COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 12018
A.C. NO. 2015-P-1510

KAREN PARTANEN,

Plaintiff-Appellant

v.

JULIE GALLAGHER,

Defendant-Appellee

DIRECT APPELLATE REVIEW OF A JUDGMENT OF
THE SUFFOLK PROBATE AND FAMILY COURT

BRIEF OF THE APPELLANT, KAREN PARTANEN

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ISSUES PRESENTED

1. Where two children were born to and raised by an unmarried same-sex couple, did the Trial Court err in dismissing the parentage complaint of a mother under G.L. c. 209C because she lacks a "biological" relationship with the children?
2. Where two children were planned and born via assisted reproduction with mutual consent, did the Trial Court err in dismissing a parentage complaint under G.L. c. 46, § 4B, because the parents were a nonmarital couple?
3. Where two children were born to and raised by an unmarried same-sex couple, did the Trial Court err in dismissing the parentage complaint rather than extending the remedy of *full* parentage through its equity jurisdiction pursuant to G.L. c. 215, § 6?

STATEMENT OF THE CASE

1. Prior Proceedings

On October 17, 2014, Partanen filed a Verified Complaint in Equity Pursuant to G.L. c. 215, § 6, G.L. c. 209C, and G.L. c. 46, § 4B, To Establish Parentage and for Other Relief ("Parentage Complaint"), in which she sought establishment as a full legal parent of Jo

and Ja[1] and to share custody of both children.[2] R. 3-10. Gallagher filed a Motion to Dismiss. R. 11-24.

On February 26, 2015, the trial court (Abber, J.) dismissed the Parentage Complaint, entering the dismissal on March 11. R. 2, 62. That court concluded, *inter alia*, that Partanen "does not meet the statutory requirements for presumed/legal parentage under G.L. c. 46, § 4B or G.L. c. 209C," among other things. R. 62-65. On April 7, 2015, Partanen filed a timely Notice of Appeal. R. 2. On November 24, 2015, Partanen sought Direct Appellate Review by this Court, which was granted on December 17, 2015.

2. Statement of Facts

This case centers on Jo and Ja, now ages seven and almost four, who were born to Partanen and Gallagher through assisted reproduction ("ART") using donor sperm. R. 4. For over twelve years, Gallagher and Partanen were in a committed relationship and

[1]This matter is not impounded, but the children's names and birthdates are redacted to protect their privacy.
[2]As noted in the Application for Direct Appellate Review, Partanen filed a Verified Complaint in Equity Pursuant to G.L. c. 215, § 6 To Establish De Facto Parentage and for Other Relief ("De Facto Complaint") in February, 2014. Add. 7. There, Partanen sought a declaration that she was a de facto parent and to share custody. Add. 13. The de facto judgment was issued, after trial, on September 21, 2015. Add. 1-6. The parties stipulated Partanen was a de facto parent, and the trial court (Casey, J.) awarded shared custody. Gallagher has filed a Notice of Appeal.

built a life together. R. 3-4. Early on, they bought a home together. R. 3. They shared a mutual goal of parenting and jointly decided to have children together. R. 3-4. Over the course of seven years, they planned for and engaged in welcoming children into their family via ART. R. 3-4.

After joint efforts to support Partanen in conceiving were unsuccessful, the parties agreed that Gallagher would try to conceive children. R. 4. Clinic documents reflect Partanen's involvement with Gallagher's lengthy fertility process. Id. In 2007, with Partanen's full engagement and consent, Gallagher conceived Jo through ART with donor sperm. Id. Gallagher gave birth to Jo in 2008. Id. In 2011, again with Partanen's full involvement and consent, Gallagher conceived Ja through ART with donor sperm. Id. Partanen even performed the artificial insemination under the auspices of the ART clinic. Id. Gallagher gave birth to Ja in 2012. Id.

Partanen was present at the birth of both children. Id. From each child's birth, she received them into her joint home with Gallagher. R. 4, 7. Partanen parented Jo and Ja in every way, performing myriad parenting duties from feeding them at night to administering their medicine. R. 4-5. Partanen's attention to Jo and Ja's developmental, social and emotional needs formed true parent-child

relationships. Id. Through consistent financial support, Partanen met the children's basic needs for food, clothing, shelter and education. R. 5.

From each child's birth, Gallagher and Partanen held the children out as their own. Together, they sent announcements about the birth of each child. Id. They spent holidays and vacations together. Id. To institutions and providers such as day cares, doctors and schools, the parties held themselves out as the children's parents. Id. To their extended families and community of friends, Gallagher and Partanen held themselves out as a family. Id. Both Partanen and Gallagher referred to Jo and Ja as their children to all, openly and consistently since their births. R. 5-7. To the children themselves, Partanen and Gallagher referred to Partanen as she was - their mother, their "Mommy." R. 6. Within their family and to the outside world, Partanen was a parent of Jo and Ja. R. 6, 7. Partanen has been a critical part of the children's lives. R. 6.

SUMMARY OF THE ARGUMENT

During their nearly thirteen years together, Partanen and Gallagher built a family with children. Relying on consented-to assisted reproduction with Gallagher giving birth, they had two children who are now ages seven and almost four. They shared a loving home and deep parent-child bonds.

Chapter 209C encompasses Partanen's parentage claim. Someone who holds a child out jointly with a mother as their own child is presumed to be a parent, and that presumed parent can be a woman. G.L. c. 209C, §§ 6, 21. The plain language of the statute contains no genetic prerequisite for standing or establishment as a holding out parent, which is also consistent with overall Massachusetts jurisprudence. The adults and children fall within Chapter 209C's terms in that the children were "born to" Partanen and Gallagher. G.L. c. 209C, § 1. Two women must also be included within the scope of unmarried adults who have children together. G.L. c. 209C, § 21; G.L. c. 4, § 6 (Fourth). Chapter 209C's text must be construed in light of its purposes, including full equality and security for nonmarital children and the importance of maintaining a developed parent-child relationship regardless of genetics. (pp. 7-23).

In Chapter 209C, Massachusetts adopted key aspects of the 1973 Uniform Parentage Act, sharing the common purpose of promoting equality for nonmarital children and securing these children to two parents. Our sister states have interpreted similar UPA provisions to conclude that mothers like Partanen can state a claim for legal parentage that is applied in a gender-neutral fashion and that is not rebutted by genetics. (pp. 23-25).

Partanen has standing and is a presumed legal parent under G.L. c. 209C, §§ 6 and 21, because the children were born to her and Gallagher; received into their shared home; and held out to the world as their own. It is not proper to rebut her parentage because, as planned, the children were conceived via ART, born to them and raised jointly by the parties; there is no competing parent (genetic or otherwise); and rebuttal would harm the children by stripping them of one of their dearly loved and needed parents along with the psychological, financial and legal protections she provides them. (pp. 25-29).

Applying Chapter 209C's plain language and construing it in light of its purposes to apply to a same-sex couple who brings children into their family avoids serious constitutional concerns. Following the trial court's interpretation of Chapter 209C would render the statute unconstitutional as applied to Partanen and these children on equal protection grounds (status as nonmarital child, sex, sexual orientation) and for burdening their family integrity. (pp. 29-38).

Partanen is also a legal parent under G.L. c. 46, § 4B, because she consented to the conception of each child. The "same rule" set forth in § 4B for automatic legal parentage of children born to a consenting marital couple through ART must extend to

include nonmarital children. See Smith v. McDonald, 458 Mass. 540, 546 (2010). Any other reading would yield an absurd result and would render the statute unconstitutional as applied to Partanen and her children. (pp. 38-44).

Finally, and in the alternative, if Partanen does not fit within the statutory framework of either c. 209C or § 4B, then the Probate and Family Court must use its equity powers to protect these children by extending full legal parentage to Partanen. It may do so by applying the policies of those statutes to provide full parentage to Partanen and the maximum protection to the children. Alternatively, it may extend parentage through the standards set forth in C.C. v. A.B., 406 Mass. 679 (1990) and E.N.O. v. L.M.M., 429 Mass. 824 (1999). (pp. 49-50).

ARGUMENT

I. There Is a Legal Presumption That Partanen Is the Mother of the Children and She Is Entitled to Establish Her Parentage Under G.L. c. 209C.

A. Standard of Review

The Probate and Family Court erred by dismissing Partanen's Parentage Complaint for failure to state a claim upon which relief can be granted. See R. 63; Mass. R. Dom. Rel. P. 12(b)(6). In reviewing dismissal under Rule 12(b)(6), an appellate court "accepts as true the facts alleged in the plaintiffs'

complaint as well as any favorable inferences that reasonably can be drawn from them." Polay v. McMahon, 468 Mass. 379, 382 (2014) (citations and quotations omitted).[3] Whether Partanen is able to establish standing and legal parentage are questions of law involving statutory construction and entitled to *de novo* review. See Massachusetts Insurers Insolvency Fund v. Smith, 458 Mass. 561, 564-565 (2010).

B. Partanen has Standing under G.L. c. 209C.

The trial court erred in concluding that Partanen did not "meet the statutory requirements for presumed/legal parentage" under G.L. c. 209C, §§ 1, 5, 6(a)(4), and 21 as a nongenetic parent.[4] R. 63-65. There is no such requirement in the statute's text, and imposing one strips Jo and Ja of a parent and contravenes the statute's purpose to provide equal

[3]The Rules of Domestic Relations Procedure limit dismissal before development of a factual record. For example, Rule 56 precludes summary judgment in the context of custody and parenting time. The Rules preclude motions for judgment on the pleadings. See Rule 12(c). The Domestic Relations rules also limit when a party can seek dismissal for failure to state a claim. Compare Rule 12(h)(2) of Rules of Domestic Relations and Rules of Civil Procedure.

[4]The trial court also concluded that Partanen was not due relief under G.L. c. 209C, § 5(c), because she did not live with and actually furnish the children with support at the time of filing. The statute, however, does not limit relief in this way. Partanen disputes that conclusion but focuses her arguments on legal parentage claims.

protection for nonmarital children and provide an easy mechanism to establish parentage,[5] child support and related relief. G.L. c. 209C, § 1. This Court has a tradition of construing Chapter 209C and the trial court's equitable powers to "effectuate the Legislature's overriding purpose to promote the welfare of children, notwithstanding restrictive common law rules to the contrary." Woodward v. Comm'r of Social Sec., 435 Mass. 536, 547 (2002).[6]

[5]Partanen will refer to "parentage" since the statute encompasses both paternity, and, pursuant to § 21, claims for a mother-child relationship.

[6]The trial court also erred in dismissing on the grounds that Partanen sought the same relief in the De Facto Complaint. The de facto complaint sought access to de facto parentage, not legal parentage. Legal parentage confers numerous rights on the child, including financial support from Partanen or her estate, intestate succession, and a presumption of dependency for Social Security and other government benefits. Woodward, 435 Mass. at 539 n.4, 545-546. See G.L. c. 46, §§ 1, 13 (regarding the recording and amendment of parentage on birth certificates). If Gallagher died, there would be no lapse in the children's care or state involvement G.L. c. 210, § 10; Adoption of Mariano, 77 Mass. App. Ct. 656, 661 (2010). Legal parentage also assures that the children's filial need for closeness, guidance and nurture from Partanen on a permanent basis, id. at 662, and an astonishing array of protections. Denying legal parentage also stigmatizes this class of children and their family. By contrast, the clarity and familiarity of legal parentage orders assists public and private parties who interact with the child in understanding the familial relationship. See III, infra.

1. The Statute's Plain Language Encompasses Partanen's Claim.

Partanen meets the standing requirement of Chapter 209C and must be able to assert her statutory rights to legal parentage. The relevant provision states that a man who alleges he has, "jointly with the mother, received the child into their home and openly held the child as their child," is a presumed father. G.L. c. 209C, § 6(a)(4). Presumed parents plainly have standing under Chapter 209C. G.L. c. 209C, §§ 5, 6. This nonmarital presumption, parallel to the presumption for a marital father, rests on the individual's and couples' actions *vis-a-vis* the children.

The holding out presumption must be applied to women because G. L. c. 209C, § 21, states that the provisions of Chapter 209C applicable to establishing paternity "shall apply" to actions establishing a mother and child relationship. See Woodward, 435 Mass. at 549 n.17 (acknowledging that § 21 requires application of paternity statute to maternity insofar as possible). A woman can receive a child into a joint home with another woman and openly hold the child out as their own. See also G.L. c. 4, § 6 (Fourth) (gendered terms may apply to other or no gender). Partanen has adequately alleged herself as a holding out parent under § 6(a)(4).

Her allegation is consistent with other plain language of Chapter 209C. An extensive array of people and institutions may commence a parentage action without reference to genetics. G.L. c. 209C, § 5(a) (including, *inter alia*, a mother, a person "presumed to be or alleging himself to be" the father (thus encompassing the parentage presumptions in § 6), a child, a child's guardian, and the relevant state agencies caring or providing for a child).[7]

Only three circumstances bar establishment of parentage under Chapter 209C, none of which apply to Partanen. See, e.g., G.L. c. 209C, § 5 (nonmarital father cannot file for relief under Chapter 209C if child was born during a marriage); G.L. c. 209C, § 22 and G.L. c. 210, §§ 3, 6 (prohibiting relief to a person whose parental rights were terminated or whose child was adopted).

Notably, Chapter 209C does not define mother, father or "parent," leaving that determination to two persons to decide amicably through execution of a Voluntary Acknowledgement of Parentage ("VAP"), id. at § 2, or to the courts to interpret through the

[7]Equally broad mandatory joinder provisions compel inclusion of a presumed parent who did not initiate litigation, as well as many other categories of persons. See G.L. c. 209C, §§ 5, 6 (including children over age fourteen and state agencies providing assistance).

adjudication process. See G.L. c. 209C, § 8 ("On complaint to establish paternity, the court shall make a judgment establishing or not establishing paternity ..."). Parentage can be presumed through marriage or attempted marriage, (§ 6), the nonmarital "holding out" presumption (§ 6 (a)(4)), or genetics (§ 17). See G.L. c. 209C, § 5. Many of these emphasize the importance of the family the child is "born to" and her parent-child relationships. See C.C., 406 Mass. at 686, 690-691.[8]

If the Legislature intended Chapter 209C only to apply to genetic children, it could have so stated. A court cannot add words to a statute that the Legislature had the option to but chose not to include. Adoption of a Minor, 471 Mass. 373, 375-376 (2015). See also Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78-79 (1998)("it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed")

[8]Genetic marker testing is not automatically ordered nor may it be ordered sua sponte, and instead may be ordered only at the court's discretion when acting on a motion. See G. L. c. 209C, § 17 (providing that testing shall be ordered "on motion of a party and upon a proper showing except as provided in this section"). Genetic testing is not always allowed or appropriate. See, e.g., Paternity of Cheryl, 434 Mass. 23, 28, 33 (2001); Dep't of Revenue v. Coull, 67 Mass. App. Ct. 1102 (2006). Such testing is not proper under these circumstances. See I, C, infra.

(statute allows men, not only women, to make sexual harassment claims).

As this Court recently noted, "[t]he reality today is that families take many different forms" and "a genetic connection between parent and child can no longer be the exclusive basis for imposing the rights and duties of parenthood." Adoption of a Minor, 471 Mass. at 379 n.8.

2. Any Statutory Construction Issues Must Be Resolved in Light of Rules of Construction and Chapter 209C's Child-Protective Purposes.

Although this history is familiar to the Court, it bears acknowledging that Chapter 209C's enactment in 1986 was "a complete revision to the law" relating to nonmarital children that sought to "unburden children from the stigma and disadvantages . . . attendant to illegitimacy." C.C., 406 at 684 n.3, 685 (citation omitted). It "repudiate[d] the common-law power of the State to provide varying levels of protection to children based on the circumstances of their birth." Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 334 (2003).

Accordingly, Chapter 209C boldly declared that "[c]hildren born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children." G.L. c. 209C, § 1 (1st sent.). To that end, its "purpose" was

"to establish a means for [nonmarital] children . . . to have an acknowledgement or adjudication of their paternity,. . . an order for support and . . . a declaration of "their custody and visitation rights." Id. (2d sent.). By securing a child to both parents, it seeks to provide the "stability and continuity of support, both emotional and financial, [that] are essential to a child's welfare." Paternity of Cheryl, 434 Mass. 23, 31 (2001).

Chapter 209C shifted focus to the well-being of children, finding the discrimination imposed on the children borne of disapproval of the parents' conduct was "not justified." C.C., 406 Mass. at 685. Whatever the views of the parents' actions or inactions, children brought into a family via assisted reproduction should have the same legal protections and support afforded other children.

This equality Partanen seeks for her children is required by our law. Summarizing a removal statute crafted to apply only to marital children, this Court stated: "the legal equality of nonmarital children pursuant to G.L. c. 209C, § 1, dictates the same rule apply for children in comparable circumstances." Smith, 458 Mass. at 546. Our courts have applied

Chapter 209C to ensure such equal treatment in numerous circumstances.[9]

In accord with that law, any ambiguous provisions of Chapter 209C, or those whose literal application would lead to an absurd result, must be construed in concert with the Legislature's intent and purposes. Adoption of a Minor, 471 Mass. at 375 (stating principle as to absurd results); City of Worcester v. Coll. Hill Prop., LLC, 465 Mass. 134, 145 (2013)(same); Walden Behavioral Care v. K.I., 471 Mass. 150, 153 (2014)(stating rule as to ambiguities).

Despite the glaring absence of a genetic connectedness requirement for holding out, Gallagher may argue that Section 1 imports such a requirement. The third sentence of that section states in part that a "'child born out of wedlock' shall refer to any child born to a man and woman who are not married to each other." G.L. c. 209C, § 1 (3d sent.).

By referring to a man and woman, this definition is simply phrased in the most common form that these families take. In addition, our statutes permit such

[9]See, e.g., L.M. v. R.L.R., 451 Mass. 682, 685-687 (2008)(support established after death); Woodward, 435 Mass. at 547, 552 (support possible for children posthumously conceived); L.W.K. v. E.R.C., 432 Mass. 438, 443–448 (2000)(continuation of support after death); Doe v. Roe, 23 Mass. App. Ct. 590, 594-595 (1987)(support for children between eighteen and twenty-one).

gendered references to be construed as applying to the other gender or as gender neutral so that a child born to an unmarried woman and woman are comparably protected.[10] See G.L. c.4, § 6 (Fourth)("words of one gender may be construed to include the other gender" unless "inconsistent with the manifest intent" of the legislature or "repugnant to the context of the same statute"). Hunter v. Rose, 463 Mass. 488, 491 (2012), has already read G.L. c. 46, § 4B in a gender-neutral manner. Applying the holding out presumption to a same-sex couple is consistent with the statute, not repugnant to it, given Chapter 209C's salutary purpose of determining parentage and securing "the same rights and protections of the law" for all nonmarital children. G.L. c. 209C, § 1 (1st sent.); L.M., 451 Mass. at 685-686.

Nor can the language "born to" refer exclusively to a genetic connection. A child can be born to a married couple but not genetically linked to both, G.L. c. 46, § 4B, and a man can "acknowledge paternity for a variety of reasons" apart from "biology." Paternity of Cheryl, 434 Mass. at 32.

Moreover, this language cannot bear the weight of the extreme result of reading out of the chapter

[10]Trial courts already use Chapter 209C to resolve custody and support issues for nonmarital same-sex couples where two legal parents have been established.

nonmarital children whose parents intentionally planned to bring them into their family, consented to ART, and thereafter parented their children together. Foreclosing one of the parents an opportunity to seek parentage because she could not biologically contribute to the child's genetic makeup disadvantages children because of their birth circumstances and unduly elevates genetics in an era where intentionality is increasingly recognized as relevant to parenting. Compare Woodward, 435 Mass. at 537-538 (looking to, *inter alia*, deceased man's intent to procreate after death and to support child as a parent); Adoption of a Minor, 471 Mass. at 376 (consent to ART establishes parentage; sperm donor is not a legal parent).

Under the plain language of G.L. c. 209C, §§ 5 and 6, there is no genetic prerequisite, and Partanen fits squarely within its terms.

3. Case Law Recognizes Parents Apart From Genetics.

Under Chapter 209C and elsewhere in our case law, a genetic tie, or lack thereof, may not determine parentage where weightier policies about child welfare or family integrity apply or where the state has interests in finality of judgments or res judicata.

The presumptions stated in Chapter 209C, § 6, reflect the state's interest in the integrity of the

family and welfare of the child. See In re Guardianship of Madelyn B., 98 A.3d 494, 500 (N.H. 2014)("Madelyn B."). A marital father is presumed to be a parent because of the marriage, not necessarily for a genetic connection to his children. See G.L. c. 209C, § 6 (a)(1); C.C., 406 Mass. at 685-686, 691 ("inestimable value" of family life justifies rule requiring putative father to have substantial relationship with marital child to seek standing on paternity claim). Our law supports legal parentage in the presumed marital spouse when he or she accepts the responsibilities of parenthood, regardless of genetic connection. See, e.g., Hunter, 463 Mass. at 493; In re Walter, 408 Mass. 584, 588 (1990).

The parallel nonmarital presumption for holding out acknowledges parentage based on the conduct of receiving a child into their home and jointly holding that child out as their own. G.L. c. 209C, § 6(a)(4). "The familial relationship. . . is considerably more palpable [to the child] than the biological relationship. . . and should not be lightly dissolved." Madelyn B., 98 A.3d at 500. See also Victoria Degtyareva, Note, Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent, 120 Yale L.J. 862, 887-888 (2011) (presumptions encompass those without genetic connections to children "on the assumption

that the relationships described will lead to a bona fide parent-child relationship").

Accordingly, "presumed" parent and genetic parent are not synonymous. As applied to ART, a sperm donor, known or unknown, is a genetic progenitor but not a legal father, whether those who planned for the child's conception and raised the child are married or unmarried. Adoption of a Minor, 471 Mass. at 377; Adoption of Tammy, 416 Mass. 205, 206, 215 (1993).

The landmark case, Paternity of Cheryl, 434 Mass. at 24, 32, firmly rejected genetics as a necessary corollary of parentage under Chapter 209C where a child had a substantial parent-child relationship and that parent had provided consistent emotional and financial support. In that case, the father sought relief from a paternity judgment five years after signing a VAP on the grounds that genetic testing indicated he was not the child's genetic father. Id. at 24. The father had conducted himself as Cheryl's father, supported her and developed a substantial parent-child relationship. Id. at 24-27. Years later, when he moved for relief from the paternity judgment under Rule 60(b)(5), this Court denied the untimely challenge, noting the "compelling public interest in the finality of paternity judgments" and the "needs of children that must be protected." Id. at 30-31. More important than the "genetic link

between parent and child" is the need for stability and continuity of emotional and financial support that is "essential to a child's welfare." Id. at 31-32. Accordingly, he remained the child's legal parent. Id. at 33-34.

