedicate this thesis to children and their interesting families.

Daniella Zlotnik, 2016.

Executive Summary

The "family" is considered as the foundational group unit in society, and it carries deep political, cultural, economic, religious, and emotional significance to all of its members, including children. At the end of the 20th century, the "Nuclear Family" was considered to be the predominant family model in the global north. The model reflects the picture of the family as a closed unit, consisting of two, often married, opposite-sex partners and their minor children. However, in recent decades, advances in assisted reproduction techniques and societal trends contributed to the emergence of alternative family models, which challenge the traditional "Nuclear Family" structure and raise questions as to definition and scope of "family" and "parenthood". In many states, these alternative family models are not entitled to legal recognition and protection, and this holds implications for the rights and interests of children in such families.

This thesis will focus on the particular family model of the multiple-parent family (hereinafter: "**MPF**"), and on its implications for the rights and well-being of children. The thesis will define MPF as family units in which more than two adults care for a child, and fulfill meaningful parent-like roles towards the child, in varying degrees. In this novel family model, multiple carers foster strong emotional, social and financial ties to a child. Yet, in most states, existing laws and policies have not been adapted to reflect this new reality: MPF are not entitled to legal recognition, and children in such families are not able to access to full range of rights and entitlements stemming from the parent-child bond. While the discourse surrounding the struggle for legal recognition tends to focus on the adults' parental rights and autonomy, children in MPF should also be viewed as active members, with specific rights, views, interests and considerations. The research question of the thesis will examine "how MPF should be addressed under a children's rights approach?". In order to do so, the thesis will introduce the UN Convention on the Rights of the Child (hereinafter: "**UNCRC**") and offer a principled child-centered and rights-based approach to MPF, to be adopted by the UNCRC Committee.

The thesis aims to promote re-thinking of the definition and scope of "family" and "parent" in the context of MPF, and present a child-centered and rights-based approach to the current academic discussion. It offers an innovative and child-centered definition to MPF, and includes theoretical legal approaches to re-interpret the meaning of the family from a functional and emotion-based point of view. The thesis frames the discussion of MPF under a children's rights approach, and analyzes the impact of the lack of legal recognition of MPF on children's rights and interests. Finally, it calls for the UNCRC Committee to effectively use its main functions to address children in alternative families, such as MPF, and effectively apply the UNCRC to ensure their rights, interests and well-being.

In chapter 1, the thesis will present the MPF as an emerging alternative family model and offer elaboration on its definition and characteristics. It will note that children in MPF form meaningful parent-like relationships with their carers, and that this bond has a crucial role in ensuring their development and family life. Yet, it will detail that current laws are founded on the concept of the nuclear family and that, therefore, they do not offer inclusive and flexible definitions to the concepts of "family" and "parent". The chapter will then offer a theoretical examination of the parent-child legal relationship, and parents' rights and duties towards children. It will present theoretical frameworks which oppose the exclusive status of parenthood, and explore new approaches to support legal recognition of MPF. In particular, the chapter will review the concepts of functional parenthood, and its emphasis on caring and dependency to establish legal rights and status towards a child. Thus, the chapter will show that diverse legal frameworks can support the recognition of MPF, and reflect the realities of children in such families. The chapter will conclude with a broad review of the potential implications for children in MPF, and the emotional, financial and social-economic difficulties that stem from lack of legal recognition. The chapter will hold that the lack of recognition of MPF can amount to a significant impediment for the child, and negatively impact the child's well-being and rights.

In chapter 2, the thesis will present the legal status of MPF in the U.S and in Canada. This focus was chosen as both states experienced litigation from alternative families, and in particular

MPF, for legal recognition. As a result, both states developed relevant jurisprudence and legislative initiatives in the field. The chapter will present and analyze five prominent case-laws concerning MPF, and subsequent legislation, to review if and how the interests of children in MPF were considered in decision and policy making. The chapter will find that cases concerning MPF were conducted in a "legal vacuum", and that courts lack relevant laws and guidance to ensure the rights and interests of children. Specifically, the views of the children effected were not adequately considered by the courts, and there was no in-depth examination of their best interests in determining the cases. The chapter will conclude that the scope of the current debate in national settings is limited. It will argue that courts tend to address the issue of MPF from a *parental* rights approach, and not consider how the lack of legal recognition impacts *children's* interests and well-being. The chapter will identify that the states are ill-equipped in appropriate legislation and policies to address MPF, and that the UNCRC and the children's rights agenda are largely missing from the discussion.

In chapter 3, the thesis will explore MPF from a children's rights approach and introduce the UNCRC as the leading international instrument on children's rights. It will offer a brief review on the UNCRC and argue that in light of its significance, it should be taken into account in relation to the discussion on the legal recognition of MPF. The chapter will also explore the roles and competences of the UNCRC Committee, and its potential to guide state-parties concerning the rights and well-being of children in MPF. The chapter will then offer a broad analysis on the most relevant provisions of the UNCRC that are impacted in the context of MPF. It will focus on the general principles of the UNCRC, the rights relating to family, and on economic and social rights that stem from the legal parent-child bond. Particular attention will be paid to the principle of the child's best interests, the principle of non-discrimination, the child's right to identity, and the child's right to be cared for by parents. The chapter will find that the lack of legal recognition of MPF negatively impacts the rights and interests of children in such families. In particular, the chapter will conclude that the UNCRC can be interpreted to require legal recognition of MPF, in order to ensure children's interests, protect their parent-like relations with carers, and ensure equal access to rights and entitlements stemming from the parent-child bond.

In chapter 4, the thesis will argue that given the impact of the lack of legal recognition of MPF on children's rights, the UNCRC Committee should address this issue as part of its functions, and develop a child-centered and rights-based approach to guide state-parties concerning their obligations for children in alternative families, such as MPF. The chapter will briefly review how the UNCRC Committee can make use of its three main functions - reporting procedure and publishing Concluding Observations, drafting General Comments, and receiving communications - to further engage with the issue of children in MPF. The chapter will conclude that for optimal outcomes, the UNCRC Committee should use all of its main functions and provide a systemic and clear response to position children's right to family at the forefront of the children's rights agenda.

In light of the conclusion of the previous chapters, the thesis will then hold that the UNCRC Committee should present a principled child-centered and rights-based approach to MPF. It will identify three main principles that should be adopted under the approach to better guide state-parties on how to ensure the rights for children in diverse models of family. First, the thesis will conclude that such an approach should call for a re-definition of "family" and "parent" in broad and flexible terms, and shall offer the UNCRC Committee to draw inspiration from the theoretical approaches discussed in chapter 1 to better accommodate children in MPF, and adequately reflect their family life. Second, the approach should note the negative implications of lack of legal recognition of MPF, and encourage state-parties to amend their laws and policies to enable recognition of such families. At the very least, the UNCRC Committee should address the discriminatory outcomes of lack of legal recognition of MPF, and urge state-parties to separate, as far as possible, between parental status and subsequent rights and entitlements concerning the child. Third, the UNCRC Committee should use its functions to encourage state-parties to raise awareness to the issue of children in alternative families such as MPF, and promote data collection and research, to reflect the realities of these children in their national context.

Main Findings

The thesis aims to promote re-thinking of the definition and scope of "family" and "parent" in the context of MPF, and present a child-centered and rights-based approach to the current academic discussion on the issue. In doing so, the thesis offers five novel findings and contributions.

First, the thesis focuses on the emerging family model of MPF, and adds to the academic literature in this field. In particular, the thesis develops a broad and child-centered definition of MPF, and identifies two distinct "types" of MPF units, which vary according to the carers' intent regarding the child. The thesis notes that while both types may present unique challenges and require different policies, in both cases, the lack of legal recognition negatively impacts the rights and well-being of children in such families.

Second, the thesis provides a close examination of prominent U.S and Canadian case law and legislation concerning MPF, from a child-centered and rights-based approach. It finds that the legal presumptions of paternity in the U.S and Canada can enable to broaden the concept of parenthood to reflect de facto parenthood and to recognize MPF. The thesis further identifies that there is a lack of a clear legal framework concerning MPF, and that courts and policy-makers require guidance to ensure the rights and interests of children in such families. Most importantly, the thesis finds that the discussion concerning MPF tends to favor considerations of the *carers'* parental rights, as opposed to *children's* rights and interests, and it notes that the children's rights agenda, and the UNCRC, are absent from the discussion.

Third, the thesis incorporates the UNCRC in the context of children in MPF, and provides an analysis on the impact of lack of legal recognition on children's rights. In doing so, the thesis finds that the UNCRC does not provide a clear definition of "family" and "parent", and that this creates uncertainty concerning its appropriate interpretation, scope and application for children in MPF. Even so, the analysis finds that the lack of legal recognition negatively impacts the general principles, family related rights, and social and economic rights in the UNCRC. In particular, the thesis finds that the principle of the best interests of the child can be interpreted to require legal recognition of MPF and notes the importance of children's right to be heard and participate in decisions relating to their family. Also, the thesis finds that lack of recognition makes the child-carer relationship vulnerable, and that this negatively impacts children's right to development, to identity, to be cared for by parents, and to privacy in their family life. Moreover, lack of legal recognition may deny children's access to social and economic rights that stem from the parent-child bond, and that this can amount to discrimination.

Fourth, the thesis explores the UNCRC Committee's potential to engage with the issue of MPF, and reviews its main functions: conducting reporting procedures and publishing Concluding Observations, drafting General Comments, and receiving communications. In that regard, the thesis identifies the benefits and challenges of utilizing these particular functions in the context of MPF, and finds that the UNCRC Committee should use all of its functions in a clear and systematic manner, to ensure that the UNCRC remains a "living document" and that it is applicable to children in emerging family models, like MPF.

Fifth, the thesis concludes by identifying three principles that should be adopted by the UNCRC Committee in order to establish a child-centered and rights-based approach to MPF. First, the UNCRC Committee should encourage state-parties to redefine "family" and "parenthood" in broad and flexible terms, drawing inspiration from the theoretical approaches discussed in the thesis. Second, the thesis holds that the UNCRC Committee should urge state-parties to recognize MPF or, at the very least, raise awareness to the negative implications of lack of legal recognition for children in MPF, and call on state-parties to separate the legal recognition of parental status to subsequent rights and entitlements for children in MPF, to avoid discrimination. Third, the thesis identifies the lack of accurate and updated data concerning MPF, and suggests that the UNCRC Committee use its functions to require state-parties to collect data and conduct research on the surge of alternative families, such as MPF, to adequately present the realities of such children in the national context.

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Table of Abbreviations

UN Convention on the Rights of the Child	UNCRC
UN Committee on the Rights of the Child	UNCRC Committee
Multiple Parent Family/Families	MPF
Assisted Reproductive Technology	ART
Uniform Law Conference of Canada	ULCC
Ontario's Children's Law Reform Act	CLRA

Introduction

The "family" is considered as the foundational group unit in society, and filiation in particular is viewed as the fundamental element. At birth, based on blood relations or other social constructs, children become part of a family group, and later, as adults, they may create new sets of familial relationships.¹ The family has a central and long-standing role in social life, and it carries deep political, cultural, economic, religious, and emotional significance to its members.² In light of its importance, the institution of the family is entitled to legal protection under the human rights regime,³ as well as in regional human rights instruments, and in national legislation.⁴

Yet, the questions of what constitutes a "family", who can be considered as a "parent", and where these legal and social boundaries lie, vary across time periods and cultures.⁵ In recent years, societal trends and progress in assisted reproduction techniques (hereinafter: "**ART**") have challenged the traditional "western" family structure and definition. Towards the end of the 20th century, in the global north,⁶ the "nuclear family" was considered to be the predominant family model. This family model is endowed with legal privileges, and in many states, the nuclear family alone is entitled to respect and to legal recognition and protection. According to the nuclear family model, the family is a self-contained unit. It comprises of two, often married, opposite-sex parents, and their minor biological or legally adopted children.⁷ However, this traditional "western" family model has been challenged, and possibly even overthrown in recent decades, as other alternative family models are increasingly emerging, particularly in the global north.

¹ A. Wilson "Family", Routledge Publishing, chapter 1 (1985) (Hereinafter: "**Wilson**"). See also R. Leckey, "Where the Parents are of the Same Sex: Quebec's Reforms to Filiation", p. 64, *International Journal of Law, Policy and the Family* 23, 62 (2009) (Hereinafter: "**Leckey (2009)**").

² Wilson, *supra note 1*, chapter 1. Briefly, from a political perspective, the family is considered an indicator of national strength and resilience, and therefore, its protection and promotion is a political aim. From an economic perspective, the family constitutes the major purchasing-group in society; the family procures many of its basic needs, such as food and shelter, and significant parts of income are spent within the family. The family also has religious and cultural roles in society, and often reflects prominent ethical and moral values.

³ See for example, Article 16(3) of the UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (Hereinafter: "**UDHR**"). Article 23(1) of the UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 (hereinafter: "**ICCPR**"). Article 10(1) of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (Hereinafter: "**ICESCR**"). Preamble of the UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (Hereinafter: "**UNCRC**").

⁴ See for example, Article 18, 27 of the Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Article 18 of the Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990) (Hereinafter: "**African Children's Charter**"). Article 17 of the Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948. Article 8 of the Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

⁵ For example, studies of the family in different points in history show marked changes in key indicators such as age of marriage, fertility rates, life expectancy, authority patterns in the family, and individual expectations of family life, reflecting the period in which they live. See Wilson, *supra note 1*, chapter 1, and D. Cutas and S. Chan, "Introduction: Perspectives on Private and Family Life", p. 1, in "**Families: Beyond the Nuclear Ideal**" (Editors: D. Cutas, S. Chan) (2012) (Hereinafter: "**Cutas & Chan**").

⁶ In the thesis, the term "global north" will be used to include socio-economic developed states, including the U.S, Canada, Western Europe and developed parts of East Asia (also known as first and second world).

⁷ See T. Markus " (only?) Two to Tango: On the Possibility of Recognizing more than Two Parents for One Child", "Mishpatim" 42, p. 415 (2014) (Originally in Hebrew) (Hereinafter: "**Markus**"). A. Harvison-Young "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family", p. 506 *6 Am. U. J. Gender & L.* 505 (1997-1998) (Hereinafter: "**Young**").

Thus, the rise in rates of divorce has led to increasing numbers of single-parent families and of blended families, following a parent's second marriage or relationship. In addition to these trends, the last two decades, in particular, brought with them far-reaching changes in the societal views on LGBTQ persons, and resulted in greater legal recognition and social acceptance of same-sex families.⁸ Medical advances in the field of ART, such as gamete-donations and surrogacy, have also contributed to the challenge to the traditional nuclear family structure, and to the notion of the family as a closed unit. These changes resulted in an increasing number of children who enjoy meaningful relationships with their biological parents, as well as with other adult carers, who fulfill parent-like roles in their lives. As will be further described in chapter 1, the carers may be partners of the legal and biological parents, or biological contributors to the creation and birth of the child. For example, in the case of gamete-donation or surrogacy, children inherently have more than two persons involved in their birth. However, legal reforms addressing these developments have, so far, been limited to the question of what is a family and "who" can be considered a parent, as opposed to "how many" parents a child may have.⁹

This thesis will focus on the particular family model of the multiple-parent family (hereinafter: "MPF"), and on its implications for the rights and well-being of children raised in MPF. For the purpose of this thesis, MPF will be defined as family units in which more than two adults care for a child, and fulfill meaningful parent-like roles towards the child, in varying degrees. This is still a novel model, yet it seems that the abovementioned societal trends and ART advances have led to more and more families which consist of multiple carers who foster strong emotional, social and financial ties towards a child. While most academic writing in this field focuses on parental autonomy and rights, this thesis will offer a child-centered approach to examine the issue of MPF, and introduce the UN Convention on the Rights of the Child (hereinafter: "UNCRC") to this discussion.

The thesis aims to answer the question: "How should MPF be addressed under a children's rights approach?", and it will conclude with a principled child-centered and rights-based approach to MPF to be adopted by the UNCRC Committee. The thesis will hold that the issue of MPF requires a child-centered approach that fosters the principles of the UNCRC. Such an approach will guarantee that children's rights, interests, views and well-being receive higher priority, and that states respect, protect and fulfil children's rights and support them in all social systems, including in family life.¹⁰ The thesis will argue that under certain conditions, legal recognition of MPF is required, and that the concepts of "family" and "parent" should be broadly interpreted and defined in the jurisprudence of the UNCRC Committee. This can enable the UNCRC Committee to adequately reflect the realities of children in alternative families, and effectively safeguard their rights and interests at the international and national levels.

The thesis will present recent theoretical developments in this regard, and argue that flexibility of legal concepts can better reflect the realities of children in alternative families, such as MPF, and provide legal clarity concerning their rights. Indeed, children in MPF will, in most cases, have at least, one recognized legal parent. Thus, from this legal parent, children can acquire the full range of rights and obligations, stemming from the parent-child relationship. These include obligations to be cared

⁸ The term "LGBTQ" stands for the lesbian, gay, bisexual, transgender and queer community. On the recognition of same-sex partnerships, see Nancy D. Polikoff "Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States", 17 N.Y.L Sch. J. Hum. Rts. 711 (2000-2001) (Hereinafter: "**Polikoff (2000-2001)**"). A. Blecher-Prigat "On Rights, Boundaries and Family", p. 551, 553 *Eyunei Mishpat* 27, 539 (2003) (Originally in Hebrew) (Hereinafter: "**Blecher-Prigat (2003)**").

⁹ M. Lotz "The Two-Parent Limitation in ART Parentage Law: Old-Fashioned Law for New-Fashioned Families" in *Families: Beyond the Nuclear Ideal* (Ed: D. Cutas, S. Chan), p. 36 (2012). (Hereinafter: "**Lotz**").

¹⁰ J. E. Doek "The UN Convention on the Rights of the Child: Some Observations on the Monitoring and the Social Context of its Implementation", p. 135-136 14 U. Fla. J. L. & Pub. Pol'y 125 (2002-2003) (Hereinafter: "**Doek (2002-2003)**"). UN Committee on the Rights of the Child (CRC), *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, par 59, 18 April 2011, CRC/C/GC/13 (Hereinafter: "**UNCRC GC 13**").

for, to be provided with nourishment, to receive financial support, to gain a nationality, and to be provided with health-care services, education and various social benefits. However, the thesis will hold that the lack of legal recognition of MPF, i.e. the other multiple carers that fulfill parent-like role towards the child, results in negative consequences for the well-being of children in MPF, and has adverse implications for their enjoyment of their rights.

Chapter 1 will present the emergence of MPF and its implications for children. Part 1.1 will briefly present the emergence of alternative family structures in the last decades, focusing on MPF. It will introduce MPF as an alternative family model, and offer further elaboration on its definition and characteristics. It will hold that in general, laws are founded on the concept of the nuclear family, and do not offer inclusive and flexible definitions to the concepts of "family" and "parent". As a result, the current legal framework does not recognize MPF, and, therefore does not provide an adequate response to children raised by multiple carers.

Part 1.2 will focus on the parent-child legal relationship, and parents' rights and duties towards children. It will examine the implications of the traditional definitions of "family" and "parent" on children in MPF, and present theoretical developments in this regard. Thus, it will offer theoretical frameworks which oppose the exclusive status of parenthood, and present new approaches in drawing the boundaries of "family" and "parent". In particular, it will review the concepts of functional parenthood, and its emphasis on caring and relations to establish legal rights and status towards a child. Thus, it will show that diverse legal frameworks can support the recognition of MPF. Finally, part 1.3 will broadly address the potential implications for children in MPF, and explore the psychological, financial and social-economic difficulties that stem from lack of legal recognition of MPF. It will address both situations of familial harmony and familial break-up, and focus on various concerns in those regards.

Chapter 2 of the thesis will present the legal status of MPF in the U.S and in Canada. This focus was chosen as both states experienced litigation from alternative families, in particular MPF, for legal recognition. As a result, both states developed relevant jurisprudence and legislative initiatives in the field. The chapter will present and analyze the prominent case-law concerning MPF, and review if and how the interests of children in MPF were considered. The chapter will provide a close reading of three Canadian cases, as well as two U.S cases, and will discuss subsequent legislation concerning MPF. The chapter will hold that the states concerned addressed the issue primarily from a parental rights approach, and lack a child rights-based approach in the discussion. Thus, as will be presented, the views of the children were either not adequately considered by the courts, or not presented at all, and there was no in-depth examination of the children's best interests in determining the cases. The chapter will conclude that the scope of the current debate in national settings is limited, and does not consider how the lack of legal recognition impacts *children's* interests and well-being, including their rights under the UNCRC.

Chapter 3 will then explore MPF from a children's rights approach and introduce the UNCRC. Part 3.1 will briefly present the history and significance of the UNCRC, and the roles and competences of the UNCRC Committee. Part 3.2 will offer a broad analysis on the most relevant provisions of the UNCRC that are impacted in the context of MPF. The sub-chapter will focus on the four general principles of the UNCRC, the rights relating to family, and on economic and social rights that stem from the legal parent-child bond. Particular attention will be paid to the principle of the child's best interests,¹¹ the principle of non-discrimination,¹² the child's right to identity,¹³ and the child's right to be cared for by parents.¹⁴

¹¹ Article 3(1) of the UNCRC.

¹² Article 2 of the UNCRC.

¹³ Article 8 of the UNCRC.

¹⁴ Article 7 of the UNCRC.

Finally, Chapter 4 will conclude that in light of the impact of the of the lack of legal recognition on children's rights, the UNCRC Committee should address this issue as part of its functions, and develop a child-centered and rights-based approach to guide state-parties concerning their obligations for children in alternative families, such as MPF. Part 4.1 will briefly review how the UNCRC Committee can make use of its three main functions - reporting procedure and publishing Concluding Observations, drafting General Comments, and receiving communications - to further engage with the issue of children in MPF. The part will identify the benefits and challenges of utilizing these particular functions, and analyze how the UNCRC Committee should use its main functions to provide a systematic and clear response to position children's right to family at the forefront of the children's rights agenda.

Part 4.2 will then suggest that in its engagement with the issue of children in MPF, the UNCRC Committee should present a principled child-centered and rights-based approach. It will identify three main principles that should be adopted under the approach, to better instruct state-parties on the definition and scope of family-related rights in the UNCRC, and guide them on how to ensure the rights for children in diverse models of family. As will be described, such an approach should call for a re-definition of "family" and "parent" in broad and flexible terms. This will reflect the changes in the traditional nuclear family model, and accommodate children raised in emerging family models, such as MPF. The approach should also encourage legal recognition of MPF, and require state-parties to amend their laws and policies accordingly. At the very least, the UNCRC Committee should address the discriminatory outcomes of lack of legal recognition of MPF, and urge state-parties to separate, as far as possible, between parental status and subsequent rights and entitlements concerning the child. Finally, the UNCRC Committee should use its functions to encourage state-parties to raise awareness to the issue of children in alternative families such as MPF, and promote data collection and research, to reflect the realities of these children in their national context.

As a whole, the thesis is meant to add to the academic writing in the field of MPF, and will be based on literature review, as well as case-law and a legislative overview in the U.S and in Canada. It aims to promote re-thinking of the definition and scope of "family" and "parent" in the context of MPF, from a child-centered and rights-based approach, and in light of the UNCRC. Its novelty is three-fold; first, it will focus on MPF, which is a relatively new and topical subject, which still requires further academic consideration. Second, the thesis will offer a child rights-based approach in the context of MPF, and introduce the UNCRC into this discussion. As will be further described, this children's rights perspective is currently lacking in both academic literature and case-law, and can contribute to the case for legal recognition of MPF. Third, the thesis will add to the academic consideration regarding the UNCRC Committee's functions, and its potential to address emerging issues related to children's rights. It will offer a principled child-centered and rights-based approach on children in MPF, and will outline how this issue should be addressed and anchored in the international children's rights framework.

