

# Co-Parent Visitation: Acknowledging the Reality of Two Mother Families

J. Shoshanna Ehrlich\*

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## I. INTRODUCTION

Embracing the reality of “non-traditional” families, the Supreme Judicial Court (SJC) of Massachusetts, in its recent *E.N.O. v. L.M.M.* decision, affirmed the right of a lesbian co-parent to visit with her son following the dissolution of her relationship with the child’s legal mother.<sup>1</sup> This decision places Massachusetts at the forefront of the

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1. 711 N.E.2d 886 (Mass. 1999), *cert. denied*, 120 S. Ct. 500 (1999). Of course, the phrase “non-traditional families” implies a norm against which families are measured. Although no longer a social reality, the idea of the “traditional family” still permeates the law, as evidenced by the fact that the underlying question here was whether or not the probate court even had the authority to resolve this case. *See id.* at 889-91.

As this article was going to press, the Supreme Court issued its decision in *Troxel v. Granville*, in which a plurality struck down the state of Washington’s expansive third-party visitation statute. No. 99-138, 2000 WL 712807, at \*4 (U.S. June 5, 2000). Given the reality of publication deadlines, a thorough discussion of *Troxel* is not possible; however, it is important to point out that the decision should not affect the continued validity of *E.N.O.* The Court, although finding the Washington statute, which allowed “any person” to request visitation “at any time,” to be overly broad, made clear that it was not enunciating a fixed rule regarding non-parental visitation statutes. *See id.* at \*4-\*9 (discussing WASH. REV. CODE ANN. 26.10.160(3) (West 1997)). Recognizing the changing composition of American families, the Court took a cautious approach by focusing on the statute’s “sweeping breadth” and the “application of that broad, unlimited power” in *Troxel*. *Id.* at \*9.

effort to rethink traditional notions of family.<sup>2</sup> Furthermore, it illustrates judicial willingness to be responsive to children's needs in

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It is also significant that unlike *E.N.O.*, *Troxel* does not involve the assertion of rights by a party with a fully developed parental relationship. *E.N.O.*'s power lies in the fact that the SJC extended parental status to a co-parent, thus lifting her from the third-party status a grandparent would occupy.

2. Although a leader, the SJC is not the first high court to recognize the rights of co-parents. In 1995, the Wisconsin Supreme Court held that the court's equitable authority to award visitation was not preempted by the state's detailed statutory scheme for resolving visitation disputes, and that the court could hear a petition for visitation where a co-parent has a parent-like relationship with a child and a sufficient triggering event (here, the post-dissolution interference with this relationship) justifies state intervention. See *In re H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995).

However, the Wisconsin court held that the legislature had preempted the field with respect to custody, thus leaving the court without equitable authority over the custody claim of a co-parent. See *id.* at 423-24, 431. It should be noted that this differs from the situation in Massachusetts where there is no preemption with respect to either visitation or custody. See *Petition of Department of Social Services to Dispense with Consent to Adoption*, 461 N.E.2d 186, 188 n.4 (Mass. 1984) (holding that in a proceeding to terminate parental rights, equitable powers of the court allow an award of custody to the father, although not authorized by statute).

Also, since the *E.N.O.* decision, the New Jersey Supreme Court, looking both to Massachusetts and Wisconsin, has embraced the concept of "psychological parent" in the context of a post-dissolution dispute between lesbian co-parents. The court concluded that once a party is determined to be a psychological parent, "[c]ustody and visitation issues between them are to be determined on a best interest standard." *V.C. v. M.J.B.*, 748 A.2d 539, 554 (N.J. 2000).

Unfortunately, co-parents have fared less well before other high courts. For example, in New York, the Court of Appeals (that state's high court) refused to consider the possibility that a co-parent could be treated as a parent for purposes of the visitation statute, and thus affirmed the lower court's dismissal of the case for lack of standing. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28-30 (N.Y. 1991). Presumably because New York's statutory scheme is considered to be an exclusive grant of authority to the courts to award visitation, the court did not discuss whether or not the court had equitable authority over this dispute. See *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (N.Y. 1998) (regarding the exclusivity of New York's statutory scheme).

