

De Facto Parents, Legal Parents, and Inchoate Rights

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INTRODUCTION

Professor Douglas NeJaime’s Essay *Parents in Fact*¹ commends the Restatement of Children and the Law’s² embrace of the de facto parent doctrine.³ He is somewhat critical, however, of the Restatement’s reference to individuals seeking recognition as de facto parents as “third parties” and its reluctance to recognize de facto parents as legal parents.⁴ He is also skeptical of the Restatement’s requirement that an individual seeking recognition as a de facto parent first show that a legal parent consented to and fostered the individual’s creation of a parent-child relationship with the child.⁵ NeJaime’s observations provide an opportunity to

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¹ See generally Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513 (2024).

² Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

³ See NeJaime, *supra* note 1, at 528–33.

⁴ See *id.* at 518.

⁵ See *id.* NeJaime also suggests that the Restatement endorses the Supreme Court of Wisconsin’s decision in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 436 (Wis. 1995), even though the court held that a de facto parent may seek visitation but not custodial rights. See NeJaime, *supra* note 1, at 540–41. To clarify, the Restatement endorses the test the *H.S.H.-K.* court adopts, but it does not endorse the *H.S.H.-K.* court’s decision to deny de facto parents custodial rights. While the Restatement “adopts the four-prong test to establish de facto parenthood announced [in *H.S.H.-K.*],” under the Restatement, as NeJaime acknowledges, a de facto parent can receive “custodial or decisionmaking responsibility for a child.” *Id.* at 528–29 (citing RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82(d) (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT Draft No. 2]). The Restatement cites *H.S.H.-K.* because it was the first case to set forth the factors that many courts have relied upon when recognizing the de facto parent doctrine. See RESTATEMENT Draft No. 2 § 1.82 cmt. a. Indeed, the Court of Appeals of Maryland, one of the last states to adopt the common law de facto parent doctrine in 2016, expressly adopted the *H.S.H.-K.* factors even though, unlike *H.S.H.-K.*, it held that a de facto parent could seek custody. See *Conover v. Conover*, 146 A.3d 433, 453 (Md. 2016) (holding that it is “adopting the multi-part test first articulated by the Wisconsin Supreme Court in *H.S.H.-K.*”); *id.* (holding that “*de facto* parents have standing to contest custody or visitation”).

clarify the scope and constraints of a restatement—which requires “clear formulations of common law” rules and must “reflect the law as it presently stands”⁶ but also provides space, albeit limited, for expression of “the relative desirability of competing rules.”⁷ NeJaime’s reflections also allow us to illustrate how silence—not taking a position—on issues that courts have yet to decide furthers the Restatement’s legitimacy while minimizing the risk that it will be “a roadblock to change”⁸ as the law evolves.

I. WHAT’S IN A WORD? THE IMPORTANCE OF LANGUAGE

NeJaime argues that the Restatement’s treatment of de facto parents highlights their “transitional status.”⁹ As an example, he points out that the section on de facto parents is subsumed under the topic that addresses “parental authority to make decisions about a child’s associations with a third party” including the sections on third-party visitation and third-party custody.¹⁰ He further observes that § 1.82 of the March 2019 Tentative Draft (which was approved by the general membership) uses the term “third party” to refer to an individual who has not yet established the requirements for de facto parent status even though such individuals are “not like any other third party.”¹¹

NeJaime’s critique is a welcome reminder of the importance of using language that conveys respect for the contributions and role of functional parents in children’s lives even when a court has not yet recognized them as de facto parents. Courts routinely refer to any individual who is not a biological or adoptive parent as a third party, at least until the individual proves that they are a de facto parent.¹² The March 2019 Tentative Draft does the same

Similar to the Court of Appeals of Maryland, the Restatement adopts the four-factor test from *H.S.H.-K.* to establish de facto parent status, but the rights of a de facto parent are much broader under the Restatement. There is a difference between the requirements to establish de facto parent status and the rights and responsibilities that attach to that status.

