



The Massachusetts Parentage Act Coalition

Massachusetts Parentage Act Legislation Overview

What is parentage?

Parentage is the *legal* parent-child relationship. A legal parent is someone who has all the rights and responsibilities of parenthood. For children, a legal parent-child relationship is central to stability, security and well-being. Although there are many ways to establish legal parentage, very few are currently codified by statute in Massachusetts. Inclusive and updated parentage statutes are key to securing children to their parents.

Why do we need to update parentage statutes in Massachusetts?

Massachusetts parentage law is outdated, incomplete and confusing. It does not reflect the richness and diversity of modern families. This creates shortcomings and gaps that leave broad swaths of children vulnerable to separation from their parents and related harms. For example:

- Massachusetts is a state where rights for the children of LGBTQ parents have been recognized by courts on an ad hoc basis as opposed to being protected through proactive, comprehensive statutory reforms.¹ While protection through the courts has been important, those protections are harder for parents and children to access, and they require extensive litigation that can result in harm to children and families.
- The Massachusetts statute that governs parentage of non-marital children – Chapter 209C – was enacted in 1986 and is clearly outdated in its language.
- Massachusetts has no statutory guidance for how to resolve competing presumptions of parentage and competing claims of legal parentage.
- De facto parent status – a status recognized since 1999 - is currently a court-created, equitable status that breeds uncertainty and confusion for children, parents, attorneys, and courts. A clear statutory standard will protect these nurturing parental relationships and ensure access to justice. This would bring Massachusetts in line with other New England

¹ See e.g., Adoption of Tammy, 416 Mass. 205 (1993), Culliton v. Beth Isr. Deaconess Med. Ctr., 435 Mass. 285 (2001); Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003), Della Corte v. Ramirez, 81 Mass App. Ct. 906 (2012); Hunter v. Rose, 463 Mass. 488 (2012); Adoption of a Minor, 471 Mass. 373 (2015); Partanen v. Gallagher, 475 Mass. 632 (2016); Adoption of Daphne, 484 Mass. 421 (2020).

states including Maine, Vermont, and Rhode Island.

- Massachusetts has only one statute addressing parentage of children born through assisted reproduction, and it only addresses marital children, which raises constitutional concerns. See G. L. c. 46, §4B. The status quo is inadequate considering that Massachusetts has the highest rate of births through assisted reproduction in the country.² Massachusetts is the only New England state without comprehensive protections for children born through assisted reproduction.
- Massachusetts has no statutes protecting those involved in the surrogacy process. This leads to harmful delays and uncertainties for children, families and people acting as surrogates as there is no uniform process for establishing parentage in our courts. For decades – and most recently in 2020 -- Massachusetts courts have called on the Legislature to enact comprehensive statutory protections for children born through surrogacy. See, e.g., Culliton v. Beth Isr. Deaconess Med. Ctr., 435 Mass. 285 (2001); Adoption of Daphne, 484 Mass. 421, 424 n. 8 (2020). We are the only New England state without any statutory protections for those involved in building families through surrogacy.

What are some of the harms happening because of our outdated parentage statutes?

Massachusetts' outdated parentage statutes cause substantial harm for children and families. Here are a few examples involving Massachusetts families directly impacted by outdated laws:

- **Insufficient access to an administrative route to parentage at birth:**
After the 2016 case Partanen v. Gallagher, it became clear that non-biological parents of children born through assisted reproduction must have equal access to establishing parentage through an administrative route to parentage – the Voluntary Acknowledgment of Parentage (VAP) process. After working with advocates, the Department of Public Health updated the VAP form in 2018 to include LGBTQ families. Despite this, the first LGBTQ family in MA who sought to sign a VAP still faced discrimination and humiliation at the hospital when their child was born because the birth certificate administrator refused to provide the parents with the form until lawyers intervened. It is critical to amend the operating statute - Chapter 209C - to ensure that the protections regarding VAPs are codified and clear.
- **Harm from unequal de facto parent status:**
A de facto mother came into her child's life around the time of birth and parented him for years with her non-marital partner. She left her full-time job to be her son's primary caregiver, but her partner refused to consent to an adoption. When the adult relationship ended, her partner severed the parental relationship. The de facto mother filed and

² Centers for Disease Control and Prevention, State-Specific Assisted Reproductive Technology Surveillance, <https://www.cdc.gov/art/state-specific-surveillance/index.html> (noting that in 2016, 4.7% of infants in Massachusetts were born as a result of assisted reproductive technology).

litigated a de facto parent case, and the case settled because it was clear she was his de facto parent and critical to her son's well-being. Given the lack of clarity of the de facto parent status, however, this de facto mother was only able to access visitation. The power imbalance of the adult relationship thus endured, and she had no ability to modify the visitation or to be involved in decision making for her child. The de facto mother remains an active parent in her son's life but in a second-class, vulnerable status that leaves her son less secure. For those parents who meet the rigorous de facto parent test, it is important to ensure that de facto parent status is an equal legal status.

