

The De Facto Parent Christopher K. Steuart, Esq.

The general trend of the law in the states is to recognize the concept of “de facto parent” as it applies to relationships between non-biologically related adults and children who have a step-parent, co-parent or similar relationship. The states that recognize this relationship take different routes, apply different principles, call the relationships by different names (e.g. loco parentis or psychological parent) but arrive at similar results with some notable exceptions. The levels of relationships supported in the states following the concept of “de facto parent” has ranged from visitation to principle/primary residential custody. This is in part be a reflection of the situations that each state has had the opportunity to address to date. This area of the law is rapidly evolving.

Several states have rejected the concept of “de facto parent” among them are: Kentucky, West Virginia, Ohio, Vermont and New York.

Kentucky has found that statutes are controlling and have covered the subject completely and there is no common law left to address “de facto parent” or “de facto custodian.”

West Virginia rejected “de factor child” and by implication “de factor parent” in *Glen Falls Ins. Co. v. Smith*.

Ohio in the unpublished opinion in *IN RE: CHEYENNE MADISON JONES* ruled in a case involving two women, that Ms Dvorak (the non-biological partner) was neither the natural nor the adoptive parent of Cheyenne, therefor she cannot be a "parent" within the meaning of Ohio law, and she is not entitled to an award of parental rights under the statute without first proving that Jones is unsuitable.

Ms Dvorak resided with Cheyenne's biological and legal mother, Ms Jones for several years prior to Cheyenne's birth and she had helped plan Cheyenne's conception and birth. Ms Dvorak asserted that, after Cheyenne's birth, she had acted as one of Cheyenne's co-custodians, providing care and support for several years. Ms Dvorak and Ms Jones separated and visitation occurred regularly between Cheyenne and Ms Dvorak until Ms Jones terminated contact. The court rejected Ms Dvorak's request for custody, visitation, support and other relevant matters.

Vermont decided in *Titchenal v. Dexter* that courts may not apply equitable powers to adjudicate a visitation dispute that cannot be brought in statutory proceedings within the family court's jurisdiction.

The breakup of a relationship between two women who had both participated in raising a child adopted by only one of them is the origin of this case. Plaintiff, Chris Titchenal, alleged facts, which were disputed but were accepted by the court as true for purposes of analysis. Chris Titchenal and Diane Dexter began an intimate relationship. They purchased a home together, held joint bank accounts, and jointly owned automobiles. They both contributed financially to the

household, and regarded each other as life partners. At some point, the parties decided to have a child. Their attempts to conceive via a sperm donor failed; they decided to adopt a child. Diane adopted a girl, who was named Sarah Ruth Dexter-Titchenal. The parties held themselves out to Sarah and all others as her parents. The child called one "Mama Chris" and the other "Mama Di." For the first three and one-half years of Sarah's life, until the separation, Chris cared for the child about 65% of the time. Chris did not adopt Sarah because they thought the then current adoption law would not allow them to do so. Eventually, the parties' relationship faltered, and defendant moved out of the couple's home, taking Sarah with her. At first following the separation, Sarah stayed with Chris between Wednesday afternoons and Friday evenings. Eventually, Diane severely curtailed plaintiff's contact with Sarah and refused Chris' offer of financial assistance.

A New York court rejected extension of visitation rights to a same sex domestic partner claiming to be a "parent by estoppel," "de facto parent," or "psychological parent" in *In the Matter of Janis C. v. Christine T.* The court did however invite the New York State Legislature or the Court of Appeals to act on the issue.

