

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-98-07878

E.O., PLAINTIFF-APPELLEE,

V.

L.M., DEFENDANT-APPELLANT

AMENDED AMICI CURIAE BRIEF ON BEHALF OF

Greater Boston Legal Services
Massachusetts Chapter of the
National Association of Social Workers
Massachusetts Human Services Coalition
Massachusetts Law Reform Institute
Massachusetts Lesbian and Gay Bar Association
Women's Bar Association of Massachusetts
Youth Law Center

Gretchen Van Ness
60 State Street Suite 750
Boston, MA 02109
(617) 723-5060
BBO #553632

Pauline Quirion
Greater Boston Legal Services
197 Friend Street
Boston, MA 02114
(617) 371-1234
BBO #542387

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INTERESTS OF AMICI

Greater Boston Legal Services (GBLS) is a nonprofit program which provides free legal assistance to indigent people in thirty-two cities and towns in the greater Boston area. GBLS offers a full range of legal assistance in many substantive areas related to domestic relations, including legal assistance to parents in divorce, paternity, child custody, visitation and child support matters. GBLS handles over 2,000 family law matters each year; most of these cases involve custody and visitation disputes. GBLS has an interest in having courts recognize all significant factors related to the best interests of children and in promoting equal protection for all children in the Commonwealth.

The Massachusetts Chapter of the National Association of Social Workers, with over 8,200 members, is the professional social work organization in the state. It is committed to human rights, social and economic justice, and unimpeded access to services for everyone. Its members work in a broad range of settings including hospitals, community agencies, government, academia, business, nursing homes, schools, and private practice. Social workers deliver more than

50% of mental health services. Their areas of expertise include family violence, depression, interpersonal issues, child welfare, aging, medical, disabilities, substance abuse, family discord, marital counseling, organizational development, policy analysis, intergroup relations, and others.

The Massachusetts Human Services Coalition (MHSC) is a public advocacy organization which serves as a watchdog of state government policies relating to human services, which include welfare, food and nutrition programs, public health, youth and elder services, child care, housing and disability issues. In particular, MHSC works with state agencies, such as the Department of Youth Services and the Department of Social Services, to ensure that children's needs are met within their families so that all children can develop their full potential.

The Massachusetts Law Reform Institute (MLRI) is a non-profit statewide legal services program which represents low-income individuals and groups. MLRI has operated a support and advocacy center since 1968. MLRI's principal activity is to represent clients, including group clients, on legal issues which have a statewide impact on low-income persons. MLRI also provides support to

other advocacy groups who similarly represent those clients. MLRI staff members have expertise and knowledge relating to public policy and family law issues which can assist the Court in deciding the issues in this case.

The Massachusetts Gay and Lesbian Bar Association (MLGBA) is a voluntary state-wide professional association of lawyers provided visible lesbian and gay presence within the Massachusetts legal community. MLGBA promotes the administration of justice for all persons without regard to their sexual orientation, serves to educate about issues affecting the lives of gay men and lesbians, advocates for the enactment and enforcement of laws promoting equal rights for lesbians and gay men, and offers a non-partisan lesbian and gay voice within the larger Massachusetts community. A key aspect of MLGBA's mission is to ensure that issues pertaining to sexual orientation are handled fairly and respectfully in the Commonwealth's courts.

The Women's Bar Association (WBA) of Massachusetts is an unincorporated nonprofit association of lawyers, judges, paralegals and other legal professionals, with more than 1,500 members throughout Massachusetts. The WBA is committed in ensuring that women and children of

the Commonwealth have equal access to the courts to seek to protect their relationships and their families.

The Youth Law Center (YLC) of San Francisco, California, is a non-profit public interest law office that represents children and youth throughout the country. Since 1978, YLC attorneys have represented children in California and seventeen other states. YLC staff have also provided research, training and technical assistance to legal professionals, public officials and service providers in every state on legal issues relating to children in out-of-home care. In its child-welfare work, YLC has emphasized the right of every child to a stable and permanent home with loving caretakers. As part of that work, YLC strives to protect the right of children to maintain a relationship with the adults who parent them.

Introduction

This appeal asks whether a four-year old child, B.O.M., may continue to receive the care, companionship and parenting of his non-biological mother, E.O., despite the dissolution of the long-term relationship between E.O. and the child's biological mother, L.M. On November 4, 1998, a single justice of this Court reinstated the temporary orders entered by the Probate and Family Court permitting weekly visitation between the child and E.O. For the reasons stated below, the actions of the Probate and Family Court are in the best interests of this child, are consistent with Massachusetts jurisprudence and the Constitutional rights of this child, and should be affirmed by the full Court.

Depriving this child of contact with one of the only parents he has ever known will cause him serious harm and will impact him the rest of his life. The Probate Court properly exercised its equity jurisdiction in appointing a guardian ad litem to represent the child's interests and in fashioning a temporary order which honors and protects his familial relationships at a time of profound and potentially devastating upheaval within his family. Where, as here, a substantial parent/child relationship exists, it is appropriate

to permit the non-birth parent to seek visitation with the child, and it is appropriate for the court to order such visitation.

Amici submit this brief to further the best interests of this child and all similarly-situated children in the Commonwealth. Amici urge this Court to adopt the rule, articulated by Appellee,¹ which recognizes that when a substantial parent-child relationship exists between a child such as B.O.M. and a non-birth parent such as E.O., the court must act to prevent harm and protect the child's best interests by permitting continuing contact with the child's non-birth parent.

