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The United States has a history of balancing the constitutional rights of the child against the constitutional rights of the parents when determining if it is in the child’s best interests for the state to remove a child from his or her family. However, in the international context, this is not the only standard used to determine if the state should intervene. Australia, in particular, relies on a two-tiered system with two primary considerations and supplementary secondary considerations. Although Australia experienced problems with the traditional best interest standard in the past, the relatively recent development of the two-tiered system signals a step in the right direction.

Over thirty-five years ago, the Australian government was removing Aboriginal and Torres Strait Islander children based solely on the children’s Aboriginal or Torres Strait Island descent. Australia’s motivations underlying the removal are conflicted. Some reports claim that Australia feared a mixing of the races, while others vaguely claimed that it was done in the best interests of the child. The removal of a child from his or her family, which resulted in emotional and sometimes physical harm to the child, for the sake of the child’s “best interests,” led to Australia’s government passing legislation that presented a more concrete definition of exactly what “best interests of the child” meant. Additionally, in 1990, Australia became one of the first nations to ratify the United Nations Convention on the Rights of the Child. This ensured Australia’s compliance with every article of the Convention, including the proclamation that laws and actions affecting children should put a child’s best interests first so that it benefit them in the best possible way. Australia has since developed, through legislation, its current system of determining the best interests of the child.

The factors, both primary and secondary, were incorporated into the Family Law Amendment Act in 2006, along with the presumption of equal shared parental responsibility. Under the
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presumption of equal shared parental responsibility, both parents are assumed to have equal and shared parental responsibility over their child unless a court determines, using the primary considerations which are supplemented by the secondary considerations, that equal shared parental responsibility is not in the child’s best interests.

In Australia, when a court is deciding whether a parent, legal guardian, or the state should have custody of the child, the Family Law Act (“Act”) requires the court to regard the best interests of the child as the most important consideration.

Under Australia’s tiered system, the two primary considerations for determining the best interests of a child are: 1) the benefit to children of meaningful relationships with both parents; and 2) the need to protect children from physical or psychological harm, including being subjected or exposed to abuse, neglect, or family violence.

The first consideration is fairly ambiguous. The phrase “meaningful relationship” is not an absolute, defined concept, however, Australian case law has provided some guidance as to the term’s meaning. In Godfrey & Sanders, Family Court of Australia, Justice Kay concluded that Australia’s legislators aspired “to promote . . . a meaningful relationship, not an optimal one.” A meaningful relationship, under this rationale, could potentially mean that a child may have significantly limited contact with one parent, if that limited contact is enough to establish a meaningful relationship. Regardless of the existence of a meaningful relationship, it is still possible for other best interest factors to prevail over this primary consideration.

The court’s role in assessing the second consideration, the need to protect children from psychological and physical harm, is often confused with the role of investigation. However, the court’s role is strictly to assess the evidence presented as to the credibility of the allegations of violence against children. This is often a difficult task for the court because the evidence presented tends to be one person’s word against another’s. Furthermore, in Australia, “family violence,” is defined more broadly than “domestic violence,” its analogous term, in the United States. The Family Law Amendment Act Section 4, defines family violence as “conduct, whether actual or
threatened, by a person towards, or towards the property of, a member of that person’s family that causes that or any other member of the person’s family to reasonably fear for, or be reasonably apprehensive about, his or her personal wellbeing or safety.” This broad definition leads to the assumption that courts may determine that children must be protected from psychological harms, such as control and intimidation.

In addition, the Act does not distinguish conduct between a party and a child, from conduct between a party and another third party, witnessed by a child. In Lawrence v. Abel, the Federal Magistrates Court held that the father’s violence toward the child’s mother in front of the child constituted psychological harm, and reasoned that the emotional consequences of witnessing violent behavior presented a threat to a child’s emotional development.

There are many secondary considerations that the court takes into account when determining what is in the child’s best interests, including, but not limited to: 1) the child’s views and factors that might affect those views; 2) the child’s relationship with each parent and other individuals, including grandparents; 3) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the child and the other parent; 4) the likely effect on the child of changed circumstances; 5) the practical difficulty and expense of a child spending time and communicating with a parent; 6) each parent’s ability to provide for the child’s needs; 7) the maturity, sex, lifestyle, and background of the child and either parent; 8) the attitude of each parent to the child and to the responsibilities of parenthood; 9) any family violence involving the child or a member of the child’s family; and 10) any other fact or circumstance that the court thinks is relevant.

Utilizing the primary and secondary considerations, Australian courts use evidence presented by the parties at trial to make a case-by-case determination as to what solution or placement would be in the best interests of the child. Similar to the United States, Australia focuses on ensuring a child’s psychological and physical well-being. What makes these two systems different is Australia’s noticeable lack of consideration of the constitutional
rights of the parents and child. Australia’s constitution does not mention the rights of a parent, and instead leaves the best interests and rights of the parent and child to be dealt with through federal legislation and on a state-by-state basis. Unlike the United States, Australia’s two-tiered system focuses on whether it is in the child’s best interests to maintain a meaningful relationship with his or her parents. The addition of secondary considerations, to supplement this determination on a case-by-case basis, make Australia’s definition of “the best interests of a child” an amorphous term, individually tailored to every child. Australia’s case-by-case and unstructured system may seem uncertain when determining the best interests of the child, however, these new developments are a major improvement over Australia’s previous system.

