

To: Drafting Committee for the Non-Parental Child Custody and Visitation Act
From: Cathy Sakimura, National Center for Lesbian Rights (Observer)
Date: August 8, 2016
RE: Possible changes to draft after First Reading

Thank you to Reporter Jeff Atkinson for preparing and circulating the helpful memo on issues raised by Commissioners in the first reading. We write to address two issues.

First, we are extremely concerned about the suggestion to treat “*de facto*” parents like all other nonparents.¹ In this memo, we detail our concern. We also provide background information that demonstrates that the proposal is contrary to the strong majority trends around the country.

Second, we address the concern raised at the annual meeting regarding multiple parents.

Requiring de facto parents to demonstrate detriment is contrary to the strong trend in the states and would be inconsistent with the well being and the best interests of children.

The primary proposed change – to have the Act apply a single standard to all non-legal parents of establishing a substantial relationship and detriment to the child – raises major concerns for us at the National Center for Lesbian Rights. As discussed in more detail below, requiring functional parents to demonstrate detriment in order to maintain contact with their child is inconsistent with the very strong trend in the states and is contrary to the best interests of children.

Applying a single standard to the full range of nonlegal parents is inconsistent with the law in the half of the states plus the District of Columbia. Most states distinguish between people who have substantial, parent-like relationships with children and those who do not. As described below, although states have developed different tests for determining when someone is a functional parent, most states that protect the rights of functional parents define a functional parent as someone who has developed a parental relationship with the child with the consent of the legal parent and have performed actual parental duties.

The majority of jurisdictions treat functional parents differently than other third parties to respect the volitional decision of the parent and to protect the needs of the child. As the New Jersey Supreme Court stated over 15 years ago:

[Such a rule] should not be viewed as an incursion on the general right of a fit legal parent to raise his or her child without outside interference. What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited

¹ To be clear, not all states use the phrase “*de facto*” parent, but we use it here for convenience to refer to someone who is not a statutory legal parent, but who has functioned as a parent to a child.

the third party into their lives. Most important, where that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation.

V.C. v. M.J.B., 748 A.2d 539, 553–54 (N.J. 2000).

In recognition of the importance of respecting this decision by the legal parent, and protecting the parent-child relationship he or she created, almost all states that have addressed the issue permit *de facto* parents to seek contact with the child² they helped raise **without requiring a showing of detriment**.³ A more comprehensive review of the existing law is provided below, but a brief summary is provided here for your convenience. In a growing number of states, *de facto* parents stand in full legal parity with any other legal parents.⁴ In other states, while *de facto* parents do not stand in parity with the legal parent, they nonetheless are entitled to seek custody and/or visitation of the children without having to show detriment or a failing on the part of the legal parent(s).

For example, a Pennsylvania intermediate court explained in over a decade ago:

Once it is established that someone who is not the biological parent is *in loco parentis*, that person *does not need to establish that the biological parent is unfit*, but instead must establish by clear and convincing evidence that it is in the best interests of the children to maintain that relationship or be with that person.

Jones v. Jones, 884 A.2d 915, 917 (2005)

Requiring *de facto* parents to show detriment in order to seek custody or visitation is inconsistent with the carefully considered decisions of approximately half the states and is contrary to the best interests and the well being of children.

We understand that some commissioners felt that the definition of *de facto* parent was too vague. It is important to note that the definition of *de facto* parent that was included in the prior draft of the Act is remarkably similar to the most commonly used existing test. The test was originally developed over twenty years ago by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K*. The Wisconsin test sets forth four elements that a *de facto* parent must satisfy: “(1) that the biological or adoptive parent consented to, and fostered the [*de facto* parent’s] formation and establishment of a parent-like relationship with the child; (2) that the [*de facto* parent] and the child lived together in the same household; (3) that the [*de facto* parent] assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without

² In some states, *de facto* parents are entitled to seek both custody and visitation. In other states, *de facto* parents are only entitled to seek visitation.

³ We are concerned with eliminating *de facto* parents as well as parents by agreement. Only a few states allow a person to seek custody based on a parenting agreement, so fewer states would be affected if this portion is not included.