In formulating this rule, Paternity of Cheryl relied on developing legal trends looking to the conduct of the parties. In A.R. v. C.R., 411 Mass. 570, 575 (1992), a husband's action seeking a declaration of nonpaternity of the two children born to his wife, the Court observed that when a husband acts as a father to a child born to his wife "and holds himself out as the father to the child," then he may be obliged to continue supporting the child despite the absence of a genetic tie. While that individual was not equitably estopped from denying parentage based on the facts and timeliness of his challenge, others have been. See, e.g., Anderson v. Anderson, 407 Mass. 251, 255-256 (1990) (challenge to child support order eleven years after divorce; determination of paternity a predicate to support order); J.C. v. E. M., 36 Mass. App. Ct. 446, 447-448 (1994)(barring former spouses from challenging the husband's paternity but allowing child's paternity action to proceed). Here, there is no doubt that the children have relied on Partanen as a parent for their entire lives of eight and nearly four years.

The seminal holding of Paternity of Cheryl has withstood over a decade of challenges. Research has discovered no Massachusetts appellate case since 2001 that has permitted disestablishment of parentage because of a lack of genetic tie between parent and child.[11] As Paternity of Cheryl and its progeny instruct, Chapter 209C's protections stretch broader than genetic lines.

4. The Cases Relied On By the Trial Court Do Not Bar Partanen's Claims.

The cases cited by the Trial Court do not defeat Partanen's claim as evidenced by the text and the treatment of genetic ties under Chapter 209C. R.D. v. A.H., 454 Mass. 706 (2009), was a guardianship matter, not a parentage action. As a third party, R.D. did not seek to establish maternity under G.L. c. 209C, and this Court did not address the expansive standing and joinder provisions of § 5 and § 6. See id. at 714 n.12. Unlike this case where there is extensive

[11]See, e.g., L.T. v. J.T., 85 Mass. App. Ct. 1119 (2014); Dep't of Revenue v. Mueller, 79 Mass. App. Ct. 1120 (2011); Dep't of Revenue v. Coull, 67 Mass. App. Ct. 1102 (2006); Lord v. Mutz, 67 Mass. App. Ct. 1111 (2006); Adoption of Grover, 54 Mass. App. Ct. 1110 (2002)(mother precluded from relief from paternity judgment); J.M. v. S.M., 52 Mass. App. Ct. 1102 (2001).

In D.H. v. R.R, 461 Mass. 756 (2012), this Court upheld a trial court vacating a VAP, where the VAP was ineffective from its outset as the child was born into a marriage and the husband did not sign an affidavit of nonpaternity prior to its execution.

evidence of planning and consent to conceive a child via ART, R.D. was not involved in the decision to bring the child into the world. The child was born to two genetic parents. See id. at 707. Instead, R.D. petitioned for guardianship pursuant to G.L. c. 201, § 5, arguing that one of those parents, the father, was unfit and that it was in the child's best interests to be in her care. Id. R.D. alternatively argued that she should be awarded custody under G.L. c. 209C, § 10(a). Id. This Court weighted the rights of a genetic legal parent over a nonlegal, nongenetic parent figure in a guardianship determination, as required absent unfitness of that parent. See G.L. c. 201, § 5. This Court's analysis of G.L. c. 209C, § 10(a) should be limited to that third-party context and those facts.

Nor does C.M. v. P.R., 420 Mass. 220 (1995), bar Partanen's claim. In that case, a man filed a Complaint to Establish Paternity, and the mother argued that he could not establish paternity due to a lack of a genetic tie. Id. at 221. The Court agreed, noting that "[b]y definition, a person who is not the biological father of a child cannot establish his paternity." Id. at 223. To the extent this case survives Paternity of Cheryl, 434 Mass. at 23, it is inapposite. C.M. did not plan with the mother to bring the child into a family, and he resided with the

mother only after she became pregnant. Thus, the child was not "born to" or deliberately brought into a family of the parties' creation, and there was a competing genetic parent who could be established as a parent in his stead. Where Partanen seeks to establish legal parentage and share custody with Gallagher, with whom she jointly created a family and raised that family to the exclusion of any competing parentage claims, neither R.D. nor C.M. can foreclose her legal parentage under Chapter 209C.

5. Including These Children and Partanen's Claims Within Chapter 209C Is Consistent With the UPA and With Our Sister States Who Have Interpreted Similar Statutes to Establish Legal Parentage in Nonmarital, Nongenetic Mothers and to Preclude Rebuttal Based on Genetics.

The first version of the Uniform Parentage Act ("1973 UPA") promulgated by the Uniform Law Commissioners included a holding out presumption and proclaimed a gender neutral approach to parentage. Unif. Parentage Act §§ 4(a)(4), 21 (1973). The Massachusetts Legislature incorporated, among other things, the 1973 UPA's holding out and gender neutrality provisions. G.L. c. 209C, §§ 1, 6(a)(4), 21. Sister states with similar UPA provisions interpret those statutes to protect parent-child

relationships similar to those at issue in this case and to resist rebuttal based on genetics.

In California,[12] Colorado, Kansas, New Hampshire and New Mexico, appellate courts have concluded that a nonmarital, nonbiological mother can state a claim as a presumed parent under UPA holding out provisions because they must be read as gender neutral and apply to women. See Elisa B. v. Superior Court, 117 P.3d 660, 666-667 (Cal. 2005); Frazier v. Goudschaal, 295 P.3d 542, 553 (Kan. 2013); Madelyn B., 98 A.3d at 501; Chatterjee v. King, 280 P.3d 283, 285-286 (N.M. 2012); In re Parental Responsibilities of A.R.L., 318 P.3d 581, 582, 584 (Col. App. 2013).

Likewise, these states conclude that a lack of genetic connection between mother and child is not a bar to the application of the holding out presumption, Frazier, 295 P.3d at 553; Madelyn B., 98 A.3d at 501; A.R.L., 318 P.3d at 584, and/or cannot rebut the presumption of parentage. Chatterjee, 280 P.3d at 293; A.R.L., 318 P.3d at 582, 585-586. These courts concluded that nonbiological and nonmarital mothers

[12]In Hunter, this Court referenced Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005), with approval, concluding that the nonbiological mother was also a parent under California law because she "receive[d] a child into [her] home and openly [held] out the child as [her] natural child." 463 Mass. at 493-494. In so doing, this Court applied a holding out provision to a nonbiological parent with a gender-neutral construction. See id.

must be able to state a claim for legal parentage under state UPAs, relying on, *inter alia*, public policies of promoting two-parent families, protecting children, and safeguarding the integrity of families. Frazier, 295 P.3d at 553; Madelyn B., 98 A.3d at 500-501; Chatterjee, 280 P.3d at 287-289, A.R.L., 318 P.3d at 586, 587. Chapter 209C and the cases applying it share these concerns, and Massachusetts should similarly interpret our UPA provisions to protect Jo and Ja.[13]

C. Partanen Is a Presumed Parent By Virtue of the Parties' Conduct and Her Status Should Not Be Rebutted by Genetics.

Because Partanen and Gallagher received Jo and Ja into their home and held them out as their own children, Partanen is a presumed parent under G.L. c. 209C, § 6(a)(4).[14]

[13]Other states have also recognized that paternity statutes apply equally to women. See Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); In re Roberto D.B., 923 A.2d 115 (Md. 2007).

[14]Most of the alleged facts were found by the Trial Court in the de facto matter, obviating the need for remand if the Court concludes that Partanen can proceed under G.L. c. 209C. Add. 7-27, at ¶ 4 (stipulation that Partanen is de facto parent); ¶ 7 ("purchased a home together"); ¶ 8 (never married); ¶¶ 9-13, 20-21 (joint planning, participation and consent to assisted reproduction procedures to conceive both children); ¶ 16 (joint medical decisions and held out as parent to doctors); ¶ 18 (present at birth); ¶ 22 (present at birth and "when each child was born, Karen was presented as the other parent and was treated as such" by Gallagher, family and hospital staff), ¶ 23

As her Parentage Complaint alleges, Partanen and Gallagher were in a committed relationship for over twelve years and lived together in a joint home. R. 3. Partanen and Gallagher "jointly decided to start a family, with the shared intention that they would both be parents to the resulting children." R. 3-4. With Partanen's full engagement and consent, Gallagher twice became pregnant using ART and donor sperm. R. 4. Partanen "received both [Jo] and [Ja] into her arms and home lovingly when each child was born" and parented them in every way. R. 4-6. Partanen and Gallagher held Jo and Ja out as their own children to countless people, institutions and communities and, most importantly, to Jo and Ja. R. 4-7. Partanen is a holding out parent.

Partanen's status as a holding out parent cannot be rebutted given the circumstances of this case. Here, Gallagher can make no "proper showing" for genetic testing pursuant to G.L. c. 209C, § 17, and it is unreasonable to rebut Partanen's parentage based on genetics. First, it would be inequitable to require testing where, from the outset of planning their family, both parties knew that only one parent would have a genetic tie. Partanen and Gallagher selected a sperm donor together and spent years planning and

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(children considered Partanen to be "Mommy"); ¶¶ 30-31 (resided together in Massachusetts).

attempting to build a family. R. 3-4. They both consented to the children's conception. Id. But for Partanen's consent to the ART and her involvement in planning for the children, there would be no children. See Okoli v. Okoli, 81 Mass. App. 371, 375-376 (2012) (equating volitional act of consenting to ART to volitional act of sexual intercourse to reason that consent to conceiving a child via ART establishes legal parentage). Rebuttal would also undermine the security of children born via ART, which is untenable given the Legislature's affirmative support of ART. Woodward, 435 Mass. at 547.

Second, rebuttal is also improper where there is no competing claim of parentage. Under Massachusetts and Florida law, a sperm donor has no legal parental rights to children born through ART. See G.L. c. 46, § 4B; Fla. Stat. § 742.14; Adoption of Tammy, 416 Mass. at 207. Jo and Ja have no legal father, no presumed father, and no putative father. If Partanen's parentage is rebutted, then Jo and Ja are stripped of a parent who has nurtured and supported them and are instead left with only one of the parents who brought them into the world. Stripping the children away from one of their parents would be harmful to them and also contrary to the Commonwealth's interests. See Hunter, 463 Mass. at 493 ("a child's welfare is promoted by ensuring that she

has two parents to provide, *inter alia*, financial and emotional support"). Although Gallagher may not need child support from the Commonwealth, a second parent ensures that children are supported from their parents rather than the public fisc.[15]

Finally, rebuttal is improper where it would disrupt and possibly sever an existing parent-child bond. Partanen has parented the children in every way since birth and provided consistent financial support. R. 4-6. It is in the children's interests to maintain their identity, their familial relationships, and the emotional and financial support they receive from Partanen. It is the children that have the most at stake in the proceeding, and undoing parentage is "potentially devastating" to them. See Paternity of Cheryl, 434 Mass. at 32.

As this Court has observed before, "[s]ocial science data and literature overwhelmingly establish that children benefit psychologically, socially, educationally and in other ways from stable and predictable parent relationships." Id. at 31 n.15.

[15]Due to the child's interest in parentage determinations and custody issues, courts may also appoint a guardian ad litem for the child since it is their lives which are so dramatically affected by the outcome of such proceedings. See, e.g., G.L. c. 201, §§ 34, 36; G.L. c. 215, § 56A, and for any child over fourteen. G.L. c. 209C, § 5(e); R.R.K. v. S.G.P., 400 Mass. 12 (1987) (authorizing appointments for attorney for a child).

See also Custody of Kali, 439 Mass. 834, 843 (2003) ("Stability is itself of enormous benefit to a child, and any unnecessary tampering with the status quo simply increases the risk of harm to the child."); Brief for Amer. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) at 19-22 (identifying (i) the qualities of parent-child relationships, (ii) the qualities of relationships among significant adults in children's or adolescent's lives, and (iii) available economic and other resources, as the factors most significant in allowing children and adolescents to function well in their daily lives). Jo's and Ja's best interests require protection of their parent-child relationship with Partanen.

D. Chapter 209C's Holding Out Provision Should Be Construed to Avoid Unconstitutional Results Or The Statute Is Unconstitutional As Applied in These Circumstances.

An interpretation of the holding out presumption, Chapter 209C, § 6 (a)(4), to exclude from Chapter 209C a class of nonmarital children deliberately brought into their families but without a genetic connection to one or both parents would create a constitutional infirmity. In addition to harming nonmarital children and their parents, construing the statute to prohibit women from holding out as parents, or to bar same-sex

couples from accessing the protections of Chapter 209C for their children, raises serious constitutional questions of sex and sexual orientation discrimination. It also unjustifiably burdens the liberty interest of the children and their nonmarital parents to maintain their parent-child relationships. The Court can and should avoid these constitutional questions, addressed in greater detail below, with reasonable constructions of the statute. School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79 (1982). However, if the Court cannot reasonably construe the statute to encompass Partanen's claim for parentage, then the statute is unconstitutional as applied to her.

E. Failure to Apply Chapter 209C's Holding Out Presumption to Partanen Would Violate State and Federal Constitutional Guarantees.

Failing to apply Chapter 209C to Partanen would create impermissible classifications based on being a nonmarital child, sex and sexual orientation and would burden Partanen's and her children's family relationship.

1. The Constitutional Violations[16]

First, deliberately denying a class of

[16]Equality and liberty guarantees compel application of Chapter 209C to these children. arts. 1 and art. 10 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments; Fourteenth Amendment to the United States Constitution.

nonmarital children protections under Chapter 209C would contravene the "paramount state policy" of "[p]rotecting the welfare of children." Goodridge, 440 Mass. at 333-334. The operative constitutional imperative is to "unburden[] children from the stigma and disadavantages" related to their status as nonmarital children, not perpetuate those burdens. Powers v. Wilkinson, 399 Mass. 650, 661 (1987).[17] See also Sec. of Comm. v. City Clerk of Lowell, 373 Mass. 178, 185-186 (1977) (recognizing Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating discrimination against nonmarital children)). As established by repeated rulings of the United States Supreme Court, statutes disadvantaging nonmarital children are unconstitutional. See, e.g., Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (statute denying worker's compensation benefits to nonmarital children violated equal protection; the children are "entitled to the rights granted to other dependent children"); Trimble, 430 U.S. at 763, 774 (statute allowing nonmarital children to inherit only through their mother rather than both parents violated equal protection); Jimenez v. Weinberger, 417 U.S. 628, 629

[17]Partanen preserved both equal protection and due process claims at the Trial Court in her complaint and in opposing Gallagher's motion to dismiss. R. 8, 33, 40-41 (preserving her equal protection and due process claims); R. 36-37 (preserving her equal protection claims).

(1974) (provision of Social Security Act unconstitutional when it barred benefits to class of children); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (same under state wrongful death law).

Second, it patently discriminates based on sex to hold that a woman cannot be a holding out parent while a man can. Equal protection guarantees that a woman similarly situated to a man for holding out should not be categorically barred from making her claim. Relatedly, nonmarital same-sex couples using ART to form families, and their children, are disadvantaged relative to different-sex couples who use ART to establish a family, creating classifications based on sex and sexual orientation. For different-sex couples using ART, the non-birth parent can sign a VAP, G.L. c. 209C, § 2, or establish a presumption of parentage by "holding out," which parentage the courts are rightfully loath to disrupt if either parent later seeks to undo the status quo given the child's "family situation and . . . future," are at stake. Paternity of Cheryl, 434 Mass. at 32.

Partanen is identically situated to such a parent, but is treated less favorably both on the grounds of her gender and her sexual orientation. See, e.g., Goodridge, 440 Mass. at 345-346 (Greaney, J., concurring). Individuals like Partanen who are

drawn to a person of the same sex for an intimate relationship, and as here, also seek to raise and nurture the next generation, are denied protections for themselves and their children otherwise available to similarly situated, nonmarital, heterosexual couples.

Finally, Partanen's exclusion from Chapter 209C would violate the liberty interest of children and unmarried parents to maintain their family relationship. See, e.g., Goodridge, 440 Mass. at 329; Lawrence v. Texas, 539 U.S. 558, 574 (2003)(confirming that "persons in a homosexual relationship may [also] seek autonomy" for "personal decisions relating to . . . procreation, . . . family relationships, child rearing, and education"). These protections do not simply "spring" from a "biological connection," but from the "enduring relationships" and bonds that arise from loving and supporting children and sharing daily life. Lehr v. Robertson, 463 U.S. 248, 257 (1983); Stanley v. Ill., 405 U.S. at 650-652 (1972); C.C., 406 Mass. at 686. Laws disrespecting family relationships of same-sex couples can also "humiliate[]" children "mak[ing] it even more difficult. . . to understand the integrity and closeness of their own family and

its concord with other families in their community." U.S. v. Windsor, 133 S. Ct. 2675, 2694-2695 (2013).[18]

2. Heightened Scrutiny Applies to the Violations.

For each of these constitutional violations, heightened scrutiny must be applied to assess whether the exclusion or burden is permissible. See, e.g., Clark v. Jeter, 486 U.S. 456, 461 (1988) (looking to whether classification is substantially related to an important government interest; nonmarital children); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n., 378 Mass. 342, 349, 354 (1979) (strict scrutiny; sex discrimination); Aime v. Commonwealth, 414 Mass. 667, 673 (1993)(strict scrutiny; due process). Sexual orientation classifications also merit heightened scrutiny.[19]

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[18] Gallagher cannot complain of Partanen burdening her constitutional rights as a parent where both created the situation to effectuate their parent-child relationships as a family with Jo and Ja, and the children's interest, including avoiding harm, are paramount. Blixt v. Blixt, 437 Mass. 649, 656 (2002) (case involving third party); E.N.O., 429 Mass. at 833 (de facto parent).

[19] Several State Supreme Courts have found sexual orientation to be a quasi-suspect classification under their state constitutions. Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009); In re Marriage Cases, 183 P.3d 384, 444 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008). Similarly, federal courts, looking to the Supreme Court's decisions in Romer v. Evans, 517 U.S. 620 (1996), Lawrence, 539 U.S. at 558; Windsor, 133 S.Ct. at 2675,

3. There Is No Permissible Justification for the Constitutional Violations Here.

The State's express purpose in Chapter 209C is to provide parentage, parental contact and support for nonmarital children.[20] G.L. c. 209C, § 1. Excluding Partanen from those protections *vis-à-vis* her children directly contradicts that stated interest and cannot justify any of the distinctions in how the statute is applied to Partanen.

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have applied heightened scrutiny to sexual orientation claims. See Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014), reh. en banc denied, 2015 WL 128117 (9th Cir. Jan. 9, 2015); SmithKline Beecham Corp. v. Abbott Lab., 740 F.3d 471, 481-482 (9th Cir. 2014), and Baskin v. Bogan, 766 F.3d 648, 671 (7th Cir.), cert. denied, 135 S.Ct. 316 (2014). See also Windsor v. United States, 699 F.3d 169, 182 (2d Cir. 2012), aff'd on other grounds, 133 S. Ct. 2675, cert. denied, 133 S. Ct. 2885 and 133 S. Ct. 2884 (2013) (applying four factors Supreme Court has looked to in assessing quasi and suspect class status); Massachusetts v. U.S. Dep't of Health & Human Serv., 682 F.3d 1, 11 (1st Cir. 2012) (pointing to Romer as reflecting "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review"). Notably, in Obergefell v. Hodges, 135 S.Ct. 2584 (2015), the Supreme Court referred to the suspect class factors as material in its analysis. See id. at 2596 (history of discrimination); id. at 2599-2601, 2604 (ability to perform in society); id. at 2594 ("immutable"); id. at 2596-97, 2600 (relative inability to prevent political harm).

[20]Where heightened scrutiny applies, only the Commonwealth's actual purpose may be offered to defend the exclusions. Finch v. Commonwealth Health Ins. Co. Connector Auth., 461 Mass. 232, 236 (2012). Partanen examines additional interests to assist the Court.

If, *arguendo*, the Commonwealth proffered administrative ease as a rationale, in that the blanket exclusion of same-sex couples as a proxy for excluding claims by or against a nongenetic parent, this rationale is directly at odds with the ability of other nongenetic parents to access the statute's protections.

In any event, it is not a sufficient justification where "the Constitution recognizes higher values than speed and efficiency." Stanley, 405 U.S. at 656, 657 (efficiency risks running over important interests of both parent and child). See also Craig v. Boren, 429 U.S. 190, 198 (1976) (administrative ease and convenience not sufficiently important objective for a gender-based regulation); Reed v. Reed, 404 U.S. 71, 76 (1971) (invalidating Idaho law preferencing males to administer estates; "the objective of reducing the workload on probate courts by eliminating one class of contests" was arbitrary and violated equal protection).

A government purpose to encourage couples to jointly adopt cannot withstand scrutiny because the court looks to the statute challenged. See, e.g., Stanley, 405 U.S. at 647 (court concerned with validity of statutory presumption, even if there are alternate ways of gaining contact with his children); Trimble, 430 U.S. at 774 (although father could have

prepared a will for the benefit of his children, court looks to the constitutionality of inheritance laws).

Moreover, whether Partanen could have established parentage through adoption does not alter her ability to do so under Chapter 209C, which exists as a default to protect the rights of all nonmarital children, many of whose parents could have entered into a joint adoption as of 1993. Adoption of Tammy, 416 Mass. at 210-212, 214-215. Similarly, in Hunter, 463 Mass. at 493, a nonbiological mother could have adopted her older child to secure her legal parentage, but adoption was immaterial because she had legal parentage under G.L. c. 46, § 4B. See also In re Marriage of Buzzanca, 61 Cal. App. 4th 1410, 1423 (1998)(even where legislature had not "address[ed] some permutation of artificial reproduction," this does not "set the default switch on adoption"). Adoption can also be an imperfect avenue for establishing parentage. [21] See Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 290-291 (2001).

Fundamentally, such an argument also ignores that

[21]Adoption can be a slow and intimidating process, involving criminal record checks and home studies, not to mention the need for an evidentiary dossier of support from those who know the child and family for the judge's consideration on best interests. Not all same–sex couples seek to or complete adoption because of the burdensome process, lack of information, and constraints of time and money.

the children, who have everything to gain or lose here, cannot initiate an adoption. Powers v. Wilkinson, 399 Mass. 650, 661 (1987). See also Weber, 406 U.S. at 175-176 (disadvantaging children in order to induce their parents to marry is "ineffectual," "unjust," and therefore unconstitutional). In any event, the choice to marry or not is a protected part of individual autonomy. Lawrence, 539 U.S. at 567 (choice of relationships belongs to individual); Goodridge, 440 Mass. at 329 ("Whether and whom to marry, . . . and whether and how to establish a family, . . . are among the most basic of every individual's liberty and due process rights").

Recognizing Partanen's legal parentage promotes these children's best interests in critical and concrete ways. Through legal parentage, the children have access to numerous rights including financial support from Partanen or her estate. See I, B, 1 at n.3, supra. For all of these reasons, there is no permissible basis for refusing to apply Chapter 209C to Partanen and her children.

II. Partanen Is a Parent Under G.L. c. 46, § 4B Because She Consented to Gallagher's Assisted Reproduction, and § 4B Must Extend to Protect Jo and Ja.

It is undisputed that Partanen consented to the conception of her children through assisted

reproduction using donor sperm.[22] R. 4. As such, she sought legal parentage under the protections of G.L. c. 46, § 4B.[23] R. 3-10. The trial court dismissed her § 4B claim because she and Gallagher "were never married or entered into an equivalent legal union."

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[22]Massachusetts leads the nation in the percentage of births involving ART. For example, in 2013, 4.8% of births in the Commonwealth involved ART. Saswati, Kissin, Crawford, Folger, Jamieson, Barfield, CDC Morbidity and Mortality Weekly Report: Assisted Reproductive Technology Surveillance – United States, 2013 (Dec. 2015), at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6411a1.htm. The same CDC survey data reported that ART use in Massachusetts exceeds twice the national average and was the state with the fourth highest number of ART procedures performed (9,416), behind California (20,299), Illinois (10,408), and New York (19,366). Id.

