



CITRON LAW

A family law practice representing clients in custody and property matters that accompany the end of a committed relationship. Our goal is to protect the investments our clients have made in their marriages, their partnerships, and their children.

## ADOPTIVE PARENTS AND OTHERS: CUSTODIAL ISSUES IN MASSACHUSETTS

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### LEGAL PARENTS AND LEGAL STRANGERS

Biological and adoptive parents are legal parents. They are generally entitled to legal custody (the right to make major life decisions for a child in the areas of health, education, and religious instruction) and physical custody (the place where the child resides), and they are obligated to support their children financially. Everyone else in the world is merely a third party, what the law calls a “legal stranger” to the child, someone with no rights and no obligations. If you are a single biological or adoptive parent living in a committed relationship with a partner who is helping to parent your child, you are living with someone who is a legal stranger to you and to your child.

### CO-PARENT ADOPTION

The point of adoption is to provide parents for children who don't have any, which is why an existing parent's rights must be terminated before a child is available for adoption. An exception to the termination rule is what has come to be known as “co-parent” or “second-parent adoption,” a proceeding in which a legal parent and a second adult jointly petition the court to establish the same legal relationship with the second adult that the child already has with his parent. The effect of the petition is to create two adoptive parents simultaneously, with identical rights and obligations to the child.

In 1993, Massachusetts and Vermont became the first states to accept such petitions. Since then, twenty-three other states have followed suit. As of this writing, second-parent adoption is authorized by statute in four states and by appellate court decisions in six. In fifteen other states, trial courts have granted second-parent adoptions that have gone unchallenged. Most of the time, these adoptions are used to allow an adult to become a legal parent to her same-sex partner's child.

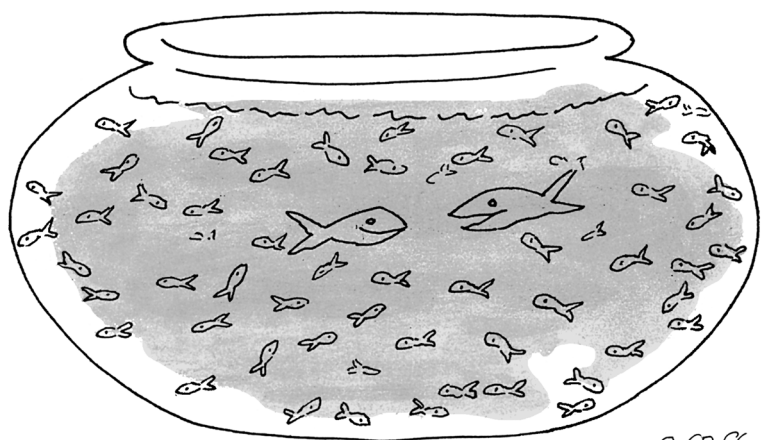
### DE FACTO PARENTS

People other than legal parents sometimes play such an important role in a

child's life that they achieve something approaching parental status. The law often acknowledges such adults using terms like “equitable parents,” “functional parents,” or “psychological parents,” depending upon the jurisdiction. Here in Massachusetts, such people are known as “de facto” parents.

A de facto parent is someone who: 1) has lived with the child for a significant period of time; and 2) has performed at least as much caretaking as the legal parent without being compensated for it; and 3) with the consent and encouragement of the legal parent, has formed a parental bond with the child. A child who has formed an attachment to such a person is likely to suffer harm if the attachment is severed, and so Massachusetts recognizes the right of such a person to bring a lawsuit seeking access to the child over the objections of the legal parent. The U.S. Constitution protects the right of a fit custodial parent to rear her child without interference by the state. But parental rights are always limited by what is in the best interests of the child. If a judge thinks that it is in your child's best interest to have continuing access to your former partner, then your former partner will be able to visit with your child even over your strenuous objections.

(CONTINUED)



S. GROSS

*I guess we'll be considered a family. We're living together, we love each other, and we haven't eaten the children yet.*

## CAUTIONARY TALES

Once upon a time, Angie and Melinda, who had been living together for five years, decided it was time to have a family. The plan was for Melinda to become pregnant and for the couple to secure legal rights for Angie by means of co-parent adoption. The adoption papers were prepared soon after the birth of the child, and Melinda signed them. But Angie did not, which became the source of considerable tension between the couple. Eventually, when the child was around 2 years old, Angie and Melinda separated. Angie then sued Melinda for joint legal and physical custody, seeking to be declared the child's de facto parent. The court case went on for three contentious years while the former partners fought over the child. A long trial and several appeals generated legal fees and expenses that might easily have exceeded \$1 million, to no avail. The court reasoned that Angie had always had the means to secure her relationship to the child and had elected not to do so. The court was not going to correct Angie's error. By the time the case ended, the child was five years old. Unfortunately, the case generated press coverage.

Smith and Jones had been living together for three years when Smith adopted a child, Rose. Two years later, Jones adopted a child, Liza. Jones rejected co-adoption of both children and none took place. However, she allowed Smith to act as an important caretaker for Liza. For a time, Smith stayed at home taking care of both children while Jones worked. The women separated when Liza was almost two years old. Smith sued Jones seeking to be declared Liza's de facto parent and to win joint legal and physical custody of Liza. For two years while the case was pending before the probate court, Jones was forced to give Liza up every Sunday so that the child could spend time with Smith. Jones needed special permission to have Liza at home with her for Mother's Day. The trial took six days. The case went to the appeals court twice and lasted three years. Smith lost. The absence of a co-adoption was one among many factors that defeated her claim. Smith gave the parties' real names to one of the alternative weeklies, inviting more inquiries and compromising the children's privacy.

## THE MORAL

If you are a single person contemplating adoption, you need to understand how the law treats legal parents and others who care for children and who play an important role in their lives. If you live with an adult to whom you are not married, and you assign significant caretaking functions to that person — whether or not the adoption was part of a joint plan to create a family — you need to be clear with yourself and with your partner about what, if any, legal relationship you want that person to have to your child. If you intend that your partner is going to be a full and equal parent forever, then you should be prepared to participate in a co-adoption, which means that you will have to share your child no matter what happens to your relationship with your partner. If you are uncertain about whether you want your partner to have a legal relationship with and custodial rights to your child, then you need to make this clear at the outset. If you allow your partner to function as a parent, then you might wake up one morning to the news that you have granted her certain enforceable rights that could secure continuing access to your child long after a breakup and a new relationship with someone else.

If you are in a same-sex marriage, you need to understand that your marriage might not be portable: it will be recognized in some places, but not in others. That means that if the legal relationship you have with your child derives solely from your marriage, that relationship might not be portable either. Adoption is recognized almost everywhere.

Whatever you decide about how to arrange your private lives, always remember this: Lawsuits are toxic to children.

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