Statement of the Case

Amici adopt the Statement of the Case provided in Appellee's Brief and repeat those facts particularly relevant to the child's interests.

E.O.'s and L.M.'s relationship began in May 1985. OA-A ¶6. From the beginning, the two women planned to become parents together. OA-A ¶8. In 1991, they decided to bring children into their lives through artificial insemination, with L.M., who is older than E.O., being the first to become pregnant. OA-A ¶11.

¹ See discussion at pp. 23-24, infra.

E.O. and L.M. decided that their children would have no known biological father. Together they selected an unknown donor. Insemination began in 1991 and lasted through 1994, when L.M. became pregnant with B.O.M. OA-A ¶¶13-16. E.O. cared for L.M. during the pregnancy, accompanying her on every visit to the obstetrician and prenatal specialist as well as to their weekly fetal monitoring appointments. OA-A ¶21. E.O. paid toward L.M.'s inseminations, OA-A ¶14, and the medical bills for B.O.M.'s birth were sent to E.O. OA-A ¶28.

The couple decided to raise their child in the Jewish faith, which is E.O.'s religion. OA-A ¶18. The couple also consulted an attorney who prepared a Co-Parenting Agreement and other documents naming E.O. the child's legal guardian. OA-A ¶22.

The Co-Parenting Agreement entered into by E.O. and L.M., which they first executed before B.O.M.'s birth and then reexecuted after his birth, memorializes the spirit of the couple's joint undertaking to create a family:

2. Each party acknowledges and agrees that the biological mother's decision to conceive and bear a child was a joint decision of the parties based upon the commitment of each party to jointly and equally parent the child.

3. Each party acknowledges and agrees that both [L.M.] and [E.O.] will share in providing the child with the necessary food, clothing, housing, education, medical and other support and care that may be needed by the child until the child reaches the age of majority.

* * *

7. Each party acknowledges and agrees that although [E.O.] is not the biological mother of the child, she has jointly cared for the child beginning with the child's birth and she is a de facto parent of the child. The parties intend for [E.O.]'s relationship with the child to be protected and promoted.

OA-A Exh. A. The Co-Parenting Agreement between E.O. and L.M. also addressed what the couple wished for their son if they were to separate:

10. The parties acknowledge and agree that if they separate, the following actions which serve the best interests of the child will occur:

a. The parent-child relationship between [E.O.] and the child will be respected and fostered.

b. The parties will jointly determine who will have actual physical custody and the other party will have reasonable visitation rights with the child. The party who has actual physical custody will take all steps necessary to maximize the other's visitation and help make visitation as easy as possible.

* * *

e. If either party dies, the child will be raised and cared for by the other party, whether or not the parties are living together.

OA-A Exh. A. The Co-Parenting Agreement also provides that "the parties agree to do everything legally possible to create a legal relationship between [E.O.] and the child to place the child in the same position as a biological child of [E.O.]
....." OA-A Exh. A.

B.O.M. was born on February 23, 1995. E.O. was L.M.'s birth coach; after B.O.M.'s birth she cut his umbilical cord. OA-A ¶24. As is common in the Hebrew tradition, the couple named B.O.M. after two of E.O.'s deceased family members. The couple also gave B.O.M. both of their last names. OA-A ¶25. The couple sent out birth announcements identifying both of them as B.O.M.'s parents. OA-A ¶30 & Exh. E. When B.O.M. was three months old, the couple had a naming ceremony at their synagogue which included all four of their son's grandparents. OA-A ¶31 & Exh. F.

E.O. participated fully in raising B.O.M. She bathed him, dressed him, cooked for him, put him to bed, stayed with him during the night, cared for him when he was sick. OA-A ¶39. In the spring of 1997, the couple returned to Massachusetts because of the availability of second-parent adoption, to be nearer to E.O.'s parents, and because L.M. wanted to live on Martha's Vineyard. OA-A ¶38. From October 1997 to April 1998, E.O. was home five days a week with B.O.M. During this time, she and B.O.M. played at home, took walks together, went to the beach, visited the library, went shopping, played with friends, took music lessons, and participated in community activities for children. OA-A ¶39.

E.O. has paid for the family's memberships at the swim club and the synagogue. In addition, she has paid for B.O.M.'s music lessons, health insurance, clothing, medical insurance, and many activities. OA-A ¶42. E.O. had virtually all financial responsibility for the family from 1995 to 1998. OA-A ¶48.

B.O.M. calls E.O. "Mommy" and L.M. "Mama." He tells people that he has two mothers. OA-A ¶40. B.O.M. calls E.O.'s parents "Gran" and "Pop Pop." He calls L.M.'s parents "Grandma" and "Grandpa." OA-A ¶33. B.O.M. refers to E.O.'s and L.M.'s siblings and their children as his aunts, uncles and cousins. Throughout his life, B.O.M. has celebrated birthdays and holidays with E.O.'s family. OA-A ¶35.

