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Janice M. v. Margaret K.: Eliminating Same-Sex Parents' Rights to Raise Their Children by Eliminating the De Facto Parent Doctrine

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JANICE M. v. MARGARET K.: ELIMINATING SAME-SEX PARENTS' RIGHTS TO RAISE THEIR CHILDREN BY ELIMINATING THE DE FACTO PARENT DOCTRINE

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In *Janice M. v. Margaret K.*,[1] the Court of Appeals of Maryland considered whether de facto parent[2] status was a recognized legal status in Maryland and, if so, whether de facto parents could seek custody or visitation of a child over the objections of legal parents based solely on a determination of the child's best interests.[3] The court held that, given legal parents' Fourteenth Amendment right to the care, custody, and control of their children, de facto parenthood is not a recognized status in Maryland.[4] Thus, the court concluded that a de facto parent, like any third party, must meet a heightened standard for obtaining custody or visitation rights—either that the legal parent is unfit or that exceptional circumstances warrant such custody or visitation.[5] In so holding, the court failed to recognize that the test for establishing de facto parent status adequately protects legal parents' rights, thus making additional safeguards for those rights unnecessary.[6] The court further failed to distinguish de facto parents from other third parties and thus incorrectly relied on cases applying the heightened standard in third party custody and visitation disputes.[7] Had the court recognized that a lesser standard is appropriate for establishing a de facto parent's child visitation rights over the objections of the child's legal parent, it could have better recognized modern

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1. 404 Md. 661, 948 A.2d 73 (2008).

2. The term "de facto parent" means "parent in fact," and describes "a party who claims custody or visitation rights based upon the party's relationship, in fact, with a non-biological, non-adopted child." *Id.* at 680–81, 948 A.2d at 84.

3. *Id.* at 664, 680, 948 A.2d at 74, 84.

4. *Id.* at 664, 671, 948 A.2d at 74–75, 79.

5. *Id.*

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.

notions of family and more adequately protected same-sex couples' parental rights without undermining the constitutional right of legal parents to the care, custody, and control of their children.[8] Finally, granting de facto parents the same rights as legal parents in visitation disputes is consistent with the laws of several other states and is especially important given the court's veiled implication that the Maryland legislature may not itself have the constitutional authority to protect de facto parents.[9]

I. THE CASE

In 1986, Janice M. and Margaret K. met and began a committed same-sex relationship.[10] For the next eighteen years, the two women lived together in Janice's home,[11] but never married.[12] During their relationship, Janice often expressed to Margaret a desire to have children.[13] In 1999, after Janice was unable to become pregnant by *in vitro* fertilization, she adopted Maya, a child from India.[14] Margaret neither formally participated in the adoption process nor attempted to adopt Maya in Maryland.[15]

Maya arrived in the United States in December 1999, and lived with Janice and Margaret in the couple's home until they separated in the summer of 2004.[16] During that time, Janice and Margaret shared the responsibilities of caring for Maya, including feeding her, changing her diapers, bathing her, and managing her schooling and healthcare needs.[17] Margaret bought Maya's food and toys and gave Janice money to purchase Maya's other necessities.[18] According to Margaret, both Janice and Maya consistently referred to Margaret as Maya's mother.[19]

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8. *See infra* Part IV.C.
9. *See infra* Part IV.D.
10. *Janice M.*, 404 Md. at 665, 948 A.2d at 75.
11. *Id.*
12. Janice M. v. Margaret K., 171 Md. App. 528, 530, 910 A.2d 1145, 1147 (2006).
13. *Janice M.*, 404 Md. at 665, 948 A.2d at 75.
14. *Id.*
15. *Id.* at 665 & n.2, 948 A.2d at 75 & n.2. The record in this case suggests that Margaret's failure to formally participate in Maya's adoption in India may be, in part, the result of Indian adoption regulations that prohibit adoption by same-sex parents. *Id.* at 665 n.2, 948 A.2d at 75 n.2.
16. *Id.* at 665–66, 948 A.2d at 75–76.
17. *Id.* at 666, 948 A.2d at 76. Margaret regularly picked up Maya from daycare, attended her field trips, choir practices, horseback riding lessons and competitions, family vacations, and other social functions. *Janice M.*, 171 Md. App. at 531, 910 A.2d at 1147.
18. *Janice M.*, 171 Md. App. at 531, 910 A.2d at 1147.
19. *Id.* at 532–33, 910 A.2d at 1148. In her Emergency Motion for Visitation, Margaret asserted that various cards and letters, including Mother's Day cards, referred to Margaret

After Janice and Margaret separated, Margaret visited Maya, unsupervised, three to four times per week.[20] But as the relationship between Janice and Margaret deteriorated, Janice began restricting Margaret's visits with Maya and, in October 2004, Janice sent Margaret a letter specifying the conditions under which Margaret could visit Maya.[21] Margaret's unsupervised visits with Maya were subsequently reduced to approximately two per week.[22] In January 2005, after Margaret became dissatisfied with Janice's restrictions, Margaret's attorney wrote Janice regarding Margaret's visitation rights.[23] In response, Janice denied Margaret all visitation with and access to Maya.[24]

In February 2005, Margaret filed a complaint in the Circuit Court for Baltimore County, alleging that she was entitled to custody of or, in the alternative, visitation with Maya.[25] The circuit court found that, as Maya's adoptive parent, Janice was entitled to a presumptive right of custody.[26] Accordingly, the circuit court granted Janice's motion for judgment as to custody, finding no evidence of Janice's lack of fitness and no extraordinary, exceptional, or compelling circumstances that would require the court to remove Maya from Janice's custody.[27] As to visitation, the trial court held that because Margaret met the four factors establishing her status as Maya's de facto parent, the propriety of visitation depended only on Maya's best interests.[28] The court granted Margaret visitation rights, reasoning that under the

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as Maya's "mother" and thanked Margaret for "'taking on such a load of responsibility for Maya'" and for the "'emotional, physical and financial support'" that Margaret gave to Janice and Maya. *Id.*

20. *Janice M.*, 404 Md. at 666, 948 A.2d at 76.

21. *Id.* The conditions in Janice's letter required Margaret to arrange visitation through Janice rather than with Maya directly, to take Maya only to places Janice approved, to not speak disparagingly about Janice, and to inform Janice of any individuals accompanying Margaret on her visits with Maya. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 666–67, 948 A.2d at 76; Janice M. v. Margaret K., 171 Md. App. 528, 530, 910 A.2d 1145, 1147 (2006). In April 2005, Margaret filed an Emergency Motion for Visitation. *Janice M.*, 171 Md. App. at 532, 910 A.2d at 1148.

26. *Janice M.*, 404 Md. at 667, 948 A.2d at 76.

27. *Id.* at 667–68, 948 A.2d at 76–77.

28. *Id.* at 668–69, 948 A.2d at 77 (listing the four factors the circuit court considered in determining Margaret's de facto parent status as: (1) whether the legal parent consented to and fostered the relationship between the third party and the child; (2) whether the third party lived with the child; (3) whether the third party performed parental functions for the child to a significant degree; and (4) whether a parent-child bond was forged). Although the circuit court, and later the Court of Special Appeals and the Court of Appeals, relied on these factors in determining whether Margaret was Maya's de facto parent, the Court of Appeals also cited the American Law Institute's definition of de facto parent as:

best interests standard, it would be detrimental to Maya to cut off her relationship with Margaret.[29]

The Court of Special Appeals affirmed the trial court's decision, holding that the circuit court correctly found no evidence to rebut the presumption that Janice was entitled to custody of Maya.[30] The Court of Special Appeals also found that, as to visitation, the trial court was correct in concluding that Margaret was Maya's de facto parent and, as such, was entitled to visitation based on the best interests standard.[31] The Court of Appeals granted certiorari to decide whether de facto parents seeking visitation rights must first show parental unfitness or exceptional circumstances before the court can apply the best interests of the child standard.[32]

II. LEGAL BACKGROUND

The Supreme Court of the United States has long recognized the right of parents to the care, custody, and control of their children under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[33] The Court has further held that the constitutional right of parents to the custody of their children rests on a presumption that parents act in their children's best interests.[34] Accordingly, the Court of Appeals of Maryland has applied a heightened standard to a third party's claim for custody of a child over the objections of the child's legal parent.[35] The Court of Appeals later determined that the same standard applied to third parties' claims for visitation.[36] Like the Maryland Court of Special Appeals, which held

> [A]n individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (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, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

Id. at 681, 948 A.2d at 84–85 (quoting AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (2003) (internal quotation marks omitted)).

29. *Id.* at 669, 948 A.2d at 77.

30. *Id.*; *Janice M.*, 171 Md. App. at 542–43, 910 A.2d at 1154.

31. *Janice M.*, 404 Md. at 669–70, 948 A.2d at 77–78; *Janice M.*, 171 Md. App. at 540, 910 A.2d at 1152.

32. *Janice M.*, 404 Md. at 680, 948 A.2d at 84.

33. *See infra* Part II.A.

34. *See infra* Part II.A.

35. *See infra* Part II.B.

36. *See infra* Part II.B.

that de facto parents did not need to meet the same heightened standard as pure third parties in visitation disputes,[37] courts in several other states have held de facto parents to be in parity with legal parents for the purpose of determining visitation and have thus generally recognized the more lenient best interests of the child standard.[38]

A. The Supreme Court Has Recognized the Fundamental Right of Parents to the Care, Custody, and Control of Their Children Under the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[39] The United States Supreme Court has repeatedly recognized that the Fourteenth Amendment protects against government interference with certain fundamental rights, including parents' interest "in the care, custody, and control of their children."[40] In *Meyer v. Nebraska*,[41] for example, the Court declared unconstitutional a Nebraska statute prohibiting schools from teaching any subject in a language other than English, or teaching languages other than English below eighth grade.[42] The Court reasoned that the Fourteenth Amendment guaranteed individuals the right to raise their children and that the statute "attempted materially to interfere" with the constitutional right of parents to control the education of their children.[43]

Two years later, in 1925, in *Pierce v. Society of Sisters*,[44] the Supreme Court affirmed the decision of an Oregon federal court enjoining enforcement of an Oregon statute that made it a misdemeanor for a parent, guardian, or other person having control or custody of a child between the ages of eight and sixteen to fail to send the child to public school in the district where the child lived.[45] The Court determined that the statute violated the Fourteenth Amendment because it

37. *See infra* Part II.C.

