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In the Courts: State Views on the Psychological-Parent and De Facto-Parent Doctrines

By Christina Spiezia

Traditionally, the parental rights of custody and visitation have belonged to a child's biological or adoptive parents. Today, however, the concept of "family" has changed dramatically. Nontraditional family arrangements are more common than ever, and the rise of family diversity has challenged the legal system to reassign parental roles. Family law is primarily a state issue, and thus state jurisdictions have diverged in their legal responses to changes in family structure.

Some state legislatures and courts have now adopted and enforced a psychological-parent or de facto-parent doctrine. The two doctrines are similar in that they allow courts to recognize a person who has a parent-like relationship with a child as either "de facto" or "psychological-parent." Courts may then view that third party as an equal to the child's biological or adoptive parent when determining visitation, custody, and standing to seek parental rights in court.

The Supreme Court has never addressed the concept of de facto or psychological-parenting, and state courts are in disagreement over the legal status of a third party that has a parent-like relationship with a child. While some jurisdictions have embraced the de facto and psychological-parent doctrines, others have decisively rejected them. Several state cases illustrate this legal division and present arguments on both sides of the de facto or psychological-parenting debate.

The Michigan Supreme Court declined multiple times to recognize a psychological-parent doctrine. In *Bowie v. Arder*, a case in which a grandmother brought an action seeking custody of the granddaughter who resided with her, the court acknowledged the existence of a psychological-parent doctrine, yet refused to apply it. The court specifically took note of arguments raised for creating third-party rights to custody as well as subsequent constitutional issues created by those rights. The court, however, explained that it was not in a position to make policy judgments regarding the

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doctrine's application when the Legislature, whose task it is to create substantive rights, had chosen not to do so. The court ultimately determined that the Legislature would create such rights for third parties if public policy so required. Several years later, in *Van v. Zahorik*, the Michigan Supreme Court agreed with its earlier statement, that public policy issues related to child custody disputes were to be resolved by the Legislature and not the judiciary.

Another case in Vermont, *Titchenal v. Dexter*, similarly discussed the involvement of two women who had together raised a child that only one of the women had legally adopted. After the women's relationship ended, the adoptive mother's previous companion brought suit seeking unsupervised contact with the child. She argued for the creation of a test to assure that only those third parties who had developed an "intended and shared de facto-parental relationship" with a child could petition for visitation. The Supreme Court of Vermont, however, was not persuaded, and stated that such a test would need to examine the merits of visitation or custody petitions on a case-by-case basis. Thus, the court explained, most cases would require a "full-blown evidentiary hearing" forcing parents to defend themselves against a wide range of third parties claiming a parent-like relationship with their child. Consequently, the court rejected the creation of such a test and held that the woman had no right to parent-child contact as a de facto-parent.

In 2007, the Supreme Court of Utah declined to adopt the psychological-parent doctrine in *Jones v. Barlow*. The case involved two women who, in the course of a romantic relationship, had a child together through the artificial insemination of Barlow. Two years later, the relationship ended and Barlow refused to allow Jones any contact with the child. Jones brought suit against Barlow to obtain visitation rights, but the court ultimately held that Jones, as a former partner, did not have standing to seek visitation or custody of the child by means of the psychological-parent doctrine.

The Supreme Court of Utah, in its reasoning, echoed the earlier Vermont and Michigan decisions by not enacting a controlling statutory provision regarding the nature of Jones' and Barlow's relationship, and in refusing to assume the legislative role of crafting

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and implementing social policy, which would overstep the judiciary's authority. The court further explained that a de facto-parent doctrine would create an ambiguous and fact-dependent test that would be difficult to administer uniformly. Thus, the doctrine would fail to fulfill the "traditional gate-keeping function of rules of standing," and would expose parents to claims by a wide variety of individuals asserting parent-like relationships. Finally, the Supreme Court of Utah looked to common law, stating that it "evidences a strong presumption that parental rights shall not be disturbed absent a determination that the legal parents are unfit." The court in *Barlow* could find "no bedrock principles" on which to effect change in the common law when there was no substantial agreement that the change was necessary and when a modification could be better brought about by legislative action.

