My Two Dads (and Three Moms): Balancing a Child’s Interest and a Parent’s Fundamental Right When Granting De Facto Parent Status

I. INTRODUCTION

The jurisprudence of the 21st century has been replete with change, but no one area so much as family law. There have been radical changes in the concept of family brought about by advances in reproductive technology, an evolution in public opinion about same-sex relationships, and an increase in non-marital relationships producing or rearing children. These changes have led to the notion that a “traditional” family is no longer composed of one father, one mother and their biological children. An adult can become a parent, absent the traditional biological component, by law (through adoption), by medicine (through advanced reproductive technology) or by attachment (through playing a parent-like role in a child’s life). It is this third method of becoming a parent that courts in Maine and throughout the nation have struggled to address over the last fifteen years.

Courts now recognize the negative impact and psychological harm that a child can suffer when an individual who has acted as that child’s parent for a significant amount of time is removed from that child’s life, often as a result of a breakdown of the relationship between the child’s biological parent and his or her romantic partner. Maine courts recognize the fundamental right of a fit1 biological parent in the care, custody and control of his or her children and have sought to establish an avenue allowing children to preserve a parent-child relationship with those that would otherwise be legal strangers. This avenue-- de facto parent status -- protects a child’s interest in continuing a vital relationship.

Every state has its own unique set of statutes governing family law, and Maine is not

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1 The Maine Superior Court has defined a fit parent as one who is “totally capable of providing for all of the physical and psychological needs of the child.” Pickford v. Pickford, No. CV-79-84, 1984 Me. Super. Lexis 29 (February 27, 1984).
alone as a state without a de facto parentage statute. In the absence of a legislative standard, the Maine Supreme Judicial Court sitting as the Law Court, has recognized de facto parentage as a necessary status. Recently, the Law Court was faced with a case that necessitated the development of a judicial de facto parentage standard in Maine. In *Pitts v. Moore*, the Court agreed that a de facto parent is one who has “fully and completely undertaken a permanent unequivocal, committed and responsible parental role in the child’s life,” but the fractured Court disagreed whether a petitioner must show that the child will be harmed if the parent-child relationship is severed. The standard established by the plurality in *Pitts* does not properly balance the rights of parents with the interests of children. As such, the Maine Legislature should enact a de facto parent standard that better serves the needs of Maine’s children.

Other states have employed similar methods to establish a de facto standard using both judicial and legislative means, and the American Law Institute (ALI) set forth a uniform de facto parent standard in 2002. In developing this standard, the ALI recognized that having a biological connection to a child is not the only way one can be a parent under the law. The ALI’s standard, did not expressly require a showing of harm, but it did set out a temporal requirement that a person seeking de facto parent status must have resided with the child “for a significant period of time not less than two years.” The ALI included the temporal requirement as a way to exclude those who have not formed strong psychological bond with a child from seeking de facto parent status.6

The Maine Family Law Advisory Commission recently proposed, as part of the Maine

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5 *Id.*
6 *Id.* cmt § 2.03c(i).
Parentage Act (MPA), a distinct de facto standard for adoption by the Maine Legislature. The MPA standard varies from the ALI standard and Maine’s judicial in some important respects. Specifically, the MPA standard eliminates the *Pitts* harm requirement and rejects the ALI’s fixed temporal requirement. Instead, the proposed MPA standard requires striking a balance between the interests of the child in maintaining the parent-child relationship and the fundamental rights of parents in the care and upbringing of their children. This standard protects the interests of the child by eliminating the need for expert witnesses at trial and utilizing the familiar best interests of the child standard as part of the de facto parentage analysis.

Part II of this paper explores the evolution of the family and the attempts by courts to address the real situations faced by modern families. It will show the necessity for new legal standards to protect vital child-parent relationships even where there is no biological or adoptive connection. It will further explore the interests of children in guarding parent-child relationships and the importance to the child’s development of protecting these bonds. Part III discusses the nature and extent of a biological or adoptive parent’s fundamental right in the care and upbringing of his or her child(ren). The need for and development of a de facto parent status and its current use in a number of jurisdictions is explained in Part IV. An analysis of de facto parent jurisprudence specific to Maine is presented in Part V. This analysis will reveal the practical difficulties of proving harm and demonstrate the effectiveness of balancing the interests of the child and with the rights of the parent. This section focuses on how the grant or denial of de facto parent status implicates the fundamental rights of parents in the care and control of their children. It also touches on the necessity for courts to implement a standard that is narrow enough to prevent unwarranted intrusion on the rights of legal parents while broad enough to

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protect the interests of children in maintaining important and meaningful relationships with those who have played a parental role in their lives. Part VI explains the de facto parent standard set forth in the proposed MPA and its use of the best interests of the child standard as part of de facto parent proceedings. Finally, Part VII concludes that the proposed MPA approach is the best standard for striking a balance between a parent’s fundamental right and a child’s interest in protecting vital relationships and advocates for its adoption by the Legislature.

II. THE PARENT-CHILD RELATIONSHIP AND THE LAW

The notion of a “traditional” American family consisting of a married heterosexual couple and their biological offspring no longer reflects reality. Children are being raised by extended family members, being born to gestational surrogates, being adopted by one member of a same-sex couple, and being cared for by their biological parent’s romantic partners. When the adult relationship that gives rise to these parent-child connections breaks down, these children may suffer harm if they are unable to have continued contact with those who who have served as their de facto parents.