⁶ AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS & THOSE WHO REVIEW THEIR WORK 4 (2015) [hereinafter CAPTURING THE VOICE].

⁷ *Id.* at 6.

⁸ *Id.* at 5.

⁹ NeJaime, *supra* note 1, at 526.

¹⁰ *Id.* (citing RESTATEMENT Draft No. 2 § 1.81).

¹¹ *Id.*; *see also* RESTATEMENT Draft No. 2 § 1.82.

¹² *See, e.g., E.N. v. T.R.*, 255 A.3d 1, 5 (Md. 2021) (holding that “both legal parents must consent to and foster a *third party’s* formation and establishment of a parent-like relationship with a child” (emphasis added)); *Pitts v. Moore*, 90 A.3d 1169, 1183 (Me. 2014) (noting that “forcing a parent to expend time and resources defending against a *third-*

even though it clearly differentiates de facto parents from third parties. It explains that, unlike third parties who must show harm to the child, parental unfitness, or extraordinary circumstances before a court may award custodial or decision-making responsibility,¹³ “[a] court may allocate custodial or decisionmaking responsibility for a child to a de facto parent when such allocation is in the child’s best interest.”¹⁴

Yet, the March 2019 Tentative Draft’s use of the term “third party,” like its use by courts, obscures the relationship between a child and an adult who identifies as a parent and whom the child sees as a parent, regardless of whether a court has declared them to be a de facto parent. As a result of NeJaime’s observations,¹⁵ in December 2022, the reporters tweaked the terminology in the March 2019 Tentative Draft to explicitly distinguish persons seeking recognition as de facto parents from third parties. Specifically, the December 2022 draft replaces the term “third party” with “individuals” when referring to a person who claims to be a de facto parent but who has not yet been found by a court to be a de facto parent.¹⁶ As NeJaime observes, “[t]he Restatement’s substantive standard is unchanged. Yet, the rhetorical shift is important for symbolic and expressive reasons.”¹⁷ The reporters agree with this point. Without altering the requirements or standard of proof for de facto parenthood, but merely replacing the term “third party” with “individual,” the Restatement clarifies the difference between a third party and a person claiming to be a de facto parent but who has yet to be declared as such by a court. It conveys respect for individuals who are waiting for the legal recognition of de facto parent status but who have functioned as parents for years.

Admittedly, the term “individual” does not fully describe the contributions to a child or importance in the child’s life of a person

party claim to a child is itself an infringement on the fundamental right to parent” (emphasis added); *Conover v. Conover*, 146 A.3d 433, 453 (Md. 2016) (holding that “de facto parents are distinct from other third parties”); *see also* *V.C. v. M.J.B.*, 748 A.2d 539, 552–53 (N.J. 2000); *Estroff v. Chatterjee*, 660 S.E.2d 73, 79 (N.C. Ct. App. 2008); *Middleton v. Johnson*, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006); *Rubano v. DiCenzo*, 759 A.2d 959, 977 (R.I. 2000). *But see* *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011) (recognizing that the petitioner was “not ‘any third party,’ [but] [r]ather, she [was] a (claimed) de facto parent”).

¹³ *See* RESTATEMENT Draft No. 2 § 1.82 cmt. a.

¹⁴ *Id.* § 1.82(d).

¹⁵ Email from Prof. Douglas NeJaime to Prof. Solangel Maldonado (Nov. 23, 2022) (on file with author).

¹⁶ RESTATEMENT Draft No. 2 § 1.82.

¹⁷ NeJaime, *supra* note 1, at 528.

who has functioned as a parent but has not yet been declared to be a de facto parent by a court. The term “individual” could also refer to a “pure third party” who has not functioned as a parent. Unfortunately, there is no term that adequately describes a person who has functioned as a parent but has yet to be legally recognized as a de facto parent. Terms such as “alleged,”¹⁸ “putative,”¹⁹ or “purported”²⁰ de facto parent may be demeaning as they might suggest that the individual is not a “real” parent or lacks an established parent-child relationship with the child. While “presumed” or “prospective” de facto parent would more accurately describe the role of *some* non-biological, nonadoptive parents in the child’s life, these terms obscure the high standard that an individual must satisfy to be recognized as a de facto parent. Thus, “individual”—the term used by the 2017 Uniform Parentage Act²¹—may be the best, albeit not ideal, option.