Massachusetts law has affirmatively supported ART, first through enactment of G.L. c. 46, § 4B in 1981 and later through statutes requiring insurance coverage for infertility diagnosis and treatment. See G.L. c. 175, § 47H; c. 176A, § 8K; c. 176B, § 4J; c. 176G, § 4. Massachusetts made establishing parentage via ART simpler than under the 1973 UPA by not requiring a writing or and physician certification. Compare G.L. c. 46, § 4B and Unif. Parentage Act § 5 (1973).

[23]No Massachusetts appellate case has addressed whether a nongenetic mother's consent to ART could be the basis for a statutory or equitable claim of parentage under § 4B. In T.F. v. B.L., 442 Mass. 522 (2004), a nonmarital, same-sex couple used ART to conceive a child but separated before the child's birth. The birth mother did not seek to establish legal or equitable parentage under § 4B. This Court answered the narrowly reported question holding that an oral agreement to co-parent the child was unenforceable. Id. at 523, 530. The Court also found no basis for imposing a support obligation on the former partner. Id. at 533.

R. 64. Through its seemingly literal reading of § 4B, the trial court left Jo and Ja with one parent where a similarly situated marital child would have two parents by operation of law. See G.L. c. 46, § 4B. Such a result is illogical and absurd and raises constitutional concerns. This Court should avoid this result by extending § 4B's protections to nonmarital children. Failing that, the statute is unconstitutional as applied to these children.

A. Partanen Meets the Simple Consent Standard of § 4B.

Partanen meets the consent requirements of § 4B. Section 4B states that "[a]ny child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."[24] It creates legal parentage by virtue of consent of a nongenetic parent, who can be a man or a woman. See Adoption of a Minor, 471 Mass. at 376-377. "Consent" means simple consent to create a child and encompasses any ART procedure. Id. at 376; Okoli, 81 Mass. App. Ct. at 377. Consent to conception is recognized under the statute regardless of whether consent occurs

[24]Section 5 of the 1973 UPA was the foundation for G.L. c. 46, § 4B. Enacted in 1981, that statute predates the revolutionary provisions of Chapter 209C in which the Legislature forcefully articulated a commitment to full equality for nonmarital children. See G.L. c. 209C, § 1.

during or outside a marriage. Della Corte v. Ramirez, 81 Mass. App. Ct. 906, 907 (2012). The record provides ample evidence of Partanen's consent to the conception of both children through ART, see R. 4, and the children should not lack § 4B's protections because of her marital status.

B. Section 4B Must Extend to Protect Nonmarital Children to Avoid an Absurd Result and Constitutional Infirmity.

Although § 4B obviously applies to married persons, construing it to apply solely to married persons to deny protections to nonmarital children leads to absurd and illogical results. See I, B, 2 supra."

Just as our Courts have construed "artificial insemination" to cover all ART procedures, Adoption of a Minor, 471 Mass. at 376, and expanded the class of persons who may rely on § 4B, Hunter, 463 Mass. at 492-493, this Court must extend § 4B's protections to nonmarital children. When marital children are protected by a statute, this Court requires those *same* protections apply to nonmarital children in comparable circumstances. Smith, 458 Mass. at 546; G.L. c. 209C, § 1.

Construing § 4B to apply to nonmarital children is not only compelled by equal protection imperatives, but also furthers myriad purposes in § 4B. For

instance, § 4B provides clarity and security for children by ensuring their status, and that of their parents, automatically at birth. Adoption of a Minor, 471 Mass. at 376-377; Culliton, 435 Mass. at 292 (delays in establishing parentage may interfere with child's medical treatment, legal rights if a parent dies, or result in undesirable support obligations).

More generally, the Commonwealth's statutory policies promote equal treatment for marital and nonmarital children, support children being raised by two parents whenever possible, promote parental responsibility for children, support procreation through ART for all, married or unmarried, and promotes equality for all children conceived via ART. See, e.g., G.L. c. 209C, § 1; Woodward, 435 Mass. at 545-546 (equal treatment for nonmarital children; promotes ART and equality for children born from ART); Hunter, 463 Mass. at 493 (child's welfare promoted by two parents); Adoption of Marlene, 443 Mass. 494 (2005) (parents responsible for support, not taxpayers). Every one of these purposes is furthered by extending § 4B's protections to nonmarital children.

Failing to extend § 4B, creates an absurd result, furthers no legitimate purpose and renders the statute unconstitutional as to nonmarital children and their parents and as to maintaining family relationships.

See I, E, supra. In addition to leaving Jo and Ja with only one parent where marital children would have two, this result privileges marital children conceived with ART with immediate and dual parenthood upon birth while denying the same to nonmarital children. There is no reason, much less an important one, for denying these protections to children born to nonmarital parents. See G.L. c. 209C, § 1. Allowing only married parents who conceive through ART to be recognized as parents serves no evidentiary function because evidence of consent is required regardless of marital status. This Court must construe G.L. c. 46, § 4B, to provide equivalent protections to nonmarital children based on the same consent standards.

Recognizing the courts' obligation to provide the same parentage protections to all children no matter how they were conceived, numerous other states have recognized that the parentage of children conceived through donor insemination can be established under common law, regardless of the marital status of the parents. See, e.g., In re Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003) (parentage statutes did not prevent a common law claim that a man who consented to the insemination of an unmarried woman was a father); In re Baby Doe, 353 S.E.2d 877, 878 (S.C. 1987) (husband who consented to his wife's insemination could be a father despite absence of a

statute addressing consent to insemination); Dunkin v. Boskey, 98 Cal. Rptr. 2d 44, 55 (Cal. App. 2000) (same); Laura WW. v. Peter WW., 856 N.Y.S.2d 258, 263 (N.Y. Sup. Ct. App. 2008) (husband who consented to his wife's insemination could be a father under common law where the requirements of the consent to insemination statute were not satisfied). These children have the same needs for legal, financial and psychological stability as others, and a contrary ruling would only harm the children involved, and harm the Commonwealth by preventing it from enforcing its strong interests in ensuring that all people who bring a child into the world are held responsible for that child's support and that parent-child bonds are protected.

III. PARTANEN CAN PURSUE A PARENTAGE ORDER BASED ON THE COURT'S EQUITABLE AUTHORITY UNDER G.L. C. 215 §§ 4, 6.

A. If Chapter 209C and § 4B Do Not Apply to Partanen, the Court Can Apply the Policies of Those Statutes to Protect Partanen and Her Children in Equity.

Even if this Court were to determine that Chapter 209C and § 4B do not apply to Partanen, it should adjudicate her to be a legal parent under its equitable powers.

This Court has repeatedly stated that G.L. c. 215, § 6, vests the Probate and Family Court with the

authority to protect children, including by adjudicating or facilitating adjudication of parentage where there are no formal statutory grounds to do so. See Hodas v. Morin, 442 Mass. 544, 547 (2004) (where statute set forth applicable policy but did not specifically address legal question before it, the Court had equitable authority to issue a parentage order protecting parental rights and responsibilities); Culliton, 435 Mass. at 291 (same); C.C., 406 Mass. at 682 (putative father may pursue complaint in equity of parentage determination despite no available statutory remedy); Normand v. Barkei, 385 Mass. 851, 852 (1982) (permitting putative father to seek paternity in absence of statute authorizing paternity claims); Gardner v. Rothman, 379 Mass. 79, 80-81 (1976) (same).

The two parentage statutes do not abrogate this Court's ability to consider parentage claims based in equity, but instead set forth the legal policies that should guide the Court as to the circumstances in which it exercises its equitable authority. This is particularly true in cases involving children born to unmarried parents because legal policy already assures those children equal legal rights with marital children, including a determination of their parentage and orders for custody, visitation and support. G.L. c. 209C, § 1. Further, one of the rights established

by the General Court has been to confirm the parentage of children born through assisted reproduction. G.L. c. 46, § 4B; Hunter, 463 Mass. at 492. If necessary because of a gap in the statutory protections, this Court should exercise its equitable jurisdiction to apply these established legal policies to recognize the parentage of children who are "born to" the unmarried parents who raise them or who have children through assisted reproduction. G.L. c. 215, §§ 4, 6.

B. Alternatively, Partanen Can Establish Legal Parentage Through the Factors Established by E.N.O. v. L.M.M.

This Court's decision in E.N.O., 429 Mass. 824 (1999), establishes that a person who satisfies the "de facto parent" standard in that case may bring a "parentage" claim in equity. While the specific issue in E.N.O. was a challenge to a temporary visitation order rather than full parentage, this Court explained that pursuant to its duty as *parens patriae,* the Probate and Family Court's equitable authority extends to protecting children's relationships "even if the Legislature has not determined what the best interests require in a particular situation." Id. at 828.

In confirming the relationship between de facto parents and their children, this Court rested part of its analysis on the factors set forth in C.C., 406 Mass. 679 (1990). The E.N.O. Court described the

issue in C.C. as whether a man "is entitled to bring an action to establish paternity" under G.L. c. 215, § 6, even though the mother of the child was, at the time of conception and birth, married to another man. E.N.O., 429 Mass. at 829-830. It then stated that "a judge may consider the factors" set forth in C.C. "[i]n assessing a child's relationship with his de facto parent." Id. at 829. In other words, the same factors relevant to proceeding in a parentage action apply under the de facto standard.

There are defining differences between persons like Partanen and others who might wish to seek parentage through equity but are more suited to the de facto framework. The E.N.O. Court distinguished her situation from that of the man claiming parental status in C.M., 420 Mass. at 220. Apart from the Court's comments about genetics, he was dispatched because his "devotion to the child. . . without more" did not permit an adjudication of paternity or visitation. E.N.O., 429 Mass. at 830. Even though he lived with the mother and child, the "more" was "he had not been part of the decision to create a family by bringing the child into the world." Id. Unlike in C.C., the man in C.M. could not bring a parentage action because he could not meet the threshold requirements to do so, not because the court lacked equitable authority to declare his parentage.

While this Court held that an oral agreement to co-parent a child is not enforceable in T.F. v. B.L., 442 Mass. 522 (2004), even though the two women had jointly planned to bring a child in the world, T.F. is distinguishable from Partanen's case and E.N.O. because the couple separated before the child was born and no parent-child relationship developed. Id. at 533 (finding that B.L. had no long-term relationship with the child).

By resting its E.N.O. analysis on a comparison to C.C. and a distinction from C.M., this Court set the stage for the conclusion that a person who satisfies the de facto standard first articulated in Youmans v. Ramos, 429 Mass. 774 (1999), and confirmed in E.N.O., has standing to bring a full on, legal parentage action premised on G.L. c. 209C or c. 46, § 4B because equity fills the gap in the law.

This approach would provide essential protections to children insofar as it yields a parentage judgment. Yet, the standards to establish standing under C.C. and E.N.O. and the requirement to then litigate a case to conclusion, thrusts families into the "highly unpredictable terrain of equity jurisdiction" rather than "the clear and reasonably predictable guidelines" of the parentage statutes. Goodridge, 440 Mass. at 335. These realities foreclose some adults from

engaging de facto parenthood at all, to the detriment of them and their children.[25]

In sum, whether by relying on Chapter 209C and § 4B, or by the E.N.O. standards (which Partanen also meets), the Probate and Family Court has the authority to issue a judgment recognizing the full legal parentage of a birth parent and a parent whose legal status arises from his or her conduct in bringing a child into the world and raising her.

C. A Parent Is a Parent.

Because having a legal parent provides myriad protections to the children, and such a judgment is respected by other states, it is important to designate Partanen a full legal parent. The visitation orders that accompany de facto parenting can be enormously beneficial to children in maintaining a significant relationship with an adult who came into their lives at some point.

[25]Some states use the de facto parent rubric to confer full parental rights and responsibilities under state law where the parent in Partanen's position lives with the child and accepts parental responsibilities, the other parent fosters the relationship between the adult and child, and there is a bonded parent-child relationship. See, e.g., Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. 2011); King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005); C.E.W. v. D.E.W., 845 A.2d 1146, 1151 (Me. 2004); L.S.K. v. H.A.N., 813 A.2d 872, 876 (Pa. Super. Ct. 2002) (using *in loco parentis* status); In re Parentage of L.B., 122 P.3d 161, 176-177 (Wash. 2005). See also Del. Code Ann. Tit. 13, §§ 8-201, 2302 (a legal parent includes a "de facto parent").

A ruling providing full parental rights and responsibilities to Partanen cannot maintain the nomenclature of "de facto parent," without creating a new status that is "equal to ['parent'], yet separate from it." Opinions of the Justices, 440 Mass. 1201, 1206 (2004). Even though unintended, it is a "choice of language" that "maintain[s] and foster[s] a stigma of exclusion" from *parenthood* for former partners in same-sex relationships like Partanen. This separate status diminishes the very stability and protection it is meant to provide, and conveys that these families are "unworthy of [parental] recognition." Windsor, 133 S.Ct. at 2694. This differentiation makes it harder for everyone from schools and government agencies to the larger community to understand that Partanen is one of Jo's and Ja's parents and to treat her and them accordingly. It also wounds the children by making it more difficult "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Id. A parent should be denominated a parent, not a de facto parent, whether that status is conferred by law or equity.

CONCLUSION

For the above reasons, the trial court should be reversed and the case remanded for adjudication of Partanen as a legal parent.

Respectfully submitted,
KAREN PARTANEN,
By her attorneys,

Dated: February 18, 2016

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CERTIFICATE OF COMPLIANCE

I, Mary Lisa Bonauto, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but limited to Mass. R. A. P. 19(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record; Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations; Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

/s/ Mary Lisa Bonauto
Mary Lisa Bonauto

Date: February 18, 2016

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES ADDENDUM

TABLE OF CONTENTS FOR CONSTITUTIONAL PROVISIONS, STATUTES AND RULES ADDENDUM PURSUANT TO MASS. R. A. P. 16 (f)

Rules

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 1

Art. I. Equality of people; natural rights

Currentness

ART. I. All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Notes of Decisions (1216)

M.G.L.A. Const. Pt. 1, Art. 1, MA CONST Pt. 1, Art. 1
Current through amendments approved February 1, 2016.

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Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 10

Art. X. Right of protection and duty of contribution; taking of property; consent to laws; taking of property for highways and streets

Currentness

ART. X. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

Notes of Decisions (1976)

M.G.L.A. Const. Pt. 1, Art. 10, MA CONST Pt. 1, Art. 10
Current through amendments approved February 1, 2016.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text
Current through P.L. 114-114 (excluding 114-92, 114-94, 114-95 and 114-113) approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Prior Version Held Unconstitutional by** Bancroft v. Jameson, Del.Fam.Ct., July 15, 2010

West's Delaware Code Annotated
Title 13. Domestic Relations
Chapter 8. Uniform Parentage Act (Refs & Annos)
Subchapter II. Parent-Child Relationship

13 Del.C. § 8-201

§ 8-201. Establishment of parent-child relationship

Effective: July 3, 2013
Currentness

(a) The mother-child relationship is established between a woman and a child by:

(1) The woman's having given birth to the child, unless she is not the intended parent pursuant to a gestational carrier arrangement;

(2) An adjudication of the woman's maternity;

(3) Adoption of the child by the woman;

(4) A determination by the court that the woman is a de facto parent of the child; or

(5) The woman's intending to be the mother of a child born pursuant to a gestational carrier arrangement; or

(6) The woman's having consented to assisted reproduction by another woman under subchapter VII of this chapter which resulted in the birth of the child.

(b) The father-child relationship is established between a man and a child by:

(1) An unrebutted presumption of the man's paternity of the child under § 8-204 of this title;

(2) An effective acknowledgment of paternity by the man under subchapter III of this chapter, unless the acknowledgment has been rescinded or successfully challenged;

(3) An adjudication of the man's paternity;

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(4) Adoption of the child by the man;

(5) The man's having consented to assisted reproduction by a woman under subchapter VII of this chapter which resulted in the birth of the child; or

(6) A determination by the court that the man is a de facto parent of the child [1]

(c) De facto parent status is established if the Family Court determines that the de facto parent:

(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;

(2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

Credits

70 Laws 1995, ch. 186, § 1, eff. July 10, 1995; 74 Laws 2003 (1st Sp. Sess.), ch. 136, § 1, eff. Jan. 1, 2004; 77 Laws 2009, ch. 97, §§ 1-3, eff. July 6, 2009; 79 Laws 2013, ch. 88, § 3, eff. July 3, 2013.

Notes of Decisions (12)

Footnotes

1 So in original.

13 Del.C. § 8-201, DE ST TI 13 § 8-201

The statutes and constitution are current through 80 Laws 2015, ch. 194. and technical revisions from the Delaware Code Revisors for 2015 Acts.

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West's Delaware Code Annotated
Title 13. Domestic Relations
Chapter 23. Guardianship of a Child
Subchapter I. Definitions and Jurisdiction

13 Del.C. § 2302

§ 2302. Definitions

Effective: June 10, 2014
Currentness

For the purposes of this chapter, unless the context indicates differently:

(1) "Abuse" or "abused child" is as defined in § 901 of Title 10.

(2) "Adult" means a person who has reached his or her 18th birthday.

(3) "Best interests" is as defined in § 722 of this title.

(4) "Child" or "children" means persons who have not reached their 18th birthday.

(5) "Court" means the Family Court.

(6) "Department" or "DSCYF" means the Department of Services for Children, Youth and Their Families.

(7) "Dependency" or "dependent child" is as defined in § 901 of Title 10.

(8) "Division" means the Division of Family Services of the Department of Services for Children, Youth and Their Families.

(9) "Foster parent" means an individual or couple who has been approved by DSCYF or a licensed agency to provide foster care in exchange for foster care payments provided by DSCYF or a licensed agency.

(10) "Guardian" means a nonparent or an agency charged with caring for a child during the child's minority.

(11) "Guardian ad litem" means an individual appointed by the Court to represent the best interests of a child, whether or not that reflects the wishes of the child, who by that individual's appointment shall be a party to the child welfare proceeding.

(12) "Neglect" or "neglected child" is as defined in § 901 of Title 10.

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(13) "Parent" is as defined by § 8-201 of this title.

(14) "Parental responsibilities" means the care, support and control of the child in a manner that provides for the child's necessary physical needs, including adequate food, clothing and shelter, and that also provides for the mental and emotional health and development of such child.

(15) "Permanency" means the safe, stable, custodial environment in which a child is raised and the life-long relationship that child establishes with a nurturing caregiver.

(16) "Relative" shall have the same meaning as used in § 901 of Title 10.

Credits

70 Laws 1995, ch. 186, § 1, eff. July 10, 1995; 73 Laws 2001, ch. 150, § 1, eff. July 10, 2001. Amended by 76 Laws 2007, ch. 136, §§ 9-12, eff. July 12, 2007; 77 Laws 2009, ch. 97, § 4, eff. July 7, 2009; 79 Laws 2014, ch. 246, § 1, eff. June 10, 2014.

13 Del.C. § 2302, DE ST TI 13 § 2302

The statutes and constitution are current through 80 Laws 2015, ch. 194. and technical revisions from the Delaware Code Revisors for 2015 Acts.

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KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or Preempted **Unconstitutional as Applied by** T.M.H. v. D.M.T., Fla.App. 5 Dist., Dec. 23, 2011

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

West's Florida Statutes Annotated
Title XLIII. Domestic Relations (Chapters 741-759)
Chapter 742. Determination of Parentage (Refs & Annos)

West's F.S.A. § 742.14

742.14. Donation of eggs, sperm, or preembryos

Currentness

The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.

Credits
Laws 1993, c. 93-237, § 2.

Notes of Decisions (23)

West's F. S. A. § 742.14, FL ST § 742.14
Current through the 2015 1st Reg. Sess. and Special A Session of the Twenty-Fourth Legislature

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PART I ADMINISTRATION OF THE GOVERNMENT
TITLE I JURISDICTION AND EMBLEMS OF THE COMMONWEALTH, THE GENERAL COURT, STATUTES AND PUBLIC DOCUMENTS
CHAPTER 4 STATUTES
Section 6 Rules for construction of statutes

Section 6. In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

First, The repeal of a statute shall not revive any previous statute, except in case of the repeal of a statute, after it has become law, by vote of the people upon its submission by referendum petition.

Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter.

Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.

Sixth, Wherever any writing is required to be sworn to or acknowledged, such oath or acknowledgment shall be taken before a justice of the peace or notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight.

Seventh, Wherever action by more than a majority of a city council is required, action by the designated proportion of the members of each branch thereof, present and voting thereon, in a city in which the city council consists of two branches, or action by the designated proportion of the members thereof, present and voting thereon, in a city having a single legislative board, shall be a compliance with such requirement.

Eighth, Wherever publication is required in a newspaper published in a city or town, it shall be sufficient, when there is no newspaper published therein, if the publication is made in a newspaper with general circulation in such city or town. If a newspaper is not published in such city or town and there is no newspaper with general circulation in such city or town, it shall be sufficient if the publication is made in a newspaper published in the county where such city or town is situated. A newspaper which by its title page purports to be printed or published in such city, town or county, and which has a circulation therein, shall be deemed to have been published therein.

Ninth, Wherever a penalty or forfeiture is provided for a violation of law, it shall be for each such violation.

Tenth, Words purporting to give three or more public officers or other persons authority to adopt, amend or repeal rules and regulations for the regulation, government, management, control or administration of the affairs of a public or other body, board, commission or agency shall not be construed as authorizing the adoption of a rule or regulation relative to a quorum which would conflict with the provisions of clause Fifth in the absence of express and specific mention therein to that effect.

Eleventh, The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.

Stat. Add. 000011

Print

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE VII CITIES, TOWNS AND DISTRICTS
CHAPTER 46 RETURN AND REGISTRY OF BIRTHS, MARRIAGES AND DEATHS
Section 4B Artificial insemination

Section 4B. Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.

Print

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XXII CORPORATIONS
CHAPTER 175 INSURANCE
Section 47H Infertility, pregnancy-related benefits

Section 47H. Any blanket or general policy of insurance, except a blanket or general policy of insurance which provides supplemental coverage to medicare or other governmental programs, described in subdivisions (A), (C) or (D) of section one hundred and ten which provides hospital expense or surgical expense insurance which includes pregnancy-related benefits and which is issued or subsequently renewed by agreement between the insurer and the policyholder, within or without the commonwealth, while this provision is effective, or any policy of accident and sickness insurance as described in section one hundred and eight which provides hospital expense or surgical expense insurance which includes pregnancy-related benefits and which is delivered or issued for delivery or subsequently renewed by agreement between the insurer and the policyholder in the commonwealth while this provision is effective, or any employees' health and welfare fund which provides hospital expense and surgical expense benefits which includes pregnancy-related benefits and which is promulgated or renewed to any person or group of persons in the commonwealth while this provision is effective shall provide, to the same extent that benefits are provided for other pregnancy-related procedures, coverage for medically necessary expenses of diagnosis and treatment of infertility to persons residing within the commonwealth. For purposes of this section, 'infertility' shall mean the condition of an individual who is unable to conceive or produce conception during a period of 1 year if the female is age 35 or younger or during a period of 6 months if the female is over the age of 35. For purposes of meeting the criteria for infertility in this section, if a person conceives but is unable to carry that pregnancy to live birth, the period of time she attempted to conceive prior to achieving that pregnancy shall be included in the calculation of the 1 year or 6 month period, as applicable.

