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COMMENT

***DE FACTO* PARENTS IN MARYLAND: WHEN WILL THE LAW RECOGNIZE THEIR RIGHTS?**

By: Michelle E. Kelly¹

I. INTRODUCTION

Rachel and Allison were in a committed same-sex relationship beginning in 1990. Although they never legally married, the couple decided to manifest their love by having a child in 2001. Rachel and Allison both agreed that Rachel would carry the child by way of an anonymous sperm donor. Their child, Kevin, was born on September 3, 2002. Allison was present in the delivery room and even cut the umbilical cord. From the time Kevin was born until the summer of 2009 when Rachel and Allison ended their relationship, the couple equally raised and cared for Kevin, sharing all major and minor decisions concerning him. Kevin refers to Rachel as “mommy” and Allison as “mama.”

After nineteen years of their relationship, Allison moved out of their shared residence, leaving Kevin with Rachel. Directly following their separation, Allison was able to visit with Kevin three days per week. After only two months of this visitation agreement, Rachel refused Allison further contact with Kevin, prompting Allison to seek judicial relief. However, the jurisdiction that both parties live in does not recognize the parent-child relationship that Allison has with Kevin. Therefore, Allison cannot have contact or visitation with Kevin, without Rachel’s approval.

While the above narrative is fictional, it is analogous to many real accounts of *de facto* parents.² The situation presented and the problems that derive from it are issues that many individuals in traditional relationships, as well as in same-sex relationships, have to deal with because of the lack of recognition of *de facto* parenthood.

As of 2008, an individual in Maryland who has raised, cared for, loved and otherwise acted as a parent for a non-biological, non-adopted child does not have custody or visitation rights with that child. A person may not claim

¹ J.D. Candidate, 2016, University of Baltimore School of Law. I would like to thank Professor Barbara Babb for offering her insightful guidance and expertise throughout the drafting process. I would also like to thank Jillian Walton and Nadya Cheatham for their overall commitment and contributions to later drafts of this Comment.

² See generally *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (2008); *S.F. v. M.D.*, 132 Md. App. 99, 751 A.2d 9 (2000) (leading Maryland cases on *de facto* parenthood).

the status of *de facto* parent in Maryland.³ This limiting rule has a great impact on non-biological, non-adoptive parents in the state of Maryland.

Denying individuals who have acted, in all respects, as a child's parent any rights to see or continue to raise the child can become a problem among non-married individuals, specifically in same-sex relationships. This problem occurs when one parent is biologically related to the child with the help of either an egg or sperm donation and that parent's partner is not biologically or legally related to the child, yet the partner has played a significant role in the child's life.⁴ As a result of Maryland failing to recognize *de facto* parenthood, the courts have determined that an individual in that position, known as a third party, must show that the biological parent is either unfit or extraordinary circumstances exist, and then the court must move to the question of whether it is in the best interests of the child for the third party to receive custody or visitation.⁵ This standard means that a third party in a parental role has to abide by the same unfitness or extraordinary circumstances test as does any third party seeking custody or visitation.⁶

The American Law Institute has defined a *de facto* parent or "parent in fact" as,

[A]n individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) 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 child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.⁷

³ *Janice M.*, 404 Md. 661, 948 A.2d 73.

⁴ MD. CODE ANN., FAM. LAW § 5-3B-13(B)(2) (2006) (providing a solution to this problem which allows for an adoption to occur if the petitioner is married to the parent of the child in question and the parent has consented to the adoption.).

⁵ *McDermott v. Dougherty*, 385 Md. 320, 418-19, 869 A.2d 751, 808-09 (2005); *See infra* note 45; *See also Janice M.*, 404 Md. at 693, 948 A.2d at 92.

⁶ *McDermott* 385 Md. 374-75, 869 A.2d at 783 ("[G]enerally, in private actions in which private third parties are attempting to gain custody of children of natural parents over the objection of the natural parents, it is necessary first to prove that the parent is unfit or that there are extraordinary circumstances posing serious detriment to the child, before the court may apply a 'best interest' standard.").

⁷ *Janice M.*, 404 Md. at 681, 948 A.2d at 85 (quoting American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.03(1)(c), at 107-08 (2003)).

This comment examines how other jurisdictions treat *de facto* parents, Maryland's relevant case law and statutes, and advocates for why the Maryland legislature should recognize *de facto* parenthood or a parent-child relationship. Section II of this article discusses the historical development of *de facto* parenthood and third party custody or visitation claims from the Supreme Court of the United States and how it is applied in other jurisdictions, while giving a background on *de facto* parent recognition in Maryland. Section III explains Maryland's decision not to recognize *de facto* parents in depth, while comparing that decision with other jurisdictions' treatment of *de facto* parents. Lastly, Section IV provides possible solutions through the Maryland legislature to individuals who are in a *de facto* parent relationship with a minor child.

II. THE BACKGROUND AND HISTORICAL DEVELOPMENT OF *DE FACTO* PARENTS IN THE UNITED STATES

In Maryland, there is a rebuttable presumption that a child born into a marriage is presumed to be the child of that marriage.⁸ This presumption, known as the marital presumption, is the "common-law rule that a child born to a married woman, assuming her husband was neither impotent nor out of the country at the time of conception, is ... presumed to be legitimate."⁹ Further, this marital presumption "also preserves family stability by 'excluding inquiries into the child's paternity that would be destructive of family integrity and privacy.'"¹⁰ While this marital presumption is historically significant, it is no longer as prominent as it once was in our nation's history due to the increasing trend of decoupling in American culture.¹¹

This notion of child legitimacy has become increasingly harder to follow in the wake of new advances in technology. Prior to Assisted Reproductive Technology,¹² it was much easier to establish the identity of the legal parents

⁸ MD. CODE ANN., FAM. LAW § 5-1027 (West 1997).