The irony here is that only two years before *Alison D.*, in the landmark case of *Braschi v. Stahl Assoc.*, this same court, in deciding that a life-partner was eligible for the non-eviction protections of New York's rent control law as a family member, stated that one must look beyond "fictitious legal distinctions or genetic history . . . [to] the reality of family life"—an approach that could have been used in *Alison D.* to grant parental status to the co-parent seeking visitation rights. See *Braschi v. Stahl Assoc.*, 543 N.E.2d 49, 53 (N.Y. 1989). For further discussion, see Joseph G. Arsenault, *Comment, "Family" but not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB. L. REV. 813, 830-32 (1995).

In Vermont, the high court also upheld the dismissal of a co-parent's case. See *Titchenal v. Dexter*, 693 A.2d 682, 683 (Vt. 1997). There, because the family court, the court which normally hears custody disputes, lacked jurisdiction as to this matter, the co-parent brought her case in superior court. See *id.* at 686. However, the court held that its equitable authority could not be exercised in this case without statutory authority, thus precluding the plaintiff from pursuing her case because she could not ground her claim in a statute. See *id.* at 685. In barring the co-parent from pursuing her claim, the court was also influenced by the fact that she had not adopted the child she was helping to raise, notwithstanding the fact that she had been unaware of her right to do so. See *id.* at 686-87.

It should be noted that at the time of writing, a decision involving the rights of co-parents is pending from the Rhode Island high court. See *Rubano v. DiCenzo*, *appeal docketed*, No. 97-0604 (R.I. 2000) (on appeal for consideration of three certified questions from the family court).

two mother (or two father) families following dissolution of the parental relationship.

The SJC's decision demonstrates that biology and adoption are not the exclusive means of achieving parental status, and that under carefully delineated circumstances, parental status may be predicated upon the existence of functional family relationships.<sup>3</sup> This notion was deeply troubling to the dissenters who bitterly criticized the court for permitting a "legal stranger" to interfere with the legal mother's right to control the upbringing of her child.<sup>4</sup>

The decision thus embodies two very different understandings of family life. Grounded in social reality, the majority embraces a definition of parenthood that recognizes the functional role of a co-parent.<sup>5</sup> In contrast, the dissent, demonstrating an imperviousness to modern reality, retains a formalistic understanding of parenthood that would have negated the very existence of this family.<sup>6</sup>

## II. BACKGROUND

E.O. and L.M. met in 1984, and maintained a committed, monogamous relationship for thirteen years. During this time, they executed a comprehensive set of legal documents signifying their commitment to one another as life partners.<sup>7</sup>

From the beginning of their relationship, the parties planned to become parents either biologically, through adoption, or through foster care.<sup>8</sup> In 1991, they opted for the biological route, deciding that L.M. would bear the first child and E.O. the next.<sup>9</sup> Children were thus

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Although a discussion of the cases is beyond the scope of this article, it should be noted that many lower courts have recognized the rights of co-parents to seek a post-dissolution relationship with their children. *See* J.A.L. v. E.P.H., 682 A.2d 1314 (Penn. 1996); A.C. v. C.B., 829 P.2d. 660 (N.M. 1992).

3. *See E.N.O.*, 711 N.E.2d at 891.

4. *See id.* at 894 (Fried, J., dissenting).

5. *See id.* at 889-91.

6. *See id.* at 894 (Fried, J., dissenting).

7. These documents included: a medical power of attorney, a general power of attorney, a right of inheritance, a living will, and an authorization for implementation of health care directive. *See* Brief for Plaintiff at 3, E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (No. 98-07878).

