

Analysis of A.H. v. M.P., decided by the Supreme Judicial Court on December 22, 2006
447Mass.828 (2006)

Chief Justice Marshall's opinion in the recent case of A.H. v. M.P. (December 8, 2006) details the legal meaning of 'de facto parent' and its application in today's complex society where children may neither be born to nor raised by their biological parents. The case focuses on the parental rights of the non-biological, non-adopting 'mama' in her equitable action seeking the status of 'de facto parent' or 'parent by estoppel' in the context of an unmarried lesbian couple (the case antedates the Goodridge decision).

Chief Justice Marshall opens the opinion with the succinct statement that this case raises two questions of first impression. First, whether an adult who is neither the biological nor the adoptive parent of minor child may assert custody and support rights as a 'de facto parent'... and second, whether and to what extent we should recognize estoppel principles as creating parental rights where the party claiming such rights is neither the biological nor adoptive parent of the child and does not meet the criteria of a de facto parent.

In affirming the trial judge's decision, the SJC sets forth the legal definition of de facto parent and relied heavily on the definition of such a parent contained in the ALI Principles. "A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent....The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." E.N.O. v. L.M.M., 429 Mass. 824, 829 (1999). See ALI Principles, Section 2.03 (1) (c).

Financial contribution by the party seeking 'de facto parent' status is not critical to the determination. The ALI Principles focus on 'caretaking functions' of the purported de facto parent rather than the more general 'parenting functions'. The narrow focus of caretaking function is the most likely to reflect various qualitative factors that are otherwise very hard to measure, including the strength of the emotional ties between the child and each parent, relative parental competencies, and the willingness of each parent to put the child's interests first.

A person seeking the status of 'de facto parent', who is neither biologically related to the child in question nor a parent by adoption, must make a substantial showing of actual

'face time' with the child that entails care giving and involvement in all the day to day activities of the child. The status of de facto parenthood will not be awarded to a person who can only make a showing of financial contribution to the child's welfare, even if coupled with shared residence. There must be evidence that the disruption of the adult-child relationship is potentially harmful to the child's best interests because the current caretaking functions will need to be substantially altered.

In the instant case, the plaintiff, known as 'mama', could not show at the trial level a history of caretaking functions that endured beyond the child's first months of life. The fact that at the outset of the separation, 'mommy', the biological parent agreed to visitation and accepted support from "mama" did not alter the outcome.

The "mama's" case was immensely harmed by evidence that she did not execute adoption papers which were prepared and given to her for signature by a lawyer retained by both "mama" and "mommy" shortly after the baby's birth and at a time the parties union was harmonious. "Mama's" failure to take this necessary and important legal step of declaring herself the parent of the baby was an omission that came to haunt her claim for the status of de facto parent.

"Mama's" second argument relied on the theory of parent by estoppel. Persons claiming the status of parent by estoppel are persons who do not have the option to adopt the baby in question. Unlike a de facto parent a parent by estoppel is afforded all the privileges of a legal parent. In this case, "Mama" had the ability to adopt and chose not to take action. She was not a person who through circumstances was estopped from any claim to parenthood.

"Mama's" last argument, that of judicial estoppel, was rejected by Justice Marshall as 'mommy' was not precluded from taking a different legal position than one taken earlier in the course of litigation, given the strong motivation to negotiate a working settlement with "mama" for the benefit of the child. The application of principles of judicial estoppel is always left to the discretion of the judge and is very fact specific.

The lessons to be learned from this case are several:

- 1.) First and foremost, advise same sex couples, married or not, to adopt any child to whom they are not biologically related;
- 2.) A claim for status as a 'de facto parent' must include recent and current evidence of caregiving;
- 3.) Caretaking functions must be set forth with particularity and demonstrate a pattern which – if interrupted – will be disruptive and harmful to the child's best interests;
- 4.) Reliance on financial contributions made by a person seeking the status of de facto parent is misplaced; financial contributions (or lack thereof) are not a material in the analysis;
- 5.) A person seeking the status of de facto parent should not make the argument of parent by estoppel if such person had the opportunity to adopt the child;

6.) Judicial estoppel may have more limited application in the area of family law than in other areas of practice.