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XXII CORPORATIONS

CHAPTER 176A NON-PROFIT HOSPITAL SERVICE CORPORATIONS

Section 8K Infertility diagnosis and treatment benefits

Section 8K. Any contract, except contracts providing supplemental coverage to medicare or other governmental programs, between a subscriber and the corporation under an individual or group hospital service plan which is delivered, issued for delivery or renewed in the commonwealth while this provision is effective and which provides pregnancy-related benefits shall provide as a benefit for all individual subscribers or members within the commonwealth and all group members having a principal place of employment within the commonwealth, to the same extent that benefits are provided for other pregnancy-related procedures, coverage for medically necessary expenses of diagnosis and treatment of infertility. Said infertility benefits shall meet all other terms and conditions of the subscriber certificate. For purposes of this section, 'infertility' shall mean the condition of an individual who is unable to conceive or produce conception during a period of 1 year if the female is age 35 or younger or during a period of 6 months if the female is over the age of 35. For purposes of meeting the criteria for infertility in this section, if a person conceives but is unable to carry that pregnancy to live birth, the period of time she attempted to conceive prior to achieving that pregnancy shall be included in the calculation of the 1 year or 6 month period, as applicable.

Print

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XXII CORPORATIONS
CHAPTER 176B MEDICAL SERVICE CORPORATIONS
Section 4J Infertility diagnosis and treatment benefits

Section 4J. Any subscription certificate under an individual or group medical service agreement, except certificates which provide supplemental coverage to medicare or other governmental programs, which is delivered, issued for delivery or renewed in the commonwealth while this section is effective shall provide as a benefit for all individual subscribers or members within the commonwealth and all group members having a principal place of employment within the commonwealth, to the same extent that benefits are provided for other pregnancy-related procedures and subject to the other terms and conditions of the subscription certificate, coverage for medically necessary expenses of diagnosis and treatment of infertility. Said infertility benefits shall meet all other terms and conditions of the subscription certificate. For purposes of this section, 'infertility' shall mean the condition of an individual who is unable to conceive or produce conception during a period of 1 year if the female is age 35 or younger or during a period of 6 months if the female is over the age of 35. For purposes of meeting the criteria for infertility in this section, if a person conceives but is unable to carry that pregnancy to live birth, the period of time she attempted to conceive prior to achieving that pregnancy shall be included in the calculation of the 1 year or 6 month period, as applicable.

Stat. Add. 000015

KeyCite Red Flag - Severe Negative Treatment
KeyCite Red Flag Negative Treatment **§§ 1 to 22. Repealed, 2008, 521, Sec. 21**

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206)
Chapter 201. Guardians and Conservators [Repealed] (Refs & Annos)

M.G.L.A. 201 § 4

§§ 1 to 22. Repealed, 2008, 521, Sec. 21

Effective: July 1, 2009
Currentness

M.G.L.A. 201 § 4, MA ST 201 § 4
Current through Chapter 171 of the 2015 1st Annual Session and Chapter 35 of the 2016 2nd Annual Session

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Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206)
Chapter 201. Guardians and Conservators (Refs & Annos)

This section has been updated. Click here for the updated version.

M.G.L.A. 201 § 4

§ 4. Powers

Effective: [See Text Amendments] to June 30, 2009

The guardian of a minor unless sooner discharged according to law shall continue in office until the minor attains the age of eighteen years and shall have the care and management of all his estate.

Credits
Amended by St.1973, c. 925, § 68.

M.G.L.A. 201 § 4, MA ST 201 § 4
Current through Chapter 171 of the 2015 1st Annual Session and Chapter 35 of the 2016 2nd Annual Session

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KeyCite Red Flag - Severe Negative Treatment
KeyCite Red Flag Negative Treatment **§§ 33 to 49. Repealed, 2008, 521, Sec. 21**

Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship, Conservatorship and Trusts (Ch. 190-206)
Chapter 201. Guardians and Conservators [Repealed] (Refs & Annos)

M.G.L.A. 201 § 36

§§ 33 to 49. Repealed, 2008, 521, Sec. 21

Effective: July 1, 2009
Currentness

M.G.L.A. 201 § 36, MA ST 201 § 36
Current through Chapter 171 of the 2015 1st Annual Session and Chapter 35 of the 2016 2nd Annual Session

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Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
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Chapter 201. Guardians and Conservators (Refs & Annos)

This section has been updated. Click here for the updated version.

M.G.L.A. 201 § 34

§ 34. Appointment; effect

Effective: [See Text Amendments] to June 30, 2009

If, under the terms of a written instrument or otherwise, a minor, a mentally retarded person, an autistic person, or person under disability, or a person not ascertained or not in being, may be or may become interested in any property real or personal, or in the enforcement or defense of any legal rights, the court in which any action, petition or proceeding of any kind relative to or affecting any such estate or legal rights is pending may, upon the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act therein as guardian ad litem or next friend of such minor, mentally retarded person, autistic person, or person under disability or not ascertained or not in being; and a judgement, order or decree in such proceedings, made after such appointment, should be conclusive upon all persons for whom such guardian ad litem or next friend was appointed.

Credits
Amended by St.1976, c. 548; St.1985, c. 315.

M.G.L.A. 201 § 34, MA ST 201 § 34
Current through Chapter 171 of the 2015 1st Annual Session and Chapter 35 of the 2016 2nd Annual Session

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This section has been updated. Click here for the updated version.

M.G.L.A. 201 § 36

§ 36. Construction

Effective: [See Text Amendments] to June 30, 2009

Nothing in this chapter shall affect the power of a court to appoint a guardian to defend the interests of a minor impleaded in such court, or interested in a suit or matter there pending, nor the power of such court to appoint or allow a person, as next friend for a minor, to commence, prosecute or defend a suit in his behalf.

M.G.L.A. 201 § 36, MA ST 201 § 36
Current through Chapter 171 of the 2015 1st Annual Session and Chapter 35 of the 2016 2nd Annual Session

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 1 Declaration of purpose; definition; responsibility for support

Section 1. Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children. It is the purpose of this chapter to establish a means for such children either to be acknowledged by their parents voluntarily or, on complaint by one or the other of their parents or such other person or agency as is authorized to file a complaint by section five, to have an acknowledgment or adjudication of their paternity, to have an order for their support and to have a declaration relative to their custody or visitation rights ordered by a court of competent jurisdiction. For the purpose of this chapter, the term "child born out of wedlock" shall refer to any child born to a man and woman who are not married to each other and shall include a child who was conceived and born to parents who are not married to each other but who subsequently intermarry and whose paternity has not been acknowledged by word or deed or whose paternity has not been adjudicated by a court of competent jurisdiction; and a child born to parents who are not married to each other whose paternity has been adjudicated by a court of competent jurisdiction, including an adjudication in a proceeding pursuant to this chapter or prior law. Every person is responsible for the support of his child born out of wedlock from its birth up to the age of eighteen, or, where such child is domiciled in the home of a parent and principally dependent upon said parent for maintenance, to age twenty-one. Each person charged with support under this section shall be required to furnish support according to his financial ability and earning capacity pursuant to the provisions of this chapter.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 2 Paternity; acknowledgment or adjudication; statistical information of parties; transmission to registrar

Section 2. Paternity may be established by filing with the court, the clerk of the city or town where the child was born or the registrar of vital records and statistics an acknowledgment of parentage executed by both parents pursuant to section 11 or pursuant to an action to establish paternity filed pursuant to this chapter; provided, however, that if a judgment or finding of paternity has been issued by a court or administrative agency of competent jurisdiction under the law of another state or foreign country or if both parents executed a voluntary acknowledgment of parentage in accordance with the law of another state or foreign country, such judgment, finding or voluntary acknowledgment shall be accorded full faith and credit and paternity shall not be relitigated. Upon receipt of an acknowledgment of paternity, the clerk of such city or town shall forward the original acknowledgment to said registrar as provided in chapter 46. Upon receipt of an acknowledgment of parentage or upon an adjudication of paternity under this chapter, the court shall transmit to the registrar of vital records and statistics a certified copy of the acknowledgment or order establishing paternity, together with such statistical information as said registrar may require, upon such form and in such format as designated by said registrar, which shall include the name, residence, date of birth, place of birth and social security number of each of the parties and the child, the sex of the child, and such additional information as the commissioner of public health deems useful for statistical and research purposes. Actions to establish support obligations or for custody or visitation rights may also be filed pursuant to this chapter.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 5 Persons entitled to maintain actions or execute voluntary acknowledgment of parentage; parties

Section 5. (a) Complaints under this chapter to establish paternity, support, visitation or custody of a child may be commenced by the mother, whether a minor or not; by a person presumed to be or alleging himself to be the father, whether a minor or not; by the child, whether a minor or not; by the child's guardian, next of kin, or other person standing in a parental relation to the child; by the parent or personal representative of the mother if the mother has died or has abandoned the child; by the parent or personal representative of the father if the father has died; by the authorized agent of the department of children and families or any agency licensed under chapter 15D provided that the child is in their custody; or, if the child is or was a recipient of any type of public assistance, by the IV–D agency as set forth in chapter 119A on behalf of the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program of the commonwealth; provided, however, that if the mother of the child was or is married and the child's birth occurs during the marriage or within three hundred days of its termination by death, annulment or divorce, complaints to establish paternity under this chapter may not be filed by a person presumed to be or alleging himself to be the father unless he is or was the mother's husband at the time of the child's birth or conception.

(b) Voluntary acknowledgments of parentage may be executed by the mother and the putative father, whether either or both is a minor, and may be registered pursuant to section 11 only if the signatures of the mother and the father are notarized. If the mother of the child was or is married and the child's birth occurs during the marriage or within 300 days of its termination by divorce, a voluntary acknowledgment of parentage naming the putative father may be executed by the mother and the putative father only if the mother and the person who was the spouse of the mother at the time of the child's birth or conception sign an affidavit denying that the spouse is the father of the child; provided, however, that where the marriage has been terminated by annulment or by the death of either spouse, paternity of the putative father may only be established by filing a complaint to establish paternity as provided in this chapter. A mother and a putative father signing a voluntary acknowledgment of parentage at the hospital or thereafter at the office of the city or town clerk as part of the birth registration process pursuant to section 3C of chapter 46, with the department of transitional assistance, with the IV–D agency set forth in chapter 119A, with any agency designated by the federal Secretary of Health and Human Services or with any official of a court shall receive notice

orally, or through the use of video or audio equipment, and in writing of alternatives to signing the acknowledgment, including the availability of genetic marker testing, as well as the benefits and responsibilities with respect to child support, custody and visitation that may arise from signing the acknowledgment, and subsequently filing the acknowledgment with the court or with the registrar of vital records and statistics as provided in this chapter.

(c) Any agency or person living with such child who is actually furnishing support to the child or, if the child who is the subject of an action under this chapter is a recipient of public assistance, the department of transitional assistance, shall be made a party to any action for paternity or support under this chapter.

(d) The IV–D agency as set forth in chapter 119A on behalf of the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program may not file complaints solely for custody or visitation, but shall be permitted to file actions for paternity or support; provided, however, that said IV–D agency shall be permitted to maintain an action for paternity or support even if issues related to custody or visitation are raised.

(e) In actions under this chapter relative to custody or visitation, the child, if the child is fourteen years of age or older, shall be made a party to such action.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE III DOMESTIC RELATIONS
CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK
Section 6 Presumption of paternity; mandatory joinder

Section 6. (a) In all actions under this chapter a man is presumed to be the father of a child and must be joined as a party if:

(1) he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce; or

(2) before the child's birth, he married or attempted to marry the mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the child was born during the attempted marriage or within three hundred days after its termination; or

(3) after the child's birth, he married or attempted to marry the mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) he agreed to support the child under a written voluntary promise, or

(ii) he has engaged in any other conduct which can be construed as an acknowledgment of paternity; or

(4) while the child is under the age of majority, he, jointly with the mother, received the child into their home and openly held out the child as their child; or

(5) he has acknowledged paternity in a parental responsibility claim as provided in section four A of chapter two hundred and ten and the mother, having received actual notice thereof, has failed within a reasonable time, to object thereto; or

(6) with respect to a child born before April 13, 1994, with his consent and the consent of the child's mother, he is named as the child's father on the birth certificate as provided in section one of chapter forty-six.

(b) Notwithstanding the provisions of subsection (a), a husband or former husband shall not be required to be joined as a party if non-paternity of the child has previously been adjudicated in a proceeding between the husband and the mother of such child in a court or administrative agency of competent jurisdiction.

(c) Notice to a party joined as herein provided shall be sufficient if the summons is mailed to the last known address by a form of mail requiring a receipt and, if actual notice shall not be made as aforesaid, by publishing a copy of the notice once in each of three successive weeks in a newspaper designated by the court.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE III DOMESTIC RELATIONS
CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK
Section 8 Judgment of paternity; age of father; notice

Section 8. On complaint to establish paternity, the court shall make a judgment establishing or not establishing paternity which shall be determinative for all purposes. Upon default of the defendant or his failure to personally appear, the court shall make a judgment establishing paternity if a showing is made that the complaint was served in accordance with the applicable rules of court and that the mother or putative father submits that sexual intercourse between the parties occurred during the probable period of conception. For good cause shown, the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with rule 60(b) of the Massachusetts Rules of Domestic Relations Procedure. The age of the person alleged to be the father or mother in any action under this chapter, including a filing of a voluntary acknowledgment of parentage, shall not be a bar to the establishment of paternity or entry of a support order pursuant to section nine. If the child or the mother on behalf of the child is a recipient of public assistance and if the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program has not been made a party as required by section five, the court shall notify the IV–D agency as set forth in chapter 119A of the judgment. If the judgment is at variance with the child's birth certificate, the court shall order that a new birth certificate be issued under section thirteen of chapter forty-six.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE III DOMESTIC RELATIONS
CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK
Section 17 Genetic marker tests; affidavit; refusal to submit to test; costs

Section 17. In an action under this chapter to establish paternity of a child born out of wedlock, the court shall, on motion of a party and upon a proper showing except as provided in this section, order the mother, the child and the putative father to submit to one or more genetic marker tests of a type generally acknowledged as reliable and performed by a laboratory approved by an accreditation body designated by the federal Secretary of Health and Human Services pursuant to Title IV, Part D of the Social Security Act. An affidavit by the mother or the putative father alleging that sexual intercourse between the mother and the putative father occurred during the probable period of conception shall be sufficient to establish a proper showing. If during the probable period of conception, the mother was married to someone other than the putative father, the court may order genetic marker tests only after notice pursuant to subsection (c) of section 6 to the spouse or former spouse. The court or the IV–D agency as provided in section 3A of chapter 119A may, order any person properly made a party under this chapter to submit to such testing. Unless a party objects in writing to the test results upon notice of the hearing date or within thirty days prior to the hearing, whichever is shorter, the report of the results of genetic marker tests, including a statistical probability of the putative father's paternity based upon such tests, shall be admissible in evidence without the need for laying a foundation or other proof of authenticity or accuracy; provided, further, that such report shall not be considered as evidence of the occurrence of intercourse between the mother and the putative father; and provided, however, that such report shall not be admissible absent sufficient evidence of intercourse between the mother and the putative father during the period of probable conception. If such report indicates a statistical probability of paternity of ninety-seven percent or greater, there shall be a rebuttable presumption that the putative father is the father of such child and, upon motion of any party or on its own motion, the court shall issue a temporary order of support. If the report of the results of genetic marker tests or an expert's analysis of inherited characteristics is disputed, the court may then order that an additional test be made at the same laboratory or different laboratory at the expense of the party requesting additional testing. Verified documentation of the chain of custody of genetic marker or other specimens is competent evidence to establish such chain of custody. The fact that any party refuses to submit to a genetic marker test shall be admissible and the court may draw an adverse inference from such refusal. The cost of making any tests ordered pursuant to this section shall, in the first instance, be chargeable against the party making the motion. The court in its

Stat. Add. 000028

discretion may order the costs of such testing to be apportioned among the parties provided, however, the court may not direct the IV–D agency as set forth in chapter 119A to pay for such tests, unless said IV–D agency is the moving party and provided further, that if the putative father is found to be the father, the court shall order the putative father to reimburse the IV–D agency or the other party. Payment for the costs of such tests shall be considered a necessary expense and if any party chargeable with the costs of the genetic marker tests is indigent as provided in section twenty-seven A of chapter two hundred and sixty-one, the court may direct payment of such costs by the commonwealth regardless of the type of tests requested by the moving party.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE III DOMESTIC RELATIONS
CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK
Section 21 Action to determine mother and child relationship

Section 21. Any interested party may bring an action to determine the existence of a mother and child relationship. Insofar as practicable, the provisions of this chapter applicable to establishing paternity shall apply.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE III DOMESTIC RELATIONS
CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK
Section 22 Proceedings barred under this chapter

Section 22. (a) A decree or judgment entered on a petition filed pursuant to sections three or six of chapter two hundred and ten shall be a bar to a proceeding under this chapter.

(b) A proceeding under chapter two hundred and seven, two hundred and eight, two hundred and nine, two hundred and seventy-three, or two hundred and nine D shall not be a bar to any proceeding under this chapter. An action brought under this chapter may be consolidated with an action brought under chapters two hundred and seven, two hundred and eight, two hundred and nine or two hundred and nine D if both actions are pending in the same department of the trial court.

(c) If an action under chapter two hundred and seven, two hundred and eight, or two hundred and nine, is filed after the commencement of proceedings or after a judgment under this chapter, any order or judgment for support of a child issued in the annulment, divorce or separate support proceedings shall supersede any prior order or judgment for support of the same child under this chapter; and any assignment made under this chapter shall be superseded by an assignment made in the divorce, separate support, or annulment proceeding; provided, however, that nothing herein shall prevent the court in such annulment, separate support or divorce proceeding from entering an order or judgment enforcing any previous support order or judgment for support under this chapter which has not been paid, consistent with the provisions of section nine.

(d) No proceeding hereunder shall be barred by a prior finding or adjudication under any repealed sections of chapter two hundred and seventy-three or by the fact that a child was born prior to the effective date of this chapter.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 210 ADOPTION OF CHILDREN AND CHANGE OF NAMES

Section 3 Dispensing with required consent in certain cases

Section 3. (a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section 2, other than that of the child, shall not be required if:— (i) the person to be adopted is 18 years of age or older; or (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child pursuant to paragraph (c).

(b) The department of children and families or a licensed child care agency may commence a proceeding, independent of a petition for adoption, in the probate court in Suffolk county or in any other county in which the department or agency maintains an office, to dispense with the need for consent of any person named in section 2 to adoption of the child in the care or custody of the department or agency. Notice of such proceeding shall be given to such person in a manner prescribed by the court. The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party. The court shall issue a decree dispensing with the need for consent or notice of any petition for adoption, custody, guardianship or other disposition of the child named therein, if it finds that the best interests of the child as provided in paragraph (c) will be served by the decree. Pending a hearing on the merits of a petition filed under this paragraph, temporary custody may be awarded to the petitioner. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. The department shall provide notice of the hearing on the merits to any foster parent, pre-adoptive parent or relative providing care for the child informing the foster parent, pre-adoptive parent or relative of his right to attend the hearing and be heard. The provisions of this paragraph shall not be construed to require that a foster parent, pre-adoptive parent or relative be made a party to the proceeding.

A petition brought pursuant to this paragraph may be filed and a decree entered notwithstanding the pendency of a petition brought under chapter 119 or chapter 201 regarding the same child. The chief justice of the trial court may, pursuant to the provisions of section 9 of chapter 211B, assign a justice from any department of the trial court to sit as a justice in any other department or departments of the trial court and hear simultaneously a petition filed under this paragraph and any other pending case or cases involving custody or

adoption of the same child. A temporary or permanent custody decree shall not be a requirement to the filing of such petition.

A juvenile court or a district court shall enter a decree dispensing with the need for consent of any person named in section 2 to the adoption of a child named in a petition filed pursuant to section 24 of chapter 119 in such court upon a finding that such child is in need of care and protection pursuant to section 26 of said chapter 119 and that the best interests of the child as defined in paragraph (c) will be served by such decree. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. Facts may be set forth either in the care and protection petition filed pursuant to said section 24 of said chapter 119 or upon a motion made in the course of a care and protection proceeding, alleging that the allowance of the petition or motion is in the best interests of the child.

The department of children and families shall file a petition or, in the alternative, a motion to amend a petition pending pursuant to section 26 of chapter 119 to dispense with parental consent to adoption, custody, guardianship or other disposition of the child under the following circumstances: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of any assault constituting a felony which results in serious bodily injury to the child or to another child of the parent; or (iii) the child has been in foster care in the custody of the commonwealth for 15 of the immediately preceding 22 months. For the purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of: (a) the date of the first judicial finding, pursuant to section 24 or section 26 of chapter 119, that the child has been subjected to abuse or neglect; or (b) the date that is 60 days after the date on which the child is removed from the home. For the purposes of this paragraph, "serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

The department shall concurrently identify, recruit, process and approve a qualified family for adoption.

The department need not file a motion or petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, or, where the child is the subject of a pending petition pursuant to section 26 of chapter 119, a motion to amend the petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, if the child is being cared for by a relative or the department has documented in the case plan a compelling reason for determining that such a petition would

not be in the best interests of the child or that the family of the child has not been provided, consistent with the time period in the case plan, such services as the department deems necessary for the safe return of the child to the child's home if reasonable efforts as set forth in section 29C of said chapter 119 are required to be made with respect to the child.

(c) In determining whether the best interests of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility and shall also consider the ability, capacity, fitness and readiness of the petitioners under said paragraph (a) to assume such responsibilities. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need for consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In considering the fitness of the child's parent or other person named in section 2, the court shall consider, without limitation, the following factors:

(i) the child has been abandoned;

(ii) the child or another member of the immediate family of the child has been abused or neglected as a result of the acts or omissions of one or both parents, the parents were offered or received services intended to correct the circumstances which led to the abuse or neglect and refused, or were unable to utilize such services on a regular and consistent basis so that a substantial danger of abuse or neglect continues to exist, or have utilized such services on a regular and consistent basis without effectuating a substantial and material or permanent change in the circumstances which led to the abuse or neglect;

(iii) a court of competent jurisdiction has transferred custody of the child from the child's parents to the department, the placement has lasted for at least six months and the parents have not maintained significant and meaningful contact with the child during the previous six months nor have they, on a regular and consistent basis, accepted or productively utilized services intended to correct the circumstances;

(iv) the child is four years of age or older, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 12 of the immediately preceding 15 months and the child cannot be returned to the custody of the parents at the end of such 15-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(v) the child is younger than four years of age, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 6 of the immediately preceding 12 months and the child cannot be returned to the custody of the parents at the end of such 12-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(vi) the parent, without excuse, fails to provide proper care or custody for the child and there is a reasonable expectation that the parent will not be able to provide proper care or custody within a reasonable time considering the age of the child provided that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(vii) because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal;

(viii) a lack of effort by a parent or other person named in section 2 to remedy conditions which create a risk of harm due to abuse or neglect of the child;

(ix) severe or repetitive conduct of a physically, emotionally or sexually abusive or neglectful nature toward the child or toward another child in the home;

(x) the willful failure to visit the child where the child is not in the custody of the parent or other person named in section 2;

(xi) the willful failure to support the child where the child is not in the custody of the parent or other person named in section 2. Failure to support shall mean that the parent or other person has failed to make a material contribution to the child's care when the contribution has been requested by the department or ordered by the court;

(xii) a condition which is reasonably likely to continue for a prolonged, indeterminate period, such as alcohol or drug addiction, mental deficiency or mental illness, and the condition makes the parent or other person named in section 2 unlikely to provide minimally acceptable care of the child;

(xiii) the conviction of a parent or other person named in section 2 of a felony that the court finds is of such a nature that the child will be deprived of a stable home for a period of years. Incarceration in and of itself shall not be grounds for termination of parental rights; or

(xiv) whether or not there has been a prior pattern of parental neglect or misconduct or an assault constituting a felony which resulted in serious bodily injury to the child and a likelihood of future harm to the child based on such prior pattern or assault.

