



UNIVERSITY
of VIRGINIA

SCHOOL *of* LAW

WHAT ROLE REMAINS FOR *DE FACTO* PARENTHOOD?

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OVERVIEW:

1. Summary of de facto parenthood
2. With nondiscriminatory parentage law, de facto parenthood is redundant in most cases where it seems reasonable to apply it.
3. Where de facto parenthood is distinctive, it violates the constitutional rights of the legal parent.

I. WHAT IS DE FACTO PARENTHOOD

TWO DISTINCT DE FACTO PARENTHOOD DOCTRINES

1. Statutory standing for visitation or custody *as a third party* – 21 states
2. Legal parentage test – 8 states

UNIFORM PARENTAGE ACT § 609

- (1) ... resided with the child as a regular member of the child's household ... ;
- (2) ... engaged in consistent caretaking of the child;
- (3) ... undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
- (4) ... held out the child as the individual's child;
- (5) ... established a bonded and dependent relationship with the child which is parental in nature;
- (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and
- (7) continuing the relationship between the individual and the child is in the best interest of the child.

2. DFP (OFTEN) OVERLAPS EXISTING FORMAL RULES

FOUR REDUNDANT CASES

1. Preconception plans
- 2.
- 3.
- 4.
- 5.

**Preconception agreements,
Marital presumption, or
Infant holding out presumption**

FOUR REDUNDANT CASES

Equitable adoption

1. Preconception plans
2. **Incomplete adoption**
- 3.
- 4.

FOUR REDUNDANT CASES

1. Preconception plans
2. Incomplete adoption
3. **Child entrustment**
- 4.

statutory guardianship or in loco parentis... abandonment (+ de facto custodian statutes)

FOUR REDUNDANT CASES

REDUNDANT CASES

1. Preconception agreements
2. Incomplete adoption
3. Child abandonment
4. **Misrepresentations about parentage**

Equitable estoppel & Residential presumption

FOUR REDUNDANT CASES

LESSONS

1. Preconception plans
2. Incomplete adoption
3. Child entrustment
4. Misrepresentations about parentage

1. Courts adopted strong DFP to avoid discrimination - not necessary for UPA
2. Many of DFP's intuitively convincing cases are covered by existing legal rules
3. Where DFP overlaps existing rules, its parentage standard may conflict with policy behind more formal rules

3. WHERE DPF IS DISTINCTIVE, IT IS
(OFTEN) UNCONSTITUTIONAL AS APPLIED

WHERE DFP IS DISTINCTIVE

Caregivers who helped care for the child while living with the parent and child

Typically, existing parent moves in with relatives or with a stepparent (married or unmarried)



A. PARENTS' CONSTITUTIONAL RIGHT TO CUSTODY AND CONTROL

Plurality opinion, J. O'Connor (+3)

States may give custody to a third party only if they give parent's judgment "special weight"

State Responses to Troxel

Raise the merits standard, either by making petitioner prove

- a. Denying visitation will harm (≈21 states) or
- b. Granting visitation serves CBI by clear and convincing evidence (≈23 states)

Troxel v. Granville (US 2000)

THREE ARGUMENTS TO
RECONCILE DFP WITH RIGHTS
OF THE EXISTING PARENT:

1. State power to define parentage
2. Parental consent
3. Children's best interests

STATE POWER SLIGHT OF HAND

Joanna Grossman, *Constitutional Parentage*, 32
Constitutional Commentary 307, 336 (2017).

“Perhaps the best way to think about de facto parentage is . . . as a dispute in which both women are rights-holding parents based on their intent to parent and actual parenting contributions[,] . . . thus *bypassing the constitutional problem altogether*. If the coparent meets the criteria to be a de facto parent, then the biological mother and the co-parent ‘would both have a ‘fundamental liberty interest’ in the ‘care, custody, and control’ of [the child].’ *Troxel*... ‘**did not address the issue of state law determinations of ‘parents’ and ‘families’ and does not ‘place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family.’** Parentage, in other words, is a threshold determination that precedes the exercise of parental rights.”