1. The Emergence of MPF and its Implications on Children

1. 1. The Multiple Parent Family

The definitions, roles and scope of what constitutes a "family" and "parent" have been changing throughout history. Sociological researchers have found that the functions and understanding of the family has evolved across time periods and culture. Among these developments, it is noteworthy to mention that the modern era has resulted in significant changes, particularly in the global north. These changes include the re-forming of the family as a two-generational closed unit comprising of parents and their minor children, to the exclusion of extended kin and relatives.¹⁵ It also enabled a (more)¹⁶ equal division of responsibilities and powers between spouses, and continued to foster the concept of childhood.¹⁷ Thus, the family is a social structure which continues to evolve and adapt, according to the prevalent political, social, cultural, religious and legal norms.

Until recently, the "nuclear family" was considered the predominant family model in the global north. The model considers the family as a self-contained unit, comprising of two (often married) opposite-sex parents, and their minor biological or adopted children. This model is considered to fulfil the multiple functions of the family. This is primarily because in many societies, the family is seen as the "orderly means of reproduction", and its norms control sexuality and relationships.¹⁸ In addition, the closed unit is seen as economically fit to provide children with financial support, shelter, nourishment and other necessary services. Also, as this nuclear family model is seen as rooted in ethical and religious values, it is believed to be beneficial for children's socialization and healthy development.¹⁹

However, this traditional "western" family model has been challenged, and possibly even "overthrown" in recent decades, as other alternative family models are increasingly emerging, particularly in the global north. This change is often associated with social and economic trends, as well as advances in the field of ART. For example, the rise in rates of divorce led to the breakdown of the nuclear family, and to the emergence of more and more 'blended' families, following a parent's second relationship with a new partner. Same-sex families, which gained legal recognition and acceptance in previous decades, have also increased in numbers, and differ from the nuclear model of two opposite-sex parents of shared biological children. In addition, it can be argued that these changes are reflecting in the institutions of adoption and foster-care. The recent promotion of open-adoption schemes, and the attempts to augment the status of foster-parents, alongside that of the biological and legal parents, can also be seen as challenging the "closed" nuclear family model.²⁰

¹⁵ For an overview, see Cutas & Chan, *supra note* 5, p. 1-6. Wilson, *supra note* 1, chapter 1.

¹⁶ There are feminist critiques on the family, as a violent and dangerous social institution for women, with a long-standing gender power imbalances. See in that regard, M. Fineman "The Sexual Family", p. 54-55 in "Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations" (editors: M. E. Fineman, et al). J. e. Jackson, A. P. Romero) (2009) (Hereinafter: "**Fineman, (2009)**").

¹⁷ Childhood is a social, political, economic, legal and moral construct that has changed over time and social and cultural contexts. Thus, the duration of childhood, its characteristics, the identifiable differences between children and adults and their consequences vary across history and cultures. See C. Haywood "A History of Childhood: Children and Childhood in the West from Medieval to Modern Times", p. 11-13, (Themes in History), Cambridge: Polity Press & Blackwell Publishing Ltd. (2001) (Hereinafter: "**Haywood**"). T. Kaime, "The Convention on the Rights of the Child: A Cultural Legitimacy Critique", p. 61, 65 Europa Law Publishing (2011) (Hereinafter: "**Kaime**").

¹⁸ Wilson, *supra note* 1, chapter 1.

¹⁹ Cutas & Chan, *supra note*, p. 5. See also K. T. Bartlett "Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed", p. 886-888 70 Va. L. Rev. 879 (1984) (Hereinafter: "**Bartlett**").

²⁰ On open-adoption, see L. Gaddie "Comment: Open Adoption", 22 J. Am. Acad. Matrimonial Law. 499 (2009). On foster parenting, see C. S Haury, "The Changing American Family: A Re-Evaluation of the Rights of Foster Parents when Biological Parental Rights have been Terminated", 35 Ga. L. Rev. 313 (2000-2001), and J. Fortin, "Children's Rights and the Developing Law", Chapters 14, 16. 3rd Edition, Cambridge University Press (2009). It is

These emerging alternative family models enable a child to have more than two carers, with whom she can develop a parent-like bond. Thus, more children may enjoy meaningful relationships with multiple carers, regardless of their genetic connection.²¹ In addition, advances in ART, such as gamete donations, and the use of surrogacy, result in children who inherently have more than two persons involved in their birth. Children born via surrogacy may have as many as six persons who can qualify as "parents": the intending couple, the gamete-donor and his/her partner and the surrogate and her partner. In sperm-donation, as many as four may qualify as "parents": the intending mother and her partner, and the donor and his partner. While in most cases, these persons will not all be involved in the child's life as carers, increasing number of families do choose incorporate them, and agree on a parenting plan. The institution of the family must, then, adjust to these developments.

These new developments raise questions concerning the definition of what constitutes as a "family", who is considered a "parent", and who remains a legal stranger to the child.²² This thesis will focus on the particular model of MPF: family units in which more than two adults care for a child, and fulfill meaningful parent-like roles towards the child, in varying degrees. The definition includes several key elements. First, it does not limit the possible number of carers within a MPF unit. Indeed, the most common model of MPF includes a unit of three adults who care for child (for example, a same-sex female couple and a male sperm-donor that co-parent the child, or two biological parents that separated, and a new partner of one of the parents that fulfils a parent-like role towards the child). In practice, though, MPF may include more than three carers.²³ Also, the thesis offers a child-centered approach and focuses on the implications of lack of recognition of MPF for children's well-being and rights, irrespective of the particular number of the carers. This is as long as the carers themselves perform a parent-like role, and wish, or have wished before, to define their status as "parents".²⁴

This definition, then, requires that the carers themselves perceive, or have previously perceived and intended, to be considered as parents. This excludes issues of kin right of access to children, such as claims made by grandparents to have visitation rights, since these individuals do not challenge the status of the legal parents, nor wish to be considered as parents themselves.²⁵ Polygamous relationship, too, may not be included under the definition, as in many cases, those practicing polygamy do not consider themselves to be parents of their non-biological children.²⁶

Also, the definition excludes cases in which children may argue for a right to maintain a significant non-parental relationships, either with peers or other adults. It can be argued that these issues share some of the same justifications as the claim for legal recognition of MPF, but they should be addressed differently. This is because those relationships, however beneficial to the child, do not seek the same rights and duties derived from the status of "parenthood".

important to note that these developments can also be interpreted as fortifying the biological family ties under the traditional approach, yet they still include recognized multiple persons with parent-like status towards a child.

²¹ Bartlett, *supra* note 19, p.881.

²² See Lotz, *supra* note 9, p. 34.

²³ For example, N. Spanjer, "These Five People Are Going to Have a Baby Together" The Vice Article (4.8.2015) <http://www.vice.com/read/a-child-in-the-netherlands-is-going-to-have-five-parents-876> (accessed: 15.4.2016)

²⁴ The particular characteristics of the carers' relationships may be relevant in setting conditions to legally recognize MPF in the national context, or in decisions made on a case-by-case basis. However, questions on these particular situations fall outside the scope of this thesis. On models to recognize MPF, see Markus, *supra* note 7, p. 447-450.

²⁵ While the issue of kin care and access to children is emerging, kin carers may not wish to define themselves as parents, and take on parental responsibilities. In that regard: S. M. Coupet, "Ain't I a Parent?: The Exclusion of Kinship Caregivers from the Debate over Expansion of Parenthood" (34 N.Y.U Rev. L & Soc. Change, 595 (2010) (Hereinafter: "**Coupet**"). And A. Blecher-Prigat "Rethinking Visitation: from a Parental to a Relational Right", 16 Duke J. Gender L. & Pol'y 1 (2009) (Hereinafter: "**Blecher-Prigat (2009)**").

²⁶ A. Campbell, "Sister Wives, Surrogates and Sex Workers - Outlaws by Choice?", p. 60-61, Gender in Law, Culture and Society, Ashgate Publishing Ltd. (2013). There sister-wives are described as assisting in child rearing and "babysitting", not as additional parents.

Second, the MPF definition requires the adults to care for the child and fulfill parental roles. The definition does not concern itself with the adult carers' relationship in itself. This means that the definition can include nonconjugal carers that act as co-parents (such as friends or relatives). The definition also does not require certain conditions for the recognition of the carers as parental figures, such as financial support between carers, shared living arrangements, contractual agreements, or the existence of a sexual relationship between the carers.²⁷ Such elements may be of importance for national policy considerations, or in litigation regarding the rights of the carers. Yet, the focus of the definition remains on the importance of the relationship *to the child*, and on any implications for the child where the relationship is not legally recognized and protected.

Third, the definition does not require that the duties and responsibilities towards the child be equally shared between all the carers. Such an expectation is not feasible in MPF, as not all carers live with the child and are able to care for her on a day-to-day basis. Instead, the definition holds a qualitative benchmark of establishing a "meaningful" relationship with the child. Of course, the question relating to the primary carer can be relevant for policy considerations and for case-by-case assessments concerning the particular child and her needs.²⁸ Yet, for the purpose of identifying and defining MPF, the thesis requires some extent of parental roles, and the establishment of meaningful relationships. The particular requirements and scope of such relationship are best determined in the national context, and in light of the particular economic, social and cultural conditions and prevailing customs. Thus, this definition incorporates all types of MPF that may be valuable to the child.

In practice, it is possible to distinguish between two main "types" of MPF, which vary according to the carers' intent regarding the child. The first type of MPF concerns more than two persons who raise a child together as part of an agreed-upon and intended parenting project. This can include prior arrangements and contractual obligations between the carers, which determine issues such as custody and access, financial support, decision-making powers, etc. A prominent example of this type is a same-sex couple and a gamete donor, who agrees to play a parenting role in the child's life. In many cases, the motivation to create this family is based on an existing friendship between the carers, on their need for financial and emotional support in raising the child, and on their belief that the child may benefit from the arrangement. This first type is common in the LGBTQ community, and often employs ART procedures for the creation of the child. Therefore, it is more prominent in North-America and Europe, where same-sex families are entitled to legal recognition and protection,²⁹ and where ART procedures are available and accessible for such individuals. As will be discussed in chapter 2, cases regarding the legal recognition of MPF can be found in Canada and U.S courts. This type is also increasing in Europe, as individuals form MPF, and countries are exploring legal reforms to reflect these situations in law and in the administrative registry.³⁰

The second type of MPF concerns more than two persons that formed a parent-like tie to an existing child. Unlike the first type, the reality of multiple carers to the child was not intended, but developed during the child's life. This often occurs as a result of an initial family conflict or break-up, in which the child's legal parents separate, and later form new relationships. In the new relationships, children experience new adult carers, and can develop attachments to them.³¹ For example, with the rise in blended families, partners of parents (step-parents) may play active roles in the child's life, and form meaningful and parent-like relationships with them. Some states have begun to address this

²⁷ Coupet, *supra note* 25, p. 596. On sexuality as a condition to family definition: Fineman (2009), *supra note* 16.

²⁸ See Markus, *supra note*, p. 447-450.

²⁹ See Polikoff (2000-2001), *supra note* 8.

³⁰ On the UK context, see J. Wallbank and C. Dietz "Lesbian Mothers, Fathers and Other Animals: Is the Political Personal in Multiple Parent Families?", 25 *Child & Fam. L. Q.* 451 (2013) (Hereinafter: "**Wallbank & Dietz**"). Also, the Dutch NGO "Meer Dan Gewenst" organizes activities for individuals interested in MPF, and advocates for legal reforms in the Netherlands to recognize MPF: Website, <http://www.meerdangewenst.nl/> (last accessed: 24.6.2016).

³¹ Bartlett, *supra note* 19, p. 881

issue, and develop legislation to grants status for step-parents.³² This type of MPF is likely to involve litigation, as legal frameworks are still mostly based on the nuclear family model, and recognition of new carers often comes at the expense of one of the legal parents, and threatens their status.

The two types of MPF may require different policies and legal measures, and each presents unique challenges and considerations.³³ Nonetheless, the lack of legal recognition of both types of MPF has similar negative implications for children.³⁴ As will be described, in both MPF types, children are raised by multiple carers and can develop meaningful parent-like relationships with them, without having these relationships recognized by the state and/or third parties. As the carers are not recognized as parents, children in MPF are prevented from fully enjoying the rights and protection that stem from the legal parent-child bond, and are more vulnerable to interference in their family life.

1. 2. Exclusive Parenthood and Alternative Theoretical Frameworks

The definitions of what constitutes a "family" or "parent" are meant to protect the family from third parties and/or state intervention.³⁵ The definitions must set clear boundaries between the *family* and the *others*. Thus, only relationships that are included within those definitions can gain access to various social and economic benefits and be entitled to legal recognition and protection.³⁶ It is the definitions, then, that provide the true meaning to both terms and establish a realm of intimacy and protection between the family members.³⁷

Yet, the emergence of MPF challenges the traditional meanings of "family" and "parent". This is because MPF do not adhere to the model of the nuclear family, and in particular, question the perception of exclusive parenthood. Exclusive parenthood is the legal recognition of only one set of parents, at one time, and the notion that all parental authority is found within the parental unit.³⁸ This approach views parenthood as a zero-sum-game that leaves no room for quasi-parenthood, or other care arrangements: a person can either be a parent, and be entitled to the rights and duties that stem from the parent-child relationship, or be a legal stranger to the child.³⁹ The exclusive parenthood model has developed throughout decades, and has been primarily influenced by the concept of natural law. Thus, the parent-child relationship is considered to be anchored in the natural order itself, and parental rights and autonomy are considered as the "very foundation of social order".⁴⁰ Some scholars even go as far to argue that it is the exclusive nature of parenthood that generates the familial bonds of commitment, and endows the family with its moral power and status in society.⁴¹

Under this conservative approach, parent-child relationships are characterized by love and care. It is therefore assumed that the natural parents will act in the best interests of their children, and that they should make decisions on their behalf.⁴² For this reason, the approach holds that state intervention in the nuclear family should be limited, in order to enable parents to exercise their

³² See N. Bala and C. Ashbourne, "The Widening Concept of 'Parent' in Canada: Step-Parents, Same-Sex Partners & Parents by ART", p. 531, 536, 20 Am. U. J. Gender Soc. Pol'y & L. 525 (2011-2012) (Hereinafter: "**Bala & Ashbourne**"). Uniform Law Conference of Canada (ULCC) Civil Law Section, "Uniform Child Status Act" Paper, p. 3 (August, 2010) (Hereinafter: "**ULCC Paper**").

³³ Bartlett, *supra* note 19, p. 881.

³⁴ Markus, *supra* note 7, p. 415.

³⁵ Blecher-Prigat (2003), *supra* note 8, p. 545, 550.

³⁶ Notes "Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family", 104 Harv. L. Rev. p. 1642-1643, 1640 (1990-1991) (Hereinafter: "**Notes**").

³⁷ Blecher-Prigat (2003), *supra* note 8, p. 549, 562-563.

³⁸ Young, *supra* note 7, p.554

³⁹ *Ibid*, p. 506, 520. Bartlett, *supra* note 19, p. 879.

⁴⁰ Bartlett, *supra* note 19, p 888

⁴¹ See *Ibid*, p. 879.

⁴² *Ibid*, p. 880, 891-892.

autonomy to guide their children.⁴³ An intervention may be warranted in extreme situations, when parents neglect or harm their children, or for other important considerations, such as public health, order and security. Yet, under the exclusive parenthood approach, in most states it is only the natural and/or legal parent that enjoy this parental autonomy and status.⁴⁴

It can be argued that the perceptions on nuclear families and exclusive parenthood are also reflected in international human rights treaties. International treaties express global agreements and shared attitudes on human rights issues, and also represent the legal and moral expectations from state-parties in that regard.⁴⁵ Concerning family and parenthood, international treaties consider the family as a closed foundational unit. This characteristic is then relied upon to justify state assistance and benefits to the family unit. Thus, both the Universal Declaration of Human Rights and the UN Convention on Civil and Political Rights consider that "the family is the natural and fundamental group unit of society" and is therefore entitled to protection by society and the state.⁴⁶ Both instruments also recognize parental autonomy to decide on children's education and religion.⁴⁷ The UN Convention on Economic, Social and Cultural Rights further notes that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children".⁴⁸

The UNCRC, which will be discussed in chapter 3, reflects a similar approach, and holds that the family is the "natural environment for the growth and well-being of all its members and particularly children".⁴⁹ However, the UNCRC recognize the child as a rights bearer, and anchors the child's right to participate and to be heard in decisions concerning her, as guiding principles.⁵⁰ As opposed to the other instruments, the UNCRC also acknowledges that there can be cultural and societal variations regarding the child's carers. Thus, Article 5 of the UNCRC discusses the obligations of the parents or "where applicable, the members of the extended family or community as provided by local custom". And Article 18 discusses "parents and legal guardians".⁵¹ Yet, the international instruments were drafted during the mid-late 20th century. Their view of the family as a "unit" suggests that they reflect a more traditional approach, and in any case, they do not explicitly refer to alternative family models.

However, as will be presented in chapter 3, UN treaty bodies such as the UNCRC have noted the recent changes in the family structure. Yet, so far, they have offered no guiding interpretation to the concepts of "family" and "parent" to accommodate these new realities, and to safeguard children in such families. In the meantime, leading children's rights NGO's argue that, as a result of the social and technological changes effecting the family, there is a strong backlash movement at the UN level, to fortify the concepts of the nuclear family and exclusive parenthood.⁵² This conservative agenda is also viewed as potentially limiting the rights and wishes of individuals, such as children, in families. Thus, the definition and scope of "family" and "parenthood" remain contested at the international arena, despite the fact that the current situation has negative implications for children's rights.

⁴³ *Ibid*, p 892.

⁴⁴ *Ibid*, p. 880.

⁴⁵ G. Lenzer & B. Gran "Rights and the Role of Family Engagement in Child Welfare: An International Treaties Perspective on Families' Rights, Parents' Rights and Children's Rights, *Child Welfare*, Vol. 90(4), p. 160, 162 (2011) (Hereinafter: "**Lenzer & Gran**").

⁴⁶ Article 16(3) of the UDHR, Article 23(1) of the ICCPR.

⁴⁷ Article 26(3) of the UDHR, Article 18(4) of the ICCPR.

⁴⁸ Article 10 of the ICESCR.

⁴⁹ The preamble of the UNCRC.

⁵⁰ See articles 3, 12 of the UNCRC. See also para 12 of the UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 (Hereinafter: "**UNCRC GC 5**").

⁵¹ See Lenzer & Fran, *supra note* 45, p. 164. Articles 5, 18 of the UNCRC.

⁵² See Human Rights Council Resolutions on the Protection of the Family, 22 July 2015 A/HRC/RES/29/22, And Human Rights Council Resolution from 25 June, 2014, A/HRC/26/L.20/Rev.1.

In national laws, and under the exclusive parenthood model, parents have unique legal rights and obligations towards children. These rights and obligations remain exclusive and indivisible. In most states, the rights and obligations apply only to natural and legal parents.⁵³ Concerning parental duties, parents are obligated to care for their children, support them financially and ensure their physical and emotional well-being and protection. These obligations are of particular importance during the period of early childhood, which is "the period of most extensive (and intensive) parental responsibilities related to all aspects of children's well-being [...] their survival, health, physical safety and emotional security...".⁵⁴ Parents are also obligated to provide their children with adequate nourishment, shelter, education and medical care.⁵⁵ Legal recognition also establishes a special status between the parent and the child. Thus, parenthood, as opposed to guardianship or foster-care schemes, is a life-long immutable declaration of status, which enables the parent to fully participate in the child's life.⁵⁶

Concerning parental rights, parents have important and exclusive decision-making powers relating to their children. In most states, and in accordance with national laws, parents are entitled to determine their child's education, discipline, and religion. Parents can also make medical decisions for the child, and are responsible for handling and safe-keeping the child's property and earnings.⁵⁷ Most states also recognize parents' autonomy in the family context. Thus, parents can consent to adoption, and make decisions regarding the child's name, residence, care and custody.⁵⁸ As described, due to the exclusive parenthood approach, natural and legal parents are denied parental status only in extreme circumstances, such as abuse, neglect, or other inability to care for the child.⁵⁹

The exclusive parenthood approach means that the parental rights and obligations are limited to the legally recognizable parents. This is problematic for various reasons. First, the notion of exclusive parenthood does not adequately reflect the current reality of many family units. It provides a narrow and limited scope to "family", which can violate the rights and interests of persons in alternative family units, including children in such families.⁶⁰ Many children do not live within nuclear families, or with their natural parents, but they can (and do) form relationships with other carers and consider them to be parental figures. However, because of the exclusive parenthood approach "current law provides no satisfactory means of accommodating such extra-parental attachment".⁶¹

Second, it can be argued that in certain situations, a child's need for continuity and stability requires the state to enable her to maintain relationships with her carers. Research holds that children's healthy development requires continuity and stability of personal relationships, especially with parental carers.⁶² In early childhood, the child is particularly dependent and maintaining the

⁵³ Bartlett, *supra note* 19, p.883

⁵⁴ UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, par 20, 20 September 2006, CRC/C/GC/7/Rev.1 (Hereinafter: "**UNCRC GC 7**").

⁵⁵ Bartlett, *supra note* 19, p 885. Notes, *supra note* 36, p. 1655-1656.

⁵⁶ See also *A.A. v. B.B.*, 2007, INCA 2, par 14 (02.01.20007) (Hereinafter: "**A.A. v. B.B. Appeal**").

⁵⁷ Bartlett, *supra note* 19, p. 884-885. See also Markus, *supra note* 7, p. 422, 429.

⁵⁸ M. B. Jacobs, "Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents", p. 311-312, 9 J. L & Fam. Stud. 309 (2007). J. Herring "The Power of Naming: Surnames, Children and Spouses", p. 313-314 in "Law and Language: Current Legal Issues", Vol 15 (Editors: M. Freeman and F. Smith) (2013). Leckey (2009), *supra note* 1, p. 64.

⁵⁹ See Bartlett, *supra note* 19, p. 885, 890, 896. On the other hand, some scholars note that the rise of the human rights discourse in family law, and the emphasis of the principle of the child's best interests, have limited parental rights. Many states balance the rights and autonomy of parents to rights and interests of children, and this limits parental autonomy with regards to health-care decisions, legal proceedings, discipline, decisions concerning children's property, education, religion, etc. For more information see R. Probert, S. Gilmore and J. Herring (editors), "Responsible Parents and Parental Responsibility", p. 23-26, and chapters 6-13, Hart Publishing (2009).

⁶⁰ Blecher-Prigat (2003), *supra note* 8, p. 552.

⁶¹ Bartlett, *supra note* 19, p. 881.

⁶² *Ibid*, p. 882, 902.

relationships protects the child's attachments to carers, and provides her with a sense of security. As the child grows older, maintaining the relationships provides the child with continuous guidance, and a sense of belonging and heritage. This is the case for children in MPF, who form meaningful relationships with their carers, and consider them to be de facto parents. Losing these relationships, which are not adequately recognized and protected by law, can negatively impact the child's well-being, and can generate feelings of shame, anxiety, and uncertainty.⁶³ Yet, the exclusive parenthood model seems to underestimate the child's ability to form these multiple parental relationships, and ignores the possible benefits that these relationships may bring to the child.⁶⁴

Third, some scholars argue that the nuclear family and the exclusive parenthood models are patriarchal in nature, and unsafe for children. The nuclear family model often portrays the father as provider and disciplinarian, to whom the mother and children owe obedience and respect. According to this criticism, the family has become a symbol with political implications. Thus, "it is the intimate unit in policy and legal discussion that is exclusively designated as what is normatively desirable".⁶⁵ In that regard, the nuclear family and the exclusive parenthood models do not adequately recognize children as independent subjects and rights-bearers, and they devalue other forms of families and deny their possible function and benefits.⁶⁶

Even so, the model of exclusive parenthood has advantages. There is a risk that expanding the role of parents may negatively impact the willingness and level of parental involvement in child rearing. Thus, recognizing multiple parents can make it easier for carers to deny their parental status. In addition, as more actors can have parental rights and obligations, some carers might be more likely to reduce their role as parents, or neglect their responsibilities altogether.⁶⁷ From a social perspective, rethinking who constitutes as a "parent" may also have consequences for the traditional approach concerning the family. Some scholars argue that such changes are "inherently destabilizing", and that they can weaken the unique status of the "family" and threaten the existing social order.⁶⁸

Exclusive parenthood also has legal and practical advantages. Apart from exceptional cases, exclusive parenthood offers a clear and effective manner to determine parentage, based on genetic ties to the child and the individuals' personal status, such as marriage. Thus, it does not require a qualitative examination of the particular parent-child relationship that can burden the legal system and increase conflict and litigation. Instead, it clearly recognizes who the parents are, and grants them the necessary control and autonomy to raise the child.⁶⁹ That being said, it must also be recognized that, globally, fewer children live in a nuclear family with two natural parents. Parenting models, and subsequent laws, should change in order to reflect this reality.⁷⁰ For example, Young holds that "at the end of the twentieth century, the paradigm of the exclusive family has outlived its value".⁷¹ Legal scholars and professionals in the field of child development have argued that the parental status should be expanded to include other carers who play meaningful parental roles. As a result, new theories on redefining "parenthood" have been developed in recent years, some of which are particularly relevant to the discussion on MPF.