Sources:
Godfrey v Sanders [2007] FamCA 102 (Austl.).
Lawrence v Abel [2013] FCR 28 (Austl.).
Opposing Viewpoints: Best Interests of the Child vs. The Fathers’ Rights Movement

By: Elizabeth Gresk

While gender bias is a concern, it is often one that is overlooked or ignored, in family court proceedings, particularly in child custody determinations. In 2010, it was estimated that twenty-two million children, nearly one-quarter of all children under age twenty-one, in the United States reside primarily with one parent while the second parent lives elsewhere. Approximately 13.7 million parents serve in the primary custodial parent role, but only one out of every six are fathers. This statistic demonstrates that even after decades of ideological changes, courts still seem to rely on the presumption that mothers are best suited to parent children.

The concept of operating family court proceedings with a focus on the children involved and their best interests, first took shape in the late nineteenth and early twentieth centuries. As changes in the American family structure—such as increased divorce rates, out-of-wedlock births, and blended families, became more prevalent, the best interests standard evolved and was used to promote gender neutrality in custody determinations. Three developments assisted this shift: (1) social science research demonstrating sole custody with mothers was not always best for children; (2) reliance on expert witnesses to conduct individual evaluations of each divorce case; and (3) a trend towards a more therapeutic, rather than adversarial, court system.

As of 2013, the courts of all fifty states employed some form of best interests analysis when making decisions about child placement and custody. This method of analysis allows courts to consider factors like a child's relationship with his or her caregivers, which home environment offers the child the most stability, and which parent is better suited to care for the child. Joint custody and shared parenting have become popular outcomes for custody disputes. Several states also make it explicit in their best interests statutes that a parent’s gender cannot serve as grounds for granting primary custody to that parent.
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Research suggests though, that the best interests standard may still be heavily intertwined with a preference for maternal custody, known as the “tender years doctrine.” Throughout much of family law history, courts operated under this doctrine when making custody decisions and many courts have been reluctant to abandon it completely.

The tender years doctrine was most prevalent in the nineteenth century, evolving from then-modern scientific research that recognized the importance of childhood in overall healthy social and emotional development. The tender years doctrine promoted the belief that children were in need of nurturing care and mothers were the most suitable parent to provide it. It was commonly accepted that caregiving and emotional support were inherent aspects of the maternal role and attitude. The fact that fathers were the primary wage-earners and increasingly spent time out of the home as industrial jobs became more popular, further supported the conclusion that mothers were best situated to provide the care children needed. Consequently, children remained for the most part, in the custody of their mothers in the event of divorce or separation.

Today, the tender years doctrine still influences decisions made in family courts. As the statistics show, mothers are overwhelmingly favored as primary custodians for children. Even when both parents are found equally suitable to care for a child, some states still allow courts to grant maternal custody because of a presumption that mothers are inherently better suited to raise children. But even when a court takes a purportedly gender-neutral approach to custody proceedings and grants joint custody, fathers are often left with only partial visitation rights. Alternating weekend visits and occasional holiday overnights for fathers tend to be the reality of shared parenting arrangements in the United States.

This gender disparity in custodial parenting has sparked an outcry from fathers and their advocates. Since the 1990s, there has been growing support for the Fathers’ Rights Movement in the United States.

The increase in popularity of the Father’s Rights Movement has been commonly attributed to changing social attitudes. In particular, the divorce reform movement of the 1960s, anti-feminist
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activism of the 1990s, and the rise of conservative religious groups have been named as impacting fathers’ activism. While the precise motives of fathers’ rights activists are not always clear, scholars posit that the movement is an attempt to counteract the power and authority men are allegedly losing to women in modern society. Additionally, some fathers’ rights advocates contend society is now a “fatherless America.” Advocates want to address the growing problem of deadbeat or absentee fathers, to ensure all children grow up and have an emotional relationship with their fathers.

Fathers’ rights advocates have a broad agenda, ranging from joint custody legislation to visitation rights to child support payment reform. The movement’s overall guiding principle is that children are best served by knowing and developing relationships with both parents. However, this principle is frequently lost when deciding parental rights and custody. Rather than looking for ways to provide children with access to both parents, the discussion often focuses instead on why one parent—usually the father—has been mistreated by the justice system.

Fathers’ rights groups take on many different roles and employ a variety of strategies to advocate on behalf of fathers. One of the preeminent organizations is the American Coalition for Fathers and Children (“ACFC”). The ACFC was founded in 1996 and calls itself “America’s Shared Parenting Organization.”