The facts in this section are based on the plaintiff's brief to the SJC. Although it omits many of the details, the court's opinion is consistent with the plaintiff's recitation of fact. It should be noted that there do not appear to be any significant disagreements between the parties as to the legally relevant facts. However, perhaps in order to minimize the importance of their relationship, the defendant's brief provides far fewer details about the parties' life together. *See* Brief for Defendant at 5-8, E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (No. 98-07878).

8. *See* Brief for Plaintiff at 4.

9. *See id.*

an integral part of the parties' vision of themselves as a family unit; as a result of their decision to have and raise a child together, L.M. became pregnant through artificial insemination.<sup>10</sup>

Both parties participated in the conception, pregnancy, and birth.<sup>11</sup> They attended workshops together to learn about both artificial insemination and parenting.<sup>12</sup> They presented themselves to the gynecologist as a couple wishing to have and raise a baby together.<sup>13</sup> E.O. attended all of the insemination sessions, participated in the related medical decisions, and shared the costs of insemination and pregnancy.<sup>14</sup> She also accompanied L.M. on her pre-natal visits to the obstetrician.<sup>15</sup>

Before the child was born, the parties executed a Co-Parenting Agreement, which expressly stated their mutual intention to jointly raise the child.<sup>16</sup> Specifically, the agreement read: "[T]he 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.] would be in for purposes of determining custody, visitation, support and inheritance rights."<sup>17</sup> The agreement also expressed the parties' intent that E.O. retain her parental status even if the parties ended their relationship.<sup>18</sup> Additionally, L.M. executed documents authorizing E.O. to care for the baby as a parent.<sup>19</sup>

During labor and delivery, E.O. served as L.M.'s birthing coach.<sup>20</sup> At birth, she performed the associated bonding tasks,

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10. See *id.* As described by the literature, E.O. and L.M. are part of the lesbian "baby-boom" which began in the 1980s when "[f]or the first time ever in any society we know about, gay people in large numbers [were] setting out consciously, deliberately, proudly, openly, to bear or adopt children." See Nancy D. Polikoff, *The Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 465 n.13 (1990) (quoting A. Martin, *The Planned Lesbian and Gay Family: Parenthood and Children* at 3 (1989) (paper delivered to the 1989 Annual Meeting of the American Psychological Association, New Orleans, copy on file at the *Georgetown Law Journal*)).

11. See *E.N.O.*, 711 N.E.2d at 888-89.

12. See *id.*

13. See Brief for Plaintiff at 5.

14. See *id.*

15. See *E.N.O.*, 711 N.E.2d at 888.

16. See *id.* at 889.

17. Brief for Plaintiff at 7. Following the birth of their baby, the parties re-executed the Co-Parenting Agreement. See *E.N.O.*, 711 N.E.2d at 889. This agreement was identical to the first, except it deleted the reference to the fact that the baby was not yet born. See Brief for Plaintiff at 7 n.2.

18. See *E.N.O.*, 711 N.E.2d at 889.

19. See *id.*

20. See *id.* at 888-89.

including cutting the umbilical cord and accompanying the baby as he was weighed, measured, bathed, and APGAR-tested.<sup>21</sup> E.O. was given a hospital bracelet identifying her as the baby's parent, and she spent the night in the hospital with L.M. and the baby.<sup>22</sup> Recognizing that this involvement signaled her parental role, the court commented that E.O. "participated in the birth as a father would."<sup>23</sup>

The parties participated together in a range of birth-related activities.<sup>24</sup> The baby, B.O.M., was given a last name consisting of both parties' last names, and, in keeping with Jewish tradition, was named for deceased relatives of E.O.<sup>25</sup> They sent out birth announcements identifying both of them as the baby's parents; they held a naming ceremony for the baby at the local synagogue; and they both signed the thank you notes for the baby gifts they received.<sup>26</sup>

Of primary importance, the parties shared fully in the raising of their son, B.O.M. Reflecting his understanding of his family, B.O.M. refers to E.O. as "mommy," and L.M. as "mama," and tells people that he has two mothers.<sup>27</sup>