One example is the functional approach to parenthood. The approach focuses on the relationship between the carer and child, and examines whether it shares essential parent-child characteristics,

⁶³ *Ibid*, p. 904-906.

⁶⁴ *Ibid*, p. 911. Young, *supra note 7*, p.510.

⁶⁵ M. L. A. Fineman "Masking Dependency: The Political Role of Family Rhetoric", p. 2183 81 Va. L. Rev. 2181 (1995) (Hereinafter: "**Fineman, (1995)**").

⁶⁶ Young, *supra note 7*, p.509-510.

⁶⁷ Markus, *supra note 7*, p. 441.

⁶⁸ Fineman (1995), *supra note 65*, p. 2184. Young, *supra note 7*, p.530.

⁶⁹ Young, *supra note 7*, p.511. Bartlett, *supra note 19*, p. 947-948.

⁷⁰ Bartlett, *supra note 19*, p. 962.

⁷¹ Young, *supra note 7*, p.554.

and fulfills the child's needs. The approach is based on finding resemblance between the child-carer relationship to the traditional notion of parenthood, and what it includes.⁷² For example, identifying care responsibilities, financial support, and affection between a child and a carer can signal that the relationship constitutes "de facto" parenthood. The functionalist approach can be relevant for the recognition of MPF. Thus, in cases in which children have developed parent-like relationships with multiple carers, these relationships should be taken into account when deciding on issues of legal recognition or entitlements to related benefits. Yet, the comparative nature of this approach requires alternative families to resemble the traditional model, and reinforces this model as the norm.⁷³ This can be problematic for MPF as the inclusion of multiple carers is in stark contrast to the exclusive two-parent model. Also, from a practical point of view, the model requires a burdensome case-by-case assessment, and does not offer practical guidance on how to analyze parent-child relationships. Moreover, the manner of examination is likely to be intrusive to the intimate and private family life (for example, evaluating intimate parent-child relationships, inquiring on financial support, etc.).⁷⁴

Other approaches hold that the definition-centered discussion on what is a "family" and who is a "parent" often replaces the examination of the values that lie at the heart of the family, such as intimacy, concern, care, or accountability.⁷⁵ One of these approaches, led by Fineman, calls for redefining the "family" in the context of dependency. According to Fineman, the family is a social institution, meant to care for the dependent, and redirect this responsibility away from the state. The family is burdened with providing financial support and caretaking of children, as well as other relatives who are ill or otherwise in need.⁷⁶ Fineman identifies two types of dependency: the first is *inevitable dependency*, which stems from the particular status and situation. This includes the dependency of children, who are biologically and developmentally dependent on their carers during their early childhood. The second type is the *derivative dependency*, which influences the carers themselves. Thus, to fulfil their caretaking role, carers are themselves dependent on assistance and resources to fulfill their duties.⁷⁷ This approach is of particular relevance in the context of parent-child relationships, and MPF. Children are considered "inevitably" dependent on their carers, and can develop attachment to multiple carers, irrespective of their own genetic ties.⁷⁸ Under this approach, determining parental status should be based on the examination of the nature of the relationship between the carer and the child, regardless of the particular family structure. It can be argued, then, that identifying elements of dependency and attachment in the relationship between the child and the carer proves that it is meaningful and beneficial. For this reason, it should be also recognized and respected by the state.

While these novel and inclusive approaches are promoted by legal scholars, and gain support from professionals in the field of child development, they have not been incorporated in the international human rights context, nor in most national laws and policies. The dominant approach concerning the definition and scope of "family" and "parent" is still heavily reliant on genetic ties and the personal status of the adult carers, and this leaves children in alternative families, such as MPF, more vulnerable to infringements of their rights and family life.

1. 3. Lack of Legal Recognition of MPF and its Implications for Children

The questions arising from MPF impact all individuals in the family unit, including children. Thus, legal recognition of MPF and its subsequent associated rights, duties and benefits are not only relevant to

⁷² Notes, *supra* note 36, p.1646.

⁷³ *Ibid*, p. 1655. See also Wallbank & Dietz, *supra* note 30, p. 454-455

⁷⁴ *Ibid*, p. 1657, 1653.

⁷⁵ See Blecher-Prigat (2003), *supra* note 8, p. 584-585.

⁷⁶ *Ibid*, p. 573. Fineman (1995), *supra* note 65, p. 2187-2188, 2205.

⁷⁷ Fineman (1995), *supra* note 65, p.2200.

⁷⁸ Notes, *supra* note 36, p. 1657.

the carers and to the state, but they extend to the children themselves. At face value, it seems that children in MPF do not experience inherent violations of their rights. This is because the child has at least one legal parent, from whom the child may access the range of rights and obligations that stem from the parent-child bond. Most children in MPF have a legally recognized parent-child relationship, albeit not with all their carers, that can provide for their needs. It is from this legal parent that the child can receive nationality, be registered, be provided with financial support, and gain access to services. Hence, it can be argued that legal recognition of MPF is primarily a matter for the carers, as the rights and duties towards the child are otherwise guaranteed by the recognized legal parents.

However, a closer examination reveals that lack of recognition holds significant implications for children in MPF. In reviewing these issues, a distinction should be made between situations of family harmony, and family break-up. In cases of functioning and harmonious MPF, legal recognition is valuable for children for its symbolic nature. Recognition and acceptance of a child's family and meaningful relations are crucial elements in the child's identity and sense of belonging.⁷⁹ While some scholars adhere to the notion that children should not develop attachments to multiple carers, and that such parental figures may even be inappropriate, current research suggests that these concerns are unfounded. Thus, children can develop relationships with multiple carers, and maintaining them is beneficial for them.⁸⁰ Legal recognition acknowledges the child's family, and this ensures that children in MPF are not marginalized or discriminated against.⁸¹ Recognition can also enable children in MPF to have appropriate birth registration and status relating to (all) their carers. It fortifies MPF as a unit, including all carers, as well as possible siblings. This is of particular concern as some children raised in MPF may have different parentage than their siblings, despite being raised together. Thus, in the event of a family break-up or death of one of the carers, the lack of legal recognition may impact the child's relationship with her de facto siblings, for example in cases of adoption or custody disputes.

In addition, lack of legal recognition can cause psychological, financial and social-economic difficulties for children in MPF. Lack of recognition denies children the rights and benefits stemming from parent-child relationships. For example, lack of recognition negatively impacts the child's ability to inherit or sue for compensation in the event of a carers' death or injury.⁸² The lack of recognition also denies carers, who have a parental role towards the child, critical decision-making powers. Thus, non-recognized carers may not be able to enroll the child to school, or decide on her medical care, and this can create difficulties for children. Children may also be denied state benefits and status that stem from the parent-child relationship, such as receiving the nationality of their carer, and being entitled to welfare and social security family support schemes.⁸³

In the event of a family break-up, additional interests of children can be negatively impacted. Psychologically, lack of recognition places the children's ability to maintain their relationships with their carers at risk. Non-recognized carers may not have standing in court litigation, and may not be entitled to custody or visitation rights.⁸⁴ The lack of recognition may also enable carers to avoid child support payments, and neglect their parent-like responsibilities.⁸⁵ In case of family conflict, the concept of the child's best interests must also be incorporated in decision-making, and states should ensure this also for children raised in MPF. These difficulties, which will be further discussed in chapter 3 in the context of the rights enshrined in the UNCRC, can amount to a significant impediment for children in MPF, and require a child-centered and rights-based approach in this field.

⁷⁹ Y. Ronen, "Redefining the Child's Right to Identity", p. 149-150, *International Journal of Law, Policy and the Family* 18, 147 (2004) (Hereinafter: "**Ronen**").

⁸⁰ Notes, *supra note* 36, p. 1657.

⁸¹ Markus, *supra note* 7, p.465.

⁸² Lotz, *supra note* 9, p. 39, 43.

⁸³ See Notes, *supra note* 36, p. 1642-1643. (it was also mentioned before in the chapter)

⁸⁴ See Lotz, *supra note* 9, p. 40, 44.

⁸⁵ *Ibid*, p. 39, 43.

Chapter 2: The Legal Status of MPF in the U.S and Canada

2. 1. Introduction to Legal Review

In many states, the advances in ART, along with social changes and the emergence of new types of families, has resulted in legal uncertainty concerning the recognition, rights, and duties of parental figures. To address this, some states, in particular in Canada and the U.S, have re-analyzed legal parenthood, and broadly reinterpreted legislation to determine who can be considered as parents, and under which conditions.

Nonetheless, laws regarding the status of MPF have been developing slowly, and relatively few states address this issue, while courts must face more and more cases which depict these new realities.⁸⁶ In harmonious MPF units, persons who are de facto parents may demand legal recognition of their parental status, and augment their relationship with the child and other carers. Also, carers may request courts for specific remedies and rights in relation to the state and/or third parties, and may litigate in order to have their status recognized under specific legislation. For families after a break-up, persons who were de facto parents to children may wish to abandon their parental relationships and obligations, such as the payment of child support. On the other hand, following a family break-up, legal parents may wish to remove non-legal parents from the child's life, and those carers may, conversely, wish courts to recognize their status and award them with subsequent custody and visitation rights. Also, in the event of a carer's death, the child and/or other carers may litigate to avoid family separation. Nevertheless, and as will be described, there are currently no laws to effectively determine such issues, and judicial developments are inconsistent and conducted in an ad hoc manner.

In addition to the legal uncertainty, there is a problem in "contracting away paternity rights". Paternity agreements deal with the creation and raising of a child, and with social and technological changes, it is likely that more and more people will enter into written or oral agreements concerning parentage.⁸⁷ Even when non-traditional families conduct agreements to clarify rights and obligations, these are often not enforced or recognized by the courts. For example, U.S and Canadian courts do note that non-traditional families rely on contracts or other agreements of varying degrees of formality to govern the donation of sperm or eggs.⁸⁸ But in many jurisdictions, courts are reluctant to interpret and enforce contracts affecting children in the same way as other contracts, because safeguarding the best interests of children trumps other considerations of the parties. In other words, if agreements are considered by the courts to infringe children's rights and interests, they may be found contrary to public policy and void.⁸⁹

This chapter will review prominent court decisions dealing with situations of MPF. The focus will be on five cases, two from the U.S and three from Canada. The cases reflect the wide range of possibilities and issues in relation to MPF, and present different approaches from the courts. Most legislation and cases concerning MPF can be found in the North American context, primarily in the U.S and Canada. This is likely the result of social acceptance of same-sex families, and the increasing prevalence of non-traditional families in those states. It can also be attributed to the prevalence of litigation in family matters, and to the tradition of fundamental constitutional rights and

⁸⁶ A. E. Kinsey, "A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion to Find that a Child has More than Two Legal Parents", p. 297-298, 51 San Diego L. Rev. 295 (2014) (Hereinafter: "**Kinsey**").

⁸⁷ J. M. Nix, "Study Note: "You Only Donated Sperm: Using Intent to Uphold Paternity Agreements", p. 492, 494, Utah Law Review, Journal of Law & Family Studies, Vol. 11, No. 2 (2010)

⁸⁸ *Ibid*, p. 492.

⁸⁹ *Ibid*, p. 493. See also K. C. Velte "Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In-Vitro Fertilization", Journal of Gender, Social Policy & the Law, Vol 7, 431 (1998-1999) (Hereinafter: "**Velte**"), and Par 45-46 of C. (M.A.) v. K. (M.), 94 O.R (3d) 569 (2009) (Hereinafter: "**M.A. v. K.M.**").

human rights considerations.⁹⁰ In addition, both states' working language is English, which enables better understanding and accessibility to relevant research and jurisprudence.

Also, in the U.S and Canada, determination of parentage does not necessarily require a genetic connection to the child. Under the common law tradition, which is employed in the U.S and in Canada (apart from Quebec), parentage is determined by presumptions. For example, the mother is considered as the person who gave birth to the child, and the father is whoever was in conjugal relationship with the mother, unless an adoption procedure was undertaken or specific regulation of ART was in issue.⁹¹ In practice, the use of presumptions enables persons who are not the actual genetic parents to be recognized as legal parents, based on their personal status (such as marriage to the mother).⁹² Also, in the common-law tradition, it is possible to recognize, in specific cases, psychological parenthood vis-à-vis a child. Thus, courts considered persons who cared for a child, for a long period of time, and that developed a parent-like bond with the child as *in loco parentis*.⁹³

Canada is a bijural country, and the Canadian province of Quebec employs a civil law tradition that also regulates family life. While scholars argue that civil law is generally less flexible and less accommodating to changing models of families,⁹⁴ the Quebec Civil Code holds the principle of the best interests of the child as a guiding principle in decision-making, and in recent years, Quebec has also changed its laws allowing for recognition of same-sex parenthood and intended parents through ART.⁹⁵ These developments can signal, that, on its face, the legal systems in the U.S and Canada acknowledge the possibility of non-biological parenthood, and are, therefore, potentially more accommodating to new types of families, including MPF.

This chapter will focus on the how the reviewed cases were decided from a child-centered and right-based approach. It is difficult to compare the U.S and Canada, or establish similar standards for analyzing their decisions and legislative initiatives, as the U.S did not ratify the UNCRC. Yet, this chapter does not seek to set national standards but primarily to focus on the place of children in the discussion, and if and how their interests were considered. This can also apply as regards the U.S, as the principle of the child's best interests is anchored in its legislation and jurisprudence, particularly in family law, and its constitutional protections and rights apply to children. Thus, even without being a state-party to the UNCRC, the U.S does share some of the values enshrined in the Convention.

As will be described, the chapter will argue that courts, in both Canada and the U.S, address MPF primarily from a parental rights approach, and pay particular attention to discrimination claims and human rights considerations of the *parent*, while the impact on the child's best interests and rights is somewhat neglected or, at least, not effectively taken into consideration. The UNCRC, in particular, is not mentioned in the Canadian cases, and is not adequately taken into account in the discussion concerning MPF.

⁹⁰ For example, it is suggested that nuclear families in Canada are no longer the majority, see Bala & Ashbourne, *supra note 32*, p. 526. For data and figures on alternative families in the U.S, see also Kinsey, *supra note 86*, p. 300-303, and see also Polikoff (2000-2001), *supra note 8*.

⁹¹ See M. Giroux and M. De Lorenzi, "Putting the Child First: A Necessary Step in the Recognition of the Right to Identity", p. 65-66, 27 *Can. J. Fam. L.* 53 (2011) (Hereinafter: "**Giroux & De Lorenzi**"). See also comment 5 of the Uniform Law Conference of Canada (ULCC), Uniform Child Status Act (2010) (Hereinafter: "**Uniform Child Status Act**").

⁹² See for example, *In re Jesusa V.* 32 Cal. 4th 588, (2004). See also Kinsey, *supra note 86*, p. 308-311. And J. Grossman, "The California Supreme Court's Recent Holding: A "Presumed" Father has Greater Rights than a Biological One", FindLaw Article (9.3.2004), <http://writ.news.findlaw.com/grossman/20040309.html> (accessed: 24.6.2016) (Hereinafter: "**Grossman (2004)**").

⁹³ Bala & Ashbourne, *supra note 32*, p. 530-531.

⁹⁴ R. Leckey, "Two Mothers in Law and Fact", p. 2-3, *Fem Leg Stud* 21 (2013) (Hereinafter: "**Leckey, (2013)**").

⁹⁵ *Ibid*, p. 3. Leckey (2009), *supra note 1*, p. 62-63, 67-69, and Giroux & De Lorenzi, *supra note 91*, p. 79. See the Civil Code of Quebec (CCQ), Book 1, Chapter III, article 33, and Book 2, Title Two, Chapter I.1, articles 538-542.

2. 2. The Legal Status of MPF in the U.S

The U.S had a key-role in the drafting process of the UNCRC, and signed it in 1995. This move signaled its intent to ratify the Convention but, in practice, the U.S remained the only country that is not a state-party to the UNCRC.⁹⁶ In general, the U.S is hesitant to ratify international treaties. It is concerned that ratification can potentially infringe its sovereignty and constructional regime, and that ratifications may result in complexities from its federal structure.⁹⁷ Even so, the U.S does incorporate a human rights agenda and principles within its jurisprudence. In particular, the U.S Supreme Court has held that constitutional protections and rights also apply to children, and has considered them as right-bearers.⁹⁸ Furthermore, in a case that concerned the death penalty for children, the U.S Supreme Court addressed the standards of the UNCRC, and incorporated the values of the Convention in its decision.⁹⁹ In recent years, and in light of the increasing emergence of alternative families, U.S courts have allowed for more rights and granted status to alternative families.¹⁰⁰ In the context of MPF, this thesis will focus on two cases: the California case of *In re M.C.*, and the New York case of *Thomas S. v. Robin Y.*

2. 2. 1. The Case of In. re. M.C.

The *In re. M.C.* case presented the California Court of Appeals with a complicated family situation, in which three persons met the criteria to be considered as legal parents of the same child. It is an unusual case in light of its disturbing circumstances. The facts of the case concerned a woman named Melissa, who developed a relationship with another woman, named Irene. This relationship was characterized by conflict, and claims of mutual violence between the women. Following a break-up, Melissa began a relationship with a man, named Jesus, and became pregnant. The couple lived together, and Jesus assisted her financially with her medical care. While still pregnant, however, Melissa reunited with Irene and the two women married.¹⁰¹

The child, a baby girl, was born during the marriage, and the two women intended to raise her together. During that time, Jesus did not know where Melissa was and could not continue to support her or the child. Yet he made no efforts to locate her, and to receive news of the child.¹⁰² A few short months after the birth, the relationship between the two women became troubled, and Melissa left. Irene sought custody and visitation rights, but Melissa objected, and in order to prevent Irene from receiving status in relation to the child, Melissa's new partner assaulted Irene. Melissa herself was arrested for being an accessory and the child, who was 10 month old, was placed in foster care.¹⁰³

The Juvenile Court had found that all three individuals - Melissa, Jesus and Irene - are presumed parents under the law. Melissa as a biological mother, Jesus as a biological father, and Irene as a legal parent. This is because the California state law holds that a person who was married to the mother of the child at the time of the birth, and who had received the child into his or her home,

⁹⁶ United Nations Treaty Collection, Status of the Convention on the Rights of the Child: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed: 24.6.2016) (Hereinafter: **UNCRC Status**). N. E. Walker et al (Editors), "Children's Rights in the United States: In Search of a National Policy", p. 30, 41 Sage Publications (1999) (Hereinafter: **"Walker"**).

⁹⁷ *Ibid*, p. 36. B. Dohrn "Children's Rights in the United States", p. 75 in "Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence" (editors: T. Liefwaard, J. E. Doek), Springer Publishing (2015) (Hereinafter: **"Dohrn"**). On the complexities arising from a federal system and implementing the UNCRC, see Doek 2002-2003, *supra note* 10, p. 129.

⁹⁸ See *In re Gault*, 387 US 1 (1967). Dohrn, *supra note* 97, p. 74. Walker, *supra note* 96, p. 7-8.

⁹⁹ See p. 22-23 of *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁰⁰ For example, the recent U.S Supreme Court decision that allowed for same-sex marriage: *Obergefell v. Hodges*, 576, U.S (2015).

¹⁰¹ *In re M.C.*, p. 3, 195 Cal.App.4th 197 (2011) (Hereinafter: **"In re. M.C. Appeal"**).

¹⁰² *Ibid*, p.4.

¹⁰³ *Ibid*, p.5.

qualifies as a legal parent.¹⁰⁴ The parties filed an appeal to the California Court of Appeal regarding the Juvenile Court's recognition of three legal parents.¹⁰⁵ The Court of Appeals rejected the finding that there were three legal parents, and returned the case to the Juvenile Court to determine which of the applicants should have his or her parental status "revoked".

In its reasoning, the Court of Appeals noted that the Uniform Parentage Act, which provides the statutory framework for judicial determination on parentage, does not require biological parenthood but can be determined according to personal status.¹⁰⁶ For example, Irene's marriage to Melissa, the mother, and recognizing the child as her own, establish legal parenthood under the law. The child, through her court appointed lawyer, as well as the Children's Advocacy Institute involved in the case as an amicus curiae, both urged the court to re-interpret the law in order to "accommodate rapidly changing familial structures and the need to recognize and accommodate novel parenting relationships".¹⁰⁷ Nevertheless, these claims were denied by the Court of Appeal, which held that in cases where multiple and conflicting presumptions of parenthood are found, these should be reduced by the appropriate courts, and reflect the claims which have stronger reasoning.¹⁰⁸

The Court of Appeals did note that the issue of MPF is critical, and that the "existing statutory framework in California is ill-equipped to resolve them [i.e., the reality of the emerging alternative family models, explanation added]. Even so, the Court of Appeals held that this remains a complex practical, political and social matter, which should be best determined by the legislator.¹⁰⁹ It further refers to case-law by the California Supreme Court, which had rejected dual paternity or maternity where such recognition would result in three parents. In particular, the Court of Appeals justified its reluctance to recognize multiple parents as "Such important policy determinations, which will profoundly impact families, children and society, are best left to the Legislature".¹¹⁰

Arguably, this decision cannot be examined apart from the disturbing circumstances of the case, in which the child, despite having three persons who qualify as parents, lacked any stable parental relationship.¹¹¹ The Court of Appeals specifically held that while a child may be well-served with the recognition and preservation of meaningful relationships with their carers, who love and provide her with a safe environment, this does not describe the case at hand. Rather, the case dealt with a "child who was detained as an infant and who has never found safety or stability with any individual claiming parental status".¹¹² For this reason, the Court of Appeals returned the case to the Juvenile Court to examine the conflicting claims of the three persons.¹¹³

A closer examination reveals that the ruling did not adequately take into account the child's well-being and best interests. For example, the Court of Appeal did not address the poor living conditions that the child had experienced and the incompetence of her carers. Thus, Melissa was in prison, and before that she lived in a car while being pregnant, and had substance-abuse problems. Irene had no stable housing arrangement, and was accused of domestic abuse. It was argued that

¹⁰⁴ *Ibid*, p.11. See also N.D Polikoff "Response: And Baby Makes.. How Many? Using *IN re M.C.* to Consider Parentage of a Child Conceived through Sexual Intercourse and Born to a Lesbian Couple", p. 2019-2026, Georgetown Law Journal, Vol. 100:2015 (2012) (Hereinafter: "**Polikoff (2012)**").

¹⁰⁵ *In re. M.C. Appeal*, *supra note* 101, p. 12.

¹⁰⁶ *Ibid*, p. 12-13. See also California Family Code, Section 7600-7606, Uniform Parentage Act., Grossman (2004), *supra note* 92, and Kinsey, *supra note* 86, p. 311-317.

¹⁰⁷ *In re. M.C. Appeal*, *supra note* 101, p. 16.

¹⁰⁸ *Ibid*, p. 27.

¹⁰⁹ *Ibid*, p. 16.

¹¹⁰ *Ibid*, p. 16

¹¹¹ See J. Grossman "California Allows Children to Have More Than Two Legal Parents", Verdict JUSTIA article (15.10.2013) <https://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents> (accessed: 15.4.2016) (Hereinafter: "**Grossman (2016)**").