⁴ See, e.g., Delaware, Del. Code Ann. Tit. 13, § 8-201(c); 13 Del. C. § 1101(10) (*de facto* parent treated as a legal parent); Maine, Me. Rev. Stat. Ann. § 1653(2) (*de facto* parent treated as a legal parent); Washington, D.C., D.C. Code 16-831.01, *et seq*; Washington, *In re Parentage of L.B.*, 155 Wash. 2d 679, 708 (2005) (*de facto* parent stands in parity with legal parent).

expectation of financial compensation; and (4) that the [*de facto* parent] 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.” 533 N.W.2d 419, 435 (Wis. 1995).

Since that time, many other states have borrowed from that test. See, e.g., *In re Parentage of L.B.*, 122 P.3d at 176; *V.C. v. M.J.B.*, 748 A.2d at 551-52; *Rubano v. DiCenzo*, 759 A.2d 959, 974-75 (R.I. 2000); *Middleton v. Johnson*, 633 S.E.2d 162, 168 (S.C. 2006); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 & n.6 (Mass. 1999); *T.B. v. L.R.M.*, 786 A.2d 913, 914, 917 (Pa. 2001). Courts have not shown any difficulty in applying the test. They long have been able to distinguish between people who have functioned as a parent, and people who simply have some other type of close relationship with the child.

While the Act contains a savings clause that is intended to protect existing law in a state, we are very worried that the proposed change would nonetheless abrogate the existing equitable and statutory protections that protect non-biological parents in half of the states plus the District of Columbia. And in states that have not yet addressed the question, adoption of the Act likely would foreclose the possibility of a court adopting more protective equitable doctrines. For good reason, as noted above, the majority of jurisdictions have declined to adopt a detriment standard for functional parents. It would be extremely harmful to children to do so. We strongly urge the Committee not to adopt a blanket requirement of detriment for all non-legal parents. As you know, our attorneys have worked on most of the cases that have established these protections for non-biological parents, and particularly for LGBT parents, over the last 25 years, and achieving these equitable protections has been a major goal of our organization.

The protections for non-legal parents in many states that have been developed, in many cases, by case law and through equitable doctrines, are so important to LGBT parents and their children (as well as non-LGBT non-biological parents) because statutes in many states do not address non-legal parents. The proposed revision risks undermining these protections. In many states, these doctrines are the only protection for non-biological, unmarried parents. This includes same-sex parents who are now married but couldn’t marry until after their children were born. Even same-sex parents who have been married since before birth need these protections as a fall back, as it is not clear that every state will fully protect same-sex married parents under their marital presumptions and many states have resisted applying this presumption to same-sex spouses. Although the UPA is being redrafted to clearly protect same-sex, non-biological parents, many states that have equitable protections will not adopt the new UPA, and parents in these states should be able to rely on existing equitable protections without having these protections inadvertently abrogated by a different Act that is aimed at providing remedies to other third parties who are not *de facto* parents.

Our thoughts on potential redrafting solutions are outlined in more detail below. Briefly, we urge the Committee to either 1) provide an exception from proving detriment for people who are *de facto* parents (and hopefully also for petitioners who have agreed in writing to be parents) that allows courts to determine custody between *de facto* parents and legal parents using a best interests analysis without a presumption in favor of the legal parent, instead of using the detriment terminology, or 2) limit this act to addressing specific contact and visitation needs of siblings and grandparents.

OVERVIEW OF CURRENT LAW

Half of the states plus the District of Columbia allow de facto parents to seek custody or visitation without proving detriment

In the majority of jurisdictions, people who are not legal parents, but who have been functioning as parents with the consent of a legal parent, are permitted to seek custody or visitation with that child, even over the objection of the legal parent. A majority of jurisdictions provide that *de facto* parents have formal rights with regard to the children they have raised alongside a legal parent. These states are: Arkansas, Delaware, Hawaii, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, Wisconsin, Washington, and Washington, D.C. States use the terms *de facto* parent, psychological parent, functional parent, and person *in loco parentis* interchangeably (and some states do not provide a label), and the rights that are conferred upon *de facto* parents vary by state. In some states, like Delaware, for example, *de facto* parents are entitled to full legal parentage. In other states, individuals who meet the definition of a *de facto* parent have legal parity with the legal parent in custody and visitation determinations. In these states there is no presumption that the legal parent has a greater right to custody over the *de facto* parent, and once a person proves that they meet the requirements to be a *de facto* parent, custody is determined based on the best interests of the child. A third category of states allows *de facto* parents to seek custody and/or visitation of the children without having to show detriment or a failing on the part of the legal parent(s).