Summary of Argument

1. A couple who raises a child together become that child's "psychological" parents, even if only one of them is biologically related to the child. Losing either parent causes suffering to the child and contact with both parents is necessary to avoid harm to the child. Temporary orders are critical to protect the best interests of young children, in particular, because they are less able to tolerate delay. For young children, access to

their parents has a component of psychological urgency. (p. 8 to p. 17)

2. The institution of the "family" must be broadly defined to include same-gender couples and the children that they raise. When couples plan for children together, raise them together, and a significant relationship develops between a child and the non-biological mother, that relationship must be honored and protected to avoid harm to the child. (p. 17 to p. 24)

3. The Court acknowledges that parents have a constitutional right to their relationship with their children. Consequently, because children, too, are "persons" under the Constitution, they must be afforded at least as much protection for their relationships with the adults they know as their "parents." Just as the law evolved to protect the interests of children born to unmarried heterosexual parents, the law must now develop protection for children born within the institution of the planned lesbian and gay family. A child has legal rights and interests which are independent of his biological parent which the Court should protect in order to avoid harm to the child. (p. 24 to p. 32)

3. L.M. should be estopped from denying visitation to E.O. because, for years, L.M. encouraged, promoted and promised that E.O. would

always be the child's mother. The child has a right to maintain his heritage and familial ties in addition to preserving his right to the care, companionship, and financial support of E.O. (p. 32 to p. 35)

Argument

I. Families Today Include Many Same-Gender Couples With Children, and These Children Form Healthy Parent-Child Attachments with Both Parents

In the landmark decision of Adoption of Tammy, 416 Mass. 205 (1993), this Court first recognized the legal significance of a child's relationship to a psychological parent in a planned lesbian family.² In the years since the Tammy decision was handed down, the number of children born into lesbian households continues to increase.³ Many same-gender

² This Court described Tammy's family as follows:

Since her birth, Tammy has lived with, and been raised and supported by, Helen and Susan. Tammy views both women as her parents, calling Helen "mama" and Susan "mommy." Tammy has strong emotional and psychological bonds with both Helen and Susan. ... Both women jointly and equally participate in parenting Tammy, and both have a strong financial commitment to her.

416 Mass. at 207.

³ Almost a decade ago, it was estimated that nationwide as many as 10,000 lesbians have formed planned or "intentional" families through the use of donor sperm. Wendall Ricketts & Roberta Achtenberg, Adoption and Foster Parenting for Lesbians and Gay Men: Creating New Traditions in Family, 14 Marriage & Fam. Rev. 83, 105 (1990). Since that time, the number has increased and the prior estimate of

couples, like E.O. and L.M., conceive a child through donor insemination, raise the child together, and jointly hold themselves out as the child's parents. Charlotte J. Patterson, Children of Lesbian and Gay Parents, 63 Child Development 1025, 1026-27 (1992).

Extensive empirical data is now available regarding children's experience within these "intentional" or "planned" lesbian families. Id. at 1028-34; see also April Martin, Lesbian Parenting: A Personal Odyssey in Gender in Transition 249 (J. Offerman-Zuckerberg, ed. 1989) (using term). Summarizing its comprehensive review of the research, the American Psychological Association concluded:

Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychosocial growth.

Lesbian and Gay Parenting: A Resource for Psychologists 8 (American Psychol. Ass'n, 1995).⁴

10,000 is considered low. Charlotte J. Patterson, Children of Lesbian and Gay Parents, supra, at 1026.

⁴ See also A. Brewaeys et al., Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families, 12 Hum. Reprod. 1349 (1997) (finding child development in lesbian mother families is similar to that of heterosexual families with regard to psychological, emotional, behavioral

Just as children raised in lesbian families are as healthy and strong as children raised in other kinds of families, it comes as no surprise that the research shows that a child raised by a same-sex couple develops strong psychological bonds to each adult

who, on a continuing, day to day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster, or common law parent, or any other person.

Joseph Goldstein, Anna Freud & Albert Solnit, Beyond the Best Interests of the Child 98 (1979). The research shows that the couple who raises a child becomes that child's "psychological" parents, even though only one of them may be biologically related to the child. Id. at 31-32.⁵ This fact was

and gender role development); Raymond D. Chan et al., Psychosocial Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers, 69 Child Dev. 443 (April 1998) ("Our results are consistent with the general hypothesis that children's well-being is more a function of parenting and relationship processes within the family ... than it is a function of household composition or demographic factors."); Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children, 31 Developmental Psychol. 105, 109 (1995) (finding remarkable similarity between group of children raised from birth by lesbian couples and matched group of children raised by heterosexual parents with respect to behavioral adjustment).

⁵ Biology does not determine whether a bond develops between the child and the adult who raises the child. For example, children form as strong attachments to adopted parents as to biological

recognized by the Court in the Tammy decision. 416 Mass. at 207 ("Tammy has strong emotional and psychological binds with both" parents).

Sexual orientation, like biology, has no bearing on the strength of the attachment that develops between the child and the adult or whether the adult becomes a psychological parent to the child. A clinical study of preschool children of lesbian couples concluded that when both parents care for the child, the child becomes attached to both of them. Barbara McCandlish, Against All Odds: Lesbian Mother Family Dynamics, in Gay and Lesbian Families 29-30 (F. Bozett, ed. 1987).

Moreover, once a child's attachments are formed "[c]ontinuity of relationships, surroundings and environmental influences are essential for a child's development." Goldstein, et al., Beyond the Best Interests of the Child, supra, at 31-32; John Bowlby, Attachment and Loss: Retrospect and Prospect, 52 Am. J. Orthopsychiatry 664, 666 (1982). Thus, a child's experiences in the family shape the child's cognitive and social development and are the

parents, Leslie Singer, David Brodzinsky & Douglas Ramsey, Mother-Infant Attachment in Adoptive Families, 56 Child Dev. 1543, 1550 (1985), and, if a grandparent fulfills the role of parent, the child typically forms a strong attachment to the grandparent. Richard Kalish & Emily Visher, Grandparents of Divorce and Remarriage, 5 J. of Divorce 127, 131 (1982).

foundation upon which a stable and self-reliant personality is built. See Virginia Mixon Swindell, Comment, Children's Participation in Custodial and Parent Right Determinations, 31 Hous. L. Rev. 659, 663-64 (1994) (citing David Meyers, Psychology 81 (3d ed. 1992); John Bowlby, 2 Attachment 322 (1969)).