While the organization establishes itself as pro-two parent, the majority of its focus is on fathers’ rights. The underlying presumption in almost all of ACFC’s efforts is that children will already be living with or have complete access to their mothers. In its mission statement, the ACFC stresses the importance of providing children with two parents and the need to shift the law to reflect that family structure. Many of the organization’s other tenets, however, express concern that the family court system is biased in favor of women and mothers.

The ACFC also emphasizes the role unbalanced custody, child support, and visitation orders can play in creating discord for children who lack full access to both parents.

To address these issues, the ACFC utilizes online and in-person tactics. On its website, the ACFC has a blog of articles written by
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fathers’ rights activists, highlighting new issues that impact parenting and custody. Additionally, the ACFC publishes materials—such as its e-newsletter and factsheets about shared parenting—and works with centers like the National Men’s Law Center, Conflict Resolution Office, and the Co-Parenting and Access Office to assist fathers in accessing resources.

The ACFC works with state and national legislatures to help reform custody and visitation laws to support dual-parenting and joint custody in divorce or separation cases. The organization has also taken on a larger role in court proceedings. For example, the organization recently assisted a military father in his international custody dispute. In February 2013, the United States Supreme Court held in *Chafin v. Chafin* that parents of children currently residing abroad with a foreign parent do have standing to proceed in American family courts, even if the child is not presently in the United States. While the Court’s decision applies to any parent, regardless of gender, the ACFC declared a strong victory for fathers’ rights in general, while also strongly criticizing the respondent mother’s parenting skills and actions and lauding the petitioner father’s.

The Fathers’ Rights Movement presents an interesting contrast to the best interests or tender years doctrine. Interaction between the two ideologies has sparked increased discussion as to what a child’s “best interests” truly means and how assumptions about parenting may be influencing the courts. The ongoing debate suggests there are still changes to be made in how courts manage child custody proceedings. Ultimately, the court’s focus is meant to be on the children. In fact, Dianna Thompson, a founder and executive director of the ACFC, told the ABA Journal that the mission of the ACFC is “not about fathers’ rights or mothers’ rights, but about seeking what’s best for the children.” From the actions of parties on both sides of the issue, though, it is hard to tell who is really the focus: parents or children.
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Sources:


CHILD CUSTODY AND VISITATION LAW AND PRACTICE Ch. 10 § 10.04 (Matthew Bender ed., Rev. ed. 2012).


Review: *The Kid With A Bike*

*By: Melina Rozzisi*

With strawberry blonde hair, a red shirt, and tireless energy, eleven-year-old Cyril is reminiscent of Annie. And he has a similar story.

Annie’s future was anything but certain before she met Daddy Warbucks. Dropped off at an orphanage at birth, she spent her entire life there, awaiting her parents’ return. She runs away in hopes of finding them on her own, but is found by the police and returned to the orphanage. When an unexpected wealthy man agrees to foster her for a week, Annie’s future changes for good.

Like Annie, Cyril’s father abandoned him a month ago. Since then, he has been living in a group home in Belgium. Like Annie, Cyril is convinced his father will return to get him. *The Kid With A Bike* opens with Cyril calling his father’s old phone line, which is disconnected. Cyril does not believe that his father left for good because if he had, Cyril knows his dad would have brought him his bike.

Refusing to accept his abandonment, the next day Cyril sets off to find his father. He literally runs into a stranger, knocking her to the ground. The audience later comes to know this woman as Samantha, a hair salon owner in the neighborhood who agrees to foster Cyril on the weekends.

Annie and Cyril share the same desire to escape the desolate existence of a foster care group home. However, *The Kid With A Bike*, unlike *Annie*, is not a detailed story about Cyril’s experience. The film merely identifies and introduces some of the challenges and experiences that a child in foster care might face, and does so without exaggeration or musical numbers, and often without detail or explanation. In *Annie*, the audience gets Annie’s full back-story, but in *The Kid with a Bike*, the audience is never introduced to or hears of Cyril’s mother. The reason behind what instigated his father’s abandonment is left intentionally unclear. Cyril meets Samantha who later agrees to take care of him but yet again, the film does not delve into why Samantha, a complete stranger, so quickly decides to help
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him or why she remains unwavering in her dedication to him. One critic recognized that, “a mainstream film would have distracted us with a spurious back-story about Samantha’s own deprived childhood . . . .” and explains that in this scenario, the audience is given what is necessary: that Samantha and Cyril have connected.

The film also avoids introducing the legal processes that Cyril would be subjected to as a foster child. Such processes would include identifying Cyril’s caregiver at any given time, as well as determining how Cyril is functioning and whether or not any services are needed to facilitate his development. And, while it is not clear which stage of the child welfare process Cyril is at during the time frame of his life that the film covers, in order to be placed in a group home in the United States, a judge would have needed to declare Cyril a ward of the state. After that, the state would be Cyril’s legal guardian until he is returned to his birth parents or legally adopted. In that instance, Cyril’s father’s parental rights would still be intact, however, if Cyril’s father wanted to regain custody of Cyril he would have to successfully complete court-ordered services. The legal proceedings are significant in that they determine the future for the child, yet the film declines to touch on that aspect of Cyril’s life at all.