A. The Evolution of the Family

The dynamics of the typical American family have changed dramatically over the past fifty years. Justice Sandra Day O’Connor wrote in 2000 that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”\(^8\) In the fifteen years since, even more changes in the family have occurred. Today, only sixty-four percent of U.S. children live with both parents while twenty-seven percent live with one biological parent, six percent live with unmarried domestic partners, two percent live with grandparents and the remaining two percent live with a nonparent.\(^9\) Further, the number of unmarried cohabiting

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couples has increased almost one thousand percent since 1960.\textsuperscript{10} Currently, almost forty-one percent of all births are to unmarried women.\textsuperscript{11} Unfortunately, the law has struggled during this time to develop legal standards to accommodate these alternative families. This is primarily because the notion of the “traditional” family has been the primary influence in the creation of family law and policy by courts and legislatures.\textsuperscript{12}

As a result, modern courts have faced the ongoing challenge of developing legal standards that reflect and meet the needs of the families appearing before them. Shifts in public policy have led to drastic changes in the rights and privacies protected by the courts. The Supreme Court began with recognizing the rights of parents to control the upbringing of their children by choosing where they are educated\textsuperscript{13} and what or how they are taught.\textsuperscript{14} Then, in 1965 the Supreme Court struck down a statute criminalizing the use of contraceptives by married couples thus recognizing a privacy interest, albeit one held by the married parties as one unit.\textsuperscript{15} This privacy interest was then expanded to cover the privacy of all individuals with the recognition of a right to contraceptives regardless of marital status.\textsuperscript{16} Concurrently, the courts identified a fundamental right to marry.\textsuperscript{17}

During the 1970s, society began to view marriage as more of a partnership between individuals than as a religious institution.\textsuperscript{18} Courts and legislatures across the country reacted to

\textsuperscript{13} Pierce v. Society of Sisters, 268 U.S. 501 (1925).
\textsuperscript{14} Meyer v. Nebraska, 262 U.S. 390 (1923).
\textsuperscript{15} Griswold v. Connecticut, 381 U.S. 479 (1965).
\textsuperscript{17} Loving v. Virginia, 388 U.S. 1 (1967).
\textsuperscript{18} See generally Homer H. Clark, Jr. The Law of Domestic Relations in the United States (2006); Herbert Jacob,
this view by adopting no-fault divorce. Following that change, a shift in the public’s view of marriage as only between a man and a woman resulted in the Supreme Court’s striking down barriers to same-sex relationships. Today, many states, including Maine, recognize same-sex marriage. All of these new legal standards were adopted in reaction to the real situations being presented in courtrooms reflecting social views of what makes a family and how and when the government can or should interfere within that family.

Similarly, the public’s view of what makes one a parent has changed in light of advances in reproductive technology, the shift in societal acceptance and recognition of same-sex relationships, and the steady increase of divorce rates.” Advanced reproductive technologies such as ova donation, sperm donation and gestational surrogacy involve three or four parties, not all of who intend (or desire) to be the parent of the resulting child. Alternatively, if one member of a same-sex couple conceives a child using these methods and the relationship subsequently fails, the other member, though of no biological or adoptive relation to the child, may desire to sustain the parental relationship with the child. Additionally, it is not uncommon for divorced parties to enter new relationships leading to unrelated third parties being involved in the everyday caretaking functions of their partner’s children from a previous relationship. Courts are thus faced with the reality that traditional legal standards defining parents as only natural or adoptive parents leave them unable to effectively address the needs of the new American family. Accordingly, courts must develop other routes to provide legal recognition to a parent-child relationship created through means other than providing part of the biological material necessary

The American Psychological Association estimates that between forty and fifty percent of first marriages end in divorce. www.apa.org/topics/divorce.
for the creation of the child, such as providing nurturing and support to a child. The needs of the child to continue these vital parent-child relationships must be recognized and supported by the courts.

When a family dissolves, the courts step in to determine the rights and responsibilities of each parent.23 When parents are unable to agree to a shared parental rights and responsibilities plan, the court will apply the “best interest of the child” standard to determine how parental rights and responsibilities are allocated between the parents.24 However, in making this determination, the courts should consider not only biological parents, but also those who have formed parent-child relationships, such as unmarried partners or married partners who have not adopted the child. To do so, the courts must balance the interests of the child against the fundamental right of a fit biological parent in the care and control of his or her children.

B. The Interests of the Child in Protecting Vital Relationships

A parent-child relationship is one of the most vital relationships a person establishes.25 Children learn developmental and social skills from observing and interacting with their parents and caregivers beginning at a very young age. This bond, however, is not dependent on blood relation.26 A child’s healthy growth depends in large part upon the continuity of his or her personal relationships.27 When a child is separated from a primary caregiver or that caregiver’s parental authority is interfered with, the child is “inevitably and deeply harmed.”28 The effects

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23 See 19-A M.R.S. § 1653(1)(C).
24 § 1653(3).
26 H. RUDOLPH SCHAFFER, MAKING DECISIONS ABOUT CHILDREN 62 (1990); See Jane Hare & Leslie Richards, Children Raised by Lesbian Couples: Does Context of Birth Affect Father and Partner Involvement?, 42 FAM. REL. 249, 254 (1993) (finding the parental role of the nonbiological parent indistinguishable from that of the biological parent to children born into existing lesbian relationships)
of such a separation or interference can be an increased risk of poor academic performance, inability to adjust to new situations, low self-esteem, antisocial behavior and self-isolation.  

These detrimental effects can last throughout childhood leaving future adults inadequately equipped, both emotionally and psychologically, to handle stressful situations. Further, an absence of permanence may cause a child to have difficulty absorbing a value system. A child lacking an adequate value system can become a hostile, depressed and anxious adult.