⁹ David M. 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, n.32 (2001) (citing Michael H. v. Gerald D., 491 U.S. 110, 117 (1989)).

¹⁰ *Id.*

¹¹ "Today, more than 40% of all births in the United States are to unmarried women, compared to approximately 6% in 1960 and less than 20% in 1980." JANE C. MURPHY & JANA SINGER, *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* 61 (NYU Press 2015).

¹² "In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. They do NOT include treatments in which only sperm are handled...or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs

of a child because there were only two parties involved.¹³ As a result of this new technology, up to five individuals can have a maternity or paternity claim to one child.¹⁴

This relatively recent phenomenon of third parties seeking visitation and custody of a child has resulted in all 50 states adopting some form of a non-parent, or third party, visitation statute.¹⁵ Traditionally, the third parties who wanted visitation rights were the child's grandparents.¹⁶ In recognizing the importance of grandparents being present in the lives of their grandchildren, the United States House of Representatives' Select Committee of Aging and Subcommittee on Human Services held hearings on the issue, in which "House Concurrent Resolution Sixty-seven was adopted, which called for a uniform state act that would provide adequate rights to grandparents to petition for visitation with their grandchildren."¹⁷

From the wave of grandparents seeking visitation rights with their grandchildren, came gay and lesbian *de facto* parents seeking visitation and custody with their non-biological, non-adopted child with their partner.¹⁸ As of 2009, it was estimated that three million adults that are members of the Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) community have a child and that upwards of six million adults and children in the United States have a parent that is a member of the LGBTQ community.¹⁹

retrieved." *Assisted Reproductive Technology*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/art/whatis.html> (last visited Jan. 29, 2015).

¹³ Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U.L. REV. 465, 465-66 (2006). See also Alan H. Boudreau, Professor, NORTHERN ILLINOIS UNIVERSITY COLLEGE OF LAW, 2014 Spring CLE Conference of the American Bar Association Section of Family Law, *Are You My Mommy?*, (May 8, 2014).

¹⁴ *Id.*

¹⁵ Holly M. Davis, Comment, *Non-Parent Visitation Statutes: Was Troxel v. Granville Their Death-Knell?*, 23 WHITTIER L. REV. 721, 736 & n.152 (2002) (listing statutes from every state).

¹⁶ *Id.* at 738 (citing Judith L. Shandling, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 COLUM. L. REV. 118, 118 (1986)). See also Jon DeWitt Gregory, *Whose Child is it, Anyway: The Demise of Family Autonomy and Parental Authority*, 33 FAM. L.Q. 833, 834-35 (1999).

¹⁷ Davis, *supra* note 15, at 739 (citing Ellen C. Segal & Naomi Karp, *Grandparent Visitation Disputes: A Legal Resource Manual I* (1989)).

¹⁸ *Id.*

¹⁹ Gary Gates, *LGBT Parenting in the United States*, The Williams Institute, UCLA SCHOOL OF LAW, 2 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

a. *The Third Party Custody and Visitation Standard from the Supreme Court of the United States*

In 2000, the Supreme Court held a Washington visitation statute that stated “any person” could petition the court for visitation²⁰ was unconstitutional because it infringed upon the fundamental rights of the fit parent to raise his or her children.²¹ In *Troxel v. Granville*, the paternal grandparents filed a petition against Tommie Granville, the biological mother, to obtain visitation rights, which the Washington Superior Court granted.²² The Washington Court of Appeals reversed the visitation order, and the Washington Supreme Court affirmed the intermediate court’s decision.²³ The United States Supreme Court granted certiorari and affirmed the judgment.²⁴

The Court stated that a parent’s fundamental liberty interest is to be able to rear their children in whatever way the parent sees fit.²⁵ In light of the presumption that a fit parent will act in the best interests of his or her child, the Washington Superior Court erred when it did not give Tommie Granville’s decision to restrict visitation with the paternal grandparents any special weight.²⁶ Thus, a fit parent has discretion with how he or she chooses to raise his or her children, which limits the ability of third parties to seek visitation rights.²⁷ While this case does not have a direct relationship to the rights of *de facto* parents, it is a significant case in the overall scheme of third party rights to custody or visitation of a minor child.

b. *Extraordinary Circumstances Standard for Third Party Visitation*

A non-biological third party seeking an interest in custody or visitation must show that the natural parent is unfit or that extraordinary circumstances exist, and that the custody or visitation is in the best interests of the child so the child may have a relationship with the third party.²⁸ The court must first determine whether the natural parent is unfit or if exceptional

²⁰ *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

²¹ *Id.*

²² *Id.* at 61.

²³ *Id.* at 62-63.

²⁴ *Id.* at 64.

²⁵ *Id.* at 65.

²⁶ *Troxel*, 530 U.S. at 58 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

²⁷ See generally *Troxel*, 530 U.S. 57 (holding that the Washington Grandparent Statute violated a parent’s fundamental liberty interest in how they raise and care for their children).