A. Separation from Their Parents Harms Children

A child's attachments to his parents form the cornerstone for ongoing healthy development. These same attachments come into play in profound ways when a parent moves out of the household:

The parental divorce is earthshaking for the child. Young children typically have operated on the assumption that they could depend on the predictability of both parents. When that assumption proves incorrect, a child may question other assumptions about the world; for example, whether he or she can count on the availability of any parent. Such concerns lead to insecure or avoidant attachment, interference with healthy object relations, and reorganization of cognitive understandings. The egocentrism of young children may lead them to conclude that a parent's absence is due to their own unlovability. Thus, abandonment by a noncustodial parent is a particularly devastating experience.

William Hodges, Child Development and the Response of Children to Separation and Divorce, Interventions for Children of Divorce-Custody Access (1991), in A Course in Psychology for the Family Lawyer 281-82 (MCLE 1994). Thus, a child's attachments

are as thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult.

Goldstein et al., Beyond the Best Interests of the Child, supra, at 32-33.

The break up of a family inevitably causes distress and "major, immediate and potentially long lasting disequilibrium" which may cause emotional problems for the child. Governor's Advisory Commission on Responsible Fatherhood and Family Support, Dads make a Difference: Action for Responsible Fatherhood 96 (1998). The dissolution of the relationship between E.O. and L.M. clearly impacts B.O.M. in significant -- and potentially harmful -- ways.

Children of B.O.M.'s age, in particular, suffer from their separation from an adult who has been a psychological parent to them. "Children, ages three to five, have a limited cognitive ability to make sense of the loss of one parent" and "have difficulty understanding and coping with separation." William Hodges, Child Development and the Response of Children to Separation and Divorce, supra, at 288. The National Institute of Mental Health has noted that children who were under the age of six when their parents divorced were three

times as likely as older children to need psychological help. Id. at 291.

Moreover, because young children have a different sense of time than adults and are less able to tolerate delay and waiting, matters relating to access to their parents have a component of psychological urgency. See Goldstein et al., Beyond the Best Interests of the Child, supra, at 40-43.⁶

"Emotionally and intellectually an infant and toddler cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of [his] parents." Id. at 40. "For most children under the age of five years, an absence of parents for more than two months is equally beyond comprehension." Id. at 41.

Even in situations where the adult is a noncustodial parent figure rather than the primary caretaker of the child,

experts on child development attach special importance to the stability and continuity of

⁶ Young children like B.O.M. perceive the future as being far away. See Note, Visitation After Adoption: In the Best Interests of the Child, 59 N.Y.U. L. Rev. 633, 661-62 (1984); Gerald Koocher, Different Lenses: Psycho-Legal Perspectives on Children's Rights, 16 Nova L. Rev. 711, 716 (1992). For children ages three to five, visitation guidelines recommend a visitation schedule of alternate weekends from Friday through Sunday evenings, one weekly mid-week visit and four weeks vacation visitation. Honorable Arline Rotman, Visitation Guidelines, in A Course in Psychology for the Family Lawyer 343-44 (MCLE 1994).

the affectionate relationships of children, and agree that trauma to the child may be occasioned by an abrupt termination of meaningful relationships.

Note, Visitation After Adoption: In the Best Interests of the Child, 59 N.Y.U. L. Rev. 633, 661 (1984).⁷

Furthermore, children who do not maintain contact with both their parents suffer a continuing sense of sadness and loss. See, e.g., Judith S. Wallerstein & Sandra Blakelee, Second Chances (1989); E. Mavis Hetherington et al., What Matters? What Does Not? 53 Am. Psychologist 167, 177 (February 1998). Contrary to popular belief, research has shown that the impact of separation and divorce is more "pervasive and enduring" on boys than it is on girls. E. Mavis Hetherington, Children and Divorce in Parent-Child Interaction: Theory, Research and Prospects 40-41 (Ronald W. Henderson, ed. 1981) ("Boys from divided families ... show a higher rate of behavior disorders and

⁷ Even after parental rights are terminated, children remember their former families and continued contact with the former family may be needed to help the child adjust to new surroundings. Note, Visitation After Adoption, *supra* at 662. It is logical to conclude, therefore, that contact with the noncustodial parent similarly provides continuity and comfort to the child adapting to his parents' break up and the new experience of living in a one-parent household.

problems in interpersonal relations in the home and in the school with teachers and peers.").

B. Continuing Contact with the Noncustodial Parent Ameliorates the Harm to the Child

Although the potential harm to the child is great, it is not inevitable. Continued contact with the noncustodial parent can significantly contribute to the child's sense of self-worth and well-being despite the upheaval caused by his parents' separation. "Continued parental visits may sustain the child's self-esteem by negating the impression that the parent has deserted [him]," helping the child feel loved and appreciated. Foster Children in the Courts 130 (Mark Hardin, ed. 1983). Research shows that

One of the most important predictors of child adjustment following divorce appears to be the amount of contact the child has with the out-of-home parents ... Children who maintain contact with both parents tend to be better adjusted.