Courts recognize the importance of protecting a child’s psychological welfare in the same way they have been protecting a child’s physical welfare and have developed legal standards to do so. In Maine, for example, the Law Court first articulated specific criteria for a “best interest of the child” standard in 1980. The standard initially included an analysis numerous factors with a heavy emphasis on the child’s relationship with each party and the community as a whole.

This standard, which was eventually adopted and modified by the Legislature and is now included in the parental rights and responsibilities statute, evolved to recognize the importance of protecting the psychological welfare of the child. It now also includes analysis of:

the effect on the child if one parent has sole authority over the child’s upbringing; the existence of domestic abuse between the parents, in the past or currently, and how that abuse affects the child emotionally; and all other factors having a reasonable bearing on the physical and psychological well-being of the child.

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30 Id. at 497.
32 Onorato, supra note 29 at 497.
33 Costigan v. Costigan, 418 A.2d 1144,1146 (Me. 1980).
34 “The age of the child, the relationship of the child with his parents and any persons who may significantly affect the child’s best interest, the wishes of the parents as to the child’s custody, the preference of the child (if old enough to express a meaningful preference), the duration and adequacy of the current custodial arrangement and the desirability of maintaining continuity, the stability of the proposed custodial arrangement, the motivation of the competing parties and their capacity to give the child love, affection and guidance, and the child’s adjustment to his present home, school and community.” Id.
35 19-A M.R.S. § 1653(3).
Additionally, courts recognize the importance of familial relationships to a child’s development and to the development of a strong society. These familial relationships, as mentioned supra, are not created by biology alone. Instead, close emotional relationships develop from “the intimacy of daily association.” In our modern society, legal scholars recognize that children can have parent-child relationships with unrelated third parties.

Unfortunately, when these relationships are formed on the basis of the third party’s relationship with the child’s biological parent, a breakdown of that relationship can have implications on the child. When an adult relationship dissolves, a child should not be forced, under the law, to have a parent-child relationship severed solely because no biological connection exists. In the context of the law’s treatment of illegitimate children, the Supreme Court has recognized that children “should neither be punished, nor treated differently, under the law for the actions of their parents.” This sentiment should also apply to children facing the cessation of a parent-child relationship due to the breakdown of an adult relationship over which the child has no control. For this reason, a child’s interest in preserving these vital parent-child relationships with unrelated third parties should be recognized and protected.

III. THE FUNDAMENTAL RIGHTS OF BIOLOGICAL AND ADOPTIVE PARENTS

When seeking to protect a child’s interest in the continuity of important parent-child relationships with unrelated third parties, courts must acknowledge a biological or adoptive parent’s fundamental right to control the upbringing of his or her child(ren). The Supreme Court recognized the fundamental right of parents to the “care, custody and control of their

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children” in Troxel v. Granville in 2000.40 In making this decision, the Court relied on its precedent established through Meyer and Pierce, discussed supra, of striking down “intrusive state statutes that effectively deprived parents of the custody of their children, or expressly divested parents of the authority to make decisions about the upbringing and education of their children.”41 In Troxel, after the death of their son, grandparents sought court-ordered visitation with their grandchildren over the objection of the mother of the children. The grandparents asserted standing under a state statute allowing “any person” to seek visitation rights at “any time.”42 The Court recognized that “the nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States’ recognition of [the] changing realities of the American family,”43 but held that “the interest of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.”44 The plurality opinion in Troxel focused heavily on the broadness of the third party visitation statute and the lack of deference given to a parent’s determination that such visitation would not be in the best interest of the child. The Court recognized the “traditional presumption that a fit parent will act in the best interests of his or her child”45 and held that “the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a ‘better’ decision could be made.”46 In his dissent, Justice Stevens urged that children’s interests in maintaining a vital relationship in their lives should be taken into consideration when balancing the competing interests of parents.

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40 Troxel, 530 U.S. at 65.
42 Troxel, 530 U.S. at 65.
43 Id at 64.
44 Id. at 65.
45 Id. at 69.
46 Id. at 72-73.
grandparents and the state.47

The Troxel case underscored the rights of parents, but it did not signify the end of third party or grandparent visitation statutes in this country. Between 1966 and 1986, before Troxel was decided, fifty states had enacted grandparent’s visitation statutes.48 After Troxel many states chose to narrow these statutes in order to protect the rights of parents while still recognizing the interests of the children in maintaining important relationships. For example, in thirteen states, there is now a presumption that a parent’s decision regarding third party visitation is correct.49 Similarly, nine state statutes include a requirement that the visitation will not adversely interfere with the parent-child relationship50 and eleven states require a showing by clear and convincing evidence that the visitation with the third party is in the best interests of the child.51 Currently, twenty-four states have general visitation statutes that allow grandparents or unrelated third parties to seek court-ordered visitation.52

In Maine, for example, grandparents who have a “significant” relationship with their grandchildren, such as one where the grandparent has been the primary caregiver of the child over a substantial period of time, may be granted visitation rights over the objection of the child’s parent.53 A grandparent must first establish standing to pursue visitation by asserting through affidavit the existence of a “sufficient existing relationship.54 If the court finds standing, a hearing will be held on the merits of the petition where the court will “consider any objection

47 Id. at 89 (Stevens, J., dissenting).
49 Id. at 5. (Arkansas, California, Illinois, Michigan, Missouri, Montana, Nevada, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Virginia).
50 Id. (Maine, Minnesota, Nebraska, North Dakota, Pennsylvania, South Carolina, South Dakota, West Virginia, Wyoming).
51 Id. (Delaware, Iowa, Kentucky, Montana, Nebraska, Nevada, Oklahoma, Rhode Island, South Carolina, Utah, Virginia).
52 Id.
53 Rideout v. Riendeau, 2000 ME 198, ¶ 33, 761 A.2d 291; See also 19-A M.R.S. §1803.
54 Id. ¶ 16.
of the parents concerning an award of rights of visitation or access by the grandparents.”55 If the court finds a sufficient relationship exists, it will use the best interest of the child standard to determine the extent of the visitation with a focus on limiting the intrusion on the rights of the parents by ensuring the amount of visitation will not be unduly burdensome on them.56 The Court found that when a child has a significant relationship with a grandparent, the cessation of contact between them could have a “dramatic, and even traumatic, effect upon a child’s well-being.”57