²⁸ *McDermott*, 385 Md. at 374, 869 A.2d at 782-83 (holding that the father’s occupation, which required him to be away from his son for months at a time, did not constitute exceptional circumstances for the grandparents to be awarded custody of the minor child.)

circumstances²⁹ exist prior to the application of the best interests of the child test.³⁰ This standard, taken from *Troxel*, requires that all third parties must meet in Maryland in order to have custody of or visitation with a minor child.

c. Recognition of De Facto Parent Status in Other Jurisdictions

Maryland would benefit greatly by adopting a *de facto* parent statute similar to those of other jurisdictions. One *de facto* parent statute that Maryland should review is that of Washington, D.C. The D.C. statute addresses the requirements for a *de facto* parent in two different but equally important ways.³¹ The first way an individual would be considered a *de facto* parent under the D.C. statute is whether that person has been present throughout the child's entire life.³² The second way is if the individual has come into the child's life at a later time but has still had a significant impact

²⁹ Exceptional circumstances can be determined by "the length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of the ties between the child and the third party custodian, the intensity and genuineness of the parent's desire to have the child, the stability and certainty as to the child's future in the custody of the parent." *Janice M.*, 404 Md. at 677, 948 A.2d at 82 (citing *McDermott*, 385 Md. at 419, 869 A.2d at 806 (quoting *Ross v. Hoffman*, 280 Md. 172, 191 (1977))).

³⁰ *Id.*

³¹ DC CODE § 16-831.01 (2009). The Washington, D.C. legislature has defined a *de facto* parent as an individual:

(A) Who:

- (i) Lived with the child in the same household at the time of the child's birth or adoption by the child's parent;
- (ii) Has taken on full and permanent responsibilities as the child's parent; and
- (iii) 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; or

(B) Who:

- (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
- (ii) Has 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 third party;
- (iii) Has taken on full and permanent responsibilities as the child's parent; and
- (iv) 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. *Id.*

³² *Id.*

on the child.³³ Both definitions of a *de facto* parent take into consideration different ways of becoming a child's *de facto* parent without holding one alternative as superior to the other. Overall, there are thirty jurisdictions in the United States that have some recognition of *de facto* parents in custody or visitation matters.³⁴

d. The Destruction of De Facto Parent Status in Maryland

Prior to *Janice M. v. Margaret K.* in 2008, Maryland recognized the importance of a *de facto* parent in a child's life. In 2000, the Court of Special Appeals of Maryland held that a *de facto* parent did not need to overcome the presumption in favor of the biological parent in showing parental unfitness or exceptional circumstances, but did need to show that visitation was in the best interest of the child.³⁵ In *S.F. v. M.D.*, a lesbian couple began their relationship in 1990.³⁶ In 1994, the couple welcomed a child by artificial insemination.³⁷ S.F. and M.D. jointly participated in raising their child until they ended their relationship in September of 1997, at which point M.D. moved out of their home, taking the child with her but agreeing to liberal visitation with S.F.³⁸ After the child began exhibiting behavioral problems, M.D. cut off all visitation with S.F. and refused S.F. visits with the child.³⁹ The Circuit Court for Montgomery County eventually held in March of 1999, after a *pendente lite* hearing that S.F. "served the fundamental role of a parent" to the child the first few years of the child's life but found that visitation with S.F. was not in the best interest of the child due to the child's behavioral issues.⁴⁰ The Court of Special Appeals of Maryland affirmed this decision.⁴¹ Although the court did not award S.F. visitation to the child because of the child's behavioral problems, the court did recognize the status of *de facto* parents and found that S.F. was the *de facto* parent to the child.⁴² This recognition of *de facto* parents in Maryland

³³ *Id.*

³⁴ *De Facto Parenting Statutes*, FAMILY EQUAL. COUNCIL, http://www.familyequality.org/get_informed/equality_maps/de_facto_parenting_statutes/ (last updated Feb. 2, 2016); *See, e.g.*, Minn. Stat. §257C.08, subd. 4 ("parent and child relationship"); Or. Rev. Stat. §109.119 ("parent-child relationship"); Mont. Code §40-4-211(4)(b)(6) ("parent-child relationship"); Nev. Rev. Stat. §125C.050(2) ("meaningful relationship").

³⁵ *S.F.*, 132 Md. App. 99 at 114, 751 A.2d 9 at 16-17.

³⁶ *Id.* at 102, 751 A.2d at 10.

³⁷ *Id.*

³⁸ *Id.* at 103, 751 A.2d at 11.

³⁹ *Id.*

⁴⁰ *S.F.*, 132 Md. App. at 104-06, 751 A.2d at 16-17.

⁴¹ *Id.* at 118, 751 A.2d at 19.

⁴² *Id.* at 114, 751 A.2d at 16-17.

came to a halt in 2008, when the Court of Appeals of Maryland decided *Janice M. v. Margaret K.*⁴³

III. *JANICE M. V. MARGARET K.: AN IN-DEPTH LOOK AT THE PROBLEMS FACING DE FACTO PARENTS IN MARYLAND*

In *Janice M. v. Margaret K.*, the Court of Appeals of Maryland ruled that *de facto* parents are not recognized under the law.⁴⁴ Therefore, every person who may be considered a *de facto* parent in another jurisdiction is only considered a third party in the state of Maryland.⁴⁵ The court concluded that when there is a dispute between a fit parent and a third party, “both parties do not begin on equal footing in respect to care, custody, and control of the children”⁴⁶ because of the parent’s fundamental right.⁴⁷ Janice M. claimed that the circuit court erred in granting visitation to Margaret K. because the court found that she was a fit parent and that no extraordinary circumstances existed.⁴⁸ Margaret K.’s argument rested on the fact that a person who is found to be a *de facto* parent by the courts thereby has satisfied the existence of exceptional circumstances, which is necessary to grant visitation or custody.⁴⁹

