

THE LEGAL FICTION OF DE FACTO PARENTHOOD

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“They who can read the political sky will see a hurricane in a cloud no bigger than an hand at the very edge of the horizon, and will run into the first harbor.” Edmund Burke, *Thoughts on the Present Discontents* (1770)¹

To understand the relentless novelty of recent proposals for reconfiguring legal parenthood, it is helpful to review the default rules for determining legal parent status. Until quite recently, legal parenthood was largely coterminous with biological parenthood. Exceptions remained at least conceptually linked to biological reality. Thus, the longstanding presumption that the wife’s husband is the father of a child born to her originates in the common-sense assumption that the husband is likely to be (or perhaps, ought to be) the biological father of the child while it maintains the integrity of a family. Even adoption, which extinguishes the parental rights of biological parents, has traditionally been organized by law in such a way as to create adoptive families that imitate biological parent families.²

Relying on biology, marriage and adoption as the pillars of legal parenthood also promoted certainty and stability for parents and children. Certainty by referencing objective verifiable criteria (the existence of a marriage, or a biological relationship or an adoption decree) and also by limiting the categories of adults who could claim the status of parenthood; and stability by promoting child-rearing settings that invoked independent variables that increase the likelihood of commitment between parents and children (such as biological ties and the obligations inherent in marriage).

LEGISLATIVE REDEFINITION OF PARENTHOOD

In July 2009, the Delaware Legislature passed a statute creating a legal status of “de facto parent.”³ The statute gives family courts the ability to designate as a child’s de facto parent, an unrelated adult. The court decides that this status can be given based on three factors. First, the adult must have “had the support and consent of the child’s parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent.” Second, the person “exercised parental responsibility for

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1. 1 SELECT WORKS OF EDMUND BURKE 105 (Liberty Fund 1999).

2. See Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 605-06 (2001).

3. 77 Del. Laws c. 97 §§1-3 (2009).

the child.” Finally, he or she must have “acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.”⁴ The relationship between the adults to be recognized as parents is irrelevant to the court.⁵ As is the number of parents who may seek that recognition since nothing in the law limits the number of a child’s parents to two.⁶ The Delaware Senate passed the bill unanimously on May 14 and the House approved it in a 34-2 vote on June 24. The governor signed the bill July 6, 2009.⁷

The closest statutory antecedent to Delaware’s law is a 2007 statute in the District of Columbia.⁸ This law allows a “de facto” parent to seek custody of a child on breakup of a relationship. A de facto parent is someone who meets one of two sets of criteria. In the first, the person must show he or she had “lived with the child in the same household at the time of the child’s birth or adoption”; who has “taken on full and permanent responsibilities as the child’s parent”; and who has “held himself or herself out as the child’s parent with the agreement of the child’s parent or, if there are 2 parents, both parents.”⁹ An alternative set of criteria would require the prospective de facto parent to show he or she “lived with the child in the same household for at least 10 of the 12 months” before seeking custody; “formed a strong emotional bond with the child with the encouragement and intent of the child’s parent that a parent-child relationship form between the child and the third party”; took “full and permanent responsibilities as the child’s parent”; and “held himself or herself out as the child’s parent with the agreement of the child’s parent, or if there are 2 parents, both parents.”¹⁰ Note that the last criterion in both sets would allow for at least three “parents” for each child.

The Delaware and D.C. legislation had been anticipated by the American Law Institute’s *Principles of the Law of Family Dissolution* published in 2002. The ALI *Principles* included a recommendation that state legislatures recognize a status of de facto parenthood, like the D.C. law, in the context of the breakup of a relationship. For the purposes of the *Principles*, a de facto parents is an unrelated adult who has lived with a child for two years and provides a majority of childcare (or at least as much as the primary residential legal parent) with the acquiescence of the legal parent or where the legal parent fails to so provide.¹¹ Only one of a child’s legal parents needs to allow the de facto parent

4. 13 DEL. CODE ANN. tit. 13, §8-201 (2006).

5. See Nancy Polikoff, *Delaware Legislature Gets It Right on Children with Two Moms*, BEYOND (STRAIGHT AND GAY) MARRIAGE, Aug. 13, 2009, <http://beyondstraightandgaymarriage.blogspot.com/2009/08/delaware-legislature-gets-it-right-on.html>.