38. *See infra* Part II.D.

39. U.S. CONST. amend. XIV, § 1.

40. *E.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (recognizing parental interests "in the care, custody, and control of their children [as] perhaps the oldest of the fundamental liberty interests recognized by this Court").

41. 262 U.S. 390 (1923).

42. *Id.* at 397, 399–400, 402–03.

43. *Id.* at 399, 401.

44. 268 U.S. 510 (1925).

45. *Id.* at 530, 533–34, 536. The appellees in *Pierce* were two private schools—a catholic school and a military academy—that argued that enforcement of the Oregon Compulsory Education Act would cause their business and property to suffer "irreparable injury." *Id.* at 531–33.

interfered with the constitutional right of legal parents "to direct the upbringing and education of children under their control."[46]

In 1944, the Supreme Court again recognized parents' right to the care, custody, and control of their children under the Fourteenth Amendment in *Prince v. Massachusetts*.[47] This time, however, the Court also held that parents' rights were subject to some limitations.[48] In *Prince*, Sarah Prince appealed her conviction for violating Massachusetts's child labor laws by permitting her two sons and a niece, of whom she was the legal custodian, to help her sell and distribute religious literature in the streets of Brockton.[49] Prince argued that she rightfully exercised her freedom of religion under the First Amendment and her right to parent under the Fourteenth Amendment.[50] In balancing these freedoms against the state's interest in protecting children from the "crippling effects of child employment" and from harms related to the "influences of the street," the Court found that neither rights of religion nor rights of parenthood were beyond limitation.[51] Accordingly, the Court affirmed Prince's conviction, concluding that, under these facts, the state properly exercised its constitutional power to limit the fundamental right of parents to protect the health and welfare of their children.[52]

Nearly sixty years later, in *Troxel v. Granville*,[53] the Supreme Court considered the constitutionality of a Washington statue that permitted any third party to petition for visitation of a child at any time and that authorized state courts to grant third party visitation when the court

46. *Id.* at 534–35.

47. 321 U.S. 158, 164, 166 (1944).

48. *Id.* at 166.

49. *Id.* at 159, 161–62. Section 69 of Massachusetts's child labor statute prohibited boys under twelve and girls under eighteen from "'sell[ing], expos[ing] or offer[ing] for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.'" *Id.* at 160–61 (quoting MASS. GEN. LAWS ch. 461, § 69 (1939)). Section 80 provided that anyone who furnished or sold any article to a minor with knowledge or written notice from an enforcement officer that the minor intended to sell the article, or who knowingly encouraged a minor to violate the provisions of the child labor laws, could be punished by a fine of $10 to $200, by imprisonment for no more than two months, or both. *Id.* at 161 (quoting MASS. GEN. LAWS ch. 461, § 80 (1939)). Finally, § 81 provided that parents, guardians, or custodians who compelled or permitted a minor under their control to work in violation of any provision of the child labor laws could be punished for a first offense by a fine of $2 to $10, imprisonment for no more than five days, or both. *Id.* (quoting MASS. GEN. LAWS ch. 461, § 81 (1939)).

50. *Id.* at 164.

51. *Id.* at 165–66, 168.

52. *Id.* at 170–71.

53. 530 U.S. 57 (2000) (plurality opinion).

determined that such visitation was in the best interests of the child.[54] In *Troxel*, Mr. and Mrs. Troxel, paternal grandparents, petitioned for visitation with their grandchildren over the objection of the children's biological mother.[55] Although the Troxels initially saw their grandchildren on a regular basis, the children's mother limited the Troxels' visits to one per month after the children's biological father committed suicide.[56] The Troxels, however, sought two weekends of overnight visitation per month and two weeks of visitation each summer.[57]

Writing for the plurality, Justice O'Connor first reaffirmed that the Due Process Clause of the Fourteenth Amendment protects the right of parents to the care, custody, and control of their children and prevents state interference with those rights.[58] Justice O'Connor also recognized the traditional "presumption that fit parents act in the best interests of their children."[59] Because Washington's visitation statute allowed any third party seeking visitation to subject parents' decisions that visitation was not in their children's best interests to court review, Justice O'Connor concluded that the statute was "breathtakingly broad."[60] And, because the statute authorized the court to determine visitation based solely on the judge's own opinion as to what constituted the best interests of the child, the statute failed to recognize the presumption.[61] Justice O'Connor and the plurality thus concluded that because neither the statute nor the Washington Superior Court limited the type of persons who could petition for visitation or the

54. *Id.* at 60–61, 63.

55. *Id.* at 60. The Troxels filed their petition for visitation in the Washington Superior Court for Skagit County under §§ 26.09.240 and 26.10.160(3) of the Revised Code of Washington. *Id.* at 61. Section 26.10.160(3) was the only statute at issue in the case and provided that "'[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.'" *Id.* (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

56. *Id.* at 60–61. The children's biological mother and father were never married. *Id.* at 60. After the couple ended their relationship in 1991, the children's father lived with his parents and regularly brought his children home for the weekend. *Id.* He committed suicide two years later. *Id.*

57. *Id.* at 61.

58. *Id.* at 65–66.

59. *Id.* at 68 (explaining that parents have the right and duty to raise their children based on a presumption that parents are able to make important life decisions for their children and that the "'natural bonds of affection'" lead parents to act in their children's best interests (quoting Parham v. J.R., 442 U.S. 584, 602 (1979))).

60. *Id.* at 67.

61. *Id.* at 67–69.

circumstances in which the court could grant such a petition, the statute was unconstitutional as applied.[62]

B. Maryland Courts Have Applied a Heightened Standard for Granting a Third Party Custody or Visitation of a Child Based on the Constitutional Right of Parents to Raise Their Children

Like the Supreme Court, courts in Maryland have also recognized legal parents' natural, common law, and statutory right to the care, custody, and control of their children in custody and visitation disputes, based on the presumption that parents will act in the best interests of their children.[63] Thus, when third parties seek custody or visitation of children, the Court of Appeals of Maryland has imposed a prima facie rebuttable presumption that the children's best interests are promoted in the care and custody of their legal parents, rather than in the custody of others.[64]

The Court of Appeals of Maryland applied this heightened standard to a custody dispute in *Ross v. Hoffman*.[65] In *Hoffman*, the court

62. *Id.* at 72–73.

63. *See, e.g.*, S.F. v. M.D., 132 Md. App. 99, 109, 751 A.2d 9, 14 (2000) (noting that "the Supreme Court of the United States and the Maryland Court of Appeals have recognized that a natural parent has a fundamental right regarding the care and custody of his or her child"); *infra* notes 65–104 and accompanying text. R

64. *E.g.*, Ross v. Hoffman, 280 Md. 172, 177–78, 372 A.2d 582, 586–87 (1977) (explaining that the Court of Appeals of Maryland has "consistently applied" such a prima facie rebuttable presumption); *see infra* notes 65–104 and accompanying text. R

65. 280 Md. at 178–79, 372 A.2d at 587. *Hoffman* was the first case to collect the factors for determining the presence of exceptional circumstances from earlier Maryland Court of Appeals cases. McDermott v. Dougherty, 385 Md. 320, 419, 869 A.2d 751, 809 (2005). However, the Court of Appeals recognized the test for third party custody of a child before *Hoffman* in several cases. *See* McClary v. Follett, 226 Md. 436, 441, 174 A.2d 66, 69 (1961) (citing the test for third party custody as articulated in *Ross v. Pick*, 199 Md. 341, 351, 86 A.2d 463, 468 (1952)); Trenton v. Christ, 216 Md. 418, 420, 140 A.2d 660, 661 (1958) ("Both sides agree that ordinarily either parent is entitled to custody of a child in preference to any third person, but that this rule is subject to the qualification that such custody will be denied if (a) the parent is unfit to have custody, or (b) if there are such exceptional circumstances as make such custody detrimental to the best interest of the child."); *Ross*, 199 Md. at 351, 86 A.2d at 468 (finding that parents' rights to the custody of their children "may be forfeited where it appears that any parent is unfit to have custody of a child, or where some exceptional circumstances render such custody detrimental to the best interests of the child"); Dietrich v. Anderson, 185 Md. 103, 117, 43 A.2d 186, 192 (1945) (noting that § 1 of Article 72A of the Maryland Code of 1939 provided that "[t]he provisions of this Article shall not be deemed to affect the existing law relative to the appointment of a third person as guardian of the person of the minor where the parents are unsuitable, or the child's interests would be adversely affected by remaining under the natural guardianship of its parent or parents" (internal quotation marks omitted)); Piotrowski v. State, 179 Md. 377, 381, 18 A.2d 199, 200–01 (1941) (explaining that "courts are bound . . . to recognize the natural right of parents to the custody of their children, and unless convinced that it would be injurious to their welfare, to maintain the relationship"); *see also Hoffman*, 280

considered whether Mr. and Mrs. Hoffman, a couple who raised and supported a child as their own for eight years on behalf of the child's biological mother, Ms. Ross, were entitled to custody over the objections of Ms. Ross, who sought to reclaim custody of her child.[66] The court first established that the best interests of the child standard controls its decisions in child custody disputes.[67] In particular, the court characterized the best interests standard as "firmly entrenched in Maryland"[68] and "'of transcendent importance'" in disputes over the custody of a child.[69] The court then identified two general categories of custody disputes: (1) disputes between parents, and (2) disputes between a parent and a third party.[70] When the dispute is between a biological mother and father, the best interests standard governs.[71] This standard also governs in disputes between a parent and a third party.[72] But for third parties to prevail, they must also meet a heightened standard to overcome the presumption that parental custody is in the child's best interests.[73] To rebut the presumption, a third party must show that either (1) the legal parent is unfit to have custody, or (2) exceptional circumstances render custody in the legal parent detrimental to the best interests of the child.[74]

The *Hoffman* court acknowledged Ms. Ross's presumptive right to custody and ruled that because she was fit to have custody, Mr. and Mrs. Hoffman had to show exceptional circumstances to overcome that presumption.[75] Because of the strong attachment between the child and Mr. and Mrs. Hoffman, the possible emotional effects on the child if the court were to order a change in custody, the uncertain

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Md. at 178, 372 A.2d at 587 (collecting authorities recognizing and applying the best interests of the child standard).

