



2008

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Recommended Citation

Ablorh-Odjidja, Angela (2008) "Recent Developments: Janice M. v. Margaret K.: Maryland Does Not Recognize De Facto Parenthood as a Legal Status, Thus All Third Parties Must Demonstrate Parental Unfitness or Exceptional Circumstances to Overcome a Parent's Constitutional Right in Custody and Visitation Disputes," *University of Baltimore Law Forum*: Vol. 39 : No. 1 , Article 13. Available at: <http://scholarworks.law.ubalt.edu/lf/vol39/iss1/13>

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RECENT DEVELOPMENT

JANICE M. V. MARGARET K.: MARYLAND DOES NOT RECOGNIZE *DE FACTO* PARENTHOOD AS A LEGAL STATUS, THUS ALL THIRD PARTIES MUST DEMONSTRATE PARENTAL UNFITNESS OR EXCEPTIONAL CIRCUMSTANCES TO OVERCOME A PARENT'S CONSTITUTIONAL RIGHT IN CUSTODY AND VISITATION DISPUTES.

By: Angela Ablorh-Odjidja

The Court of Appeals of Maryland held that *de facto* parenthood is not a recognized legal status. *Janice M. v. Margaret K.*, 404 Md. 661, 948 A.2d 73 (2008). As a result, individuals who would qualify as *de facto* parents must overcome the threshold considerations of parental unfitness and exceptional circumstances to overcome a legal parent's constitutional right to the care, custody, and control of his or her child. *Id.* at 664, 948 A.2d at 75.

Domestic partners Janice M. ("Janice") and Margaret K. ("Margaret") were involved in a committed relationship for approximately eighteen years. During their relationship, Janice adopted a child, Maya, from India in December 1999. Margaret was not involved in the formal adoption process in India nor did she seek to adopt the child in Maryland. The couple lived together with Maya and divided most of the child's caretaking duties. In 2004, Janice and Margaret separated; however, Margaret continued to visit Maya, unsupervised, three to four times a week. As tension between Janice and Margaret mounted, Janice placed restrictions on Margaret's visitation. Frustrated with the restrictions, Margaret, through her lawyer, sent a letter to Janice regarding her limited visitation rights. Janice completely denied Margaret all visitation and access to Maya in response to the letter.

Margaret filed a complaint in the Circuit Court for Baltimore County seeking custody or, in the alternative, visitation. The circuit court granted Janice's motion for summary judgment on the issue of custody; however, the circuit court found that Margaret was a *de facto* parent and granted her visitation rights. Janice appealed, and the Court of Special Appeals of Maryland affirmed, holding that Margaret was, indeed,

Maya's *de facto* parent. Both parties petitioned the Court of Appeals of Maryland for writs of certiorari, which were granted.

The Court of Appeals of Maryland reviewed the legal history regarding parental rights in custody and visitation disputes with third parties. *Janice M.*, 404 Md. at 671-80, 948 A.2d at 79-84. The court recognized that the Due Process Clause of the Fourteenth Amendment protects a legal parent's fundamental right to take care of and make decisions regarding her child. *Id.* at 671, 948 A.2d at 79 (citing *Troxel v. Granville*, 530 U.S. 57 (2000)). Accordingly, parents are presumed to act in the best interest of their children. *Janice M.*, 404 Md. at 673, 948 A.2d at 80. To overcome this presumption in third party custody disputes, a court must find the legal parent unfit or find the existence of extraordinary circumstances deemed harmful to the child. *Id.* at 676, 948 A.2d at 81 (citing *McDermott v. Dougherty*, 385 Md. 320, 869 A.2d 751 (2005)). Findings of parental unfitness or exceptional circumstances also are required in third party visitation disputes. *Janice M.*, 404 Md. at 680, 948 A.2d at 84 (citing *Koshko v. Haining*, 398 Md. 404, 443-44, 921 A.2d 171, 194 (2007)). In the past, however, the Court of Special Appeals of Maryland distinguished *de facto* parents from third parties and held that *de facto* parents were not required to overcome these threshold considerations. *Janice M.*, 404 Md. at 683-84, 948 A.2d at 86-87 (citing *S.F. v. M.D.*, 132 Md. App. 99, 111-12, 751 A.2d 9, 15 (2000)).