Janice M. and Margaret K. began their relationship in 1986, and after thirteen years of being in a relationship, Janice M. legally adopted Maya from India.⁵⁰ In their shared household, Janice M. and Margaret K. divided their childcare responsibilities until 2004, when Margaret K. moved out of the family home.⁵¹ Janice M. started putting limitations on Margaret K.’s visitation with Maya, which eventually led to Janice M. denying Margaret K. all visitation rights.⁵² After several years of litigation, Margaret K. ultimately lost all custody and visitation rights to Maya.⁵³

⁴³ See generally *Janice M.*, 404 Md. 661, 948 A.2d 73.

⁴⁴ *Id.* at 695, 948 A.2d at 93.

⁴⁵ *Id.*

⁴⁶ *Id.* at 675, 948 A.2d at 81 (citing *McDermott*, 353 Md. at 743, 869 A.2d at 770.)

⁴⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), *Troxel*, 530 U.S. 57.

⁴⁸ *Janice M.*, 404 Md. at 682, 948 A.2d at 85.

⁴⁹ *Id.*

⁵⁰ *Id.* at 665, 948 A.2d at 75.

⁵¹ *Id.* at 666, 948 A.2d at 76.

⁵² *Id.*

⁵³ *Id.* The Circuit Court for Baltimore County ruled that Margaret was a *de facto* parent to Maya and was entitled to visitation. The Court of Special Appeals of Maryland affirmed the circuit court’s decision. The Court of Appeals of Maryland reversed the intermediate court’s decision, saying that *de facto* parent status is not recognized in the state; therefore, Margaret is not entitled to custody or visitation of Maya, unless she was successful in proving that Janice M. was unfit or that extraordinary circumstances existed. See *Janice M.*, 404 Md. at 666, 948 A.2d at 76.

In 2005, the Circuit Court for Baltimore County awarded Margaret K., the non-biological, non-adoptive parent of Maya, visitation with Maya because she was viewed, in all regards, as Maya's parent, acting as her *de facto* parent.⁵⁴ The court found that Margaret K.'s visitation was in Maya's best interests.⁵⁵ The circuit court relied on *S.F. v. M.D.*,⁵⁶ in which there were four factors to prove that Margaret K. was a *de facto* parent to Maya.⁵⁷ The factors require 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 importantly, a parent-child bond must be forged."⁵⁸ After establishing that all four factors were met, the court stated that it would be "detrimental [to Maya] that [visitation] be cut off totally."⁵⁹ On appeal, the Court of Special Appeals of Maryland affirmed the circuit court's decision to grant Margaret K. visitation.⁶⁰

Janice M. appealed the decision to the Court of Appeals of Maryland, which held that Margaret K. is not a *de facto* parent; therefore, she is not entitled to custody or visitation.⁶¹ The court went further to expressly deny *de facto* parental rights in Maryland.⁶² The court of appeals addressed the fact that a visitation claim is a "species of custody"⁶³ and therefore receives the same deference as does a petition for custody.⁶⁴

The essence of the court's decision rested on the notion that there is a presumption in the law that a parent will act in the best interest of his or her child, so the third party seeking visitation or custody has the burden of showing exceptional circumstances for that individual to have a claim.⁶⁵ The assessment of whether exceptional circumstances exists relies upon a number of factors that the court may consider, such as the child's age when the third party began caring for the child, or the psychological bond that the child may have with the third party.⁶⁶ The court noted, however, that before a trial court can assess the best interest of the child question, it must first find that

⁵⁴ *Id.* at 669, 948 A.2d at 77.

⁵⁵ *Id.*

⁵⁶ *S.F.*, 132 Md. App. at 111.

⁵⁷ *Janice M. v. Margaret K.*, 171 Md. App. 528, 536-37, 910 A.2d 1145, 1150-51 (2006), *rev'd*, 404 Md. 661, 948 A.2d 73 (2008) (citing *S.F.*, 132 Md. App. at 111).

⁵⁸ *Id.* at 537.

⁵⁹ *Janice M.*, 404 Md. at 669, 948 A.2d at 77.

⁶⁰ *Id.*

⁶¹ *See generally Janice M.*, 404 Md. 661, 948 A.2d 73; *see infra* Section III.

⁶² *Janice M.*, 404 Md. at 685.

⁶³ *Id.* at 678, 948 A.2d at 83 (citing *Koshko v. Haining*, 398 Md. 404, 429, 921 A.2d 171, 185 (2007)).

⁶⁴ *Id.*

⁶⁵ *McDermott*, 385 Md. at 424-25, 869 A.2d at 812-13; *See also Troxel*, 530 U.S. 57.