Denise Donnelly & David Finkelhor, Does Equality in Custody Arrangement Improve Parent-Child Relationship?, 54 J. Marriage & Fam. 837, 838 (1992) (citation omitted). Children ages three to five "benefit from highly predictable visits" with the noncustodial parent. William F. Hodges, Intervention for Children of Divorce: Custody, Access and Psychotherapy 177 (2d ed. 1991).

Continued contact with the noncustodial parent also improves the child's academic performance. Lise N.C. Bisnaire, Philip Firestone & David Rynard, Factors Associated With Academic Achievement in Children Following Separation, 60(1) Amer. J. Orthopsychiatry 67 (1990). Because a continuing relationship with the noncustodial parent makes such a positive difference in a child's life following the dissolution of his parents' relationship, appropriate temporary visitation, as ordered by the Probate Court in this case, is in complete harmony with the child's best interests.

II. The Court Acts Properly When it Seeks to Protect the Best Interests of Children of Same-Gender Couples

Every child has but one childhood, and a child's relationships with his or her family are central to the child's happiness and well-being. The fact that B.O.M.'s relationship with E.O. does not fit neatly into an existing statutory scheme does not negate B.O.M.'s attachment to or "unique filial ties" with E.O., Adoption of Tammy, 416 Mass. at 214; his reliance on L.M.'s and E.O.'s representations that E.O. is his mother; or the fact that B.O.M. was raised as part of an "intentional" or "planned" lesbian family and would not be here today but for the actions of both E.O. and L.M.

While L.M. urges this Court to narrowly define "family" so as to terminate B.O.M.'s relationship with E.O., the U.S. Supreme Court as well as the Massachusetts courts have rejected similar efforts to straightjacket the definition of "family":

The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases ... We have not hesitated to protect this relationship even when it has existed outside the traditional family arrangement.

Bowen v. Gilliard, 483 U.S. 587, 612 (1987). See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979)

(recognizing parental interest of unwed father who had participated in raising his children); Smith v.

Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (foster parents have a

protected interest in removal proceedings based on

"the emotional attachments that derive from the intimacy of daily association" with the child);

Moore v. East Cleveland, 431 U.S. 494 (1977)

("family" includes grandmother, her son and

grandson); Petition of Department of Public Welfare to Dispense With Consent to Adoption, 383 Mass. 573,

581-82 (1981) ("family" is not limited to "nuclear

family"); Prince v. Massachusetts, 321 U.S. 138

(1944) ("family" comprised of child and the aunt who had custody of her). Thus, this Court recognizes

that "enduring family relationships" may develop in what may seem to be "unconventional settings." C.C. v. A.B., 406 Mass. 679, 690 (1990) (quoting Michael H. v. Gerald D., 491 U.S. 110, 133 (1989) (Stevens, J. concurring)).

Children born outside of marriage traditionally suffered great stigma and legal disadvantages based on their so-called "illegitimacy." Over time, however, more enlightened views have emerged which reflect the reality that many children are born outside of marriage,⁸ and a jurisprudence has developed that recognizes that children have rights apart from their parents. See, e.g., G.E.B. v. S.R.W., 422 Mass. 158, 163 (1996) (child not barred from seeking paternity adjudication because child has independent rights and intangible interests which cannot be entirely equated with the mother).

Discrimination based on the marital status of the mother is no longer tolerated. Children born to

⁸ In the past three decades in Massachusetts, the number of children born outside marriage has increased from 5% to 32%. Governor's Advisory Commission on Responsible Fatherhood and Family Support, Dads Make A Difference: Action for Responsible Fatherhood 46 (1998). The Commission found that "[i]n Massachusetts, as in the nation as a whole, more children end up on single-parent households as a result of the failure [or inability] of their parents to marry than as a result of divorce." Id. at 23.

parents who are not married to each other are now "entitled to the same rights and protection of the law as all other children." Mass. Gen. Law ch. 209C, §1. See also Doe v. Roe, 32 Mass. App. Ct. 63, 68-69 (1992) (attorneys' fees may be awarded in paternity cases regardless of absence of statutory authority under Chapter 209C because such awards are authorized in actions involving children of married parents); Adoption of Tammy, 416 Mass. 205 (1993) (adoption statute permits child to be co-adopted by same-sex couple when such adoption was in child's best interests); Doe v. Roe, 23 Mass. App. Ct. 590 (1987) (pre-Chapter 209C decision holding that children born outside marriage are entitled to same support after age 18 as children of divorced parents).

This Court has not yet addressed what visitation or other rights should be awarded in cases involving the children of same-sex partners who have made written agreements to raise children together as co-parents, have lived and raised children together as a family, are known to their children and others as the children's parents, and have formed substantial parent-child bonds together. Therefore, in the unfortunate circumstance of a family dissolution, the future holds much uncertainty, particularly for the children of the

non-biological parent. The child's "unique filial ties" with the psychological parent are in jeopardy absent a co-adoption decree. Adoption of Tammy, 416 Mass. at 214.⁹

While the protection of these family relationships may be uncharted legal terrain in Massachusetts,¹⁰ this Court has not hesitated to

⁹ Families who are indigent face even greater uncertainty. Female-headed households are most likely to live in poverty, and lack of access to legal counsel is the most serious barrier to their ability to obtain justice. Report of the Gender Bias Study of the Supreme Judicial Court 18-20 (1989). The many parents who are unable to afford co-adoption and their indigent children are at the greatest risk of not having their family relationships protected under the law.

