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Michelle M. Botek

Indiana University Maurer School of Law, mbotek@indiana.edu

Dorothy R. Fait

Jillian L. DiLaura

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Who is a Parent?

By Dorothy R. Fait,
Jillian L. DiLaura, and
Michelle M. Botek



In the second half of the 20th century, structural changes emerged in the American family. Currently, an estimated 2.9 million children in the United States do not live with either biological parent. As others perform the practical and psychological functions of a parent, the “parent” can no longer be identified by the traditional legal definitions. The U.S. Supreme Court recognized a fundamental liberty interest to parent, as guaranteed by the 14th Amendment. However, the era of the “postmodern family” has blossomed, muddying the conventional criteria for parenthood. State legislatures have responded by enacting statutes

allowing third parties to seek visitation, and in some cases, custody of children.

In *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court examined a case involving grandparents (Troxels) seeking visitation with their grandchildren, following the death of their son (the biological father). The Troxels petitioned under the Washington statute, which did not require a prefatory showing of changed circumstances, after the children’s mother (Granville) reduced visitation with the grandparents. The trial court granted visitation to the grandparents based on a “best interests of the child” standard. Granville appealed. The



U.S. Supreme Court found that the Washington statute was unconstitutional, as it was overly broad and exceeded the bounds of the 14th Amendment's due process protections.

Under *Troxel*, presumptively fit parents should not have the burden of disproving visitation as not in the child's best interests and are entitled to certain protections of their liberty interests. The Court expressly declined to address whether the Due Process clause requires a showing of harm to the children as a prerequisite to visitation, thereby implicitly endorsing visitation statutes which are well-considered and adequately

take into account parental liberty interests.

In the recent Maryland case, *Koshko v. Haining*, 398 Md. 404, (2007), the Maryland Court of Appeals revisited third party custody cases, specifically those filed under Maryland's Grandparent Visitation Statute ("GVS"). *Koshko* involved the Haining grandparents seeking visitation with their grandchildren. The Circuit Court held that the Hainings had successfully rebutted the presumption that the Koshkos were acting in the best interests of the children by limiting visitation. The court ordered visitation. On appeal, the Maryland Court of Special Appeals affirmed.

Although the Court of Appeals in *Koshko* did not find the GVS was unconstitutional, the Court's ruling essentially gutted the statute, leaving third party custody or visitation claimants to negotiate an entirely new playing field. *Koshko* relegated grandparents to third party standing in custody and visitation cases, while also eradicating any distinction between the standards for "custody" versus "visitation."

Despite the vast difference between custody and visitation, under *Koshko*, the same two-part test is used for third parties in both instances (third party first proves natural/biological parent is unfit or exceptional circumstances

exist before applying the best interests analysis). Visitation is considered a "species of custody" that may be a lesser degree but still requires a strict scrutiny standard application. Thus, all third-party visitation cases require the application of an initial threshold test before reaching a best-interests analysis.

Unfortunately, the ruling renders the standard application unduly burdensome for visitation claims. While a third party might seek custody when a biological parent is unfit, it is not logical that in a parental unfitness situation, the third party would merely request visitation. By default, the only available avenue a third party seeking visitation can pursue is that of "exceptional circumstances."

The exact definition of "exceptional circumstances" is provided solely through case law. In *McDermott v. Dougherty*, 385 Md. 320, 374-5 (2005), the Court ruled that in the absence of parental unfitness, "extraordinary circumstances that could result in serious detriment if the child were to remain in the custody of the parents" must exist. A non-exhaustive list was enumerated in *Ross v. Hoffman*, 28 Md. 172 (197), including (1) the length of time the child has been away from the biological parent; (2) the age of the child when care was assumed by the third party; (3) the possible emotional effect on the child of a change of custody; (4) the period of time which elapsed before the parent sought to reclaim the child; (5) the nature and strength of the ties between the child and the third party custodian; (6) the intensity and genuineness of the parent's desire to have the child; and (7) the stability and certainty as to the child's future in the custody of the parent. Other factors have also been considered, including the stability of the home environment, the ongoing family unit, the child's

physical, mental, and emotional needs, the child's past relationship with the putative father, or the child's ability to ascertain genetic information. *Turner v. Wisted*, 327 Md. 106 (1992).

These factors address situations where the third party was already essentially fulfilling the role of a custodial parent or has (or had) actual physical custody and is now seeking legal verification of his or her status. The exceptional circumstances factors as set forth in *Ross* presuppose a discrete set of circumstances that do not fully cover all instances where third party visitation might be appropriate. Specifically, the "exceptional circumstances" test as it currently stands does not account for any type of parent by estoppel or de facto argument.

