Suffolk Journal of Trial and Appellate Advocacy

Volume 19 | Issue 1 Article 20

1-1-2014

Family Law - Child Custody for the Non-Biological Parent When a Same-Sex Relationship Deteriorates - Hunter v. Rose

Linden K. Nash
Suffolk University Law School

Recommended Citation
19 Suffolk J. Trial & App. Advoc. 445 (2014)

FAMILY LAW—CHILD CUSTODY FOR THE NON-BIOLOGICAL PARENT WHEN A SAME-SEX RELATIONSHIP DETERIORATES—*HUNTER V. ROSE*, 975 N.E.2D 857 (MASS. 2012).

Throughout both statutory and common-law traditions, a biological parent's legal right to his or her child has been consistently recognized.[1] However, in most jurisdictions, non-biological lesbian and gay parents have no legal relationship to the child and are often seen as "legal strangers" regardless of their level of parental involvement.[2] When a domestic partnership deteriorates, gay, lesbian, or transgender parents demand the right to maintain relationships with their children, but they often face unique hurdles in establishing parentage against the biological parent or ex-partner.[3] In *Hunter v. Rose*,[4] the Massachusetts Supreme Judicial Court ("SJC") addressed the issue of whether a non-biological parent in a domestic partnership had the same parental rights to a child born within the relationship as the biological parent.[5] The SJC found that both parents, regardless of their biological ties, had parental rights to the child and subsequently awarded primary physical custody of the child to the non-

---

[1] U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."). Although not explicitly stated, the judiciary has held numerous times that the Due Process Clause of the Fourteenth Amendment protects the parents' fundamental right to make decisions as to "the custody, care, and control of their children." *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (reiterating biological parents have fundamental right in choosing how to raise their children); *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) (stating freedom of choice in family matters is a liberty protected by Due Process Clause); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166 (1944) ("[T]he custody, care and nurture of the child reside first in the parents . . . [and] these decisions have respected the private realm of family life . . . ."). *See generally* MASS. GEN. LAWS ch. 209B, § 1 (2013) (defining "parent" as biological, foster, or adoptive parent whose rights have not been terminated).

[2] *See* Laurie A. Rompala, Note, *Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-Sex Parents Seeking Visitation*, 76 CHI.-KENT L. REV. 1933, 1934 (2001) (discussing increasing trend of non-biological parents demanding fundamental parental rights with their children).

[3] *See* Pulliam v. Smith, 501 S.E.2d 898, 899 (N.C. 1998) (holding gay father could not have custody of his children). *See generally* Kelly M. O'Bryan, Comment, *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L. REV. 1115, 1116-18 (2011) (discussing how courts often refuse to grant gay or lesbian non-biological parents custody).

[4] 975 N.E.2d 857 (Mass. 2012).

[5] *See id.* at 859.

biological partner.[6]

In 2001, Amy E. Hunter and Miko Rose started dating and later moved to California in 2002 with the intention of establishing residency so that Rose could attend medical school.[7] A few years later, the couple legally entered a domestic partnership under California law and tried to conceive a child through artificial insemination, with Hunter as the intended birth mother.[8] By September of 2006, Hunter had yet to become pregnant, so Rose tried, and was successful.[9] The couple then moved to Massachusetts to seek better healthcare coverage, and accommodate Rose's new medical rotations on the east coast.[10]

Nine months later, Rose gave birth to a baby, Jill, with Hunter as the primary care giver.[11] While Hunter began filing for the adoption of Jill, the couple wanted another child, so Hunter again attempted to become pregnant through artificial insemination, and successfully became pregnant, using the previous donor's sperm.[12] Unfortunately, the relationship deteriorated in August 2008; however, the two continued to live together until October when Rose moved to Oregon with Jill, cutting off all ties with Hunter, and stopping the adoption process entirely.[13]

---

[6] *See id.* at 865 (considering numerous factors in determining why primary physical custody was awarded to non-biological parent).

[7] *See id.* at 859.