The Law Court specifically noted that “harm consisting of a threat to physical safety or imminent danger” is not the only acceptable basis for state interference but that the state also has an interest in protecting the “welfare” of its children.58 The Court explained that this interest has been previously expressed through regulations regarding child labor and compulsory school attendance.59 This detrimental effect on the well being of the child is the type of “harm “ the Law Court found to create an “urgent reason” to interfere with a parent’s fundamental right.60 The intrusion into a parent’s rights, however, must be limited to ensure that it does not “significantly interfere with any parent-child relationship or with the parent’s rightful authority over the child.”61 The Court’s decision in Rideout and the grandparent’s visitation statute strike a balance between the rights of parents and the interests of children in maintaining important relationships with those who have played a substantial role in their upbringing.

Oftentimes, significant relationships are formed with non-biological caregivers that rise to the level of a parent-child relationship. These caregivers may seek to petition the court to

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55 19-A M.R.S.A. § 1803(2)(D).
57 Id. ¶ 26.
58 Id. ¶ 23.
59 Id.
60 Id. ¶¶ 22, 23, & 25.
61 19-A M.R.S. § 1803(3).
continue the relationship against the wishes of the biological or adoptive parents. These
situations differ significantly from grandparent and third parent visitation because a court’s
recognition of the parent-child relationship may lead not only to visitation rights but also to the
allocation of parental rights and responsibilities.

IV. DE FACTO PARENTS

State courts and legislatures vary widely in their recognition of the need to protect parent-
child relationships between children and non-biological caregivers. States that have chosen to
recognize these de facto parents have struggled to develop standards that balance the interests of
the child in maintaining the relationship with the right of the biological parents not to have
interference in the care and upbringing of their children.

A. States Choose Whether to Recognize De Facto Parent Status

In response to the family dynamics appearing in courts across the country, some state
courts began recognizing the need for allowing unrelated third parties to sustain parent-child
relationships. Many of these state courts were forced to address the needs of children and the
rights of parents in the absence of public-policy-based legislative guidance. Most courts chose
one of three paths (1) deferring to the fundamental rights of parents by declining to recognize a
de facto parent status that may infringe on their rights; (2) recognizing the need for a de facto
parent status but deferring to the state’s legislature by declining to develop a judicial standard; or
(3) considering the importance of the public policy in the state by recognizing a de facto parent
status and developing a judicial standard for its application.

Some state courts have chosen not to recognize a de facto parent status as a way of
protecting the fundamental rights of fit biological and adoptive parents. The Court of Appeals of
New York declined to recognize de facto parent status by holding that “allow[ing] the courts to
award visitation—a limited form of custody—to a third person would necessarily impair the parents’ right to custody and control.”62 Similarly in Utah, the Supreme Court found that “in carving out a permanent role in the child’s life for a surrogate parent, this court would necessarily subtract from the legal parent’s right to direct the upbringing of her child and expose the child to inevitable conflict between the surrogate and the natural parents.”63 These courts then chose not to recognize the right of a third party to maintain a parent-child relationship after dissolution of a relationship with the child’s biological parent through de facto parent status.

Other courts have chosen to defer to the state legislature’s role in developing new family law policy by recognizing a need for a de facto parent status but declining to adopt a judicial standard.64 The Utah Supreme Court, when declining to recognize a de facto parent status, held that “courts are unable to fully investigate the ramifications of social policies and cannot gauge or build the public consensus necessary to effectively implement them.”65 The Michigan Court of Appeals deferred the matter to its Legislature because “the responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature’s, not the judiciary’s.”66 Similarly, the Supreme Court of Vermont held that de facto parentage has “complex social and practical ramifications” that “the Legislature is better equipped to deal with” when it declined to recognize a de facto parent status in the state.67

Finally, some state courts have answered the public policy considerations of their communities and the realities of the situations appearing in local courtrooms by recognizing a

64 See Aubrey Holland, The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law, 96 CALIF. L. REV. 1049, 1050 (2008) (“Family law primarily consists of individual state policies and statutes that regulate many aspects of family life and tends to be more in touch with modern trends and sensibilities.”)
need for a de facto parent status and the important role of the judiciary in its development. For example, the Supreme Court of Wisconsin noted the importance of protecting the interests of the children of unmarried or nontraditional couples and recognized that “when a non-traditional adult relationship is dissolving, the child is as likely to become a victim of turmoil and adult hostility as is a child subject to the dissolution of a marriage. Such a child needs and deserves the protection of the courts as much as a child of a dissolving traditional relationship.”68 Other courts, such as the Pennsylvania Superior Court, have held that an adult’s decision to end a relationship should not be treated as more important than the interests of the children of the relationship. That court held that a party’s “rights as a biological parent do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties’ separation she regretted having done so.”69 These states thus recognized the need for a de facto parent status. However, once the need for a de facto parent status was recognized, the courts and state legislatures were faced with the difficult task of developing and implementing a workable standard.