¹¹² *In re. M.C Appeal.*, *supra note*, p. 17.

¹¹³ *Ibid*, p. 26-27, 29.

Irene had poor parenting skills, and that no parent-child attachment had developed between her and the child.¹¹⁴ Jesus made no effort to contact the child, or to continue to support her. While he was the only one who could offer the child a stable home, he "remained a relative stranger to M.C."¹¹⁵

These issues were mentioned in the decision, but did not result in any substantial decision concerning the child, her development, her attachments (or lack thereof) to the presumed parents, or her best interests in this situation. The Court of Appeals held that this "is not a case about reunifying or preserving a familial relationship between a child and her biological or presumed parent or parent. It is about creating an opportunity to build a familial relationship where no family has ever existed".¹¹⁶ On the other hand, it can be argued that the decision remained unclear on how this conflict impacted the *child* herself. The position of her lawyer, who had supported the legal recognition of the three carers, was dismissed by the Court of Appeals, and some scholars criticize the decision because it meant that the child would have to "lose" a relationship with an adult that she considers, or might consider in the future, as a parent.¹¹⁷

2. 2. 2. The California State Bill on MPF

In 2013, and following the *In. re. M.C.* case, the California legislator issued a law that enabled courts to recognize more than two legal parents: the Senate Bill No. 274 (Hereinafter: "**California Act**").¹¹⁸ This is a landmark and novel legal development, both nationally in the U.S and globally.¹¹⁹ The California Act recognizes that "in rare cases, children have more than two people who are that child's parent in every way", and it specifically notes that the separation of a child from a parent-like carer can have devastating psychological and emotional impacts on the child.¹²⁰ For this reason, the California Act acknowledges that children may have a parent-child relationship with more than two parents, and that legal recognition is required to protect children in these situations. Thus, the California Act holds that for state law, administrative regulation, governmental policies, and other relevant protections and benefits "any references to two parents shall be interpreted to apply to every parent of a child whether that child has been found to have more than two parents under this part".¹²¹

The California Act also amends specific provisions relating to custody and child support payments, in order to effectively apply them in MPF. It does not automatically apply the presumption of joint-custody on MPF, but requires courts to set custody and visitation rights "based on the best interests of the child".¹²² In particular, the California Act requires courts to address the child's need for continuity and stability in relation to parental care and emotional bonds. With respect to child support, the California Act holds that courts may apply the state's uniform guidelines concerning the determination of child support in cases of separation, even in the context of MPF. However, in case courts find these guidelines to be unjust in the context of MPF, the California Act allows courts to divide the sum between the parents, according to their income and access to the child, "in a just and appropriate manner".¹²³ Thus, the child would be presumptively entitled to the same dollar amount of support, with allocation among all legal parents.

That being said, it is worth pointing out that the California Act is not revolutionary in its scope. First, it is still based on the Uniform Parentage Act of California. It authorizes courts to recognize more

¹¹⁴ *Ibid*, p. 4-5 (concerning Melissa's parental capacities), p. 8, 17 (concerning Irene's parental capacities).

¹¹⁵ *Ibid*, p. 4, 9, 17.

¹¹⁶ *Ibid*, p.18.

¹¹⁷ Polikoff (2012), *supra note* 104, p. 2048-2050.

¹¹⁸ California Senate Bill No. 274, Chapter 563 (2013), See in particular section 1(B) (Hereinafter: "**California Act**").

¹¹⁹ Grossman (2016), *supra note* 111. On the legislative history and scope of the California Act, see Kinsey, *supra note* 86, p. 322-326.

¹²⁰ California Act, *supra note* 118, section 1(A).

¹²¹ *Ibid*, section 5(B)-(C).

¹²² *Ibid*, section 2(D). See also Grossman (2016), *supra note* 111.

¹²³ *Ibid*, Legislative Counsel's Digest, par 4. See also Grossman (2016), *supra note*,111.

than two persons as parents, but requires that these persons would have an independent claim to parentage according to the law (for example, a genetic link to the child, marriage to the mother, etc.).¹²⁴ This, then, does not cover the full range of possibilities of MPF units, as discussed in chapter 1, such as carers in non-conjugal relationships. Second, the California Act does not define MPF, nor require courts to award them with legal recognition under certain conditions. Rather, the California Act merely endows courts with a margin of appreciation, and enables them to decide such issues, on a case-by-case basis. Arguably, this does not provide sufficient legal certainty to children in MPF. Third, the legal recognition is based on the possible harm caused to the child in the event of separation and family break-up.¹²⁵ This raises the question of how willing courts would be to legally recognize MPF in harmonious relationships. Fourth, the California Act does not effectively guide courts and other relevant bodies on how to interpret the child's best interests in the context of MPF, nor does it require or explicitly enable children to be heard in court or administrative proceedings.

Nonetheless, the California highlights a child-focused examination of MPF. The recognition of multiple parents appears to be solely based on the principle of the child's best interests. In particular, courts are directed to consider the harm of removing the child from a stable family environment, and from a carer that had fulfilled the child's physical and emotional needs for care and affection, "for a substantial period of time".¹²⁶ Thus, the considerations that courts must weigh concern only the child, and her unique circumstances, relationships and family unit. Notably, no mention is found relating to the autonomy or the rights of the presumed parent, and the assessment of parental claims in MPF seems to be wholly assessed from the point of view of the child. In any case, to date the California Act has not been addressed in litigation, and it remains unclear how it will be applied in practice by courts, and what significance there would be for the rights and well-being of children in MPF.

2. 2. 3. The Case of Thomas S. v. Robin Y.

An older and interesting example of the legal reactions towards multiple carers and to the question of who is a "parent" is found in the New York Appeal Court decision of Thomas S. v. Robin Y. The facts of the case concern Thomas' petition for an order of filiation concerning a child, named Ry, who was conceived via artificial insemination using Thomas' sperm.¹²⁷ Ry was born to Robin Y., and was raised by Robin and her partner, Sandra. Sandra herself had another child, Cade, who was born from another donor. The women co-parented the two girls together as sisters. The parties had an oral agreement stating that Thomas would not have any parental rights and obligations towards Ry, but that he would agree to meet her, if and when she wished.¹²⁸ Ry, who was about ten years old during the initial proceedings, considered both women to be mothers, and viewed her family as a closed-unit, comprising of her mothers and sister.¹²⁹

When Ry was almost four years old, both mothers arranged that both sisters meet their biological fathers. Thus began a periodic contact between Thomas and Ry, which lasted for six years. The two had developed a comfortable relationship, and during this period contact was always in the presence of both mothers.¹³⁰ Conflict ensued as Thomas wished to take Ry alone to meet his family. The mothers refused the request, and Thomas then petitioned for order of filiation and access rights

¹²⁴ California Act, *supra* note 118, section 1(C). 6(B)-(C).

¹²⁵ *Ibid*, section 1(A).

¹²⁶ *Ibid*, section 6(C). See also the Legislative Counsel's Digest, par 1.

¹²⁷ Thomas S. v. Robin Y., p. 300, 209 A.D. 2d 298, 618 N.Y.S.2d 356, (App. Div. 1994) (Hereinafter: "**S. v. Y. Appeal**"). An order of filiation is an order to name a man as father to a child. The order may include subsequent issues of visitation, custody and child support). See New York Court System Website on "Order of Filiation": <https://www.nycourts.gov/courthelp/family/paternityOrder.shtml> (accessed: 25.6.2016).

¹²⁸ K. J. Hellman, "Introduction to Thomas S. v. Robin Y", p. 427, Journal of Law and Policy, Vol. 3, Issue 2 (1995) (Hereinafter: "**Hellman**").

¹²⁹ *Ibid*), p. 427. See also S. v. Y Appeal, *supra* note 127, p. 300.

¹³⁰ S. v. Y Appeal, *supra* note 127, p. 300.

to the New York Family Court. In 1993, the Family Court refused to grant an order, based on the doctrine of equitable estoppel. It regarded Thomas as "an outsider attacking [Ry's] family" and, in particular, the Family Court noted that Thomas did not assert his parental rights early, and offered no support to the child throughout her life.¹³¹ The Family Court also relied in its decision on a psychiatric evaluation of the child, which found that she feared that Thomas would disrupt her family life, and that she did not wish to continue her relationship with him.¹³²

This decision was later overturned by the Appellate Division of the New York State Supreme Court. In a three to two decision, the Appellate Court granted the order of filiation, and remanded the case for hearing on Thomas' visitation rights. The majority opinion held that as Thomas was recognized as the biological father, an order of filiation was warranted, and that his wish to maintain his relationship with Ry should not be viewed as "threat to the stability and legitimacy of the family unit".¹³³ It can be argued that the majority opinion reflects an understanding of the sensitive realities of alternative families. Thus, it held that requiring Thomas to assert parental rights immediately, or to provide child support payments are disconnected from the particular family situation, and should not have been set as criteria to assess whether he is a parent.¹³⁴ The decision held that "it is no one's best interests to require a father, in the position of petitioner, to choose between asserting full parental rights, encompassing support and custody of the child [...] in order to achieve the limited relief sought - an order of filiation and, ultimately, visitation".¹³⁵

The case can be interpreted as a decision as to what qualifies a person as "parent".¹³⁶ The majority opinion held that the genetic link is sufficient, and that this approach does not, *in itself*, threaten the family unit. The dissent, on the other hand, held that Thomas is not to be considered as a parent, as he did not have any functional parental role in Ry's life. The dissent noted that Thomas did not have substantial and continuous contact with Ry, did not care for her, did not pay child support, nor offered any other assistance. It is instructive to have regard to the description in the dissent on the meaning of parenthood. Thus, it held that "for Ry's first 9½ years of life the appellant at no time sought to establish a true parental relationship with her either by way of seeking to legally establish his paternity and assuming the responsibilities and obligations which that status entailed or by any involvement in her upbringing or schooling or by attempting to provide any support for her. He was not there when she cut her baby teeth, started to walk, was sick or in need of parental comfort or guidance, nor did he seek to involve himself in the everyday decisions which are peculiarly the domain of parents - decisions as to what schools she should attend, what camps, what doctors should be consulted, the extent of her after school and social activities, the need for tutors and the like [...] during the 6 years that he occasionally saw her until she was almost 10 years old was that of a close family friend or fond surrogate uncle".¹³⁷

The dissent was identified by scholars as novel in its approach to the concept of parenthood, and its understanding of alternative families. As mentioned by Richman, the dissent is "evidence that the judiciary had begun to respond to and recognize the changing face of the family as a social

¹³¹ Thomas S. v. Robin Y., p. 861, 157 Misc. 2d 858, 599 N.Y.S.2d 377 (Fam. Ct. 1993) (Hereinafter: "**S. v. Y. Fam. Ct.**"). Hellman, *supra note* 128, p. 428-429.

¹³² S. v. Y. Fam. Ct., *supra note* 131, p. 864.

¹³³ S. v. Y. Appeal, *supra note* 127, p. 304.

¹³⁴ *Ibid*, p. 303.

¹³⁵ *Ibid*, p. 304.

¹³⁶ The case is also often examined under the theme of same-sex families and parenthood. Many scholars critique the Appellate Court's 'interference' in the family life of the female couple, and argue that same-sex families are assumed to be incomplete, and in need of an additional opposite-sex carer. Notwithstanding, the case also holds relevance to the discussion of MPF. See Vette, *supra note* 89, p. 446-448, and K. D. Richman "Courting Change: Queer Parents, Judges and the Transformation of American Family Law", p. 46-47, New York University Press (2009) (Hereinafter: "**Richman**").

¹³⁷ S. v. Y. Appeal, *supra note* 127, p. 308-309.

construct, even if the majority of the legislature had not entirely embraced or adapted to these changes".¹³⁸ As early as 1994, the Appellate Court did note, in the dissent, that there are many alternative families in the U.S, and that the current law is inadequate to accommodate the emerging conflicts.¹³⁹ It can be argued that the dissent, in particular, had broadened the scope of who is a parent, and what constitutes as a parental role. However, the dissent not explicitly promote the legal recognition of more than two parents: it rejected Thomas' request for an order of filiation, and Sandra herself did not have an official legal status towards Ry.

Yet, the Appellate Court in its majority opinion recognized Thomas as a parent, based (solely) on his genetic link to Ry. The ruling avoided the fact that he was not a de facto carer for the child, and that she considered him to be a relative stranger.¹⁴⁰ Another concern is that the majority opinion purposely separated the order of filiation from the possible subsequent rights and obligations stemming from it, such as visitation or custody.¹⁴¹ If the other rights and obligations require an additional examination, it may drain the meaning and value of the filiation order itself. Legal recognition should be accompanied by some guaranteed safeguards and provisions, yet the court separated the issues. This division may also raise doubts regarding the recent California Act, and what exactly it entails for parents.

Furthermore, the decision in the case is not child-centered. First, the court did not hear Ry, despite the fact that she was 10 at the time of the Family Court hearing, and 12 at the time of the appeal. A legal guardian was appointed for her, but the statement Ry presented to the court, describing her fear for her family life, and her wishes to avoid seeing Thomas, were rejected in the appeal. In fact, the majority opinion even held that Ry had been manipulated by her mothers, despite contrasting statements by Ry and the psychiatrist who evaluated her.¹⁴² Second, the Appellate Court failed to consider the child's best interests in its ruling, as it disregarded the child's fears and her wishes, and based its ruling on Thomas' parental rights.¹⁴³ It was only in the dissent that the child's best interests was examined, and the principle was regarded as the "touchstone of the analysis".¹⁴⁴ The dissent noted that granting parental authority to a person that Ry had never viewed as a parental figure could have negative implications for her, including uncertainty, emotional harm, further litigation, and possible separation from her mothers and sister. Third, the majority opinion can be interpreted as framing parenthood as a genetic issue, regardless of the actual parent-like bond, care and affection. The majority opinion did consider both women to be Ry's mothers yet, overall, the ruling seems to strengthen the notion of exclusive parenthood, and to reject functional approaches to the parent-child relationship.

On the other hand, it can be argued that the decision is novel. It recognized that a child may develop meaningful relationships with multiple carers, and the Appellate Court sought to recognize and safeguard these relationships. That being said, the reasoning of the decision was based on Thomas' genetic link to Ry, as opposed to his role in her life. The Appellate Court was more focused on the parties' intent, and the issue of parental rights - whether these concerned the rights of the two women, or Thomas' - and it did not effectively consider the relationships of the child and her wishes concerning *her family*. Therefore, the decision may not be easily applied in the context of MPF, but it does offer evidence of strong voices recognizing functional parenthood and the realities of alternative families.

¹³⁸ Richman, *supra* note 136, p. 133.

¹³⁹ S. v. Y Appeal, *supra* note 127, p. 308.

¹⁴⁰ Richman, *supra* note 136, p. 46-47.

¹⁴¹ S. v. Y Appeal, *supra* note 127, p. 302.

¹⁴² *Ibid*, p. 302, 309-310, 314.

¹⁴³ See Richman, *supra* note 136, p. 113-114.

¹⁴⁴ S. v. Y Appeal, *supra* note 127, p. 308. Hellman, *supra* note 128, p. 429.

The two cases did not mention MPF, nor was it an intended choice of the parent-like carers. But the courts recognized that children can develop relationships with multiple carers, and that these relationships may be entitled to legal recognition and protection, depending on the particular circumstances. In California, this recognition resulted in new legislation, which endows courts with the mandate to recognize MPF, in light of the principle of the child's best interests. However, as discussed, the decisions themselves do not reflect a child-centered approach, nor do they adequately take into account the rights and best interests of children in MPF.

2. 3. The Legal Status of MPF in the Canada

Canada is a federal state, which includes ten provinces and three territories. Unlike the U.S, Canada has been a long-standing committed state-party to the UNCRC. It ratified the convention in 1991, and it was later approved by all of Canada's provinces.¹⁴⁵ That being said, it has been argued that the domestic implementation of the UNCRC in Canada has been slow and limited in scope.¹⁴⁶ Another concern stems from Canada's federal structure: while the federal government is responsible to ensure that its laws, policies and practices are in conformity with the UNCRC, its provinces and territories also bear a significant share of responsibilities independently in areas relating to children's rights.¹⁴⁷

In particular, concerning the issue of parentage, the provinces and territories have legislated bills on a national level, with certain variations and regional differences.¹⁴⁸ Yet, Canadian society has diverse adult relationships. Thus, "alongside the nuclear family centered on the conjugal couples, there have always been a variety of other living arrangements".¹⁴⁹ Nuclear families are no longer the majority in Canada,¹⁵⁰ and there are increasing numbers of alternative families, including same-sex families and blended families, in which children may have multiple carers.¹⁵¹ However, these alternative family models and relationships are not accorded with full legal recognition.¹⁵²

As a result of the advances in ART, and the increasing number of alternative families, various national and federal legislative initiatives have emerged in recent years. The legislator noted that these societal and technological changes have resulted in legal uncertainty for Canadian parents and their children, and that in the absence of legal guidance on such issues, court must make decisions in a "policy vacuum".¹⁵³ For this reason, the Uniform Law Conference of Canada (Hereinafter: "**ULCC**") found parentage to be a field in need of harmonization.¹⁵⁴ Thus, and as will be further discussed, in 2010, the ULCC drafted the Uniform Child Status Act, which also deals with MPF. The Act serves as a 'model law' for governments to consider and enact, and it has influenced their national law reforms.¹⁵⁵

¹⁴⁵ R. B. Howe and K. Covell (Editors)"A Question of Commitment: Children's Rights in Canada", p. 1, Wilfrid Laurier University Press (2007) (Hereinafter: "**Howe & Covell**"). See also UNCRC Status, *supra* note 96.

¹⁴⁶ Howe & Covell, *supra* note 145, p. IX.

¹⁴⁷ *Ibid*, p. 1-2, 7. On federal systems and implementing the UNCRC, see Doek (2002-2003), *supra* note 10, p. 129, and UNCRC GC 5, *supra* note 50, par 41.

¹⁴⁸ See overview in Manitoba Law Reform Commission, "Assisted Reproduction: Legal Parentage and Birth Registration", p. 14-18, Issue Paper (April, 2014) (Hereinafter: "**Manitoba Law Reform Paper**").

¹⁴⁹ Law Commission of Canada, "Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships", p. ix (2001) (Hereinafter: "**Beyond Conjuality Report**").

¹⁵⁰ Bala & Ashbourne, *supra* note 32, p. 526.

¹⁵¹ See Beyond Conjuality Report, *supra* note 149, p. x, 6.

¹⁵² *Ibid*, p. ix, xxiv.

¹⁵³ See Bala & Ashbourne", *supra* note 32, p. 538-543. ULCC Paper, *supra* note 32, p. 2.

¹⁵⁴ The ULCC includes delegates appointed by the provincial and territorial government, and it operates in three sections: criminal, civil and drafting. The civil section considers areas in which provincial and territorial laws would benefit from harmonization, and adopts uniform statutes, as a recommendation to be enacted by all governments in Canada: Uniform Law Conference of Canada Website (ULCC): <http://www.ulcc.ca/en/> (ACCESSED: 19.6.2016).

¹⁵⁵ See Uniform Child Status Act, *supra* note 91. See also Manitoba Law Reform Paper, *supra* note 148, p. 1, 14.

In the context of MPF, this sub-chapter will focus on three main cases that brought the issue of children with multiple carers to the forefront: the Ontario case of A.A. v. B.B. the Ontario case of C. (MA) v. K (M), and the Alberta case of D.W.H v. D.J.R.

2. 3. 1. The Case of A.A. v. B.B.

The case of A.A. v. B.B. marks the first time in Canada where a child was recognized as having three legal parents.¹⁵⁶ Unlike the examples from the U.S, this case presents an intended MPF unit, comprised of three carers, who sought legal recognition as parents together. Briefly, the facts of the case concerned a female couple (A.A. and C.C.) who had been in a stable same-sex union. In 1999, the two women decided to have a child, with the assistance of a male friend (B.B). The three had agreed that the women would be primary care-givers of the child, but that the father will also have a parenting role, as this was considered by the three to serve the best interests of the child.¹⁵⁷ The boy-child, D.D. was born in 2001 to C.C, but since his birth, he had been brought up by both A.A. and C.C. as mothers, and he referred to them both as "momma".¹⁵⁸

In 2003, A.A filed a claim to the Ontario Superior Court (hereinafter: "**Superior Court**") to be recognized as a legal parent of the child.¹⁵⁹ The Superior Court accepted that A.A. had formed a parental relationship with D.D., and that parentage does not require a genetic link. Even so, the Superior Court refused the claim, noting that the Ontario's Children's Law Reform Act (hereinafter: "**CLRA**"), which determines issues of parentage, negated the option of recognizing more than two parents.¹⁶⁰ In that regard, the Superior Court refused to use the *parens patriae* doctrine in order to intervene for the child. This legal doctrine grants courts the authority to act for the sake of a child in the case of a legislative gap, but the Superior Court found that the CLRA limitation on the number of recognized parents does not amount to a legislative gap, and that applying that doctrine in the case is, therefore, not appropriate.¹⁶¹ The Superior Court did note that recognizing A.A. as a parent may be in line with D.D's best interests, but held that under the examination of the principle, the interests of other children should also be considered. It ruled that recognizing MPF in the particular situation may bring about claims by other carers, such as step-parents or relatives, and that this can be dangerous to children.¹⁶² In doing so, the Superior Court admittedly favored policy considerations over D.D.'s best interests in the case.¹⁶³

Following the decision, A.A. had filed an appeal to the Ontario Court of Appeals (hereinafter: "**Court of Appeals**") in 2007, which overturned the decision of the Superior Court, and recognized A.A. as a mother and third parent to D.D. In its decision, the Court of Appeals held that recognizing A.A. as a parent is the only option that will grant her the rights and obligations of parenthood, without infringing the status of the other carers, in particular, B.B.¹⁶⁴ The Court of Appeal also noted the importance of a declaration of *parentage*, as opposed to other related legal concepts, such as guardianship. It considered parentage as a life-long immutable declaration of status, which enables parents to fully participate in the child's life, and that it carries a symbolic significance to both parent

¹⁵⁶ D. Bouchard "The Three-Parent Decision: A Case Commentary on A.A. v. B.B", p. 459 70 Sask. L. Rev. 459 (2007) (Hereinafter: "**Bouchard**").

¹⁵⁷ A.A. v. B.B. Appeal, *supra* note 56, par 1.

¹⁵⁸ *Ibid.* Also A.A. v. B.B. (2003), par 5, 225 D.L.R. (4th) 371, 38 R.F.L. (5th), 1 (Ont. Sup. Ct.) (Hereinafter: "**A.A v. B.B. Ont. Sup.**").

¹⁵⁹ A.A. could have requested to adopt D.D., but under the adoption laws, it would mean that B.B. would have to relinquish his parental rights. For this reason, the petition was to be declared as a mother, alongside the other legal carers: C.C., and B.B. See A.A v. B.B. Ont. Sup., *supra* note 158, par. 5.

¹⁶⁰ *Ibid.*, par 34, 37. See also A.A. v. B.B. Appeal, *supra* note 56, par 18.

¹⁶¹ A.A v. B.B. Ont. Sup., *supra* note 158, par 39, 43. On *parens patriae*, Bouchard, *supra* note 156, p. 472-474

¹⁶² A.A v. B.B. Ont. Sup., *supra* note 158, par 41.

¹⁶³ Bouchard, *supra* note 156, p. 466.