For the purposes of this section "abandoned" shall mean being left without any provision for support and without any person responsible to maintain care, custody and control because the whereabouts of the person responsible therefor is unknown and reasonable efforts to locate the person have been unsuccessful. A brief and temporary absence from the home without intent to abandon the child shall not constitute abandonment.

Hearings on petitions to dispense with consent to adoption that allege that a child has been abandoned shall be scheduled and heard on an expedited basis. Notwithstanding the foregoing, the following circumstances shall constitute grounds for dispensing with the need for consent to adoption, custody, guardianship or other disposition of the child: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of an assault constituting a felony which resulted in serious bodily injury to the child or to another child of the parent. For the purposes of this section, "serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

(d) Nothing in this section shall be construed to prohibit the petitioner and a birth parent from entering into an agreement for post-termination contact or communication. The court issuing the termination decree under this section shall have jurisdiction to resolve matters concerning the agreement. Such agreement shall become null and void upon the entry of an adoption or guardianship decree.

Notwithstanding the existence of any agreement for post-termination or post-adoption contact or communication, the decree entered under this section shall be final.

Nothing in this section shall be construed to prohibit a birth parent who has entered into a post-termination agreement from entering into an agreement for post-adoption contact or communication pursuant to section 6C once an adoptive family has been identified.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 210 ADOPTION OF CHILDREN AND CHANGE OF NAMES

Section 6 Decree of court; force and effect; private hearings

Section 6. If the court is satisfied of the identity and relations of the persons, and that the petitioner is of sufficient ability to bring up the child and provide suitable support and education for it, and that the child should be adopted, it shall make a decree, by which, except as regards succession to property, all rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between the child and the petitioner and his kindred, and such rights, duties and legal consequences shall, except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred or any previous adopting parent; but such decree shall not place the adopting parent or adopted child in any relation to any person, except each other, different from that before existing as regards marriage, or as regards rape, incest or other sexual crime committed by either or both. The court may also decree such change of name as the petitioner may request. If the person so adopted is of full age, he shall not be freed by such decree from the obligations imposed by section six of chapter one hundred and seventeen and section twenty of chapter two hundred and seventy-three.

In evaluating whether a petitioner is of sufficient ability to provide suitable support for the child, the court shall give consideration to assurances by the department of children and families that it will provide an adoption subsidy for the child.

No decree shall be made under this section until there has been filed in the court a statement, signed and sworn to by the petitioner, or petitioners, setting forth the date of birth and place of residence of each adopting parent and such other facts relating to each such parent as would be required by section thirteen of chapter forty-six for the correction of the record of the birth of the person sought to be adopted, and also a copy of the birth record of such person; provided, that in case such person has been previously adopted, either a copy of the record of his birth amended to conform to the previous decree of adoption or a copy of such decree may be so filed; and, provided further, that the filing of any such copy may be dispensed with if the judge is satisfied that it cannot be obtained.

Every decree of adoption entered by the court shall include the words "This adoption is final and irrevocable."

The probate judge may determine that the hearing on any adoption petition shall be held in chambers. He shall, on the request of any party to an adoption proceeding, hold the hearing thereon in chambers, except that if said petition is contested, the consent of the other party or parties shall be required. No person shall be allowed to be present at any such hearing unless his presence is necessary either as a party or as a witness, and the probate judge shall exclude the general public from the hearing.

Print

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 210 ADOPTION OF CHILDREN AND CHANGE OF NAMES

Section 10 Second adoption; effect

Section 10. If the child has been previously adopted, all the legal consequences of the former decree shall, upon a subsequent adoption, determine, except so far as any interest in property may have vested in the adopted child, and a decree to that effect shall be entered on the records of the court.

Print

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE I COURTS AND JUDICIAL OFFICERS

CHAPTER 215 PROBATE COURTS

Section 4 Separate estates of married women; paternity, custody and support of minors

Section 4. Probate courts shall have exclusive original jurisdiction of actions by married women relative to their separate estate, of actions relative to the care, custody, education and maintenance of minor children provided for by sections thirty and thirty-seven of chapter two hundred and nine, and of actions relative to paternity, support, and custody of minor children provided for in chapter two hundred and nine C and shall have jurisdiction concurrently with the district and Boston municipal court departments of actions relative to paternity or support as provided in chapter two hundred and nine C and actions for support as provided in section thirty-two F of chapter two hundred and nine and actions relative to paternity or support as provided in two hundred and nine D.

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PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
TITLE I COURTS AND JUDICIAL OFFICERS
CHAPTER 215 PROBATE COURTS
Section 6 Equity jurisdiction

Section 6. The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction, except that the superior court department shall have exclusive original jurisdiction of all actions in which injunctive relief is sought in any matter growing out of a labor dispute as defined in section twenty C of chapter one hundred and forty-nine.

Probate courts shall also have jurisdiction concurrent with the supreme judicial and superior courts, of all cases and matters in which equitable relief is sought relative to: (i) the administration of the estates of deceased persons; (ii) wills, including questions arising under section twenty of chapter one hundred and ninety-one; (iii) trusts created by will or other written instrument; (iv) cases involving in any way the estate of a deceased person or the property of an absentee whereof a receiver has been appointed under chapter two hundred or the property of a person under guardianship or conservatorship; (v) trusts created by parol or constructive or resulting trusts; (vi) all matters relative to guardianship or conservatorship; and (vii) actions such as one described in clause (11) of section three of chapter two hundred and fourteen and of all other matters of which they now have or may hereafter be given jurisdiction. They shall also have jurisdiction to grant equitable relief to enforce foreign judgments for support of a wife or of a wife and minor children against a husband who is a resident or inhabitant of this commonwealth, upon an action by the wife commenced in the county of which the husband is a resident or inhabitant. They shall, after the divorce judgment has become absolute, also have concurrent jurisdiction to grant equitable relief in controversies over property between persons who have been divorced. They shall also have jurisdiction of an action by an administrator, executor, guardian, conservator, receiver appointed as aforesaid or trustee under a will to enjoin for a reasonable period of time the foreclosure, otherwise than by open and peaceable entry, of a mortgage on real estate, or the foreclosure of a mortgage on personal property, which real estate or personal property is included in the estate or trust being administered by such fiduciary, if in the opinion of the court the proper administration of the estate or trust would be hindered by such foreclosure. They shall also have jurisdiction, concurrent with the superior court, of proceedings in which

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equitable relief is sought under sections seven to twelve, inclusive, of chapter one hundred and seventeen and section twenty-six of chapter one hundred and twenty-three.

Notwithstanding any contrary or inconsistent provisions of the General Laws, procedure in cases in the probate court within the jurisdiction granted by this section shall be governed by the Massachusetts Rules of Civil Procedure.

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PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
TITLE I COURTS AND JUDICIAL OFFICERS
CHAPTER 215 PROBATE COURTS
Section 56A Investigations

Section 56A. Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations except those for the investigation of which provision is made by section sixteen of chapter two hundred and eight. Said guardian ad litem shall, before final judgment or decree in such proceeding, report in writing to the court the results of the investigation, and such report shall be open to inspection to all the parties in such proceeding or their attorneys. The compensation shall be fixed by the court and shall be paid by the commonwealth, together with any expense approved by the court, upon certificate by the judge to the state treasurer. The state police, local police and probation officers shall assist the guardian ad litem so appointed, upon his request.

Massachusetts General Laws Annotated
Massachusetts Rules of Domestic Relations Procedure (Refs & Annos)
III. Pleadings and Motions

Massachusetts Rules of Domestic Relations Procedure(Mass.R.Dom.Rel.P.), Rule 12

Rule 12. Defenses and Objections--When and How Presented--by Pleading or Motion

Currentness

(a) When Presented

(1) After service upon him of any pleading requiring a responsive pleading, a party shall serve such responsive pleading within 20 days unless otherwise directed by order of the court.

(2) The service of a motion permitted under this rule alters this period of time as follows, unless a different time is fixed by order of the court:

(i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action;

(ii) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement. *Identical to Mass.R.Civ.P. 12(a).*

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted;

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(7) Failure to join a party under Rule 19;

(8) Misnomer of a party;

(9) Pendency of a prior action in a court of the Commonwealth.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based. *Identical to Mass.R.Civ.P. 12(b).*

(c) [Deleted]. (Motion for Judgment on the Pleadings.)

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(9) in subdivision (b) of this rule, whether made in a pleading or by motion shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. *Identical to Mass.R.Civ.P. 12(e).*

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may after hearing order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. *Identical to Mass.R.Civ.P. 12(f).*

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, or pendency of a prior action is waived (A) if omitted from a motion in the circumstances described

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in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) [Deleted].

(3) Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Notes of Decisions (374)

Massachusetts Rules of Domestic Relations Procedure (Mass. R. Dom. Rel. P.), Rule 12, MA ST DOM REL P Rule 12
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Massachusetts General Laws Annotated
Massachusetts Rules of Domestic Relations Procedure (Refs & Annos)
VII. Judgment

Massachusetts Rules of Domestic Relations Procedure(Mass.R.Dom.Rel.P.), Rule 56

Rule 56. Summary Judgment

Currentness

(a) Motions for Summary Judgment. A party may move for summary judgment subsequent to the commencement of any proceeding under these rules except in actions for divorce or in actions for custody or visitation or for criminal contempt. Each motion for summary judgment shall be accompanied by an "Affidavit of Undisputed Facts" which shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, answer to interrogatories, admission or other document relied upon to establish that fact. The motion shall be served at least ten (10) days before the time fixed for the hearing. The moving party shall be responsible for filing with the Court all evidentiary documents cited in the moving papers. The motion for summary judgment shall be denied if the moving party fails to file and serve the affidavit required by this paragraph.

(b) Opposition. Any party opposing a motion for summary judgment shall file and serve no later than three (3) days before the time fixed for the hearing, unless the court otherwise orders, an affidavit using the same paragraph numbers as in the "Affidavit of Undisputed Facts" and admit those facts which are undisputed and deny those which are disputed, including with each denial a citation to the particular portions of any pleading, affidavit, deposition, answers to interrogatories, admission or other document relied upon in support of the denial. The opposing party may also file a concise "Affidavit of Disputed Facts," and the source thereof in the record, of all additional material facts as to which there is a genuine issue precluding summary judgment. The opposing party shall be responsible for the filing with the court of all evidentiary documents cited in the opposing papers. If a need for discovery is asserted as a basis for denial of the motion, the party opposing the motion shall provide a specification of the particular facts on which discovery is to be had or the issues on which discovery is necessary.

(c) Stipulated Facts. All interested parties may jointly file a stipulation setting forth a statement of stipulated facts to which all interested parties agree. As to any stipulated facts, the parties so stipulating may state that their stipulations are entered into only for the purposes of the motion for summary judgment and are not intended to be otherwise binding.

(1) In any pending motion for summary judgment, the assigned judge may order the parties to meet, confer and submit, on or before a date set the assigned judge, a joint statement of undisputed facts.

(d) [deleted] [Case Not Fully Adjudicated on Motion].

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in any affidavits shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by

affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the responsible expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Judgment. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment, when appropriate, may be rendered against the moving party.

Credits

Adopted October 10, 1997, effective December 1, 1997. Amended October 27, 1999, effective January 1, 2000; June 5, 2003, effective September 2, 2003; April 1, 2009, effective May 1, 2009.

Editors' Notes

REPORTER'S NOTES--1997

Rule 56 introduces summary judgment for the first time to domestic relations procedure. The rule allows a party to move for summary judgment in actions for modification and actions to modify or enforce a foreign judgment. Rule 56(h) allows summary judgment only if there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(a) requires that each motion for summary judgment be accompanied by an "Affidavit of Undisputed Facts" which sets forth the material facts relied upon in support of the motion. If the moving party fails to file and serve the affidavit, the summary judgment motion will be denied.

The party opposing the motion for summary judgment shall reproduce the "Affidavit of Undisputed Facts" and shall admit those facts which are undisputed and deny those which are disputed. The opposing party has the option of filing an "Affidavit of Disputed Facts" enumerating all additional material facts where there is a genuine issue which would preclude summary judgment.

Rule 56 allows parties to jointly file a statement of stipulated facts. If they do so, they may state that the stipulation is only for the purpose of the motion for summary judgment and is not intended to be otherwise binding. The rule also allows the judge to order the parties to meet and submit a joint statement of undisputed facts.

Sections (e), (f) and (g) of Rule 56 address the form of the affidavits, when an affidavit is not available, and sanctions for falsely made affidavits.

REPORTER'S NOTES--2000

As originally promulgated, rule 56(b) did not require the party opposing a motion for summary judgment to file an affidavit. Rather, it required the opposing party to reproduce the itemized facts contained in the "Affidavit of Undisputed Facts" and admit those facts which were undisputed and deny those which were disputed. The amendment to rule 56(b) rectifies this problem by requiring the party opposing the motion for summary judgment to file and serve, no later than three (3) days before the time fixed for the hearing, an affidavit reproducing the itemized facts contained in the "Affidavit of Undisputed Facts."

REPORTER'S NOTES--2003

The amendment to Rule 56(h) deletes the phrase "on file" from the first sentence in recognition that discovery documents are generally no longer filed separately with the court. See Rule 5(d)(2). The previous reference to admissions has also been replaced by a reference to "responses to requests for admission under Rule 36."

REPORTER'S NOTES--2009

The amendment will allow for summary judgment in all cases exclusive of divorce actions, actions for custody or visitation or actions for criminal contempt.

Notes of Decisions (683)

Massachusetts Rules of Domestic Relations Procedure (Mass. R. Dom. Rel. P.), Rule 56, MA ST DOM REL P Rule 56
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Massachusetts General Laws Annotated
Massachusetts Rules of Domestic Relations Procedure (Refs & Annos)
VII. Judgment

Massachusetts Rules of Domestic Relations Procedure(Mass.R.Dom.Rel.P.), Rule 60

Rule 60. Relief From Judgment or Order

Currentness

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. *Identical to Mass.R.Civ.P. 60(a).*

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. *Identical to Mass.R.Civ.P. 60(b).*

Notes of Decisions (465)

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ADDENDUM

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ADDENDUM

Commonwealth of Massachusetts
The Trial Court
Probate and Family Court Department

Middlesex Division

Docket No.: 14E0010

Karen Partanen, Plaintiff

v.

Julie Gallagher, Defendant

JUDGMENT
(on Plaintiff's Verified Complaint in Equity Pursuant to G.L. c. 215, § 6 to Establish De Facto Parentage Dated 2/6/14)

A trial on the merits was held on June 9, 2015. At trial, the Plaintiff, Ms. Partanen, was represented by Elizabeth A. Roberts of Todd & Weld, LLP and Teresa Harkins La Vita of La Vita Law Center, and the Defendant, Ms. Gallagher, was represented by Mary Beth Sweeney and Gretel Dufresne of Atwood & Cherny, P.C. The parties proceeded at trial on the basis of written submissions, including affidavits from each party, and representation of counsel, all in accordance with the procedure outlined in the parties Partial Agreement for Judgment. After trial, the Court enters the following Judgment:

1. The parties' Partial Judgment for Judgment, dated April, 2015, is hereby incorporated into the Judgment of this Court.

2. Ms. Partanen is the de facto parent of J[redacted] (d.o.b.: [redacted], age 7) and J[redacted] ([redacted], age 2).

3. The parties shall have shared legal custody of the children. This legal custody shall mirror the rights afforded to parents in G.L. c. 209C, Sec. 10(a).

4. The parties shall share decision making for the children, with Ms. Gallagher having the final determination with regard to the children's attendance at public school, but all other decisions including, but not limited to, education (except as to whether and into which public school a child shall be enrolled), health, safety, welfare, emotional and physical well-being and religious upbringing shall be made jointly. Nothing herein shall be construed so as to limit or remove the requirement that the parties exchange information and consult with one another regarding educational decisions. However, if there is a dispute regarding public school enrollment, Ms. Gallagher shall have the final decision-making authority on that sole issue for both children. All other educational decisions, including but not limited to class placement, individualized education plans,

choice of private school enrollment and the like, shall be made jointly.

5. Both parties shall have complete and unfettered access to all providers for the children, including but not limited to medical, dental, education, religion, and extracurricular activity providers. Ms. Gallagher shall sign any and all forms necessary in order for Ms. Partanen to have and maintain such access.

6. Both parties shall have complete and unfettered access to any and all records for the children, including but not limited to medical, dental, education, religion, and extracurricular activity providers. Ms. Gallagher shall sign any and all forms necessary in order for Ms. Partanen to have and maintain such access.

7. Both parties shall have the right to seek and authorize necessary medical and dental care for the children during their respective parenting times, including when traveling out of state with the children. Each party shall provide the other with the appropriate written authorization. In the event either seeks medical care for a child during her parenting time, she shall immediately, or as soon as practical, notify the other parent by phone or text message.

8. The parties shall share physical custody of the children. The overnight parenting plan shall be a two week schedule which is as follows:

Week 1

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Gallagher	Gallagher	Partanen	Partanen	Partanen	Partanen	Partanen

Week 2

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Gallagher	Gallagher	Partanen	Partanen	Gallagher	Gallagher	Gallagher

All transitions shall occur at school or daycare unless school is not in session, and in the case school is not in session, a transition shall occur at a parent's home. The party concluding her parenting time shall be responsible for taking the children to the other parent's home at the conclusion of her parenting time. In the event school is not in session, transitions shall occur at a time agreed upon by the parties.

9. The parties shall email one another within 24 hours of any significant but non-emergency events (e.g. medical problems or accidents that do not require ER, administration of medication, notice of school events received, party invitations, etc.). Each party shall notify the other of an emergency as soon as she is able.

10. Vacation Parenting Time

Vacation parenting time shall supersede regularly scheduled parenting time.

Summer

Each party may take the children for two (2) non-consecutive weeks of summer vacation until such time as they both agree that the children are able to take two (2) consecutive weeks away from the other parent. In all odd numbered years, Ms. Gallagher may have first choice of weeks; in all even numbered years, Ms. Partanen may have first choice of weeks. The parent with first choice must notify the other of her choice of weeks by email no later than May 1st of each year. If email notice is not given by May 1st of a particular year, either party may give the other email notice of vacation if it is provided at least three (3) weeks in advance of the vacation.

February/Winter School Vacation

The parties shall alternate Winter School Vacation, with Ms. Partanen having it in the odd years beginning in 2017 and Ms. Gallagher having the same in even years, beginning in 2016. Winter School Vacation shall be defined as of the conclusion of school prior to the vacation week through the commencement of school the week following the vacation week.

April School Vacation

The parties shall alternate Spring School Vacation, with Ms. Gallagher having it in odd years beginning in 2017 and Ms. Partanen having the same in even years beginning in 2016. Spring School Vacation shall be defined as of the conclusion of school prior to the vacation week through the commencement of school the week following the vacation week.

11. Holiday Parenting Time

The Holiday Parenting Time shall supersede regularly scheduled parenting time. The parties shall alternate all holidays as described below.

Thanksgiving

Ms. Gallagher shall have Thanksgiving parenting time in all odd numbered years, beginning in 2015, with Ms. Partanen having the same in all odd numbered years, beginning in 2015. Thanksgiving parenting time shall be from 9:00 a.m. on Thursday of the holiday until school commencement on Monday, following the holiday.

Christmas

Ms. Partanen shall have Christmas parenting time in all odd numbered years, beginning 2015 with Ms. Gallagher having the same in all even numbered years, beginning in 2016. Christmas parenting time shall be defined as 9:00 p.m.. Christmas

Eve until 3:000 p.m. on December 25th.

Christmas Break

Christmas school vacation, which is defined as the children's time off from school[1] less Christmas parenting time described above, shall be divided equally between the parties, with Ms. Partanen having the first half and Ms. Gallagher the second in odd numbered years, beginning in 2015 and Ms. Gallagher having the first half and Ms. Partanen the second in even numbered years, beginning in 2016.

Easter

Easter weekend shall be alternated for so long as it does not fall within the Spring Vacation Week as described above. In th event it falls in vacation week, the person with vacation time shall have the children for the holiday. In all other cases, Ms. Gallagher shall have Easter weekend parenting time in odd years, beginning in 2017, and Ms. Partanen shall have the same in even years, beginning in 2016. Easter weekend parenting time shall be defined as the conclusion of school on Good Friday (9:00 a.m. if school is not in session) until school commences on Monday following Easter Sunday.

12. The parties shall share equally in the cost of any agreed upon extracurricular activities for the children. All extracurricular expenses shall be submitted by the party seeking reimbursement within fourteen (14) days of incurring the same. The reimbursing party shall have fourteen (14) days to pay the reimbursement.

13. The parties shall share equally in any uninsured medical and dental expenses for the children. All uninsured medical and dental expenses shall be submitted by the party seeking reimbursement within fourteen (14) days of incurring the same. The reimbursing party shall have fourteen (14) days to pay the reimbursement. Any elective uninsured medical and dental expenses, including cosmetic or orthodontics shall be agreed upon by the parties in advance in writi8ng, with email being sufficient.

14. Ms. Gallagher shall maintain and provide health and dental insurance for the benefit of the children for so long as said coverage is available to her at a reasonable cost.

15. Each party shall be entitled to take one child as a dependency exemption on her tax forms, with Ms. Gallagher taking [redacted] and Ms. Partanen taking [redacted]. When [redacted] is emancipated and can no longer be claimed as a dependency exemption, the parties shall alternate taking [redacted] as a dependency exemption.

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[1]Based upon Jo 's school calendar, as Ja is in a private pre-school program at this time.

16. Restraint on Disparaging Remarks

Neither party shall disparage the other to the children and neither party shall discuss this litigation with the children. Neither party shall permit a third party to disparage the other party in front of the children. The parties shall communicate directly with one another via email with regards to all issues regarding the children. They shall not use the children as messengers, and the parties shall be civil in their communications with one another.

17. Communication Between the Parties

The parties' primary form of communication shall be by email regarding issues surrounding the children. If a party sends an email to the other party, the receiving party shall make all efforts to respond within forty-eight (48) hours. Neither party shall send emails to the other's work account but shall send the same to their home account. The parties shall communicate by phone first when practical regarding any emergency issues surrounding the children. The parties shall not exceed (2) emails per week unless it involves an emergency.