In the fall of 1997, the parties moved to Massachusetts for a number of reasons, including the availability of joint adoption.<sup>28</sup> That spring, E.O. contacted an attorney to inquire about initiating adoption proceedings.<sup>29</sup> Thereafter, the couple's relationship began to deteriorate, and they separated in May of 1998.<sup>30</sup> Following this separation, L.M. did not permit E.O. to see their son.<sup>31</sup>

In response to this denial of access, E.O. filed a complaint in the probate and family court seeking specific performance of the agreement to allow her to adopt and assume joint custody of B.O.M.<sup>32</sup> She also sought visitation rights.<sup>33</sup> L.M. filed a motion to dismiss the

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21. See Brief for Plaintiff at 5.

22. See *E.N.O.*, 711 N.E.2d at 889-91.

23. *Id.* at 892.

24. See *id.* at 889; Brief for Plaintiff at 5-6.

25. See *E.N.O.*, 711 N.E.2d at 889; Brief for Plaintiff at 6.

26. See *E.N.O.*, 711 N.E.2d at 889; Brief for Plaintiff at 6.

27. See *E.N.O.*, 711 N.E.2d at 889, 892-93.

28. See *E.N.O.*, 711 N.E.2d at 889; Brief for Plaintiff at 28. In 1993, the SJC held that a lesbian couple could jointly adopt the biological child of one of the partners without extinguishing the biological parent's rights. See *In re Tammy*, 619 N.E.2d 315, 316 (Mass. 1993); *In re Susan*, 619 N.E.2d 323, 324 (Mass. 1993). It should be noted that the defendant's brief is silent as to why the parties decided to move to Massachusetts.

29. See *E.N.O.*, 711 N.E.2d at 889.

30. See *id.* at 889.

31. See *id.*

32. See *id.*

33. See *id.* Although not relevant to this article, and not a focus of the decision, it should be noted that E.O. also sought a winding down of her financial affairs with L.M. See *id.*

complaint, which was denied.<sup>34</sup> Following a hearing, E.O. was granted temporary visitation rights pending trial.<sup>35</sup> Upon appeal by L.M., the visitation order was vacated by the appeals court.<sup>36</sup> E.O. then successfully petitioned a single justice of the SJC to reinstate her rights of visitation pending a trial on the merits.<sup>37</sup> L.M. appealed this decision to the full court, resulting in the present decision.<sup>38</sup>

### III. LEGAL ANALYSIS: JURISDICTION

As framed by the SJC, the legal question before it was “whether the facts warrant[ed] the Probate Court’s exercise of jurisdiction to grant visitation between a child and the child’s de facto parent.”<sup>39</sup> In plain terms, the court had to determine if E.O. had standing to bring the suit, and whether, as the legal mother, L.M. could not only prevent her from seeing their child, but could also deny her a forum in which to seek redress for her loss.<sup>40</sup>

Before discussing the court’s jurisdictional analysis, it is important to consider the significance of L.M.’s position in relational terms as its true meaning is easily obscured by the formality of legal argument. Arguing that the court lacked authority to resolve the dispute between her and E.O., L.M. is effectively denying the reality of her own family.<sup>41</sup> Not only is she seeking to prevent E.O. from having a meaningful role in the life of their son, as many parents might attempt to do in the grief of dissolution, she is seeking to redraw the boundaries of their family.<sup>42</sup>

L.M. casts E.O. as an “outsider” who is not B.O.M.’s other mother, but a “well-intentioned third party” who is “seek[ing] to infringe” on L.M.’s exclusive parent-child relationship with her son.<sup>43</sup>

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34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.* at 888.

38. *See id.*

39. *Id.* In their briefs, both parties frame the issue as one of standing, and since the characterization does not seem to affect the analysis, this article will not concern itself with any technical distinctions between these two concepts. *See* Brief for Plaintiff at 23; Brief for Defendant at 10.

