

DE FACTO PARENTAGE

ABA FAMILY LAW SECTION FALL MEETING

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Demographic changes in the family

- In 1960, 73% of children in the U.S. 17 and under were living in a home with two married heterosexual parents in their first marriage.
- In 2014, fewer than half (46%) of children fit that description.
- Source: Pew Research Center analysis of American Community Survey (ACS) and Decennial Census data.

Demographic changes in the family

- In 1960, only 9% of children were living with an unmarried parent.
- In 2014, 34% of children were living with an unmarried parent.
 - ▣ A small share of these children are living with two cohabiting, unmarried parents.
- Source: Pew Research Center analysis of American Community Survey (ACS) and Decennial Census data.

Demographic changes in the family

- In 2014, 5% of children were not living with either parent.
- Many, if not most, of these children were living with a grandparent.
- “According to U.S. Census Bureau estimates, 2,687,216 grandparents served as the primary caregiver or custodian over their minor grandchildren in 2011.” 264 Elder Law Advisory 1

De facto parentage

- The vast majority of states already recognize some form of *de facto* parentage (often using different terms), by statute or in equity.
 - ▣ These states range from Alaska, to Montana, to Arkansas, to West Virginia, to North Carolina.
- Many of these states recognize that a *de facto* parent is a legal parent or at least stands in legal parity with a parent.
- By statute, Maine and Delaware treat *de facto* parents as legal parents in their UPAs.

Grandparent visitation

- All 50 states have statutes permitting grandparents (and sometimes other enumerated family members) to seek custody or visitation, often under specified circumstances.

Common equitable parenting criteria

“To demonstrate the existence of the petitioner’s parent-like relationship with the child, the petitioner must prove 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.”

□ Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995)

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

- Plurality opinion by Justice O'Connor:
 - ▣ Held the statute unconstitutional “as applied.”
 - “The Washington nonparental visitation statute is breathtakingly broad.”
 - The statute permitted “any person” to petition for visitation “at any time” and required the court to award visitation under a “best interest of the child” standard.
 - “The Superior Court’s order was not founded on any special factors.”
 - Not only did the trial court give no “special weight” to the mother’s determination, “it appears that the Supreme Court applied exactly the opposite presumption.”
 - ▣ “Considered together ... the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on [the mother’s constitutional rights].”

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

- Plurality opinion by Justice O'Connor:
 - ▣ “[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”
 - ▣ “In this respect, we agree with Justice Kennedy that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and the constitutional protections in this area are best ‘elaborated with care.’”

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

- Justice Stevens, dissenting:
 - “The second key aspect of the Washington Supreme Court’s holding—that the Federal Constitution requires a showing of actual or potential ‘harm’ to the child before a court may order visitation continued over a parent’s objections—finds no support in this Court’s case law. “

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

- Justice Stevens, dissenting:
 - ▣ “A parent’s rights with respect to her child have thus never been regarded as absolute These limitations have arisen ... because of this Court’s assumption that a parent’s interests in a child must be balanced against the State’s long-recognized interests as *parens patriae* and, critically, the child’s own complementary interest in preserving relationships that serve her welfare and protection.”

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

- Justice Kennedy, dissenting
 - ▣ One of the theories espoused below by the Washington Supreme Court was that a finding of harm was necessary before visitation could be ordered.
 - ▣ Justice Kennedy rejected that principle: “In my view the first theory is too broad to be correct.”

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

- Justice Kennedy, dissenting:
 - The Washington Supreme Court's decision, requiring the use of a harm standard, "seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. . . . [But c]ases are sure to arise . . . In which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child"
 - "In my view, it would be more appropriate to conclude that the constitutionality of the application of the best interests standard depends on more specific factors. In short, a fit parent's rights vis-à-vis a complete stranger is one thing, her right vis-à-vis another parent or a de facto parent is another."

Functional parents and *Troxel*

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

- “The opinion 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. . . .
- 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 the third party into their lives.”

Functional Parents and Troxel

- *Conover v. Conover*, 146 A.3d 433 (Md. 2016)
 - ▣ “As many courts immediately recognized, *Troxel* did not denote the end of third party visitation.”
 - ▣ “[N]umerous courts have declined to treat *Troxel* as a a bar to recognizing de facto parenthood or other designations used to describe third parties who have assumed a parental role.”
 - ▣ “The de facto parent doctrine does not contravene the principle that legal parents have a fundamental right to direct and govern the care, custody, and control of their children because a legal parent does not have a right to voluntarily cultivate their child’s parent-type relationship with a third party and then seek to extinguish it.”

DRAFT Uniform Nonparental Child Custody and Visitation Act (UNCCVA)

- The Act distinguishes between two types of nonparents who may seek child custody and visitation:
 - (1) consistent caretakers; and
 - (2) persons who have a substantial relationship with the child.