II. DE FACTO PARENTS AND LEGAL PARENTAGE

The Restatement recognizes that de facto parents have the same custodial rights and responsibilities, including financial responsibility, as legal parents.²² Yet, it does not expressly recognize de facto parents as legal parents. The 2017 Uniform Parentage Act, in contrast, recognizes de facto parents as legal parents.²³ An increasing number of states treat de facto parents as legal parents, but, as NeJaime observes, “the Restatement does not go so far as to endorse the recent trend . . . to treat functional parents as legal parents.”²⁴ Although I, the lead drafter of the Restatement section on de facto parents, personally endorse treating de facto parents as legal parents, given the nature of a restatement and the state of the common law at this time, the Restatement does not take a position on whether de facto parents are legal parents.²⁵

¹⁸ *Rubano*, 759 A.2d at 966 (describing an “alleged de facto parental relationship”).

¹⁹ *Pitts*, 90 A.3d at 1180 (using the term “putative de facto parent”).

²⁰ *Smith v. Jones*, 868 N.E.2d 629, 635 n.10 (Mass. App. Ct. 2007) (using the term “purported de facto parent”).

²¹ UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM’N 2017).

²² RESTATEMENT Draft No. 2 § 1.82 cmt. b.

²³ UNIF. PARENTAGE ACT § 609 cmt.

²⁴ NeJaime, *supra* note 1, at 531.

²⁵ I can, however, express my personal support for statutes that recognize de facto parents as legal parents in the reporters’ notes. See CAPTURING THE VOICE, *supra* note 6, at 45 (“[T]he [reporter’s] [n]otes furnish a vehicle for the Reporter to convey views not necessarily those of the Institute and to suggest related areas for investigation.”).

“The law of the Restatements is generally common law, the law developed and articulated by judges in the course of deciding specific cases.”²⁶ Restatements “reflect the law as it presently stands or might appropriately be stated by a court.”²⁷ Unlike the 2017 Uniform Parentage Act, and other model statutes, which are primarily addressed to legislatures,²⁸ “Restatements are primarily addressed to courts.”²⁹ Thus, a restatement must focus on what a court has the authority to decide, and it must restate what courts have held.

The jurisdictions that have recognized de facto parents as *legal parents* have done so by statute, either through their own parentage statutes or adoption of the 2017 Uniform Parentage Act. While some courts have held that the “common law recognizes the status of de facto parents and places them in parity with biological and adoptive parents,”³⁰ this parity may not confer all of the legal rights and responsibilities of *legal* parentage. First, even courts that recognize legal parity sometimes apply stricter standards to de facto parents. For example, after declaring that “a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise,” the Washington Supreme Court added that “[a] de facto parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child.”³¹ Legal parents, in contrast, are entitled to parental privileges as a matter of right. Legal parents, for example, have a right to parenting time (commonly known as visitation) with a child even if it is not in the child’s best interests.³² A court can only deny a legal parent access to their child when there is evidence that the child will suffer harm if visitation

²⁶ *Id.* at 4.

²⁷ *Id.*

²⁸ *Id.* at 11 (“Model or uniform codes or statutes and other statutory proposals are addressed mainly to legislatures, with a view toward legislative enactment.”).

²⁹ *Id.* at 4.

³⁰ *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005); *see also* *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000).

³¹ *In re Parentage of L.B.*, 122 P.3d at 177.