[8] *See id.* In September of 2003, the California Legislature amended its domestic partnership laws to grant same-sex partners rights that are identical to those of marriage. *See* CAL. FAM. CODE § 297.5(a) (West Supp. 2012) (granting same-sex partners broader rights); *Hunter*, 975 N.E.2d at 859 (discussing amendment to California domestic partnership laws). The law applied retroactively to all registered same-sex domestic partnerships that were not terminated prior to the statutes effective date of January 1, 2005. *See* CAL. FAM. CODE § 299.3 (West Supp. 2012) (applying retroactively); *Hunter*, 975 N.E.2d at 859 (noting retroactive application of California amendment). Therefore, Hunter and Rose's relationship was governed by the provisions of the 2003 statute. *Hunter*, 975 N.E.2d at 859.

[9] *See Hunter*, 975 N.E.2d at 859.

[10] *See id.* at 859-60.

[11] *See id.* at 860. Although both women contributed to Jill's care, Hunter was the primary care giver due to Rose's busy and hectic schedule. *Id.* In January of 2008, Rose contacted an attorney to start the process of Hunter's adoption of Jill and the couple began to collect supporting affidavits. *Id.*

[12] *See id.* (noting same sperm donor used for Jill's conception was also used for second pregnancy). Therefore, Jill and the unborn child are siblings because they share the same biological father. *Id.*

[13] *See id.* Rose misled Hunter by assuring her that she and Jill would return, and promising that she would send regular updates about Jill and use a web camera so that Hunter could continue to see Jill, but she failed to deliver on any of these promises. *Id.* Instead, Rose cancelled her cell phone service, changed her number, ignored Hunter's attempts to communicate with them, refused gifts that Hunter sent to Jill for Christmas, and made crucial decisions about Jill's life without consulting Hunter. *Id.* Even after a temporary court order was issued in February of 2009 that allowed Hunter to have contact with Jill, Rose insisted that Hunter not refer to herself

In November of 2008, Hunter filed a complaint against Rose for custody of Jill.[14] Shortly after in January 2009, Hunter gave birth to Mia, whom Rose expressed no intention in raising as her child.[15] After a bench trial in the Probate and Family Court, the presiding judge dissolved the party's domestic partnership and declared that Hunter and Rose were the legal parents of both children.[16] In addition, the judge granted Hunter sole legal and physical custody of Mia, as well as primary physical custody of Jill, but allowed Hunter and Rose to share joint legal custody of Jill.[17]

The Fourteenth Amendment's Due Process Clause prohibits state and local government officials from depriving anyone of life, liberty, or property without the necessary procedural safeguards.[18] The Supreme Court has repeatedly held that the freedom of personal choice in marriage is a protected liberty interest under the Due Process Clause, and should not be harmed by a state's disregard.[19] The United States has traditionally defined "marriage" as a legal union between one man and one woman as husband and wife.[20] This tradition held until the landmark decision in *United*

---

as "mommy" and she deliberately applied for positions in Oregon in an attempt to keep Jill as far away from Hunter as possible. *Id.*

[14] *See Hunter*, 975 N.E.2d at 860 (outlining procedural history of case). In December 2008, Hunter filed an amended complaint in equity, seeking sole physical custody of Jill and her unborn child, along with a complaint for divorce. *Id.*

[15] *See id.* Even though Rose conceded that she and Hunter used the same sperm donor, she denied the assertion that Jill and Mia were sisters. *Id.* In addition, Rose actively discouraged any relationship between Jill and Mia, and wanted whatever relationship they did have terminated. *Id.*

[16] *Id.* at 861.

[17] *See id.* (describing judge's parenting schedule of visitation between Hunter and Rose). The judge also awarded Hunter $180,000 in attorney's fees in a separate order. *Id.* Rose appealed the decision and the SJC granted an application for direct appellate review. *Id.* at 859-60 (emphasizing Rose only challenged award of custody for Jill, not Mia).

[18] *See* U.S. CONST. amend. XIV, § 1, cl. 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . .").

[19] *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (striking down Texas sodomy law); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) (clarifying issues relating to marriage and family are covered by Due Process Clause); Loving v. Virginia, 388 U.S. 1, 12 (1967) (stating marriage constitutes protected liberty interest under Due Process Clause); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting protected right "to marry, establish a home and bring up children" under Fourteenth Amendment). In *Cleveland Board of Education*, the Court stated, "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ.*, 414 U.S. at 639. In that same vein, the Court emphasized in *Loving* that, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. More recently, in *Lawrence*, the Supreme Court held that the Due Process Clause protected a person's right to privacy in the bedroom without government intrusion. *See Lawrence*, 539 U.S. at 578.