Janis C. and Christine T. committed themselves to be partners for life in a formal commitment ceremony, which was conducted by a minister and attended by about 50 friends and relatives. The women decided to raise children together and agreed that Christine T., who was younger, would be artificially inseminated and stay home with the children, while Janis C. would support the family. Before the children were born, Christine T. executed a will and other documents which, inter alia, appointed Janis C. as the "co-parent" and "adoptive parent" of the children in the event of her incapacity or death. Christine T. gave birth to a boy named Brandon Philip T.-C., and Christine T. gave birth to a girl named Juliette Marcella T.-C. Together, they chose the children's names, godparents, pediatrician, and school. They lived in the same household. Both parties considered themselves, and were considered by others, to be the "mothers" of the children. This arrangement continued until Christine T. suddenly left with the children and refused to allow Janis C. to visit them.

In the middle of the United States and in the middle position on this issue is Illinois. In *In re Marriage of Simmons*, even as it rejected the concept of "de facto parent" status to a transexual (female to male), Illinois granted visitation to the rejected "de facto parent."

Petitioner began taking testosterone to alter his appearance and started going by the name of Sterling Robert Simmons. He has the outward appearance of a man. Petitioner and respondent participated in a wedding ceremony and a certificate of marriage was issued. They decided to have a child and agreed that respondent would undergo artificial insemination, respondent gave birth to the child and petitioner was listed as the father on the birth certificate. Petitioner underwent a surgery removing his uterus, fallopian tubes and ovaries but retaining external female genitalia. Petitioner obtained a new birth certificate designating his sex as "male" and legally changed his name to Sterling Robert Simmons. Petitioner filed a petition for dissolution of marriage and sought temporary and permanent sole care and custody of the child. After a trial the court found that petitioner lacked standing to assert custody rights over the minor child because their same-sex marriage was invalid under Illinois law, and he was neither the

biological nor adoptive parent. The court awarded sole custody of the minor child to respondent and declared that petitioner lacked parental rights or standing to seek custody. However, the court did grant petitioner visitation rights. Petitioner and the minor child raised and the court rejected several issues (1) whether petitioner is a woman and not legally male and, therefore, not legally married to respondent, also a woman; (2) whether petitioner is not a legal parent under the Illinois Parentage Act, the Illinois Parentage Act of 1984, the Illinois Marriage and Dissolution of Marriage Act, or common law; (3) whether respondent was barred from challenging petitioner's parentage of the minor child under equitable estoppel and laches and the statute of limitations (4) whether the child can bar respondent from attacking the validity of petitioner's parentage as a third-party beneficiary to his parents' artificial insemination agreement; (5) whether finding petitioner is not the legal father of the minor child violates the minor child's equal protection and due process rights; and (6) whether petitioner should be given standing as a parent to seek custody of the minor child under equitable or de facto parentage theories. The Court of Appeals rejected all of the claims of petitioner.

Also in the middle leaning toward rejecting the concept of “De Facto Parent” or a related concepts is Florida in *Azmierazak v. Query*.

Appellant sought custody and temporary visitation of appellee's biological child. The court denied the request because appellant failed to state a cause of action and lacked standing to seek custody or visitation. The court rejected the concept of *loco parentis* which had appeared only in the context of a marital relationship. Without status equivalent to biological parent, appellant lacked standing to seek custody or visitation of appellee's biological child against her wishes. The court had recognized the concept of psychological parent but did not construe these cases as holding a psychological parent is entitled to parental status equivalent to the biological parent.

Also somewhere in the middle, but clearly recognizing the trend is Arizona. Arizona has not made a definitive statement on “De Facto Parent” status, but based on dicta in *Riepe v. Riepe* suggests that it leans toward some degree of recognition of “De Facto Parents.”

Following the general trend are states clearly recognizing “de facto parents” and “in loco parentis.” Of those states, Maine’s courts have taken a position supporting parental relationships from whatever source and analyzed them in the context of the best interest of the child.

Maine in *Leonard v Boardman* (de facto parent, male, non-biological) Boardman was granted the primary physical residence of child. Leonard (female, biological parent) argued that the court was required to turn over possession of the child to her because she is the child's mother and Boardman is not the child's biological father. Boardman participated with Leonard in childbirth classes, and he named Dymond. Boardman took care of Dymond as much as, if not more than, Leonard. Dymond has lived all of his life with Boardman. The court found that Leonard became intoxicated in the presence of the children and had no stable residence, and that Boardman was a de facto parent to Dymond and that it was in Dymond's best interest for him to reside with Boardman.