In the 1991 New York case of *Alison D. v. Virginia M.*, a woman who previously had a live-in relationship with a child's mother, sought to obtain visitation rights after the relationship ended. The New York Court of Appeals denied the woman's argument that being a de facto-parent gave her standing to bring the claim. The court asserted a rule that biological parents, assuming fitness, have the right to the care and custody of their children, and to award visitation to a third person would impair those rights. Thus, the court explained parentage under New York law as a derivative of biology or adoption.

In contrast to states that have decisively blocked de facto or psychological-parents from obtaining visitation or custody rights, at least twenty-one states have recognized the doctrines. A 1995 Wisconsin case, *In re Custody of H.S.H.-K.*, sets forth a four-element test that now provides a common definition of the psychological-parent doctrine. Other states, including California, New Mexico, New Jersey, and Oklahoma have all adopted de facto or psychological-parent statutes that mirror this test. As *In re Custody of H.S.H.-K* illustrates, actually gaining standing to petition for visitation or custody rights as a de facto or psychological-parent can be insurmountably difficult.

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In re Custody of H.S.H.-K involved a woman who was seeking visitation of the child she raised with her former same-sex partner, who had been artificially inseminated. The child's biological mother opposed the visitation, arguing that she had a constitutional right to determine who could visit her child. The court, while "mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child," ultimately concluded that a circuit court has the power to hear a petition for visitation once two conditions are met. First, a plaintiff must show that she has a parent-like relationship with the child. That objective, however, is difficult to accomplish. Specifically, to achieve psychological-parent status, a plaintiff must prove each individual element of a four-factor test set forth by the Supreme Court of Wisconsin. The plaintiff must demonstrate that: (1) the biological or adoptive parent consented to, and fostered, the establishment of a "parent-like" relationship between the nonparent and the child; (2) the nonparent lived in the same household with the child; (3) the nonparent undertook parental obligations, assumed a "significant responsibility" for the "care, education and development" of the child, and contributed toward the child's support without expectation of financial repayment; and (4) the nonparent assumed a parental role for a sufficiently long period of time to have established a "bonded, dependent relationship parental in nature" with the child.

Even if a plaintiff is able to demonstrate that she qualifies as a psychological-parent under this four-element test, she still must show the existence of a "significant triggering event" that justifies state intervention in the child's relationship with the biological or adoptive parent. Such an event may be the disruption in the child's life caused by the elimination of his relationship with the psychological-parent. Only after a plaintiff satisfies this heavy burden may a circuit court consider whether visitation or custody with the psychological-parent is in the best interest of the child.

The Wisconsin Supreme Court explained that its approach was supported by policy considerations. While biological and adoptive parents have a constitutional right to rear their children free of unnecessary state intervention, there are cases where the best

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interest of the child overrides a parent's right. Especially when a parent consents to and fosters another person's parent-like relationship with the child and then substantially interferes with that relationship. In such a situation, a triggering event notifies the state that intervention into the constitutionally protected realm of parent and child might be warranted to protect a child's best interest.

In re Custody of H.S.H.-K was ultimately remanded to the lower court to give the plaintiff the opportunity prove, under the four-part test, that she was a psychological-parent, and further that a triggering event substantially interfered with her relationship with the child. The court explained that if she were able to do so, the lower court would in turn determine whether visitation was in the child's best interests.

The Supreme Judicial Court of Massachusetts has also addressed the standing of a de facto-parent by applying a best-interests-of-the-child standard, but has done so without a factor test. In *E.N.O. v. L.M.M.*, the plaintiff, the former same-sex partner of a child's birth mother, sought visitation and custody against the birth mother's wishes. Ultimately, the court held that the plaintiff was the child's de facto-parent. The court explained that "recognition of a de facto parent is in accord with notions of the modern family" because nontraditional families, including same gender couples, are becoming increasingly common. The court further noted that it is to be expected that children of nontraditional families form relationships with de facto-parents just as they do with legal parents.

Consistent with the Supreme Court of Wisconsin, the Supreme Judicial Court of Massachusetts recognized that a parent's constitutional rights can be outweighed if a court determines that a third party relationship is in the best interests of the child. The court explained that a biological parent's interest in protecting the custody of her child must be balanced against the child's interest of maintaining a relationship with the de facto-parent. In this case, the court looked directly at the child's best interest, deciding that it tipped the scale in favor of a continued relationship with the plaintiff.