[20] *See* Defense of Marriage Act, 1 U.S.C. § 7 (1996) (defining "spouse" as person of the opposite sex who is a husband or wife), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

States v. Windsor, in which the Supreme Court found the old definitions within the Defense of Marriage Act ("DOMA") to be unconstitutional.[21] Ten years prior to *Windsor*, Massachusetts became the first state to legalize same-sex marriage when the state's highest court held that same-sex couples had the right to marry under the Massachusetts Constitution.[22] Since these ground breaking decisions, more states have followed Massachusetts and are allowing civil unions, domestic partnerships, and same-sex marriages.[23] If a civil union or domestic partnership from another state became a point of issue within Massachusetts, the SJC would likely treat the relationship as a same-sex marriage because the court considers them to be the functional equivalent.[24]

Considering the rise in legal recognition of same-sex relationships, the number of children born into these relationships is also increasing, creating more "non-traditional" families.[25] Under Massachusetts law, children born into a legal spousal relationship are presumed to be the children of both spouses.[26] Parents have a fundamental interest in their relationship with their child, and the Due Process Clause of the Fourteenth Amendment protects that liberty.[27] Furthermore, many same-sex couples utilize artifi-

---

[21] *See* United States v. Windsor, 133 S. Ct. 2675, 2680 (2013) (holding DOMA unconstitutional as deprivation of equal liberty of persons protected by Fifth Amendment); *see also* § 7 (defining "marriage" as legal union between one man and one woman).

[22] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (finding no constitutionally adequate reason for denying civil marriages to same-sex couples).

[23] *See Civil Unions & Domestic Partnership Statutes*, NATIONAL CONFERENCE OF STATE LEGISLATURES, June 26, 2013, http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx. (demonstrating increase in number of states allowing civil unions, domestic partnerships, and same-sex marriage).

[24] *See* Elia-Warnken v. Elia, 972 N.E.2d 17, 20 (Mass. 2012) (treating Vermont civil union as equivalent to marriage). Failure to recognize a domestic partnership from another state would allow a partner to avoid obligations like child support. *See id.* at 20-21; *see also* Joseph W. Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 28-29 (2005) (discussing how non-recognition of legal relationships allows spouse to avoid obligations).

[25] *See* Mary L. Bonauto, *Advising Non-Traditional Families: A General Introduction*, 40 BOS. B.J. 10, 10 (1996) (asserting Census data shows non-traditional families are becoming more prevalent).

[26] MASS. GEN. LAWS ch. 209C, § 6 (2013) (explaining parentage for children born outside of legal spousal relationship); *see also* MASS. GEN. LAWS ch. 208, § 31 (2013) (addressing issues in determining child custody). When "making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody." MASS. GEN. LAWS ch. 208, § 31; *see* Commonwealth v. Beals, 541 N.E.2d 1011, 1014 (Mass. 1989) (recognizing both parents have an equal right to their child).

[27] *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (explaining parents' right to their child is fundamental); *supra* note 19 and accompanying text (discussing Fourteenth Amendment's protection of parents' fundamental rights to raising their children); *see also* U.S. CONST. amend. XIV, §

cial insemination, so any child born as a result of artificial insemination with spousal consent is considered to be the child of the consenting spouse.[28] If a couple separates, the biological parent usually gets custody of their child, unless the judge finds "by clear and convincing evidence, that the natural parent currently is unfit to further the welfare and the best interest of the child."[29]

In determining who should receive custody of a child, the touchstone inquiry is determining what is in the best interests of that particular child.[30] When deciding what is in the child's best interest, judges have

---

1, cl. 1; MASS. CONST. pt. 1, art. 10 ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws."). *But see* Opinion of the Justices to the Senate, 691 N.E.2d 911, 914 (Mass. 1998) (asserting best interest of child overrides parents' fundamental interest). The SJC explained that the interest of children being free of neglect and promoting their welfare outweighs any risk of erroneous deprivation of parental rights to a relationship with the child. *Id.*