None of these states listed below require that the *de facto* parent meet a detriment standard in order to be ordered custody or visitation. See, e.g., *Frazier v. Goudschaal*, 296 Kan. 730 (2013); *Latham v. Schwerdtfeger*, 282 Neb. 121 (2011); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); Haw. Rev. Stat. § 571-46; Ind. Code § 31-9-2-35.5. A uniform statute that included a detriment requirement would have the potential to abrogate equitable law and amend existing statutory law in the majority of jurisdictions, which provide greater protection to people who have acted as parents to their children but are not legal parents.

States that confer full legal parentage upon *de facto* parents by statute:⁵

- Delaware: Del. Code Ann. Tit. 13, § 8-201(c); 13 Del. C. § 1101(10); *Smith v. Guest*, 16 A.3d 920 (Del. 2011)
- Maine: Me. Rev. Stat. Ann. § 1653(2)

States in which an individual who is found to be a *de facto* parent is clearly entitled to legal parity with the legal parent when determining custody and visitation (similar to the current draft of the Act). Custody determinations in these states are based on the best interests of the child.

- Kansas: *Frazier v. Goudschaal*, 296 Kan. 730 (2013)
- Nebraska: *Latham v. Schwerdtfeger*, 282 Neb. 121 (2011)
- Oklahoma: *Eldredge v. Taylor*, 339 P.3d 888 (Okla. 2014); *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015)

⁵ If the Act applied to all non-legal parents, Delaware and Maine would be unaffected, but such an Act would likely eliminate or at least seriously weaken existing law in the nearly 30 states listed below.

- Pennsylvania: *Peters v. Costello*, 586 Pa. 102 (2005)
- Washington: *In re Parentage of L.B.*, 155 Wash. 2d 679, 708 (2005)
- Washington, D.C.: D.C. Code 16-831.01, *et seq.*

States in which a *de facto* parent is entitled to seek custody of and/or visitation with their children without a showing of detriment. Some of these states do not clearly enumerate the standard for determining custody or visitation (not all explicitly provide a presumption in favor of the legal parent(s)).

- Arkansas: *Bethany v. Jones*, 2011 Ark. 67 (Ark. 2011)
- Hawaii: Haw. Rev. Stat. § 571-46
- Indiana: Ind. Code § 31-9-2-35.5
- Kentucky: Ky. Rev. Stat. Ann. § 403.270(1) (narrower test by statute); *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010) (based on equity when statute does not apply)
- Massachusetts: *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999)
- Minnesota: Minn. Stat. § 257C.01-08; *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (interpreting the statute)
- Mississippi: *Logan v. Logan*, 730 So.2d 1124 (Miss. 1998)
- Missouri: Mo. Rev. Stat. § 452.375.5(5); *In re T.Q.L.*, 386 S.W.3d 135 (Mo. 2012) (interpreting the statute)
- Montana: Mont. Code § 40-4-211; *Kulstad v. Maniaci*, 352 Mont. 513 (2009) (interpreting the statute)
- New Jersey: *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (placing the psychological parent in legal parity but allowing the parental presumption still to have some weight)
- North Carolina: *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010)
- North Dakota: *McAllister v. McAllister*, 779 N.W.2d (N.D. 2010)
- Ohio: *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002)
- Oregon: Ore. Rev. Stat. § 109.119
- Rhode Island: *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000)
- South Carolina: S.C. Code § 63-15-60 (narrower test by statute); *Marquez v. Caudill*, 656 S.E.2d 737 (S.C. 2008) (based on equity where statute does not apply)
- Texas: Tex. Fam. Code § 102.003(9)
- West Virginia: *In re Clifford K.*, 217 W. Va. 625 (2005)
- Wisconsin: *In re the Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995)

Standards used to establish de facto parent status

States have adopted a variety of tests for determining when an individual is a *de facto* parent. Courts in these states have recognized that if a parent-child relationship exists, severing that relationship will always pose a serious risk of harm to the child, so an individual showing of detriment is not required to establish a *de facto* parent relationship.