- **Vulnerability to family separation in the child welfare system:**

A non-biological mother, who married her partner a few days after their child's premature birth, had carefully planned to build a family through assisted reproduction. After living together and parenting jointly, and when the child was three years old, the Massachusetts Department of Children and Families (DCF) removed the child from their home due to circumstances surrounding the parent's separation, including issues relating to mental health. DCF did not recognize the non-biological mother as a presumed legal parent despite Massachusetts case law and did not permit her to participate in the initial removal proceedings and denied her access to counsel. If she had been properly recognized as a parent at the outset, with due process protections, her child might never have entered the foster care system. With advocacy, this parent was appointed counsel and adjudicated a legal parent. She was reunited with her son, but it took almost 2 years to do so. It is critical to amend Chapter 209C to be gender neutral so that parentage protections are clearer for all involved – particularly the juvenile courts and DCF.

- **Years-long delays in securing parentage:**

Without a statutory framework for the surrogacy process, there is no clear route to garner post-birth orders of parentage which are necessary in some surrogacy situations, leaving families with only the adoption code to secure their children. In a recent gestational surrogacy case, Adoption of Daphne, the trial court's misunderstanding of the law led to a two-year delay in securing parentage of the child. The Supreme Judicial Court (SJC) ensured that this child's parentage was secured, urging the Legislature, once again, to act.

What are the benefits of the Massachusetts Parentage Act?

Comprehensive statutory parentage reform – ensuring that all children have equal access to the protections of legal parentage – is in reach, and the Massachusetts Parentage Act would provide these protections.

The Massachusetts Parentage Act, based on the Uniform Parentage Act of 2017,³ ensures that Massachusetts parentage statutes are (1) constitutional after the U.S. Supreme Court cases

³ The annotated Uniform Parentage Act of 2017 is available here:

<https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=librarydocuments&LibraryFolderKey=&DefaultView=> It is endorsed by

Obergefell v. Hodges, 135 S. Ct. 2071 (2015), and Pavan v. Smith, 137 S. Ct. 2075 (2017); (2) inclusive and protective of all Massachusetts children; and (3) reflective of advances in science.

The Uniform Parentage Act (UPA) is model legislation issued by the non-partisan Uniform Law Commission that is recommended for adoption in all states to ensure uniformity of parentage protections. UPA 1973 ensured that parentage laws were constitutional and protected children born of non-marital parents. UPA 2017 recommends to states a number of important updates to ensure state parentage law remains constitutional post Obergefell and Pavan and consistent with best practice and trends in family law. Comprehensive parentage reform legislation consistent with UPA 2017 has already been adopted in Rhode Island, Vermont, Maine, California, and Washington.

The Commonwealth, its children, families, and courts, will benefit in numerous ways through this bill:

- Clarifying the paths to parentage and articulating standards for each path will increase court efficiency, promote access to justice, and protect more children.
- Providing courts a standard for resolving competing claims of parentage will reduce litigation.
- Clarifying the de facto parent standard will provide greater security for the children of de facto parents and better delineate the line between parents and third parties.
- Codifying expanded access to VAPs – the administrative route to parentage – will increase access to justice and reduce litigation.
- Codifying protections for children born through assisted reproduction will ensure the intended parentage of these children.
- Codifying standards and protections in surrogacy will not only protect all of those involved in the process but will promote efficiency and consistency in our courts.
- Ensuring equality, recognition, and respect for the diversity of families in the Commonwealth, particularly LGBTQ families, ensures that Massachusetts meets the demands of both the state and federal constitutions.⁴

leading national organizations including the American Bar Association and the National Child Support Enforcement Association

⁴The American Bar Association, in Resolution 113 adopted in 2018, recognized the urgent need for state lawmakers to ensure equal protection for LGBTQ parents and for bar associations and attorneys to support family law reform efforts. Resolution 113 notes the importance of comprehensive statutory reform as opposed to ad hoc recognition of rights through case law. See American Bar Association, House of Delegates Resolution 113, <https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/113.pdf>.

- Bringing a best-practices parentage law to Massachusetts will bring us in line with the other New England states – Maine, New Hampshire, Rhode Island, and Vermont – who have comprehensively updated their parentage statutes to protect all children.

Overview of the Massachusetts Parentage Act

The proposed Massachusetts Parentage Act is based on a uniform act – the Uniform Parentage Act of 2017 – and adapted to Massachusetts.

The bill amends Chapter 209C’s parentage provisions so that they are inclusive and constitutional, and the bill creates a new Chapter – 209E – to ensure protections for children born through assisted reproduction and surrogacy.

The Massachusetts Parentage Act is designed to update the existing statutes to ensure equality for all children in access to legal parentage, to keep pace with medical science, to codify existing case law, and to increase access to justice by clarifying paths to parentage. The MPA does not change existing laws on child custody, parenting time, or child support. The sole focus of the MPA is initial parentage adjudication.

What are some common myths about parentage law in MA?

Myth: Genetic connection makes someone a parent.