B. Developing a De Facto Parent Standard

In response to the different considerations and approaches being taken by courts across the country that chose to recognize de facto parent status, many state legislatures established de facto parent statutes. A Montana statute allows a “person other than the parent if the person has established a child-parent relationship with the child” to petition for the commencement of a parenting plan proceeding.70 Similarly, in Delaware, there is a statutory de facto parent standard that was established in 2013.71 Other states that have enacted de facto parent statutes include

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Oregon\textsuperscript{72} and the District of Colombia.\textsuperscript{73} In 2002 the American Law Institute (ALI) set forth a uniform de facto parent standard.\textsuperscript{74}

The ALI noted that “giving rights to de facto parents may serve to weaken the commitment society has to legal parents, on which the ideology of responsible parenting is based; yet disregarding their connection to a child at the time of family dissolution ignores child-parent relationships that may be fundamental to the child’s sense of stability.”\textsuperscript{75} The ALI further defined caretaking functions to mean “a subset of parenting functions that involves the direct delivery of day-to-day care and supervision to the child” including “physical supervision, feeding, grooming, discipline, transportation, direction of the child’s intellectual and emotional development, and arrangement of the child’s peer activities, medical care and education.”\textsuperscript{76}

Some states, however, believe that a showing of harm is required before the court can interfere with the fundamental rights of parents and have added such a requirement to their state’s respective de facto standard.\textsuperscript{77} The Massachusetts Supreme Judicial Court, for example, requires a showing that “measurable harm would befall the child” if the relationship with the de facto parent were severed.\textsuperscript{78} Similarly, the Supreme Court of North Dakota held that the basis

\begin{itemize}
\item \textsuperscript{72} Or. Rev. Stat. § 109.119 (1999).
\item \textsuperscript{73} D.C. Code § 16-831.02 (2009).
\item \textsuperscript{74} \textit{PRINCIPLES} § 2.03(C)(1). The ALI defined a de facto parent as follows:
  \begin{itemize}
  \item An individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,
  \item (i) lived with the child and,
  \item (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
  \item (A) regularly performed a majority of the caretaking functions for the child, or
  \item (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily live.
  \end{itemize}
\item \textsuperscript{75} \textit{PRINCIPLES} cmt Topic 1(I)(c).
\item \textsuperscript{76} \textit{PRINCIPLES} cmt §2.03(g).
\item \textsuperscript{77} \textit{E.g., Pitts}, 2014 ME 59 ¶ 42, 90 A.3d 1169; \textit{Smith v. Jones}, 868 N.E.2d 629, 632 (Mass. App. Ct. 2007);
\item \textsuperscript{78} \textit{In re Care and Protection of Sharlene}, 840 N.E.2d 918, 926 (Mass. 2006).
\end{itemize}
for a de facto parent standard was “prevent[ing] serious harm or detriment to the welfare of the child.” 79  Finally, the Louisiana Court of Appeals found that custody may only be awarded to third parties over the objection of fit biological or adoptive parents when “parental custody would result in substantial harm to the child.” 80

Other courts are split on the temporal requirement set out by the ALI and have chosen to omit or alter a time requirement for their own standards. The ALI requires that a parent-child relationship exist for two years before a party can assert de facto parent status. 81  The ALI included this threshold to ensure “that an individual has the kind of relationship that warrants recognition” and to avoid “potential claimants who have only temporary relationships with a child.” 82  Many state courts have disagreed with the ALI’s bright line temporal requirement. Before the ALI presented its standard, the Supreme Court of New Jersey rejected designating a specific time requirement concluding that “how much time is necessary [to establish a de facto parent relationship] will turn on the facts of each case including an assessment of exactly what functions the putative parent performed, as well as at what period and stage of the child’s life and development such actions were taken.” 83  Similarly, the judicial standard created in Wisconsin rejects a specific temporal requirement and instead calls for “a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.” 84  These states and others established state-specific standards to address the situations faced by their judiciaries.

V. DE FACTO PARENT STATUS IN MAINE

Maine courts are among those that have chosen to address a child’s need for continuity in

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79 McAllister v. McAllister, 779 N.W.2d 652, 658 (N.D. 2010).
81 See supra note 75.
82 PRINCIPLES cmt § 2.03(iv).
84 Holtzman, 533 N.W.2d at 658 - 659.
relationships with individuals who have assumed a parental role in their lives, but have found it
difficult to articulate and enforce a workable standard in the absence of legislative guidance on
the matter.

A. The Development of a Judicial Standard

Maine courts have recognized de facto parental relationships for almost fifteen years. In
the 2001 case of Stitham v. Henderson, the Law Court recognized the de facto parental rights of
a father with a child whom he thought to be his biological child and with whom he had lived and
provided support while being married to the child’s mother.⁸⁵ The Court found it important that
“the child does not, without cause, lose the relationship with the person who has previously been
acknowledged to be the father both in the law, through marriage, and in fact, through the
development of the parental relationship over time.”⁸⁶ The Court relied heavily on its analysis in
Rideout about the necessity of protecting the welfare of Maine’s children in reaching this
conclusion. Further, the Law Court recognized the authority of the District Court to use the best
interest of the child standard to determine the extent of the de facto parent’s parental
responsibilities.⁸⁷

Two years later, in C.E.W v. D.E.W, the Law Court refined its definition of de facto
parent as those who had taken a “permanent, unequivocal, committed, and responsible parental
role in a child’s life.”⁸⁸ In that case a former partner in a same-sex relationship, who was not
biologically related to the child nor had adopted the child but who had functioned as a parent for
the child’s entire life was granted de facto parent status. The Law Court highlighted the need for

⁸⁶ Id. ¶ 24 (Saufley, J. concurring).
⁸⁷ Id. ¶ 17.
the Legislature to “flesh out” the definition of de facto parenthood.\textsuperscript{89}