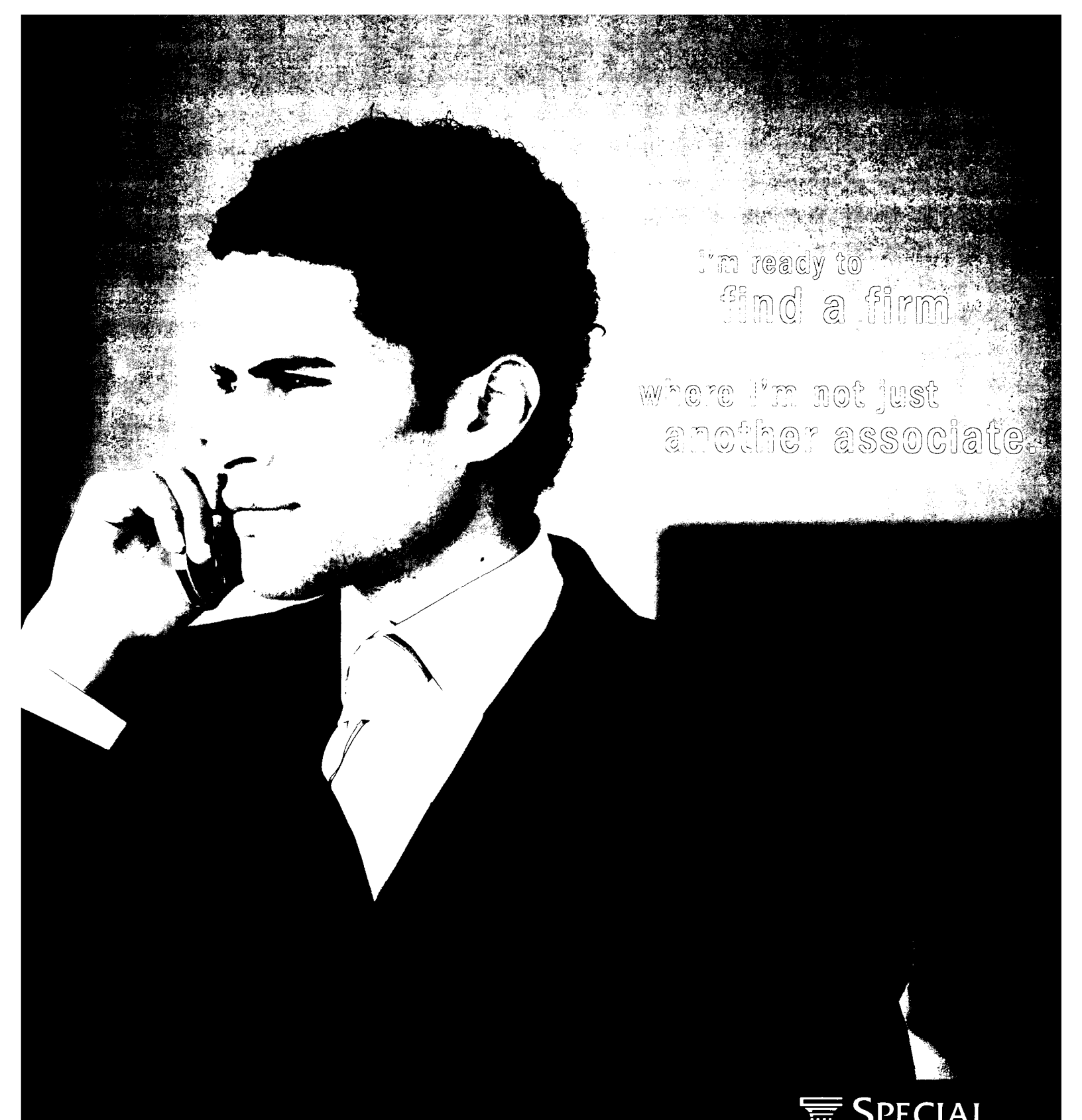
The term "de facto parent" literally means "parent in fact" and is used to describe a party who claims custody or visitation rights based upon the party's relationship with a non-biological, non-adopted child. *Janice M., infra*. The American Law Institute defines de facto parents as "an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (1) lived with the child; (2) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions (a) regularly performed a majority of the caretaking functions for the parent; or (b) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived. *American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.03(1)(c) at 107-108, (2003).