The detail, however, is purposefully lacking. The result is a strikingly powerful film that successfully uses its central character as a universal figure for all children who have been abandoned by their parents. Therefore, without imposing too much on the viewer, the film inspires the audience to think about the issues a child may face when his biological parents are not present. The film accomplishes this successfully by maintaining a broad focus and providing the audience with just enough detail about Cyril’s life to genuinely empathize with him.

Therefore, the glimpse of Cyril’s life that the audience sees is focused entirely on his relationships outside the legal process. Through Cyril, the film is successful in identifying some of the risks children in foster care encounter. The struggle to develop relationships and the search for someone to rely on are prominent issues and the film does an excellent job of giving the audience a sense of how those issues affect one particular child. Additionally,
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the film clearly captures the struggle a child endures in understanding or accepting the abuse, neglect, or abandonment by his parents. Cyril fervently searches for his father, visiting several stores and asking if anyone knows where his father might have moved. He rides his bike aggressively all over the town, focused on feeling anything other than alone. Cyril’s desire to reunite with his father despite the harmful and unsupportive behavior is a common urge for foster children and many children may struggle for years to understand why they feel that urge.

The film also identifies a foster child’s search for acceptance and belonging. The film begins with Cyril in a foster care group home, from which he is constantly trying to escape. In the United States, laws and policies exist that require children to be placed in the “least restrictive setting that can meet their needs.” For children Cyril’s age, though, it is challenging to find foster homes that are willing to accept the risks that come along with fostering an older child who has experienced maltreatment or abandonment. Consequently, these children often land in foster care group homes like Cyril. In addition, many children with various physical or behavioral needs require attentive structure and services and are thus placed in residential facilities that can provide such assistance.

During his search for acceptance and belonging—in his eyes, a hunt for his father—Cyril enters a fortunate setup with the potential to improve his situation, but one that is entirely unrealistic in the United States foster care system. Cyril meets Samantha, a complete stranger, who agrees to foster him on the weekends. In the various foster care systems in the United States, non-relative adults must be trained, assessed, and licensed or certified or both to provide this type of care. The foster care agency would be involved in any outside visitation arrangement, which would first need to be approved by the court. Therefore, while in reality this setup is legally impractical, for Cyril, it seems promising.

The next turn the film takes is to introduce the audience to the vulnerabilities that foster children experience and the risky behavior they often exhibit as a result of their abandonment and transition into and through foster care. At this point, Cyril meets Wes, a gang leader in the area. Cyril’s newfound friendship with Wes threatens to
unravel the positive relationship between Cyril and Samantha. Gang involvement or other delinquent behaviors are common in foster children due to the child’s exposure to an unstable or weak family structure. Studies show that foster children are significantly more likely to have a delinquency petition compared with the children who had never entered care—23 percent vs. 11 percent for males, and 8 percent vs. 3 percent for females. Foster children are also at an increased risk for mental health and behavioral issues such as depression, post-traumatic stress, dissociation, social problems, suicidal behavior, attention-deficit or hyperactivity disorder, and conduct disorders, and they are less likely to be engaged in school and more likely to be held back or drop out. Each of those risk factors puts foster children at an increased risk for gang involvement.

Samantha tries to prevent Cyril from hanging out with Wes; she lectures him and physically tries to stop him from leaving the house. Yet Cyril is determined to earn Wes’ appreciation, and he violently jabs Samantha in her shoulder with a pair of scissors to break free. Minutes later, Cyril succumbs to the acceptance that Wes offers to him, and proves his dedication by committing a violent crime.

Fortunately, Cyril is not hardened by his crime and instead feels remorse and finally understands what is best for him. When Cyril returns to Samantha’s house immediately after, she accepts him back into her home and unconditionally forgives him for hurting her. The next day she sets up a mediation meeting with the man who Cyril mugged where she agrees to pay the damages. At this point, the audience recognizes a shift in the film, as the commitment between Cyril and Samantha seems solidified.

The idea of caregiver support is an important theme. Although the ending of the film is vague and open-ended, viewers leave the film acknowledging the importance of Samantha in Cyril’s life. Samantha and Cyril’s relationship identifies the potential for a nurturing caregiver to mitigate the risks surrounding a child in foster care; a relationship that research has found to be crucial in the successful outcome of children in foster care. Evidence-based studies have identified that family stability can counteract many of those risk factors and provide foster children with the opportunity to have a
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healthy well-being and a positive outcome. One developmental psychologist explained that “family stability is defined not as a specific family structure or condition, but rather as a family environment in which giving practices provide children with the consistent, nurturing care they need to thrive.” The filmmakers acknowledge this idea. Cyril and Samantha’s relationship in the film is certainly not the nuclear family model, but eventually it could become a stable family environment.