The most widely-adopted version of the test is established by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 435. Under this test a *de facto* parent must satisfy four elements: “(1) that the biological or adoptive parent consented to, and fostered the [*de facto* parent’s] formation and establishment of a parent-like relationship with the child; (2) that the [*de facto* parent] and the child lived together in the same household; (3) that the [*de facto* parent]

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 [*de facto* parent] 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 435-36. Courts in South Carolina, Washington, New Jersey, and Rhode Island have adopted the test set forth in *H.S.H.-K.* See *In re Parentage of L.B.*, 122 P.3d at 176; *V.C. v. M.J.B.*, 748 A.2d at 551-52; *Rubano*, 759 A.2d at 974-75; *Middleton*, 633 S.E.2d at 168.

There are a number of other states that have not specifically adopted the precise test in *H.S.H.-K.* but have applied very similar tests to protect parent-child bonds where the *de facto* parent performed the functions of a parent and the bond developed with the consent and encouragement of the legal parent. For example, the Massachusetts Supreme Judicial Court held that a *de facto* parent must live with the child and act as a parent to the child by performing an equal or greater share of the parental caretaking functions "for reasons primarily other than financial compensation" with the "consent and encouragement" of the legal parent. *E.N.O.*, 711 N.E.2d at 891 & n.6. See also *T.B.*, 786 A.2d at 914, 917 (finding that a *de facto* parent may seek custody where he or she has "assumed a parental status and discharged parental duties with the consent of the biological parent" and "the child has established strong psychological bonds"); D.C. Code 16-831.01 (*de facto* parent must meet a number of factors including taking on "full and permanent responsibilities as the child's parent" and forming "a strong emotional bond with the child with the encouragement and intent of the child's parent"); Minn. Stat. Ann. § 257C.01-08 (allowing visitation for *de facto* parents based on a number of factors including whether the parent and child "had established emotional ties creating a parent and child relationship"); *Soohoo*, 731 N.W.2d 815 (interpreting Minn. Stat. Ann. § 257C.01-08); Mont. Code § 40-4-211 (*de facto* parent must demonstrate that she "fulfilled the child's psychological needs for a parent as well as the child's physical needs"); *Kulstad*, 352 Mont. 513 (interpreting Mont. Code. § 40-4-211); *McAllister*, 778 N.W.2d at 658 ("A person who provides a child's daily care and who, thereby, develops a close bond and personal relationship with the child becomes the psychological parent to whom the child turns for love, guidance, and security."); S.C. Code § 63-15-60 (*de facto* parent defined as someone who resided with the child for a specific amount of time and who was the primary caregiver and financial supporter of the child).

Other states have not adopted a specific test but have granted custody to *de facto* parents where there is a parent-child relationship developed with the consent and encouragement of the legal parent and the *de facto* parent has performed parental functions. See, e.g., *Mason*, 660 S.E.2d at 67-69 (allowing the former same-sex partner of a biological parent to seek custody because the biological mother "intentionally took steps to identify [the non-legal parent] as a parent of the child"); *In re E.L.M.C.*, 100 P.3d at 556 (allowing the legal mother's former same-sex partner to seek custody where she was a "psychological parent from birth, a relationship [the biological mother] consented to and encouraged"); *In re Clifford K.*, 619 S.E.2d at 157 (holding that a *de facto* parent may seek custody where the *de facto* parent "fulfills the child's psychological and physical needs for a parent and provides for the child's emotion and financial support" for a substantial duration with the "consent and encouragement" of the legal parent); *Latham*, 802 N.W.2d at 76 (emphasizing non-birth mother's role "in the decision to conceive the minor child," performing "parental duties such as feeding, clothing and disciplining" the child during the years they lived together); *Bethany*, 378 S.W.2d at 738 (finding non-birth parent stood *in loco parentis* where parties jointly planned to become parents through artificial

insemination, their “intentions were always to co-parent” and parent-child relationship developed between child and non-birth mother); *Mullins*, 317 S.W.3d at 575-77; *Latham*, 282 Neb. 121; *Peters*, 586 Pa. 102;; Haw. Rev. Stat. § 571-46; Ind. Code § 31-9-2-35.5; Ore. Rev. Stat. § 109.119; *Marquez*, 656 S.E.2d 737.