Maryland law frequently cites a test

set out by the Wisconsin Supreme Court in *Holtzman v. Knott* (In re H.S.H-K), 193 Wis. 2d 649 (Wis. 1995) and the New Jersey Supreme Court in *V.C. v. M.J.B.*, 163N.J. 200 (N.J. 2000). Under this test, de facto parents are found by four elements: (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 the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing toward 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 in nature." The person claiming to be a de facto parent bears the burdens of pleading, production of evidence, and persuasion.

Despite this test, however, Maryland courts have not recognized the de facto parent as a legal status in Maryland. According to the Court of Appeals, "short-circuiting the requirement to show unfitness or exceptional circumstances is contrary to Maryland jurisprudence, as articulated in *McDermott* and *Koshko*." *Janice M., infra*.

The Court of Appeals recently decided *Janice M. v. Margaret K.*, 404 Md. 661 (2008), which involved a custody dispute stemming from same-sex partners. The couple was together for approximately eighteen years, during which time Janice M. adopted a child. The parties raised the child together, sharing caretaking duties, for approximately five years before they separated. The Circuit Court relied on the case *S.F. v. M.D.*, 132 Md. App. 99 (2000), which held that if a



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party can meet the test enunciated in *Holtzman*, he or she is a de facto parent and although still a third party for purposes of custody and visitation, is not required to show unfitness or exceptional circumstances when the right to visitation is at issue.

In *Janice M.* however, the Court of Appeals overturned the *S.F.* decision, based in part on the *Koshko* holding that visitation and custody require the same level of scrutiny, and in part on the determination that Maryland law will not recognize a de facto parent status. The Court opined that even if it did recognize de facto parenthood, there is not sufficient reason to find that a de facto parent should be treated differently from other third parties. According to the Court, "where visitation or custody is sought over the objection of the parent, before the best interest of the child test comes into play, the de facto parent must establish that the legal parent is either unfit or that exceptional circumstances exist."

A de facto parent is distinguished from another third party by one significant factor: the biological or adoptive parent consented to, and fostered, the petitioner's parent-like relationship with the child. The current law allows the biological/adoptive parent to unilaterally change her mind, waive her "fundamental rights" banner and shield herself behind it, dictating the terms of all contact between the minor child and the de facto parent, who had been acting as the child's second parent. Once a de facto parent has been created, it can be argued that the biological parent has forfeited his or her right to claim a "fundamental right" to parent.

A de facto parent's standing, however, does not abrogate a natural parent's fundamental right to parent when considering the role of the natural parent in the creation of the de facto parent role. A parent's

constitutional right ceases to be fundamental when the natural parent fosters the parental bond with the third party, deliberately and consciously creating and encouraging a relationship between the third party and the child. To then allow that parent to renege on that promise and relegate the other party, who had in fact been functioning in all conceivable capacities as a full parent for a significant length of time, to just a third party is unfair to the de facto parent and not in the best interests of the child.

An interesting conundrum occurs in the case of the "parent by estoppel," where one parent, typically the father, believes he is the biological parent due to certain affirmative actions of the mother. In *Janice M.*, the Court of Appeals noted that parenthood by estoppel prevents one legal parent from denying a party visitation or custody rights where the legal parent previously has taken affirmative steps or actions to treat that party as the actual parent of his or her child. The Court of Appeals had examined this circumstance in *Monroe v. Monroe*, 329 Md. 758 (1993).

There a mother informed a man that he was the father of her unborn child. The man subsequently married the mother and went on to raise the child as if she were his own. The Court found that given the relationship between the minor child and the father, as well as the other significant factors, exceptional circumstances existed to warrant the rebuttal of the best interest presumption. Despite being a technical third party, the Court has found that the parent by estoppel argument can be sufficient evidence of an exceptional circumstance to warrant overcoming the natural parent presumption.

In theory, the concept of a parent by estoppel is no different from that of a de facto parent. Particularly, both rely

on the actions of the "natural" parent, either through representations that the other party is actually a biological parent or that the other party is a co-parent and an equal member of the family. The articulated distinction between these two fact patterns turns on what the third party actually believes. In *Janice M.*, Margaret K. argued that de facto parenthood status is a subset of exceptional circumstances, citing *Monroe* as precedent.

However, the Court distinguished the two cases by looking at the totality of the circumstances giving rise to the exceptional circumstances in *Monroe*. According to the Court in *Janice M.*, it was not just the psychological bond between the child and the father that led to exceptional circumstances but the fact that the putative father believed he was the biological father from the time of the child's birth, the mother's representations, the father's actions, and the presence of a separation agreement outlining joint custody of the child. However, when comparing the two cases, the only differences appear to be Margaret K.'s knowledge that she was not (and could not be) the biological parent and the existence of a separation agreement (although we note that Margaret K. did have a consistent visitation schedule that was being exercised post-separation).