The Law Court addressed de facto parent status again in 2008 in the case of \textit{Philbrook v. Theriault}.\textsuperscript{90} There, the Law Court denied de facto parent status to two grandparents who had played a substantial role in the care and upbringing of their grandchildren but who were not “understood and acknowledged to be the child’s parent both by the child and by the child’s other parent.”\textsuperscript{91} The Court used the process established in \textit{Rideout} requiring the grandparents to first establish standing to seek de facto parent status by making a prima facie showing that they meet the elements of the status through affidavit.\textsuperscript{92} The Court found that the Philbrooks had acted as “loving and helpful grandparents” but that the care they had provided for the children “was not sufficient to transform them into the boys’ de facto parents.”\textsuperscript{93}

B. \textit{Pitts v. Moore}

In 2014, the Law Court, in a fractured plurality opinion, set forth a more comprehensive judicial de facto parentage standard in the case of \textit{Pitts v. Moore}.\textsuperscript{94}

1. Factual and Procedural Background

Matthew Pitts and Amanda Moore, an unmarried couple, lived together off and on for more than eight years.\textsuperscript{95} During a break in their relationship in 2008, Moore briefly dated another man, Eric Hague.\textsuperscript{96} After resuming her relationship with Pitts, Moore discovered she was pregnant.\textsuperscript{97} Although the paternity of the child was in question, Pitts agreed to sign his

\textsuperscript{89} \textit{Id}.
\textsuperscript{90} \textit{Philbrook v. Theriault}, 2008 ME 152, 957 A.2d. 74.
\textsuperscript{91} \textit{Id}, \textsuperscript{¶} 23.
\textsuperscript{92} \textit{Id}, \textsuperscript{¶} 15.
\textsuperscript{93} \textit{Id}, \textsuperscript{¶} 26.
\textsuperscript{94} \textit{Pitts}, 2014 ME 59, \textsuperscript{¶} 18, 90 A.3d 1169.
\textsuperscript{95} \textit{Id}, \textsuperscript{¶} 2.
\textsuperscript{96} \textit{Id}.
\textsuperscript{97} \textit{Id}. 

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name on the child’s birth certificate and to give the child his last name.98 The parties and the child lived together for eleven of the child’s first twelve months of life.99 During this time, Pitts was the primary wage earner and Moore was the primary caregiver.100 Pitts participated in raising the child and was responsible for the care of the child while Moore was working out of the home.101 The relationship continued in an on-again-off-again manner until mid-2011.102 In July 2011, following the dissolution of the relationship, Pitts filed a complaint in the District Court seeking a parental rights and responsibilities order.103 A paternity test revealed Hague as the child’s biological father and the matter proceeded as a de facto parent petition.104 The District Court found Pitts to be the child’s de facto parent.105 Moore appealed and the fractured Law Court established a de facto parent standard in a plurality opinion while also vacating the judgment and remanding the matter to the District Court.106

2. The Plurality Opinion Sets Forth a De Facto Parent Standard Including a Harm Requirement

The plurality held that de facto parent status will only be granted when “the failure or refusal to so determine will result in harm to the child” and established a three-stage procedure for obtaining de facto parent status.107 To begin, a “party seeking de facto status must . . . establish his or her standing to initiate the litigation by making a prima facie showing of de facto parenthood.”108 This standing requirement is the same as that used in both Rideout and Philbrook. Next, using a clear and convincing evidence standard, “an individual seeking

98 Id. ¶ 4.
99 Id. ¶ 5.
100 Id.
101 Id.
102 Id. ¶ 6.
103 Id. ¶ 3.
104 Id. ¶¶ 3 & 7.
105 Id. ¶ 1.
106 Id.
107 Id. ¶ 17.
108 Id.
parental rights as a de facto parent must show (1) that he or she has undertaken a permanent, unequivocal, committed, and responsible parental role in a child’s life; and (2) that there are exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parent’s rights.”

Finally, “if and only if, the individual is a de facto parent, the court must establish the extent of the de facto parent’s rights and responsibilities.”

Justice Gorman, writing for the Pitts plurality emphasized that “it remains ‘firmly established’ that parents have ‘a fundamental liberty interest to direct the care, custody, and control of their children.’” Justice Gorman noted that “a parent’s ‘constitutional liberty interest in family integrity is not . . . absolute, or forever free from state interference,” but emphasized the plurality’s desire to protect this interest by establishing the standing requirement which limits occasions where the parent would be forced “to expend time and resources defending against a third-party claim to a child [which] is itself an infringement on the fundamental right to parent.”

Justice Gorman further highlighted the rights of parents by stating that “a court contemplating an order that creates a parent out of a non-parent must first determine that the child’s life would be substantially and negatively affected if the person who has undertaken a permanent, unequivocal, committed, and responsible parental role in that child’s life is removed from that role.”

Finally, Justice Gorman explained that “because the extent of such an intrusion into a parent’s rights is substantial . . . a court may determine that an individual is a child’s de facto parent only when the failure or refusal to so determine will result in harm to the child.”

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109 Id. ¶ 27.
110 Id. ¶ 37.
111 Id. ¶ 11 (quoting Davis v. Anderson, 2008 ME 125, ¶ 18, 953 A.2d 1166).
112 Id. ¶ 12 (quoting Rideout, 2000 ME 198, ¶ 12, 761 A. 2d 291).
113 Id. ¶ 35.
114 Id. ¶ 29.
115 Id. ¶ 17.
Justice Gorman’s focus on requiring a showing of harm mimicked the court’s harm requirements for other times the State of Maine is permitted to interfere with the fundamental rights of parents: when protecting a child from abuse or neglect, or when protecting a child is from a temporarily intolerable living situation. In the former situation, “the State has a compelling interest in limiting, restricting or even terminating a parent’s rights when harm to the child will result from the absence of such governmental interference.” Similarly, when a child faces a temporarily intolerable living situation, a third party may petition for temporary guardianship over the objection of the parent. However, the harm prevented in these situations is not the same as the harm the Law Court addressed in *Rideout*. There, the Court was not seeking to prevent physical harm, but was seeking to advance the well being of child in a situation where “more than the best interest of the child” was at stake.

