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Verdict

December 10, 2013

Joanna L. Grossman

De Facto Parentage and the Rights of Former Stepparents



Does a former stepfather have the right to custody or visitation of a stepchild he helped raise from birth? This question was recently answered by the Washington State Supreme Court, in *In re Custody of B.M.H.* The rights of non-parents to custody and visitation have been in flux in many states over the last decade, but perhaps nowhere as much as Washington State.

It was a Washington State case that gave rise to the U.S. Supreme Court ruling, *Troxel v. Granville* (<http://supreme.justia.com/cases/federal/us/530/57/>) (2000), which upended the law of third-party visitation and forced many states to revisit the standards that they had previously applied when deciding disputes between parents and non-parents. In *Troxel*'s wake, Washington State courts began to take a hard line on claims by non-parents, having been rebuked by the High Court for giving insufficient regard to constitutionally protected parental rights. But with this new ruling, the state's highest court, sitting en banc, takes a step back toward its previous approach by allowing a former stepfather to pursue recognition as a de facto parent.

In re B.M.H.

Michael and Laurie Holt had a child, C.H., in 1995, after spending two years in a romantic relationship. There is no question about the legal ties of both Michael and Laurie to this child, who was biologically related to both of them and whom they co-parented. But what about the child's younger sibling, who was born four years later? This second child had a different biological father—a man to whom Laurie became engaged after she and Michael broke up in 1998. Three months into this second pregnancy, however, Laurie's fiancé was killed in an industrial accident.

Michael then came back into the picture during Laurie's second pregnancy. He was present at the child's birth and cut the umbilical cord. He and Laurie then married shortly after the child, B.M.H., was born. For the first two years of life, B.M.H. was cared for by Michael and Laurie living together in the same household. After they divorced in 2001, the parties agreed to a parenting plan that gave Laurie primary residential custody of C.H. and visitation every other weekend to Michael. Although the parenting plan did not expressly cover the second child, B.M.H. followed the same visitation schedule as C.H. And even after the couple divorced, Laurie changed C.M.H.'s last name from the biological father's to Michael's. Adoption was also discussed, but Laurie and Michael decided not to pursue it because of its adverse effects on C.M.H.'s ability to collect survivor's benefits

through his biological father.

For many years after they divorced, Laurie and Michael continued to co-parent both children. Laurie had a series of relationships, including another brief marriage, the onset of which would often trigger a threat by Laurie to minimize or eliminate C.M.H.'s time with Michael. It was a situation like this that gave rise to the lawsuit at issue, in which Michael sought formal recognition of his parent-child relationship with C.M.H. Laurie revealed plans to move to another city 50 miles away with a new boyfriend. Michael filed a petition for "nonparental custody" on the basis that such a move would "disrupt the close relationship" he had with C.M.H., a child to which he claimed to be "extremely bonded" and the "child's father in all respects."

Michael's suit raised two questions that made their way to the state's highest court: (1) Did Michael allege sufficient harm to justify transferring custody from a parent to a non-parent?; and (2) Could a former stepparent like Michael qualify as a "de facto parent," who might have the right to custody or visitation despite his lack of legal parent status? Both of these questions require an understanding of who qualifies as a legal parent and the ways in which parents differ from non-parents, as I will explain.

Parents v. Non-Parents: A Question of Federal Constitutional Significance

A legal parent is someone who, by virtue of a particular tie to a child, is endowed with constitutionally protected rights, and subject to potentially onerous obligations. A biological mother is a legal parent unless and until her parental rights are terminated. A biological father is a legal parent if he is married to the child's mother at the time of conception or birth, or if some other criterion for fatherhood is met—such as an adjudication or acknowledgment of paternity, or his openly holding out the child as his own.

The difference between a parent and a non-parent has always been meaningful, but it became ever more so after the Supreme Court's 2000 decision in *Troxel v. Granville*, in which the Court drew a stark line. The distinction between legal parents and legal strangers is paramount in determining the rights that various adults have with respect to the care, custody, and visitation of children. A battle for custody between two legal parents, neither of whom has been declared legally unfit, is straightforwardly about the best interests of the child. The court asks the following question: Given a variety of factors, which parent is best suited to have custody? But a battle between a parent and a non-parent is completely different.

It is virtually impossible for a non-parent to successfully obtain legal custody of a child who has at least one fit parent. Visitation is sometimes possible—but it may be hard to come by. In *Troxel*, a plurality of the Supreme Court concluded that a Washington State law that allowed any third party to petition for visitation with a child at any time was unconstitutional as applied to Tommie Granville, a mother who had sought to limit visitation by her children's paternal grandparents after their father's suicide. The Court in that case cited the substantive due process right of parents to make decisions regarding the care, custody, and control of their children unless they have been declared unfit: The law must presume that fit parents act in the best interests of their children, and give "special weight" to their decisions about, among other things, who should be able to spend time with their children.