The research is concrete. When a child maintains placement stability with a supportive and nurturing caregiver, the child will potentially have improved outcomes in all areas of developmental well-being. First, the child is likely to have fewer health issues, as stable families are more likely to have consistent access to health services and immunizations for their children. Also, children with a stable placement have higher educational advancement and achievement levels and are less likely to be held back or drop out of school. Finally, children in stable family environments have improved behavioral and emotional functioning. Therefore, because stability and caregiver support are crucial to a child’s healthy well-being and positive outcome, it is essential to support those who volunteer as a child’s caregiver by providing them the resources and legal rights to do so successfully.

The audience does not see Cyril’s outcome. Unlike in Annie where the loose ends are tied up as Annie and Daddy Warbucks’ sing “I Don’t Need Anything But You” in a final medley, with Cyril, his future seems less certain. The ending, of the film, while extremely fitting, happens abruptly. As Cyril and Samantha ride bikes together, the audience expects more to follow. As one critic noted, “If there’s a happy ending, it’s implied rather than delivered – let’s say the filmmakers make you work for it, or at least, imagine it for yourself.” This ending is successful in capturing and reminding the audience of the unfortunate reality that because foster children are intensely vulnerable to begin with, and increasingly more susceptible to the circumstances that being in the state welfare system brings, nothing is certain, even when things seem to be going smoothly. Undoubtedly, how one imagines Cyril’s ending will depend on her
knowledge or experience of children who enter the foster care system.

Sources:


ANNIE (Columbia Pictures 1982).


Review: *The Kid With A Bike*


*THE KID WITH A BIKE* (Les Films du Fleuve 2011).


In the Courts: State Views on the Psychological-Parent and De Facto-Parent Doctrines

By Christina Spiezia

Traditionally, the parental rights of custody and visitation have belonged to a child’s biological or adoptive parents. Today, however, the concept of “family” has changed dramatically. Nontraditional family arrangements are more common than ever, and the rise of family diversity has challenged the legal system to reassign parental roles. Family law is primarily a state issue, and thus state jurisdictions have diverged in their legal responses to changes in family structure.

Some state legislatures and courts have now adopted and enforced a psychological-parent or de facto-parent doctrine. The two doctrines are similar in that they allow courts to recognize a person who has a parent-like relationship with a child as either “de facto” or “psychological-parent.” Courts may then view that third party as an equal to the child’s biological or adoptive parent when determining visitation, custody, and standing to seek parental rights in court.

The Supreme Court has never addressed the concept of de facto or psychological-parenting, and state courts are in disagreement over the legal status of a third party that has a parent-like relationship with a child. While some jurisdictions have embraced the de facto and psychological-parent doctrines, others have decisively rejected them. Several state cases illustrate this legal division and present arguments on both sides of the de facto or psychological-parenting debate.

The Michigan Supreme Court declined multiple times to recognize a psychological-parent doctrine. In Bowie v. Arder, a case in which a grandmother brought an action seeking custody of the granddaughter who resided with her, the court acknowledged the existence of a psychological-parent doctrine, yet refused to apply it. The court specifically took note of arguments raised for creating third-party rights to custody as well as subsequent constitutional issues created by those rights. The court, however, explained that it was not in a position to make policy judgments regarding the
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document’s application when the Legislature, whose task it is to create substantive rights, had chosen not to do so. The court ultimately determined that the Legislature would create such rights for third parties if public policy so required. Several years later, in Van v. Zahorik, the Michigan Supreme Court agreed with its earlier statement, that public policy issues related to child custody disputes were to be resolved by the Legislature and not the judiciary.

Another case in Vermont, Titchenal v. Dexter, similarly discussed the involvement of two women who had together raised a child that only one of the women had legally adopted. After the women’s relationship ended, the adoptive mother’s previous companion brought suit seeking unsupervised contact with the child. She argued for the creation of a test to assure that only those third parties who had developed an “intended and shared de facto-parental relationship” with a child could petition for visitation. The Supreme Court of Vermont, however, was not persuaded, and stated that such a test would need to examine the merits of visitation or custody petitions on a case-by-case basis. Thus, the court explained, most cases would require a “full-blown evidentiary hearing” forcing parents to defend themselves against a wide range of third parties claiming a parent-like relationship with their child. Consequently, the court rejected the creation of such a test and held that the woman had no right to parent-child contact as a de facto-parent.

In 2007, the Supreme Court of Utah declined to adopt the psychological-parent doctrine in Jones v. Barlow. The case involved two women who, in the course of a romantic relationship, had a child together through the artificial insemination of Barlow. Two years later, the relationship ended and Barlow refused to allow Jones any contact with the child. Jones brought suit against Barlow to obtain visitation rights, but the court ultimately held that Jones, as a former partner, did not have standing to seek visitation or custody of the child by means of the psychological-parent doctrine.