3. The Concurring Opinion Rejects the Harm Requirement

Justice Jabar, writing a concurring opinion disagreed with the necessity of a showing of harm. He noted instead of focusing on a harm threshold, the court “should weigh both a parent’s fundamental liberty interests and a child’s interest in continuing contact with an adult who has acted as a parent to the child.” The opinion quotes Chief Justice Wathen’s concurring opinion in *Rideout* cautioning that focusing only on the rights of the parents “is to ignore what may in a particular case be the equally compelling interests of the children, the family and the [third parties seeking custody or visitation].” Justice Jabar relied on the holdings of *Troxel* and *Rideout* that a showing of harm to a child is not required before the court

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116 Id. ¶ 14.
119 *Pitts*, 2014 Me 59, ¶ 42, 90 A.3d 1169.
120 Id. ¶ 43 (Jabar, J. concurring) (internal quotations removed).
121 Id. ¶ 51 (quoting *Rideout*, 2000 ME 193, ¶ 39, 761 A.2d 291 (Wathen, C.J., concurring)).
can interfere with parental rights.  Finally, he warned that the plurality opinion might lead the Legislature to believe that a showing of harm is a constitutional requirement and to, therefore, forego its independent analysis of a harm requirement based on Maine’s public policy climate.

C. A Harm Requirement is Unnecessary When Striking a Balance Between the Competing Interests in a De Facto Parent Determination.

As Justice Jabar indicated, a de facto standard should strike a balance between a fit biological parent’s fundamental rights and the interests of a child to maintain vital parent-child relationships. A requirement that a de facto petitioner show that a child will suffer harm if the relationship is severed is flawed, however, because it is difficult to establish harm and show a potential for future harm in court. Further, the establishment of harm will likely require the use of expert witnesses, a process that is expensive and difficult for pro se parties, and may lead to a battle of the experts.

The first difficulty is determining what harm to the child means and how it will be proven. The harm standard set forth by the Pitts plurality is not the same harm the court referred to in Rideout and differs also from the harm used in child protection proceedings. In child protection proceedings, one of the grounds for the termination of parental rights is a finding by the court by clear and convincing evidence that “the parent is unable or unwilling to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child’s needs.” Jeopardy is “evidenced by serious harm or threat of serious harm.” Serious harm means “serious injury” or “serious mental or emotional injury or impairment which now or in the future is likely to be evidenced by serious mental,

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122 Id., ¶ 43.
123 Id., ¶ 57.
125 § 4002(6)(A).

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behavioral or personality disorder, including severe anxiety, depression or withdrawal, untoward aggressive behavior, seriously delayed development or similar serious dysfunctional behavior” or “sexual abuse or exploitation.” The plurality specifically rejected this definition of harm in de facto parent cases.

There are few ways to prove the type of psychological or emotional harm a child may suffer upon the forced dissolution of a parent-child relationship without the use of an expert witness as the potential harm is psychological and not physical. An expert psychiatric or psychological witness can testify as to the harm a child will suffer if a person with whom that child has a child-parent relationship is removed from his or her life. Even with an expert, however, harm may still be difficult to prove with expert testimony as the Massachusetts Supreme Judicial Court has noted stating “the damage to the child, who cannot understand what is happening, . . . is something which even competent psychiatrists may be unable to predict.”

Even if a potential de facto parent has the financial resources to hire an expert witness to testify as to the harm the child will suffer if the relationship is terminated, he or she may face further complications if he or she is pro se. The process of qualifying an expert and adequately questioning and potentially cross-examining one is complicated. The proponent of expert testimony must establish the witness’s qualification as an expert under Maine Rule of Evidence 702 by establishing that “the testimony to be given is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue.” Similarly, Maine Rule of Civil Procedure 26 outlines specific and detailed procedures for obtaining discovery from expert witnesses, communicating with expert witnesses, and paying expert witnesses. The process of

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126 § 4002(10).
127 Pitts, 2014 Me 59, ¶ 29, 90 A.3d 1169.
130 State v. Williams, 388 A.2d 500, 504 (Me. 1978).
obtaining and questioning an expert witness may be too complicated for many pro se participants in a family dissolution matter to successfully complete. As such, the use of expert testimony to prove harm necessitates the use not just of the expert witness, but also of counsel in a de facto parent proceeding. The prospect of paying for an attorney and an expert witness may be prohibitive to many who wish to continue these relationships. Further, unlike in child protection matters, parties seeking de facto status are not entitled to legal counsel by law if they are unable to afford private counsel.  

Finally, if the de facto petitioner must hire an expert to prove harm to the child, the natural or adoptive parent of the child is likely to also hire an expert to show the child will not be harmed thus resulting in a “battle of the experts.” Alternatively, if the petitioner is unable to afford an expert or is pro se and does not realize the necessity of an expert, he or she may be unable to prove the required harm element leading to the severance of the parent-child relationship. The final outcome of *Pitts* represents the practical problems of implementing a harm requirement.