In light of the relevant legal history, the Court of Appeals of Maryland considered the following two-pronged issue: (1) whether Maryland recognizes *de facto* parenthood status, and (2) if it does, whether a person who satisfies the requirement of the status is entitled to visitation or custody over the objection of a fit, legal parent, without having to establish that exceptional circumstances exist. *Janice M.*, 404 Md. at 664, 948 A.2d at 74. Margaret argued that an individual who qualifies as a *de facto* parent automatically demonstrates the exceptional circumstances needed to overcome a legal parent's presumption of custody. *Id.* The court disagreed with her interpretation of case law and indicated that exceptional circumstances are not established by a rigid test, but rather by an analysis of all relevant factors in the particular custody or visitation case. *Id.* at 689, 948 A.2d at 89. The court set forth several factors, which include: (1) the child's age when the third party assumed care; (2) the potential emotional impact on the child; (3) the child's physical, mental and emotional needs; (4) the past relationship and bond between the child and the third party; and (5) the stability of the child's current home environment. *Id.* at 694-95, 948 A.2d at 92-93.

The court held that Maryland does not recognize *de facto* parent status and, as a result, overruled the intermediate appellate court's decision in *S.F. v. M.D.*, 132 Md. App. 99, 751 A.2d 9 (2000). *Janice M.*, 404 Md. at 685-86, 948 A.2d at 87. The Court of Appeals of Maryland noted that the intermediate appellate court's decision was made prior to the case law that currently guides Maryland custody and visitation disputes. *Janice M.*, 404 Md. at 683, 948 A.2d at 86. The court, therefore, reasoned that allowing *de facto* parents to circumvent the necessary showing of parental unfitness or exceptional circumstances was inconsistent with current Maryland law. *Id.* at 685, 948 A.2d at 87.

The court further reasoned that even if Maryland recognized *de facto* parent status, a *de facto* parent is indistinguishable from other third parties. *Id.* A person who would qualify as a *de facto* parent in Maryland would still need to prove parental unfitness or exceptional circumstances to overcome the presumption that the legal parent will act in the child's best interest. *Id.* Furthermore, a court may only apply the best interest of the child test after making these threshold considerations. *Id.*

The court considered the approach of other jurisdictions. *Id.* at 686-89, 948 A.2d at 88-89. The court acknowledged that statutes from other states grant visitation to *de facto* parents, despite objections from legal parents. *Id.* at 686, 948 A.2d at 88. Despite this recognition, the court indicated that the choice to create a similar Maryland statute fell under the purview of the Maryland General Assembly and refused to comment on the constitutionality of such a statute under Maryland law. *Id.* at 689, 948 A.2d at 89. The Court of Appeals of Maryland ultimately held that the circuit court erred in granting visitation to Margaret, on the basis of her *de facto* parent status, without first addressing the threshold considerations of parental unfitness and the existence of exceptional circumstances. *Id.* at 695, 948 A.2d at 93.

In this case, the Court of Appeals of Maryland strengthened the constitutional right of a legal parent to control the care and upbringing of her child. Additionally, the court identified a number of factors to help legal practitioners determine whether extraordinary circumstances exist. The court's decision, however, does not support the growing number of non-traditional families in custody and visitation disputes. Same-sex partners, step-parents, grandparents, and others regularly assume responsibility for the care, custody, and control of non-biological children. Recognizing *de facto* parenthood as a legal status would help legitimize the significant role these parties play in the lives of children today. The court leaves open the possibility for the

Maryland legislature to recognize *de facto* parent status through Maryland statute and afford third parties equal standing as fit, legal parents in custody and visitation disputes.