18. Communication with the Children

The parties shall make reasonable efforts to have the children available for telephone contact and/or video with the non-custodial party the days she does not have scheduled time with the children. Such communications, if possible, shall occur between 5:00 p.m. and bedtime. Neither party shall interfere with any child(ren) calling the other party. Both parties shall ensure that the other has all current telephone and contact information for the other party at all times.

Child Support

19. Commencing Friday, June 12, 2015, and each Friday thereafter, Karen shall pay to Julie the sum of $206.00 via direct deposit each week for the support and maintenance of the two (2) unemancipated children. (This amount was calculated using a 50/50 parenting plan and includes a credit to Julie for $461.00 per week in child care costs paid and $80.00 per week in health insurance costs paid. Additionally, this calculation includes a credit to Karen for $29.00 per week in health insurance costs paid and $6.00 per week in dental insurance costs paid).

20. Said child support payments under the within Section C, Paragraph 21 above, and any judgments for the payment thereof, are intended to be (I) not dischargable in any bankruptcy proceedings and (ii) fully excludable to Julie and fully non-deductible to Karen for federal and state (if applicable, local) income tax purposes, and they shall terminate upon the first to occur of the death of Karen, the death of Julie, or the emancipation of the children as said term is defined as follows:

Emancipation shall occur or be deemed to have occurred upon the earliest

happening of any of the following events:

a. the death of a child;

b. a child's marriage;

c. a child's entering full-time military service of the United States of America; provide however that upon termination of military service, such emancipation shall cease and thereafter be determined in accordance with other applicable provisions of this paragraph;

d. a child's living away from the parties' residence on a full-time basis, but this subparagraph shall not apply to a child living on campus or in approved off-campus housing while attending college or private secondary school on a full-time basis or to a child attending summer camp;

e. a child's obtaining full-time and permanent employment (provided that emancipation shall be deemed to terminate upon a child's terminating such full-time employment); thereafter, emancipation shall be determined in accordance with other applicable provisions of this paragraph; or,

f. the later of a child attaining the age of eighteen (18) years or graduating from high school, except if a child commences college undergraduate education following graduation from high school, s/he shall not be deemed to be emancipated until s/he graduates from college or abandons the education program or reaches the age of twenty-three (23), whichever first occurs.

So ORDERED and ADJUDGED this 21st day of September, 2015.

John D. Casey, Justice
Probate & Family Court

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

MIDDLESEX DIVISION DOCKET NO. MI-14E-0010

KAREN PARTANEN,
Plaintiff

v.

JULIE GALLAGHER,
Defendant

RELEVANT PROCEDURAL HISTORY, FINDINGS OF FACT, RATIONALE, AND CONCLUSIONS OF LAW

(On Plaintiff's Verified Complaint in Equity Pursuant to G. L. c. 215, § 6 To Establish De Facto Parentage and for Other Relief, filed February 12, 2014)

This matter came before the Court (Casey, J.) for a trial on June 9, 2015. Karen Partanen (hereinafter referred to as "Karen") was present and represented by Attorneys Teresa M. Harkins La Vita and Elizabeth A. Roberts. Julie Gallagher (hereinafter referred to as "Julie") was present and represented by Attorneys Mary Beth Sweeney and Gretel Dufresne. Eight (8) exhibits were entered into evidence. The parties proceeded at trial on the basis of written submissions, including affidavits from each party, and representation of counsel, all in accordance with the procedure outlined in the parties Partial Agreement for Judgment.

After trial, and consideration of the evidence and all reasonable inferences drawn therefrom, the Court hereby enters the following Relevant Procedural History, Findings of Fact, Rationale, and Conclusions of Law:

RELEVANT PROCEDURAL HISTORY

1. On February 12, 2014, Karen filed a Verified Complaint in Equity Pursuant to G. L. c. 215, § 6 To Establish De Facto Parentage and for Other Relief.

2. On February 21, 2014, Karen filed a Motion for Temporary Orders.

3. On March 27, 2014, Karen filed a Motion to Over-Ride the Normal Docketing Schedule.

4. On April 22, 2014, Karen filed an Amended Motion for Temporary Orders.

5. On the same date, Karen filed a Motion for Appointment of Guardian *Ad Litem*.

6. On May 8, 2014, Julie filed an Opposition to Karen's Amended Motion for Temporary Orders.

7. On May 9, 2014, Karen filed a Motion for Relief from Mass. R. Dom. Rel. P. 6(C) in Order to File a Memorandum in Support of Karen's Amended Motion for Temporary Orders, Pursuant to Mass. R. Dom. Rel. P. 8(f).

8. On the same date, the parties filed a Stipulation, which provided, *inter alia*, that:
   a. Karen and Julie agree that Karen may have time with [redacted] and [redacted] on Sunday, May 11, 2014 from 2:00 pm to 6:00 pm. Karen shall pick the children up from Julie's residence and return the children to Julie's residence.
   b. Julie shall file a Response to Karen's Memorandum filed Friday, May 9, 2014 by Friday, May 16, 2014 via in-hand and email to the Court.

9. On the same date, the parties filed a Stipulation Re: Appointment of a GAL Investigator, which provided, *inter alia*, that:
   a. Mary Lou Kaufman, LICSW of 1419 Beacon Street, Brookline, MA 02446, shall be appointed to serve as Category E Guardian *Ad Litem* Investigator (hereinafter "GAL") for the purposes of gathering, reporting, and recommending to the Court as to issues pertaining to the care and custody of and the parenting plan for the two (2) minor children, [redacted], age 5 ([redacted]), and [redacted], age 2 (DOB: [redacted]), as well as to the circumstances surrounding Karen's status as de facto parent of the children.
   b. The cost of the GAL shall be shared equally (50/50) by the parties.
   c. The parties request that the GAL order psychological testing of each party. In the event the GAL out sources the testing, each party shall be responsible to pay the uninsured cost of their own psychological testing. The GAL shall choose the professional(s) who perform the psychological testing, and said professional(s) shall not be a person who is already known to either party.

10. On the same date, the Court (Kagan, J.) entered an Order appointing Eric J. Chafe, Esq. as guardian *ad litem* to investigate and report on the issues of visitation/parenting plan/access to the children and issues of legal and physical custody. On May 21, 2014, the Court (Kagan, J.) vacated the Order and appointed Mary Lou Kaufman, LICSW as guardian *ad litem* to investigate and report on the issues of visitation/parenting plan/access to the children, issues of legal and physical custody, and the issue of de facto parent.

11. On the same date, Julie filed a Verified Answer and Counterclaim to Karen's Verified Complaint in Equity Pursuant to G. L. c. 215, § 6 to Establish De Facto Parentage and for Other Relief. The Counterclaim requests denial of Karen's de facto parent status.

12. On May 12, 2014, the Court (Kagan, J.) entered the following Temporary Order:
    a. Karen shall be allowed to enjoy the companionship of [redacted] born [redacted] and [redacted] born [redacted] on alternating weekends from Saturday at 10:00 to Sunday at 9:00 p.m. and Wednesday from 6:00 p.m. to Thursday at 7:00 when she shall drop off the children either at pre-school or to Julie's home or daycare as the case may be.
    b. In addition, Karen shall have the children two weeks during this coming summer upon giving Julie at least three weeks notice. When the children are with Karen, she shall give Julie the address and telephone number where the children shall be. Julie shall be allowed to call the children when they are with Karen for the two week period at reasonable times.
    c. Julie shall execute all required forms to allow Karen to obtain not only the children's medical records but also to be allowed to talk to their doctors and teachers.
    d. Julie shall have sole physical and legal custody of the minor children.
    e. Julie shall continue to provide medical insurance for the children and the parties shall share equally the children's uninsured medical expense after Julie exceeds $250.00 per child.
    f. Karen shall pay to Julie, each week as support for the children the sum of $377.00.

13. On May 16, 2014, Julie filed an Opposition to Karen's Memorandum in Support of Karen's Amended Motion for Temporary Orders.

14. On May 21, 2014, the parties filed a Stipulation, which provided, *inter alia*, that:
    a. Karen shall be allowed to enjoy the companionship of [redacted] (DOB: [redacted]) and [redacted] (DOB: [redacted]) on alternating weekends from Saturday at 10:00 a.m. to Sunday at 5:00 p.m. Karen shall pick the children up from Julie's home or from the location of a child's scheduled extracurricular activity, upon 24 hours' notice, on Saturdays and she shall return the children to Julie's home on Sundays.
    b. Karen shall be allowed to enjoy the companionship of [redacted] and [redacted] every Wednesday from 2:00 p.m. to Thursday at 7:00 a.m. On Wednesdays, Karen shall pick the children up from day care or school, or from Julie's home if there is no day care or school, and she shall return the children to day care or school on Thursday mornings, or to Julie's home if there is no day care or school.
    c. Mary Lou Kaufman, LICSW of 1419 Beacon Street, Brookline, MA 02446, shall be appointed to serve as Category E Guardian *Ad Litem* Investigator (hereinafter

"GAL") in this matter pursuant to the parties' Stipulation re: Appointment of GAL Investigator dated May 9, 2014, which is incorporated herein by reference.

15. On June 6, 2014, Karen filed a Motion for Judicial Recusal and Reassignment, stating that there is a current conflict of interest that prevents Todd & Weld LLP from appearing before Judge Kagan on a temporary basis. On the same date, the Court (Kagan, J.) allowed the Motion.

16. On the same date, the Court (Donnelly, J.) entered an Order of Assignment, assigning the matter to The Honorable Jeffrey A. Abber.

17. On June 16, 2014, Karen filed an Answer to Counterclaim.

18. On August 14, 2014, the parties filed a Joint Motion to Continue Pre-Trial Conference. On August 19, 2014, the Court (Abber, J.) allowed the Motion and continued the pretrial conference to 10/15/14 at 2:00 p.m. in Cambridge.

19. On November 14, 2014, Karen filed an Emergency Motion to Continue Status Conference. On the same date, the Court (Abber, J.) allowed the Motion and continued the matter to 12/12/14 at 8:30 in Cambridge, by agreement.

20. On November 21, 2014, the parties filed the following Stipulation for Further Temporary Orders:

a. Holiday/Vacation parenting time shall be as follows and shall supersede regularly scheduled parenting time and any date not mentioned in the below schedule shall be pursuant to the "regular" schedule:

i. Thanksgiving: Karen shall have the children from Wednesday after school until 10 a.m. on Friday (11/28). Julie shall have the children from 10 a.m. on Friday (11/28) until 10 a.m. of Saturday (11/29). Thereafter the "regular" schedule shall take effect, and Karen shall have weekend time.

ii. Christmas Eve/Christmas Day: Julie shall have the children from 12 p.m. on 12/24 until 12 p.m. on 12/25. Karen shall have the children from 12 p.m. and thereafter parenting time shall be pursuant to the paragraph below.

iii. Christmas Vacation: Karen shall have the children from early release on 12/23 until 12 p.m. on 12/24. Julie shall have the children from 12 p.m. on 12/26 until, 10 a.m. on 12/31. Karen shall have the children from 10 a.m. on 12/31 until school drop-off on 1/5.

iv. February/April Vacation: The parties shall share the children's February and April vacations equally. February vacation: Karen shall have the children from school conclusion the Friday before vacation week until 12 p.m. on Wednesday during school vacation week. Julie shall have the children from 12 p.m. Wednesday during vacation week until school

commences the following week. April vacation: The parties shall reverse the February vacation schedule with Julie having the first half and Karen the second.

v. Martin Luther King, Jr. Holiday Weekend: Karen shall have the children from school conclusion, the Friday before the holiday (January 16, 2015), until school drop off on the Tuesday following the holiday (January 20, 2015).

vi. Easter: Julie shall have the children from school release on Thursday, April 2, 2015 until school drop-off on Monday, April 6, 2014.

vii. Children's Activities/School Events: Both parties shall be permitted to attend any of the children's activities and school events so long as said activity/event is open to family, regardless of which party has time with the children during said activity.

21. On November 21, 2014, Julie filed an Opposition to Karen's Motion for Further Temporary Orders Dated November 12, 2014.

22. On February 3, 2015, Karen filed a Motion for Parties to Share Child Dependency Exemption for the 2014 Tax Year. On the same date, the Court (Abber, J.) denied the Motion notwithstanding the fact that Karen is not the biological, adoptive, or foster parent of either child. The Motion is denied as Karen has only paid support since May, 2014.

23. On the same date, Karen filed a Motion for Child to Engage in Therapy. Also on the same date, the Court (Abber, J.) denied the motion and noted the following: At this time, the Court questions Karen's authority to request this relief. Notwithstanding this issue, Karen has not demonstrated any need for the therapy at this time.

24. On or about June 1, 2015, Karen filed a Request to Take Judicial Notice of Karen's Prior Equity Action (Docket# MI-14E-0132-GC).

25. On or about June 4, 2015, Julie filed an Opposition to Karen's Request to Take Judicial Notice of Karen's Prior Equity Action (Docket# MI-14E-0132-GC).

26. On June 9, 2015, the parties filed a Stipulation regarding Karen's Request to Take Judicial Notice of Karen's Prior Equity Action (Docket# MI-14E-0132-GC). The parties stipulate that this Honorable Court shall take judicial notice of the prior equity action filed by Karen on October 17, 2014 (Middlesex Probate and Family Court, Docket No. MI-14E-0132-GC) and the disposition of same. On June 9, 2015, the Court (Casey, J.) entered a Temporary Order, ordering the parties to comply with the terms of their Stipulation of the same date.

27. On the same date, the parties filed the following Stipulation:

a. The parties hereby agree that their respective Proposed Judgments, Rationales,

and Affidavits shall be treated as exhibits in order to preserve the record.

b. Karen shall have vacation time on: July 18-25 at 12 p.m. and August 8-14 at 12 p.m.

c. Julie shall have vacation time on: June 27-July 4 at 12 p.m. and August 1-7 at 12 p.m.

d. Vacation time shall supersede regularly scheduled time.

28. On the same date, the Court (Casey, J.) entered a Partial Judgment, which incorporated the Partial Agreement for Judgment filed by the parties on the same date. The Partial Agreement for Judgment provides the following:

a. On February 6, 2014, Karen filed a Verified Complaint in Equity Pursuant to G. L. c. 215, § 6 To Establish De Facto Parentage and for Other Relief.

b. On May 7, 2014, Julie filed a Verified Answer and Counterclaim to Karen's Verified Complaint in Equity.

c. The Court (Kagan, J.), on May 12, 2014, ordered Karen to pay to Julie $377.00 per week for the support of Jo and Ja .

d. The Court also ordered that Julie shall continue to provide medical insurance for the children and the parties shall share equally the children's uninsured medical expense after Julie exceeds $250.00 per child.

e. Julie is female.

f. Karen is female.

g. The parties were involved in a relationship from approximately February, 2001 until November, 2013, and the parties dispute the period of time that was romantic, including Julie disputing that the relationship was a "committed" one.

h. Julie is the biological mother of two (2) children: [redacted], age 6 (DOB: [redacted]), and [redacted], age 3 (DOB: [redacted]) (hereinafter collectively "children" or by his/her first names).

i. Each of Julie's pregnancies was the result of artificial insemination using anonymous donor sperm through the provider Florida IVF.

j. Prior to Julie getting pregnant, Karen attempted to get pregnant and utilized the services of Florida IVF.

k. Karen and Julie were present for the inseminations that resulted in Julie's pregnancies with the children.

l. [redacted] and [redacted] were delivered via cesarean section.

m. Karen was present in the operating room when [redacted] and [redacted] were born.

n. The parties resided together from 2001 until early 2014. During that period, however, Julie moved out of the parties' residence from September 2008 until November 2008.

o. Both parties performed parenting roles for the children.

p. Karen has a preexisting relationship with the children and disruption of said relationship may be harmful to the children.

q. Karen meets all the factors to qualify as a "de facto" parent of the children based on Massachusetts law.

r. The parties are scheduled for trial on the following dates: April 27, 28, and May 1, 2015.

s. This Agreement does not resolve the (1) parenting plan as between the parties, (2) the issue of joint legal custody, and (3) the amount of child support. The parties acknowledge that Karen is seeking joint legal and physical custody and that Julie is not agreement with that request.

t. The parties agree to submit the issues set forth in Paragraph 19 herein on written submissions, which may include Affidavits of the parties, Child Support Guidelines, a proposed rationale, and judgment. In addition, the parties agree that the following exhibits shall be admitted into evidence as uncontested exhibits:

i. Report of the Guardian ad Litem, dated October 2, 2014;

ii. Psychological testing of the Parties performed by Stephanie Tabashneck, Psy.D.;

iii. Financial Statement of Karen, dated May 9, 2014;

iv. Financial Statement of Julie, dated May 9, 2014;

v. Financial Statement of Karen, dated April 27, 2015; and

vi. Financial Statement of Julie, dated April 27, 2015.

u. Neither party waives her right to contest the representations or contents of the GAL Report in their Affidavits, if any, submitted in accordance with this Partial Agreement for Judgment.

v. The parties ask that the Court set down this matter for an oral argument on the submissions of not longer than 30 minutes per side, with each party having a 5 minute rebuttal following the other's oral argument. The parties waive their right to any further evidentiary hearing/trial on these issues at this time, beyond the submissions described herein and the representations of counsel, and agree that the Court shall issue a Judgment on these issues.

w. Neither party waives their right to appeal the Judgment on the issues set forth in paragraphs 19-21 herein. Further, this Agreement shall not be construed as a waiver of any other appellate rights in any other matter, and the parties expressly agree that the language of this Agreement shall not make any other claims that Karen may have moot, including the claims set forth in her parentage complaint.

29. On the same date, Julie filed a Motion *in Limine* to Strike Hearsay Portions in Affidavit of Karen Dated May 31, 2015.

30. On the same date, Julie filed a Motion *in Limine* to Preclude the Submission of All Documents Attached to Karen's Affidavit Dated May 31, 2015. On July 17, 2015, the Court (Casey, J.) allowed the Motion in part as to Tab B only which shall be stricken.

31. On the same date, Julie filed a Motion *in Limine* to Preclude the Submission of IVF Florida Reproductive Associates Records and Infertility Psychosocial Assessment. On July 17, 2015, the Court (Casey, J.) allowed the Motion as the records do not comply with the requirements set forth in G. L. c. 233, § 79(G).

32. On the same date, Karen filed a Motion *in Limine* to Incorporate Julie's Response to Request for Admissions into Uncontested Facts. On July 17, 2015, the Court (Casey, J.) allowed the Motion.

33. On the same date, Julie filed a Motion *in Limine* to Prohibit Karen from Introducing Julie's Answers to Admissions as Evidence. On July 17, 2015, the Court (Casey, J.) denied the Motion.

34. On the same date, the Court (Casey, J.) entered a Temporary Order as of May 26, 2015, which incorporated a Stipulation of the parties dated May 26, 2015. The Stipulation provided, *inter alia*, that:

a. The parties shall exchange Proposed Judgments, Proposed Rationales, and Affidavits of the parties at 4:00 p.m. on June 1, 2015 via e-mail.
b. Any Motions *in Limine*, which the parties intend to file with the court, shall be served on opposing counsel no later than June 4, 2014.
c. Any and all Oppositions to any properly filed Motions *in Limine* shall be served on opposing counsel no later than June 8, 2015.
d. Service on counsel pursuant to paragraphs 2 and 3 above shall be performed electronically, via e-mail, no later than 4:00 p.m. on the deadline stated above.
e. Any submissions which are to be served on opposing counsel pursuant to paragraphs 1 and 2 of the Stipulation shall also be served by the same deadline on the court, by providing a copy, in-hand, to Judge Casey's Assistant, Olivia Contini.

35. On July 17, 2015, the Court (Casey, J.) entered an Order striking the following provisions of Karen's Affidavit and ordering Karen to submit an amended Affidavit in conformance with this Order within fourteen (14) days:

a. All references to "we" when referring to Karen and Julie together.
b. Any reference to what Karen believes Julie was "thinking" and "feeling".
c. Any references to statements which Julie may have made to others without further foundation or unless otherwise admissible.
d. All references to statements made by the minor children without further foundation.

36. On or about July 28, 2015, Karen filed an Assented-to Motion to Extend Deadline for Filing Amended Affidavit. On July 29, 2015, the Court (Casey, J) allowed the Motion.

37. On August 19, 2015, Julie filed a Motion to Strike Hearsay Portions in Amended Affidavit of Karen Dated August 7, 2015.

38. On August 24, 2015, Karen filed an Opposition to Julie's Motion to Strike Hearsay Portions in Amended Affidavit of Karen Dated August 7, 2015.

39. On August 29, 2015, the Court (Casey, J.) entered the following Order on Julie's Motion to Strike Hearsay Portions in Amended Affidavit of Karen Dated August 7, 2015:
    a. The Motion is ALLOWED as it relates to full paragraphs 63, 70, 74, 110, 113, 118, and 125 which shall be stricken in their entirety.
    b. Paragraph 71. Strike ". . . Jo asked me to attend a dental appointment during a FaceTime call."
    c. Paragraph 83. Strike everything after the word email in the third line.
    d. Paragraph 112. Strike everything after the word night in the second line.

FINDINGS OF FACT

Basic Factual Information

1. Julie was born on March 16, 1973 and is forty-two years old. She is the biological mother of two children: [redacted], born on [redacted], is seven years old; and [redacted], born on [redacted], is three years old.

2. Julie currently resides at her mother's and stepfather's home located at 26 Day Circle, Woburn, Massachusetts.

3. Julie is employed by the Arlington Public School System as a sixth grade science teacher, earning $1,365.00 per week. Julie has weekly health insurance costs of $80.11 and weekly daycare costs of $460.65.

4. Karen was born on September 11, 1968 and she is forty-seven years old. The parties stipulate that Karen is [redacted] and [redacted] de facto parent.

5. Karen currently resides at 1601 Arboretum Way, Burlington, Massachusetts.

6. Karen is the Director of Parks and Recreation for the City of Salem, earning $1,676.84 per week. Karen has weekly medical insurance costs of $29.09 and weekly dental insurance costs of $5.56.

The Parties' Decision to Create a Family

7. The parties met in Massachusetts in 2000 and began a romantic relationship in 2001. In 2002, the parties decided to move to Florida together. The parties purchased a home together in Florida in 2003. In 2005, the parties exchanged rings as a symbol of their commitment to each other.

8. The parties never married. Julie's parents are divorced and Karen does not believe that marriage is necessary to have a committed relationship. Once Julie and Karen began a

committed and long-term relationship, Karen saw having children as part of the parties' future. Therefore, Karen wanted to secure her rights as a parent as much as possible under the laws of Florida, including the following: becoming a domestic partner to Julie; naming each other as beneficiaries and guardians of the children in their respective estate documents; informing family members and medical personnel of their intentions prior to the births of the children; and informing family members and medical and educational personnel that Karen was a parent following the birth of each child. Karen did what she thought she could do to protect her rights as a parent. Since that time, Karen has come to learn that some judges in Florida allowed co-parent adoptions for same-sex couples. She did not know this at the time the children were born. Karen claims that had she been aware of this, she would have sought a co-parent adoption after the birth of each child.

9. In 2005, Karen attempted to get pregnant and utilized the services of Florida IVF. The parties equally participated in the sperm donor selection process. Specifically, the parties were looking for sperm donors with physical traits similar to Julie.