¹⁶⁴ A.A. v. B.B. Appeal, *supra* note 56, par 13-14.

and child.¹⁶⁵ The decision then reviews the particular rights and obligations that stem from a parent-child relationship in Canada, including the requirement of a parental consent to future adoptions, parental decision-making powers in education and health-care, right of the child to receive citizenship, inherit, be granted access to social services, etc.¹⁶⁶

In interpreting CLRA, the Court of Appeals held that "the CLRA was a progressive legislation, but it was a product of its time".¹⁶⁷ Thus, it was intended to remove obstacles for children born out of wedlock: to combat specific concerns of illegitimacy and stigma, and promote equality between all children.¹⁶⁸ Because the possibility of same-sex couples, and implications of ART "were not on the radar scheme",¹⁶⁹ the CLRA does not directly deal with children in MPF, and was not meant to negate future possibilities of multiple carers. For this reason, the Court of Appeals used its *parens patriae* authority to bridge the legislative gap, and address the changing social conditions.¹⁷⁰ The Court of Appeals, then, based its decision to recognize A.A. as a third parent on the initial purpose of the CLRA: promoting equality among children.¹⁷¹

While the decision did not mention the UNCRC or the child's rights concerning his family, it did provide a child-centered approach for its reasoning. First, the Superior Court and the Court of Appeals noted that D.D. is a "bright, healthy and happy individual who is obviously thriving in a loving family that meets his every need. The applicant has been a daily and consistent presence in his life. She is fully committed to a parental role. She has the support of the two biological parents who themselves recognize her equal status".¹⁷² Thus, D.D.'s interests and his meaningful relationships were specifically mentioned. Second, while D.D., who was five years old at the time of the appeal, was not heard by the courts, he had independent legal representation from the Office of the Children's Lawyer. In addition, because D.D. was still young, the Court of Appeal referred to a statement made by a twelve year old girl in a different Canadian case, which concerned the claim to legally recognize her two female carers as her mothers. This reference can be viewed as a creative way to reflect children's voices in similar situations, and to ensure courts take their presumed interests under consideration.¹⁷³

Third, the principle of the child's best interests guided the reasoning of the Court of Appeal, and Bouchard holds that the decision "reaffirms the centrality of the 'best interests of the child' principle in family law",¹⁷⁴ and that it enables courts to better meet the needs of children in MPF. The interests of the child were the reason to apply the *parens patriae* doctrine, and the decision specifically noted the negative impacts of lack of legal recognition of MPF on *children's* well-being and rights, and not only the *carers* parental rights. Thus, the Court of Appeal noted that "The CLRA, however does not recognize these forms of parenting and thus the *children of these relationships* are deprived of the equality of status that declarations of parentage provide" [...] It is contrary to *D.D.'s best interests* that he is deprived of the legal recognition of the parentage of one of his mothers" [emphasis added].¹⁷⁵ In sum, the Court of Appeal rejected the Superior Court's implementation of the best interests' principle, and decided in accordance with D.D.'s particular family life and interests.

¹⁶⁵ *Ibid*, par 15.

¹⁶⁶ *Ibid*, par 14.

¹⁶⁷ *Ibid*, par 20-21, 34.

¹⁶⁸ *Ibid*, par 20.

¹⁶⁹ *Ibid*, par 21

¹⁷⁰ *Ibid*, par 27, 30, 33.

¹⁷¹ *Ibid*, par 36, 41. It should be noted that the attorney-general for Ontario chose not to intervene in the appeal and did not support the legislation, see par 6.

¹⁷² *Ibid*, par 2. A.A v. B.B. Ont. Sup., *supra* note 159, par 8.

¹⁷³ A.A. v. B.B. Appeal, *supra* note 56, par 15. See in that regard, M.D.R v. Ontario (Deputy Registrar General), par 216, 219, [2006], O.J. No. 2268 (S.C.J.).

¹⁷⁴ Bouchard, *supra* note 156, p. 475.

¹⁷⁵ A.A. v. B.B. Appeal, *supra* note 56, par 35, 37.

This "important and novel case" has expanded the concept of family and provided first ever legal recognition of MPF in Canada, while championing the interests of children in such families.¹⁷⁶ That being said, it can still be argued that the Court of Appeal should have required more information relating to D.D.'s actual family life, and his relationships with all carers. It appears that most information regarding D.D.'s development was submitted by the carers themselves, and it is unclear whether any of the courts ordered an independent review to examine D.D.'s interests and wishes. Such an approach would have signaled a shift from the realm of parental rights in alternative families, to the realm of a child-centered and rights-based examination of MPF.

2.3.2. The Uniform Child Status Act

In light of the societal changes and ART advances, and in particular following the decision of the A.A. v. B.B. case, Canadian legislators recognized that current legislation is not equipped to effectively address MPF. This created legal uncertainty for parents, children, and the courts.¹⁷⁷ For this reason, the ULCC has drafted the Uniform Child Status Act which serves as a recommended model law for all provinces and territories. In the drafting process, the ULCC's working group set out to ensure that the legislation shall be in accordance with Canada's international obligations under the UNCRC. This included the principle of the child's best interests as a primary consideration, non-discrimination, and the protection of the parent-child relationship from birth.¹⁷⁸

Regarding MPF, the Act recognized that in general, a child has two legal parents, but that "there are specific limited situations where it is appropriate to recognize additional legal parents".¹⁷⁹ Section 9 of the Act sets out the specific circumstances in which MPF can be legally recognized. It holds that an additional parent can be recognized for a child born via ART, in case the legal parents had agreed prior to conception that another person is to be considered as a parent, and that that person has intended to do so. The claim to the court should be filed within 30 days of the child's birth, unless the courts find that it is reasonable to extend the period.¹⁸⁰ The working group's report notes that "the cornerstone here is the intention to be a parent", and that it is meant to provide certainty for the child, potential parents and donors regarding legal responsibilities and parental status.¹⁸¹

The Act, however, is limited in its scope. It applies only for children born via ART, and, thus, cannot apply in cases of the second type of MPF, such as step-parents.¹⁸² Also, the Act enables courts to recognize additional parents only in such cases where the person has provided the reproductive material for the ART (i.e. that the person has a genetic link to the child), or has been in a conjugal relationship with a genetic parent at the time of the child's conception.¹⁸³ In addition, the Act does not note which considerations courts must weigh up when assessing a request to recognize additional parents, and to what extent the principle of the child's best interests, and the children's rights agenda, should be taken into account.

Thus, it can be argued that the legislative response to increasing litigation concerning MPF is cautious, and weak. It does not threaten the notion of exclusive parenthood in general, and allows MPF to be recognized in limited cases, and only in the context of ART. Nevertheless, it is a speedy legislative and novel response to A.A. v. B.B. and to the realities of many Canadian families. Also, various provinces and territories in Canada already formed unique legal structures to recognize step-

¹⁷⁶ *Ibid*, par 41. Bouchard, *supra note* 156, p. 474-475

¹⁷⁷ ULCC Paper, *supra note* 32, p. 2.

¹⁷⁸ *Ibid*, p. 3.

¹⁷⁹ *Ibid*.

¹⁸⁰ Uniform Child Status Act, *supra note* 91, Section 9.

¹⁸¹ *Ibid*, Section 9 and comment.

¹⁸² *Ibid*, Article 9(2). See also ULCC Paper, *supra note* 32, p. 3.

¹⁸³ Uniform Child Status Act, *supra note* 91, Article 9(5).

parents, and hold them to certain responsibilities, obligations and status in relation to their non-genetic children. So, addressing the issue in the Act may not have been explicitly required.¹⁸⁴

2.3.3. The Case of D.W.H v. D.J.R and D.D.

The case of D.W.H v. D.J.R and D.D. concerns an intending MPF, yet unlike the A.A. v. B.B. case, the carers in the case were in a conflict situation. Briefly, the facts of the case concerned a male couple (H. and R.) who had been in a same-sex relationship. The two men arranged to have a child using ART, with D., who was also in a same-sex relationship with a woman. The two couples agreed that D. would give birth to a child, to be raised by the two men, and that they would later have another child to be raised by her and her partner.¹⁸⁵ In 2003, D. gave birth to a girl-child, named S., whose genetic father was R. Both men were present at birth, and cared for the child together. The child referred to R. and H. as "daddy" and "papa", and D. and her partner were also involved in the child's life and visited regularly.¹⁸⁶ When the child was three, the men separated, and their conflict made R. create a parenting agreement with D. declaring that they are the only guardians of the child.¹⁸⁷

It should be noted that the conflict resulted in extensive litigation between the men, and included complex legal claims concerning the relevant legislation, and other procedural issues.¹⁸⁸ Despite the emotional nature of the family conflict, the case mainly focused on the interpretation of the relevant laws, and whether they discriminate against H., as a gay male intending father.¹⁸⁹ In that regard, the Queen's Bench Court held that the law bases male parentage on the existence of a spousal relationship with the birth mother. However, as a gay intended father will not have a spousal relationship with the birth mother, the law grants legal parentage and subsequent rights to heterosexual couples alone.¹⁹⁰ The Queen's Bench Court identified this as discrimination, and held that it is a result of a legal vacuum, as during the drafting of the law, issues of MPF and same-sex parenthood were not considered.¹⁹¹

The Queen's Bench Court further rejected the claim that H. could have sought a guardianship or adoption instead. It refers specifically to A.A. v. B.B. in that regard, and noted the particular practical and emotional significance of declaration of parental status.¹⁹² Also, adoption may result in D.'s losing her parental status as a mother, which may not be in the child's best interests.¹⁹³ It held that denying the status of legal parent from a gay father, whether genetic or intending, was rejected in Canadian courts, and has a negative effect on human dignity.¹⁹⁴ Thus, drawing inspiration from the A.A. v. B.B. case, the Queen's Bench Court used the *parens patriae* doctrine. It held that the current law contained a legislative gap regarding the parentage of intended gay male fathers, and that in light of the child's best interests, it declared H. to be a legal parent, so that the child has three parents: R., H., and D.¹⁹⁵

The appeal on the decision was rejected by the Alberta Court of Appeals. The Court of Appeals, in a majority decision, recognized the legislative gap and its discriminatory outcome towards

¹⁸⁴ See ULCC Paper, *supra note 32*, p. 3. Bala & Ashbourne, *supra note 32*, p. 531, 536.

¹⁸⁵ D.W.H. v D.J.R., par 1-3, 2013 ABCA 240 (2013) (Hereinafter: "**D.W.H Appeal**").

¹⁸⁶ *Ibid*, par 5.

¹⁸⁷ *Ibid*, par 6.

¹⁸⁸ The particular legal and procedural claims will not be comprehensively discussed, due to the scope and focus of the chapter. A main argument concerned the laws that should be applied in the circumstances of the case, see D.W.H. v. D.J.R., 2011 ABQB 791, Supplement Reasons for Judgement, par 1-3, (2011) (Hereinafter: "**D.H.W. ABQB**").

¹⁸⁹ *Ibid*, par 8-10.

¹⁹⁰ *Ibid*, par 9, 12.

¹⁹¹ *Ibid*, par 13, 26.

¹⁹² *Ibid*, par 15-16, 20.

¹⁹³ *Ibid*, par 14.

¹⁹⁴ *Ibid*, par 19.

¹⁹⁵ *Ibid*, par 31. See also D.W.H Appeal, *supra note 185*, par 27.

gay male fathers, and upheld the Queen's Bench Court's use of the *parens patriae* doctrine to decide that the child has three legal parents.¹⁹⁶ The majority decision also rejected the claim that the recognition of three parents is problematic, and that the other parties were not given an opportunity to effectively object and provide evidence against this family structure. In that regard, the Court of Appeals held that H. played a parental role towards the child, and that "children benefit when the law recognizes the reality of their family situation, even when that reality falls outside the norm".¹⁹⁷ The dissent did not explicitly reject the outcome of the Queen's Bench Court. Rather, it focused on R.'s procedural and evidentiary claims. The dissent found that the remedy provided by the Queen's Bench Court of declaring H. as a legal parent and guardian was not sought in the original motion, and that for this reason, R. was prevented from providing evidence to counter the claim.¹⁹⁸ In any case, and similarly to the U.S decision on *In. re. M.C.*, both the Queen's Bench Court and the majority opinion of the Court of Appeals held that the legal recognition of H. as a parent and guardian does not impact on other issues concerning parenthood - such as custody, access, and support – and that these should be determined by the relevant courts, under specific procedures.¹⁹⁹

Both Courts noted that H. was a *de facto* parent. To illustrate H.'s parental role towards the child, the Court of Appeal noted his involvement in planning the conception, his presence at the birth, and his role as a carer. Specifically: "when the baby came home to reside with them, he attended to her needs, changed her diapers, fed her, and cared for her as one might expect for three years. He was known to her as Papa".²⁰⁰ This signals a functional understanding of parenthood, rooted in love, dependency and care. Both courts emphasized the importance of maintaining the child's relationship with H. as a parental figure, alongside R., and providing both men with legal recognition for the sake of the child.²⁰¹

Yet, the decision raises concerns regarding the lack of a child-centered approach in the case. First, the fact that the legal recognition of H. as a parent did not alter any of the parenting arrangements between the parties may mean that the declaration itself has no real value. Such outcome does not benefit the child nor adequately safeguard her relationship with the parental carers.²⁰² Second, the Queen's Bench Court and the Court of Appeals decisions were mainly based on the claims of parental discrimination of gay male fathers. Thus, the decisions themselves reflected a parental rights focus, as opposed to considering the child's family life. The Queen's Bench Court held that assuming parental rights and obligations are critical for the carer's sense of identity, and the Court of Appeal held that recognizing parental rights fulfills, in itself, the child's best interests.²⁰³ Particularly, the dissent held that the Queen's Bench Court lacked evidence to determine the best interests of the child and that, therefore, the examination of the principle was incomplete and problematic.²⁰⁴ Third, both courts paid little attention to the reality of the family unit. It was unclear how D. functioned as a mother to the child, and the courts did not have information relating to the current relationship between the child and H., and did not have sufficient evidence for conducting a best interests' assessment.²⁰⁵

Despite the fact that the decision referred to *A.A. v. B.B.*, and emphasized functionality and care over genetic links, it did not present a child-centered evaluation. The child was not heard in the

¹⁹⁶ D.W.H Appeal, *supra note* 185, par 37, 61

¹⁹⁷ *Ibid*, par 47-48, 60-61.

¹⁹⁸ *Ibid*, Dissent Opinion, par 1-2, 7-8, 10.

¹⁹⁹ *Ibid*, par 70.

²⁰⁰ *Ibid*, par 7. See also *Bala & Ashbourne*", *supra note* 32, p. 532.

²⁰¹ D.H.W. ABQB, *supra note* 188, par 26.

²⁰² *Ibid*, par 30.

²⁰³ *Ibid*, par 19. D.W.H. Appeal, *supra note* 185, par 50.

²⁰⁴ D.W.H. Appeal, *supra note* 185, Dissent, par 11-13.

²⁰⁵ *Ibid*, par 68, and par 12 of Dissent. D.H.W. ABQB, *supra note* 188, par 26.

case, and her current relationships with her carers were not effectively examined. The decisions were based on parental discrimination claims, and it can be argued that the case offers a new interpretation of legislation to accommodate *parents* in alternative families, while the influence on *children in MPF* is seen as a by-product of the recognition of parental rights.

2. 3. 4. M.A.C et al v. M.K

Another recent and interesting case relating to MPF in conflict is the 2013 Ontario case of M.A.C et al v. M.K. The case reflects the new approach in Canadian courts regarding MPF and its examination of children's interests in alternative families. Briefly, the case concerned a motion for an order dispensing with the consent of a parent for adoption. The applicants, M.A.C and C.A.D were a female couple, and primary care-givers of a girl-child, B, who had been seven years old at the time of the proceedings. M.A.C is the child's genetic mother, and the respondent, M.K, was her genetic father. The three had agreed on having a child together, as the women would be the child's primary care-givers, and M.K would be "a known and involved father".²⁰⁶

However, as the child grew older, a conflict broke out between the parties: M.K wished to be more involved in the child's life, and extend his access rights, and the women saw this as negatively impacting the child's well-being, and as a threat to their family unit. The women filed for an adoption order for C.A.D. and the court recognized that the order had two aims: to ensure that C.A.D, as the non-biological carer, has equal legal status to the child, and also to change M.K's status as a legal parent.²⁰⁷ For this reason, the court rejected the motion. It referred specifically to A.A. v. B.B. case and held that C.A.D could have applied for an order stating that the child has three legal parents,²⁰⁸ and that the end goal of creating a legal obstacle to M.K's access claims was contrary to the best interests of the child.

Interestingly, the court described, in detail, the reality of the parties as MPF before the conflict. Thus, the court noted that the parties "endeavored to construct themselves as a "family": they were all present at birth, viewed themselves as parents to the child, celebrated holidays together, enjoyed shared vacations, and had their extended families involved in the child's life.²⁰⁹ In particular, the court held that M.K is "indisputably a loving and reliable presence" in the child's life, and that he is "a caring and protective parent".²¹⁰ The court notes in the decision that M.K and the child enjoyed spending time together, and that the child loves her extended family. The court held that if the adoption order is granted, the child's positive relationship with M.K and his family might be at risk, and his subsequent lack of legal status can prejudice his standing in access procedures.²¹¹

In the decision, the court considered the child as "the central character",²¹² whereas the other carers, and the stability of the female two-parent family were considered to have a secondary role. In particular, the court identifies the women's motion for an adoption order as a claim under the concept of the nuclear family. The court rejects this model as paramount: it held that the role of the court is "not the protection of a specific family structure ab initio [...] absent specific statutory provisions otherwise, the nuclear family of two parents and a child enjoys no special preference when the court is assessing the best interests of a child".²¹³ The court identifies that, even in the context of MPF, the best interests of the child is paramount, and this reflects the shift away from parental rights considerations, to a child-centered perspective.²¹⁴

²⁰⁶ M.A. v. K.M, *supra* note 89, par 1.

²⁰⁷ *Ibid*, par 2, 5.

²⁰⁸ *Ibid*, par 29-30.

²⁰⁹ *Ibid*, par 13, 15, 17-19.

²¹⁰ *Ibid*, par 22.

²¹¹ *Ibid*, par 62-64.

²¹² *Ibid*, par 38.

²¹³ *Ibid*, par 36.

²¹⁴ *Ibid*, par 37. For an overview of the case, see also Bala & Aschbourne, *supra* note 32, p.537-538.

Thus, the court views the order that was sought as a means to limit M.K's parental status and his involvement in the child's life, and aims to protect that relationship. The decision focuses on the child's interests, and on close examination of her familial relationships with all of her carers. In that regard, the court notes that C.A.D is recognized as the child's parent "for all practical purposes",²¹⁵ and that all three carers play a meaningful parental role in the child's life. As opposed to the abovementioned cases, in which the legislative options were not applicable to MPF, the court can now refer to the judicial developments of A.A. v. B.B., and subsequent legislation, and to the possibility of legal recognition of all of the child's carers as legal parents.

2. 4. Overview and Conclusion

The chapter reviewed prominent cases concerning MPF in the U.S and Canada, as well as subsequent legislative initiatives, and assessed them from the perspective of the child's interests and a child rights-based approach. It is notable that all selected cases from lower levels, and are non-binding. Even so, their novel decisions have led to legislative and policy development at the national and federal levels, and the cases are considered influential in the legal and academic context of MPF. This overview, while exploring different states with particular legal contexts, can identify three main and recurring themes.

First, legal parentage in Canada and the U.S, like in many other states, is not based solely on genetic links to the child. In both states, there are various legal presumptions of paternity, and these are also based on the personal status of the individual, and their intent.²¹⁶ Arguably, this leaves room for legislative reforms to broaden the concept of parenthood to include functional parenthood, and children's relationships with parent-like carers, as in MPF.

Second, there is a lack of a clear legal frameworks concerning MPF. All the courts noted that the decisions reviewed in this chapter were taken in a practical legal vacuum. Thus, the judiciary is currently not equipped to handle MPF litigation, and lacks guidance and comprehensive legislative frameworks. This is the case for MPF in conflict situations, and for MPF in familial harmony. Both may seek legal recognition and subsequent rights from courts, and both lack specific policies and legislation. The courts' decisions relating to MPF have prompted legislative initiatives, but these remain limited in scope and lack specific guidance as to the interests of children.

Third, the cases reveal that courts dealing with MPF tend to favor considerations of parental rights, as opposed to a child-focused examination. Indeed, in all cases courts addressed the realities of alternative families, and were willing to consider the impact of the decisions on children in MPF.²¹⁷ In particular, both the U.S and Canada paid attention to the principle of the child's best interests, and emphasized that children may develop parental relationships with their carers, and that maintaining those relationships is beneficial to the children. Nevertheless, courts struggle to adequately interpret what the best interests of children in MPF are, and how to evaluate their wishes. Moreover, the children's rights agenda is entirely lacking in the discussion on MPF, and in the Canadian cases, there was no reference to the UNCRC and its relevant provisions and protections in the family context.

Thus, while courts are willing to address emerging cases concerning MPF, they are ill-equipped as regards appropriate legislation and policies, and struggle to effectively address the interests and wishes of children in such families. In particular, the children's rights agenda is lacking from the discussion. In the following chapter, the thesis will introduce the UNCRC into the discussion. It will identify the relevant provisions relating to children in MPF, and present the measures that the UNCRC Committee can employ to safeguard children in such family environments, and offer adequate guidance to state-parties concerning their obligations to these children.

²¹⁵ *Ibid*, par 33. The court refers to recognition in the context of the child's school, health-care, etc.

²¹⁶ ULCC Paper, *supra* note 32, p. 2. Uniform Child Status Act, *supra* note 91, Section 5, comment.

²¹⁷ See Manitoba Law Reform Paper, *supra* note 148, p. 27.

3. The UNCRC and the Issue of MPF

3. 1. The UNCRC and the Work of the Committee: an Introduction

The UNCRC is the leading human rights instrument that is dedicated to the protection of children and the promotion of their rights.²¹⁸ The UNCRC was unanimously adopted by the UN General Assembly in 1989, and entered into force in 1990.²¹⁹ Since then, it remains the most widely ratified international convention, and received nearly universal acceptance. It provides a systematic and comprehensive legal framework, and sets global minimum standards for the rights of children.²²⁰

The UNCRC reflects a new notion of the child, as both vulnerable and in need of protection, and as an independent right-bearer.²²¹ It is a comprehensive treaty, which unlike previous human rights instruments, incorporates the full range of human rights. It contains forty provisions of substantive rights, including civil, economic, social, cultural and humanitarian rights. The provisions address "almost every aspect of a child's life", and reflect the universal, indivisible, interdependent and interrelated nature of human rights.²²² During the beginning of the 21st century, the UNCRC was further augmented by the adoption of three optional protocols, concerning children in armed conflict, the sale of children, child prostitution and child pornography, and a communication procedure.²²³

This makes the UNCRC the prominent legal instrument for children, and its framework is relevant to all discussions involving and effecting children. Since its adoption, the UNCRC has significantly impacted the status of children worldwide. Globally, it served as an inspiration for other regional legislative initiatives for children,²²⁴ and has also been used for litigation, and trickled down to jurisprudence of regional human rights courts.²²⁵ The UNCRC also serves as the guiding legal framework for developing legislation and policies on children's rights in state-parties, and it is referred to in domestic legal proceedings.²²⁶ Thus, the UNCRC is a key document in the children's rights agenda, and should be taken into account in all emerging discussions, including on children in MPF.

In order to oversee the implementation of the UNCRC and examine the progress of state-parties in fulfilling their obligations, the UNCRC Committee was established. Currently, the UNCRC Committee is comprised of eighteen independent experts in the field of children's rights, who serve in

²¹⁸ D. Fottrell "One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child", p. 1, in "Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child" D. Fottrell (editor), Kluwer Law International (2000) (Hereinafter: "**Fottrell**").

²¹⁹ For an overview of the legislative process of the UNCRC, see Office of the United Nation High Commissioner for Human Rights, "Legislative History of the Convention on the Rights of the Child", Vol 1-2 (2007) HR/PUB/07/1 (Hereinafter: "**Legislative History of the UNCRC**").

²²⁰ Howe & Covell, *supra note* 145, p. 3. Walker, *supra note* 96, p. 28.

²²¹ See Howe & Covell, *supra note* 145, p.3.

²²² Kaime, *supra note* 17, p. 16-17. Fottrell, *supra note* 218, p. 1, 4. See also Article 5 of the UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

²²³ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263., UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, A/RES/54/263., and UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council*, 14 July 2011, A/HRC/RES/17/18 (Hereinafter: "**UNCRC OP 3**").