The Supreme Court of Utah, in its reasoning, echoed the earlier Vermont and Michigan decisions by not enacting a controlling statutory provision regarding the nature of Jones’ and Barlow’s relationship, and in refusing to assume the legislative role of crafting
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and implementing social policy, which would overstep the judiciary’s authority. The court further explained that a de facto-parent doctrine would create an ambiguous and fact-dependent test that would be difficult to administer uniformly. Thus, the doctrine would fail to fulfill the “traditional gate-keeping function of rules of standing,” and would expose parents to claims by a wide variety of individuals asserting parent-like relationships. Finally, the Supreme Court of Utah looked to common law, stating that it “evidences a strong presumption that parental rights shall not be disturbed absent a determination that the legal parents are unfit.” The court in Barlow could find “no bedrock principles” on which to effect change in the common law when there was no substantial agreement that the change was necessary and when a modification could be better brought about by legislative action.

In the 1991 New York case of Alison D. v. Virginia M., a woman who previously had a live-in relationship with a child’s mother, sought to obtain visitation rights after the relationship ended. The New York Court of Appeals denied the woman’s argument that being a de facto-parent gave her standing to bring the claim. The court asserted a rule that biological parents, assuming fitness, have the right to the care and custody of their children, and to award visitation to a third person would impair those rights. Thus, the court explained parentage under New York law as a derivative of biology or adoption.

In contrast to states that have decisively blocked de facto or psychological-parents from obtaining visitation or custody rights, at least twenty-one states have recognized the doctrines. A 1995 Wisconsin case, In re Custody of H.S.H.-K., sets forth a four-element test that now provides a common definition of the psychological-parent doctrine. Other states, including California, New Mexico, New Jersey, and Oklahoma have all adopted de facto or psychological-parent statutes that mirror this test. As In re Custody of H.S.H.-K. illustrates, actually gaining standing to petition for visitation or custody rights as a de facto or psychological-parent can be insurmountably difficult.
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_In re Custody of H.S.H.-K_ involved a woman who was seeking visitation of the child she raised with her former same-sex partner, who had been artificially inseminated. The child’s biological mother opposed the visitation, arguing that she had a constitutional right to determine who could visit her child. The court, while “mindful of preserving a biological or adoptive parent’s constitutionally protected interests and the best interest of a child,” ultimately concluded that a circuit court has the power to hear a petition for visitation once two conditions are met. First, a plaintiff must show that she has a parent-like relationship with the child. That objective, however, is difficult to accomplish. Specifically, to achieve psychological-parent status, a plaintiff must prove each individual element of a four-factor test set forth by the Supreme Court of Wisconsin. The plaintiff must demonstrate that: (1) the biological or adoptive parent consented to, and fostered, the establishment of a “parent-like” relationship between the nonparent and the child; (2) the nonparent lived in the same household with the child; (3) the nonparent undertook parental obligations, assumed a “significant responsibility” for the “care, education and development” of the child, and contributed toward the child’s support without expectation of financial repayment; and (4) the nonparent assumed a parental role for a sufficiently long period of time to have established a “bonded, dependent relationship parental in nature” with the child.

Even if a plaintiff is able to demonstrate that she qualifies as a psychological-parent under this four-element test, she still must show the existence of a “significant triggering event” that justifies state intervention in the child’s relationship with the biological or adoptive parent. Such an event may be the disruption in the child’s life caused by the elimination of his relationship with the psychological-parent. Only after a plaintiff satisfies this heavy burden may a circuit court consider whether visitation or custody with the psychological-parent is in the best interest of the child.

The Wisconsin Supreme Court explained that its approach was supported by policy considerations. While biological and adoptive parents have a constitutional right to rear their children free of unnecessary state intervention, there are cases where the best
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interest of the child overrides a parent’s right. Especially when a parent consents to and fosters another person’s parent-like relationship with the child and then substantially interferes with that relationship. In such a situation, a triggering event notifies the state that intervention into the constitutionally protected realm of parent and child might be warranted to protect a child’s best interest.

In re Custody of H.S.H.-K was ultimately remanded to the lower court to give the plaintiff the opportunity prove, under the four-part test, that she was a psychological-parent, and further that a triggering event substantially interfered with her relationship with the child. The court explained that if she were able to do so, the lower court would in turn determine whether visitation was in the child’s best interests.

The Supreme Judicial Court of Massachusetts has also addressed the standing of a de facto-parent by applying a best-interests-of-the-child standard, but has done so without a factor test. In E.N.O. v. L.M.M., the plaintiff, the former same-sex partner of a child’s birth mother, sought visitation and custody against the birth mother’s wishes. Ultimately, the court held that the plaintiff was the child’s de facto-parent. The court explained that “recognition of a de facto parent is in accord with notions of the modern family” because nontraditional families, including same gender couples, are becoming increasingly common. The court further noted that it is to be expected that children of nontraditional families form relationships with de facto-parents just as they do with legal parents.

Consistent with the Supreme Court of Wisconsin, the Supreme Judicial Court of Massachusetts recognized that a parent’s constitutional rights can be outweighed if a court determines that a third party relationship is in the best interests of the child. The court explained that a biological parent’s interest in protecting the custody of her child must be balanced against the child’s interest of maintaining a relationship with the de facto-parent. In this case, the court looked directly at the child’s best interest, deciding that it tipped the scale in favor of a continued relationship with the plaintiff.