On remand in *Pitts*, the judge was presented with the testimony of an expert child psychologist witness who “testified authoritatively that the child was resilient and would not experience harm if his relationship with the plaintiff were terminated.” The de facto parent petitioner presented testimony that “he has a close bond with the child, that they enjoy their time together and that the child will certainly miss [him] and his family and ‘be sad’ if he does not continue to be a part of the child’s life.” The judge found this testimony insufficient to prove the child would “suffer any measurable long term harm.” While it is unclear why the de facto

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133 Id.  
134 Id.
petitioner did not present his own expert witness, the court clearly held that his testimonial evidence alone was “insufficient to meet the clear and convincing standard of proof” required to establish the requisite harm.\footnote{Id.}

For these reasons, a required showing of harm, while on its surface appears to focus on a child’s needs, in fact does not protect a child’s interest in maintaining a vital relationship. The fact a de facto parent relationship may exist and the petitioner can meet the standing requirement should be enough to establish that the child will be harmed if the relationship is severed. There should be no need for a parental figure to offer proof that the child will suffer future harm because, as discussed supra, extensive research has already been conducted proving that the severance of a parent-child relationship causes harm to the child. Instead, the courts should focus on ensuring a parent-child relationship exists using, in Maine, the remaining factors set forth in Pitts. Once the court has determined that a parent-child relationship exists, the best interests of the child standard will properly assess the level of involvement the de facto parent should have in the child’s life.

VI. A LEGISLATIVE STANDARD IS NECESSARY

On numerous occasions, both the Law Court and the judges of Maine’s District Courts have urged the Legislature to enact guidelines that can be used to determine when a person is a legal parent and how a person can becomes a legal parent.\footnote{An Act to Update Maine Family Law: Hearing on L.D. 1071 Before the Joint Standing Committee on Judiciary, 2015 Leg. 127\textsuperscript{th} Sess. (Me. 2015) (statement of District Court Judge Wayne Douglas).} In the wake of the confusing and unclear standard set forth in Pitts, Maine children need the Legislature to step in. The practical implications of the harm requirement that is currently the legal standard in Maine can be overcome by enacting a clearly defined de facto parent statute.

A. The Maine Parentage Act
After assessing the ALI standards, the standards set forth by both the plurality and the concurring opinions of *Pitts*, and the standard of other jurisdictions, the Family Law Advisory Commission (FLAC)\(^{137}\) developed proposed legislation that has recently been presented to the Maine State Legislature as the Maine Parentage Act (MPA).\(^{138}\) This proposal follows the three-part procedural requirements of *Pitts* for the establishment of de facto parent status.\(^{139}\) A petitioner must first show by affidavit “specific facts to support the existence of a de facto parent relationship.”\(^{140}\) If the court determines that prima facie evidence of de facto parentage exists, that person now has standing to have his or her de facto parent status adjudicated.\(^{141}\) If successful, the District Court will then use the best interest of the child standard to determine the extent, if any, of parental rights and responsibilities to be allocated to the de facto parent.

The MPA\(^{142}\) does not require a showing that a child will be harmed if a de facto petition is denied because the FLAC felt a harm showing “may present practical problems and complicate issues of proof at trial, including necessitating expert testimony on the question of ‘harm’ and setting up the potential for a battle of the experts.”\(^{143}\) The FLAC agreed that “the

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\(^{137}\) The FLAC, composed of family law practitioners, representatives from the Department of Health and Human Services, law enforcement and the judiciary, was created twenty years ago to examine, evaluate and recommend changes to Maine’s family laws. 19-A M.R.S. § 354.

\(^{138}\) While a Uniform Parentage Act does exist, it has not been adopted in Maine and it does not recognize de facto parent status. The FLAC analyzed the thirteen-year-old Act before determining that it needed updating and customizing in order to dovetail with Maine law.

\(^{139}\) L.D. 1071, § 1891(2) (127th Legis. 2015).

\(^{140}\) *Id.* §1891(2)(A).

\(^{141}\) *Id.* §1891(2)(C) & (D).

\(^{142}\) MPA standards for de facto parentage require a determination by the court that:

(A) the person has resided with the child for a significant period of time;
(B) the person has engaged in consistent caretaking of the child;
(C) a bonded and dependent relationship has been established between the child and the person seeking to be adjudicated as a de facto parent, and this relationship was fostered or supported by another parent of the child, and the person and the other parent have understood, acknowledged, accepted, or behaved as though the person is a parent of the child;
(D) the person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and
(E) the continuing relationship between the person and the child is in the best interest of the child.

\(^{143}\) Family Law Advisory Commission, Appendix B, 12/15/2014 Report, Page 10
‘best interest’ standard is a familiar yet equally germane standard” that can be used more effectively by Maine judges.\textsuperscript{144} The MPA was presented at a public hearing to the Joint Standing Committee on Judiciary on April 16, 2015 as the Kids Act of 2015.\textsuperscript{145} By presenting it with this delegation, the Act’s co-sponsor, Senator Roger Katz emphasized that the purpose of the MPA to provide stability for children by focusing on them and not on parents.\textsuperscript{146}

VI. CONCLUSION

A balancing of the interests of the child in protecting and maintaining a parent-child relationship with a third party with the fundamental rights of the parent should be conducted when determining parental rights and responsibilities upon the dissolution of alternative relationships. A required showing of harm to the child to establish de facto parent status increases the expense of litigation and puts lower income parties at a disadvantage. It does not protect the interests of the children and instead weighs heavily against them in a balance against the rights of biological and adoptive parents. Therefore, the MPA standard should be adopted and employed in Maine cases regarding de facto parentage because it will better serve the needs of Maine’s children by striking an adequate balance between the rights of the parents and interests of the child.

\textsuperscript{144} Id. at 10-11.
\textsuperscript{146} Id.