66. *Hoffman*, 280 Md. at 179, 181–82, 372 A.2d at 587–89.

67. *Id.* at 174–75, 372 A.2d at 585.

68. *Id.*

69. *Id.* at 175 n.1, 372 A.2d at 585 n.1 (quoting *Dietrich*, 185 Md. at 116, 43 A.2d at 191). The Court of Appeals of Maryland also noted in *Monroe v. Monroe* that the best interests of the child is "the critical and overriding consideration." 329 Md. 758, 769, 621 A.2d 898, 903 (1993) (citing McCready v. McCready, 323 Md. 476, 481, 593 A.2d 1128, 1130 (1991); Taylor v. Taylor, 306 Md. 290, 303, 508 A.2d 964, 970 (1986)).

70. *Hoffman*, 280 Md. at 174, 372 A.2d at 585. In *McDermott v. Dougherty*, another third party custody case, the Court of Appeals identified a third category of custody disputes: state intervention in a child's parental situation to protect the child from harm. 385 Md. at 355, 869 A.2d at 771. In such disputes, the best interests standard applies after a finding that it is necessary for the state to interfere with a parent's right to protect the child from harm caused by the parent. *Id.*

71. *Hoffman*, 280 Md. at 175, 372 A.2d at 585.

72. *Id.*

73. *Id.* at 178–79, 372 A.2d at 587.

74. *Id.*

75. *Id.* at 180, 187, 372 A.2d at 588, 591.

stability of Ms. Ross's household, and the lapse of time before Ms. Ross attempted to reclaim her child, the court held that the lower court properly found exceptional circumstances to rebut the presumption that Ms. Ross should be awarded custody.[76] In its decision, the court also articulated the factors Maryland courts should consider when determining the existence of exceptional circumstances in third party custody disputes, which included:

> the length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of the ties between the child and the third party custodian, the intensity and genuineness of the parent's desire to have the child, [and] the stability and certainty as to the child's future in the custody of the parent.[77]

In *Monroe v. Monroe*,[78] the Court of Appeals explained that the cases on which the lower court relied, including *Hoffman*, "d[id] not exhaustively or finally define the universe" of exceptional circumstances that warrant granting custody to a third party because these cases did not account for circumstances in which the biological parent was present in the child's life.[79] The court found that psychological bonding and dependence between a third party and a child sufficient to constitute exceptional circumstances can develop during an ongoing legal parent-child relationship, particularly when the legal parent fosters and encourages the child's bonding with the third party.[80] In *Monroe*, after the respondent learned through blood tests that he was not the biological father of a child he had raised as his own with the child's biological mother for the first few years of the child's life, he sought custody of the child as a third party.[81] The court identified

76. *Id.* at 192, 372 A.2d at 594.

77. *Id.* at 191, 372 A.2d at 593.

78. 329 Md. 758, 621 A.2d 898 (1993).

79. *Id.* at 773–76, 621 A.2d at 905–06.

80. *Id.* at 775–76, 621 A.2d at 906.

81. *Id.* at 760–62, 621 A.2d at 899–900. After raising the child together for two and a half years after the child's birth, the respondent and the petitioner, the child's mother, married. *Id.* at 760–61, 621 A.2d at 899. A year later, the couple separated and agreed to joint custody of the child. *Id.* at 761, 621 A.2d at 899; Monroe v. Monroe, 88 Md. App. 132, 135, 594 A.2d 577, 579 (1991). The agreement provided that the child would reside with the petitioner, that the respondent would have visitation rights, and that neither party would move from Maryland with the child without the express consent of the other party. *Monroe*, 329 Md. at 761, 621 A.2d at 899. When the petitioner moved out of Maryland with the child, the respondent filed a motion for temporary and exclusive custody. *Id.* at 762,

evidence that proved that the child viewed the respondent as her father, that they shared a parent-child bond, and that the respondent had acted as the child's "psychological father."[82] Accordingly, the court determined that the trial court erred in focusing on the length of time the child was separated from her legal parent instead of on the relationship that developed between the child and third party.[83] Moreover, the court concluded that enough evidence existed for a trier of fact to find exceptional circumstances to rebut the presumption that it was in a child's best interests to grant custody to the biological mother.[84]

In 2005, the Court of Appeals in *McDermott v. Dougherty*[85] clarified the rule in Maryland for determining custody between a parent and pure third party by categorizing the three distinct approaches to custody dispute cases.[86] In *McDermott*, maternal grandparents filed a complaint in the Circuit Court for Harford County, Maryland, seeking third party custody of their grandson against the will of their grandson's mother and father.[87] The trial court awarded custody to the grandparents on the grounds that the father's employment in the Marines required him to be away from home for months at a time, and thus constituted exceptional circumstances.[88] The Court of Appeals reversed, explaining that under the heightened standard for third party custody, the child's father was a fit parent and no exceptional circumstances, including his decision to work in the Marines or his periodic absences from home, warranted disturbing his constitutional right to the custody of his child.[89] According to the court, a minority of states applied only a best interests standard to third party

621 A.2d at 899–900. In response, the petitioner filed a motion to order blood tests to establish the respondent's paternity. *Id.*, 621 A.2d at 900. Blood tests confirmed that the respondent was not the biological father. *Id.*

82. *Id.* at 776, 621 A.2d at 907. The *Janice M.* court explained that the term "psychological parent" is often used interchangeably with the term "de facto parent," and refers to a party who has a "parent-like" relationship to a child "as a result of 'day-to-day interaction, companionship, and shared experiences.'" Janice M. v. Margaret K., 404 Md. 661, 681 n.8, 948 A.2d 73, 84–85 n.8 (2008) (quoting JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973)).

83. *Monroe*, 329 Md. at 775, 777, 621 A.2d at 906–07.

84. *Id.*

85. 385 Md. 320, 869 A.2d 751 (2005).

86. *See id.* at 356–57, 869 A.2d at 772–73 (comparing states' approaches to determining custody of a child in parent-third party custody disputes to clarify that, in Maryland, a court must first find parental unfitness or exceptional circumstances before applying the best interests test).

87. *Id.* at 323–24, 869 A.2d at 753.

88. *Id.* at 324, 869 A.2d at 753.

89. *Id.* at 325–26, 869 A.2d at 754.

custody disputes and did not require a finding of parental unfitness or exceptional circumstances to award custody to a third party.[90] The court also observed that other state courts took a "hybrid view," using ambiguous language in their decisions, such that it was difficult to determine whether the courts intended the third parties to show parental unfitness or exceptional circumstances before those courts could consider the best interests of the child.[91] Lastly, the Court of Appeals noted that states applying the "majority view" recognized that, because natural parents are presumed fit to raise their children and have a constitutional right to custody, a court must find parental unfitness or exceptional circumstances detrimental to the child's welfare before applying the best interests test.[92]

The court in *McDermott* acknowledged that, although *Hoffman*'s language discussing the standard in third party custody dispute cases in Maryland created "a conundrum of sorts," Maryland's view was consistent with the majority view that it is necessary first to prove that the legal parent is unfit or that extraordinary circumstances pose a serious detriment to the child before the court may apply the best interests standard.[93] Applying this rule, the *McDermott* court concluded that maternal grandparents petitioning for sole custody of a child over the objections of the child's biological father were not entitled to custody because they could not prove parental unfitness or exceptional circumstances.[94]

Although Maryland courts originally applied the heightened standard of parental unfitness or exceptional circumstances only to third party custody disputes, the Court of Appeals in *Koshko v. Haining*[95] extended the standard to third party visitation disputes.[96] In *Koshko*, maternal grandparents Mr. and Mrs. Haining sought visitation of their grandchildren over the objections of the children's legal parents, Mr.

90. *Id.* at 357–61, 869 A.2d at 773–74 (listing Colorado, Illinois, Pennsylvania, and West Virginia as states that appear to take the minority approach to pure third party custody disputes).

91. *Id.* at 361–75, 869 A.2d at 775–83. According to the *McDermott* court, hybrid view states included Oregon, Connecticut, Vermont, Washington, Missouri, Louisiana, Maine, Nevada, Arkansas, Nebraska, Texas, perhaps California, and until this decision, perhaps Maryland. *Id.* at 361, 869 A.2d at 775. In some hybrid states, the court noted, intermediate appellate courts rendered conflicting decisions in third party custody disputes. *Id.* In other hybrid states, the same opinion contained both positions. *Id.*

92. *Id.* at 375, 869 A.2d at 783.

93. *Id.* at 372, 374–75, 869 A.2d at 781, 783.

94. *Id.* at 435, 869 A.2d at 818–19.

95. 398 Md. 404, 921 A.2d 171 (2007).

96. *Id.* at 430–31, 440–41, 444–45, 921 A.2d at 186, 192–93, 195.

and Mrs. Koshko.[97] The Hainings lived with and helped raise one of their grandchildren for a few years before their relationship with the Koshkos deteriorated.[98] After not communicating with the Hainings for several months, the Koshkos offered them a single visit with the children, with the possibility of future visits.[99] The Hainings, however, demanded a more consistent visitation schedule with their grandchildren, and soon thereafter filed a petition for visitation.[100]

Before *Koshko*, the Court of Appeals noted, Maryland courts had applied the presumption that parents acted in the best interests of their children in custody cases, but deemed the presumption to be "'weaker'" in visitation cases.[101] In *Koshko*, however, the court established that "visitation is a species of custody" and that although "visitation involves a lesser *degree* of intrusion on the fundamental right to parent" than custody, the differences between visitation and custody are not constitutionally significant.[102] The court explained that because visitation is still an intrusion upon the constitutional right of parents to the care, custody, and control of their children, visitation merits the same rigorous scrutiny applicable to custody disputes.[103] Thus, under *Koshko*, third parties seeking visitation over the objections of a parent must show that the parent is unfit or exceptional circumstances warrant third party visitation.[104]

97. *Id.* at 408, 921 A.2d at 173.

98. *Id.* at 408–09, 921 A.2d at 173–74.

99. *Id.* at 410, 921 A.2d at 174.

