

In a first, de facto parent is granted shared custody

By Brandon Gee

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A woman is entitled to shared custody of two children she jointly raised during and after a same-sex relationship with their biological mother, a Probate & Family Court judge has ruled in a case of first impression.

While the parties agreed that the plaintiff qualified as a “de facto parent” to the children under Massachusetts case law, the defendant biological mother argued that it was not within the power of the court to award shared legal custody to a de facto parent.

Judge John D. Casey disagreed.

“Both parties have been equal parents to the children throughout their lives and should be afforded equal parental rights upon their separation,” he wrote. “The Court finds the authority to make such an award in the Court’s equity jurisdiction.”

The 36-page decision is *Partanen v. Gallagher*, Lawyers Weekly No. 15-005-15. The full text of the ruling can be ordered at masslawyersweekly.com.

New ground

Lawyers say the ruling is the first in Massachusetts to award joint child custody to a de facto parent.

“The dispute they brought to the judge was not whether she was a de facto parent, but, given her de facto status, was she able to share custody?” said Boston’s Pasquale DeSantis, a family law practitioner who was not involved in the case. “To date, no court has given a de facto parent shared custody or sole custody.”

The plaintiff was represented by Elizabeth A. Roberts of Boston and Teresa M. Harkins La Vita of Danvers. They and other lawyers who lauded the decision said it helps fill a statutory gap in Massachusetts for dealing with custody issues that arise when unwed same-sex couples — specifically those who use assisted reproductive technology to have children — separate.

Prior to Casey’s decision, La Vita said, non-biological parents were treated as second-class parents.



ELIZABETH A. ROBERTS
Co-counsel for prevailing party

“She doesn’t fit into the statutory scheme in the way other couples do,” La Vita said of her client. “The judge had to use equity here because the Legislature hasn’t acted for people like her yet.”

La Vita said she hopes the decision will prove useful to other parents in similar situations who might now point to it in pushing for shared custody instead of settling for visitation.

“It’s given family law attorneys a good beacon to guide our ship into port when we have these kind of cases,” Winthrop family lawyer Edward L. Amaral Jr. said.

Boston lawyer Mary Beth L. Sweeney, who was co-counsel for the defendant biological mother, said she, too, expects the case to impact other litigants — but in a negative way.

“It’s a monumental deviation from existing law,” Sweeney said. “The question going forward is whether such a drastic decision should be dictated by the judicial branch, or the Legislature through a change of the law.”

Sweeney also rejected attempts to cast the issue as one of gay rights, claiming the decision will “weaken” biological parents’ rights regardless of their situation.

“It’s not only gays and lesbians who can seek

de facto parentage,” Sweeney said.

As defined in the 1999 Appeals Court case *E.N.O. v. L.L.M.*, 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.”

Sweeney warned that Casey’s decision could create a slippery slope by encouraging de facto parents — no matter the age of the children or how long the de facto parent has been in their lives — to seek custody after their relationships with biological parents end.

She further rejected the notion that there is a gap that needs filling in Massachusetts, noting that the parties could have taken any number of steps to provide the plaintiff with parental rights before her relationship with the defendant biological mother ended. For example, the couple could have agreed to add the plaintiff’s name to the children’s Florida birth certificates, gotten married once they moved to Massachusetts, or arranged to have the plaintiff formally adopt the children.

But other lawyers said the main function of the Probate & Family Court in custody battles is to protect the best interests of children, who know and care little about the formal legal actions taken by those they consider their parents.

In *Partanen*, the plaintiff was deeply involved in the decision to have children, personally performed one of the artificial inseminations of the defendant, was present at both births, lived with the children and biological mother, shared child-rearing duties, and was held out as a parent to the public, health care providers, school officials and others.

“I think it’s a really helpful and natural progression in our jurisprudence,” Cambridge lawyer Patience W. Crozier said of the decision. “Family law in the court needs to protect children and the parental relationships they know and depend on.”

Equity judgment

Roberts, the plaintiff's co-counsel, said the judge's decision to apply a gender-neutral reading of the Massachusetts paternity statute in reaching his ruling was one of the most significant aspects of the case.

"Any time you can see an intact family preserved in the eyes of the law is a good day," Roberts said. "As lawyers, it's very rare that you get to [address] a gray, unsettled area of the law."

Sweeney said the defendant is evaluating whether to appeal. If she does, the case could be consolidated with a related action the plaintiff filed, a previously dismissed motion for a determination of parentage that has been appealed but not yet docketed.

In the related matter, the plaintiff is represented by Boston-based Gay & Lesbian Advocates & Defenders. GLAD lawyer Jennifer L. Levi said while they ultimately hope to prevail on the motion for a determination of full parentage, Casey's decision is helpful in the interim.

"It's a very important victory," Levi said. "The children in this case just simply viewed [the plaintiff] as 'mommy.' ... It's important to [all] couples who bring children into the world and raise them together and then split up and have conflict over allowing the non-birth-parent to be fully involved in the children's life. From a child's perspective, this decision is hugely important because it is looking at the way people are functioning. If you are acting like a parent, the court will recognize that and ensure you continue in that role."

History and legal analysis

From the time they decided to have children while living in Florida, plaintiff Karen Partanen and defendant Julie Gallagher had

Partanen v. Gallagher

THE ISSUE	Was a non-biological de facto parent entitled to joint legal custody of two children she jointly raised during and after a same-sex relationship with the children's biological mother?
DECISION	Yes (Probate & Family Court)
LAWYERS	Elizabeth A. Roberts of Todd & Weld, Boston, and Teresa M. Harkins La Vita of Danvers (plaintiff) Mary Beth L. Sweeney and Gretel M. Dufresne, of Atwood & Cherny, Boston (defense)

mutual responsibility and involvement in major decisions regarding the welfare of their children, Jordan and James. That continued after the couple moved to Massachusetts and eventually split up.

Even after parenting conflicts arose, the couple agreed that Partanen, the non-biological parent, was a de facto parent to the children. They disputed whether a de facto parent could seek custodial rights.

"The [Supreme Judicial Court] has not yet specifically reached the issue of whether a de facto parent may be awarded shared legal and physical custody," Casey wrote. "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."

The SJC has ruled, however, in a custody battle between a biological parent and a de facto parent. In its 2009 decision in *R.D. v. A.H.*, the SJC determined that a judge "correctly ruled that the de facto parent, in seeking appointment as permanent guardian with custody, has the burden of proving by clear and convincing evidence that the legal parent was legally unfit."

In that case, the SJC looked to the statute governing custody awards for children born out of wedlock, G.L.c. 209C, §10, and

construed the word "parent" to mean "biological parent."

Probate Court Judge Casey did not feel bound by that determination, however.

"The Court finds that the present case is distinguishable from *R.D. v. A.H.*," Casey wrote. "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 present-

ed 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."

Casey noted that while R.D. brought her petition for custody under the guardianship statute, Partanen brought a complaint to establish de facto parentage pursuant to the court's equity jurisdiction. The judge also pointed out that 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 children's best interests."

"Both parties have been equal parents to the children throughout their lives and should be afforded equal parental rights upon their separation," Casey wrote. "The Court finds the authority to make such an award in the Court's equity jurisdiction."

In addition to the court's equity jurisdiction, Casey relied on a gender-neutral reading of G.L.c. 209C, §6, which states: "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 ... 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." **MILW**



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