¹⁰ Wisconsin permits visitation between children in planned lesbian families and their psychological parents following dissolution of the couple's relationship. Citing the best interests of the child standard, in In re Custody of H.S.H.-K, 533 N.W.2d 419, 435-36 (Wis. 1995), the Wisconsin Supreme Court held that visitation may be ordered when a petitioner shows a "parent-like relationship" with the child and a "significant triggering event justifies state interference with the child's relationship" with the biological parent. A "parent-like relationship" is shown by satisfying four criteria: (1) consent and fostering of the relationship by the biological parent; (2) the petitioner and the child must have lived in the same household; (3) the petitioner must have voluntarily assumed parental obligations and significant responsibility for the child's care, education, development, and support; and (4) the petitioner must have maintained a parental role for a time sufficient to establish a "bonded, dependent relationship parental in nature." Interference by the biological parent with the petitioner's parent-like relationship with the child can be the triggering event in seeking court-ordered visitation. Id. at 436.

seize past opportunities to protect children and to develop the law in ways which adapt "to new institutions and conditions of society ... new usages and practices, as the progress of society in the advancement of civilization may require." C.C. v. A.B., 406 Mass. 679, 688-89 (1990). In particular, this Court has fashioned relief on other occasions to meet the best interests of children even when it required acting outside the existing statutory framework. E.g., Normand v. Barkei, 385 Mass. 851 (1982) (visitation granted to the father in equity before Chapter 209C remedies became available); C.C. v. A.B., 406 Mass. 679 (1990) (Lord Mansfield's Rule abolished; common law burden of proof needed to overcome the presumption of legitimacy lowered; biological father who was

In J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. 1996), the Pennsylvania Superior Court permitted the former lesbian partner of E.P.H. to petition for partial custody of a child born to E.P.H. during their relationship. The court held that the presumption of family autonomy

must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child, provided care, nurture and affection, assuming in the child's eye a stature like that of a parent.

Id. at 1320. The court went on to state that the biological mother's rights "do not extend to erasing a relationship between her partner and her child she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." Id. at 1332.

"stranger to the marriage" permitted to seek visitation if he had substantial relationship with child).¹¹ Now, the best interests of children require this Court to acknowledge the existence of substantial parent-child relationships in gay and lesbian families and to spare this child and children like him the trauma and tragedy of losing their "parents."

Based on this Court's ruling in C.C. v. A.B., 406 Mass. 670 (1990), Amici join with Appellee in urging the adoption of the following rule: When two adults like E.O. and L.M. (1) have jointly planned for and created a family that includes the child, which planning is evidenced by a written agreement or course of conduct between the parties, and (2) the non-biological parent has been formally acknowledged as a parent on the child's birth certificate or other documents; and (3) both parties have accepted the responsibilities of parenthood, including the obligation to provide support and

¹¹ This Court and the U.S. Supreme Court have acknowledged that the existence of a "substantial relationship" between the child and the adult, rather than a biological tie, is most significant in determining whether the relationship is protected. See M.J.C. v. D.J., 410 Mass. 389 (1991) (biological father denied standing based on his failure to establish relationship with child); Lehr v. Robertson, 463 U.S. 248, 261 (1983) ("mere existence of a biological link does not merit ... constitutional protection.").

caretaking, as evidenced by written agreements or a course of conduct; and (4) a substantial parent-child relationship has developed between the child and the parties (which is evaluated depending on the age of the child); then (5) either party has standing to pursue a claim for visitation with the child regardless of status as a biological or adoptive parent (6) when the other parent has interfered substantially with the petitioner's parent-child relationship and the petitioner has promptly moved to redress that interference. This rule will protect the relationships children like B.O.M. have formed with their parents, while truly protecting families from interference by third parties.

III. A Child Has Rights Independent of His Biological Parent to Continue His Relationship with His Other Parent

The law recognizes the special status of children and it recognizes the special status of children's relationships with their parents.

The legal treatment of the parent-child relationship differs from that afforded relationships among adults precisely because of children's unique nature as children.

Virginia Mixon Swindell, Comment, Children's Participation in Custodial and Parental Right Determinations, 31 Hous. L. Rev. 659, 661 (1994).

The Court, for example, may exercise the

Commonwealth's *parens patriae* power in furtherance of the protection of children's welfare and interprets the law in ways which advance the best interests of children. Prince v. Massachusetts, 321 U.S. 158 (1944). See also Adoption of Tammy, 416 Mass. 205 (1993) (adoption statute broadly interpreted to permit child's adoption by same-sex couple); Custody of Vaughn, 422 Mass. 590 (1996) (Supreme Judicial Court imposed requirement of entry of findings of fact on effects of violence on children to ensure that judges would weigh effect of abuse before awarding custody, although the custody statute did not require such findings when case was decided). The law's emphasis on the best interests of the child is particularly important because courts and mental health experts agree that parents and children may have competing or conflicting concerns.

A child is an individual person, apart from his parents or others, within the meaning of the Constitution. In re Gault, 387 U.S. 1 (1966). He is therefore entitled to the Constitution's protections of his most intimate associations -- his relationships within his family. Smith v. O.F.F.E.R., 431 U.S. 816, 834-44 (1977); see also Roberts v. United States Jaycees, 468 U.S. 609, 620

(1984) (right of intimate association protects family relationships).