⁶⁶ *See S.F.*, 132 Md. App. at 102, 751 A.2d at 10.

the legal parent is unfit or that extraordinary circumstances exist.⁶⁷ Thus, Margaret K.'s active involvement in Maya's life from the time Maya came to the United States in 1999 until 2004, when Janice M. and Margaret K. separated, had no bearing on the Court of Appeals of Maryland.⁶⁸

a. *The Dissenting Opinion to Janice M. v. Margaret K.*

In the dissent, Judge Raker stated that a *de facto* parent should be viewed differently than a third party.⁶⁹ Judge Raker would recognize the rights of *de facto* parents as they should stand in "legal parity with a legal parent, whether biological, adoptive, or otherwise," and would hold that an individual, who has established that he or she is a *de facto* parent, would not be required to show that the natural parent is unfit or extraordinary circumstances exist, but only that the visitation would be in the best interests of the child.⁷⁰ She argued that the best interests of the child standard should control the custody or visitation determination.⁷¹ Judge Raker noted that a *de facto* parent statute can be applied too broadly by asserting that an individual who has satisfied the requirements of a *de facto* parent has already jumped the hurdle and "overcome the presumption in favor of a natural parent's rights" proving that he or she is a parent to the child.⁷²

b. *Margaret K. Did Not Legally Adopt Maya*

Janice M. was the only legally adoptive parent of Maya, while Margaret K. was fulfilling the role of Maya's other parent.⁷³ A criticism to *Janice M.*, and largely to the notion that the two parties could have avoided this lawsuit, is that Margaret K. could have legally adopted Maya as the second parent along with Janice M.⁷⁴ It is true that Margaret K. and Janice M. could have gone through with the second adoption, but they chose not to because they had plans to continue growing their family, and the adoption agency advised them that they would likely not be able to adopt another child from a foreign

⁶⁷ *Janice M.*, 404 Md. at 676, 948 A.2d at 773.

⁶⁸ See generally *Janice M.*, 404 Md. 661, 948 A.2d 73.

⁶⁹ *Id.* at 696, 948 A.2d at 94.

⁷⁰ *Id.* at 709, 948 A.2d at 83.

⁷¹ *Id.* at 696-97, 948 A.2d at 94.

⁷² *Id.* at 704, 948 A.2d at 98.

⁷³ *Id.* at 666, 948 A.2d at 79.

⁷⁴ *Family Law - De Facto Parent Bill: Hearing on SB402 and HB0577 Before the Senate and House Comm.* 2015 Leg. Regular Session (2015) (question by Senator Norman: 2:16:36) <http://mgahouse.maryland.gov/mga/play/cf7d05ef17a84b8a98386dc72587c709/?catalog/03e481c7-8a42-4438-a7da93ff74bdaa4c&playfrom=7863750>.

country if they went through with a second adoption.⁷⁵ Therefore, Margaret K. and Janice M. made the decision to have Janice M. as the sole legal adoptive parent of Maya with the understanding that they would continue to grow their family through more foreign adoptions.⁷⁶

c. Maryland Law in Comparison to Other Jurisdictions that Recognize De Facto Parents

While Maryland has not recognized *de facto* parenthood since 2008, other jurisdictions have become increasingly more accepting of *de facto* parents.⁷⁷ With thirty jurisdictions recognizing *de facto* parents or allowing a limited recognition of *de facto* parents,⁷⁸ Maryland has the opportunity to scrutinize these jurisdictions' statutes in order to craft a working statute for Maryland. The jurisdictions that do recognize *de facto* parenthood are not limited to one specific region, as they stretch from Maine to New Mexico to Washington.⁷⁹

In *C.E.W. v. D.E.W.*, the Supreme Judicial Court of Maine determined that a *de facto* parent should be awarded parental rights and responsibilities to the child in question and that it is in the best interests of the child for the *de facto* parent to have those rights.⁸⁰ In this case, C.E.W. and D.E.W. were lesbian partners who parented a child equally; however, D.E.W. was the biological mother.⁸¹ After the child's birth, C.E.W. and D.E.W. established a parenting agreement, in which each party was to have equal parental roles and rights to their child.⁸² Additionally, D.E.W. conceded that C.E.W. was the child's *de facto* parent.⁸³

⁷⁵ *Id.* According to Jer Welter, Deputy Director and Managing Attorney of FreeState Legal, which is Maryland's provider of direct pro-bono legal services for the low-income lesbian, gay, bisexual, and transgender community, there are two main reasons for why one party, specifically the *de facto* parent, does not adopt. The two reasons are that adoption is not something an individual thinks about when times are happy with the legally adoptive parent and child, and that "adoption is difficult and expensive in this state." *Id.* at 2:43:30.

⁷⁶ Brief for Appellee/Cross-Appellant at 4, *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (2008) (No. 122).

⁷⁷ See, e.g., 2015 Maine Laws, LD 1017, subch. 5 (127th Leg., 1st Reg. Sess. 2015) (eff. July 1, 2016); *In re Guardianship of Victoria R.*, 145 N.M. 500 (2008) n. 6 (recognizing that Petitioners would be considered psychological parents); *In re Parentage of L.B.*, 155 Wn.2d 679 (2005) (adopting the four-part test in determining *de facto* parentage).

⁷⁸ See *supra* note 33.

⁷⁹ See *supra* note 77.

⁸⁰ *C.E.W. v. D.E.W.*, 845 A.2d 1146 (2004).

⁸¹ *Id.* at 1147.

⁸² *Id.*

⁸³ *Id.*

In its opinion, the court stated that, “the child, now age nine, has bonded with C.E.W. as his parent.”⁸⁴ This statement shows that this court took the child’s age into consideration when determining if C.E.W. was a *de facto* parent. While the court did not confront the question of the standard for determining *de facto* parenthood, it did state that this determination “must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.”⁸⁵ The facts of *C.E.W. v. D.E.W.* are analogous to the facts of *Janice M. v. Margaret K.*, with the only disparity being different jurisdictions.