In *C.E.W. v. D.E.W.* the court determined C.E.W. was a de facto parent of D.E.W.'s

minor son by artificial insemination and is entitled to be considered for an award of parental rights and responsibilities. C.E.W. has parented the child equally with D.E.W., the biological mother, since the child's birth but she is not related to the child biologically or by adoption.

In *Young v. Young* the court found that a step-father could develop a “de facto parent” status.

California in *Elisa b. v. Superior Court* considered the parental rights and obligations, if any, of a woman with regard to a child born to her partner in a lesbian relationship and concluded that a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own, is the children's parent under the Uniform Parentage Act and has an obligation to support them. In *In re Nicholas H.* California found that "natural" as used in the UPA does not always mean "biological."

Delaware in *Chambers v. Chambers*, determined the rights of de facto parent to be on par with those of biological or legal parent for purposes of obligation to support child conceived through in vitro fertilization)

Indiana in *In re Parentage of A.B.* accorded legal co-parent status to same-sex partner of woman who had agreed, with partner, to conceive child through artificial insemination.

Washington in *In re the Parentage of: L.B.; Sue Ellen ("Mian") Carvin v. Page Britain*. The partners actively coparenting L. B., both active in her nurturing and upbringing. The court determined that Carvin, who is neither a biological nor adoptive parent, had standing under Washington common law to petition the courts for a determination of coparentage with regard to L.B. and decided that Carvin does not have standing to assert rights to visitation with L.B. under Washington statute. The equitable power of the courts to adjudicate relationships between children and families is well recognized, and the legislature has evinced no intent to preclude the application of an equitable remedy in such circumstances. Washington's common law recognizes the status of de facto parent and grants standing to petition for the rights and responsibilities that accompany legal parentage.

Massachusetts in *T.F. v. B.L.* rejected parentage by contract and equity power to determine parentage in a case involving a same sex (female) couple. “De Facto Parent” status is created through long term relationship with the child described in *E.N.O. v. L.M.M.*, and *Youmans v. Ramos*.

Pennsylvania in *T.B. v. L.R.M.* determining the application of the doctrine of in “loco parentis” as a method of conferring standing to seek partial custody of a child for purposes of visitation. Evidence established that Appellee assumed a parental status and discharged parental duties with consent of the biological parent Appellee possessed standing to seek visitation.

Appellant and Appellee, both females, engaged in an exclusive, intimate relationship. The

parties shared finances and expenses and jointly purchased a home. The parties decided to have a child. They agreed that Appellant would be impregnated by donor sperm and that Appellee would choose the donor. Appellee cared for Appellant during her pregnancy and attended childbirth classes with her. Appellee was the designated co-parent for purposes of being present in the operating room during the birth of A.M.. The parties lived together with the child, and had a formal (but unsigned) parenting agreement. Appellant named Appellee as guardian of the child in her will. Appellant and Appellee shared day-to-day child rearing responsibilities, including taking A.M. for medical check-ups and other appointments. A.M. referred to Appellee as "Aunt T." and referred to Appellee's sisters as "aunts" as well. Appellee was active, yet deferential to Appellant in making parental decisions. Appellee either cared for A.M. during the day or took her to daycare. When A.M. fell ill, Appellee stayed home to care for her. The parties separated, and initially, Appellee visited A.M. Later Appellant refused Appellee contact with the child.

Pennsylvania in *J.A.L. v. E.P.H.* in a case based on "Loco Parentis" found that E.P.H. and J.A.L. had lived together not merely as roommates or friends, but as a nontraditional family, for many years before the birth of the child. E.P.H.'s own testimony establishes that although she had long wished to have a child, she did not do so until J.A.L. agreed, and thereafter the parties acted together to make arrangements for the artificial inseminations.