10. Karen and Julie planned to each give birth to a child with sperm from the same donor. Due to Karen's age, the parties decided that Karen would attempt to get pregnant first. Despite undergoing extensive fertility treatments, Karen was unable to get pregnant.

11. At all times during Karen's fertility treatments, the parties represented themselves to medical providers as partners who were attempting to create a family together.

12. In August of 2007, the parties decided that Julie would begin the fertility process. The parties dispute Karen's involvement in selecting the sperm donor. Julie claims that while Karen was in the room when she selected the sperm donor, she made the selection herself without considering Karen's physical attributes. Karen maintains that the parties selected the sperm donor together and that the sperm donor was chosen, in part, because he had similar physical characteristics as Karen. Regardless of which party made the ultimate selection of the sperm donor or whether that sperm donor had physical characteristics similar to Karen, the Court finds that both parties were actively involved in the selection process.

13. Through artificial insemination, Julie conceived [redacted] in November of 2007. Karen found out Julie was pregnant in December of 2007. Karen described the Christmas of 2007 as the best Christmas of her life. The parties were in Massachusetts for the holidays and informed Julie's family of the pregnancy. Thereafter, the parties and Julie's family visited Karen's family in Connecticut and informed them of Julie's pregnancy.

14. On or about April 2, 2008, the parties entered into a domestic partnership through Karen's employer, the City of Palm Beach Gardens. This allowed Karen to take time off to care for Julie and the children following each cesarean section. In addition, Karen received a family daycare discount through her employer.

15. On July 17, 2008, the parties executed an estate plan, including reciprocal Last Wills and Testaments and Living Wills. In the reciprocal Wills, the parties describe each other as partners and devised their property to each other. Additionally, in the reciprocal Living Wills, the parties list each other as the health care surrogates for one another.

16. In August of 2008, the parties jointly chose [redacted] pediatric facility. Karen recommended the practice because she knew someone who worked there. Additionally, the practice was close to Karen's work. Karen often left work, during working hours, to bring [redacted] to doctors appointments. Karen was listed as a parent for both [redacted] and [redacted] at the pediatric facility.

17. While the parties lived in Florida, Julie worked as an eighth grade science teacher and coach.

18. [redacted] was born on [redacted] via cesarean section; Karen was present in the operating room. Julie was on maternity leave from August of 2008 through December 15, 2008. During this time period, Julie took on the majority of the childcare responsibilities.

19. From September 2008 until November 2008, Julie moved out of the parties' home; she was having a relationship with another woman, Maryanne.

20. In March of 2011, Julie began a second round of fertility treatments, which led to the eventual conception of [redacted], who was born on [redacted].

21. At all times during both Karen and Julie's fertility process, the parties were represented to medical providers as partners who were creating a family together; Karen participated in the medical procedures and discussions with medical providers during Julie's fertility treatments. During the fertility process for Julie's second pregnancy, Karen injected the donor sperm into Julie, as well as administered some fertility injections.

22. Karen was present in the operating room when [redacted] was delivered via cesarean section. When each child was born, Karen was presented as the other parent and was treated as such by Julie, Julie's family, and the hospital physicians and staff.

23. Since [redacted] and [redacted] were able to speak, they referred to Julie as "Mama" and Karen as "Mommy." Karen submitted numerous cards that Julie gave her on behalf of the children, calling Karen "Mommy."

The Parties' Co-Parenting

24. In January of 2009, the parties jointly decided to enroll [redacted] in the Riverside Youth Enrichment Center for daycare. Due to the fact that Karen was a city employee, [redacted]

received a 30% discount; [redacted] eventually attended this daycare as well. The daycare was very close to Karen's work and she was primarily responsible for the children's transportation to and from the daycare.

25. In March of 2009, Julie executed an authorization allowing Karen to make medical decisions for [redacted].

26. When [redacted] was a one-year old, she was diagnosed with asthma. Throughout the first three years of [redacted] life, she required periodic Xopenex treatments. Karen administered the majority of the required morning and evening treatments. Additionally, Karen provided all of the afternoon treatments, which occurred at [redacted] daycare.

27. On August 19, 2012, Julie executed a Designation of Health Care Surrogate, giving Karen the authority to make health care decisions for [redacted] and [redacted]

28. Karen was present at [redacted] newborn screening, where he was diagnosed with a heart murmur. Additionally, Karen was present at [redacted] cardiac scan and the follow-up appointment six months later, which confirmed that [redacted] murmur was resolved.

29. Karen attended the majority of the children's doctors appointments.

30. In September of 2012, Julie moved to Massachusetts with [redacted]. They stayed at Julie's mother's and stepfather's home in Woburn, Massachusetts. [redacted] stayed in Florida with Karen until October of 2012. On November 1, 2012, Karen joined Julie and the children in Massachusetts.

31. In February of 2014, the parties moved into an apartment in Malden, Massachusetts.

32. In February of 2014, Julie refused to proceed with a co-parent adoption. Therefore, Karen filed the instant Complaint to Establish De Facto Parentage.

33. In March of 2014, the parties separated. The parties met with a child psychologist regarding parenting plans. Julie moved with the children into her mother's and stepfather's home in Woburn, Massachusetts, where she continues to reside.

34. In April of 2014, the parties discussed how to co-parent going forward; created a shared account to share photographs; discussed how to share school notices; and agreed that Karen would have the children for Easter that year.

35. The parties have a history of making joint decisions for the children, including decisions related to each child's educational, religious, and medical needs.

36. Since litigation commenced, the parties have had some difficulty cooperating with each

other. For example, Julie refused to allow Karen to attend the children's extracurricular activities which did not occur during her parenting time. Additionally, Julie refused to allow Karen to sign the children up for extracurricular activities. Despite some disagreement of the parties, they continue to co-parent the children remarkably well. Both children are doing very well in school.

37. In November of 2014, the Court made clear that Karen was permitted to attend all extracurricular activities open to the public regardless of whether the activity occurred during her parenting time. Currently, the parties both attend most of the extracurricular activities and generally sit together. If [redacted] has a sporting event, one of the parties usually plays with [redacted] while the other watches the event and then they switch half way through the event.

38. The parties share school notices, birthday party invitations, and photographs of the children.

39. At the commencement of the 2014/2015 school year, the parties walked [redacted] to first grade together.

40. Shortly before trial, the parties worked together to coordinate caring for [redacted] while she was out sick from school with a stomach virus. Julie and Karen rearranged their schedules to accommodate the other, ensuring that they were both able to attend important meetings while the other stayed home with [redacted].

41. On November 1, 2014, Karen moved from the Malden apartment to an apartment closer to the children. She currently resides in an apartment in Burlington, Massachusetts.

42. Since May of 2014, the parties have attended some of the children's medical appointments together. In August of 2014, the pediatrician complimented the way the parties worked together, despite the end of their relationship.

43. The Court does not credit Julie's allegation that Karen is controlling. On the contrary, the Court finds that the parties work well together in regard to caring for and making decisions for the children.

44. In April of 2015, the parties attended [redacted] parent-teacher conference together. [redacted] teacher introduced the parties as [redacted] moms.

45. The Court finds that throughout the children's lives, the parties have engaged in co-parenting and continue to do so to date.

46. In Julie's proposed judgment, she expresses her desire for Karen to have access to the children's medical records and providers; access to the children's educational records and

teachers; and access to the children's religious records and instructors. Additionally, Karen expresses her belief that it is in the children's best interests to spend time with Karen during various holidays.

Guardian ad Litem *Report*

47. The Court appointed Mary Lou Kaufman, LICSW (hereinafter referred to as "the GAL"), as guardian *ad litem* to investigate and report on the issues of visitation/parenting plan/access to the children, issues of legal and physical custody, and the issue of de facto parenting. The Court credits the report of the GAL and finds that her report supports the Court's finding that the parties' engaged in co-parenting throughout the children's lives and that shared legal and physical custody is in the children's best interests.

48. The GAL interviewed Julie in-person in the GAL's office for over three hours. Additionally, the GAL interviewed Julie by phone on June 11, 2014 for almost two hours.

49. Currently, Julie works at the Ottoson Middle School in Arlington, Massachusetts. She teaches sixth grade science. Typically, Julie arrives at work around 7:45 a.m. and she is finished by 2:25 p.m. On Tuesdays, Julie attends faculty meetings, which last until 3:30 p.m. Julie reported to the GAL that her school administrators are "very flexible" about allowing teachers to take time off to tend to their children's needs.

50. Julie reported to the GAL that she always knew she would have children one day. She knew she wanted two children. Julie reported to the GAL that "Karen tried to get pregnant first. We decided she was older. She is 45 now." However, she explained that she was "skeptical" about having children with Karen because they were "having trouble." In December of 2007, before Julie became pregnant, she began seeing another woman, Maryanne. Less than two months after [redacted] was born, Julie moved in with Maryanne. Julie moved back in with Karen on November 2, 2008 after she had a fight with Maryanne. She moved into the spare bedroom.

51. When the GAL asked Julie whether she considered herself to be operating as a single or in concert with Karen in regards to planning the pregnancy with [redacted], Julie answered, "both." Julie explained that on the one hand, she was "involved with another person." On the other hand, Julie "had conversations with Karen about wanting children."

52. Julie reported that during her cesarean section, she "let Karen come into the room for 10 minutes, not her mom, because only one was allowed." After [redacted] birth, Julie was on maternity leave for twelve weeks. Julie reported that [redacted] was not a fussy baby and that she slept regularly. [redacted] was healthy for her first year and then she contracted pneumonia, which led to asthma. A pulmonologist noted the importance of treating asthma flares immediately, including the use of antibiotics, an inhaler, and a nebulizer. After symptoms developed, [redacted] required three breathing treatments per day.

53. Julie reported to the GAL that Karen usually took [redacted] to and from her daycare, which was one of the facilities Karen managed. Julie asserted that "Karen was not happy to pick up all the time," in spite of its convenient location. Julie's after-school coaching duties made it impossible for her to handle pickup most of the time. Julie reported that she typically handled drop-off two days per week in the summer. Additionally, Julie reported that "Karen felt the drop-offs were hard." She implied this was because "[redacted] cried."

54. Julie expanded on [redacted] "struggle" with transitions while in daycare. [redacted] not only cried and was "clingy" when she first entered the childcare center, she had difficulty moving from one classroom to the next each year she was there. [redacted] attended daycare one or two days per week over the summer, even when Julie was home, in order to minimize her upset when she returned to daycare after the new school year started. [redacted] was also nervous at the orientation for kindergarten in the summer of 2013. Nonetheless, [redacted] made a quick and positive adjustment to kindergarten and first grade.

55. Julie reported to the GAL that [redacted] is a "nervous kind of kid" in general. "She is not the type to jump on a ride at an amusement park. She needs time to size things up first." [redacted] is a "perfectionist" who is "afraid to lose." [redacted] does not like math because she fears giving a wrong answer. According to Julie, [redacted] did well in kindergarten. Julie believes that [redacted] "is pretty smart," noting that the sperm donor's medical records indicate that he has a PhD and has no medical issues. [redacted] enjoys play dates with friends; soccer; swim lessons; and dance classes. Julie reported that [redacted] prefers dance to other sports like soccer, which place more of a premium on aggressiveness. [redacted] is a "pleaser."

56. Julie reported to the GAL that she had "no discussion whatsoever" with Karen or anyone else about the children's birth certificates. Reportedly, neither Julie nor Karen knew it was possible to have Karen's name listed on the birth certificates. Even if they had known, Julie "wouldn't have allowed it" because they "weren't in a solid relationship." The only "real conversation around adoption" occurred sometime during the first year of [redacted] life. Karen asked Julie about adoption and Julie said "no" because she did not think the relationship was "stable" enough.

57. When asked how the children came to refer to Karen as "Mommy," Julie replied that she did not remember but that they must have agreed to it. Julie said the following regarding Karen's relationship with [redacted]: "I think they get along well. I don't question their caring for each other. I think they have a good relationship. I do question her discipline and her unwillingness to accept suggestions."

58. Julie described Karen as "task-oriented" and "very organized," while acknowledging that she is not. Additionally, Julie said that Karen primarily did the grocery shopping and vacuuming. Julie preferred to play with the children than to vacuum. Julie took the

children to birthday parties as Karen preferred to stay at home. The GAL observed that based on what Julie was saying, the parties complemented each other and noted that had they been able to communicate better, they could have made a good team.

59. Julie told the GAL that Karen did more of the cooking and food shopping. Additionally, Karen mowed the lawn. Julie folded the laundry and put it away. Both Karen and Julie gave the children baths and read to the children at night. Karen took time off from work to stay with both children and/or to take them to the doctor when they were ill. Additionally, both parties took the children to their doctors appointments.

60. The GAL interviewed Karen in-person in the GAL's office on June 5 and June 11, 2014 for 5.5 hours.

61. Since the fall of 2012, Karen has worked as the Director of Parks and Recreation for the City of Salem. She works Mondays, Tuesdays, and Wednesdays from 8:00 a.m. to 4:00 p.m.; Thursdays from 8:00 a.m. to 7:00 p.m.; and Fridays from 8:00 a.m. to 12:00 p.m. Karen is able to adjust her schedule as necessary to meet the children's needs.

62. Karen reported to the GAL that she had "no reason to think there was an issue" between her and Julie when she began trying to have a child in 2005. Karen and Julie hoped that each of them would give birth to a child with sperm from the same donor. When Karen decided her effort to conceive was getting too expensive and possibly futile, Julie stopped taking Zoloft and began trying to get pregnant in 2007.

63. After Julie stopped taking Zoloft, Karen observed her to be "more secretive." Julie went from writing love poems and notes and wanting to wear rings as a sign of their commitment to each other, to going out more often without Karen.

64. Karen and Julie were back together and doing better when [redacted] was born on [redacted]. However, they broke up again a month later.

65. Karen believed that it was virtually impossible to adopt [redacted] and [redacted] under Florida law. Karen explained, "I never dreamed this would happen. I am not a person to make waves. I was told [by Julie] on many occasions, Christmas 2013, 'I will never take these kids from you.'"

66. In December 2008, after Julie returned to work after her maternity leave, Karen took a week and a half off from work to care for [redacted]. After [redacted] was first born, both parties would get up when [redacted] awoke in the middle of the night. The parties stopped this practice and began taking turns getting up with [redacted] at night. Karen believes that the parties split [redacted] infant care "pretty 50-50, except she gave [redacted] more baths." Julie got [redacted] ready for daycare in the morning and Karen drove [redacted] to and from daycare. [redacted] was in daycare Monday through Friday from 8:00 a.m. to 5:00 p.m. Julie coached

four days per week and on these days, she did not get home until 6:30 p.m. Frequently, Karen bathed, fed, and put [redacted] to bed by the time Julie got home. Karen prepared dinner for herself and Julie.

67. Regarding financial contributions, Karen paid the parties' mortgage and Julie paid for daycare. Karen typically bought the diapers, clothing, and shoes.

68. According to Karen, the parties agreed she would stay home with the children whenever they were sick. Karen took the children to their doctors appointments when they were ill because she had a more flexible work schedule than Julie. When [redacted] went through "several scary bouts of pneumonia", it was Karen who kept track of the five different medications [redacted] needed. Karen made a chart to help Julie keep track. Additionally, Karen administered the necessary daytime treatment at [redacted] daycare.

69. Similar to Julie, Karen observed [redacted] to have trouble transitioning from one classroom to the next until she was approximately four years old. [redacted] is better now with transitions and she went off to her kindergarten class without "even a wave." Karen thinks that [redacted] does "fine" transitioning between her and Julie. Reportedly, [redacted] is mainly troubled by how little she sees Karen. [redacted] asked Karen on June 4, 2014, "who decides when I can come stay with you?" Karen told [redacted], "Mama and I are trying to work things out. I love you just as much." [redacted] asked why she didn't do "seven sleeps" at both houses.

70. When the parties decided to move back to Massachusetts in 2012, Karen believed her relationship with Julie was still romantic and committed, but "there was not a lot of intimacy." Karen implied that Julie's relationship with [redacted] former preschool teacher, Alicia Gusto, might have had something to do with the parties' relationship problems in Massachusetts.

71. On June 14, 2014, the GAL visited Julie at her mother's and stepfather's home in Woburn. The GAL arrived at 3:40 p.m. and departed at 5:10 p.m. The GAL had no concerns regarding the home, noting that there was plenty of space for everyone.

72. On June 25, 2014, the GAL visited Karen at her apartment in Malden. The GAL arrived at 4:30 p.m. and departed at 6:00 p.m. During the home visit, the GAL asked [redacted] what it is like having two homes. [redacted] replied, "It's hard." When asked what was hard about it, [redacted] said, "I don't see as much of Mommy." [redacted] said she does not get to spend much time at Mommy's cottage. She sees less of her cousins "on that side" too. Whenever [redacted] finds herself in the vicinity of the cottage on her way to somewhere else, she "thinks about it, with tears in [her] eyes, and gets sad."

73. On June 20 and September 18, 2014, the GAL spoke to Afi Afshar, the Director of Arlington Infant Toddler Childcare. Ms. Afshar told the GAL that "both Karen and Julie

are awesome and loving. I can say only positive things."

74. On July 1 and 6, 2014, the GAL spoke to Maria Lise Royer, PhD. The parties engaged Dr. Royer for couple's counseling in January of 2013. Dr. Royer reported the following: "There was no discussion about adoption" in the sessions. "Karen always talked as if they were hers, as if she had given birth." Dr. Royer said she "had to look at her notes to recall it was Julie who had the children." She believed both Julie and Karen were very invested [in the children], "but Karen maybe more . . . Karen had more responsibility for the children in January 2013."

75. On March 13, 2014, the GAL spoke to Leslie Sands, LICSW. Ms. Sands is Karen's therapist. Based on her discussions with Karen, Ms. Sands "doesn't see Karen as a control freak. [Karen] is sad, disappointed, and confused about why things didn't work out with Julie. She does not appear to be carrying a torch for Julie. She wants Julie in the [parenting] picture. Karen wants more time, more equal time."

76. On July 3, 2014, the GAL spoke to Jana Sax, LICSW. The parties engaged Ms. Sax to counsel them on how to ease the children into their separation. Ms. Sax reported the following to the GAL: "Julie expressed concerns that came across as 'ungrounded.' Julie could not point to any incidents that made a case for her fear Karen would try to take the children away from her. 'Julie came across as rigid.' She did not assert Karen was not a 'real parent.' Ms. Sax believed Karen was 'very involved with the two children in the past.' It appeared Julie did not want Karen to have any 'delineated parenting time.' Julie wanted contact between Karen and the children to be at Julie's discretion. Ms. Sax thought Julie came across as 'rigid'."

77. On July 9, 2014, the GAL spoke to Ellen Austen, LICSW. Ms. Austen is Julie's therapist. Ms. Austen diagnosed Julie with Specific Phobia, Situational. Julie is very anxious and fears closed spaces. She cannot tolerate public transportation, ski lifts, traffic, elevators, and other closed spaces. Ms. Austen is working with Julie on breathing and visualization techniques to help her gain control over her symptoms. Ms. Austen stated that she is "amazed at how resilient [Julie] is."

78. On July 15, 2014, the GAL spoke to Marie Walsh, MD. Dr. Walsh is a friend of Julie's family. She described Julie's parenting style as follows: "Julie's parenting style is very loving, nurturing. She is a teacher. She encourages them to learn from the environment, to have fun learning. She gets good reviews as a teacher. She has a good handle on [child] development. She encourages them to develop into good people. She always had their best interests in mind."

79. On July 17, 2014, the GAL spoke to Jim Nicholson, Julie's stepfather. Mr. Nicholson spoke about the parties' parenting styles as follows: "Asked about the parties' parenting, Mr. Nicholson said Karen 'was much more of a disciplinarian.' Sometimes he thought

she was 'too focused on [redacted] doing the right thing.' If [redacted] did not use 'proper manners' Karen spoke to her in a strict voice. She did not yell, but she 'reprimanded and then redirected.' Julie wouldn't say anything to Karen when this occurred. They did not argue about how they dealt with the children. Julie would be much more likely to simply redirect the children. Karen was 'quicker to intervene.' Julie disciplined in a more easy going way."

80. On August 5, 2014, the GAL spoke to Kimberly Cobb, Karen's sister. Ms. Cobb reported the following to the GAL: "Focusing on her contact with the parties and the children, Ms. Cobb reported she went to Florida with her mother and sister to stay for a week soon after [redacted] birth. Subsequently she and her family tried to get together with the children and their parents as often as possible, usually about four times a year. They got together in Maine and Hampton Beach several years in a row when Julie and Karen traveled north. She remembered pitching tents at Julie's Mom's house. She and her family took day trips with Karen, Julie and the children. Her children used to spend a week at a time with Karen and Julie. Reportedly they referred to Julie as 'Uncle Julie.' She never questioned either one's ability to care for her children." Ms. Cobb reported that her son, Kyle, is [redacted] godfather and her daughter, Kayla, is [redacted] godmother.

81. On August 22, 2014, the GAL interviewed Charlotte Presensky. Ms. Presensky worked with Karen in Florida and she and her partner used to be close friends with the parties. Ms. Presensky reported that she and her partner saw Julie and Karen at least weekly until the couple moved back to Massachusetts in 2012. Ms. Presensky held [redacted] within twenty-four hours of her birth. On the day Ja was born, Ms. Presensky cared for [redacted]. Ms. Presensky was listed as an emergency contact for [redacted] and [redacted] at the daycare center in Florida. Additionally, Ms. Presensky and her partner witnessed Julie's Designation of Health Care Surrogate form dated August 19, 2012.

82. In response to whether the parties presented themselves as partners, Ms. Presensky stated the following, "Oh absolutely [Karen and Julie] presented as partners. They shared a bedroom." Ms. Presensky recalled sitting outside with the parties and discussing adoption. Everyone agreed that "Florida is a horrible state for gay parents." Ms. Presensky could not recall discussing adoption in Massachusetts with the parties, but she "understood a reason for the move was adoption." Julie referred to Karen's sisters as "aunties." Additionally, Karen's parents were the children's "grandparents."

83. Ms. Presensky emphasized that she has "no concern whatsoever about [Julie or Karen's] parenting." "Both are good moms." Ms. Presensky stressed that both parties did whatever was needed for the children. When asked if she found Karen rigid, Ms. Presensky reported the following: "[Karen] has strong beliefs. I never found her to be rigid. We worked together. She is strong-willed, but she never diminished or dismissed another person. She doesn't dismiss a person who holds a different belief." Ms. Presensky concluded her conversation with the GAL by stating the following: "All the people on

both sides are equally aunts and uncles and grandparents. I saw all of them. Julie's parents referred to the other parents as grandparents. They were all equally excited to have children. If Julie called me I'd be a friend to her. [redacted] birthday is coming. Some day this will work out, and I will get a chance to see [redacted] again. I feel like her aunt. I love them both."

84. On August 26, 2014, the GAL spoke to Laura Haase, a friend of Karen's. When the parties moved to Florida, Ms. Haase came to know Julie very well also. Ms. Haase reported that she was part of the conversation when Karen and Julie discussed having two children together. They planned for Karen to have the first child and Julie to have the second one. They wanted the same donor for both. Ms. Haase recalled that "Karen began AI in 2006. They asked Ms. Haase to be a godparent. Karen was disappointed when she could not carry a child. The procedures were getting too expensive to persist. Julie was nervous at first about becoming pregnant. Ms. Haase said she was shocked the breakup became contentious over the kids."