100. *Id.*

101. *Id.* at 434 & n.14, 921 A.2d at 188–89 & n.14 (quoting Wolinkski v. Browneller, 115 Md. App. 285, 316–17, 693 A.2d 30, 45 (1997), *overruled by Koshko*, 398 Md. 404, 921 A.2d 171).

102. *Id.* at 429–30, 921 A.2d at 185–86.

103. *Id.* at 430–31, 921 A.2d at 186.

104. *Id.* at 440–41, 921 A.2d at 192–93. Applying the heightened standard, the *Koshko* court ruled that Maryland's grandparent visitation statute, which authorized a court to grant grandparental visitation if in the best interests of the child, was unconstitutional as applied because it failed to require the Hainings to make a threshold showing of either parental unfitness or exceptional circumstances. *Id.* at 407–08, 424, 444–45, 921 A.2d at 172–73, 182, 195. The court thus reversed the Court of Special Appeals' decision to grant the grandparents visitation rights and remanded to the trial court for further proceedings under the new heightened standard for third party visitation. *Id.* at 444–45, 921 A.2d at 195.

C. *Before the Court of Appeals Extended the Heightened Standard to Third Party Visitation Disputes, the Court of Special Appeals Did Not Require De Facto Parents to Prove the Same Heightened Standard When Seeking Visitation*

In *S.F. v. M.D.*,[105] the Court of Special Appeals of Maryland found that the heightened standard for obtaining custody or visitation of a child did not apply in third party visitation cases where the third party was a de facto parent.[106] The court adopted its test for establishing de facto parenthood from *In re Custody of H.S.H.-K.*,[107] a Wisconsin case in which the test originated.[108] Under the *H.S.H.-K.* four-part test, to qualify as a de facto parent:

> [T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.[109]

The court in *S.F.* acknowledged that, in third party custody disputes, there is always a presumption that it is in the child's best interest to award custody to the legal parent, and this presumption is only overcome when a third party, including a de facto parent, demonstrates that the legal parent is unfit or exceptional circumstances justify the third party's custody.[110] However, the court noted that in third party visitation disputes in which the third party is a de facto parent, no presumption favoring the biological or legal parent exists.[111] Thus, de facto parents seeking visitation need not show parental unfitness or exceptional circumstances.[112]

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105. 132 Md. App. 99, 751 A.2d 9 (2000), *overruled by* Janice M. v. Margaret K., 404 Md. 661, 948 A.2d 73 (2008).

106. *Id.* at 111–12, 751 A.2d at 15.

107. 533 N.W.2d 419 (Wis. 1995).

108. *See S.F.*, 132 Md. App. at 111, 751 A.2d at 15 (adopting the *H.S.H.-K.* test for de facto parenthood); *see also Janice M.*, 404 Md. at 697, 948 A.2d at 94 (Raker, J., dissenting) ("The *de facto* parent test has its origins in the Wisconsin case of *In re Custody of H.S.H.-K.*"). In addition to developing the de facto parent test, the court in *H.S.H.-K.* noted that although there was little uniformity in case law on visitation by third parties over the objections of a legal parent, courts "have observed a judicial trend toward considering or allowing visitation to nonparents who have a parent-like relationship with the child if visitation would be in the best interest of the child." 533 N.W.2d at 435 n.37.

109. *S.F.*, 132 Md. App. at 111, 751 A.2d at 15 (quoting V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) (internal quotation marks omitted)).

110. *Id.* at 110–11, 751 A.2d at 15.

111. *Id.* at 111, 751 A.2d at 15.

112. *Id.* at 111–12, 751 A.2d at 15.

Applying this de facto parent exception, the *S.F.* court found that a mother's former domestic partner, who helped raise the mother's biological child for three years, was a de facto parent and thus needed to show only that her visitation was in the child's best interests.[113] Under this standard, the court held that the trial court did not err or abuse its discretion in finding that it would not be in the best interests of the child to award visitation to the former domestic partner because the child developed behavioral problems associated with the split-parent visitation.[114]

D. Other States that Recognize the De Facto Parent Doctrine Hold that De Facto Parents Stand in Legal Parity with Legal Parents and Apply a Best Interests Standard in Visitation Disputes

Several state courts, which have recognized in common law that de facto parent status stands in parity with legal parent status, do not apply the heightened standard of parental unfitness or exceptional circumstances to de facto parent visitation disputes.[115] Instead, these courts accord de facto parents visitation based on the best interests of the child.[116]

For example, in *E.N.O. v. L.M.M.*,[117] the Supreme Judicial Court of Massachusetts assessed only the child's best interests in considering whether a single justice of the appeals court erred in reinstating the probate court judge's order granting visitation rights to the child's de facto parent.[118] To determine the best interests of the child, the court examined the child's relationship with both the legal parent and the de facto parent.[119] The court reasoned that recognizing de facto parenthood was "in accord with notions of the modern family," particularly because "[a]n increasing number of same gender couples . . . are deciding to have children" and to form "nontraditional families."[120] Under a best interests standard, the court concluded that the single justice did not err because the de facto parent lived with, financially supported, and actively participated in raising the child, and be-

113. *Id.* at 102–03, 114, 751 A.2d at 10–11, 16–17.

114. *Id.* at 114–15, 117–18, 751 A.2d at 17–19. The court in *S.F.* noted that the child's behavioral problems were likely a result of the child's inability to "negotiate both relationships at the same time, and the parties had not been successful in enabling the child to do that." *Id.* at 117, 751 A.2d at 18.

115. *See infra* notes 117–131 and accompanying text. R

116. *See infra* notes 117–131 and accompanying text. R

117. 711 N.E.2d 886 (Mass. 1999).

118. *Id.* at 892–93.

119. *Id.* at 891.

120. *Id.*

cause the legal parent and the de facto parent agreed that continuing the child's relationship with his de facto parent, in the event the parents terminated their relationship, would promote the child's best interests.[121]

In *V.C. v. M.J.B.*,[122] the Supreme Court of New Jersey similarly found that once the court determines that a third party is the psychological parent of a child, that third party is in parity with the legal parent and both custody and visitation disputes turn on the best interests standard alone.[123] When evidence concerning a child's best interests equally supports custody by the legal parent and the de facto parent, the court will award custody to the legal parent.[124] In visitation disputes, however, if the evidence weighs equally in favor of a legal parent and a de facto parent, the court will treat the dispute as if it were between two natural parents and assess factors for determining the best interests of the child.[125] Applying this standard, the court held that a biological mother's former same-sex domestic partner who sought custody and visitation of the mother's twins was a psychological parent to the children, and that visitation with the ex-partner was in the children's best interests.[126] But because the psychological parent was not involved in decision-making for the twins for four years while the case was pending, the court refused to grant her joint legal custody for decision-making purposes.[127]

In the case of *In re Parentage of L.B.*,[128] the Supreme Court of Washington granted a woman standing under Washington law to petition the court for co-parentage of her non-adopted, former domestic partner's biological daughter because Washington common law recognized de facto parenthood and granted de facto parents the same rights and responsibilities given to legal parents.[129] The court held that de facto parents are in "legal parity" with legal parents and are thus entitled to parental rights based on the court's determination of the best interests of the child.[130] In its reasoning, the court noted that common sense supported recognition of de facto parents by common

121. *Id.* at 888, 892–93. The legal parent and the de facto parent were two women who were involved in a committed relationship for thirteen years. *Id.*

122. 748 A.2d 539 (N.J. 2000).

123. *Id.* at 554.

124. *Id.*

125. *Id.*

126. *Id.* at 541–42, 555.

127. *Id.* at 555.

128. 122 P.3d 161 (Wash. 2005).

129. *Id.* at 163.

130. *Id.* at 177.

law, even where state statutes failed to specifically define the rights of parents in nontraditional parenting arrangements, because "statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations."[131]

III. COURT'S REASONING

In *Janice M. v. Margaret K.*,[132] the Court of Appeals of Maryland held that de facto parent status is not a recognized legal status in Maryland and that the circuit court thus erred in granting Margaret visitation based on her status as a de facto parent.[133] The court reasoned that permitting de facto parents to establish visitation based solely on a best interests standard, without first showing unfitness of the legal parent or exceptional circumstances, contravened Maryland law.[134] The court thus remanded the case to determine whether Margaret was entitled to visitation under a parental unfitness or exceptional circumstances standard.[135]

Writing for the majority, Chief Judge Bell began by establishing that because the Due Process Clause of the Fourteenth Amendment protects parents' right "to direct and govern the care, custody, and control of their children,"[136] a non-governmental third party generally has no right to custody against the fundamental constitutional right of the legal parent to raise his or her own child.[137] Accordingly, the court held that where a third party seeks custody, before considering the best interests of the child, courts must first find that either the legal parent is unfit or exceptional circumstances show that the child could suffer serious detriment if he or she remained in the custody of the legal parent.[138] The court then noted that although third party visitation is generally less intrusive on the rights of legal parents than third party custody, the same standard for determining a child's custody should nonetheless apply to visitation disputes.[139]

131. *Id.* at 176.

132. 404 Md. 661, 948 A.2d 73 (2008).

133. *Id.* at 664, 695–96, 948 A.2d at 74, 93–94.

134. *Id.* at 685, 948 A.2d at 87.

135. *Id.* at 695–96, 948 A.2d at 93–94.

136. *Id.* at 671, 948 A.2d at 79. Judges Battaglia, Cathell, Greene, Harrell, and Wilner joined Chief Judge Bell's majority opinion.

137. *Id.* at 675–76, 948 A.2d at 81 (quoting McDermott v. Dougherty, 385 Md. 320, 353, 869 A.2d 751, 770 (2005)).

138. *Id.* at 676, 948 A.2d at 81.

139. *Id.* at 677–80, 948 A.2d at 82–84 (quoting Koshko v. Haining, 398 Md. 404, 430–31, 440–41, 921 A.2d 171, 186, 192–93 (2007)).