Specifically, the court in E.N.O. considered the following factors as evidence of de facto-parenthood: the plaintiff attended
doctors’ visits while her former partner was pregnant, was listed on the child’s birth announcement, expressed her intention to parent the child, raised the child, shared a residence with the child, supported the family financially, took on a parental role, was authorized to make medical decisions for the child, and was called “Mommy” by the child himself. The court decided that these facts indicated an attachment to the plaintiff on behalf of the child, and subsequently granted the plaintiff visitation rights.

Other states adopting the de facto or psychological-parent doctrines have made various statements supporting their reasoning. The Supreme Judicial Court of Maine explained that emotional ties constitute “a compelling basis for the State’s intervention into an intact family with fit parents.” In stark contrast to New York’s decision in Alison D., Pennsylvania courts have noted that a biological parent’s rights do not extend to “erasing a relationship” between the biological parent and her former partner, even if she regrets entering into the relationship with the former partner in the first place. Further, some state courts have recognized de facto or psychological-parenthood in specific contexts. While not every jurisdiction uses the term “de facto” or “psychological-parent,” certain states effectively allow nonparents to achieve legal parental status if they qualify under the concept of a de facto or psychological-parent. Illinois and North Carolina, for example, have abolished any preference for biological or adoptive parents in conservatorship placements. Connecticut, Iowa, and New Hampshire have enacted legislation granting same-sex partners who have no biological ties to children, but who have bonded with the children by undertaking parental roles, standing to file conservatorship suits.

Recognizing the de facto or psychological-parent doctrine can enable courts to protect parent-like relationships when doing so is in a child’s best interest. Mere adoption of the doctrines need not infringe upon a biological or adoptive parent’s right to raise a child because, as seen in In re Custody of H.S.H.-K, courts can apply a rigid standard to determine whether an individual achieves de facto or psychological-parent status. Thus, recognizing the de facto or psychological-parent doctrine should not simply grant any nonparent
State Views on the Psychological-Parent and De Facto-Parent Doctrines

standing to petition for visitation and custody. In fact, as a safeguard to parental rights, courts adopting the doctrines should decline to consider most third parties as psychological-parents. In the rare instance, however, where an individual truly serves as a de facto-parent, the court should develop a clear, yet strict test to apply, such as that created in In re Custody of H.S.H.-K.

Ultimately, there are dozens of cases on each side of the debate as to whether courts should grant de facto and psychological-parents standing to seek visitation and custody rights. Cases adopting the doctrines often stand in direct contrast to decisions that refuse to recognize them, thus illustrating the great divide that exists among jurisdictions in this area of law. With social diversity and the growing prevalence of nontraditional family forms, it is certain that the de facto and psychological-parent doctrines and their application to parental rights will remain a hotly contested issue in state courts.

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State Views on the Psychological-Parent and De Facto-Parent Doctrines

Interview With: Cindy Liou, Trafficking Coordinator with API Legal Outreach

By: Amanda Crews Slezak

The Trafficking Victims Protection Reauthorization Act (“TVPRA”) is essential legislation in the effort to combat human trafficking in the United States and throughout the world. Originally passed in 2000, the law established the State Department Office to Monitor and Combat Trafficking in Persons, authorized the yearly Trafficking in Persons Report, and created global minimum standards for preventing trafficking. The original law made trafficking a federal crime and advanced the rights of survivors by offering assistance programs. The legislation also created the T-visa, which provides immigration relief to survivors who were trafficked across United States’ borders.

Congress, after allowing the law to lapse in 2011, reauthorized the bill as an amendment to the renewed Violence Against Women’s Act, and President Obama signed it into law on March 7, 2013. While this federal legislation is critical, it is important for states to review existing laws to see how legislators can improve these laws to be more effective in protecting survivors of trafficking. State anti-trafficking laws need to be stronger because, as evidenced by the most recent authorization, the federal law’s protections are subject to the deliberations and delays of U.S. Congress. Many advocates argue that states should focus more on protecting and providing services for survivors, as the federal TVPRA does, instead of concentrating solely on criminalization.

Cindy Liou is a staff attorney and the Trafficking Coordinator with Asian Pacific Islander (“API”) Legal Outreach. API Legal Outreach has worked for more than thirty years as a community-based, social justice organization with offices in San Francisco and Oakland, California. The organization is also part of the Anti-Trafficking Collaborative of the Bay Area (“ATCBA”), formerly known as Asian Anti-Trafficking Collaborative (“AATC”) in the Greater Bay Area.
Interview With Cindy Liou

AATC was founded in 2001 as a partnership with four leading agencies in the area: API Legal Outreach, Asian Women’s Shelter, Donaldina Cameron House, and Narika. Today, ATCBA, established in October 2012 in order to reflect the diversity of communities served, consists of API Legal Outreach, Asian Women’s Shelter, Narika, The SAGE Project, and Mujeres Unidas y Activas. The organizations of ATCBA work closely together to provide trafficking survivors with legal options, as well as alternative options for shelter, other than returning back to the source of trafficking. The organizations involved in the ATCBA are close partners and have built trust over the years while collaborating to provide direct services for marginalized populations, particularly immigrants subjected to domestic violence, sexual assault, abuse, and exploitation. This trust is vital when working on complex cases together.