40. *See E.N.O.*, 711 N.E.2d at 889-90.

41. *See id.* at 889.

42. It should be noted that there is an effort underway in the gay community to keep these disputes out of court through the promulgation of standards for use in the resolution of custody and visitation disputes. These standards emphasize the importance of maintaining relationships with both parents in the event of dissolution. These standards are entitled *Protecting Our Children: Standards for Child Custody Disputes in Same-Sex Relationships* (visited March 23, 2000) <<http://www.glad.org/bro.html>>.

43. Brief for Defendant at 10, 13, 16.

Exalting her biological link to the child, L.M. denies the mutuality of this co-created “family of intention.”<sup>44</sup> In seeking jurisdictional preclusion, L.M. is not simply arguing that E.O. is not a good parent; she is denying her very existence as a parent—a status L.M. both consented to and encouraged.<sup>45</sup>

Turning now to the decision, the SJC stated that the probate court had the authority to hear this matter pursuant to its broad equitable powers.<sup>46</sup> As the court explained:

[T]he Probate Court’s equity jurisdiction encompasses “persons and estates of infants.” . . . 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.<sup>47</sup>

The SJC is unequivocal about the probate court’s authority to hear this matter. However, it is not entirely clear whether the SJC is saying that a party must allege sufficient facts regarding the existence of a substantial parent-child relationship before she can invoke the equitable authority of the court, or whether it is saying that an assertion of best interest is sufficient for establishing jurisdiction, with the substantiality of the relationship becoming the central factor in the determination of best interest.<sup>48</sup> In any event, it is clear that E.O. could not have prevailed had she been unable to establish her status as the other mother of B.O.M.<sup>49</sup> The uncertainty remaining for future cases is whether a lack of sufficient facts regarding the existence of a parent-child relationship will serve as a jurisdictional barrier

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44. Brief for Plaintiff at 21.

45. Although not discussed by the court, in light of L.M.’s agreement that E.O. participate in their son’s life as his other mother, and be so recognized by the world, a possible route to formal parental status for E.O. might have been the doctrine of parenthood by estoppel. See Polikoff, *supra* note 10, at 491-502 (discussing this approach, including its strengths and limitations).

46. See *E.N.O.*, 711 N.E.2d at 889-90. In 1963, the legislature conferred equitable jurisdiction on the probate court, making it a court of general equity jurisdiction. See MASS. GEN. LAWS ch. 215 § 6 (1993). In identifying the probate court’s equitable powers as its source of authority to hear this dispute, the SJC noted that other state statutes which confer authority on the probate court to hear visitation disputes between parents were not applicable because they specifically require marriage or a determination of paternity. See *E.N.O.*, 711 N.E.2d at 890 n.3.

The court also noted that the legislature “has authorized the Probate Court to grant visitation rights to grandparents of unmarried minor children, G.L. c. 119, § 39D, but there is no parallel provision authorizing similar measures in actions pressed by parents in the plaintiff’s position.” *Id.* at 890 n.3.

47. *Id.* at 890.

48. See *id.* at 886-99.

49. See *id.* at 889-91 (reviewing the court’s analysis where de facto parentage is a precursor for determining whether a person’s connection to a child is in that child’s best interest).

preventing a plaintiff from being heard, or if, being permitted to reach the merits, it will preclude a finding of best interest at trial.<sup>50</sup>

#### IV. RESOLVING THE VISITATION DISPUTE: THE BEST INTEREST TEST AND THE SIGNIFICANCE OF E.O.'S STATUS AS A DE FACTO PARENT