The court then acknowledged that *Janice M.* was its first case involving third party custody or visitation disputes where the third party was a de facto parent.[140] Thus, the court had never determined whether a de facto parent, like a third party, must demonstrate parental unfitness or exceptional circumstances to justify visitation or custody over a legal parent's objections.[141] The court recognized, however, that the Maryland Court of Special Appeals had considered the issue in *S.F. v. M.D.*, holding that de facto parents seeking visitation needed to show only that visitation was in the child's best interests to prevail.[142] According to Chief Judge Bell, although the Court of Special Appeals in *S.F.* recognized a legal parent's constitutional right to the custody of his or her own child, it nonetheless concluded that in visitation disputes, the best interests of the child may take precedence over a parent's interests.[143]

Based on the court's holdings in *McDermott* and *Koshko* that established that a third party seeking custody or visitation must prove parental unfitness or exceptional circumstances before the court can apply the best interests of the child test, the Court of Appeals in this case overruled the lower court's decision in *S.F.*[144] Applying its new rule, the *Janice M.* court also reversed the circuit court's decision in this case as to visitation, finding that it erred in granting Margaret visitation based on her status as Maya's de facto parent without first determining whether Janice was unfit or whether exceptional circumstances existed to overcome Janice's constitutional right to Maya's care, custody, and control.[145] Because the circuit court found Janice to be a fit parent, the Court of Appeals remanded the case to determine whether exceptional circumstances show that visitation with Margaret is in Maya's best interests.[146] The court explained that exceptional circumstances are based on all factors relevant to the particular case.[147] The court also explained that a finding that a third party

140. *Id.* at 683, 948 A.2d at 86.

141. *Id.*

142. *Id.* at 683–85, 948 A.2d at 86–87 (citing S.F. v. M.D., 132 Md. App. 99, 111–12, 751 A.2d 9, 15 (2000)); *see supra* Part II.C. (discussing *S.F. v. M.D.*).

143. *Janice M.*, 404 Md. at 684, 948 A.2d at 86 (quoting *S.F.*, 132 Md. App. at 109, 751 A.2d at 14).

144. *Id.* at 685–86, 948 A.2d at 87.

145. *Id.* at 695, 948 A.2d at 93.

146. *Id.* at 682, 695–96, 948 A.2d at 85, 93–94.

147. *Id.* at 695, 948 A.2d at 93. See *supra* note 77 and accompanying text for a list of factors set forth in *Ross v. Hoffman*, 280 Md. 172, 372 A.2d 582 (1977), that the court stated the circuit court should consider on remand in determining whether exceptional circumstances exist. Other important factors for the court to consider include the stability of the child's current home, whether the child is part of an ongoing family unit, the child's physi- R

meets the requirements for de facto parent status, were the court to recognize that status, is a strong factor, but is not determative in assessing whether exceptional circumstances exist.[148]

Additionally, the court noted that neither party contended at oral argument that the fact that the dispute arose between a same-sex couple should bear on the court's analysis.[149] Further, when asked, Margaret agreed that although there is no legal or statutory authority in Maryland for adoption by same-sex couples, she could have attempted to adopt Maya in Maryland.[150] The court also recognized that several other states have created statutes granting visitation rights to de facto parents over the objections of legal parents, but found that only the Maryland General Assembly had the authority to enact similar legislation in Maryland.[151]

Judge Raker dissented, arguing that the court should recognize de facto parenthood.[152] Accordingly, Judge Raker rejected the majority's holding that the threshold determinations of parental unfitness or exceptional circumstances, rather than the best interests standard, should determine a de facto parent's visitation rights.[153] Judge Raker noted that the opinions the majority relied on in establishing its standard did not address the issue in this case because they involved custody and visitation disputes between legal parents and "pure third parties," not between legal parents and de facto parents.[154] In fact, Judge Raker argued, other Maryland precedent supported the de facto parent doctrine and the notion that de facto parent status is different from third party status with respect to custody and visitation disputes.[155]

Judge Raker further argued that Maryland courts should decide that de facto parenthood is in parity with legal parenthood in visita-

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cal, mental, and emotional needs, and the child's past relationship with the third party. *Janice M.*, 404 Md. at 694, 948 A.2d at 93 (quoting Turner v. Whisted, 327 Md. 106, 116–17, 607 A.2d 935, 940 (1992)).

148. *Janice M.*, 404 Md. at 695, 948 A.2d at 93. See *supra* note 109 and accompanying text for a description of the de facto parenthood test established in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). R

149. *Janice M.*, 404 Md. at 686, 948 A.2d at 88.

150. *Id.*

151. *Id.* at 686–87, 689, 948 A.2d at 88–89. Chief Judge Bell further established that the court had no view as to the federal or state constitutionality of statutes granting visitation to de facto parents. *Id.* at 689, 948 A.2d at 89.

152. *Id.* at 696–97, 948 A.2d at 94 (Raker, J., dissenting).

153. *Id.*

154. *Id.* at 706, 948 A.2d at 99–100.

155. *Id.* at 706–07, 948 A.2d at 100 (citing Monroe v. Monroe, 329 Md. 758, 621 A.2d 898 (1993)).

tion matters.[156] Judge Raker explained that many other states have recognized that de facto parent status entitles an otherwise third party to the same rights as a legal parent in custody or visitation disputes, especially because recognizing de facto parenthood "'accord[s] with notions of the modern family.'"[157] According to Judge Raker, other courts have recognized that advancing technologies and evolving notions of the traditional family unit have forced courts to adapt the common law to give de facto parents the same rights and responsibilities as legal parents.[158]

Consequently, Judge Raker concluded that because a de facto parent is "in parity" with a legal parent, granting parental rights to a de facto parent does not implicate the legal parent's constitutional right to the care, custody, and control of his or her own child.[159] Thus, Judge Raker stated, de facto parenthood is not inconsistent with Supreme Court jurisprudence protecting the interests of legal parents.[160] Moreover, Judge Raker explained, the high standard for establishing de facto parent status minimizes the likelihood that courts could apply the status too broadly, opening "the floodgates" for claims by third parties seeking custody or visitation.[161] According to Judge Raker, the strict requirements for becoming a de facto parent avoid unnecessary intrusions into the legal parent-child relationship.[162] Finally, Judge Raker suggested that the court should recognize de facto parent status because the law on adoption by same-sex couples is unresolved in Maryland.[163]

IV. ANALYSIS

In *Janice M. v. Margaret K.*, the Court of Appeals of Maryland held that de facto parenthood is not a recognized legal status in Maryland.[164] The court thus found that the trial court erred in granting Margaret visitation of her non-biological, non-adopted child based on

156. *Id.* at 703, 948 A.2d at 98.

157. *Id.* at 700–03, 948 A.2d at 96–98 (quoting E.N.O. v. L.M.M., 711 N.E.2d 866, 891 (Mass. 1999)). Judge Raker cited cases recognizing the special status of de facto parents from courts in Massachusetts, New Jersey, Rhode Island, New Mexico, Washington, Maine, South Carolina, Indiana, and Colorado. *Id.*

158. *Id.* at 701–02, 948 A.2d at 97 (quoting *In re* Parentage of L.B., 122 P.3d 161, 165, 176–77 (Wash. 2005)).

159. *Id.* at 703, 948 A.2d at 98.

160. *Id.*

161. *Id.* at 698, 948 A.2d at 95.

162. *Id.* at 699–700, 948 A.2d at 96 (quoting AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(c) cmt. c (2003)).

163. *Id.* at 696 n.1, 948 A.2d at 94 n.1.

164. *Id.* at 685, 948 A.2d at 87 (majority opinion).

her status as a de facto parent without first determining whether the child's legal parent was unfit or exceptional circumstances entitled Margaret to visitation.[165] The court found that in light of parents' fundamental constitutional right to the care, custody, and control of their children, and Maryland precedent requiring third parties to show a heightened standard of parental unfitness or exceptional circumstances, the same heightened standard should apply to de facto parents seeking visitation.[166] In so holding, the court failed to appreciate that the de facto parent doctrine does not interfere with the constitutional rights of parents because, unlike statutes invalidated by the Supreme Court that made child-rearing decisions for parents, the de facto parent test requires legal parents to consent to the de facto parent-child relationship.[167] As such, the test limits the number of third parties eligible to become de facto parents.[168] By failing to distinguish pure third parties from de facto parents, the court also inappropriately relied on cases involving only the former.[169] Additionally, recognition of de facto parenthood would, in some cases, better protect same-sex couples' parental rights because same-sex parent adoption is unsettled in Maryland, leaving non-biological, non-adoptive parents without rights to children they have helped raise.[170] Finally, unlike several other state courts, the Court of Appeals of Maryland unnecessarily deferred to the legislature to decide whether to grant visitation rights to de facto parents.[171] In fact, the court may have effectively prevented the legislature from exercising its discretion by suggesting that such a statute might be unconstitutional under the court's broad interpretation of the Maryland constitution to more extensively protect fundamental rights, including the right of parents to the care, custody, and control of their children.[172]

A. Recognition of De Facto Parenthood Is Consistent with the Fourteenth Amendment Right of Legal Parents to the Care, Custody, and Control of Their Children

The Court of Appeals could have recognized the de facto parent doctrine without disturbing the constitutional right of legal parents to the care, custody, and control of their children because the strict test

165. *Id.* at 695, 948 A.2d at 93.
166. *Id.* at 664, 685–86, 948 A.2d at 74–75, 87.
167. *See infra* Part IV.A.
168. *See infra* Part IV.A.
169. *See infra* Part IV.B.
170. *See infra* Part IV.C.
171. *See infra* Part IV.D.
172. *See infra* Part IV.D.

for establishing de facto parent status requires that the legal parent not only consent to, but also foster the child's relationship with the de facto parent.[173] Moreover, this high standard for de facto parenthood narrows the class of people eligible for custody or visitation.[174]

Unlike the statutes the Supreme Court has invalidated, which were designed by states to limit parents' ability to control the care and custody of their children, the de facto parent doctrine respects parents' own determinations of their children's best interests.[175] In both *Meyer* and *Pierce*, for example, the Supreme Court decided that state laws, made by others hardly within a family circle, that unreasonably interfered with parents' authority to make decisions for their children violated the Fourteenth Amendment.[176] The de facto parent test, in contrast, requires that a legal parent consent to and foster the formation of the de facto parent relationship.[177] Unlike statutes that impose child-rearing decisions on parents without their consent, the de facto parent doctrine recognizes the voluntary, autonomous decisions of legal parents to permit third parties to develop parent-like relationships with their children and to foster such relationships.[178] Because the legal parent thus controls the relationship between his or her

173. *Cf.* Janice M. v. Margaret K., 404 Md. 661, 684, 948 A.2d 73, 87 (2008) (explaining that, under the four-prong de facto parent test established by *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), the legal parent must consent to and foster the relationship between the third party and the child).