6. See Nancy Polikoff, *More Thoughts on Delaware De Facto Parent Law – a Child Can Have Three Parents*, BEYOND (STRAIGHT AND GAY) MARRIAGE, Aug. 15, 2009, <http://beyondstraightandgaymarriage.blogspot.com/2009/08/more-thoughts-on-delaware-de-facto.html>.

7. S.B. 84, 145th Gen. Assem. (Del. 2009), <http://legis.delaware.gov/LIS/LIS145.NSF/vwLegislation/SB+84?Opendocument>.

8. D.C. CODE §16-831.01 (2001).

9. *Id.*

10. *Id.*

11. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND

to be involved in the child's life. Thus, one parent could allow another person to establish a de facto parent relationship without the knowledge and consent of the other legal parent.¹² In this situation, a father might be surprised to find himself splitting time with his child not only with an ex-wife but with one or more of her subsequent boyfriends. Unlike the Delaware and D.C. laws, the *Principles* do allow "responsibility for making significant life decisions" for the child to be limited to two persons at the same time (unless the legal parents want to waive that limitation).¹³

This novel legal status has also been recognized in a handful of state court decisions.¹⁴ One of the early decisions in Massachusetts provided the ex-partner of a child's biological parent with standing to seek visitation.¹⁵ The court based its conclusion on its finding that the partner was a de facto parent, a legal status the majority felt was "in accord with notions of the modern family."¹⁶ The court defined a de facto parent in the following passage:

A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care and serves as a moral guide.¹⁷

More recently, the Washington Supreme Court recognized the status of de facto parent in a dispute between a child's mother and her former partner over the child's legal parentage.¹⁸ The court said a de facto parent is a person who can meet criteria first outlined in a Wisconsin decision: (1) the unrelated adult has a "parent-like relationship" with a child which the "natural or legal parent consented to and fostered," (2) the adult lived in the same house as the child, (3) the adult performed child care tasks without pay, and (4) the adult "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature."¹⁹ The court said that from the point of its decision on, Washington law would provide that "a de facto

RECOMMENDATIONS §2.03 (2002).

12. David Wagner, *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1183 (2001).

13. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §§ 2.09, 2.18 (2002).

14. See, e.g., *In re H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

15. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

16. *Id.* at 891.

17. *Id.*

18. *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

19. *Id.* at 176.

parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”²⁰

IMPLICATIONS OF THE DE FACTO PARENT STATUS

In his important study of the no-fault divorce revolution, Professor Herbert Jacob noted that a change in family law as momentous as no-fault would have presumably been “the product of controversy and conflict, of a mass movement or of vigorous interest group activity as recorded by the media.”²¹ He found that, instead, the change to no-fault divorce was largely treated by legislators as “routine” policy making, more fit for “experts” “because only professionals ha[d] sufficient understanding to design a proper bill” on the issue.²²

The limited statutory incursion of “de facto” parental status in the law seems to be following the pattern of the no-fault revolution. There has been little discussion or outcry despite the incredibly momentous change being discussed. A unanimous vote in the Delaware Senate and a near unanimous vote in the House suggest that the legislators there were either not aware of the significance of what they were doing or they considered it routine to give parental rights to numbers of unrelated adults in repudiation of all of the principles of parentage that had obtained until the 21st Century. Proponents of the idea of de facto parenthood would, clearly, like for this unquestioned acceptance to continue but when it is clear what is at stake, this would be supremely unwise.

To make the stakes clear, one need only examine the implications of the acceptance of the principles adopted in Delaware’s law and to a lesser degree in D.C., the states with de facto court decisions and the ALI proposals.

Count Olaf Doctrine

The most obvious implication of a legal status for de facto parents is an increase in the classes of adults who would be able to claim a status equivalent to that accorded legal parents. Having cast off the anchors of biology, marriage and adoption, what kinds of scenarios are likely to be covered by the Delaware law and similar ones in other states?

The group most likely to have been in the minds of proponents in enacting the de facto parent laws are same and opposite-sex cohabiting partners of a child when that partner lives in the child’s home. Other likely de facto parents could be stepparents or boyfriends and girlfriends of a child’s parent. Given the not infrequent incidence of serial divorce followed by remarriage (or divorce followed by serial cohabitation) the potential number of children who could be affected by the recognition of this new legal status is significant. Thus, for instance, the Delaware law (and on breakup, the D.C. law and the ALI

20. *Id.* at 177.

21. HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 9 (1988).

22. *Id.* at 12.

Principles) would allow unrelated adults in these categories to seek a range of parental rights from visitation to decision-making authority for the child because that unrelated adult had a relationship with the child facilitated by the child's legal parent. In its de facto decision, the Washington Supreme Court suggested that this limitation of collusion by a legal or natural parent is a significant limitation on the kinds of people who could be recognized as de facto parents.²³ Perhaps that would be the case where a child is raised by one legal parent and that parent's partner from birth (as was the situation in the Washington case) and where one of the child's biological parents is unavailable (such as a sperm donor). In serial divorce or serial cohabitation situations, however, this limitation would not necessarily apply and a child could end up with three or more legal parents. It is easy to imagine a parent seeking to foster their child's relationship with a person they have just married or begun to live with either as a way of providing a second "parent-like" person in the child's life or as a way to cement the parent's relationship with the new spouse or partner. Even in the same-sex couple situations that have been most prominent in the de facto parent cases, a parent may allow a sperm or egg donor or other adult to play a "parent-like" role in a child's life for a variety of reasons. There have been cases where this has happened in the United States and elsewhere.²⁴

Unfortunately for the children involved, de facto parents are as likely to resemble Count Olaf in *A Series of Unfortunate Events*²⁵ as the unmarried version of Ozzie and Harriett (or Harriett and Harriett) that the drafters of the de facto law in Delaware likely had in mind. Indeed, there is reason to believe that by endorsing parental status for cohabiting parents, the de facto laws threaten to place children in unsafe settings. Professor Robin Wilson has powerfully argued this point in her critique of the ALI *Principles*.²⁶ A body of empirical research bears out the concern. Children living in a cohabiting household are more likely to experience poverty.²⁷ They are also typically subject to significant instability; as one study notes: "virtually all children in cohabiting-couple families will experience rapid subsequent changes in family status."²⁸ They are

23. In re Parentage of L.B., 122 P.3d 161, 179 (Wash. 2005).

24. See *LaChapelle v. Mitten*, 607 N.W.2d 151, 157 (Minn. App. 2000) (involving a case where a lesbian couple conceived with the help of a donor, and the parties agreed in writing that donor would have a right to a "significant relationship" with the child); *A.A. v. B.B.*, 28 D.L.R. (4th) 519, 522 (2007) (concerning same-sex partners recognizing a biological father 'sequal parenting status'); Caroline Overington, *Gays seek access to friend's daughter*, THE AUSTRALIAN, Oct. 15, 2009, at 1, available at 2009 WLNR 20267459 (describing a gay couple and a lesbian couple who raised two children jointly).

25. LEMONY SNICKET, *THE BAD BEGINNING* 66 (1999) (Count Olaf relied for his authority on the related doctrine of *in loco parentis*).

26. Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, in *RECONCEIVING THE FAMILY* 90 (Robin Fretwell Wilson ed., 2006).

27. Peter D. Brandon & Larry Bumpass, *Children's Living Arrangements, Coresidence of Unmarried Fathers, and Welfare Receipt*, 22 J. FAM. ISSUES 3, 13 (2001); GREGORY ACS & SANDI NELSON, *URBAN INST. THE KIDS ARE ALRIGHT? CHILDREN'S WELL-BEING AND THE RISE IN COHABITATION* 2 (2002), available at http://www.urban.org/UploadedPDF/310544_B48.pdf; ROBERT I. LERMAN, *URBAN INST., HOW DO MARRIAGE, COHABITATION, AND SINGLE PARENTHOOD AFFECT THE MATERIAL HARDSHIPS OF FAMILIES WITH CHILDREN?* 20 (2002), available at http://www.urban.org/UploadedPDF/410539_SippPaper.pdf.

