



## THE CASE FOR INCLUSION

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### Probate & Family Court Grants Shared Custody to De Facto Parent for First Time

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On September 21, 2015, in what may prove to be a landmark decision in Massachusetts, the Middlesex Division of the Probate and Family Court granted a de facto parent joint legal and joint physical custody with the legal parent of two minor children. So what is a de facto parent?

“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. . .” *E.N.O. v. L.M.M.*, 429 Mass. 824, 829 (1999). The Parties entered into a domestic partnership in Florida and carefully planned how their family would be created. They relocated to Massachusetts at least in part to secure legal protections for their family unit. The Parties agreed that the non-biological parent was a de facto parent in this instance. She had been involved in the decision to start a family, she actively participated in the insemination process, the children called her “mommy” and she raised both children as her own throughout their entire lives.

Now the most important question, how can the Court order a legal parent to share custody of his or her children with a person who is neither a biological nor adoptive parent of that child or children? The Court relied on its equitable powers and extended its equity jurisdiction to award the children’s parents shared legal custody. The Court wrote extensively about the parents’ ability to make joint decisions for the children both prior to and during litigation. Among others, the Court noted that the de facto parent often stayed home with the children when they were sick; that both parties bathed and fed the children; and that they exercised joint decision making regarding the children’s medical and educational care. The Court went on to find that the “parties have the continued ability to communicate and plan with each other concerning the children’s best interests” noting that they have co-parented extremely well and have continued to jointly attend the children’s medical appointments.

For these reasons, the Court decided that it was in the best interests of the children “to have the benefit of both their parents involvement in the major decisions concerning their welfare.” Ultimately, the Court concluded that the

biological or adoptive parent's fundamental rights, as a fit parent, would not be restricted by an award of joint legal custody to the de facto parent.

In addition to its equitable powers, the Court also considered the presumption of fatherhood under M.G.L. c. 209C. Applying the statute in a gender-neutral manner, the Court concluded that "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 their child into their home and openly held the child out as their child." Thus, under both its equitable powers and its authority under 209C, the Court determined an award of joint custody was appropriate and in the best interests of the children.

It, however, remains to be seen whether the Appeals Court or the SJC will agree with the Middlesex Probate and Family Court.