Although the Court has been extremely careful to specify that the mere presence of a parent by estoppel is not sufficient to warrant a finding of "exceptional circumstances" on its own, the key difference hinges on the third party's belief and knowledge about the genetic status of the child. In focusing solely on this component, the Court overlooks the bond between the child and the third party, the substance of the *Hoffman* factors, and the role of the biological parent in fostering the relationship. In both instances, the biological or adoptive

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parent bears the brunt of the responsibility, either for misrepresenting the circumstances of the conception or through creating and encouraging the relationship between the child and the third party. However, it is the third party who suffers as a result of the parent's actions, and ultimately the child who bears the greatest loss.

There is a place here for equitable estoppel principles to apply. Moreover, Maryland law has allowed for equitable estoppel in other domestic cases. In *Ashley v. Mattingly*, 176 Md. App. 38, 62 (2007), the Court instructed that before ordering genetic testing, the trial court must first consider whether such testing would be in the best interests of the child. The Court also recognized that the State has a vital "interest in ensuring [that] children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern of a child's biological origins." *Id.* at 63.

In *Dep't of Human Resources, Garrett County Dep't of Social Services, Bureau of Support Enforcement, ex rel. Duckworth v. Kamp*, 180 Md. App. 166 (2008), the Maryland Court of Special Appeals followed the *Ashley* ruling and found that not only was genetic testing improper, but that subsequent termination of child support, in certain cases, based on non-paternity was prohibited.

In *Knill v. Knill*, 306 Md. 527, 538-39 (1986), the Court again considered an equitable estoppel claim in a child support case, citing a three part test: (1) the party claiming the benefit of the estoppel was misled to his injury and (2) changed his position for the worse; (3) having believed and relied on the representations of the party sought to be estopped. In other words, there must be voluntary conduct (representation), reliance, and detriment. Although the Court did not find that sufficient deprivation existed

in that case, they opined, significantly, that even though the non-biological father knew the minor child was not his, he treated him as his son and as a member of their family.

According to the Court, "such conduct is consistent with this State's public policy of strengthening the family, the basic unit of civilized society. We encourage spouses to undertake, where feasible, the support, guidance, and rearing of their spouses' children, so long as such conduct does not deprive the children of their right to support from their natural parents."

Certainly in the case of a de facto parent, there is a complete abrogation of the public policy of strengthening the family. Assuming that the non-parent was functioning as an equal, that person contributed to the minor child in a myriad of ways. The non-parent suffers a detriment through the unceremonious stripping of rights by the natural parent. Moreover, the child suffers a detrimental loss of the second parent.

Equitable estoppel arguments are entertained in child support cases, based on the theory that a child has a right to rely on a certain amount of financial support and security. Yet the emotional stability and relationship with the non-parent is accorded less significance under the law. Essentially, we have created a system whereby a non-parent may be estopped from having visitation or seeking custody of a child, despite prior roles or existing relationships, but who may still be obligated to pay child support.

Maryland law also permits adoption by estoppel. In *Geramifar v. Geramifar*, 113 Md. App. 495 (1997), the Court of Special Appeals upheld the doctrine of equitable adoption, whereby an individual contracts to adopt a child and partially performs on the contract but falls short of completing the adoption. A court, applying

equitable principles, may accord to the child the status of a formally adopted child for certain limited purposes. In *Geramifar*, the Court considered a case where a presumptive adoptive father attempted to terminate his obligations to the child, based on the fact that the American adoption had not yet been formalized. The Court of Special Appeals found that the father equitably adopted the child and it was in the child's best interests for the adoptive father to contribute to his support.

The Courts of Maryland find that equitable doctrines apply to some family law instances, but not others. Perhaps the concept of parent by estoppel can be broadened to include parties formerly thought of as "de facto parents." Allowing for these parties' rights, especially with regard to visitation, will not undermine the fundamental right to parent established through *Troxel* and its progeny. Nor will it open the door to unqualified grandparent visitation claims, such as the *Koshko* case. Rather, it will hold the biological or adoptive parent responsible for his or her decision to invite another parent into the life of the child.

The natural parent should not be permitted to use the "fundamental right to parent" as a shield once the "de facto parent" relationship is no longer convenient. In certain cases, the best interests of the child can only be protected through the legal acceptance of the de facto parent or the parent by estoppel. ♪

Ms. Fait, Ms. DiLaura, and Ms. Botek practice family law at Fait, Wise & DiLima, LLP in Rockville, Maryland. They may be reached at dfait@faitwisedilima.com, jdilaura@faitwisedilima.com, or mbotek@faitwisedilima.com.

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