³² *See V.C.*, 748 A.2d at 554.

is ordered.³³ De facto parents, however, have no right to contact with a child unless it is in the child's best interest.³⁴

Second, as NeJaime acknowledges, courts' recognition of de facto parents' custodial rights and financial responsibilities does not mean that de facto parents will be recognized as parents "for purposes of government benefits or wrongful death claims."³⁵ I am not aware of any court that has recognized a de facto parent as a legal parent for purposes of tort law, intestacy law, or government benefits, for example. Although at least one court has held that "once the court finds that a party is a de facto parent, that party is a parent for all purposes," each of the examples provided by the court addressed family law statutes—specifically child custody, child support, relinquishment for adoption, and child protection.³⁶ None of the referenced statutes addressed other rights deriving from legal parentage.

The Restatement's silence is surely disappointing to some, and there is a risk that readers who may not be familiar with the scope of a restatement and its constraints may interpret the Restatement's silence as endorsing a hierarchy of parents and devaluing of de facto parents. That would be an unfortunate and inaccurate conclusion. In remaining silent, the Restatement is not endorsing a hierarchy of parents nor devaluing de facto parents. The challenge, however, is that if the Restatement were to take a position despite the lack of case law based on the common law (not statutes) to support it, it places the legitimacy of this project, and potentially all American Law Institute projects, at risk.³⁷ When adopting a restatement rule, "the choices generally are constrained by the need to find support in sources of law."³⁸

³³ See, e.g., ARIZ. REV. STAT. ANN. § 25-403.01 (2022) (providing that a parent without custodial rights "is entitled to reasonable parenting time to ensure that the minor child has substantial, frequent, meaningful and continuing contact with the parent unless the court finds, after a hearing, that parenting time would endanger the child's physical, mental, moral or emotional health"); *Boswell v. Boswell*, 721 A.2d 662, 670 (Md. 1998) ("Visitation rights . . . are not to be denied even to an errant parent unless the best interests of the child would be endangered by such contact.").

³⁴ See, e.g., *In re Parentage of L.B.*, 122 P.3d at 177.

³⁵ NeJaime, *supra* note 1, at 535.

³⁶ *Pitts v. Moore*, 90 A.3d 1169, 1182–83 (Me. 2014); see also *In re K.S.*, 93 A.3d 687, 688 (Me. 2014) ("A de facto parent is 'a parent for all purposes,' including child protection proceedings.").

³⁷ CAPTURING THE VOICE, *supra* note 6, at 6 ("An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy.").

³⁸ *Id.*

There is another reason for the Restatement's reluctance to recognize de facto parents as legal parents—the state of the law on multiple parentage. The majority of courts that have adopted the common law de facto parent doctrine recognize that a child can have two legal parents and one or more de facto parents.³⁹ Few states, however, recognize more than two legal parents.⁴⁰ Extending legal parentage to de facto parents may lead courts in the majority of states that do not recognize more than two legal parents to refuse to recognize an individual as a de facto parent when the child already has two legal parents since recognition would mean that the child has three legal parents.⁴¹ NeJaime's and Professor Courtney Joslin's own study of families in West Virginia illustrates this point.⁴² In many of those cases, the child was living with the functional parent (usually an extended family member) alone, but the legal parents had some contact with the child.⁴³ Recognizing the functional parent as a legal parent would mean that the child has three legal parents. Since West Virginia does not recognize more than two legal parents,⁴⁴ a court would not be able to recognize the individual who has actually been parenting the child as a de facto parent. By declining to address whether a de facto parent is a legal parent, the Restatement allows courts in these states to recognize an individual who has

³⁹ See, e.g., *E.N. v. T.R.*, 255 A.3d 1, 40–41 n.31 (Md. 2021) (noting “that this opinion should not be interpreted as a determination that the formation of three-parent or tri-parent families by people who consent is prohibited in Maryland” and that “with the satisfaction of the four factor test for de facto parenthood . . . including the consent of both parents where there are two legal parents . . . , a third party may become a de facto parent”).