28. Deborah Roempke Graefe & Daniel T. Lichter, *Life Course Transitions of American Children: Parental Cohabitation, Marriage, and Single Motherhood*, 36 *DEMOGRAPHY* 205, 215 (1999). See also R.

more likely to experience academic failure.²⁹ Perhaps more tragically, “although mothers’ boyfriends perform comparatively little child care, they are responsible for more child abuse than any other nonparental caregivers.”³⁰ Indeed, the biological tie between parents and children “increase[s] the likelihood that the parents [will] identify with the child and be willing to sacrifice for that child, and it [reduces] the likelihood that either parent [will] abuse the child.”³¹

The law’s previous preference for parenting by married biological parents, or (as with adoption) a close substitute, admirably advanced children’s interests.³² Repudiating this preference for marriage and biological ties is an abandonment of children’s interests.

Third (and Fourth) Parents

In her important recent book on the inner lives of children of divorce, Elizabeth Marquardt describes a common sense these children have of being “between two worlds.” The new de facto legislation may well introduce children to the anguish of being between three or four worlds. As difficult as it is for children to navigate between the expectations and demands of two households, a common enough occurrence in instances of divorce, imagine the difficulty of navigating the demands of a mother, her former partner, a sperm donor father and perhaps even his partner – or shuttling between the homes of a mother and father and the mother’s ex-husband or ex-boyfriend. As noted

Kelly Raley & Elizabeth Wildsmith, *Cohabitation and Children’s Family Instability*, J. MARRIAGE & FAM. 210, 216 (2004); Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children 15–16* (Ctr. for Family & Demographic Research, Bowling Green State Univ., Working Paper No. 02-18, 2002), available at <http://www.bgsu.edu/downloads/cas/file35355.pdf>; Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the U.S.*, 54 POPULATION STUD. 29, 33 (2000); Larry L. Bumpass & James A. Sweet, *Children’s Experience in Single-Parent Families: Implications of Cohabitation and Marital Transitions*, 21 FAM. PLAN. PERSP. 256, 258 (1989).

29. Elizabeth Thomson et al., *Family Structure and Child Well-Being: Economic Resources vs. Parental Behaviors*, 73 SOC. FORCES 221, 237 (1994); Wendy D. Manning & Kathleen Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single Parent Families*, 65 J. MARRIAGE & FAM. 876, 878 (2003); Rachel Dunifon & Lori Kowaleski-Jones, *Who’s In the House? Race Differences in Cohabitation, Single Parenthood, and Child Development*, 73 CHILD DEV. 1249, 1260 (2002); Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 224–225 (2003).

30. Leslie Margolin, *Child Abuse by Mothers’ Boyfriends: Why the Overrepresentation?*, 16 CHILD. ABUSE & NEGLECT 541, 548 (1992).

31. SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT* 38 (1994).

32. See generally Robin Fretwell Wilson & W. Bradford Wilcox, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child* 14 WM. & MARY BILL RTS. J. 883 (2006); KRISTIN ANDERSON MOORE ET AL., *CHILD TRENDS, MARRIAGE FROM A CHILD’S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT?* (2002), available at <http://www.childtrends.org/files/MarriageRB602.pdf>; Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE CHILD. 75, 89 (2005) (“Research clearly demonstrates the children growing up with two continuously married parents are less likely than other children to experience a wide range of cognitive, emotional, and social problems, not only during childhood, but also in adulthood . . . This distinction is even stronger if we focus on children growing up with two happily married biological parents.”).

above, this is not an unheard of scenario.³³

This kind of complicated parenting situation threatens the stability so important to children. It also undercuts the authority of a biological or adoptive parent who must accommodate his or her relationship with their child to the demands of other adults who are likely to have divergent ideas about how to direct their child's upbringing. The time, attention and loyalty of a child are not limitless and more adults making a claim on these resources will necessarily diminish the share available to others. The ideal setting for children is where marriage between the child's parents mediates their potentially conflicting ideas and goals about the child's rearing. Here, the parents would work together and negotiate with one another *before* making demands of children.³⁴ Divorce upsets this ideal. The degree to which it does so is somewhat (though not entirely) dependent on how well the divorcing spouses work together. The greater the number of adults who can claim the prerogatives of a parent, the more likely it is that a child will be faced with unsettling and disorienting demands beyond what is fair to expect of a child.

It is important to note that even the novel proposal of the ALI recognizes this difficulty. It thus *allows* judges to limit the number of adults who can exercise major decision-making authority for a child to two.³⁵ While this would not shield the child from the emotional and psychological conflicts of relating to two or more adults anxious to secure their parental status, it could limit conflicts over children's schooling or health care.