[28] MASS. GEN. LAWS ch. 46, § 4B (2013) (defining parentage of children born from artificial insemination). When a child is born as a result of artificial insemination, the child is the legitimate child of both spouses, so long as consent can be shown from both parents. *See generally* Mitchell v. Banary [hereinafter *In re M.J.*], 787 N.E.2d 144, 148 (Ill. 2003) (addressing issue of parentage through artificial insemination). In *In re M.J.*, the Supreme Court of Illinois found that the father should pay child support because he recommended to the plaintiff that she undergo artificial insemination, although they were unmarried, because he had a secret wife. *See id.* at 146. Although he was not the biological father and never consented in writing to the insemination procedure, he showed actual consent by paying support. *See id.* at 152.

[29] *See generally* MASS. GEN. LAWS ch. 119, § 24 (2013) (detailing procedure and requirements to commit child to custody of the state); *see* Stanley v. Illinois, 405 U.S. 645, 650 (1972) (striking down Illinois law providing that unwed fathers were not "parents"); *see also In re* Stephen, 514 N.E.2d 1087, 1091 (Mass. 1987) (affirming biological mother unfit to care for children). In *Stanley*, the Supreme Court asserted that the state may contest parentage and make a child a ward of the state but it must show unfitness with clear and convincing evidence based on family privacy. *See Stanley*, 405 U.S. at 658. In *Stephen*, the court found by clear and convincing evidence that the biological mother was not able to take care of her children, and that the children should be committed to the custody of the department. *See In re Stephen*, 514 N.E. at 1093 (asserting necessity of removing the child from their biological parent must be persuasively shown).

[30] MASS. GEN. LAWS ch. 209C, § 10 (2013) (addressing court's considerations in awarding custody of child). Custody is given to whoever is in the best interest of the child. *See* MASS. GEN. LAWS ch. 208, § 31A (2013) (noting rebuttable presumption that abusive parents' custody is not in best interest of child). A judge must identify the parenting and living arrangement that best satisfies the child's welfare and happiness based on the evidence presented. *See In re* Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983) (listing factors to consider in determining best interest of child). In *Marriage of Weidner*, the Supreme Court of Iowa found that custody determinations should be made based on what is in the best interest of the child, with a strong preference for joint custody. *See id.* In this case, because the parents constantly fought when together, joint custody was not in the child's best interest. *See id.* at 359; *cf.* Johnson v. Johnson, 564 P.2d 71, 75 (Alaska 1977) (rejecting tender years doctrine as proper criterion for determining child's best interest). In *Johnson*, the trial court applied the "tender years doctrine" and awarded custody of the children to the mother, who, as a Jehovah's Witness, did not want the children to be with the father because he had been excommunicated from the congregation for smoking cigarettes.

considered a number of factors, such as the child's relationships with siblings, the existence of a particularly hostile or disrespectful parent, and the stability of the home.[31] Because Massachusetts defines a parent as a "biological, foster, or adoptive parent whose parental rights have not previously been terminated," it remains difficult for a non-biological parent to obtain custody of a child where there is a conflict with the natural parent.[32]

In *Hunter*, the SJC made three distinct holdings that significantly affect the rights of same-sex couples in the state of Massachusetts.[33] First, the SJC upheld the trial court's determination that the parties' registered domestic partnership ("RDP") in California was the equivalent of a marriage in the Commonwealth.[34] Next, the court determined that Hunter and Rose were the legal parents of both children under Massachusetts and California law.[35] Finally, and most significantly, the SJC granted primary physical custody of Jill to Hunter, the non-biological parent.[36]

The SJC began its reasoning for awarding primary physical custody to Hunter by acknowledging the equal rights of both parents to their children, but focused its inquiry for custody matters on what is in the best

---

See Johnson, 564 P.2d at 72-73, 76 (asserting that making custody determinations based on parents' religious practices violated First Amendment).

[31] *See, e.g.*, Custody of Kali, 792 N.E.2d 635, 644 (Mass. 2003) (clarifying that stability and flexibility of work schedules factor into determining child's best interest); Adoption of Hugo, 700 N.E.2d 516, 524 (Mass. 1998) (recognizing importance of siblings' being raised together); Custody of Zia, 736 N.E.2d 449, 454-55 (Mass. App. Ct. 2000) (stressing importance that custodial parent support child's relationship with non-custodial parent); Haas v. Puchalski, 402 N.E.2d 1088, 1090 (Mass. App. Ct. 1980) (denying custody where home was not "settled").