Specifically, the court in *E.N.O.* considered the following factors as evidence of de facto-parenthood: the plaintiff attended

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doctors' visits while her former partner was pregnant, was listed on the child's birth announcement, expressed her intention to parent the child, raised the child, shared a residence with the child, supported the family financially, took on a parental role, was authorized to make medical decisions for the child, and was called "Mommy" by the child himself. The court decided that these facts indicated an attachment to the plaintiff on behalf of the child, and subsequently granted the plaintiff visitation rights.

Other states adopting the de facto or psychological-parent doctrines have made various statements supporting their reasoning. The Supreme Judicial Court of Maine explained that emotional ties constitute "a compelling basis for the State's intervention into an intact family with fit parents." In stark contrast to New York's decision in *Alison D.*, Pennsylvania courts have noted that a biological parent's rights do not extend to "erasing a relationship" between the biological parent and her former partner, even if she regrets entering into the relationship with the former partner in the first place. Further, some state courts have recognized de facto or psychological-parenthood in specific contexts. While not every jurisdiction uses the term "de facto" or "psychological-parent," certain states effectively allow nonparents to achieve legal parental status if they qualify under the concept of a de facto or psychological-parent. Illinois and North Carolina, for example, have abolished any preference for biological or adoptive parents in conservatorship placements. Connecticut, Iowa, and New Hampshire have enacted legislation granting same-sex partners who have no biological ties to children, but who have bonded with the children by undertaking parental roles, standing to file conservatorship suits.

Recognizing the de facto or psychological-parent doctrine can enable courts to protect parent-like relationships when doing so is in a child's best interest. Mere adoption of the doctrines need not infringe upon a biological or adoptive parent's right to raise a child because, as seen in *In re Custody of H.S.H.-K*, courts can apply a rigid standard to determine whether an individual achieves de facto or psychological-parent status. Thus, recognizing the de facto or psychological-parent doctrine should not simply grant any nonparent

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standing to petition for visitation and custody. In fact, as a safeguard to parental rights, courts adopting the doctrines should decline to consider most third parties as psychological-parents. In the rare instance, however, where an individual truly serves as a de facto-parent, the court should develop a clear, yet strict test to apply, such as that created in *In re Custody of H.S.H.-K.*

Ultimately, there are dozens of cases on each side of the debate as to whether courts should grant de facto and psychological-parents standing to seek visitation and custody rights. Cases adopting the doctrines often stand in direct contrast to decisions that refuse to recognize them, thus illustrating the great divide that exists among jurisdictions in this area of law. With social diversity and the growing prevalence of nontraditional family forms, it is certain that the de facto and psychological-parent doctrines and their application to parental rights will remain a hotly contested issue in state courts.

Sources:

- Alison D. v. Virginia M., 572 N.E.2d 27, 28-29 (N.Y. 1991).
Bowie v. Arder, 490 N.W.2d 568, 570-71, 578-79 (Mich. 1992).
E.N.O. v. L.M.M., 711 N.E.2d 886, 888-89, 891-94, 898 (Mass. 1999).
In re Custody of H.S.H.-K., 533 N.W.2d 419, 421-24, 435-37 (Wis. 1995).
J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking Up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104, 104, 107-08 (2013).
J.A.L. v. E.P.H., 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996).
Jones v. Barlow, 154 P.3d 808, 810-11, 815-19 (Utah 2007).
Lauren Valastro, Comment, *Training Wheels Needed: Balancing the Parental Presumption, the Best Interest Standard, and the Need to Protect Children*, 44 TEX. TECH L. REV. 503, 524-25, 527, 529-30 (2012).

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Lindsay J. Rohlf, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 693-94, 698-705 (2009).
T.B. v. L.R.M., 786 A.2d 913, 917-19 (Pa. 2001).
Titchenal v. Dexter, 693 A.2d 682, 683, 687-89 (Vt. 1997).
Van v. Zahorik, 597 N.W.2d 15, 18-19 (Mich. 1999).