²²⁴ See for example, the preamble of the Council of Europe, *European Convention on the Exercise of Children's Rights*, 25 January 1996, ETS 160., Article 46 of the African Children's Charter, *supra note* 4.

²²⁵ For an overview on the UNCRC in regional and national jurisprudence, see T. Liefwaard, J. E. Doek (editors) "Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence", Springer Publishing (2015). In particular, see p. 1-2, 8-9. Fottrell, *supra note* 218, p. 13.

²²⁶ T. Liefwaard & J. E. Doek, "Chapter 1: Litigation the Rights of the Child: Taking Stock after 25 Years of the CRC", in "Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence", p. 1, (editors: T. Liefwaard, J. E. Doek), Springer Publishing (2015). Kaime, *supra note* 17, p. 7.

their "personal capacity".²²⁷ The UNCRC Committee has three main responsibilities. First, it conducts periodic assessment of state-parties, to monitor their progress, evaluate the measures taken to fulfill their obligations, and identify areas of concern. In order to do so, the UNCRC Committee receive periodic reports from state-parties, as well as additional reports from local NGO's and relevant UN agencies that provide more information on the level of implementation in practice.²²⁸ The UNCRC Committee then can identify the key issues to be discussed in the meeting with the state-parties' delegations. In the meeting, the parties engage in "constructive dialogue", which is followed by the publication of Concluding Observations. This document recognizes the achievements of the state-party, highlights areas of concern and offers recommendations.²²⁹

For UN treaty bodies, including the UNCRC Committee, Concluding Observations are the "key procedure" for monitoring.²³⁰ Yet, Concluding Observations are not binding and their particular legal status is contested. Thus, some scholars and judicial officers consider Concluding Observations to be recommendations and advisory in nature, while others suggest that they reflect actual findings of violations, which state-parties are obligated to remedy.²³¹ Concluding Observations also have a political importance as they raise awareness about particular issues in the national context, and can offer guidance for further action.²³² Issues relating to family and parenthood are discussed under the fifth cluster in the reporting guidelines, which concerns "Family Environment and Alternative Care". Under this heading, state-parties provide relevant information on legislative, judicial, administrative and other measures regarding the main family-related provisions in the UNCRC.²³³ Thus, and as will be discussed in chapter 4, the UNCRC Committee can utilize its periodic review and Concluding Observations to engage further with the topic of children in alternative families, such as MPF.

Second, the UNCRC Committee, similarly to other UN treaty bodies, drafts General Comments.²³⁴ In his historical review, Alston described General Comments as "a means by which a UN human rights expert committee distills its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises [...] In essence the aim is to spell out and make more accessible the 'jurisprudence' emerging from its work".²³⁵ Thus, the function of General

²²⁷ Article 43(1)-(2) of the UNCRC.

²²⁸ Article 44(1)-(2) of the UNCRC. See also Doek (2002-2003), *supra note* 10, p. 129.

²²⁹ Fottrell, *supra note* 218, p.6. P. Gerber and J. Glory "The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?", p. 406-407, *Human Rights Law Review*, 14 403, (2014) (Hereinafter: "**Gerber & Glory**"). D. Otto "Gender Comment": Why does the UN Committee on Economic, Social and Cultural Rights need a General Comment on Women?", p. 6-7, *14 Can. J. Women & L.* 1 (2002) (Hereinafter: "**Otto**").

²³⁰ W. Kälin, "Chapter 2: Examination of State Reports", p. 71 in "UN Human Rights Treaty Bodies: Law and Legitimacy" (H. Keller, G. Ulfstein (Editors), Cambridge University Press (2012) (Hereinafter: "**Kälin**"). On the history and evolution of concluding observations, see also p. 16-19, and M. O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodes", p. 28-31, *Human Rights Law Review* 6:1, 27 (2006) (Hereinafter: "**O'Flaherty**").

²³¹ O'Flaherty, *supra note* 230, p. 32-34, 36. Kälin, *supra note* 230, p. 48.

²³² Kälin, *supra note* 230, p. 64-71. Gerber & Glory, *supra note* 229, p. 407.

²³³ UN Committee on the Rights of the Child, "Treaty-Specific Guidelines regarding the Form and Content of Periodic Reports to be submitted by State Parties under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child", par 23, 23 November 2010, CRC/C/58/Rev.2 (Hereinafter: "**UNCRC Reporting Guidelines**"). The cluster covers articles 5, 9-11, 19-21, 25, 27 of the UNCRC.

²³⁴ There are 165 general comments (9.6.2016), published by the Human Rights Committee (35), Committee on Economic, Social and Cultural Rights (23), Committee on the Elimination of all forms of Racial Discrimination (35, referred to as general recommendations), the Committee against Torture (3), The Committee on Migrant Workers (2), The Committee on the Elimination of Discrimination against Women (34, referred to as general recommendations), Committee on the Rights of Persons with Disability (2), Working Group on Enforced Disappearances (13), and the UNCRC Committee (18).

²³⁵ P. Gerber, J. Kyriakakis, K. O'Byrne "General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What is its Standing, Meaning and Effect?", p. 97 *supra note* 23, 14 *Melb.*

Comments is multi-layered: they explain the rights contained in the instrument, provide an "authoritative interpretation" on the relevant issues, and guide state-parties on understanding their international obligations and implementing them in practice. They also enable the Committees to share their insights on particular issues, and include policy recommendations, best practices, etc.²³⁶

The standing and legal status of General Comments, and the weight they should be accorded with in international law is contested.²³⁷ Initially, and particularly before UN treaty bodies began issuing Concluding Observations, General Comments were considered as procedural and descriptive, and were drafted as a way to highlight issues without holding specific state-parties accountable. Gradually, General Comments did receive political and moral weight, and their normative value increased.²³⁸ They are recognized as an authoritative source of interpretation, and are also incorporated in regional and domestic litigation. In particular, they are often invoked with regards to progressive interpretation of laws.²³⁹ Thus, scholars argue that General Comments have "taken the form of a powerful and indispensable juridical tool".²⁴⁰ While General Comments remain non-binding, they provide, at the very least, persuasive interpretation of provisions and conceptualize obligations to enable better understanding and effective enforcement by state-parties.²⁴¹

The UNCRC Committee is empowered to draft "general recommendations" and, to date, it published eighteen General Comments dealing with particular provisions, as well as emerging thematic issues.²⁴² As part of the drafting process, the UNCRC Committee has held consultations with relevant stakeholders, including children, and have received comments and submission for consideration. This reflects a move to a more transparent and participatory process, and strengthens the acceptability and norm-building functions of General Comments themselves.²⁴³ Strikingly, the UNCRC Committee did not explicitly refer to family-related provisions in its General Comments. This may stem from the difficulty in reaching consensus on issues related to the family, and the fear that any progressive interpretation might be viewed as illegitimate. That being said, as provisions related to family are of critical importance to children, they should be addressed by the UNCRC Committee.

Third, the UNCRC Committee is also competent to receive communications. In 2011, following efforts from prominent NGO's and other stakeholders, the UN General Assembly adopted an optional protocol to the UNCRC on communications procedures. It entered into force in 2014 and, to

J. Int'l L. 93 (2013) (Hereinafter: "**Gerber et al.**"). P. Alston, "The Historical Origins of the Concept of 'General Comments' in Human Rights Law", in "The International Legal System: In Quest of Equity and Universality", p. 763-764, L. Boisson de Chaznoumes et al. (editors), Martinus Nijhoff (2001). See also Otto, *supra note*, p. 7-10.

²³⁶ Gerber et al., *supra note* 235, p. 97-100, 102. Otto, *supra note* 229, p. 3.

²³⁷ While the UN treaty bodies are not explicitly mandated to offer interpretations, this has become an acceptable practice: see Gerber et al., *supra note* 235, p. 96-97. Otto, *supra note* 229, p. 11-13

²³⁸ Gerber et al, *supra note* 235, p. 98. Gerber & Glory, *supra note* 229, p. 420. Otto, *supra note* 229, p. 10.

²³⁹ Otto, *supra note* 229, p. 10-11.

²⁴⁰ Gerber et al., *supra note* 235, p. 100, 102-103.

²⁴¹ *Ibid*, p. 98. Otto, *supra note* 229, p. 13. Nonetheless, general comments can also be considered to be broad and unsystematic statements: Otto, *supra note* 229, p. 11. H. Keller & L. Grover, "Chapter 4: General Comments of the Human Rights Committee and their Legitimacy", p. 118, in "UN Human Rights Treaty Bodies: Law and Legitimacy", Keller, G. Ulfstein (Editors), Cambridge University Press (2012).

²⁴² Article 45(D) of the UNCRC. For overview of the UNCRC general comments and drafts, see UNHCR Websites: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11. (accessed: 26.6.2016).

²⁴³ On the participatory process, see Gerber et al, *supra note* 235, p. 102-104, 95, and NGO Child Rights Connect Website, <http://www.childrightsconnect.org/connect-with-the-un-2/committee-on-the-rights-of-the-child/general-comments/>. (accessed: 26.6.2016). For an example of a call for participation in the drafting of a general comment see UNHCR Website, "Call for Submission on General Comments on the Rights of Adolescents", <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CallRightsofAdolescents.aspx> (accessed: 26.6.2016).

date, has been ratified by 27 state-parties.²⁴⁴ The optional protocol grants the UNCRC Committee new competence to receive communications from individuals, groups of individuals and state-parties that claim that their rights under the UNCRC, or its optional protocols, were violated. The UNCRC Committee can then resolve the communications through friendly settlements, inquiries, or by publishing specific recommendations.²⁴⁵ The communication procedure can be viewed as another venue to address emerging issues impacting children's rights, such as MPF. The procedure offers a unique opportunity for the UNCRC Committee to offer particular guidance to state-parties, and flesh out the realities of children in alternative families, such as MPF, and the impact of the lack of legal recognition on their rights and well-being.

In sum, the UNCRC "stands unique" for its universal acceptance and global impact. It is the leading and most comprehensive international legal framework on children's rights. The UNCRC Committee also has multiple competences that allow it to contribute to the conceptualization of children's rights, and to a progressive and effective implementation of the UNCRC. Therefore, the UNCRC, as well as the UNCRC Committee should be introduced to the discussion of children in MPF.

3. 2. The UNCRC and its Implications on Children in MPF

This sub-chapter will present an overview and analysis of the relevant rights and provisions of the UNCRC in the discussion of children in MPF. While there is extensive academic literature on each of the provisions, in light of the scope of this thesis, the analysis here shall be concise. It will focus on the most relevant provisions in the context of MPF, and on those that were mentioned in the case-laws reviewed in chapter 2. In particular, it will address the general principle of the UNCRC, the family-based rights, and the relevant social and economic rights that concern services stemming from the parent-child legal bond.

3. 2. 1. The General Principles of the UNCRC

The UNCRC Committee has identified four provisions of the UNCRC as general principles: non-discrimination, the principle of the child's best interests, the right to life, survival and development, and the child's right to be heard.²⁴⁶ The four are cross-cutting principles that underpin the UNCRC, and play a critical role in the interpretation of its substantive provisions.²⁴⁷ As will be described, in the context of children in MPF, most of the general principle have both a stand-alone importance, as well as an indirect influence on the interpretation and scope of other relevant provisions.

Non-Discrimination

Article 2(1) of the UNCRC requires state-parties to ensure the rights of the Convention to all children "without discrimination of any kind".²⁴⁸ The provision includes a non-exhaustive list of discriminatory grounds relating to the child and/or her parents or legal guardians. The most relevant of which in the context of MPF are the "child or his or her parent's or legal guardian's political or other opinion [...] birth or other status".²⁴⁹ Article 2(2) further requires state-parties to take all appropriate measures to

²⁴⁴ For the list of ratifying state-parties, see United Nations Treaty Collection Website, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11-d&chapter=4&lang=en (accessed: 4.7.2016). For an overview on the history of the UNCRC optional protocol on communication, see G. de Beco, "The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: Good News?", *Human Rights Law Review* 13, 367 (2013) (Hereinafter: "**De Beco**"). And R. Smith, "The Third Optional Protocol to the UN Convention on the Rights of the Child? - Challenges arising Transforming the Rhetoric into Reality", *International Journal of Children's Rights*, 21, 305 (2013) (Hereinafter: "**Smith**")

²⁴⁵ See Articles 5(1), 9-10, 12, 13 of the UNCRC OP 3. See also De Beco, *supra note* 244, p. 377-378.

²⁴⁶ Respectively, Articles 2, 3, 6 and 12 of the UNCRC.

²⁴⁷ UNCRC GC 5, *supra note* 50, Par 12. See also Kaime, *supra note* 17, p. 90.

²⁴⁸ Article 2(1) of the UNCRC.

²⁴⁹ *Ibid.*

ensure children are protected "against all forms of discrimination [...] on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians, or family members".²⁵⁰

As described in chapter 1, in case of the first type of MPF, carers decide together to form an MPF unit, and raise children together in a planned parenting project. This can perhaps amount to a parents' "opinion", "activity" or "belief". This can also apply in the second type of MPF for carers who develop a parent-like relationship with an existing child, such as in blended-families. This, too, can be considered as "activity" or "opinion", as the carers may function as a family, and seek recognition as parents together. Another relevant ground is discrimination of children based on their "birth" or "other status". However, these terms are ambiguous: the ground of "birth" originally referred to discrimination based on social class, and it is unclear whether it can be legitimately broadened to address children born and raised in alternative families, including MPF.²⁵¹ The ground of "other status" also has an open-ended definition, and its scope and specific meaning is unclear.²⁵²

In any case, the essence of the principle is that children should not suffer due to the behaviors of their parents, legal guardians or family members, or due to the status of their birth. The UNCRC Committee has been described as liberal and innovative in its use and interpretation of the non-discrimination principle, and it did add new reasons under the umbrella of "other status".²⁵³ For example, in a recent concluding observation the UNCRC Committee addressed discriminatory attitudes and practices against children in disadvantaged situation, which included a reference to "children living in family forms other than heterosexual marriage".²⁵⁴ In addition, in a draft General Comment on the Rights of Adolescents, it is held that "measures are also needed to ensure that adolescents who belong to LGBTI groups *or from LGBTI families are not subjected to any forms of violence, discrimination or bullying* (emphasis added)...".²⁵⁵ Thus, it can be argued that if lack of legal recognition results in an infringement of the rights of children in MPF, it can amount to discrimination.

Even so, non-discrimination is not a stand-alone principle and can only be invoked in relation to other substantive rights in the UNCRC.²⁵⁶ This requires that a child's right is indeed violated and that this is because of one of the grounds mentioned. To effectively find discrimination, the UNCRC Committee noted the importance of comprehensive data collection, specifically of disaggregated data.²⁵⁷ However, in the context of MPF, there is little information on the number of MPF or of children raised in MPF, and there is a lack of accurate information on the challenges children in MPF face concerning the enjoyment of their rights. Such information is essential to understand the scope of the phenomenon and to ensure the rights of children in MPF, without discrimination.

The Child's Best Interests

Article 3 holds that in all actions concerning children "the best interests of the child shall be primary consideration".²⁵⁸ The UNCRC Committee considers it to be "one of the fundamental values of the

²⁵⁰ Article 2(2) of the UNCRC.

²⁵¹ B. Abramson, "Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-Discrimination", p. 106, Martinus Nijhoff Publishers (2008) (Hereinafter: "**Abramson**").

²⁵² *Ibid*, p. 27, 29.

²⁵³ J. E. Doek "The CRC 20 Years: An Overview of Some of the Major Achievements and remaining Challenges", p. 779, *Child Abuse & Neglect* 33, 771 (2009) (Hereinafter: "**Doek (2009)**").

²⁵⁴ Committee on the Rights of the Child, "Concluding Observations on the Combined Third, Fourth and Fifth Periodic Reports of Hungary", par 19, 14 October 2014, CRC/C/HUN/CO/3-5. Abramson, *supra note* 251, p. 129.

²⁵⁵ UN Committee on the Rights of the Child (CRC), *General Comment on the Implementation of the Rights of the Child during Adolescence*, Draft Version (April, 2016). The draft version can be found in <http://www.ohchr.org/EN/HRBodies/CRC/Pages/childduringadolescence.aspx> (accessed: 6.7.2016).

²⁵⁶ Abramson, *supra note* 251, p. 25.

²⁵⁷ UNCRC GC 5, *supra note* 50, par 12, 48.

²⁵⁸ Article 3(1) of the UNCRC.

convention",²⁵⁹ and while the four principles are of equal importance, the principle of the child's best interests arguably "underpins all the other provisions in the convention".²⁶⁰ The principle has three main functions. First, it is a broad independent substantive right. It requires state-parties to position the interests of children as primary consideration in all decisions, laws, and other policies. It applies to all decisions and actions that may, directly or indirectly, impact a child or a group of children, and it encompasses public and private institutions.²⁶¹ Second, the principle is an interpretive tool. It can be used in relation to other substantive provisions, either to support particular approaches, or to resolve conflict of rights. Third, the principle is also of procedural importance. It is a basis for evaluation of laws, policies and other practices, in matters that lack specific provisions in the UNCRC.²⁶²

The principle predates the UNCRC and can be found in many legal systems. But, despite its long-established use in law, its content is unclear, and varies across historic and cultural contexts.²⁶³ Eekelaar interprets the principle to include the child's basic, developmental and autonomy interests. The basic interests include the child's physical, emotional and intellectual care. The developmental interests include the child's need for assistance in order to grow and enter into adulthood. And the autonomy interests include the child's freedom to choose his or her own path.²⁶⁴ The principle has also faced criticism. Some scholars argue that it reflects an adult-oriented perspective, and that given its adaptive nature, it can be misused and manipulated. Thus, there is a concern that the principle is actually used to reflect dominant ideologies or traditional cultural and religious values, under the guise of benefitting the child.²⁶⁵ Despite the criticism, the UNCRC Committee considers the principle as appropriate and even neutral.²⁶⁶ It held that the principle is constrained by the other provisions of the UNCRC, and that its application should be carried out with respect to the UNCRC as a whole. For this reason, the content and meaning of the principle remain flexible, and are determined on a case-by-case basis, without overriding any of the state-parties obligations.²⁶⁷

The principle of the child's best interests is of particular importance in the context of the family. It is referred to in other UNCRC provisions relating to children and families, and the UNCRC Committee has criticized state-parties that did not enact the principle in family law matters.²⁶⁸ Some state-parties have even conceptualized the principle in relation to family matters, and include in its scope considerations such as the child's physical and emotional needs, cultural background, level of development, relationships with family members, and wishes and other considerations.²⁶⁹ However, there is no international consensus on the scope and content of the best interests' principle, and its application on children in alternative families, such as MPF. In fact, as was reviewed in chapter 2, both Canada and the U.S experienced difficulties in determining the best interests of children in MPF.

Academic literature in this field identifies four main considerations in the debate on the legal recognition of MPF from a child-centered approach. These considerations can highlight the interests of children in such family environments, and determine what may benefit the children most. First, from

²⁵⁹ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, p. 3, 29 May 2013, CRC/IC/GC/14 (Hereinafter: "**UNCRC GC 14**").

²⁶⁰ M. Freeman, "Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child", p.1, Martinus Nijhoff Publishers (2007) (Hereinafter: "**Freeman**").

²⁶¹ UNCRC GC 14, *supra note 259*, p. 7-8.

²⁶² *Ibid*, p. 3, 18. Freeman, *supra note 260*, p. 32-33.

²⁶³ UNCRC GC 14, *supra note 259*, p. 3. Freeman, *supra note 260*, p. 33-38.

²⁶⁴ See Freeman, *supra note 260*, p. 27. J. Eekelaar, "The Importance of Thinking that Children have Rights", p. 230-231, *International Journal of Law and the Family* 6, 221 (1992).

²⁶⁵ Freeman, *supra note 260*, p. 2, 50.

²⁶⁶ See *Ibid*, p. 1-2, 26.

²⁶⁷ *Ibid*, p. 39, UNCRC GC 14, *supra note 259*, p. 3, 9.

²⁶⁸ Freeman, *supra note 260*, p. 52-53. See Articles 9, 18, 20, and 21 of the UNCRC.

²⁶⁹ See UNCRC GC 14, *supra note 259*, p. 12. And *M.A. v. K.M.*, *supra note 89*, par 59.

a normative point of view, it can be argued that MPF are harmful to children's moral and emotional well-being. MPF are contrary to the nuclear family model, which can be perceived as natural and inherently stable and beneficial to children.²⁷⁰ Also, children raised in non-traditional family structures, like MPF, can be exposed to stigma and social exclusion. However, legal recognition of diverse family structure promotes social acceptance, and reduces this stigmatization.²⁷¹ In addition, as discussed in chapter 1, the view that the nuclear family is the sole or rightful family model is obsolete. In practice, more and more children are raised in MPF, but they lack legal recognition of their family situation.²⁷²

Second, from a practical point of view, it can be argued that MPF involve increased litigation and conflict, and that this is harmful for children. It is argued that MPF are inherently vulnerable to conflict, as multiple carers are less stable, and may find it difficult to reach agreements.²⁷³ Yet there is no empirical data to support this claim and, in any case, this complexity may not be in itself sufficient to withhold recognition from children and their carers. Also, it is the lack of recognition that leads to legal uncertainty, as it means that there are no specific legislative or policy measures applicable to MPF. This, in turn, can intensify conflicts and result in extensive and complex litigation.²⁷⁴ In addition, Markus interestingly points out that the involvement of multiple carers in decisions might result in better and wiser outcomes for children, and that this model should not be discouraged completely.²⁷⁵

Third, determining the child's best interests in MPF raises concerns of a slippery slope of the outcome of legal recognition for all children. This concern was echoed in the Superior Court's decision in *A.A. v. B.B.*, which was later overturned. There, the Superior Court held that enabling recognition to MPF means that "the door is wide open to step-parents, extended family and others to claim parental status [...] if a child can have three parents, why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect?".²⁷⁶ It is possible, then, that recognition of multiple carers can make all children more vulnerable to harmful interferences in their family lives, and that it can pose a threat to the parental status.²⁷⁷ However, the UNCRC Committee held that the principle should be applied on a case-by-case basis and rely on the factual circumstances. Hence, the possible harm to children in other situations should not take precedence.²⁷⁸ In that regard, Bouchard holds that the possible risks of "opening the floodgates" may not be realized in practice, and that their probability should be further assessed.²⁷⁹ Particularly, it can be argued that expanding the concept of family neither harms the status of legal parents, nor enables them to easily abandon their responsibilities. In fact, legal recognition of MPF creates more (not less) carers that are responsible for the child.²⁸⁰

Fourth, the main point in favor of legal recognition of MPF is rooted in the child's parent-like relationships with her carers. Children in MPF are supported by their carers physically, emotionally and financially, and these network of connections enrich the child socially and culturally as well.²⁸¹ Thus, while MPF poses legal and practical challenges "there may be great benefits to children from protecting all their meaningful relationships and sending out positive messages about diverse families

²⁷⁰ Markus, *supra note 7*, p. 438 V. C. Jackson, "Baby M and the Question of Parenthood, p. 1821, 76 Geo. L. J. 1811 (1987-1988) (Hereinafter: "**Jackson**").

²⁷¹ See Lotz, *supra note 9*, p. 41. Freeman, *supra note 260*, p. 28.

²⁷² See Markus, *supra note 7*, p. 438-439.

²⁷³ *Ibid*, p. 436-437. Jackson, *supra note 270*, p. 1811. Kinsey, *supra note 86*, p. 329-330.

²⁷⁴ Lotz, *supra note 9*, p. 41-42.

²⁷⁵ Markus, *supra note 7*, p. 436-437

²⁷⁶ *A.A v. B.B. Ont. Sup.*, *supra note 159*, par 41.

²⁷⁷ See Bouchard, *supra note 156*, p. 475-476.

²⁷⁸ UNCRC GC 14, *supra note 259*, par 23, 39.

²⁷⁹ See Bouchard, *supra note 156*, p. 466, 478.

²⁸⁰ Markus, *supra note 7*, p. 442-443.