It is now recognized, for example, that children have constitutional rights to obtain contraceptives and abortions, to freedom of expression, and to due process in school discipline and civil commitment proceedings. See Tinker v. Des Moines Independent Community School, 393 U.S. 503 (1969) (children's wearing armbands in protest was symbolic speech entitled to First Amendment protection); Bellotti v. Baird, 443 U.S. 622 (1979) (children's right to privacy regarding medical treatment permits minor child to receive abortion without parental consent if judge permits such based on child's best interest and competence to consent); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (restrictions on distributing contraceptives to minors violated their due process rights); Parham v. J.R., 442 U.S. 584 (1979) (children's right to due process in mental hospital admissions); Goss v. Lopez, 419 U.S. 565, 582 (1975) (school suspensions without hearing violated children's right to procedural due process).

Given that children spend just a portion of their lives in schools or at the doctor's office and most of their childhoods in their families, they should receive at least as much protection of their

rights within the family as they have received within other institutions.

Like families, these institutions seek to promote children's best interests. Extending the children's constitutional rights to the familial setting, as in other institutional settings, will limit the court's ability to deny children constitutional rights merely because they are in the protective institution of the family. As with schools and other institutions, the protective nature of the family should not insulate the child from receiving the guarantees of the Constitution.

Gilbert Holmes The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals, 53 Md. L. Rev. 358, 387 (1994).

The Court's decision as to whether B.O.M. has the right to continue his relationship with E.O., who he knows to be his mother, is a decision that will impact this child for the rest of his life. This Court acknowledges that parents have a fundamental interest in relationships with their children that is constitutionally protected. Opinion of the Justices to the Senate, 427 Mass. 1201, 1203 (1998). Consequently, because children, too, are "persons" under the Constitution, they must be afforded at least as much protection for their relationships with the adults they view as their "parents." Anything less not only dishonors children's attachments and disregards their needs for stability, but relegates children to the status

of personal property or "moveable chattels."
Virginia Mixon Swindell, Children's Participation in
Custodial and Parental Rights Determinations, supra,
at 666.

B.O.M. did not choose his family, nor did he participate in creating the "legal" barriers to maintaining his relationship with his mother, E.O. While B.O.M.'s family is comprised of two parents of the same sex, the sexual orientation of his parents should not make him a "stranger" to the Constitution, the laws of this Commonwealth, or the equitable remedies available in our courts. See Romer v. Evans, 517 U.S. 620, 633-34 (1995) (Colorado amendment prohibiting protections for gay and lesbian citizens held unconstitutional); Adoption of Tammy, 416 Mass. 205 (1993) (same sex couples permitted to adopt when it was in the child's best interests).

Just as the courts do not consider the sex of a parent when making a custody determination, Silva v. Silva, 9 Mass. App. Ct. 339 (1980); C. Kindregan & M. Inker, 2A Mass. Practice, Child Custody, § 47.1, the fact that B.O.M.'s parents are of the same sex is not grounds to deny him protection. "In Massachusetts the focus in a custody dispute between parents is not on their personal rights but on the welfare of the child." C. Kindregan, supra, at 326

(citing Hershey v. Hershey, 271 Mass. 545, 555 (1930)). While this is not a custody case, in other contexts this Court has recognized that a parent's liberty interest may be burdened when it is necessary to promote the best interests of the child. E.g., Kendall v. Kendall, 426 Mass. 238 (1997), and Felton v. Felton, 383 Mass. 232 (1981) (court may restrict parent's right to practice his or her religious beliefs, when unfettered exercise of that right negatively impact's best interests of the children).

Mental health professionals have indicated that an adult becomes an "attachment figure" for a child (1) when she or he provides physical and emotional care to the child, (2) is a consistent or stable presence in the child's life, and (3) makes an "emotional investment" in the child. Carollee Howes, Continuity of Care: The Importance of Infant, Toddler, Caregiver Relationships, Zero to Three (June/July 1998).

These three principles are reflected in the Co-Parenting Agreement executed by E.O. and L.M. The approach now suggested for B.O.M. by L.M. -- namely, termination of his right to see E.O. or termination of temporary visitation until an evidentiary hearing, does violence to each of these principles and the child's human attachments. Not

surprisingly, the cases cited by L.M. for the proposition that E.O. must wait, most likely many months,¹² for an evidentiary hearing or trial before the court can enter a temporary order are inapposite, as they involve cases where a "stranger to the marriage" is attempting to gain visitation over the objection of the mother and the man legally presumed to be the child's father.

E.O. is no stranger to anyone in this family. Her name is on B.O.M.'s birth certificate, his birth announcements, the co-parenting agreement and other documents identifying her as B.O.M.'s mother and guardian. This case presents an unassailable record of extensive parental involvement by E.O., as his mother, in B.O.M.'s life.

B.O.M.'s right to the care and companionship of E.O. is more akin to those cases decided in the context of paternity actions, where courts have repeatedly held that "parents may not bargain away the rights of their children." See Knox v. Remick, 371 Mass 433, 437 (1976); Department of Revenue v. Jarvenpaa, 404 Mass. 177, 185-86 (1989). For

¹² There is no question that the Probate Court may enter temporary orders in the case. Marshall v. Marshall, 236 Mass. 248, 251 (1920) (Probate Court has jurisdiction to enter temporary orders for care and custody of children where plaintiff's claim for separate support denied because of improper pleading). See also Rules 1 and 6 of the Massachusetts Domestic Relations Rules.

example, even where a mother's rights to adjudicated paternity or support are barred by claim preclusion, the action will survive because "the real party in interest is the plaintiff's child." J.C. v. E.M., 36 Mass. App. Ct. 446, 449 (1994) (child has independent right to bring paternity action although her mother's separation agreement and divorce judgment provided that mother's former husband was child's father). Consequently, if this Court deems that a child's right to financial support is entitled to this level of protection, the child has no less at stake in an action aimed at preserving his relationship with an adult he loves and knows to be his mother.