Another case with facts similar to *Janice M.* is *In re Parentage of L.B.*,⁸⁶ which established *de facto* parentage in the state of Washington.⁸⁷ In this case, a lesbian couple parented a minor child, L.B., to whom one of the women is biologically related through artificial insemination.⁸⁸ The couple equally cared for L.B. and maintained one residence for the first six years of L.B.’s life.⁸⁹ After the couple’s separation, the biological mother terminated contact between her former partner and L.B.⁹⁰

As a result of the biological parent terminating contact with the non-biological parent, the non-biological parent sought to be declared as a *de facto* parent and argued that she was entitled to visitation.⁹¹ Ultimately, the Supreme Court of Washington held that the claim of *de facto* parentage existed.⁹² The court adopted a four-part test to determine if an individual is entitled to be recognized as a *de facto* parent.⁹³

In the instant case, the child in question, Maya, resided with Margaret K. for the first four and one-half years of her life.⁹⁴ During the four and one-half years, Janice M. and Margaret K. shared the responsibilities of caring for Maya, such as “preparing Maya’s food, changing her diapers, bathing her,

⁸⁴ *Id.*

⁸⁵ *Id.* at 1152.

⁸⁶ *In re Parentage of L.B.*, 155 Wn.2d 679 (2005).

⁸⁷ *Id.* The terms “parentage” and “parenthood” can be used interchangeably.

⁸⁸ *Id.* at 683-84.

⁸⁹ *Id.* at 684.

⁹⁰ *Id.* at 684-85.

⁹¹ *Id.* at 685.

⁹² *In re Parentage of L.B.*, 155 Wn.2d at 707.

⁹³ The four-part test to determine *de facto* parentage is: (1) whether the natural or legal parent consented to and fostered the parent-like relationship, (2) whether the petitioner and the child lived together in the same household, (3) whether the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) whether 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. *Id.* at 708.

⁹⁴ *Janice M.*, 404 Md. at 666, 948 A.2d at 76.

handling her schooling, addressing her healthcare needs, and performing most other caretaking duties.”⁹⁵ The facts of *Janice M.* are very similar to those of *C.E.W. v. D.E.W.* and *In re Parentage of L.B.*. Nonetheless, the Court of Appeals of Maryland, unlike courts in Maine and Washington, did not hold these facts to be persuasive in the establishment of *de facto* parenthood.⁹⁶

Additionally, *Holtzman v. Knott (In re H.S.H.-K.)* set forth a four-part test for how to determine if a *de facto* parent-child relationship exists.⁹⁷ This case demonstrates how difficult it is for an individual to be found a *de facto* parent by the courts. The facts in this case are similar to those of the previous two cases in which lesbian partners maintained a household and provided equal care to their child, to whom only one of the women was biologically related.⁹⁸

The court in *In re H.S.H.-K.* held that the petitioner’s custody claim to the child could not be supported because she failed to raise a triable issue to which a custody award could be granted.⁹⁹ The court stated that a circuit court could determine if she was entitled to visitation if it was in the best interests of the child and if each factor in the four-part test had been satisfied.¹⁰⁰ Thus, this outcome demonstrates the burden that one must overcome to prove that a parent-child relationship exists in order to be granted custody or visitation, furthering Judge Raker’s dissent in *Janice M. v. Margaret K* that a statute can be narrowly tailored to only benefit a true *de facto* parent.¹⁰¹

⁹⁵ *Id.*

⁹⁶ See generally *Janice M.*, 404 Md. 661, 948 A.2d 73.

⁹⁷ *Holtzman v. Knott (In re H.S.H.-K.)*, 193 Wis. 2d 649 (1995). The four part test requires “(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 in nature.” *Id.* at 658-59.

⁹⁸ *Id.* at 660-61.

⁹⁹ See generally *In re H.S.H.-K.*, 193 Wis. 2d 649 (holding, in part, that the circuit court’s conclusion that a triable issue was not raised regarding the biological parent’s fitness or compelling circumstances that would justify a hearing on custody).

¹⁰⁰ *Id.* at 699.

¹⁰¹ *Supra* notes 69-72.

d. *Justifications of a De Facto Parent Statute*

The justification for having a *de facto* parent statute in Maryland is that it would allow for individuals who are not related biologically or by adoption but who have acted in a parental role with the child to have visitation and custody rights to that child.¹⁰² Also, a *de facto* parent statute would protect the child's interest in maintaining a relationship with a person with whom he or she has a strong parental bond, despite there being no biological or adoptive relationship.¹⁰³ A *de facto* parent has a much stronger claim to custody or visitation because that person is not merely a third-party, like a grandparent.¹⁰⁴ *De facto* parents are treated as a parent – as a person who has cared for the child in a parental capacity.¹⁰⁵ Parental capacity can be defined as meeting the child's health, developmental, and emotional needs, providing consistent care and putting the child's needs first.¹⁰⁶ Further, only those individuals who “developed parent-child relationships with the consent and support of the children's legal parents could have become *de facto* parents.”¹⁰⁷

Additionally, as Justice Kennedy stated in his dissent in *Troxel*, “a fit parent's right vis-à-vis a complete stranger is one thing; his or her right vis-à-vis another parent or a *de facto* parent may be another.”¹⁰⁸ Justice Kennedy acknowledged that the traditional nuclear family is no longer the norm, especially now that the Supreme Court has decided that same-sex marriage is legal.¹⁰⁹ The change in the traditional family prompted Justice Kennedy to point out that many cases will arise where a third party, who has acted in a parental capacity for a “significant time” and has developed a relationship with a child, is not subject to “absolute parental veto.”¹¹⁰ Justice Kennedy stated that the best interests of the child standard should be applied in

¹⁰² Rachel Simmons, *Legislating After Janice M.: The Constitutionality of Recognizing De Facto Parenthood in Maryland*, 70 MD. L. REV. 525, 526-28 (2011).