API Legal Outreach provides legal representation to those who have been able to escape their trafficking situations. Furthermore, API Legal Outreach helps trafficking victims to “stabilize their immigration status, protect and advocate . . . during the ensuing criminal investigation and prosecution, and work with [its] sister agencies in the Anti-Trafficking Collaborative of the Bay Area” to provide them with additional, necessary services. Those services include shelter, medical attention, aid when seeking refugee benefits, counseling, and job training.

API Legal Outreach is a particularly effective organization for many reasons, including its long-standing collaboration with service providers, its victim-centered approach, and the comprehensive services made available to victims. In addition, API Legal Outreach focuses on enabling the transition from victim to survivor, as well as providing long-term services to support survivors’ independence. Ms. Liou highlighted the importance of providing linguistically, culturally, and age appropriate services, and always working with an attitude of empowerment – not rescue – even with children.

Ms. Liou provides direct legal services for survivors of both sex and labor trafficking. She represents survivors from all over the world in complex cases that often implicate the U.S. criminal, civil, and immigration systems. She and other attorneys at API Legal
Interview With Cindy Liou

Outreach offer services dealing with immigration issues that include T-visas, U-visas, VAWA, civil litigation, restraining orders, divorce, and other family law issues, such as child custody.

When asked how state laws can be improved to be more effective for survivors of trafficking, Ms. Liou stated that state laws must do more than simply criminalize trafficking. She offered the example of the California Trafficking Victims Protection Act. As it was passed in 2005, the law was comprehensive and effective. It criminalized human trafficking, but the law also promoted the rights of survivors of trafficking through a victim-centered approach that provided survivors with access to social services, a path to immigration relief under federal law, mandatory restitution, and a civil cause of action.

However, a recent change has negated some of those advances. Ms. Liou explained that California Proposition 35, which passed last year, shifted the California anti-trafficking law away from the basic goals advanced when the law first passed, such as the victim-centered approach, which is also reflected in the federal TVPA. While the California law was well intentioned in its goal to increase penalties for certain forms of sex trafficking, the law now emphasizes the criminalization of trafficking instead of the need to protect the survivors.

Proposition 35 requires traffickers to pay fines up to $1.5 million to governmental agencies and non-governmental service providers, but does not allocate any of this money to trafficking victims, either in the form of restitution or a civil action. Most human traffickers will not have sufficient resources to pay both the fines to the government and a judgment awarded to the victim. Therefore, even if a trafficking survivor succeeds in a claim against her trafficker, it is unlikely she will be able to collect a monetary award once the trafficker pays the fines imposed by Proposition 35. Additionally, Ms. Liou stated that Proposition 35 increased sentences for sexual exploitation to much higher levels than those for labor exploitation. This diminishes the harsh experience that survivors of forced labor face and creates a sentencing scheme that prioritizes certain forms of trafficking over others.
Interview With Cindy Liou

Ms. Liou believes that anti-trafficking laws should prioritize the advancement of survivors’ rights. In fact, she said, most state anti-trafficking laws focus on criminalization when the focus should be on measures to protect the survivors. For example, Ms. Liou mentioned that states should “encourage comprehensive immigration reform to continue supporting the rights of immigrant survivors of violence.”

Ms. Liou suggested that California Assembly Bill 1899, which went into effect January 1, 2013, is another example of how states can improve anti-trafficking laws. This law allows access to in-state tuition rates, scholarships, and other forms of financial aid that would otherwise be available to crime survivors who were granted immigration status based on their cooperation with law enforcement. This would include survivors who have been granted the “T” or “U” nonimmigrant status. The law ensures that these crime survivors continue their education from high school to college without interruption.

Ms. Liou also suggested that laws such as AB 241, the California Domestic Worker Bill of Rights, which would extend labor protections such as breaks for meals and overtime to domestic workers, would increase protections for many domestic workers who are exploited, abused, and sometimes trafficked. After Governor Brown vetoed the first domestic worker’s bill, Assemblyman Ammiano re-introduced the bill in the 2013-2014 legislative session.

Considering the extended delay of Congress to reauthorize the federal TVPRA, it is imperative that Congress protects workers’ rights and prevents exploitation of immigrants in Comprehensive Immigration Reform efforts and additionally, that states focus on strengthening anti-trafficking laws so that they are more effective in protecting the victims, rather than simply criminalizing trafficking. More can and must be done at the state level to protect and provide services for those who have survived this modern-day form of slavery.

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Interview With Cindy Liou


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