⁴⁰ Courtney G. Joslin & Douglas NeJaime, *The Next Normal: States Will Recognize Multiparent Families*, WASH. POST (Jan. 28, 2022), <https://perma.cc/Q26J-6MCF> (noting six states that recognize multiparent families).

⁴¹ In the majority of states that recognize only two legal parents, when an individual wishes to adopt an intimate partner's biological or adopted child (for example, in a step-parent adoption), and the child has another legal parent, that other parent must consent to termination of their parental rights (unless proven unfit) before the individual may adopt the child. Presumably, if an individual in a state that recognizes only two legal parents seeks to be recognized as a de facto parent of a child with two legal parents, the court would have to terminate one of the legal parents' parental rights in order to recognize the individual as a de facto parent if the de facto parent will also be a legal parent. See, e.g., U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE INFO. GATEWAY, STEPPARENT ADOPTION 2 (2022) (“If you want to adopt a stepchild, you may need the consent (or agreement) of both your spouse and the child's noncustodial parent (requirements vary by State). By giving their consent, the noncustodial parent relinquishes all rights and responsibilities, including child support.”).

⁴² See Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families: Real and Imagined*, 90 FORDHAM L. REV. 2561, 2579–85 (2022).

⁴³ See *id.* at 2575.

⁴⁴ *Id.*

functioned as a parent as a de facto parent even if the child has two legal parents.

While deeming de facto parents to be legal parents would treat them with the dignity and respect warranted by the role, requiring full recognition as legal parents may limit the universe of individuals that courts would be willing to find have met the requirements for de facto parenthood. As an equitable doctrine, the de facto parent doctrine grants trial courts substantial discretion when deciding, for example, whether an individual “has been in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.”⁴⁵ Appellate courts have the power to decide whether to require one or all legal parents to have “consented to and fostered the formation of the parent-child relationship between the [individual] and the child.”⁴⁶ By focusing on the needs of the child and protecting the child’s relationship with the individual who is taking care of those needs, the Restatement encourages courts to grant extended family members and fictive kin—who often do not see themselves as legal parents, and may not wish to be treated as such—the rights and responsibilities necessary to further the child’s best interests, irrespective of whether they are legal parents.

III. CONSENT AND DE FACTO PARENTS’ RIGHTS

NeJaime questions whether the Restatement’s requirement that an individual seeking recognition as a de facto parent establish that a legal “parent consented to and fostered the formation of the parent-child relationship between the individual and the child” is constitutionally required.⁴⁷ The majority of courts that have adopted the common law de facto parent doctrine require the consent of at least one legal parent, but NeJaime argues that requiring consent obscures that de facto parents have the same fundamental liberty interest in being recognized as parents as biological and adoptive parents. Specifically, he contends that if we appreciate that de facto parents are parents, the legal parent’s consent cannot be constitutionally required and, in support,

⁴⁵ RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82(a)(3) (AM. L. INST., Revised Tentative Draft No. 4, 2022) (on file with author) [hereinafter RESTATEMENT Revised Draft No. 4].

⁴⁶ *Id.* § 1.82(a)(4). *See, e.g., E.N.*, 255 A.3d at 5 (holding that “both legal parents must consent to and foster [the individual’s] formation and establishment of a parent-like relationship with a child”).

⁴⁷ *See NeJaime, supra* note 1, at 518.

points out that the “holding out” presumption does not expressly require a legal parent’s consent to the parent-child relationship.⁴⁸

As NeJaime observes, courts have interpreted consent broadly and do not require that it be express.⁴⁹ Instead, courts will infer consent from a parent’s actions or lack thereof, including their absence from the child’s life.⁵⁰ As applied, the Restatement’s consent requirement serves to ensure that a legal parent had “actual knowledge of and participat[ed] in the formation of a third party’s parent-like relationship with a child.”⁵¹ Although there may be cases in which a legal parent’s knowledge and participation are unnecessary—when a legal parent has been absent from the child’s life, for example—in the majority of cases, involvement by the legal parent is critical to protect the legal parent’s “fundamental liberty interest in the care, custody, and control of [the child].”⁵²

I agree with NeJaime that courts have not been sufficiently concerned with de facto parents’ constitutional rights—and they should be. The consent requirement, however, is not applied to de facto parents but rather to individuals who have not yet established that they are de facto parents. While an individual whom a court has determined to be a de facto parent should have the same constitutional rights as a legal parent,⁵³ a person claiming to be a de facto parent does not yet have any constitutionally protected parental rights. The requirements for establishing that an

⁴⁸ *Id.* at 545–46.