Having determined that the probate court had jurisdiction, and thus could resolve the visitation dispute, the SJC next considered whether allowing visitation was in B.O.M.'s best interest.<sup>51</sup> Noting that the best interest standard is amorphous, the court framed the substantive inquiry as follows: "We must ask what facts the judge may take into account in determining where a child's best interests lie."<sup>52</sup> In determining what facts are essential to an assessment of best interest, the court took notice of E.O.'s parental role, stating: "Here, the judge emphasized the plaintiff's role as a parent of the child. It is our opinion that he was correct to consider the child's nontraditional family."<sup>53</sup>

Simply and eloquently, the SJC affirmed E.O.'s parental status, stating:

A child may be a member of a nontraditional family in which he is parented by a legal parent and 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.<sup>54</sup>

Perhaps anticipating the dissent's argument that recognizing E.O. as a parent would allow visitation or even custody claims by anyone with a significant relationship with a child, thereby diluting the significance of the parent-child relationship, the court stressed the narrow confines within which this doctrine operates.<sup>55</sup> To be

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50. As legal expert Nancy Polikoff indicates, custody and visitation disputes between co-parents present three distinct, although interrelated, legal questions: First, what is the legal status of the co-parent? Does the court recognize her as a parent, or is she relegated to third party status? *See* Polikoff, *supra* note 10, at 471-72 (explaining that parties considered nonparents are not on equal legal footing with legal parents, and that nonparents may have no standing to challenge parental custody). Second, does she have standing to seek either custodial or visitation rights? (Alternatively, this can be framed as a jurisdictional question: does the court have the authority to hear the dispute?) *See id.* Third, what substantive standard is to be used in resolving the merits of the dispute? *See id.* at 473.

51. *See E.N.O.*, 711 N.E.2d at 890.

52. *Id.* at 890-91.

53. *Id.* at 891.

54. *Id.*

55. *See id.* at 896-97 (Fried, J., dissenting). This is a red herring argument as there is nothing in the court's decision which even suggests that anyone other than someone who has truly participated in a child's life as a parent would be able to claim de facto parent status. Of course, as in any other custody or visitation dispute, the court may be called upon to sort out competing claims regarding the nature and extent of parental involvement, but this is no different

considered a de facto parent, an individual must reside with the child and share caretaking functions with the legal parent with the consent and encouragement of the legal parent.<sup>56</sup> Accordingly, as delineated in the present case, the legal parent must cooperatively participate in the creation of this status: the status cannot be imposed upon her.<sup>57</sup>

In recognizing E.O. as a de facto parent, the SJC was also influenced by the fact that B.O.M.'s existence was a result of the parties' joint decision to have and raise a child together.<sup>58</sup> Focusing on their reproductive intent as well as on E.O.'s functional role, the court distinguished this case from its earlier decision in *C.M. v. P.R.*, in which it had refused to extend parental status to a man who began living with child's legal mother during her pregnancy and then shared in the raising of the child.<sup>59</sup> In differentiating the cases, the court emphasized that unlike E.O., C.M. "had not been part of the decision to create a family by bringing the child into the world."<sup>60</sup>

At first glance, this distinction may seem somewhat arbitrary given that both E.O. and C.M. had significant parental ties to the children they were helping to raise. Although not elaborated on by the court, it is important to recognize that this is not the first time a court has given weight to procreative intent.<sup>61</sup> In fact, in both the paternity and the gestational surrogacy contexts, procreative intent by itself has been sufficient to establish parental status.<sup>62</sup>

In the landmark case of *People v. Sorensen*, the Supreme Court of California responded to a claim by a man who was denying any

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from what the court is asked to do in divorce cases, although the stakes are higher for the co-parent, as her very status as a parent is at issue.

56. See *id.* at 891.

57. See *id.* at 891-93. In adopting this definition of a co-parent, the court relied on the ALI Principles of the Law of Family Dissolution § 2.03(1)(b) (Tentative Draft No. 3 part 1, 1998) (adopted at the annual meeting, May 1998).