The Delaware de facto status, by contrast, does not specify such a numerical limit. As an example, a recent Louisiana case involved a dispute between a same-sex couple about, among other things, which school the child of one of the partners would attend.³⁶ Add to this scenario, then, the not implausible possibility that in a similar situation a third party might also have a relationship with the child.³⁷ Looking at this scenario under the new Delaware law, the mother, her partner and the third adult could all assert conflicting proposals for the child's education.

Even worse than a dispute over school, which would end with only one program for education being chosen, are disputes over time and loyalty. These commodities can be divided. The Delaware de facto parent law is likely to result in children being forced to have three or more residences or to divide filial loyalties between three or more adults, all of whom may want to have the child treat that person as the most important "parent."

33. *Supra* note 24 and accompanying text.

34. ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* 24 (2005).

35. AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* 2.09, 2.18 (2002).

36. *Palozzolo v. Mire*, 10 So.3d 748, 754 (La. Ct. App. 2009).

37. See Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545, 549 (1981) (reporting that female same-sex couples are more likely to involve male friends and relatives in their children's lives).

Foundling Fathers and Intentional Mothers

One of the ways the traditional tie between marriage and parents has served children's interests is by promoting an ethic of unchosen obligation. When a couple marries, they assume obligations for each other and for their children—obligations that go beyond what they might have freely chosen if they had known all the details before making the choice ("for richer or poorer, in sickness and in health"). The law also enforces support obligations in biological and adoptive parents without asking whether the parents really intended all the implications of the choice that led to their becoming parents.

De facto parenthood, by contrast, is founded on an ethic of intention. A person gains the de facto status because a legal parent intends for them to have a "parent-like" relationship with the child and because they took on that role voluntarily. The de facto doctrine endorses an entirely novel route to parenthood—the dickered bargain. It facilitates adult arrangements, even to the exclusion of children's legitimate interests, such as the opportunity to know and be raised by their own mother and father and to experience the implications of their "double origin."³⁸

A mother who would like to raise a child with the aid of another adult but without the participation of the child's father can more easily do so if the law will designate the chosen adult as a parent. The sperm donor in such a situation is a foundling father creating a child he plans not to raise or support. The new de facto parent is a "mother" by intention.

Surely, however, children deserve a more certain protection for their interests than a mere hope that adults will choose to take on obligations in their behalf.

Judicial Role

Another implication of de facto parenthood is a dramatic expansion of the role of the state in children's lives. Well established precedent recognizes a fit parent's right to direct the upbringing of his or her child free from interference from third parties or even the state.³⁹ The de facto parent status allows a third party to assert claims adverse to a fit parent's decisions, interfering with the fit parent's constitutional rights by allowing these to be overturned in court or at least requiring the parent to go to the trouble of defending against them.⁴⁰ As Professor Katharine K. Baker notes: "By increasing the number of people who can assert relationship rights" de facto parent proposals "necessarily increase the likelihood that courts, not parents, will be deciding what is in a child's best interest."⁴¹

38. See DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 197, 156 n.59 (2007) (discussing Sylvaine Agacinski's theory of "double origin").

39. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

40. *Kulstad v. Maniaci*, 220 P.3d 595, 612 (Mont. 2009) (Rice, J., dissenting).

41. Katharine K. Baker, *Asymmetric Parenthood*, in *RECONCEIVING THE FAMILY* 122 (Robin Fretwell Wilson ed., 2006).

CONCLUSION

While the states have given limited standing to unrelated adults to have some parental rights when a child is deprived of a relationship with one or both parents, the novelty of the new Delaware de facto parent law cannot be stressed too strongly. It creates an entirely new class of “parents” without any reference to the clear, predictable relationships that have always been the foundation of legal parenthood—biology, marriage and adoption. In doing so, it threatens children’s well-being, their stability and their opportunity to have a relationship (wherever possible) with their own parents. It allows family courts to endlessly second guess parental authority at the behest of an expanding category of unrelated adults.

The Delaware legislation might seem insignificant because its radical experiment is currently confined to that single state. In what it portends for children and families and for state power, however, its implications could not be more momentous. One state’s creation of a legal fiction for parenthood is a small step in U.S. law but it is a fateful one and given the probable costs, one that ought to be reversed and certainly not followed by any other state.