

## The facts about establishing de facto parenthood

It takes a village to raise a child, but does that mean that each member of the village should be granted parental rights? Maryland courts have flip-flopped over the last decade, seemingly deciding, “It depends.”

The term “de facto parent” describes the situation where someone is raising a child who is not biologically or legally their child. In today’s world, it is typically used to describe a stepparent or grandparent, but prior to *Obergefell*, which recognized the right to same-sex marriage, it also often included same-sex parents (and still does).

Many states and neighboring Washington, D.C., have long given some form of legal rights to de facto parents, including custody and visitation.

Maryland’s highest court, however, took the position that de facto parenthood was not a legally recognizable status and nonparents had no standing to seek custody or visitation. This effectively shut the door on many parents, particularly same-sex parents, from obtaining custody or visitation of a child who they had raised.

In 2016 and only after the passage of *Obergefell*, the court reversed itself in *Conover v. Conover* to recognize that “de facto parenthood is a viable means to establish standing to contest custody or visitation.”

Key to the court’s analysis was the fact that this was an LGBTQ+ couple who had planned for this child, and the legal parent had earlier consented to and fostered the relationship between the child and the de facto parent.

In 2018, in *Kpetigo v. Kpetigo*, the Court of Appeals expanded *Conover* to hold stepparents could have legal rights to custody and visitation if they met the factors outlined in *Conover* to establish a de facto parent relationship between them and the minor child.

*Kpetigo* left open the question of whether one or both legally recognized parents needed to consent to the de

facto parent relationship before the de facto parent could seek custody and visitation.

The Maryland Court of Special Appeals and the Court of Appeals recently each took on this question in *E.N. v. T.R.* This case centered on an informal agreement between the natural parents, where the minor children lived primarily with father and his girlfriend.

When the father was incarcerated, the minor children continued to live with father’s girlfriend, subject to access and visitation with mother. Eventually the girlfriend and mother disagreed about access and custody and each filed a complaint for custody. The father submitted a written consent to the girlfriend’s custody and did not enter himself as a party to the action.

The trial court found that the girlfriend was a de facto parent and granted her sole physical custody of the minor children and gave mother weekend visitation. Legal custody was shared jointly between the girlfriend and the mother.

Later, the Court of Special Appeals held that as a matter of first impression, one legal parent can allow a third party to become a de facto parent to children by consent. Further, the court held that a de facto parent has the same constitutional rights as legal parents regarding care and control of a child.

The mother appealed and the Court of Appeals reversed, grappling with “the requirements necessary for establishment of de facto parenthood in Maryland where a child has two legal parents.”

Specifically, the court opined on whether both legal parents had to consent to the de facto parent’s “formation and establishment of a parent-like relationship with the child.”

The court employed a four-factor test to determine when a third party could become a de facto parent to a child with two legal parents. When petitioning for child custody or

visitation with a child, the person seeking de facto parent status must prove the following:

(1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child;

(2) that the petitioner and the child lived together in the same household;

(3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation, and

(4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental nature.

The court’s analysis hinged on the first factor, and the court held that when there are two legal parents, both of them must consent to the creation of a de facto parent. It reasoned that allowing one parent to consent to the creation of a putative parent could result in situations where a child may have three parents vying for custody and visitation—an overwhelming scenario for most children.

Further, if one legal parent’s consent was enough to establish de facto parenthood, the other legal parent may not even have knowledge of such relationship being forged. The court also noted that in situations where children had only one parent, that parent’s consent was enough to establish de facto parenthood for a third-party.

While it may take a village to raise a child, only those villagers that can satisfy the four factors will have standing to seek custody and visitation.

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