¹⁰³ *Id.* at 554.

¹⁰⁴ *Id.* at 560 n. 300 (citing *Koshko v. Haining*, 398 Md. at 441-42, 921 A.2d at 192-93 (2007) (In Maryland, a grandparent must satisfy the same standard as a third party would for custody or visitation of their grandchild.)).

¹⁰⁵ *See supra* note 74.

¹⁰⁶ *Assessing Parenting Capacity: A NSPCC Factsheet*, 2014 NSPCC, <https://www.nspcc.org.uk/globalassets/documents/information-service/factsheet-assessing-parenting-capacity.pdf>.

¹⁰⁷ Simmons, *supra* note 100, at 554 (citation omitted).

¹⁰⁸ *Troxel*, 530 U.S. at 100-01 (Kennedy, J., dissenting).

¹⁰⁹ *Id.* at 98.

¹¹⁰ *Id.* An “absolute parental veto” refers to the biological parent's ability to prohibit third parties from forming or maintaining a relationship with the child(ren) in question.

situations like these, because cutting off a child's substantial relationship with a *de facto* parent could harm that child, as well as the *de facto* parent.¹¹¹

e. Criticisms of a De Facto Parent Statute

The major criticism for establishing a *de facto* parent statute is that such a statute would allow for any party to make a *de facto* parent claim.¹¹² The argument is that a *de facto* parent statute would increase the number of classes of adults who would "claim a status equivalent to [that] accorded to legal parents."¹¹³ In addition, the criticism laid out against same-sex couples that raise a child together could be applied to a step-parent, boyfriend or girlfriend, or ex-spouse of the child's parent.¹¹⁴ This argument stems from the fact that there is both a high divorce rate and a high cohabitation rate in the United States, which could increase the numbers of persons who might seek parental rights when they otherwise would not be entitled to those rights.¹¹⁵

Another criticism of a *de facto* parent statute is that only one biological or adoptive parent has to allow another person, wholly unrelated to the child, to establish a *de facto* parent relationship with that child.¹¹⁶ This can result in the other biological or adoptive parent being completely unaware of this *de facto* relationship that has been fostered by the other biological parent.¹¹⁷ This argument, specifically in reference to the American Law Institute's definition of *de facto* parent,¹¹⁸ stands to say, "the ALI proposal requires the consent of only one natural parent, and the consent is not to the *de facto* relationship itself. Rather, the consent is only to the precursor facts that the would-be *de facto* parent may later use in their petition for that status from a court."¹¹⁹ This could mean, for example, that a legal parent would not only have to share custody or visitation with the ex-partner or spouse, but he or she would also have to share custody with that ex-partner's or ex-spouse's current partner.¹²⁰

Although these criticisms are valid, it is possible for the legislature to avoid such dilemmas by drafting a narrower *de facto* parent statute, allowing

¹¹¹ *Id.* at 99.

¹¹² William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263, 266 (2010).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 265.

¹¹⁷ Duncan, *supra* note 110, at 265.

¹¹⁸ See *supra* note 7.

¹¹⁹ 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, 1185-86 (2001).

¹²⁰ Duncan, *supra* note 110, at 265.

only those individuals who have truly been in a *de facto* parent relationship to have a custody or visitation claim in court.

IV. TIMELY SOLUTIONS TO THE LACK OF RECOGNITION OF *DE FACTO* PARENTS

During the 2015 Regular Session of the Maryland General Assembly the “Family Law – De Facto Parent” Bill was proposed in the Senate by Senator Madaleno and cross-filed in the House.¹²¹ The Bill received an unfavorable report by the judiciary and was subsequently withdrawn by the Bill’s sponsors.¹²²

¹²¹ Family Law – De Facto Parent, S.R. 402, MARYLAND GENERAL ASSEMBLY (2015), <http://mgaleg.maryland.gov/2015RS/bills/sb/sb0402f.pdf>; House Bill 0577, Family Law – De Facto Parent, H.R. 0577, 2015 Sess. (M.D. 2015), <http://mgaleg.maryland.gov/2015RS/bills/hb/hb0577f.pdf>. The bill was introduced on February 6, 2015 and first read on February 12, 2015. *Id.* The House Bill was sponsored by Delegate Valentino-Smith. *Id.*