174. *See id.* at 704, 948 A.2d at 98 (Raker, J., dissenting) (noting that the de facto parent test is "narrowly tailored and allows a person to overcome the presumption in favor of a natural parent's rights only after that party demonstrates that he or she is in essence a parent to the child").

175. *Compare* Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923) (determining that a state statute forbidding the teaching of certain languages in public school "materially . . . interfere[d]" with parents' ability to control their children's education), *and* Pierce v. Soc'y of Sisters, 268 U.S. 510, 530, 534–35 (1925) (finding that a state statute requiring parents to send their children to public school impermissibly intruded on parents' constitutional right to direct the upbringing of their children), *with Janice M.*, 404 Md. at 700, 948 A.2d at 96 (explaining that the requirement that legal parents consent to the de facto parent-child relationship "again assuages any fear that the standard conflicts with the liberty interest of parents in the custody and care of their children").

176. *See Pierce*, 268 U.S. at 530, 532–36 (finding that a state statute that required parents to send their children to public school interfered with parents' right to direct the education of their children and threatened injury to appellees' private school business and property); *Meyer*, 262 U.S. at 399, 401, 403 (deciding that a state statute that forbade the teaching of specific languages in public schools was unconstitutional because it interfered with parents' control of their children's education and because the statute was not reasonably related to its alleged purpose of allowing children to learn English before any other language and of establishing English as the "mother tongue" of the state).

177. *See Janice M.*, 404 Md. at 684, 948 A.2d at 87 (majority opinion).

178. *See id.* at 704, 948 A.2d at 98 (Raker, J., dissenting) (noting that, under the de facto parent test, "'a person who performed parental functions is not entitled to *de facto* parent status unless the court finds as a fact that the child's legal parent has actually fostered such

child and the de facto parent, the recognition of de facto parenthood is not a traditionally prohibited interference with constitutionally protected parent-child relationships.[179]

The de facto parent doctrine also does not interfere with the constitutional protections afforded to parent-child relationships because the high threshold for establishing de facto parent status limits the third parties eligible to obtain custody or visitation of a child. In *Troxel*, the Supreme Court determined that, because the visitation statute failed to defer to parents' decisions concerning third party visitation of their children, the statute failed to honor the traditional presumption that fit parents act in the best interests of their children, thus violating the constitutional protections to which legal parents are entitled.[180] The de facto parent test, by contrast, is a narrow test that protects parents' interests by limiting the third parties who are legally eligible to seek custody or visitation under the doctrine.[181] As Judge Raker noted in her dissent, this high standard also ensures that the recognition of de facto parenthood will not "open the floodgates for litigation" by any third party, such as babysitters or foster parents.[182]

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a relationship'" (quoting Janice M. v. Margaret K., 171 Md. App. 528, 539, 910 A.2d 1145, 1152 (2006))).

179. *See In re* Parentage of L.B., 122 P.3d 161, 179 (Wash. 2005) (explaining that the threshold requirement that the legal parent consent to and foster the de facto parent-child relationship is critical to the constitutional analysis because it suggests that de facto parent status can only be achieved through the active encouragement of the legal parent, thus ensuring that the recognition of de facto parenthood does not infringe on the constitutional rights of legal parents); *see also* V.C. v. M.J.B., 748 A.2d 539, 551–52 (N.J. 2000) (noting that a legal parent's consent and fostering of the de facto parent relationship is critical because it requires the legal parent's participation in the creation of the relationship and it places control in the hands of the legal parent).

180. Troxel v. Granville, 530 U.S. 57, 67–70 (2000). The Court in *Troxel* found that because the visitation statute permitted "'any person'" to petition for visitation of a child "'at any time,'" if the visitation was in the best interests of the child, the statute inappropriately subjected the decisions of parents concerning visitation of their children to state court review. *Id.* at 67 (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

181. *See Janice M.*, 404 Md. at 698, 948 A.2d at 95 (noting that the four-part de facto parent test that the Supreme Court of Wisconsin adopted in *H.S.H.-K.* "set forth a high bar for establishing *de facto* parent status, minimizing concerns that it could be applied too broadly").

182. *Id.* Judge Raker argued that the high bar for establishing de facto parent status thus "eliminates the majority's fear" that recognizing the de facto parent doctrine will burden the courts and produce a flood of litigation. *Id.*

B. The Court of Appeals Failed to Distinguish Third Parties from De Facto Parents and Thus Improperly Relied on Cases Establishing the Custody and Visitation Standard for Pure Third Parties

In holding that de facto parents must show the heightened custody or visitation standard of parental unfitness or exceptional circumstances, the *Janice M.* court improperly relied on prior cases applying this standard to pure third parties.[183] In light of the constitutional right of parents to govern the care, custody, and control of their children, the Court of Appeals of Maryland in both *Koshko* and *McDermott* held that, to prevail, third parties seeking custody or visitation over legal parents' objections must make a threshold showing of either parental unfitness or exceptional circumstances.[184] Applying the holdings from *Koshko* and *McDermott*, the *Janice M.* court ruled that the same heightened standard should also apply to de facto parents seeking custody or visitation.[185]

The court in *Janice M.* failed to recognize that the test for awarding third party custody in *McDermott* applied only to pure third parties, not to de facto parents. In *McDermott*, the Court of Appeals held that under the heightened standard for third party custody, the trial court erred in awarding custody to maternal grandparents because the child's father was fit and no exceptional circumstances warranted disturbing his constitutional right to the custody of his child.[186] In so holding, the *McDermott* court distinguished third parties from "physiological parents"[187] with respect to the application of the heightened standard of parental unfitness or exceptional circumstances.[188] The court determined that, within the general category of parent-third party disputes, a subset of cases involving third parties classified by some states as "physiological parents" were decided according to the standards that apply in parent-parent disputes.[189] The court acknowl-

183. *See infra* notes 184–193 and accompanying text. R

184. Koshko v. Haining, 398 Md. 404, 440–41, 921 A.2d 171, 192–93 (2007); McDermott v. Dougherty, 385 Md. 320, 325, 418, 869 A.2d 751, 754, 808 (2005).

185. *Janice M.*, 404 Md. at 685, 948 A.2d at 87 (majority opinion).

186. *McDermott*, 385 Md. at 325–26, 869 A.2d at 754.

187. The court defined "physiological parents" as "third parties who have, in effect, become parents." *Id.* at 356, 869 A.2d at 772. *See also Janice M.*, 404 Md. at 706, 948 A.2d at 99–100 (Raker, J., dissenting) (noting that *McDermott* "delineat[ed] the distinction between 'pure third-party cases' and cases involving 'psychological [sic] parents, third parties who have, in effect, become parents'" (quoting *McDermott*, 385 Md. at 356, 869 A.2d at 772)).

188. *McDermott*, 385 Md. at 356–57, 869 A.2d at 772–73.

189. *Id.* at 355–56, 869 A.2d at 771–72. The standard applicable to parent-parent disputes is the best interests standard. *Id.* at 354–55, 869 A.2d at 771. Although the majority in *Janice M.* pointed out that the court in *S.F. v. M.D.* treated de facto parents as third parties, this finding does not suggest that the same legal standard for determining visita-

edged that *McDermott* was a "pure third party" case and thus focused its analysis on other pure third party cases in applying the heightened custody standard.[190]

The Court of Appeals in *Janice M.* also improperly relied on *Koshko* in applying the heightened third party visitation standard to de facto parents because *Koshko* similarly involved pure third parties. In *Koshko*, maternal grandparents sought visitation of their grandchildren under Maryland's grandparental visitation statute.[191] The *Koshko* court held that the same standard that applies to third party custody disputes should apply to third party visitation disputes because, although visitation may be less intrusive on parents' constitutional rights, it nonetheless constitutes an interference with parental rights that requires the same rigorous scrutiny as third party custody disputes.[192] Although *Koshko* extended the heightened standard to visitation, it did so in the context of pure third party disputes.[193]

Of course, distinguishing de facto parents from pure third parties is important because unlike third parties, de facto parents are required to significantly participate in a child's life for a sufficient length of time to qualify for parental rights.[194] Under the test for de facto parenthood, the de facto parent must have lived with the child.[195] Additionally, establishing de facto parent status requires that the legal parent foster the de facto parent-child relationship.[196] Separating de facto parents from children with whom they have lived and developed a parent-child relationship nurtured by the legal parent can substantially harm the children.[197] Thus, recognizing the differ-

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tion should apply because, as the court explained in *McDermott*, "physiological parents," or de facto parents, are a "subset" of third parties that must meet a different standard than other third parties to establish a right to visitation. *Janice M.*, 404 Md. at 684 n.9, 948 A.2d at 86 n.9; *McDermott*, 385 Md. at 356, 869 A.2d at 772.

190. *McDermott*, 385 Md. at 356, 869 A.2d at 772.

191. Koshko v. Haining, 398 Md. 404, 407–08, 410, 921 A.2d 171, 171–74 (2007).

192. *Id.* at 430–31, 440–41, 444–45, 921 A.2d at 186, 192–93, 195.

193. *See id.* at 441, 444–45, 921 A.2d at 192–93, 195 (applying the heightened test for third party visitation to third party maternal grandparents); *see also Janice M.*, 404 Md. at 706, 948 A.2d at 99–100 (arguing that because *Koshko* "dealt with the rights of pure third parties, and not those of *de facto* parents," it did not address the issue before the court).

194. *Janice M.*, 404 Md. at 700–01, 948 A.2d at 96–97 (quoting E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999)); *see also In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995) (explaining that a de facto parent must take significant responsibility for a child's care and act like a parent for a sufficient amount of time to establish a bond with the child that is "parental in nature").

195. *Janice M.*, 404 Md. at 700–01, 948 A.2d at 96–97 (quoting *E.N.O.*, 711 N.E.2d at 891).

196. *Id.* at 698, 700–01, 948 A.2d at 95–96.

197. *See* Troxel v. Granville, 530 U.S. 57, 99 (2000) ("'[I]n certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the

ences between de facto parents and third parties, and adopting the specific standard that applies to each, is especially important for the well-being of the child.