In the wake of *Troxel*, many state courts have ruled on the validity of their respective third-party visitation statutes. Those that survived review built in a strong preference for deferring to a legal parent's decision about visitation with third parties. Those that didn't treated parents and non-parents closer to equals.

In Washington State, the post-*Troxel* decisions have been careful to show more respect for parental rights, sometimes at the expense of children's best interests.

The Rights of Former Stepparents, and Michael Holt's Claim for Nonparent Custody

Generally, when a relationship is created by marriage—as in the case of a stepparent or a mother- or brother-in-law—it terminates when the marriage is dissolved. A stepparent becomes, in essence, a legal stranger to his or her stepchildren upon divorce from the children's parent.

Unless state law provides otherwise, the end of the marriage spells the end of any contact with the children

without the continuing acquiescence of the parent. In California, for example, a statute allows a court to grant “reasonable visitation” by a stepparent when he or she divorces a child’s legal parent.

Third parties like former stepparents can also, in some states, petition for nonparent custody. The State of Washington provides for this possibility. But because of the special constitutional protection given to legal parents, the statute precludes granting nonparent custody without a showing that the legal parent is unfit (a tough standard) or that custody with a parent would result in “actual detriment to the child’s growth and development.” Michael’s claim revolved around Laurie’s pattern of engaging in intense, short-term relationships and allowing those relationships to interfere with his relationship with C.M.H. Since he is the only father C.M.H. has ever known, Michael claimed that her plan to immediately relocate to another city would be harmful to C.M.H. by cutting off his access to Michael. Although the court seemed sympathetic to Michael’s claim—and concerned about Laurie’s behavior—it concluded that Michael had not made a showing of actual harm, because while Laurie had said she might terminate contact between Michael and C.M.H., she had not yet done so. A showing of actual detriment, the court decided, required more immediate evidence of harm to justify overriding the custodial rights of a fit parent.

Michael Holt’s Claim for De Facto Parentage

Alternatively, Michael claimed that he should be treated as a de facto parent, an adult who is not a legal parent, but has functioned as a social or psychological parent nonetheless. Despite the conventional wisdom about the hierarchy between parents and non-parents, some jurisdictions recognize this middle-ground status. While some states, such as New York, have rejected this status outright (a development I have described in a [previous column \(http://writ.news.findlaw.com/grossman/20100511.html\)](http://writ.news.findlaw.com/grossman/20100511.html)), several states have recognized the de facto parentage doctrine to recognize a quasi-parent status based on a functional parent-child relationship.

This doctrine was first recognized in a 1995 Wisconsin case, *In re Custody of H.S.H.-K* (http://scholar.google.com/scholar_case?case=9444398073080790210), and has been adopted in a few other jurisdictions since then. In its typical formulation, the doctrine requires not only that the co-parent function as a parent, but also that the legal parent consented to the creation of the functional parent-child relationship and actively fostered its growth. Although the doctrine varies from state to state, it typically does not give rise to rights equivalent to a legal parent’s. Rather, it allows the de facto parent to seek visitation, but not custody. Courts in states that recognize de facto parentage justify the intrusion into the legal mother’s constitutionally-protected parental rights by pointing to her role in creating and fostering the relationship with the co-parent.

The Washington Supreme Court has recognized de facto parentage as a viable doctrine under state law. In *In re Parentage of L.B.* (2005), the court applied it in a dispute between a biological mother and her lesbian partner. The two women had agreed to become parents together, and one of them was inseminated and gave birth to a child. Under Washington law, only the biological mother had legal parent status, but the court recognized her partner as a de facto parent. The court acknowledged de facto parentage as an equitable remedy that could be used to fill statutory gaps in parentage law. The law at the time provided no mechanism by which a lesbian co-parent could attain parental rights despite longstanding and deep involvement in parenting her partner’s child. In that case, the doctrine of de facto parentage allowed the court to award some residential time to the co-parent, despite her lack of legal parent status.

The court reconciled the doctrine with the biological mother’s constitutionally-protected parental rights by requiring, as one prong of the test, that the biological parent must have consented to and facilitated the relationship between the child and the nonparent. Proving oneself to qualify as a de facto parent is, the court wrote, “no easy task.” The status is “limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.”

Although de facto parentage seems like a good fit for Michael Holt, who was encouraged to assume the role of C.M.H.’s father from birth, and to continue in that role for years after he and Laurie divorced, a later ruling from the Washington State high court made his suit more difficult. In that ruling, *Corbin v. Reimen* (discussed [here \(http://writ.lp.findlaw.com/grossman/20100413.html\)](http://writ.lp.findlaw.com/grossman/20100413.html)), the court ruled against an ex-stepfather who was trying to maintain strong parental ties with his former stepdaughter “M.F.” by seeking recognition as a de facto parent. As

with Michael Holt, M.F.'s stepfather was encouraged to maintain a parental role after he divorced M.F.'s mother. No distinction was made between his biological children of the marriage and his stepchild. After more than a decade of co-parenting (both during marriage and after the divorce), the child's mother stopped sending M.F. for visitation. His former stepfather then sued and asked to be recognized as a de facto parent.