¹²² The Bill stated: “(A) In this section, “de facto parent” means an individual, including a current or former spouse of a parent of a child, who: (1) Over a substantial period of time has: (I) Been treated as a parent by the child; (II) Formed a meaningful parental relationship with the child; and (III) Lived with the child; (2) Has undertaken full and permanent responsibilities as a parent of the child; and (3) Has held the individual out as a parent of the child with the agreement of a parent of the child, which may be expressed or implied from the circumstances and conduct of the parties. (B) (1) In a judicial proceeding in which the parentage of a child is at issue, including a judicial proceeding concerning child custody, visitation, or support, the court may determine whether an individual is a de facto parent of the child on request of the individual, the child, or a parent of the child. (2) An individual who asserts that the individual is a de facto parent of a child may initiate or intervene in a judicial proceeding in which the parentage of the child is at issue by filing a verified pleading alleging prima facie evidence that the individual is a de facto parent of the child. (3) In a judicial proceeding in which the parentage of a child is at issue and a request has been made for a determination of whether an individual is a de facto parent of the child, the court shall determine in a written finding on the record whether the individual is a de facto parent of the child: (I) On the basis of a preponderance of the evidence; (II) With the burden of proof placed on the party asserting that the individual is a de facto parent of the child; and (III) At the earliest practicable opportunity in the proceeding. (C) (1) An individual who is judicially determined to be a de facto parent of a child under this section shall have all the duties, rights, and obligations of a parent of the child, including the duties, rights, and obligations described in § 5–203(B) of this subtitle, unless the court determines by clear and convincing evidence that a continuing parent-child relationship between the de facto parent and the child is not in the best interest of the child. (2) In a judicial proceeding in which a parent of a child and an individual who has been judicially determined to be a de facto parent of the child dispute the allocation of child custody and visitation, the court shall resolve the dispute on the basis of the best interest of the child.”

Although the Bill did not go forward in the 2015 General Assembly Session, there is another solution to provide *de facto* parents and third parties with rights by enacting a statute that defines a “parent-child relationship.” The Commission on Child Custody Decision-Making’s final report submitted to the Governor and General Assembly provides such a definition. The December, 2014 final report defines a parent-child relationship as a relationship that:

- 1) exists or did exist preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline; 2) continues or existed on a day-to-day basis through interaction, companionship, and mutuality that fulfill the child’s psychological need for a parent as well as the child’s physical needs; and 3) meets or met the child’s need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home.¹²³

This Final Report has the potential to provide *de facto* parents in Maryland with the opportunity to establish the existence of a parent-child relationship in a court setting. While this definition is not law, it permits *de facto* parents to argue that a parent-child relationship exists and receive recognition as the child’s parent.

Colorado and several other jurisdictions have parent-child relationship statutes.¹²⁴ Colorado has several statutes that recognize a parent-child

¹²³ DEP’T OF FAMILY ADMIN., COMM’N ON CHILD CUSTODY DECISION-MAKING 17 (2014), available at <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/020000/020737/unrestricted/20150076e.pdf>.

¹²⁴ Another jurisdiction that has a parent-child relationship statute is Oregon. Oregon’s statute defines a “child-parent relationship” as: “(a) “Child-parent relationship” means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child’s psychological needs for a parent as well as the child’s physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.” OR. REV. STAT. § 109.119(10)(a).

relationship, both traditional and non-traditional, however, the state's most significant statute that provides guidelines for satisfying the *de facto* parent status appears in the Probate, Trusts, and Fiduciaries Title.¹²⁵ The Colorado statute has similar language to the final report in its definition of the role that an individual has played in a child's life. Many other states have recognized a parent-child relationship through their legislature or case law that allows for a non-biological, non-adoptive parent to have a legally established relationship with a child.

V. CONCLUSION

The *Janice M. v. Margaret K.* decision had a chilling effect because it affirmatively denied parents legal recognition of their parent-child relationship. For the time being, individuals in same-sex relationships must proceed with the second legal adoption to ensure that the non-biological, non-adoptive parent has a legally recognized parent-child relationship. Although the *Janice M. v. Margaret K.* decision has negatively affected the lives of many *de facto* parents in Maryland, it might not remain the standard for long. The *Obergefell v. Hodges* decision, recognizing same-sex couples' constitutional right to marry, may encourage states to adopt *de facto* parent statutes.¹²⁶ And more significantly the Court of Appeals of Maryland has been presented with a second opportunity to decide this issue in *Conover v. Conover*.¹²⁷ In *Conover*, the court was asked to reconsider their *Janice M.* decision.¹²⁸

¹²⁵ “[A] parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(a) Before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent; or (b) In the absence of a signed record under paragraph (a) of this subsection (6): (i) Functioned as a parent of the child no later than two years after the child's birth; (ii) Intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or (iii) Intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.” COLO. REV. STAT. ANN. § 15-11-120 (West 2010).

¹²⁶ See generally *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding that the Fourteenth Amendment requires a state to marry two people of the same sex and all states must recognize a marriage between a same-sex couple that was lawfully licensed in another state).

¹²⁷ *Conover v. Conover*, 224 Md. App. 366, 128 A.3d 51 (2015). Michelle Conover and Brittany Conover started dating in 2002 and, together, decided to have a child through artificial insemination of Brittany. The child, Jaxon, was born on April 4, 2010. In September, 2010, Michelle and Brittany married in D.C. because, at the

More than half of the jurisdictions in the U.S. recognize that individuals who take on a parental role deserve legal protection of their parent-child relationship. They should be entitled to seek custody or visitation so long as it is in the best interests of the child. The traditional nuclear family is no longer the norm in today's society. Thus, individuals, who have satisfied the criteria of a *de facto* parent, should be recognized under the law. Maryland should follow this trend whether it is through an act of the judiciary or the legislature.

time, Maryland did not recognize same-sex marriages. One year later, Michelle and Brittany separated, but Michelle continued to visit with Jaxon until Brittany prevented her from seeing Jaxon in July, 2012. Michelle argues that she has met the paternity factors for a "father" under E.T. § 1-208(b)(4) and that she should be recognized as a *de facto* parent to Jaxon. The Court of Appeals of Maryland heard oral arguments on April 5, 2016.

¹²⁸ *Conover*, 445 Md. 487, 128 A.3d 51 (2015).