To both E.P.H. and J.A.L. the child was to be a member of their nontraditional family, the child of both of them and not merely the offspring of E.P.H. as a single parent. This intention was borne out by the documents executed by the parties before the child's birth and by E.P.H.'s conduct in giving the child J.A.L.'s surname as a middle name on the birth certificate. Clearly, the parties contemplated that J.A.L. would be in a parent-like relationship with the child and took some pains to formalize that relationship to the extent legally possible.

New Jersey in *A.F. v. D.L.P.* acknowledges the concepts of psychological parent, de facto parent, and functional parent although rejecting the establishment of the relationship in this case. the adoption process, including a home study by the adoption agency, as well as court proceedings in China and later in New Jersey, was completed in defendant's name alone. Plaintiff is not mentioned in any record of the adoption. The child was given defendant's family name, and her given names were chosen after defendant's deceased grandparents, following the tradition of defendant's Jewish heritage. The child called plaintiff "Aunt" or "Weestie," the latter being her pronunciation of "Sweetie," which was the name defendant called plaintiff during their happier times. There was no evidence that Plaintiff was in a parental role or that she undertook any legal or financial responsibility for the child, such as naming her in a will, or as the beneficiary of any life insurance, trust, retirement account, or bank account. The parties had been in a lesbian relationship. The standard is applicable to all persons who have willingly, and with the approval of the [biological or adoptive] parent, undertaken the duties of a parent to a child not related by blood or adoption." "The standards to which we have referred will govern all cases in which a third party asserts psychological parent status as a basis for a custody or visitation action regarding the child of a legal parent, with whom the third party has lived in a familial setting." In defining the applicable standard, and noting the absence of any specific statute addressing the issue of a third party's claim to custody or visitation, the court

found in the "statutory scheme dealing with issues of custody and visitation" a legislative intent "that children should not generally be denied continuing contact with parents after the relationship between the parties ends.

The Court also found, that in the definition of "parent" the legislature left open the possibility that individuals other than natural or adoptive parents may qualify as parents, depending on the circumstances. The test is that the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.

New Jersey determined in *V.C. v. M.J.B.* the legal standard applied to a third party's claim to joint custody and visitation of her former domestic partner's biological children, with whom she lived in a familial setting and in respect of whom she claims to have functioned as a psychological parent. Although the case arises in the context of a lesbian couple, the standard we enunciate is applicable to all persons who have willingly, and with the approval of the legal parent, undertaken the duties of a parent to a child not related by blood or adoption

Rhode Island decided in *RUBANO v. DiCENZO* the case of two women who had agreed to become parents of a child. They arranged for one of them to conceive via artificial insemination by an anonymous donor. They raised him for four years while living together as domestic partners in the same household. Later the women separated but the biological mother agreed to allow the nonbiological parent to have informal visits with the child.

Rhode Island law does not require an allegation that he or she is a biological parent of the child. The court may determine whether a de facto parent-child relationship exists.

Maryland courts in *Evans v. Evans* allowed visitation to a third party when it is in the best interest of the child. In *S.F. v. M.D.*, (allowing visitation by a former domestic partner who qualified as a "de facto parent" to a non-biological child). Recognition was given to the Supreme Court's decision in *Troxel* and the possibility that some modification of Maryland's standards respecting visitation by third parties may be necessary, but noted that *Troxel* did not prohibit courts from ordering third-party visitation.

The common law has long recognized alternative non-biological, non-adoptive parental relationships. The statutory law is interpreted in some states as covering the subject completely and leaving no residual common law on the subject (and generally excluding alternative relationships). Some states recognize the existence of surviving elements of the common law as the mechanism to address situations not clearly addressed by statute. Some states recognize equity as a mechanism for addressing the relationships of "de factor parents."

This article is only and overview of the law as of December 2005 and is not intended to be a comprehensive description of the law of "De Factor Parents."