In Massachusetts and around the world, contact with both parents is always considered the goal for a child when parents separate. The United Nations Convention on the Rights of the Child, adopted to deter the violation of children's human rights in all countries, specifies that states

shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

United Nations General Assembly, Resolution 44/25, November 20, 1989, Article 9, ¶3, Convention on the Rights of the Child. B.O.M.'s relationship with E.O. is no less significant to him than the

relationships that other children worldwide have with their parents. Thus, he, too, deserves the right to maintain contact with his mother, E.O., who is profoundly significant to his life.

IV. L.M. is Estopped from Denying That E.O. is the Child's Mother Because the Child and E.O. Formed a Parent-Child Relationship in Reliance on L.M.'s Express and Implied Promises and Agreements to Co-Parent the Child

While Massachusetts courts have not yet decided whether emotional detriment, without a showing of financial detriment, is sufficient to support a claim of equitable estoppel or to create a duty based on express or implied promises, this Court could apply the equity principle of estoppel and find that a duty exists in this case. See A.R. v. C.R., 411 Mass. 570, 574-75 (1992); Liebson v. Liebson, 412 Mass. 431, 434 (1992) (citing A.S. v. B.S., 139 N.J. Super. 366, 371-72, 354 A.2d 100 (1976)).

Both the child and E.O., with years of encouragement and consent by L.M., acted in good faith in forming parent-child relationships with each other. L.M. clearly benefited from and caused E.O. both economic and emotional detriment. But for E.O.'s contribution toward the cost of L.M.'s inseminations and health insurance, made in reliance on the couple's agreement to raise their child

together, this child would not exist. E.O. also cared for and financially supported B.O.M. based on the agreement that both L.M. and E.O. were the child's parents. E.O. and the child formed a parent-child relationship and emotional attachment based on L.M.'s promises and representations that the three were part of a family. E.O. also involved her parents and other relatives in B.O.M.'s upbringing. Thus, L.M. knew or should have known that by having a family with E.O. and putting E.O. in the position to become B.O.M.'s psychological parent, any severance of that relationship after its formation would be expected to be to the child's detriment.¹³

Repudiation of E.O.'s parentage will also cause the child, who is the "real party in interest," to suffer irreparable harm because it removes the "familial roots" and known "heritage" he has developed because of his relationship with E.O. A.S. v. B.S., 139 N.J. Super. at 371-72 (child's

¹³ Permitting L.M. to repudiate the relationship between B.O.M. and E.O. -- in conflict with the fact that for most of his life L.M. openly espoused the belief that E.O. is B.O.M.'s parent -- may also adversely affect the child's process of moral development. A "hindrance to moral development is parents who vehemently espouse certain mores that they fail to follow, leaving their disillusioned children with the task of reconciling the basic contradiction." S. Chess & M. Hassibi, Principles and Practice of Child Psychiatry 44 (1978).

heritage was chosen for him by the parties who took him in; they cannot avoid the obligation to support him). Moreover, repudiation of E.O.'s parentage will also terminate the child's right to financial support which E.O. has always provided to him. This loss will adversely impact B.O.M.'s standard of living. See G.E.B. v. S.R.W., 422 Mass. 158 (1996) (child's interest in support is independent of his mother's rights). See also Karin T. v. Michael T., 484 N.Y.S. 2d 780 (Fam. Ct. 1985) (lesbian who procured insemination services for her female partner was estopped from denying responsibility for the support of the children in the family they formed).

The U.S. Supreme Court has stated that "[t]he rights of the parents are a counterpart to the responsibilities they have assumed." Lehr v. Robertson, 463 U.S. 248, 257 (1983). More importantly, perhaps, the Court also recognized that

[w]hen parents make a commitment to meet those responsibilities, the child has a right to rely on the unique contributions of each parent to material and emotional support.

Bowen v. Gilliard, 483 U.S. 587, 612-13 (1987)

(emphasis added). In this case, the bond between child and parent formed long ago. The prospect of losing his mother in these circumstances is too much for this child or any child to bear. There is simply no substitute for E.O. in B.O.M.'s life. As

Justice Brennan observed, "No society can assure its children that there will be no unhappy families. It can tell them, however, that their Government [and courts] will not be allowed to contribute to their pain." Bowen v. Gilliard, 483 U.S. 587, 634 (1987).¹⁴

¹⁴ "Oftentimes, society pays for the effects of this anguish and anger in the form of crime, generational welfare dependence, disruptive behavior at school, juvenile justice and correctional facilities, and a less competitive workforce" The Governor's Advisory Commission on Responsible Fatherhood and Family Support, supra, at 25. Children may experience depression or suffer other behavioral problems even years after the separation of their parents. Id. at 96.

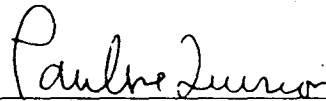
Conclusion

For the foregoing reasons, the order of the
Single Justice of this Court should be affirmed.

Respectfully Submitted
By Their Attorneys,



Gretchen Van Ness
60 State Street Suite 750
Boston, MA 02109
(617) 723-5060
BBO #553632



Pauline Quirion
Greater Boston Legal
Services
197 Friend Street
Boston, MA 02114
(617) 371-1234
BBO #542387

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