Finally, a few states have recognized the custody rights of a *de facto* parent based on an agreement between the *de facto* parent and the legal parent. See, e.g., *Frazier*, 296 P.3d 542; *In re Bonfield*, 780 N.E.2d at 249; *Eldredge*, 339 P.3d 888; *Ramey*, 362 P.3d 217.

MULTIPLE PARENTS ISSUE

The concerns that were raised in the July reading about children having too many parents have not been born out in states that already have *de facto* parent laws, which as noted above is half the states, plus Washington, D.C. First, the very nature of a broad non-parent visitation and custody act is to allow any other person who meets certain criteria to seek custody or visitation, even if there are two legal parents. Second, it appears that this concern may be based on the wording of the current Act, rather than its actual effect. The Act does not create legal parentage in more than two people, but rather allows certain non-legal parents to seek custody or visitation based on the best interests of the child without a presumption in favor of the legal parent. Third, very few cases have actually arisen where there are two legal parents and one person who meets the definition of *de facto* parent. There are a few states that explicitly allow children to have more than two legal parents in some circumstances (including California, which has a large population) – even in these states, this issue only comes up rarely. The current draft of the Act, as well as the standards in most states, require that both legal parents consent to the development of the *de facto* parent relationship, so this seriously limits situations where there can be even one *de facto* parent in addition to two legal parents, let alone more than one *de facto* parent.

A few states with *de facto* parent laws have allowed *de facto* parents to seek custody where there are two, fit legal parents – though again, not many such cases have gone up on appeal. Cases in Washington and Pennsylvania, which treat *de facto* parents as being on equal footing as parents for custody purposes, as well as cases in New Jersey, and Colorado, which do not require a showing of detriment, have allowed a *de facto* parent to seek either custody or, in some cases, just visitation where there are two fit legal parents. *In re Custody of M.J.M.*, 173 Wash. App. 227, 294 P.3d 746 (Div. 1 2013); *In re M.W.*, 2012 COA 162, 292 P.3d 1158 (Colo. App. 2012); *K.A.F. v. D.L.M.*, 437 N.J. Super. 123, 96 A.3d 975 (App. Div. 2014).

Several states allow *de facto* parents to seek custody or visitation where there are two legal parents, or recognize that a child may have more than two legal parents, by statute. The District of Columbia allows *de facto* parents (who are not legal parents but are on equal footing as parents for custody purposes) to do so. D.C. Code §§16-831.01 et seq. California, Delaware, Maine, and Louisiana recognize that children can have more than two legal parents in some situations. Cal. Fam. Code § 7612(c); Del. Code Ann. tit. 13, §§8-201, 8-203, 8-204; Me. Rev. Stat. tit. § 1853; *Smith v. Cole*, 553 So. 2d 847 (La. 1989).

POSSIBLE SOLUTIONS

Solution 1

We believe that concerns with the Act may be based in large part on the wording of the current draft Act, and fears that it appears to be establishing legal parentage, although we do not think that is the intent or the effect of the current draft. We think that the Act could be reworded to continue to allow *de facto* parents (and persons who have agreed to parent a child) to seek custody without having to prove detriment. This could be accomplished by providing an exception to the detriment requirement where certain other factors could be proven, without providing a particular term for these petitioners. The Act could then either say that where detriment is not required to be shown, custody/visitation should be determined based on the best interests of the child, or note that in such situations, there is no presumption in favor of custody to then legal parent. This wording may create fewer concerns than the wording we currently have saying that a *de facto* parent has the “same right to custody” as a parent.

Solution 2

If there is not a way to create some standard for *de facto* parents where detriment is not required, the only solution that we could see that would avoid the danger of abrogating existing protections is to create a narrow Act addressing grandparent and sibling visitation. We know this is not ideal and leaves out a lot of potential litigants, but it would do less harm than broadly requiring all non-legal parents to show detriment.