²⁸¹ *Ibid*, p. 444. See also M. B. Jacobs "More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage", 16 *Cardozo J.L & Gender*, 217 (2009-2010)

to wider society".²⁸² Legal recognition can grant stability to the relationship: it endows children with all rights stemming from the parent-child bond, and carries symbolic significance. By contrast, legal uncertainty of the child's parent-like relationships is harmful to the child's development and well-being.²⁸³ Indeed, children lack knowledge on what serves their interests, and upon maturity, they may find that growing up in MPF was problematic.²⁸⁴ That being so, when assessing what the child's best interests are, "general physical, emotional, and intellectual care within the social capabilities of his or her immediate caregivers would seem a minimum expectation".²⁸⁵ Thus, protecting and maintaining parent-like relationships should always be viewed as serving the best interests of children.

In sum, it appears that the principle can require the legal recognition of MPF, in particular to protect the child's attachments and family life. This is in line with the case-law mentioned in chapter 2, which emphasized the principle in the decision-making process. Yet, the interpretation of the principle in the context of MPF is not consistent, and it seems that more guidance on its analysis is required. To ensure that the principle is implemented in state-parties, the UNCRC Committee has called on them to conduct children's impact assessments on new legislation, to identify child-friendly solutions, and to incorporate the principle in setting procedural safeguards.²⁸⁶ However, the UNCRC Committee has yet to offer specific guidance on how to interpret these obligations in the context of MPF.

Right to life, survival and development

Article 6 of the UNCRC recognizes the child's right to life, and requires state-parties to "ensure to the maximum extent possible the survival and development of the child".²⁸⁷ In the context of MPF, the relevant obligation concerns the child's development. While the provisions seem to be focused on the *physical* survival and development of children, the UNCRC Committee held that "development" should be interpreted in its broadest sense and as a "holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development".²⁸⁸

The family unit has a crucial impact on the child's psychological and emotional development. In particular, the attachment between the child and her carers is a meaningful bond. Research holds that the loss of such a relationship may result in uncertainty, stress, depression, and other harmful effects on the child.²⁸⁹ Because MPF do not have legal recognition, the protection of parent-like bonds is limited, and the carers are more vulnerable to interference by the state or third parties. As described in chapter 2, especially in the event of a family break-up, the carers may not have standing or legal status, and their relationship with the child can be limited, and even discontinued entirely. The lack of legal recognition means that the family environment and meaningful parent-like relationships of children in MPF are not well protected. This can lead to harmful effects of separation, and can amount to a violation of the child's right to a healthy psychological and emotional development.

Right to be heard

The UNCRC requires state-parties to assure that a child, who is capable of forming his or her views, shall have the right "to express those views freely in all matters affecting the child", and that these views shall receive "due weight in accordance with the age and maturity of the child".²⁹⁰ In particular, the provision holds that the child shall be provided with "the opportunity to be heard in any judicial and administrative proceedings affecting the child".²⁹¹ This is a unique provision, which reflects "the legal

²⁸² Wallbank & Dietz, *supra* note 30, p. 470.

²⁸³ Markus, *supra* note 7, p. 446. Freeman, *supra* note 260, p. 31.

²⁸⁴ Freeman, *supra* note 260, p. 3.

²⁸⁵ J. Eekelaar "The Emergence of Children's Rights", p. 170, 6 Oxford J. Legal Stud. 161 (1986).

²⁸⁶ UNCRC GC 14, *supra* note 259, p. 9, 18. See also UNCRC GC 5, *supra* note 50, par 45-47.

²⁸⁷ Article 6 of the UNCRC.

²⁸⁸ UNCRC GC 5, *supra* note, par 12.

²⁸⁹ See Bartlett, *supra* note 19, p. 904-906

²⁹⁰ Article 12(1) of the UNCRC.

²⁹¹ Article 12(2) of the UNCRC.

and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights".²⁹² The principle recognizes that children may have inherent challenges in forming and expressing their views, especially when they are young. But it still highlights the role of the child as an active participant in the protection and promotion of his or her rights.²⁹³

The UNCRC Committee noted that the principle includes the child's right to participate and be heard in family-related proceedings, such as cases of separation or divorce, as "the children of the relationship are unequivocally affected by decisions of the courts".²⁹⁴ Allowing the child to be heard is linked to the best interests' principle, as hearing children enables courts and policy makers to better understand their wishes and needs. Thus: "the best interests of the child, established in consultation with the child, is not the only factor to be considered in the actions of institutions, authorities and administrations. It is however, of crucial importance, as are the views of the child".²⁹⁵ As described in chapter 2, children in MPF have not been able to effectively participate in the decisions and policies that impact their lives. Children were not consulted with regarding the legislative initiatives discussed, and in many of the cases reviewed, the children were not heard directly and their views (as expressed by their legal representatives) were often rejected.

Also, MPF is an emerging family model, and in many cases the children in those families are particularly young. Nonetheless, the UNCRC Committee held that the "Convention requires that children, including the very youngest children, be respected as persons in their own right. Young children should be recognized as active members of families, communities and societies, with their own concerns, interests and points of view".²⁹⁶ The UNCRC Committee held that the consideration of age and maturity should not be seen as a limitation. Rather, this obligates state-parties to conduct individual assessment of the child's ability to express her views, without imposing inflexible age-limits, and by recognizing other forms of communications that are appropriate for younger children, such as body language, drawings, etc.²⁹⁷

Thus, the provision sets a clear and immediate legal obligation on state-parties, even with younger children. While it can be argued that ensuring children's right to be heard, and to have their wishes given due weight is a "general" problem in family litigation, its absence is of particular concern in the context of MPF. This is because MPF is an emerging family model, and courts may not fully understand the nature of the child's relationship with her carers. In order to promote a child-centered approach to MPF, authorities and courts should be required to take measures to ensure children in MPF can be heard and fully participate in procedures affecting their family environment.

3. 2. 2. Family Rights in the UNCRC

Many rights in the UNCRC concern the role of the family, and of the parents, in the child's life. The UNCRC, similarly to other UN human rights instruments, describes the family as the "fundamental group of society and the natural environment for the growth and well-being of all its members and particularly, children".²⁹⁸ The family is considered as the "best environment for children", and state-parties are obligated to adopt laws, programs and policies to strengthen the family, and ensure its resilience in society.²⁹⁹ Parents, too, are awarded special protected status in the UNCRC. Thus, the

²⁹² UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, par 1, 20 July 2009, CRC/C/GC/12 (Hereinafter: "**UNCRC GC 12**").

²⁹³ See UNCRC GC 5, *supra note* 50, par 12.

²⁹⁴ UNCRC GC 12, *supra note* 292, par 51-52.

²⁹⁵ *Ibid*, par 71, 74.

²⁹⁶ UNCRC GC 7, *supra note* 54, par 5.

²⁹⁷ UNCRC GC 12, *supra note* 292, par 20-21, 135.

²⁹⁸ The preamble of the UNCRC.

²⁹⁹ I. Ziemele, "Commentary on the United Nations Convention on the Rights of the Child, Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents", p. 26, Martinus Nijhoff Publishers (2007) (Hereinafter: "**Ziemele**").

UNCRC holds that parents have common responsibilities for the upbringing of their children and that state-parties are required to respect the responsibilities, rights and duties of parents.³⁰⁰

However, the concepts of family and parenthood are not defined in the UNCRC, and it is unclear how they should be understood and interpreted, and whether they can apply in the context of children in MPF. On the one hand, the UNCRC tends to reflect the concept of the family as a closed "unit" and reflects the exclusive parenthood model. Many of its provisions refer to "both parents", and the UNCRC Committee itself mentioned the "primacy of parents, mothers and fathers".³⁰¹ Also, the UNCRC reflects the international consensus, and a radical re-definition of family and parenthood was not the purpose of its drafters. For example, during the drafting process of the UNCRC, there was a proposal that parenthood "shall be interpreted to include, where appropriate, other family members or guardians who have de-facto responsibility for the care and upbringing of the child". However, the proposals, which signal a recognition of functional parent-like relationships was not even discussed.³⁰²

On the other hand, the UNCRC was formulated nearly three decades ago when ART and the emergence of alternative families, in particular MPF, had not fully developed. The UNCRC Committee, has recognized that family patterns are changing, and held that the term "family" should be interpreted broadly.³⁰³ In particular, it considered the family to be a "variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangement, provided these are consistent with children's rights and best interests".³⁰⁴ In that regard, the UNCRC Committee emphasized that it is the functional parenthood, and the care relationship, that benefit children. It held that a child's physical, personal and emotional development is "best provided within a small number of consistent caring relationships, typically with parents, and other family members."³⁰⁵

The UNCRC itself can support such an approach. For example, Article 5 holds that, in certain circumstances, rights and duties of parents can apply to members of the extended family, guardians, and other persons who are legally responsible for the child.³⁰⁶ Also, while Article 18 refers to "both parents", it appears that the provision was meant to promote equal parental responsibilities between men and women, and not to reject other forms of families. The provision also refers to "legal guardians" that have responsibilities in the upbringing of the child, so it does leave room to consider other carers.³⁰⁷ While the UNCRC is rooted in its historical context, and its original scope did not include children in MPF, it remains a "living instrument". The UNCRC should, then, respond to new developments in the field of children's rights, and be used as a framework to evaluate emerging issues concerning the family, such as MPF.³⁰⁸

One of the most relevant provisions relating to children in MPF is Articles 7, which requires state-parties to have a birth registration system, and holds that a child shall have "as far as possible, the right to know and be cared for by his or her parents".³⁰⁹ The issue of birth registration is anchored as a child's right in different international and regional instruments, yet it remains "a major challenge

³⁰⁰ Articles 18, 5 of the UNCRC.

³⁰¹ Articles 9(3)-(4), 10(2), 18(1) of the UNCRC. See also, UNCRC GC 7, *supra note* 54, par 18.

³⁰² Legislative history of the UNCRC *supra note* 219, Vol 1, p. 897.

³⁰³ UNCRC GC 14, *supra note* 259, p. 14.

³⁰⁴ UNCRC GC 7, *supra note* 54, par 15.

³⁰⁵ *Ibid*, par 19.

³⁰⁶ Article 5 of the UNCRC.

³⁰⁷ Article 18(1) of the UNCRC.

³⁰⁸ J. E. Doek, "Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9: The Right to Preservation of Identity and the Right not to be Separated from his or her Parents", Introduction, p. 1 Martinus Nijhoff Publishers (2006) (Hereinafter: "**Doek (2006)**").

³⁰⁹ Article 7(1) of the UNCRC.

for many countries and regions".³¹⁰ Birth registration recognizes the child's legal personality, and it is required to ensure the child's identity.³¹¹ Also, in most states, birth registration is required in order for the child to receive subsequent rights and entitlements, such as access to health services, education, and social welfare.³¹² In that regard, "The CRC committee takes a very firm position that non-recognition leads to the lack of enjoyment of human rights", and this can amount to discrimination.³¹³

In the context of MPF, lack of legal recognition means that the registration of children does not adequately reflect the child's family reality. The child is not registered under her carers' name and, thus, she can be denied subsequent rights, and suffer discrimination. As described in chapter 2, the legislative responses specifically aim to enable appropriate registration of children under the name of their carers, and this is viewed as the main result of legal recognition. In its Concluding Observations and General Comments, the UNCRC Committee stressed the positive obligation of state-parties to ensure children are properly registered. Many of its remarks relate to registration challenges in developing countries. These include issues pertaining to the availability and the accessibility of birth registration, for example in remote communities. In the global north, however, registration is generally accessible and available, whereas the main concern regards the inclusiveness of the system. In MPF, registering multiple carers holds administrative and technological difficulties that should be addressed.³¹⁴ Currently, lack of recognition of MPF leads to inaccurate and incomplete registration of children that does not reflect their identity and family situation. State-parties should ensure that their registration can accommodate such children and ensure their access to subsequent rights.

The significance of Article 7 in the context of MPF also relates to right to know and to be cared by parents, which is known as the child's right to family life.³¹⁵ Most of the academic literature concerning Articles 7 and 8 is focused on the child's right "to know" her parents, and the implication of the right in the contexts of ART, adoption, or birth out of wedlock.³¹⁶ However, concerning the child's right "to be cared" for by parents, scholars have supported an inclusive interpretation of "parent", that encompasses birth, genetic, and psychological parents.³¹⁷ Regarding MPF, in the case-law reviewed, courts have paid particular attention to characteristics of the relationships between children and their carers, and have highlighted matters of care and guidance, alongside genetic links. The UNCRC Committee also held that interference with the attachment of children to their parent-like carers is contrary to their best interests and to their healthy development.³¹⁸ Even so, lack of legal recognition

³¹⁰ UNCRC GC 7, *supra* note 54, par 25. For an overview of the right to birth registration in human rights instruments, Ziemele, *supra* note 299, p. 3-7. On the importance of birth registration, see also African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, 16 April 2014, ACERWC/GC/02 (2014).

³¹¹ Ziemele, *supra* note 299, p. 8.

³¹² *Ibid*, p. 1.

³¹³ *Ibid*, p. 8, 22. See also UNCRC GC 7, *supra* note 54, par 25. An additional concern regarding birth registration is linked to stateless of children. However, as children in MPF have at least one legal parent, in most cases they will be entitled to a nationality: Ziemele, *supra* note 299, p. 12-13.

³¹⁴ Ziemele, *supra* note 299, p. 20.

³¹⁵ A. Draghici, et al., "The Right of Children to Know their Parents - A Constitutive Element of the Child's Identity", p. 116, *Acta U. Danubius Jur.* 115 (2013) (Hereinafter: "**Draghici**").

³¹⁶ Currently, the European trend is to ban anonymous gamete donation, and to enable children conceived via gamete donations to access information about the donor/s. This approach was also encouraged by the UNCRC Committee, which expressed concern over anonymous births, secret adoption, and anonymity in ART procedures. See Ziemele, *supra* note 299, p. 26-27, 30. Draghici, *supra* note 315, p. 118-122. Giroux & De Lorenzi, *supra* note 91, p. 56-57, 87. And E. Blyth and A. Farrand, "Anonymity in Donor-Assisted Conception and the UN Convention on the Rights of the Child", p. 96-99, *International Journal of Children's Rights* 12, 89 (2004).

³¹⁷ L. O'Donovan, "Interpretations of Children's Identity Rights", p. 78, 73-74, in "Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child", D. Fottrell (editor), Kluwer Law International (2000) (Hereinafter: "**O'Donovan**"). Ronen, *supra* note 79, p. 155-156.

³¹⁸ Freeman, *supra* note 260, p. 31. UNCRC GC 7, *supra* note 54, par 18.

makes children and carers more vulnerable to interference in their family life. In family break-up, carers can be denied legal standing, and encounter difficulties to ensure their access to the child, and maintaining their parental bonds. This, then, can result in violation of the child's right under Article 7.

Article 8 further anchors the child's right to "preserve his or her identity, including nationality, name and family relations".³¹⁹ It is a unique provision in an international human rights instrument. Historically, the provision is a response to the phenomenon of child disappearances in South America, and this is why the provision further requires state-parties to assist children in re-establishing their identities.³²⁰ Nonetheless, the UNCRC is a "living instrument", and in recent years, scholars focused on the positive obligations that stem from the provision in relation to new developments in the area of children's rights, including in the context of family.³²¹ In psychology, the term "identity" refers to the unique features that make a person himself or herself. It includes both static elements, such as race, and dynamic and evolving elements, such as family relations.³²² The provision implies that identity is an "open-ended concept", and that name, nationality and family relations are examples of elements of identity, and not a closed-list.³²³

The child's identity does not develop in vacuum, but through dialogue and contact with significant others. This is the reason that family relations are critical, and why they are specifically mentioned as elements of the child's identity.³²⁴ Applying the provision, however, depends on what constitutes family relations. In that regard, scholars note that the provision should protect all family-based meaningful ties the child develops.³²⁵ The provision should not be limited to genetic ties, but rather accommodate the subjective perceptions of the child as to who he or she consider as parental figures. Thus: "protecting the child's right 'to be' primarily means ensuring that they will not be forced to disown their authentic familial and communal identity, to the detriment of their sense of self and of their human dignity in order to gain recognition of their normalcy by mainstream society".³²⁶ The provision does not explicitly guarantee the child the right to preserve all meaningful ties, but in the context of MPF, the child's relationship with all carers has a unique contribution to her identity. Therefore, it can be argued that the UNCRC Committee should pay particular attention to Article 8 and interpret the meaning of family relations broadly, to reflect the child's actual family life.³²⁷

The value of maintaining relations with parents is also anchored in Article 9 of the UNCRC, which requires state-parties to "ensure that a child shall not be separated from his or her parents against their will". The principle of non-separation should apply, except in cases where separation is necessary for the best interests of the child, and where determined by judicial authority, in accordance with the law.³²⁸ The provision again raises the questions of who are parents, and what the interests of children in MPF are. The provision anchors non-separation as a starting point, and requires state-parties to take positive measures to prevent separation of parents and children.³²⁹ Yet, as children in MPF develop parent-like relations, and can be psychologically harmed in case of separation - the provision should apply in MPF. At the very least, this can require states to ensure, via laws, policies or

³¹⁹ Article 8(1) of the UNCRC.

³²⁰ Article 8(2) of the UNCRC. Doek (2006), *supra note* 308, chapter 2, p. 2, 7.

³²¹ See Doek (2006), *supra note* 308, Introduction, p. 1.

³²² Giroux & De Lorenzi, *supra note* 91, p. 59-60.

³²³ Doek (2006), *supra note* 308, p. 10. On other issues relating to identity in the context of the UNCRC, see Ronen, *supra note* 79, p. 159-161.

³²⁴ Ronen, *supra note* 79, p. 149. For overview on psychological identity and its relation to the children's rights agenda, see also p. 148-154. Giroux & De Lorenzi, *supra note* 91, p. 61.

³²⁵ Ronen, *supra note* 79, p. 154-155.

³²⁶ *Ibid*, p. 147, 154.

³²⁷ *Ibid*, p. 159, 173-174. Doek (2006), *supra note* 308, p. 12.

³²⁸ Article 9(1) of the UNCRC. On the conditions of separation, see Doek (2006), *supra note* 308, p. 18, 24-26.

³²⁹ Doek (2006), *supra note* 308, p. 21-22.

other measures, that carers are entitled to legal standing and appropriate assistance, when there is risk of separation, for example in case of the death of a legal parent, or family break-up.³³⁰

Another relevant provision relating to children in MPF is Article 16, which anchors the child's right to privacy and holds that he or she shall not be subjected to "arbitrary or unlawful interference with his or her privacy, family, home...".³³¹ The risk of the violation of privacy can negatively impact the child's development, well-being and stable family life. Lack of recognition of MPF can make children particularly vulnerable to violations of their privacy with their parent-like carers, or in their family home/s. The lack of legal recognition leaves these familial spheres unprotected, and children's family life can be interfered with, supervised and even limited without effective legal safeguards.

In addition, Article 18 requires state-parties "to render appropriate assistance to parents and legal guardians", and to establish relevant institutions and services for the care of children.³³² This can be in the form of educational programs for carers, or other professional assistance in matters relating to child development. Access to these services benefits children, as it provides their carers with information and guidance, and promotes family resilience. Yet access to such services may not be available to carers in MPF, who are not considered legal parents. Thus, lack of access to such services can negatively impact the child, and her quality of care, and may amount to discrimination.

3. 2. 3. Social and Economic Rights in the UNCRC

In many states, access to social and economic services and benefits stems from the child's legal parents. Mainly, it is the registration of the child under the name of a parent, and the legal recognition, that enable access to health, education, social welfare, and other related rights and entitlement. Nonetheless, the UNCRC requires state-parties to ensure children have access and fully enjoy these rights, without discrimination. Yet in the context of MPF, lack of this legal recognition results in children being unable to access those services through all their carers. This can have a discriminatory result, in which children are deprived of their rights based on their parents' status and family model.³³³

As described in chapter 1, in most cases children in MPF have, at least, one legal parent. While other carers may not be legally recognized as parents, the children themselves should be entitled to economic and social rights, based on the legally recognized parent-child relationship. For this reason, children in MPF are generally not excluded from social, economic and social benefits altogether. Rather, the problem lies in their ability to access such rights through all of their carers. Of course, children in MPF should not have "excess" benefits, but the inability to access benefits through all of their carers raises concerns. The benefits and entitlements of the carers may not be the same (for example, one of the carer may have better health insurance plans, or have specific parental rights from his or her place of employment). More importantly, the issue of social and economic rights extends further than *access* and it can be argued that children should be able to have their carers be actively involved in decisions relating to their lives, particularly in matters of education and health.

Article 24 anchors the right of the child "to the enjoyment of the highest attainable standard of health...".³³⁴ The lack of legal recognition of MPF has practical challenges for carers who wish to be involved in medical decisions concerning the child. In most states, without being legally recognized as a parent, a carer cannot receive medical information, or give consent to any treatment or procedures, even in cases of emergency.³³⁵ Also, the provision specifically holds that state-parties should ensure

³³⁰ *Ibid*, p. 27, 29.

³³¹ Article 16 of the UNCRC. More on the complexities of the child's right to privacy, see A. Blecher-Prigat and B. Shmueli, "Privacy for Children", 42 Colum. Hum. Rts. L. Rev. 759 (2010-2011).

³³² Article 18(2) of the UNCRC.

³³³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, par 1-2, 31, 2 July 2009, E/C.12/GC/20.

³³⁴ Article 24 of the UNCRC.

³³⁵ Markus, *supra note 7*, p. 446

that parents and children are informed, and have access to education and support services regarding children's health and nutrition matters.³³⁶ This, again, relies on the recognition of a carer as parents. If the term "parents" is not applied to carers, then lack of access to information and guidance can negatively impact the child's right to health. Similar practical challenges arise in the context of the child's right to education.³³⁷ In most states it is only legal parents that are qualified to register their children to school. As MPF are not legally recognized, carers cannot effectively influence their child's education. They may not have legal standing to litigate disagreements regarding the child's schooling, and might even be prevented from receiving information from the school regarding the child's progress, from meeting the staff, and from being invited to school events.

Another right that can be impacted in the context of MPF is the right of every child "to benefit from social security" according to law.³³⁸ Access to social security, and in particular parental leave or family benefits, is also dependent on legal recognition of carers as legal parents. While MPF should not exploit social security schemes to provide children with "excess" benefits, the complexity concerning legal parenthood can prevent children from enjoying social security altogether. Family benefits are aimed to compensate families for the economic burden of child-rearing, to alleviate poverty, and protect children from economic exploitation.³³⁹ The UNCRC Committee identified family-benefits as an important tool to eradicate child poverty, and guarantee children's adequate standard of living.³⁴⁰ For this reason, state-parties should take measures to ensure that children in MPF are not excluded, or discriminated against, in the context of social security.

The lack of legal recognition of MPF also concerns children's right to housing, and to an adequate standard of living. Article 27 holds that parents have primary responsibility to secure the necessary conditions of living for children, "within their abilities and financial capacities".³⁴¹ Article 27 anchors the system of child support at the international level, and requires state-parties to "secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child".³⁴² Historically, maintenance payments stem from the moral and legal duty of parents to support their children, and ensure their basic needs to food and shelter.³⁴³ The issue of MPF raises the question of who can be considered as parent and bear this duty towards the child. The lack of legal recognition of MPF means that in the case of a family break-up, carers can avoid their financial responsibilities to children more easily, and the family history and dependency of the child may not be taken into account. This can make children in MPF particularly vulnerable in event of family break-up, when neither their parental relationships nor their standard of living is adequately protected.

To conclude, the UNCRC, which is the leading legal framework on children's rights, spells uncertainty for children in MPF. This uncertainty can be seen as a direct result of both the lack of clear definition of "family" and "parent" at the international level, and due to the lack of guidance in interpreting the best interests of children in such families. As described, the lack of legal recognition of MPF negatively impacts the rights, entitlements and well-being of children raised in such families, and the UNCRC Committee should engage further with this issue, and make use of its available functions to benefit children in MPF and safeguard their family life.

