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# Verdict

MARCH 3, 2015

JOANNA L. GROSSMAN

## Wyoming Supreme Court Ruling Reveals Continued Controversy Over De Facto Parentage Doctrine

Parentage law—called upon to answer the often-complicated questions about the identity of a child's *legal* parents—boasts several flashpoints. Surrogacy remains controversial, and the law in many states does not satisfactorily resolve many questions of parentage that arise (see examples [here](#)



(<https://verdict.justia.com/2014/10/14/traditional-surrogacy-tennessee-strange-statute-begets-strange-judicial-ruling>), [here](#) (<https://verdict.justia.com/2012/01/10/the-complications-of-surrogacy>) and [here](#) (<https://verdict.justia.com/2014/04/29/adoption-gay-couple-blocked-illegal-surrogacy-agreement>)). Children conceived with donor sperm find themselves at the center of more rather than fewer disputes about parentage as time goes on (see examples [here](#) (<https://verdict.justia.com/2012/01/24/men-who-give-it-away>), [here](#) (<https://verdict.justia.com/2014/01/27/craigslist-sperm-donor-owes-child-support>) and [here](#) (<https://verdict.justia.com/2013/11/27/sperm-donors-large-small-screen>)).

A third flashpoint involves claims of de facto parentage. These claims (which I have written about [here](#) (<https://verdict.justia.com/2013/12/10/de-facto-parentage-rights-former-stepparents>), [here](#) (<https://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights>), [here](#) (<https://verdict.justia.com/2014/08/20/mommy-momma-determining-parentage-new-family>), and [here](#) (<http://writ.news.findlaw.com/grossman/20100525.html>)) arise out of situations in

which an individual acts as a parent to a child despite the absence of a clear basis for parentage such as a genetic tie, adoption, or a marriage to the child's other parent. If recognized, this doctrine allows a court to grant parental or quasi-parental rights to an individual on the basis of functional parentage. The two most common plaintiffs in de facto parentage cases are lesbian co-parents and former stepparents, many of whom function as co-equal parents to a partner's child, but are left with no legal rights when the adult relationship ends.

A recent decision from the Wyoming Supreme Court, ***L.P. v. L.F.*** (<http://law.justia.com/cases/wyoming/supreme-court/2014/s-14-0066.html>), arises in a more idiosyncratic scenario, but nonetheless raises familiar issues about whether courts or legislatures should recognize the doctrine; whether functional parentage should ever be a sufficient basis for the acquisition of parental rights; and whether de facto parentage can be reconciled with the constitutionally protected parental rights of the child's legal parent.

### ***L.P. v. L.F.*: A Tangled Web**

L.F. gave birth to a baby, KEP (initials are used in the case to protect everyone's privacy). L.P. claims that he and L.F. had a sexual relationship around the time she conceived the child; she, on the other hand, says she was five-months-pregnant and showing when they first met. This is just one example of facts that continue to be disputed.

But what is not disputed is biological reality: DNA testing found a 0.00% chance that L.P. is KEP's biological father. Yet, he asked to be recognized as a legal parent of KEP under a variety of theories, the most salient of which is that he deserved recognition as a de facto parent.

As a factual matter, L.P.'s claim rested on his role in raising KEP. He was present at the hospital when KEP was born, and he was listed on the birth certificate as the child's father. KEP was named for L.P.'s brother and uses L.P.'s surname. L.F. and L.P. lived together when KEP was born and continued to do so for at least eighteen months. Around that time, the couple decided to separate, and L.F. left with KEP. L.P. enlisted law enforcement to help track them down, but the search was unsuccessful. L.F. later explained that she and KEP had been living in a safe house for battered women, although there was no evidence in the record of domestic violence.

On her own, L.F. made contact with L.P., and they met at a Wal-Mart in Cheyenne, Wyoming, where L.F. had moved. L.P. moved there, too, and rented an apartment across the street from L.F. KEP went back and forth between L.F.'s and L.P.'s houses, apparently at times of his own choosing. This shared, but not co-residential, parenting continued for

about five years.

In 2011, when KEP was eight years old, L.F. filed a petition to disprove paternity. This led to the DNA testing, and a variety of other twists and turns that led the Wyoming Supreme Court to denounce the procedural history as “confusing.” The facts were also confusing, especially after L.F. physically attacked L.P., and KEP got involved in the fight. L.P. (the alleged father) obtained a restraining order, but, without court approval, took KEP and left Wyoming.

More than a year later, while L.P. still had KEP in the State of Washington, the trial court ruled against L.P.’s claims to paternity. He was not KEP’s biological father. He did not qualify as a “presumed parent” (a statutory status used in many states to identify the child’s biological father or a man who has held himself out to others as the biological father). And the court saw no basis to “deviate from the statutory elements required to establish that he was presumed to be KEP’s parent” given that he “had hardly acted equitably himself in taking the child to Washington.”

The court also ruled that L.P. had failed to prove he was in a common-law marriage with L.F., thus depriving himself of parental status arising out of marriage to the child’s other parent. Having lost on all his claims to parentage, L.P. had no basis for requesting custody or visitation. A child’s best interests are only relevant when a person seeking custody has proven parental rights. L.P., after these adverse rulings, was a legal stranger to KEP, despite his longstanding relationship with him.

L.P. appealed the ruling, relying primarily on the argument that he should be recognized as a de facto parent—one who can seek custody or visitation despite the lack of a formal basis for legal parentage. L.F. did not file an appearance or a brief, yet, as discussed below, she won the appeal.