The court also stated that the person must perform these caretaking functions for "reasons primarily other than financial compensation," thus establishing that a nanny or a baby-sitter could not qualify as a de facto parent. *E.N.O.*, 711 N.E.2d at 891 n.6. The dissent maintained that in recognizing E.O. as a parent, the court was giving effect to the parties' Co-Parenting Agreement. See *id.* at 897 (Fried, J., dissenting). However, the majority made clear that it was relying on the agreement simply "as indicative of the defendant's consent to and encouragement of the plaintiff's de facto [status]." *Id.* at 892 n.10.

58. See *id.* at 891-92.

59. See *id.* at 891 (distinguishing *C.M. v. P.R.*, 649 N.E.2d 154 (Mass. 1995)).

60. *Id.* Further distinguishing the cases, the court pointed out that C.M. was seeking an adjudication of paternity, rather than visitation rights as a de facto parent; and further, that the record was sparse with respect to his parental involvement. See *id.*

61. See *People v. Sorensen*, 437 P.2d 495, 498 (Cal. 1968).

62. See *id.* at 499; see also *Johnson v. Calvert*, 851 P.2d 776, 782-83 (Cal. 1993) (holding that as between two women with biological connections to a child, parental intent determines maternity).

obligation to pay child support upon divorce, on the grounds that he was not a legal or biological parent because his wife had been artificially inseminated.<sup>63</sup> He denied the monetary obligation despite his consent to his wife's insemination and his assistance as a father in the raising of the child.<sup>64</sup> The court stated: "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will . . . it is safe to assume that without defendant's active participation and consent the child would not have been procreated."<sup>65</sup> Thus, by consenting to the insemination, the husband was deemed the legal father of his child despite the lack of a biological connection.<sup>66</sup>

In a more recent California opinion, the court held that where parties to a gestational surrogacy contract disputed legal parenthood, priority should be given to the intending parents since "the mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers."<sup>67</sup> Continuing, the court equated reproductive intent with the child's best interest: "Honoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."<sup>68</sup>

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63. 437 P.2d at 497-98.

64. *See id.* at 497.

65. *Id.* at 499. It should be noted that *Sorensen* involved different issues than are raised by the present case as it involved the construction of California's paternity presumption statute. *Sorensen* is discussed here simply to illustrate the role that procreative intent has played in the assignment of parental status.

Since *Sorensen*, most courts which have considered this issue have also "assigned parental responsibility to the husband based on conduct evidencing his consent to the artificial insemination." *In re Baby Doe*, 353 S.E.2d 877, 878 (S.C. 1987). Unfortunately, despite the *Sorensen* decision, California courts have not looked with favor on the claims of co-parents. *See Z.C.W. v. Lisa W.*, 84 Cal. Rptr. 2d 48 (1999) (including citations to other California cases); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (1991) (denying parental rights to a lesbian co-parent).

66. *See Sorensen*, 437 P.2d at 501-02.

67. *Johnson*, 851 P.2d at 783 (quoting Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986)).

68. *Id.* (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 2 WIS. L. REV. 297, 397 (1990)). It should be noted that in *Johnson*, both the intending mother and the surrogate had a biological connection to the child: the intending mother, having contributed the egg, had a genetic link, and the surrogate, having carried the child to term, had a gestational link. *See id.* at 779. However, the court focused on intent as the dispositive factor, noting in dicta that if the woman gestating the embryo had been the intending parent, she would be considered the child's legal mother. *See id.* at 782 n.10.

In a subsequent gestational surrogacy case in which the child was not biologically linked to either intending parent, as both the sperm and the egg were donated, the court clarified that *Johnson* did not require a biological link, and that intent was controlling in fixing parental status, as parents who make the decision to bring a child into the world "are likely to have the child's best interest at heart." *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 290 (1998) (*rev. denied* June

Thus, intent can be understood as a procreative act which correlates with an affirmative desire to be responsible for the care of a child. Grounded in this legal framework, the court's reliance on E.O.'s participation in the decision to bring a child into the world as a distinguishing factor is the logical conclusion, because E.O., together with L.M., are responsible for the child's very existence.