The Washington Supreme Court denied the stepfather's request, ruling that "M.F.'s legal parents and their respective roles were already established under our statutory scheme," and that the former stepfather had entered the relationship "as a stepparent, a third party to M.F.'s two existing parents." The court reasoned that recognizing the former stepfather as a de facto parent would, in essence, enlarge his rights and potentially infringe on the parental rights of M.F.'s legal parents. As a stepparent, the court concluded, Corbin could only obtain custody (as opposed to simply visitation) over a legal parent's objection upon a showing of either parental unfitness or actual detriment to the child—both of which showings set very high standards.

One reading of *Corbin* is that a former stepparent is barred, categorically, from being treated as a de facto parent. But the majority in *In re C.M.H.*, the recent case, rejected that interpretation. Although the legislature has passed new laws to deal with a broader array of family forms—including those formed by same-sex couples that become parents together—the court reasoned that those laws "do not provide the exclusive basis for obtaining parental rights and responsibilities." Rather, the majority explained: "Where the legislature remains silent with respect to determinations of parentage because it cannot anticipate every way that a parent-child relationship forms, we will continue to invoke our common law responsibility to 'respond to the needs of children and families in the face of changing realities.'"

The question, then, was whether existing statutory law adequately provided for situations like the one facing Michael Holt—and whether he, like M.F.'s former stepfather, was precluded from attaining status as a de facto parent. The majority saw the two cases differently, however. For M.F., two biological parents divorced and shared responsibilities under a custody and visitation agreement. The former stepfather was a third wheel, in the court's eyes, who could only gain parental time under the mechanism reserved for nonparents—by proving the unfitness of the biological parents or proving actual detriment to M.F. from being deprived of contact with his former stepfather.

For Michael Holt, the situation was different. C.M.F.'s father was dead before he was born, and Michael stepped into an "unequivocal and permanent parental role with the consent of all existing parents." Such a person "does not have a statutorily protected relationship," but "justice prompts [the court] to apply the de facto parent test." This approach, in the majority's view, "adequately balances the rights of biological parents, children, and other parties."

This ruling does not mean that Michael Holt will win his case, but it does mean that he will have the opportunity, on remand, to prove that he qualifies as a de facto parent. Given the apparent depths of his involvement with C.M.H. in a parent-type relationship, it seems likely that he will succeed in this endeavor.

One justice dissented in part; three dissented in full. Although they raised several points in dissent, the most compelling among them is the question whether this ruling alters the general treatment of former stepparents. An obvious concern, as one justice wrote, is that the parent is "highly likely to encourage her spouse, the stepparent, in pursuit of a harmonious family life that includes a loving relationship with her child together with shared responsibilities of childrearing." But that encouragement, the Court said, may "not mean that the parent consents to a permanent, life-long parent-child relationship between her child and the stepparent if the marriage should end." Yet, the de facto parent test looks first and foremost to the consent and active fostering by the parent as an indicator of intent to share parental status. But when the marriage ends, is the inference of consent still justified by the spouse-parent's behavior during the marriage?

It is true that broadly granting stepparents the right to insist on continuing parent-child relationships after divorce from the spouse-parent would fundamentally alter the way we conceive of stepparent and stepchild relationships—as well as the way we conceive of the parental rights of the spouse-parent, a cornerstone of which is the right to exclude other adults from a child's life. But the ruling in *C.M.H.* need not lead to this result. The majority was careful to emphasize the need for case-by-case application of the de facto parentage doctrine and the

unattractiveness of categorical rules. And the one fact that made Michael Holt's claim seem most compelling—that he stepped into a parental role before birth (indeed, before he was married to C.M.H.'s mother) and as the only father the child ever had—is a fact that will not be true of most stepparents. His parent-like relationship with C.M.H. both preceded and outlasted his marriage to the child's mother. So it is perhaps unfair to lump him in with all stepparents, who are presumed to derive parent-child relationships solely from marriage to a child's parent. Because of this distinction, the ruling may not have broad application or lead to the parade of dangers that was raised by the dissenters.

Cases like *C.M.H.* raise difficult questions, to be sure. And they highlight a troubling fact about our current laws of parentage: They turn primarily on the interests and rights of adults, rather than on the interests and needs of children. In allowing Michael Holt to pursue his de facto parentage claim, the Washington Supreme Court may have recalibrated that balance more in favor of children, without sacrificing the important constitutional rights of parents.



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