³³⁶ Article 24(E) of the UNCRC.

³³⁷ Article 28 of the UNCRC.

³³⁸ Article 26 of the UNCRC.

³³⁹ I. Esser et al "A Framework for Comparing Social Protection in Developing and Developed Countries: The Example of Child Benefits", p. 104, *Int. Social Security Rev.* Vol 62 (2009). On the various kinds of family benefit schemes, see ILO: *Social Security for Social Justice and a Fair Globalization Report*, p. 73-74, (2011).

³⁴⁰ W. Vandenhoele "Commentary on the UNCRC: Article 26: Right to Benefit from Social Security", p. 28, 41 (2007).

³⁴¹ Article 27(2) of the UNCRC.

³⁴² Article 27(4) of the UNCRC. See also N. Wikeley, "Child Support: Law and Policy", p. 28, Hart Publishing (2006) (Hereinafter: "**Wikeley**").

³⁴³ Wikeley, *supra note* 342, p. 4-5, 8, 10.

4. The UNCRC Committee and Engaging with MPF

4. 1. The UNCRC Committee's Function in the Context of MPF

The MPF family model has increased in recent decades, and it can be argued that "there are, and will be, families of a less traditional composition in which the social roles and responsibilities of parenting are undertaken by three or more people".³⁴⁴ Yet, as previously discussed, the lack of legal recognition of MPF can result in violation of children's rights under the UNCRC, and makes them particularly vulnerable in their unique family environment. This is mainly a result of the three intertwined elements. First, the lack of concrete and clear definition of the concepts of "family" and "parent" in the international level, to reflect the changing models of families. Second, the lack of guidance as to the adequate interpretation of the best interests of children in such alternative families. And, third, the subsequent difficulty to effectively and uniformly apply the rights and protections of the UNCRC to children in alternative families such as MPF.

The changing picture of the family, and the impact it holds for children's rights and well-being, calls for intervention of the UNCRC Committee. This can be achieved through effective use of all of its functions to further engage with the issue of children in MPF, and ensure their full enjoyment of their rights. As will be presented, while some functions may be more suitable than others, promoting a child-centered and rights-based approach to the issue can and should be reflected in all main functions of the UNCRC Committee: the reporting procedure and publishing of Concluding Observations, drafting General Comments, and receiving communications. This sub-chapter will briefly present the benefits and challenges of using these three functions and consider how they can effectively guide state-parties in that regard.

Concerning the reporting process and Concluding Observations, the fifth cluster of the UNCRC reporting guidelines refer to "Family Environment and Alternative Care".³⁴⁵ Under this part, a state-party must provide relevant and updated information regarding legislation, judicial, administrative and other measures concerning family environment and parental guidance. The part covers issues such as parental guidance, responsibilities, maintenance, and other elements that relate to children in MPF. The UNCRC Committee can apply this function and require state-parties to report on their definitions of "family" and "parent", and on their extent of legal recognition of alternative families, including MPF. Such requirement may enable the UNCRC Committee to compare state-parties, and thereby, develop overarching constructs and articulate broader categories and considerations in the family sphere. Potentially, this may allow the UNCRC Committee to harmonize concepts of law and develop shared-values concerning the functions and protection of the family, on a near-universal level.³⁴⁶ These issues can be further explored during the constructive dialogue with state-parties, and this can allow the UNCRC Committee to raise awareness and prioritize the issue on the international level.

That being said, engaging with MPF by means of Concluding Observations may not be a sufficient response in itself. From a practical point of view, some relevant issues concerning MPF, such as preservation of identity, or birth registration, are not covered under the particular cluster. This may complicate the reporting process, and the drafting of Concluding Observations and recommendations on the issue of children in MPF.³⁴⁷ In addition, the discussions with state-parties usually focus on matters that are of critical importance for the majority of children. Yet, in most states, children in alternative families are a minority, and therefore it is unlikely that the subject will be explored regarding all state-parties.

³⁴⁴ Lotz, *supra* note 9, p. 43

³⁴⁵ UNCRC Reporting Guidelines, *supra* note 233, par 31. It covers Articles 5, 9-11, 19-21, 25. 27 of the UNCRC.

³⁴⁶ See J. C. Reitz "How to do Comparative Law", p. 625-626, 46 Am. J. Comp. L. 617 (1998) (Hereinafter: "**Reitz**").

³⁴⁷ Article 8 is under the Civil Rights and Freedoms Cluster: UNCRC Reporting Guidelines, *supra* note 233, par 28.

Most importantly, it can be argued that Concluding Observations are meant to reflect an individual assessment, based on the specific conditions in the state-party. Therefore, it may not be the ideal platform to deal with emerging issues like MPF, which first require norm-building and general guidance. As O'Flaherty noted, "much of the content of Concluding Observations simply does not lend itself to normative expression".³⁴⁸ Therefore, while addressing the issue of children in MPF in the reporting procedures marks the importance of the issue, and can allow the UNCRC Committee to offer particular guidance and recommendations to relevant state-parties, this cause requires further measures.

The communication procedures, too, provides a venue to address concerns over the lack of recognition of MPF and its impact on children's rights. The UNCRC Committee may receive claims on this issue, and present a child-centered and rights-based approach in its decisions. The decisions can provide national courts with guidance on how to appropriately analyze particular facts and testimonies, and how to determine the best interests of children in alternative families such as MPF. However, the communication procedure is limited. Currently, only a minority of state-parties have ratified the Optional Protocol and so far, the UNCRC Committee has published one decision of inadmissibility.³⁴⁹ Also the communication procedure holds inherent challenges for children who wish to utilize it. For example, children may lack information on their rights, or the capacity to file communications themselves. Additionally, children may experience conflicts between their rights and the interests of their adult representatives in filing a communication.³⁵⁰ This makes it difficult to predict if and when the issue of MPF might be brought before the UNCRC Committee. In any case, any decision relating to MPF will be likely to be focused on the particular facts and circumstances of the complaint, instead of offering general guidance on the topic. Thus, as is the case with Concluding Observations, it cannot be used for norm-building or for providing general guidance.

Drafting a General Comment on the definition of "family" and "parenthood" and the rights of children in alternative families such as MPF, can also greatly contribute to the discussion. As described, the standing and legal status of General Comments, and the weight they should be accorded with in international law is unclear and contested.³⁵¹ Yet, in recent years, General Comments received additional political and moral weight, as well as increased their normative value.³⁵² They are recognized as an authoritative source of interpretation, and are increasingly incorporated in regional and domestic litigation with regards to progressive interpretation of laws.³⁵³ There are four main benefits to drafting a General Comment that will consider the special status of children in alternative families, and in particular, MPF.

First, the role of the General Comment is to clarify the provisions of the UNCRC, as well as to tackle with new emerging thematic themes. Children in MPF is both a new and emerging issue in the children's rights field and it requires the interpretation and guidance of the UNCRC Committee. Advances in ART and social changes make the traditional definitions of family and parenthood irrelevant for many children. The new reality requires a more inclusive and broad interpretation to the UNCRC, to ensure that children in alternative families enjoy the full range of their rights. In that regard, General Comments are ideal, as they not only meant to reinforce existing standards, but also to push the boundaries and reflect changing norms.³⁵⁴

³⁴⁸ O'Flaherty, *supra* note 230, p. 36

³⁴⁹ De Beco, *supra* note 244, p. 368-369. Otto, *supra* note 229, p. 7. See Committee on the Rights of the Child, *Decision under the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure* (adopted 69th session), par 4.1, No. 1/2014, 8 July 2015, CRC/C/69/D/1/2014.

³⁵⁰ Smith, *supra* note 244, p. 309-320.

³⁵¹ See Gerber et al., *supra* note 235, p. 96-97. Otto, *supra* note 229, p. 11-13

³⁵² See Gerber & Glory, *supra* note 229, p. 420. Otto, *supra* note 229, p. 10

³⁵³ See Otto, *supra* note 229, p. 10-11.

³⁵⁴ Gerber et al., *supra* note 235, p. 127.

Second, General Comments are increasingly used as litigation tools in international and in national contexts. As reviewed in chapter 2, state-parties dealing with the complex issue of children in MPF lack appropriate guidance. Particularly in the attempt to promote a child-centered and rights-based approach to MPF, courts are struggling to conceptualize the interests of children, respect their voices, or consider the impact of the decisions and policies on their rights and well-being. A General Comment can provide guidance for courts and prompt state-parties to establish applicable frameworks for MPF. Third, the drafting of a General Comment by the UNCRC Committee includes a participatory multi-stakeholders process, which is missing in Concluding Observations or in decisions on communications. This can increase international consensus on the issue, and ensure the acceptance of the General Comment. Thus: "...general comments play an increasingly important role in promoting a shared understanding of the treaty norms and developing agreement about the detail of their content".³⁵⁵

Fourth, so far, the UNCRC Committee has avoided drafting any General Comments that specifically address children's family rights. This is a critical issue for all children, which deserves an appropriate consideration. Particularly in light of developments in ART and social changes, the UNCRC should be re-interpreted in a broad and modern manner. The need to harmonize concepts, like family and parenthood, are increasingly important in a globalized world, and in light of the situation of more and more children raised in alternative families, such as MPF.³⁵⁶ Thus, a General Comment can provide an opportunity to develop an appropriate and inclusive interpretation of family and parenthood, and recognize the realities of children in MPF.

To conclude, the emerging issue of children in MPF requires the consideration of the UNCRC Committee. In order to interpret and apply the rights anchored in the UNCRC to children in alternative families, such as MPF, the UNCRC Committee should use all of its available measures and functions: Concluding Observations, General Comments, and communication procedures. This systemic response can position the issue of children's right to family at the forefront of the children's rights agenda, and promote change in the national level, to the benefit of all children.

4. 2. A Principled Child-Centered and Rights-Based Approach to MPF

The UNCRC Committee's engagement with the issue of children in MPF, in any of its functions, should set and promote a child-centered and rights-based approach to the issue. As is evident from the case law examples in chapter 2, the impact of the lack of legal recognition on children is not adequately explored, and voices of children from alternative families are missing from the discussion. The UNCRC Committee should aim to fill this void, and provide guidance to state-parties at the international level.

In its approach, the UNCRC Committee should instruct state-parties on the definition and scope of family-related rights in the UNCRC, and guide them on how to ensure these rights for all children, including those in MPF. A child-centered and rights-based approach will, then, aim to promote the rights, interests and views of children in MPF, and prioritize their wishes and needs in decision-making and in policy considerations.³⁵⁷ This sub-chapter will flesh out three main principles to be adopted by the UNCRC Committee in the discussion on MPF, to enable such a child-centered and rights-based approach.

4. 2. 1. Re-Definition of "Family" and "Parent" in Broad and Flexible Terms

In its response to the issue of MPF, the UNCRC Committee should first reaffirm the important role of the family, and of parents, for children, and society as a whole. Any consideration by the UNCRC

³⁵⁵ Otto, *supra* note 229, p. 3.

³⁵⁶ See in that regard, Reitz, *supra* note 346, p. 625.

³⁵⁷ See UNCRC GC 13, *supra* note 10, par 59.

Committee should further anchor the status of the family at the international level as the fundamental unit in society, and stress the obligations of state-parties to respect, protect and assist families. It should also acknowledge that state-parties have a large margin of appreciation in family matters, in light of the diverse social, cultural and religious considerations.

Nonetheless, the UNCRC Committee must urge also state-parties to recognize the profound changes in the traditional nuclear family model, and reflect the emergence of alternative families, including MPF. In particular, it should note that ART advances and the social changes have challenged the assumption of exclusive parenthood, and that children in MPF can and do form beneficial and parent-like bonds with other carers. The lack of legal recognition of MPF results in negative implications for the rights and well-being of children, and this must be addressed and adequately resolved in the national level. Drawing inspiration from the theoretical approaches presented in chapter 1, the UNCRC Committee must hold that the concept of "family" should be understood in a holistic manner, and reflect the realities of children. It should reaffirm its stance on broad interpretation of the term "family",³⁵⁸ and specifically recommend state-parties to consider functional and psychological parenthood, and value elements such as care, affection, dependency and guidance in the parent-child bond. This can be accomplished through constructive dialogue with state-parties, and by drafting a particular General Comment on the issue.

In order to enable such flexible and inclusive definitions, the UNCRC Committee should highlight the principle of the best interests of the child, and the right of the child to be heard, in the context of the family. It should explicitly hold that maintaining and protecting children's parent-like relations with carers, as well as recognizing their family life, is in their best interests. In addition, the UNCRC Committee should address children as active members of families, and note that their views in the family context should be given due weight in decision-making and in policy considerations. In that regard, the UNCRC Committee should recommend state-parties to further anchor the child's right to be heard in family matters, and take measures to consult with children on relevant legislative and policy initiatives. It should be stated that such legislation and policies require a children's rights impact assessment, and should incorporate procedural safeguards for children in alternative families, such as MPF.³⁵⁹

4. 2. 2. Encourage Legal Recognition of MPF

The UNCRC Committee should stress that laws cannot remain inactive and static in light of social changes in the family, and encourage state-parties to legally recognize alternative family models, such as MPF, in appropriate cases.³⁶⁰ As evident from the analysis of chapter 3.B., legal recognition has significant practical and symbolic benefits for children in MPF, whereas the lack of legal recognition can result in violations of children's rights under the UNCRC. For this reason, the UNCRC Committee should expressly favor legal recognition of MPF, and offer technical assistance to state-parties in amending their laws and policies to accommodate the changing forms of families.

The UNCRC Committee must use its functions to raise awareness of the discrimination faced by children in diverse family forms, as a result of the lack of legal recognition. A child-centered and rights-based approach must require state-parties that will not grant legal recognition, to at least take measures to prevent any discriminatory consequences for children in MPF. State-parties should be required to take measures to separate issues of legal recognition and parental status, to subsequent access to rights and entitlements. For example, regardless of the particular legal status of the carers, courts should be flexible in their approach to MPF, and determine issues relating to the care of the child on a case-by-case basis, guided by the principle of the child's best interests, and right to be

³⁵⁸ UNCRC GC 14, *supra note* 259, p. 14.

³⁵⁹ *Ibid*, p. 9, 18. UNCRC GC 5, *supra note* 50, par 45-47.

³⁶⁰ See Markus, *supra note* 7, p. 475.

heard.³⁶¹ Thus, state-parties should enable carers, in appropriate cases, to have standing in family litigation, to seek custody and access to children in their care, and to claim decision-making powers in the child's life.³⁶² The UNCRC Committee can further promote this by commenting on existing legislation of state-parties during the reporting process and offer recommendations in that regard, or through its decisions on particular cases as part of the communication procedure.

This approach will require state-parties to review their legislation and policies to identify whether they, directly or indirectly, intentionally or unintentionally, discriminate against children in alternative families, such as MPF. To do so, the UNCRC Committee should use its functions, in particular its reporting obligations and Concluding Observations, to encourage state-parties to gather statistical information and disaggregated data on children who might be identified as living in MPF. This is necessary in order to identify discriminatory consequences resulting from the lack of legal recognition, and to find child-sensitive solutions to ensure the equal enjoyment of the rights and entitlements for all children.

4. 2. 3. Awareness Raising and Data Collection

The issue of children in alternative families, such as MPF, is still a new and developing area of law. For this reason, the UNCRC Committee should use its functions, such as its Concluding Observations and General Comments, to increase awareness about the issue. In particular, it should recommend state-parties to offer appropriate training to the relevant stakeholders, and to gather data on children in alternative families, including MPF.

To date, there is little information on the phenomenon of MPF, the number of children raised in such families, and the challenges they face concerning the enjoyment of their rights. Such information is essential to better understand the family model, and effectively protect children in MPF. The UNCRC Committee should call on state-parties to develop mechanism for collecting accurate, standardized and disaggregated data that reflects the actual situation of children in alternative families, such as MPF, in the national context.³⁶³ This can be achieved by cooperation with relevant academic and other institutions and organizations in the field, as well as with the families themselves. The UNCRC Committee should recommend to state-parties to engage all sectors of society and provide training to professionals working with children or on family-related issues, including policy makers, judges, lawyers, law enforcement officials, educators, health workers, social workers, and media staff to better engage with children in alternative families, including MPF, and promote respect for their family life.

To conclude, in light of the negative implications of the lack of legal recognition of MPF, the UNCRC Committee should use its main functions to raise awareness and address the issue of children in MPF at the international level. The UNCRC Committee should present the child as an active member of the family, and recognize that children need "a familial and communal environment, which they feel is theirs and which affords them a clear understanding of who they are and helps to give meaning to their life".³⁶⁴ In doing so, the UNCRC Committee can provide state-parties with a child-centered and rights-based approach to engage with the issue of MPF. In particular, this approach should promote a re-definition of "family" and "parent" in an inclusive and broad manner, to reflect the changes in the nuclear family. It should favor legal recognition of MPF and urge state-parties to amend their legislation and policies accordingly. It should provide state-parties with guidance on how to apply the rights of the UNCRC on children in alternative families, and avoid discrimination and marginalization. And it should promote awareness raising and data collection on the issue, to better understand the realities of such children in their national context.

³⁶¹ *Ibid*, p. 466-467. Lotz, *supra* note 9, p. 38.

³⁶² See Markus, *supra* note 7, p. 468. Blecher-Prigat (2009), *supra* note 25.

³⁶³ UNCRC GC 5, *supra* note 50, par 12, 48.

³⁶⁴ Ronen, *supra* note 79, p. 154.

Conclusion

Technological and societal developments in recent years have brought dramatic changes to the picture of the family. Particularly in the global north, more and more children are raised in alternative family models, and develop meaningful parent-like relations with their adult carers. However, in most states, the existing laws and policies have yet to be adapted to this new reality, and in many cases, alternative families are not entitled to legal recognition and subsequent rights and entitlements. While the discourse surrounding the struggle for legal recognition tends to focus on the adults' rights and autonomy, children in such families should also be viewed as active members, with specific considerations. This thesis set out to explore a particular emerging family model - the MPF - and review if and how the lack of legal recognition of such families impacts children's rights, interests and well-being.

The thesis explored the shift from the traditional Nuclear Family model, and the notion of Exclusive Parenthood, towards diverse and alternative models of family, such as MPF. This shift raises questions on the current definitions and scope of the concepts of "family" and "parenthood", and their ability to adequately reflect the realities of children in such families. In chapter 1, the thesis provided a definition to MPF, as family units in which more than two adults care for a child, and fulfil meaningful parent-like roles towards the child, in varying degrees. The definition centered the discussion on the carer-child relationship, and explored the different types of MPF from a child-centered approach. The thesis presented theoretical approaches that can contribute to the discussion of MPF, which emphasize the family-like relations. In particular, it noted scholars that call for recognition of psychological parenthood, and re-defining the family in light of emotional values, such as care, dependency, and guidance, regardless of the child's particular genetic links.

The thesis presented various scholarly positions that recognize that children in MPF can, and do, form meaningful parent-like relationships with their carers. Research holds that the child's bond with a parental figure has a crucial role in the child's psychological development and sense of identity, and that maintaining such relationship serves the child's best interests. In addition, the thesis details that the parent-child status provides children with various protections and entitlements, and augments the obligations of their carers to care and provide for their needs. Yet, the lack of legal recognition makes children in alternative families, such as MPF, more vulnerable to interference in the family life. It leaves their relationships with their carers largely unprotected, and it deprives them of the rights and entitlements that stem from the parent-child bond. For this reason, the thesis holds that the lack of legal recognition of MPF should also be framed as a children's issue, and that it requires a suitable child-centered and rights-based approach.

Yet the thesis showed that in practice, in litigation concerning MPF the interests and rights of children are not adequately taken into account. In chapter 2, the thesis provided a legal review of leading case-law and legislation relating to MPF in Canada and the U.S. Both states had experienced MPF litigation that resulted in decisions broadening the concept of parenthood. Courts have increasingly emphasized the value of psychological parenthood and elements of care between a child and her carers, and subsequent legislative initiatives have enabled to recognize MPF, under certain conditions. Nonetheless, the thesis found that decisions concerning MPF are conducted in a "legal vacuum", and that courts lack relevant laws and guidance to ensure the rights and interests of children. The case-law review reflected that courts tend to favor considerations relating to parental rights and autonomy, over the interests of children. Particularly, courts lack guidance on how to determine the best interests of children in MPF, and the voices of the children were missing from the discussion.

In order to address the absence of the children's rights agenda from the discussion, chapter 3 introduces the UNCRC, and the UNCRC Committee, and explore their possible role in developing a child-centered and rights-based approach to MPF. Chapter 3 highlights the importance of the UNCRC, as the leading international instrument on children's rights. It holds that the UNCRC legal

framework addresses "almost every aspect of a child's life",³⁶⁵ and that, therefore, it should also be considered in relation to legal recognition of MPF. The thesis further explored the UNCRC Committee and its potential to engage with the issue, and guide state-parties on applying the UNCRC for children in alternative families such as MPF. The chapter reviews the UNCRC Committee's main competences: conducting reporting procedures and publishing Concluding Observations, drafting General Comments, and receiving communications. It holds that these functions can enable the UNCRC Committee to interpret the UNCRC as a "living document", and ensure that it can be applicable to emerging issues impacting the lives of children, such as children in MPF.

The thesis then reviewed how the lack of legal recognition of MPF impacts children's rights under the UNCRC. The analysis was complicated due to the fact that the UNCRC does not provide a clear definition of "family" and "parent". This creates uncertainty concerning the appropriate interpretation, scope and application of the UNCRC provisions for children in MPF. Yet, focusing on the UNCRC general principles, family-related rights and social and economic rights, the analysis found that lack of legal recognition of MPF can result in violations of children's rights. Chapter 3 held that the principle of the best interests of the child can be interpreted to require legal recognition of MPF, in order to reflect the actual family life of children, and protect their parent-like relations. This is tied to the principle of the child's right to be heard and participate in decisions relating to her family. Both of the principles were not adequately taken into account in the case-law examples in chapter 2, and the thesis notes the need of state-parties for further guidance on the application of the principles for children in MPF. The thesis further found that lack of legal recognition makes the relationship between children and their carers vulnerable, and that this negatively impacts children's right to development, to be cared for by parents, to identity, and to privacy in their family life. Moreover, the analysis noted that lack of legal recognition may deny children's access to social and economic rights, such as receiving social services and benefits, and entitlement to maintenance from carers. Also, the lack of legal recognition prevent carers from being involved in decision-making and fully participating in the child's life. These consequences can harm children in MPF, and amount to discrimination.

In chapter 4, the thesis described how the UNCRC Committee can use its functions to engage with the issue of MPF. It found that the UNCRC Committee should utilize all of its diverse competences to address the issue, and increase international awareness. Finally, the thesis identifies three principles that should be adopted by the UNCRC Committee in its actions concerning children in MPF, in order to establish a child-centered and rights-based approach. The principles require the UNCRC Committee to encourage state-parties to recognize the changing picture of the family, and redefine "family" and "parenthood" in broad and flexible terms, drawing inspiration from the theoretical approaches discussed in chapter 1. The UNCRC Committee should also urge state-parties to recognize MPF, and develop "a legal structure that reflects the psychological realities of children's lives".³⁶⁶ At the very least, the UNCRC Committee should call state-parties to effectively separate the legal recognition of parental status to subsequent rights, and ensure that lack of legal recognition does not hold discriminatory consequences for children in MPF. And it should use its functions to require state-parties to collect data and conduct research on the surge of alternative families, to better understand the interests of children.

This child-centered and rights-based approach to MPF values children's relations with parental carers, and augments their position as active and right-bearing members of families. It points out that the lack of legal recognition to alternative families, such as MPF, predominantly effects children's rights, interests and well-being. Therefore, the issue requires the attention of the UNCRC Committee, and calls for effective interpretation and guidance to incorporate the UNCRC in the discussion, applying it to the changing picture of the family, for the benefit of children.

³⁶⁵ Kaime, *supra note 17*, p. 16-17. Fottrell, *supra note 218*, p.4.

³⁶⁶ Bala & Aschbourne, *supra note 32*, p. 557.

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