Having recognized E.O. as a parent, the court turned to the importance to B.O.M of maintaining his relationship with E.O.<sup>69</sup> Seeking to protect him from the trauma of disruption, the SJC concluded that preservation of the child's "filial ties" with E.O. through court ordered visitation outweighed L.M.'s custodial interests.<sup>70</sup>

Disturbed by this result, the dissenters chastised the majority for allowing visitation where "[t]here has been no allegation, much less any finding, that the mother has failed in any recognized legal duty to her child."<sup>71</sup> Claiming that the probate court had usurped L.M.'s parental authority, the dissent asserted that "it has never been supposed that a probate judge may simply drop into a family relation without any particular legal warrant and decree that a parent must follow a particular course in the upbringing of that child."<sup>72</sup> As understood by the dissent, much as an uninvited dinner guest might disrupt an evening, the judge, by dropping into the relationship between L.M. and E.O., capriciously unsettled traditional understandings of family.

In seeking to protect the exclusivity of the relationship between L.M. and B.O.M., the dissent ignored the fact that until the dissolution of their relationship, L.M. herself had not claimed exclusive parental status. Instead, from the outset of their decision to have a child, parenting was a shared endeavor. Only by distorting the facts and the parties' agreement can the dissent claim that E.O.'s relationship is

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10, 1998). For an excellent discussion about the role of intent in determining parental status, see JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997).

69. See *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893-94 (Mass. 1999).

70. See *id.* at 893-94. As with the determination of parental status, the court looked to the parties' agreement as expressive of their belief that in the event of dissolution, it would be in their son's best interest to maintain a relationship with E.O. See *id.* at 892 n.10. This result was supported by the G.A.L. who had been appointed by the probate court. In her report, she stated that E.O. "was an active parent and appreciative of the child's needs." *Id.* at 889.

71. *Id.* at 894 (Fried, J., dissenting).

72. *Id.* at 895 (Fried, J., dissenting).

potentially indistinguishable from those that others, such as a teacher or classmate, might have with B.O.M.<sup>73</sup>

Seeking to protect the traditional understandings of legal parenthood, the dissent fails to consider the impact on B.O.M. of severing his parental relationship with E.O. While criticizing the majority for focusing on the parties' relationship rather than on the child's best interest, it is in fact the dissent who, in its failed quest to preserve the "fundamental liberty interests" of a select class of parents, ignores the essential relational needs of B.O.M.<sup>74</sup>

#### V. AN UNANSWERED QUESTION: IS A DE FACTO PARENT A FULL LEGAL PARENT?

The SJC carefully delineated the requirements of the de facto parent doctrine, and made clear that a de facto parent is entitled to maintain a relationship with his/her child. However, the court did not go beyond this to discuss whether a de facto parent acquires all of the rights of a "legal parent." Given that the decision responds to a dispute over interim visitation rights, such a determination was not necessary, but one can hope that the court was laying the initial foundation for the acceptance of full parental rights for co-parents when it recognized that B.O.M. truly has two mothers.

#### VI. CONCLUSION

By recognizing E.O.'s de facto parent status and rejecting L.M.'s contention of exclusive authority as a parent, the SJC embraced the reality of "non-traditional" families. In so doing, the court refused to be bound by traditional definitions of family. The SJC refused to be intimidated by claims that it was diluting the meaning of parenthood, where to do so would have disrupted the very meaning of this family, and severed a child's ties with a loving parent.

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73. *See id.* at 895-97 (Fried, J., dissenting). The dissent claimed that the parties' arrangements and agreements had no bearing on the best interest of the child. *See id.* at 895-96 (Fried, J., dissenting). What the dissent, however, failed to see is that these arrangements and agreements embodied the parties' own understanding of themselves as a family—an understanding that L.M. subsequently sought to disavow.

74. *Id.* at 898 (Fried, J., dissenting) (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).