CONSENT EQUIVOCATION

“Once a petitioner has made the threshold showing that the natural or legal parent consented to and fostered the parent-like relationship, the State is no longer interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to de facto parents.”

In re BMH (Wash. 2013)

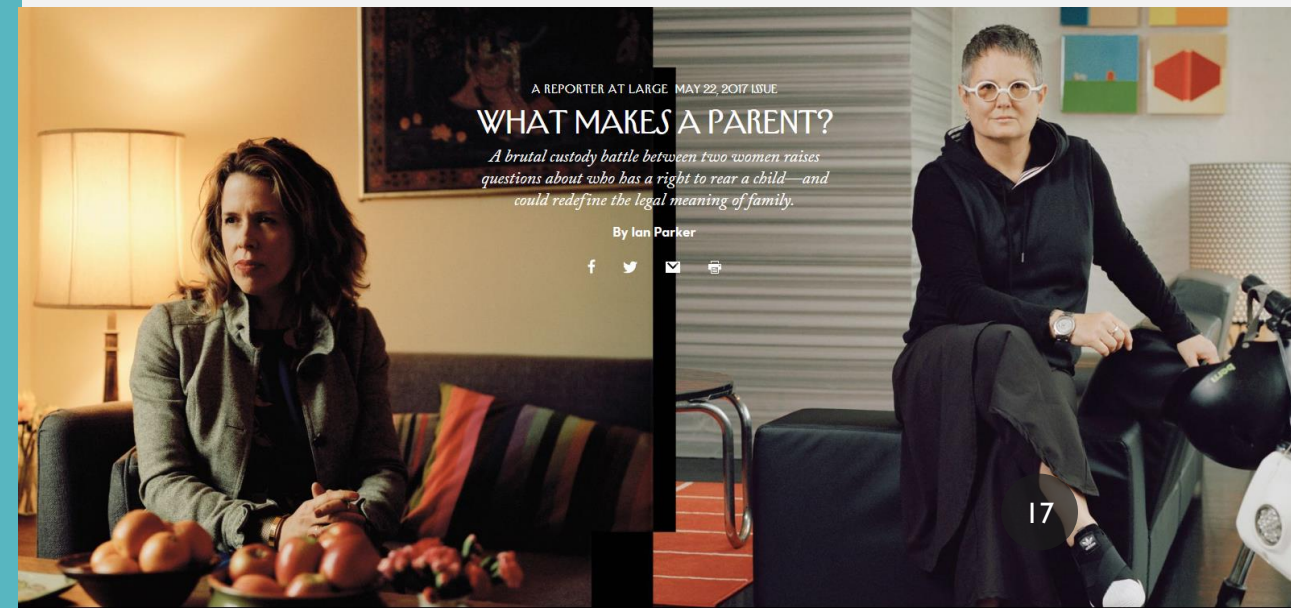
“[B]ecause [the legal parent] permitted [the de facto parent] to share physical custody of Child in addition to the parenting responsibilities and duties with regard to Child, [the legal parent] does not have a protected privacy interest in excluding [the de facto parent] from Child’s life.”

A.A. v. B.B. (Haw. 2016)

Would be sufficient but not present

1. Performative act creating legal rights
2. Subjective assent waiving right to exclude
3. Subjective assent **detrimental reliance**

Always present but not sufficient



CHILDREN'S INTERESTS WITHOUT EVIDENCE

Can a state presume
that ending a child's
relationship with a de
facto parent is ...

contrary to child's best
interests?

- Same dispute as in Troxel; the legislature is demanding parents disprove its assumption that sustaining parent-like relationship benefits children

likely to cause harm to the
child?

- Simply no such evidence
- Not narrowly tailored – given that DFP is redundant in its more convincing cases and still have the option to prove harm under weak DFP as standing rule