DRAFT UNCCVA – Section 106

STANDING FOR CONSISTENT CARETAKERS:

(a) A non parent has standing . . . if the nonparent:

(1) has acted as a consistent caretaker of the child without expectation of financial compensation and

(A) has resided with the child for six or more consecutive months, [immediately before the commencement of a child-custody proceeding], or for a child less than six months of age, since the birth of the child, excluding each period of temporary absence; and

(B) a parent of the child explicitly or tacitly accepted the development of a bonded and dependent relationship between the child and the nonparent.

DRAFT UNCCVA

Consistent caretaker is defined to mean:

“an individual who:

(A) has consistently exercised care and control of a child;
and

(B) regarding the welfare of the child, exercised care or made decisions solely or in cooperation with a parent or other custodian.”

UNCCVA Section 102(4).

DRAFT UNCCVA – Standing

STANDING BASED ON SUBSTANTIAL RELATIONSHIP:

(a) A nonparent has standing . . . if the nonparent: . . .

(2) has a substantial relationship with the child and denial of custody or visitation would result in [detriment] to the child.

□ UNCCVA, Section 106

UNCCVA – Standards for granting custody or visitation – Consistent Caretaker

(a) A court may grant custody or visitation to a nonparent . . . if the nonparent proves by clear-and-convincing evidence that:

(1) the nonparent has acted as a consistent caretaker of the child without expectation of financial compensation and:

(A) has resided with the child for six or more consecutive months . . .;

(B) A parent of the child explicitly or tacitly accepted the development of a bonded and dependent relationship between the child and the nonparent; and

(C) Granting custody or visitation to the nonparent is in the best interest of the child.

□ UNCCVA, Section 112

UNCCVA – Standards for granting custody or visitation – Substantial Relationship

(a) A court may grant custody or visitation to a nonparent . . . if the nonparent proves by clear-and-convincing evidence that:

(2) the nonparent has a substantial relationship with the child, denial of custody or visitation would result in [detriment] to the child, and granting custody or visitation to the nonparent is in the best interest of the child.

□ UNCCVA, Section 112

Uniform Parentage Act (2017)

- Revises provisions throughout the Act so that they apply equally to same-sex couples
- Includes a new method of establishing parentage for persons claiming to be de facto parents – Section 609
- Includes a multi-factor assessment to resolve competing parentage claims – Section 613
- Optional recognition of more than two parents – Section 613
- Includes a provision regarding the parentage of children born as the result of sexual assault – Section 614
- Updates surrogacy provisions – Article 8
- Adds a new Article that addresses the right of children born through assisted reproduction to information about their gamete provider – Article 9

UPA (2017), Section 609

- Only person alleging self to be a de facto parent can proceed under the Section.
- Includes a heightened pleading standard.
- Requires proof by a clear-and-convincing evidence standard of a list of enumerated criteria.

UPA (2017), Section 609(d)

- Requirements – proof by clear-and-convincing evidence that:
- “(1) the individual resided with the child as a regular member of the child’s household for a significant period;
- (2) the individual engaged in consistent caretaking of the child;
- (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
- (4) the individual held out the child as the individual’s child;
- (5) the individual established a bonded and dependent relationship with the child which is parental in nature;
- (6) another parent of the child fostered or supported the bonded and dependent relationship required under parentage (5); and
- (7) continuing the relationship between the individual and the child is in the best interest of the child.”

Hypo #1

- After living together for six years, Ana and her unmarried same-sex partner Betty decide to have a child together through assisted reproduction. They decide that Ana will try to get pregnant since she is the younger of the two. They both help pick out the anonymous sperm donor. Betty attends all of the pre-natal appointments and is present with the child – Chris – is born.
- Ana and Betty raise Chris together for three years. They both participate in daily caretaking responsibilities, and they jointly make important decisions about Chris, including decisions about his education and medical care.
- When Chris is three, the women end their relationship.
- Initially, Ana and Betty share custody, but after Betty begins a new relationship, Ana tells Betty that she can no longer see Chris.

Hypo #2

- Carol is an unmarried woman. Carol gets pregnant after having a one-night stand. She does not tell the biological father that she is pregnant. Shortly after getting pregnant, Carol meets Diego. Carol and Diego move in together. Carol and Diego decide that they will parent the child together. Diego is present when the child, Maria, is born.
- For the next year, Carol and Diego jointly care for Maria.
- When they are in the presence of Maria, Carol and Diego refer to Diego as “Dada.” When Maria is 13 months old, Carol and Diego break up.

Hypo #3

- Elena is a single mother of one child – Carlos. Since Carlos' birth, Carlos has lived with Elena's mother Flora. Elena sometimes lives with them; sometimes she lives elsewhere.
- Flora is person who is primarily responsible for Carlos' well being; Flora is the one who makes sure that Carlos gets to school every day, makes sure he does his homework, and feeds him meals.
- When Carlos is six, Elena tells her mother than she would like to take Carlos to live with her.

Hypo #4

- After Fran's husband, George, passes away, Fran takes their two children to see George's parents about once a month, as they had done prior to George's death. The visits typically last for about 4 hours. The children enjoy visiting their grandparents. George's parents also join Fran and the children for major holidays.
- George's parents would like more contact with their grandchildren.