

Opening the door to de facto parenthood

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Can custody by a non-legally recognized parent establish a de facto parenthood relationship?

From *Obergefell* to *Conover* and *Kpetigo*, Maryland has been opening the door to de facto parenthood and custody/access to nonlegally recognized parents.

Since this is a relatively recent development, the Maryland courts are left with sparse guidance on how to determine when a third party steps into the role of a de facto parent, particularly where a child already has two legal parents.

The Court of Appeals was recently tasked again with taking this on in the case of *B.O. v. S.O.*, discussing what it means to foster a parent-child relationship in terms of establishing de facto parenthood where a third-party has previously been granted custody of the minor child.

B.O. v. S.O. highlights the issues raised in the 2020 and 2021 *E.N. v. T.R.* cases that introduced and outlined the four-factor test that must be shown in order to establish de facto parenthood. Specifically, the person seeking de facto parent status must prove:

(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 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 petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental nature.

In that case and its progeny, the focus of the court's analysis starts with the first factor, i.e., the encouragement and fostering of a parent-like relationship between the petitioner and the child.

In *E.N. v. T.R.* the Court of Special Appeals initially held that it is enough for one of the two legal parents to allow or consent to a third-party establishing a parent-like relationship with the child.

On appeal, however, the Court of Appeals reversed, holding that when there are two legal parents, both must consent to the creation of the parent-like relationship. The court reasoned that holding otherwise would create the situation – that is found in other states – where three or more parties are vying for custody and visitation of a minor child.

In *B.O. v. S.O.*, the Court of Special Appeals examined whether a third party (“Aunt”) who had obtained custody from “Mother” pursuant to a protective order and then continued living with the minor child after that protective order's expiration could establish the first prong, i.e., the fostering of the parent-like relationship.

Aunt began caring for the minor child after the child was removed from Mother's custody due to a finding of neglect and domestic violence. Aunt sought and obtained on behalf of the child a protective order. This protective order granted custody to Aunt for a period of one year; however, even upon its expiration, the child continued to live with Aunt.

During the custody hearing, Mother testified that at all times she had contested Aunt's custody of the child and continued to seek time with the child. Mother testified that during the term of the protective order that she saw the child at Aunt's discretion and, when Mother entered treatment, that the child spent overnights with her.

In 2019, both Mother and Aunt sought various protective orders

against each other. Aunt's protective orders were all denied. Mother did obtain a protective order against Aunt but it did not address custody.

Following these proceedings, Aunt filed for emergency custody and Mother filed criminal kidnapping charges.

The testimony revealed that Aunt continued to restrict and, at times, deny Mother's access to the minor child.

At the conclusion of the custody case, the trial court held that Aunt did not meet the first prong of the four-factor test because Mother had not “consented to, and fostered” the relationship between Aunt and child.

In reaching this conclusion, the court noted that: (i) Mother contested the original neglect finding and protective order hearing, (ii) Mother attempted several times to have the child returned, (iii) there was no written document or custody agreement evidencing consent, (iv) there was no evidence of oral statement indicating consent or as to who should raise the child, and (v) Mother contested Aunt's custody litigation.

This demonstrated to the court that Mother clearly and plainly did not voluntarily consent to or foster a parent-like relationship between Aunt and child.

Having not met the first prong of the four-factor test, Aunt did not meet her burden of establishing her status as a de facto parent.

This decision, as well as the Court of Appeals decision in *E.N. v. T.R.*, clarifies that the courts are not to fling the doors open for any person seeking de facto parenthood status, but must strictly show all four factors of the test before proceeding.

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