Reality: There are many paths to legal parentage and a genetic connection alone does not correlate with legal parent status. See, e.g., G. L. c. 46, § 4B; G. L. c. 209C, s. 6(a)(4); Adoption of a Minor, 471 Mass. 373 (2015); Partanen v. Gallagher, 475 Mass. 632 (2016).

For example, the marital presumption of parentage has long protected close family relationships, not genetic connection. See, e.g., C.C. v. A.B., 406 Mass. 679 (1990); Michael H. v. Gerald D., 491 U.S. 110 (1989). It is the *relationship* with a child that merits constitutional protection. See, e.g., Smith v. McDonald, 458 Mass. 540, 540-545 (2010) (no constitutional right for putative father until he is a legal father); Michael H. v. Gerald D., 491 U.S. 110, 128-129 (1989) (constitutional protections do not arise from biology alone). Indeed, in Lehr v. Roberston, the Supreme Court reasoned that the significance of genetic connection was that it offered a father an *opportunity* to establish a parental relationship with a child but that genetic connection alone was not due constitutional protection. See 463 U.S. 248, 262 (1983).

Massachusetts strongly protects children's established relationships with adults they know as parents. See, e.g., G. L. c. 209C, § 6(a) (4); Partanen v. Gallagher, 475 Mass. 632, 642 (2016); Paternity of Cheryl, 434 Mass. 23, 31-32 (2001).

Myth: De facto parent status is unnecessary and raises concerns about constitutionality and potential abuse of the status.

Reality: De facto parent status remains a critical protection for children, and a majority of states protect these functional relationships. The rigorous standard outlined in the bill is constitutional and will ensure that true de facto parents are able to secure their children.

A de facto parent is a person who, through their conduct, establishes a parent-child relationship. In Massachusetts, the concept of a de facto parent dates to E.N.O v. L.M.M., 429 Mass. 824 (1999).⁵ Today, a majority of states, whether through case law or statute, protect these functional parent-child relationships that are so critical to children and their well-being. Courtney Joslin, De Facto Parentage and the Modern Family, 40 Fam. Advoc. 31, 32 (2018). In recent years, the following five states have codified de facto parent status as an equal, legal parental status: Delaware (2009), Maine (2015), Rhode Island (2020), Vermont (2018), and Washington (2018).

Right now, de facto parent status in Massachusetts is a court-created equitable status that is confusing and murky for children, parents, lawyers, and courts. In its current form, it is an unequal status that only permits access to visitation and does not fully protect children or parents and entails extensive and expensive litigation that is out of reach for most people. The bill clarifies that de facto parents are equal legal parents with all the rights and responsibilities of parentage, including child support.

The Massachusetts Parentage Act's standard is rigorous, with a standing requirement and seven factors that all must be proven by clear and convincing evidence.

De facto parent status is a *parental* status and not a third party status as in Troxel v. Granville or Blixt v. Blixt. The national trend is to recognize de facto parent status, and there are no constitutional barriers. As noted in Conover v. Conover, "several state courts of last resort have expressly held that Troxel does not prevent the recognition of de facto parent status... Indeed, no case has interpreted Troxel as inconsistent with parental status for non-biological parents except Maryland." Conover, 141 A.3d 31, 42-44 (reversing former ruling; citing state court decisions in Washington, Delaware, Arkansas, South Carolina, New Mexico, North Carolina, West Virginia, Maine, Colorado, Pennsylvania, and Delaware).

The de facto parent provisions were drafted mindful of concerns about abuse of the status by putative de facto parents. De facto parents must pay child support, which will further discourage abuse of the status. Finally, the catch all requirement that the parent-child relationship is in the child's best interests serves as an important protection to ensure that abusive parents do not meet the standard.

Myth: Massachusetts does not allow a child to have three parents.

⁵ In Massachusetts, the core of the de facto parent standard has remained the same since E.N.O.: "A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide." 429 Mass. at 829 (internal citations omitted).

Reality: Massachusetts has long recognized that a child can have three parents.

Massachusetts' courts have long recognized that, for some children, it is in their best interests to have more than two parents. In 1944, in Merrill v. Berlin, the SJC found that it was in the best interests of the children to be raised by three persons, in that case, the deceased mother's aunt and two female cousins. 316 Mass. 87, 99 (1944). Since the mid-1990s, three-parent adoptions have routinely been allowed in Massachusetts, recognizing the benefit to children in having their actual parental relationships recognized. Many of these are LGBTQ families where two of the three parents are the biological parents and the third is the partner of one of the biological parents. In most cases, these are intentional families where the parents have determined together to co-parent a child. In others, the third, non-biological parent has become involved after a child's birth and, with the mutual consent of the two other parents, has taken on a parental role.

The UPA 2017 recommends that states ensure that courts have the discretion to determine that a child has more than two legal parents, and this recommendation is consistent with the status quo in Massachusetts.

Who supports the Massachusetts Parentage Act?

The MPA is supported by Massachusetts families and community organizations including:



Who can I contact for more information or to discuss the bill?

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For more information on the Massachusetts Parentage Act, including family stories, please visit www.massparentage.com