85. Ms. Haase discussed the parties' parenting as follows: "It was Mama and Mommy. The interaction with the kids was two parents co-parenting. They co-parented nicely. Without a doubt the kids looked on the two of them as co-parents." Ms. Haase knew that Karen and Julie had problems as a couple, but she does not believe that those problems made them roommates. Additionally, Ms. Haase stated that "they made a decision to have kids as a family."

86. On September 17, 2014, the GAL spoke to Lucille Nicholson, Julie's mother. Ms. Nicholson provided the GAL with the following description of how the parties' co-parented while they lived in Florida: "[Ms. Nicholson] knew [redacted] went to daycare and came home with Karen in Florida. She said, 'Karen did most of the cooking while Julie was playing with [redacted]. Karen did errands. Julie went to the park with [redacted]' Ms. Nicholson reported [that] they divided the other chores like going to the supermarket and buying the children's clothing equally. 'Either one did it.' She did not think either parent was 'neglectful.' 'They both insure the children's care. They did things, got it done, and could count on each one to make sure the kids got what they needed.'" Regarding how the children are handling the current parenting schedule, Ms. Nicholson stated that "she doesn't see an issue with transitions for [redacted]. When they spent the week with Karen on vacation and she dropped them off he was upset at mommy leaving him. More recently it has not been an issue. She does not see any signs of stress in either child."

87. In her report, the GAL notes that children "Jo 's age generally have an easier time accepting two residences than younger children or much older children do. Assuming both parties have solid parenting experience, manageable work commitments, live reasonably close to one another, and are capable of communicating effectively, children [redacted] age benefit from spending the maximum amount of time possible with each parent." Children Ja 's age "usually can tolerate being away from either parent for two

to three days if they have a solid attachment to both of them. Depending on their temperament, and assuming normal development, they can tolerate a shared parenting plan *if* both parents have been involved in every aspect of their care before separation. Having an older sibling, to whom the child is strongly attached, typically helps ease transitions."

88. Julie signed a notarized Employee Affidavit of Domestic Partnership in April 2008, four months before [redacted] was born, and in February 2012 soon after Ja was born. The children's school enrollment forms, from 2008 to 2013, list Karen as both children's parent/guardian. The sign-out sheets for daycare indicate Karen is the one who most often signed them out in Florida.

89. Virtually all of the collaterals the GAL spoke to, including Julie's mother and stepfather, reported that Karen was at least as involved as Julie was in caring for the children. The GAL is convinced that the parties will find co-parenting easier than answering [redacted] and [redacted] questions down the road about why Mommy was not more involved in their lives

90. The GAL recommended that the parties share legal custody of the children and that they have equal parenting time, with as many consecutive days with each parent, and as few days apart from a parent, as possible.

RATIONALE

On February 6, 2014, Karen filed a Verified Complaint in Equity Pursuant to G. L. c. 215, § 6 To Establish De Facto Parentage and for Other Relief. On June 9, 2015, the parties filed a Partial Agreement for Judgment on Plaintiff, Karen Partanen's Verified Complaint in Equity Pursuant to G. L. c. 215, § 6 To Establish De Facto Parentage Dated February 6, 2014. The Partial Agreement for Judgment set forth the facts outlined above and settled all issues except the following: (1) the parenting plan as between the parties; (2) the issue of joint legal custody; and (3) the amount of child support.

Legal Custody

"In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement pursuant to section eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests." G. L. c. 209C, § 10(a). The Court finds that prior to the commencement of this proceeding, the parties exercised joint responsibility for the children. Karen drove the children to and from daycare and was often the parent who stayed home with the children when they were sick. Julie often was responsible for taking the children to the park and birthday parties. Both parties bathed and fed the children. Additionally, both parties were

responsible for making decisions regarding the children's medical and educational care. The children's school enrollment forms from 2008 through 2013 list Karen as a parent/guardian. Julie executed authorizations allowing Karen to make medical decisions for the children and both parties consistently attended the children's medical appointments.

In addition to finding that the parties exercised joint responsibility for the children prior to the commencement of this proceeding, the Court also finds that parties have the continued ability to communicate and plan with each other concerning the children's best interests. Since litigation commenced, the parties have had some difficulty cooperating with each other. For example, Julie refused to allow Karen to attend the children's extracurricular activities which did not occur during her parenting time. Additionally, Julie refused to allow Karen to sign the children up for extracurricular activities. Despite some disagreement of the parties, they continue to co-parent the children remarkably well. Since May of 2014, the parties have attended some of the children's medical appointments together. In August of 2014, the pediatrician complimented the way the parties worked together, despite the end of their relationship. Also shortly before trial, the parties worked together to coordinate caring for [redacted] while she was out sick from school with a stomach virus. Julie and Karen rearranged their schedules to accommodate the other, ensuring that they were both able to attend important meetings while the other stayed home with Jo .

Shared legal custody is defined as the "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." G. L. c. 208, § 31. Throughout the children's lives, Julie and Karen have always had mutual responsibility and involvement in major decisions regarding the children's welfare. The parties continue to communicate and plan with each other concerning the children's best interests. Therefore, the Court finds that it is in the children's best interests to have the benefit of both their parents involvement in the major decisions concerning their welfare. The parties agree that Karen is a de facto parent to the children. However, Julie argues that it is not within the power of the Court to award shared legal custody to a de facto parent. The Court disagrees.

General Equity Jurisdiction of the Probate and Family Court

General laws chapter 215, section 6 provides the general equity jurisdiction of the Probate and Family Court. Pursuant to the Court's equity jurisdiction, the Supreme Judicial Court has recognized the status of "de facto parent," holding that a person who is neither a biological nor an adoptive parent of a child may still be accorded certain parental rights. E.N.O. v. L.M.M., 429 Mass. 824 (1999). The SJC provided that in certain situations, a child may have developed a "significant preexisting relationship" with an adult who is not the legal parent of the child to the extent that when determining the best interest of the child, interfering with said relationship could cause measurable harm to the child. In re Care and Protection of Sharlene, 445 Mass. 756, 767 (2006). "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 child's 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).

The SJC has not yet specifically reached the issue of whether a de facto parent may be awarded shared legal and physical custody. However, in R.D. v. A.H., the Court found that R.D. qualified as a de facto parent to the child in question. Nevertheless, the Court found that the proper standard for awarding custody of the child to R.D. was not whether such an award would be in the child's best interests, but rather whether R.D. carried her burden "of proving by clear and convincing evidence that A.H. was 'legally unfit' to parent the child." 454 Mass. 706, 711 (2009). In R.D. v. A.H., the child's biological parents were A.H. (father) and R.P. (mother). Id. at 707. For the first fourteen months of the child's life, he lived with relatives and occasionally his mother. Id. A.H. met R.D. in the spring of 1998. Id. In the fall of 1998, A.H. moved into R.D.'s apartment and began an intermittent relationship with her that lasted until April of 2004. Id. The relationship was volatile and included some acts of domestic violence by A.H. against R.D. Id. at 708. In early 2000, A.H. brought the child to live with him in R.D.'s apartment. Id. On January 18, 2001, A.H. was granted sole legal and physical custody of the child. Id. On May 7, 2002, A.H. and R.D. filed a joint petition for the adoption of the child; R.P. opposed the adoption. Id. The trial on the adoption matter never took place because on December 5, 2003, A.H. took the child with him to Florida. Id. On December 8, 2003, R.D. filed a petition for permanent guardianship of the child, along with an ex parte motion to be appointed temporary guardian. Id. The judge appointed R.D. temporary guardian for a period of three months and ordered A.H. to surrender the child to R.D., with the proviso that A.H. could be heard on the issue of custody on forty-eight hours' notice. Id.

Thereafter, A.H. surrendered the child to R.D.'s custody and between December 8, 2003 and June 8, 2004, A.H. agreed to extend R.D.'s temporary guardianship on two separate occasions. Id. In June of 2004, A.H. filed a motion to terminate the guardianship and to relocate with the child to Florida. Id. The trial on the guardianship petition did not begin until November 30, 2005. Id. Throughout the course of the litigation, R.D.'s appointment as temporary guardian remained in effect. Id. at 710. The trial judge found that R.D. had been the primary caretaker of the child for a number of years and was a de facto mother to the child. Id. However, the judge also found that A.H. had been consistently involved in the child's life, had actively participated in his care when living with R.D. and the child, and loved the child. Id. The judge concluded that R.D. had not proved A.H. was currently unfit as a parent, and that A.H. was therefore entitled to custody. Id. Accordingly, she dismissed R.D.'s guardianship petition and awarded sole legal and physical custody of the child to A.H. with visitation rights to R.D. Id. R.D. argued on appeal that because the judge found R.D. to be a de facto parent, the judge was required to determine the question of custody by focusing solely on a determination of the child's best interests. Id. R.D. argued that G. L. c. 209C, § 10(a) was applicable to her situation. Id. at 714.

In R.D. v. A.H., the SJC construed the word "parent" in G. L. c. 209C, § 10 to mean a

biological parent. Id. Therefore, the Court found that G. L. c. 209C, § 10(d) to be the applicable standard for deciding whether to award custody to a de facto parent. Id. Section (d) provides the following: "If a person who is not a parent of the child requests custody, the court may order custody to that person if it is in the best interests of the child and if the written consent of both parents or the surviving parent is filed with the court. Such custody may also be ordered if it is in the best interests of the child and if both parents or the surviving parent are unfit to have custody or if one is unfit and the other files his written consent in court." G. L. c. 209C, § 10(d). The SJC found neither of the situations to apply in the case of R.D. and A.H. The biological parent, A.H., did not consent to R.D. having custody of the child and the court found that R.D. failed to prove that A.H. was an unfit parent.

The Court finds that the present case is distinguishable from R.D. v. A.H. Unlike R.D., Karen did not enter the children's lives after they were several years old. Karen was part of the decision to create a family. Karen and Julie presented themselves to medical providers as partners who were starting a family. Although at various points prior to this litigation, marriage and adoption were options for the parties, both these options require assent. Karen swore in her affidavit that she was not aware that judges in Florida were approving same-sex adoptions at the time the children were born. Thereafter, when the parties moved to Massachusetts, Julie refused to consent to Karen's adoption of the children. Both parties have been equal parents to the children throughout their lives and should be afforded equal parental rights upon their separation. The Court finds the authority to make such an award in the Court's equity jurisdiction. Unlike R.D., who brought her petition for custody under the guardianship statute, Karen has brought a Complaint to Establish De Facto Parentage pursuant to the Court's equity jurisdiction. There is no dispute that Karen is a de facto parent. There is a dispute, however, over whether the Court has the authority to award shared legal custody to a de facto parent.

In E.N.O. v. L.M.M., the SJC found that the "Probate Court's equity jurisdiction is broad, extending to the right to authorize visitation with a child. This is because the Probate Court's equity jurisdiction encompasses 'the persons and estates of infants.'" 429 Mass. 824, 827 (1999). "The Court's duty as parens patriae necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation." Id. at 828. The Court finds that in order to protect the best interests of [redacted] and [redacted], the Court must extend its equity jurisdiction to award the children's parents shared legal custody. Both parties made joint decisions for the children in the past and have the ability to do so going forward. It is in [redacted] and [redacted] best interests to have the benefit of both of their parents having a say in the decisions regarding their well-being.

Other jurisdictions have held that de facto parents have the same rights and responsibilities as a biological or adoptive parent, including the right of shared legal custody if it is in the child's best interests. For example, in In re Parentage of L.B., the Supreme Court of Washington held that a "*de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise. As such, recognition of a person as a child's *de facto*

parent necessarily 'authorizes [a] court to consider an award of parental rights and responsibilities . . . based on its determination of the best interest of the child.' A *de facto* parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the interests of the child at the center of any dispute." In re Parentage of L.B., 155 Wash.2d 679, 708-709 (2005) (internal citations omitted). Additionally, numerous other states have authorized de facto parents to be awarded custody based on the best interests of the children. See Pitts v. Moore, 90 A.3d 1169, 1181 (2014) (Supreme Judicial Court of Maine held the following: "A determination that a person is a de facto parent means that he or she is a parent on equal footing with a biological or adoptive parent, that is to say, with the same opportunity for parental rights and responsibilities."); Smith v. Guest, 16 A.3d 920, 932 (2011) ("The Delaware General Assembly has expressly decreed that *de facto* parents are legal 'parents' who have standing to petition for custody.").

In a footnote of a recent unpublished decision of the Appeals Court of Massachusetts, the Court suggested that the issue of whether a de facto parent may be awarded custody is still an undecided question. Smith v. Williams, 81 Mass. App. Ct. 1109, *1 (2012) (in an unpublished memorandum and order issued pursuant to rule 1:28) ("Noting that a de facto parent, in appropriate circumstances, may be awarded visitation with a child when it is in the child's best interests, see, e.g *E.N.O. v. L.M.M.*, 429 Mass. 824, 828-832, cert. denied, 529 U.S. 1005 (1999), Smith asserts briefly that the rationale in *E.N.O.* should, in logic, apply to 'custody' as well. She points to certain cases from other jurisdictions which, she asserts, support her view. We need not and do not consider Smith's cursory argument on this difficult and complex question. Among other things, Smith fails to respond in any meaningful way (if at all) to the alternative rationales proffered by the probate judge in granting summary judgment, including questions of constitutional import."). The Court does not find that the award of shared legal custody to a de facto parent restricts the biological or adoptive parent's fundamental right, as a fit parent, to the custody of her child.

In E.N.O. v. L.M.M., the SJC provided the following analysis: "A parent's liberty interest in her relationship with her child is grounded in art. 10 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution. Parental rights, however, are not absolute." 429 Mass. 824, 832 (1999). "Indeed, postadoption visitation by members of an adoptee's natural family is constitutionally permissible, *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, supra,* as is visitation by grandparents." Id. at 833. The Court "must balance the defendant's interest in protecting her custody of her child with the child's interest in maintaining her relationship with the child's de facto parent. The intrusion on the defendant's interest is minimal. What tips the scale is the child's best interests." Id. Similar to an award of visitation to a de facto parent, an award of shared legal custody to a de facto parent results in minimal intrusion on a parent's liberty interest in her relationship with her child when compared to the child's best interest. It is in [redacted] and [redacted] best interests to have both their parents involved in the important decisions in their lives. Historically, Karen and Julie have always jointly made decisions regarding the children's medical and educational care. Therefore, since it is in the children's best interests to have this practice continue going forward,

the intrusion on Julie's liberty interest is slight and is outweighed by the best interests of the children. "The first and paramount duty of courts is to consult the welfare of the child." Youmans v. Ramos, 429 Mass. 774, 782 (1999).

The Paternity Statute Should be Applied in a Gender-Neutral Manner

General laws chapter 209C, § 6(a)(4) provides the following: "In all actions under this chapter a man is presumed to be the father of a child and must be joined as a party if: (4) while the child is under the age of majority, he, jointly with the mother, received the child into their home and openly held out the child as their child." General Laws chapter 4, section 6 provides the following: "In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute: words of one gender may be construed to include the other gender and the neuter." Therefore, a woman could be presumed to be the mother of a child if while the child is under the age of majority, she, jointly with the mother, received the child into their home and openly held out the child as their child.

The New Hampshire paternity statute used to provide the following: "Notwithstanding any other provision of law, a man is presumed to be the father of a child if: While the child is under the age of majority, he receives the child into his home and openly holds out the child as his child." RSA 168-B:3, I(d) (2002). Additionally, the New Hampshire legislature instructed that in construing all statutes, "words importing the masculine gender may extend and be applied to females," "unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute." In re Guardianship of Madelyn B., 98 A.3d 494, 498 (2014). In In re Guardianship of Madelyn B., the New Hampshire Supreme Court held that the policy goals of ensuring legitimacy and support would be thwarted if our interpretation of RSA 168-B:3 failed to recognize that a child's second parent under the statute can be a woman. Without that recognition, a child in a situation similar to Madelyn's could be entitled to support from, and be the legitimate child of, only her birth mother." Id. at 500.

The New Hampshire Supreme Court reasoned that two "adults—Melissa and Susan—intentionally brought Madelyn into the world and held her out as their child; we cannot read RSA 168-B:3 so narrowly as to deny Madelyn the legitimacy of her parentage by, and her entitlement to support from, both of them." Id. Additionally, the Court noted that "paternity presumptions are driven, not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family. . . . Accordingly, in some cases, we have refused to allow a presumption of paternity to be rebutted by proof of biological paternity." Id. The Court also noted that In the Matter of J.B. v. J.G., it "held that the petitioner—who was listed as the father on the child's birth certificate, had filed an affidavit of paternity, had a child support order entered against him, and had 'consistently maintained contact with the child'—had 'standing to seek full parental rights and responsibilities under RSA chapter 461-A' notwithstanding that paternity testing had confirmed he was not the child's biological father." Id. at 501 (quoting In

the Matter of J.B. v. J.G., 953 A.2d 1186 (2008)).

The New Hampshire Supreme Court found that Susan "adequately pleaded that she received Madelyn into her home and openly held Madelyn out as her child." Susan and the biological mother, Melissa, "planned to have and raise children together. They prepared Madelyn's nursery together in the home they had jointly purchased because they 'thought it would be a good place to raise a family.' When Madelyn was born, Susan was in the delivery room. She alleges: 'from the very beginning, Maddie, Melissa, and I were a family. Melissa was the 'Mommy,' and I was the 'Momma.'" Id. at 501-502. In the present case, Karen similarly was a part of the children's lives from their birth. She was present in the operating room when both children were delivered via cesarian section. Karen, Julie, and the children were a family from the start of the children's lives; the children refer to Julie as "Mama" and Karen as "Mommy."

Similar to the New Hampshire Supreme Court, Massachusetts has refused to allow a presumption of paternity to be rebutted by proof of biological paternity. In Matter of Walter, the SJC held that the trial court's "finding, that an adjudication of paternity in favor of the parent not asserting the claim, with no apparent interest in the child and who was not married to the child's mother, is not in the best interest of the child where the presumptive father is willing and able to raise and support the child, is clearly warranted if not compelled." Matter of Walter, 408 Mass. 584, 589 (1990). Although in Hunter v. Rose, the non-biological mother was presumed to be the child's parent because the child was born during the parties' marriage, it is still important to note that the SJC applied a gender neutral construction to the paternity statute. 463 Mass. 488, 493 (2012) (holding that under "Massachusetts law, children born into a legal spousal relationship are presumed to be the children of both spouses" despite the use of the male pronoun in the statute).

The Court acknowledges that Karen filed a Complaint to Establish Parentage pursuant to G. L. c. 209C, § 6(a)(4), among other statutory provisions, and that said Complaint was dismissed. However, because of the fact that Karen filed her Complaint to Establish De Facto Parentage pursuant to the Court's equity jurisdiction, seeking legal custody, the Court considered all relevant statutory a non-statutory support for Karen's assertion that shared legal custody is in the children's best interests.

Child Support

The Court applied the Massachusetts Child Support Guidelines for when two parents share physical custody approximately equally. First, the Court calculated the child support guidelines with Julie as the recipient. The Court credited Julie for $461 per week in child care costs paid and $80 per week in health insurance costs paid. Additionally, the Court credited Karen for $29 per week in health insurance costs paid and $6 per week in dental insurance costs paid. This resulted in a weekly child support order from Karen to Julie in the amount of $405. Next, the Court calculated the child support guidelines with Karen as the recipient. The Court

applied the same credits as listed above and this resulted in a weekly child support order from Julie to Karen in the amount of $199. The difference in the calculations is $206 and therefore, Karen shall pay to Julie $206 per week as child support.

CONCLUSIONS OF LAW

1. "In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement pursuant to section eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests." G. L. c. 209C, § 10(a).

2. Shared legal custody is defined as the "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." G. L. c. 208, § 31.

3. General laws chapter 215, section 6 provides the general equity jurisdiction of the Probate and Family Court. Pursuant to the Court's equity jurisdiction, the Supreme Judicial Court has recognized the status of "de facto parent," holding that a person who is neither a biological nor an adoptive parent of a child may still be accorded certain parental rights. E.N.O. v. L.M.M., 429 Mass. 824 (1999).

4. The SJC provided that in certain situations, a child may have developed a "significant preexisting relationship" with an adult who is not the legal parent of the child to the extent that when determining the best interest of the child, interfering with said relationship could cause measurable harm to the child. In re Care and Protection of Sharlene, 445 Mass. 756, 767 (2006).

5. "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 child's 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).

6. In E.N.O. v. L.M.M., the SJC found that the "Probate Court's equity jurisdiction is broad, extending to the right to authorize visitation with a child. This is because the Probate Court's equity jurisdiction encompasses 'the persons and estates of infants.'" 429 Mass. 824, 827 (1999).

7. "The Court's duty as parens patriae necessitates that its equitable powers extend to

protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation." Id. at 828.

8. In E.N.O. v. L.M.M., the SJC provided the following analysis: "A parent's liberty interest in her relationship with her child is grounded in art. 10 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution. Parental rights, however, are not absolute." 429 Mass. 824, 832 (1999). "Indeed, postadoption visitation by members of an adoptee's natural family is constitutionally permissible, *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, supra,* as is visitation by grandparents." Id. at 833.

9. The Court "must balance the defendant's interest in protecting her custody of her child with the child's interest in maintaining her relationship with the child's de facto parent. The intrusion on the defendant's interest is minimal. What tips the scale is the child's best interests." Id.

10. "The first and paramount duty of courts is to consult the welfare of the child." Youmans v. Ramos, 429 Mass. 774, 782 (1999).

11. General laws chapter 209C, § 6(a)(4) provides the following: "In all actions under this chapter a man is presumed to be the father of a child and must be joined as a party if: (4) while the child is under the age of majority, he, jointly with the mother, received the child into their home and openly held out the child as their child."

12. General Laws chapter 4, section 6 provides the following: "In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute: words of one gender may be construed to include the other gender and the neuter."

13. In Matter of Walter, the SJC held that the trial court's "finding, that an adjudication of paternity in favor of the parent not asserting the claim, with no apparent interest in the child and who was not married to the child's mother, is not in the best interest of the child where the presumptive father is willing and able to raise and support the child, is clearly warranted if not compelled." Matter of Walter, 408 Mass. 584, 589 (1990).

14. Although in Hunter v. Rose, the non-biological mother was presumed to be the child's parent because the child was born during the parties' marriage, it is still important to note that the SJC applied a gender neutral construction to the paternity statute. 463 Mass. 488, 493 (2012) (holding that under "Massachusetts law, children born into a legal spousal

relationship are presumed to be the children of both spouses" despite the use of the male pronoun in the statute).

15. "Where two parents share equally, or approximately equally, the financial responsibility and parenting time for the child(ren), the child support shall be determined by calculating the child support guidelines twice, first with one parent as the Recipient, and second with the other parent as the Recipient. The difference in the calculations shall be paid to the parent with the lower weekly support amount." Massachusetts Child Support Guidelines, Section II.D. Parenting Time, June 12, 2013.

Dated: 9/21/15

John D. Casey, First Justice
Norfolk Probate and Family Court
Sitting by designation