## **De Facto Parentage**

L.P.’s first line of argument was that he was KEP’s legal parent. But after losing that argument, he fell back on de facto parentage. But de facto parentage provides a less certain path to continuing contact with a child. First, not all jurisdictions recognize the doctrine. Second, de facto parenthood does not necessarily give rise to the same rights as legal parentage. And third, if the doctrine is recognized, it must be squared with the constitutional rights of the child’s legal parent, who has the right to the “care, custody, and control” of the child, including the right to exclude third parties from the child’s life.

This last point is especially important in the wake of the U.S. Supreme Court’s ruling in ***Troxel v. Granville*** (<https://supreme.justia.com/cases/federal/us/530/57/>)

(2000), in which the Court drew a stark line between parents and non-parents, requiring state visitation laws to presume that a parent's decision to deny contact was in the child's best interests and presumptively the correct decision.

Despite the conventional wisdom about the hierarchy between parents and non-parents, some jurisdictions nonetheless recognize a 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.

Wisconsin was the first to recognize de facto parentage. In a 1995 case, *In re Custody of H.S.H.-K* ([http://scholar.google.com/scholar\\_case?case=9444398073080790210](http://scholar.google.com/scholar_case?case=9444398073080790210)), the state's highest court set forth a four-part test to determine whether a non-legal parent qualified as a de facto parent. Several states have adopted some form of the test. 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.

In 2005, the Washington Supreme Court recognized de facto parentage as a viable doctrine under state law. In *In re Parentage of L.B.* (<http://law.justia.com/cases/washington/supreme-court/2005/75626-1-1.html>), 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 other 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 in *L.B.* 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.”

But in a similar case, ***Smith v. Gordon*** (<http://law.justia.com/cases/delaware/supreme-court/2009/116890.html>), the Delaware Supreme Court refused to recognize de facto parentage on the grounds that a new basis for parentage should be adopted by the legislature, rather than courts. The legislature did accept the court’s invitation and added a statutory provision for de facto parentage the following year.

### **Is L.P. a De Facto Parent?**

L.P.’s claim to de facto parentage was not as strong as the claims in the cases above. For one thing, although the facts are disputed, it seems clear that he and L.F. did not decide at the outset to have and raise a child together. In cases where a couple has made such a joint decision, it is much less an infringement on the biological mother’s parental rights to recognize the co-parent. Indeed, one might argue that the two women’s claims to parentage arose at the same time—one from giving birth and the other from participating in the decision to have a child and the preparation for its arrival—and thus neither has a superior claim to parentage.

But for L.P., his claim is clearly inferior to L.F.’s. She became KEP’s legal parent by the act of giving birth. Despite his claim to the contrary, he was not the biological father and thus had none of the constitutional protection for that relationship (the opportunity to seek a parent–child relationship, which an unwed father must grasp in order to preserve his rights). And he had no statutory claim to parentage because he did not qualify as a presumed parent. His only hope was for the court to recognize de facto parentage as a doctrine and to decide that he met its definition.

The Wyoming Supreme Court, however, declined the invitation to adopt the de facto parentage doctrine. It considered the key de facto parentage rulings from other states and decided that the Delaware court was right to defer to the legislature’s wisdom. Given that Wyoming (like Delaware) has a comprehensive and codified parentage scheme, the court felt it had no basis for adding an additional basis for parentage. It thus invited the legislature, as the Delaware court did, to consider whether to add de facto parentage to the list of ways a legally protected parent–child relationship can be formed.

The *L.F.* court did not reach this conclusion lightly. Indeed, it acknowledged the risk of harming KEP by “abruptly terminating a relationship with someone who has cared for

him as a parent would.” And although L.P.’s “behavior has not always been ideal, and he may in desperation have made claims that could not be true, he has been devoted to KEP, who regards him as his father.” It also cited authority—provided in a friend-of-the-court brief since the mother declined to file a brief—supporting the claim that the “preservation of attachments by children to those who have cared for them is critical to their healthy development . . . , and these bonds develop without regard to biological ties.”

While the court had “little doubt” that the attachment claims are true, it worried about usurping the legislature’s role. The current parentage scheme in Wyoming was adopted in 2003, five years after the well-known *H.S.H.-K* case was issued. The court presumed “the legislature has acted in a thoughtful and rational manner with full knowledge of existing law when it enacts a statute.” Moreover, the best contours of the de facto parentage doctrine deserve, the court concluded, further study. Issues that it invited the legislature to consider include: the effect on a noncustodial biological parent’s rights (say, in this case, KEP’s biological father); the extent of the rights (only visitation or rights co-equal with legal parent’s); a minimum length of the functional parent–child relationship in order for a de facto parentage claim to ripen; the possibility of more than one de facto parent (and thus perhaps more than two rights-holding adults with respect to the same child); when and under what circumstances a de facto parentage relationship could be terminated; and the correct apportionment of child support obligations among legal parents and de facto parents.

## Conclusion

A compelling case can be made in many cases that de facto parentage is necessary to recognize the fully formed parent–child relationships that often arise despite the lack of a formal tie like biology or adoption. This is especially so when the de facto parent played an equal role in every aspect of childrearing—from before conception into childhood. And it is even more compelling when raised by same-sex co-parents, who, in many states, did not have (and still might not have) any alternative mechanism for protecting those ties. It is less compelling to protect an individual who casually wanders into parenting and who simply chooses to forego the available methods for securing the parent-child tie. L.P.’s claim seems to lie somewhere between these two extremes. But certainly the Wyoming Supreme Court was within its rights to defer to the legislature. Legislatures in most states would do well to contemplate the amazing array of situations in which children today are raised—and to craft rules of parentage that account for all of them.





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