C. Recognition of De Facto Parent Status Is a Valid Limitation on Parents' Constitutional Right to Govern the Care, Custody, and Control of Their Children, Particularly Because Same-Sex Parents' Right to Adopt in Maryland is "Unsettled"

Even if the Court of Appeals found that distinguishing de facto parents from pure third parties limits the constitutional rights of parents, Supreme Court jurisprudence generally permits those limits.[198] Further, if the court had recognized de facto parenthood, it could have better protected same-sex parents' right to visit their children because, under Maryland's adoption statutes, same-sex parents cannot both be legal parents of the same child.[199] Given the changing notions of the modern family and the increased number of "nontraditional" family units, the court should have instead made it easier for de facto parents to seek visitation without showing the high standard used in custody disputes.[200] A more lenient standard would thus protect same-sex parents' tenuous rights as a valid limitation on legal parents' constitutional rights to raise their children.[201]

1. Even if Recognition of De Facto Parent Status Limits Parents' Constitutional Rights, Supreme Court Jurisprudence Permits Some Limits

Recognizing a de facto parent's right to seek visitation without a threshold showing of parental unfitness or exceptional circumstances does not unduly limit the constitutional right of parents to the care, custody, and control of their children because the high standard for establishing de facto parent status requires legal parents to consent to and foster the parent-like relationship with their children.[202] In fact,

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child of the relationship could cause severe psychological harm to the child . . . .'" (quoting *In re* Smith, 969 P.2d 21, 30 (Wash. 1998))); *see also* V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) ("At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life." (citing Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977))).

198. *See infra* Part IV.C.1.

199. *See infra* Part IV.C.2.

200. *See infra* Part IV.C.2.

201. *See infra* Part IV.C.2.

202. *See supra* note 173, 175–179 and accompanying text. R

the Supreme Court has not prohibited de facto parents from seeking visitation under only a best interests standard.[203] The *Troxel* Court did not determine whether the Fourteenth Amendment's Due Process Clause required non-parental third party visitation statutes to include a showing of harm or potential harm to the child before authorizing the court to grant visitation.[204] Instead, the Court in *Troxel* determined only that legal parents' decisions concerning visitation are entitled to "at least some special weight," but did not define the scope of parental rights in visitation disputes.[205] Thus, as the dissenting opinion in *Janice M.* acknowledged, de facto parents should have the same status as legal parents in visitation disputes, and although Supreme Court jurisprudence is not binding on Maryland law, determining visitation based on a best interests standard is consistent with the Court's holding in *Troxel*.[206]

Moreover, even if the Court of Appeals were to find that granting de facto parents visitation rights without requiring them to show parental unfitness or exceptional circumstances limited legal parents' constitutional right to raise their children, it is well settled that parental rights are not beyond limitation.[207] In *Prince*, for example, the Su-

203. *See* Troxel v. Granville, 530 U.S. 57, 73 (2000) (finding that the Court did not define the "precise scope" of parental due process rights under the Fourteenth Amendment in the context of visitation).

204. *Id.*

205. *Id.* at 70, 73. The *Troxel* Court held that the Washington Supreme Court unconstitutionally applied a state statute permitting any third party to petition for visitation of a child at any time over a legal parent's decision not to allow visitation because the statute permitted the court to overlook the traditional presumption that parents make decisions in their children's best interests. *Id.* at 67–68, 72–73. The Court also noted that although the Washington Supreme Court deemed the statute unconstitutional based on its failure to require third parties to show harm or potential harm to the child before the court permits state interference with parental rights, the Court rested its holding only on the statute's breadth. *Id.* at 63, 67, 73.

206. *See* Janice M. v. Margaret K., 404 Md. 661, 703, 948 A.2d 73, 98 (2008) (Raker, J., dissenting) (arguing that the de facto parent test is not inconsistent with *Troxel* because the Court in *Troxel* did not determine whether a finding of parental unfitness was a condition precedent to according rights to a third party in visitation disputes).

207. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (explaining that rights of parenthood are not beyond limitation and that the state, as "*parens patriae*," may restrict parental control to protect a child's well-being, including requiring school attendance or prohibiting child labor). Likewise, the Court of Appeals of Maryland has held that courts of equity have power over minors and can exercise jurisdiction in gaining custody of children from legal parents when necessary to secure the welfare and promote the best interests of the child. Ross v. Hoffman, 280 Md. 172, 174–75, 372 A.2d 582, 585 (1977) (citing Burns v. Bines, 189 Md. 157, 162, 55 A.2d 487, 489 (1947)). Courts in Maryland have thus limited legal parents' constitutional right to the care, custody, and control of their children by determining that exceptional circumstances exist to rebut the presumption that custody in the legal parent is in the best interests of the child. *See* Monroe v. Monroe, 329 Md. 758, 776–77, 621 A.2d 898, 906–07 (1993) (deciding that exceptional

preme Court found that the state has the power to limit parental freedom in matters affecting children's welfare.[208] The *Troxel* Court similarly suggested that a state may interfere with parental rights under special circumstances.[209] In fact, the *Troxel* plurality noted that one of the problems with the Washington Superior Court's order to award visitation to paternal grandparents under Washington's visitation statute was its failure to rely on any "special factors" that justified state interference with the legal parent's decisions.[210] By failing to expressly identify the factors that would justify overcoming the presumption that legal parents' visitation decisions are in their children's best interests, the Court left open the possibility that de facto parenthood is one of those special factors.[211]

2. *Recognition of De Facto Parenthood Is a Justified Limitation on Legal Parents' Constitutional Rights Because it Protects Same-Sex Couples' Ability to Parent in Maryland*

Granting de facto parents special rights to visitation by requiring them to prove a lower, best-interests-only standard, protects non-marital, same-sex couples from losing the right to see the children they

circumstances authorized the trial court to award custody to a nonbiological father of a child, over the objections of the biological mother, where the father raised the child with the biological mother for the first few years of the child's life and developed a psychological bond with the child); *see also Hoffman*, 280 Md. at 192, 372 A.2d at 594 (holding that the chancellor properly concluded that (1) exceptional circumstances existed to rebut the presumption that custody should be awarded to a child's biological mother; and (2) custody in the third party who raised the child was in the child's best interests).

208. *Prince*, 321 U.S. at 166–67.

209. *See Troxel*, 530 U.S. at 68 (noting that "special factors" may justify state interference with parents' fundamental rights to make decisions concerning the interests of their children).

210. *See id.* at 60–61, 67–68 (explaining that the record suggested that the superior court's order granting visitation to paternal grandparents over the restrictions on visitation imposed by the children's biological mother was based solely on the Washington statute authorizing any person to petition for visitation if such visitation was in the best interests of the child, and not on "special factors" authorizing state interference with parental rights); *see also Janice M.*, 404 Md. at 705–06, 948 A.2d at 99 (arguing that *Troxel* did not prohibit the recognition of de facto parenthood because the Supreme Court found that "'special factors . . . might justify the State's interference with [the biological mother's] fundamental right to make decisions concerning the rearing of her [children],'" and because the dissent in *Troxel* specifically noted that parental rights under the state statute depend on whether the third party seeking visitation is a "complete stranger" or a de facto parent (quoting *Troxel*, 530 U.S. at 68, 100–01)).

211. *See* Mark C. Rahdert, *In Search of a Conservative Vision of Constitutional Privacy: Two Case Studies from the Rehnquist Court*, 51 VILL. L. REV. 859, 876 (2006) (noting that Justice O'Connor's opinion in *Troxel* "made no attempt to identify what sort of justification might meet her 'special factors' test," thus leaving the test "wide open, recognizing that the states needed some maneuvering room to respond to rapid social changes in the structure of the family").

lived with and helped raise because the law in Maryland as to whether same-sex couples can legally adopt is "unsettled."[212] If unmarried same-sex couples are unable to jointly adopt a child, and Maryland does not recognize de facto parenthood, then the non-adoptive partner, as a pure third party, must prove the higher standard, and is thus more likely to lose all rights to the child upon dissolution of the couple's relationship.[213] By recognizing the de facto parent doctrine as a justified limitation on legal parents' absolute right to the care, custody, and control of their children, the court could protect gay and lesbian parents' tenuous rights.[214]

Recognizing de facto parents' rights is prudent given the nature of Maryland adoption law. Under Maryland's adoption statutes, any adult may petition a court for adoption.[215] If the petitioner is married, the petitioner's spouse may join in the petition unless the spouse (1) is separated from the petitioner under circumstances that give the petitioner grounds for annulment or divorce; (2) is not competent to join in the petition; or (3) is a parent of the prospective adoptee and has consented to the adoption.[216] Under Section 1-207 of the Estates and Trusts article of the Maryland Code, "[a]n adopted child shall be treated as a natural child of his adopting parent or parents," terminating the legal status of the natural parents as the child's legal parent.[217] Where the adopting parent is the spouse of the child's natural parent, however, the adoption does not terminate the natural parent's rights.[218] Additionally, a child adopted more than once is considered

212. *Janice M.*, 404 Md. at 696 n.1, 948 A.2d at 94 n.1. Although the majority in *Janice M.* explained that it was not expressing an opinion on the issue of same-sex couples' right to adopt in Maryland, the court nonetheless acknowledged that there is "no explicit legal or statutory authority in Maryland for adoption" where a domestic partner seeks custody and/or visitation of her former partner's adopted child. *Id.* at 686, 948 A.2d at 88 (majority opinion).

213. *Id.* at 664, 685, 948 A.2d at 74–75, 87 (holding that Maryland does not recognize de facto parenthood and that de facto parents, like any third party, must show a heightened standard of parental unfitness or exceptional circumstances in seeking visitation of a child over the objections of the child's legal parent before the court can consider the best interests of the child); s*ee infra* notes 215–223 and accompanying text. **R**

214. *See infra* notes 223–225 and accompanying text. **R**

215. MD. CODE ANN., FAM. LAW §§ 5-3A-29(a), 5-3B-13(b)(1) (West 2006).

216. *Id.* §§ 5-3B-13(b)(2)(i)–(iii).