⁴⁹ *See id.* at 542–43.

⁵⁰ *See, e.g., E.N.*, 255 A.3d at 39 (quoting PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. c (AM. L. INST. 2002):

[A] de facto parent may be recognized without the agreement of a legal parent . . . when there has been a total failure or inability by the legal parent to care for the child. This circumstance exists only when a parent is absent, or virtually absent, from the child’s life, such as when a parent has abandoned the child or has been imprisoned or institutionalized.

⁵¹ *E.N.*, 255 A.3d at 34 (“[W]e recognize and hold that a legal parent’s actual knowledge of and participation in the formation of a third party’s parent-like relationship with a child may occur either through the parent’s express or implied consent to and fostering of the relationship.”); *id.* (“Implied consent may be shown through action or inaction, so long as the action or inaction is knowing and voluntary and is reasonably understood to be intended as that parent’s consent to and fostering of the third party’s formation of a parent-like relationship with the child.”); *see also* NeJaime, *supra* note 1, at 542–53 & nn. 194–99 (citing cases).

⁵² NeJaime, *supra* note 1, at 523 (quoting *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005)).

⁵³ *In re Parentage of L.B.*, 122 P.3d at 178 (holding that once a person establishes standing as a de facto parent, they have a “fundamental liberty interest in the care, custody, and control of [the child]” (quotation marks omitted)). *See generally* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020).

individual is a de facto parent, including involvement by a legal parent either by “consent[ing] to and foster[ing] the formation of the parent-child relationship between the individual and the child,” or by “foster[ing] or support[ing]” such relationship, as the 2017 Uniform Parentage Act requires,⁵⁴ are necessary to protect the rights of individuals who have already established that they are parents—biological, adoptive, or de facto. An adoptive parent, for example, has the same fundamental liberty interest as other legal parents but not until they have adopted the child.⁵⁵ Similar to a prospective adoptive parent, the constitutional interests of an individual claiming to be a de facto parent are inchoate until the individual establishes that they are a de facto parent.⁵⁶ While consent does not “transform a *third party* into a de facto parent,”⁵⁷ as the individual was already functioning as a parent, consent, along with the other requirements to establish de facto parent status, reveals to the court that a de facto parent claimant is a parent.

CONCLUSION

A restatement cannot go beyond the law, but it can and should raise awareness of any inequities in the law’s application. While the Restatement’s section on de facto parents does not explicitly address the doctrine’s effects on low-income families or families of color, NeJaime’s (and Joslin’s) work shows that de facto parents are often extended family members who step in to care for children, sometimes at the behest of the state. In a sense, the state created these de facto parents, and their needs and those of their children might be different from those of de facto parents raising children with intimate partners and whose relationships formed the basis for the doctrine. Given the disproportionate representation of low-income and Black and brown families in the child protection system, when de facto parents are extended family members, they and their children are likely to be low-income or of color. While NeJaime’s Essay does not explicitly address low-income families or families of color, his observations are a reminder that family law scholars, judges, and practitioners must be mindful of how race and class affect every aspect of this area of the law.

⁵⁴ UNIF. PARENTAGE ACT § 609(d)(6).

⁵⁵ See, e.g., *In re Parentage of L.B.*, 122 P.3d at 177–78.

⁵⁶ See *Conover v. Conover*, 146 A.3d 433, 447 (Md. 2016).

⁵⁷ NeJaime, *supra* note 1, at 540 (emphasis in original).