217. MD. CODE ANN., EST. & TRUSTS § 1-207(a) (West 2001).

218. *Id.* Adoptions by the natural parent's new spouse, which do not terminate the natural parent's full legal rights, are generally known as "step-parent adoptions." Jason N.W. Plowman, *When Second-Parent Adoption Is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 63 (2008).

a child of the most recent adopting parents and legally ceases to be a child of the previous adopting parents.[219]

Although trial courts in Maryland have granted second-parent adoptions, the state legislature has not permitted second-parent adoptions and no appellate court has ruled on the issue.[220] Thus, because Maryland law does not recognize same-sex marriage,[221] and Maryland adoption statutes preclude unmarried partners from jointly adopting a child, same-sex couples' parental rights are unresolved.[222] Absent second-parent adoption in Maryland, equitable legal theories including recognition of de facto parenthood are the only measures available to protect a same-sex parent's right to visit his or her non-biological, non-adopted child.[223]

De facto parent status is a particularly valuable limitation on legal parents' constitutional rights where second-parent adoption in Maryland is unsettled, given notions of the modern family and the increasing number of same-sex couples deciding to raise children.[224] With advancing technology and evolving notions of what constitutes a family, more children are forming parent-child relationships with non-traditional parents.[225] Recognition of de facto parent status thus

219. MD. CODE ANN., EST. & TRUSTS § 1-207(b) (West 2001).

220. *See* Plowman, *supra* note 218, at 72 (citing Nat'l Gay & Lesbian Task Force, Second-Parent Adoption in the U.S. (2007), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_11_08.pdf (last visited Mar. 23, 2009)) (showing which states, by statute and by common law, permit second-parent adoptions). Like step-parent adoptions, second-parent adoptions allow a child's non-biological parent to become a legal parent without terminating the legal parent's rights. *Id.* at 59. R

221. MD. CODE ANN., FAM. LAW § 2-201 (West 2006) ("Only a marriage between a man and a woman is valid in this State.").

222. *See supra* notes 212, 215–219 and accompanying text. R

223. *See* Nicole Berner, *Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations*, 10 BERKELEY WOMEN'S L.J. 31, 32–35 (1995) (discussing different strategies litigators have used to protect parent-child relationships in lesbian families, including second-parent adoption and equitable theories such as equitable estoppel, in loco parentis, and de facto parenthood). Alternatively, the Maryland General Assembly could amend Maryland's adoption statutes so that the spousal exception to terminating a legal parent's rights also applies to same-sex partners. *See* Plowman, *supra* note 218, at 85 (noting that legislation could amend adoption statutes' reference to step-parent adoption to include partners). R

224. Janice M. v. Margaret K., 404 Md. 661, 701, 948 A.2d 73, 96 (2008) (Raker, J., dissenting) (quoting E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999)); *see also* Plowman, *supra* note 218, at 59 (citing Lisa Bennett & Gary J. Gates, Human Rights Campaign, The Cost of Marriage Inequality to Children and Their Same-Sex Parents 3 (Apr. 13, 2004), http://www.hrc.org/documents/costkids.pdf) (noting that according to the 2000 census, 34.3% of lesbian couples and 22.3% of gay couples are raising children compared to 45.6% of married, heterosexual couples and 43.1% of unmarried, heterosexual couples). R

225. *Janice M.*, 404 Md. at 701–02, 948 A.2d at 97 (quoting *In re* Parentage of L.B., 122 P.3d 161, 165 (2005)).

accords with the modern family and protects children from unnecessary separation from their nontraditional parents.[226]

D. Maryland Could Have Avoided Perpetuating its Detrimental Adoption Regime by Following Other States in Recognizing that a De Facto Parent Stands in Legal Parity with a Legal Parent

If the Court of Appeals in *Janice M.* had found that de facto parents stood in legal parity with biological or adoptive parents for purposes of assessing custody and visitation rights, the law in Maryland would be consistent with the more forward-looking common law of several other states.[227] In *Janice M.*, Chief Judge Bell conceded that

226. Although this analysis focuses on protection of same-sex parental rights, recognition of the de facto parent doctrine protects classes of de facto parents other than same-sex parents. As Judge Raker argued in dissent in *Janice M.*, *Monroe v. Monroe* also supports recognition of the de facto parent doctrine in the context of mistaken paternity. *Id.* at 706–07, 948 A.2d at 100; Monroe v. Monroe, 329 Md. 758, 760–62, 621 A.2d 898, 899–900 (1993). In holding that exceptional circumstances justified the court's decision to grant custody to a third party who mistakenly believed he was the natural father of a child, then-Judge Bell noted in *Monroe* that, in custody disputes, the relationship between the child and the third party is "[w]hat is important." *Monroe*, 329 Md. at 775, 621 A.2d at 906. Then-Judge Bell further explained that a child can become psychologically dependent on a third party while the child maintains an "ongoing" relationship with his or her legal parent, particularly when the parent fosters and facilitates the relationship between the child and the third party. *Id.* Thus, the de facto parent doctrine would also protect third parties, including parents who have mistakenly treated their children as their own, from unnecessary separation, which can harm both the de facto parent and the child. *See* Troxel v. Granville, 530 U.S. 57, 98–99 (2000) (Kennedy, J., dissenting) (noting that relationships between a third party and a child can "be so enduring that 'in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child' . . . and harm to the adult may also ensue" (quoting *In re* Smith, 969 P.2d 21, 30 (Wash. 1998))); *see also* Mellisa Holtzman, *The "Family Relations" Doctrine: Extending Supreme Court Precedent to Custody Disputes Between Biological and Nonbiological Parents*, 51 FAM. REL. 335, 340 (2002) (explaining that a doctrine recognizing that, in custody disputes, the child should be placed in the custody of the parent to whom the child is psychologically attached "goes a long way toward protecting the interests of children and adults simultaneously . . . by preserving their attachments to one another").

227. *See, e.g.*, *E.N.O.*, 711 N.E.2d at 888–90, 893 (holding that despite the lack of statutory authority expressly permitting visitation privileges to third parties in a "parent-like position," a de facto parent seeking visitation only needed to show that such visitation was in the best interests of the child); V.C. v. M.J.B., 748 A.2d 539, 541–42, 547–48, 554–55 (N.J. 2000) (finding jurisdiction in a case involving a woman seeking custody and visitation of her former domestic partner's biological child despite the lack of statutory authority explicitly addressing whether unmarried domestic partners had standing to seek custody and visitation of their former partners' biological children, and holding that the woman was the child's "psychological parent," stood in legal parity with the child's biological mother, and as such was entitled to visitation under a best interests standard); *In re Parentage of L.B.*, 122 P.3d at 163, 169, 177 (holding that (1) even though a de facto parent lacked standing to seek visitation rights under state statute, because the legislature was

several other states had created third party visitation statutes that grant de facto parents visitation rights over the objections of legal parents, but argued that it was "within [the] prerogative" of the Maryland General Assembly to adopt this approach.[228] Yet several of these other states created rights for de facto parents equal to those of legal parents in visitation disputes in the absence of explicit statutory authority.[229] Thus, the *Janice M.* court failed to acknowledge that the Court of Appeals may similarly approve de facto parent visitation without explicit statutory authority to do so.

Moreover, the *Janice M.* court may have restricted the legislature from adopting a statute granting de facto parents visitation by suggesting that the statute may be unconstitutional. As Chief Judge Bell suggested, the court's broad interpretation of Article 24 of the Maryland Declaration of Rights,[230] Maryland's counterpart to the Fourteenth Amendment's Due Process Clause, may limit the Maryland General Assembly.[231] According to Chief Judge Bell, although Maryland courts read the United States Constitution and the Maryland constitution *in pari materia*, they often interpret the Maryland constitution to better protect individual liberties.[232] Thus, the Court of Appeals of Maryland may now find a statute limiting parents' fundamental right to the care, custody, and control of their children to be unconstitutional. Although the court declined to express a view as to the constitutionality of a state visitation statute granting de facto parents visitation without showing parental unfitness or exceptional circumstances, the court's more expansive protection of legal parents' constitutional rights may have nonetheless closed the legislative door on this issue.[233]

"conspicuously silent" on the rights of children in nontraditional families, de facto parents stood in legal parity with biological or adoptive parents and had standing under the common law to seek the same rights and responsibilities as legal parents, and (2) the court may award such rights based on the best interests of the child).

228. *Janice M.*, 404 Md. at 686, 689, 948 A.2d at 88–89 (majority opinion) (citing SooHoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000)).

229. *See supra* note 227. R

230. MD. CONST. art. XXIV.

231. *See Janice M.*, 404 Md. at 679–80 n.7, 948 A.2d at 83–84 n.7 (noting that the Maryland Court of Appeals has interpreted Article 24 more broadly than the Due Process Clause of the Fourteenth Amendment "'in instances where fundamental fairness demanded that we do so'" (quoting Borchardt v. State, 367 Md. 91, 175, 786 A.2d 631, 681 (2001) (Raker, J., dissenting))).

232. *Id.*

233. *Id.* at 689, 948 A.2d at 89.

V. CONCLUSION

In *Janice M. v. Margaret K.*, the Court of Appeals of Maryland invalidated the de facto parent doctrine and held that any third party seeking custody or visitation over the objections of a legal parent must prove parental unfitness or exceptional circumstances.[234] In applying this heightened standard, the court failed to recognize that de facto parents, unlike third parties, do not intrude on the rights of legal parents to raise their children because the de facto parent test requires that the legal parent consent to and foster the de facto parent-child relationship.[235] Accordingly, the court failed to distinguish cases involving pure third parties from those involving de facto parents.[236] In applying a heightened standard to all third parties, which includes de facto parents, the court also threatened same-sex couples' right to maintain relationships with their children where same-sex parent adoption is unsettled in Maryland.[237] Instead, the court should have updated its law to grant special visitation rights to de facto parents based on a more lenient standard. even without statutory authority. Moreover, even if the legislature were to act, the court has suggested that such legislation may be unconstitutional.[238] Although the court argued that a higher standard for granting de facto parent visitation protects the rights of legal parents, a more flexible approach would have better recognized modern notions of family without jeopardizing the right of parents to the care, custody, and control of their children.

234. *Id.* at 664, 685, 948 A.2d at 74–75, 87.
235. *See supra* Part IV.A.
236. *See supra* Part IV.B.
237. *See supra* Part IV.C.
238. *See supra* Part IV.D.