[32] *See* MASS. GEN. LAWS ch. 209B, § 1 (2013) (providing definition of "parent").

[33] *See* Hunter v. Rose, 975 N.E.2d 857, 859 (Mass. 2012) (stating holdings on appeal). In addition to these three holdings, the SJC also addressed the award of attorney's fees to Hunter on appeal. *See id.* (upholding trial court's award of attorney's fees).

[34] *See id.* at 861 (holding trial court did not err in treating registered domestic partnership as a marriage); *cf.* Elia-Warnken v. Elia, 972 N.E.2d 17, 20 (Mass. 2012) (recognizing Vermont civil union as marriage under principles of comity). The SJC clarified that Rose's arguments for not treating the domestic partnership as a marriage were analogous to the issues addressed in *Elia-Warnken*. *See Hunter*, 975 N.E.2d at 861 (treating parties' domestic partnership as marriage because such affords rights and responsibilities identical to marriage).

[35] *See Hunter*, 975 N.E.2d at 861-62 (finding California's domestic partnership law provides virtually same rights as marriage). Rose claimed that she did not consent to Mia's conception and challenged the finding of her parentage as inconsistent with chapter 46, section 4B of the Massachusetts General Laws. *See* MASS. GEN. LAWS ch. 46, § 4B (2013) (providing spouse who consents to use of artificial insemination establishes parentage); *Hunter*, 975 N.E.2d at 861-62. The court found that Rose consented to Mia's conception because she signed three consent forms, gave blood for testing, accompanied Hunter to many doctors visits, and told others that Hunter's pregnancy was "great news." *Hunter*, 975 N.E.2d at 862. Therefore, the judge's conclusion that Rose consented to Mia's conception was fully supported by the facts. *See id.*

[36] *See Hunter*, 975 N.E.2d at 868 (holding trial court did not err in awarding primary physical custody to Hunter). The SJC gave joint legal custody of Jill to both the plaintiff and defendant. *See id.* at 861.

interest for the child.[37] The SJC considered Hunter's role as primary care giver, and noted that Jill had developed a "strong emotional bond with Hunter" from the time she was born until she was fifteen months old.[38] The SJC further opined that Rose had shown little regard for Jill's basic and fundamental needs by moving to Oregon, accepting employment in Michigan, and completely cutting off all ties with Hunter.[39] In determining the award of physical custody, the SJC stated that "it is in the best interests of a child to be in the sole custody of the parent who can support the involvement of both parents rather than with the parent who alienates the child from the other parent."[40] After considering all the facts, the SJC found that Hunter was the parent who best exemplified this quality.[41]

In addition, the court evaluated the stability that each parent would be able to offer Jill while also taking into account the flexibility of their jobs, and again found that Hunter was the most appropriate choice.[42] Due to Rose's frequent moving, Jill had lived in four different residences in less than one year, which was further complicated by the fact that Rose accepted a job with extensive hours in Michigan.[43] In contrast, the court noted that Hunter "has a stable job as an attorney in Massachusetts [that] provides flexibility by giving her the opportunity to work from home and to work

---

[37] *See id.* at 862; *see also* MASS. GEN. LAWS ch. 208, § 31 (2013) (stating parents rights equal but custody given based on best interests of child); *cf.* Commonwealth v. Beals, 541 N.E.2d 1011, 1014 (Mass. 1989) (recognizing both parents have equal right to their child).

[38] *See Hunter*, 975 N.E.2d at 863. When Jill was fifteen months old, Rose removed her from their home and they moved to Oregon. *Id.* The court noted that Jill was in all likelihood harmed by Rose's actions as demonstrated by the child's combative and "clingy" behavior. *See id.* Rose unjustly removed Jill from Hunter's life because Rose knew that Hunter was Jill's legal parent and in the process, disrupted Jill's bond with Hunter. *See id.*

[39] *See id.* At trial, the judge found that Rose's failure to have a plan for maintaining Jill's ties to Hunter and engaging in behaviors demonstrating an attempt to alienate the child from Hunter exacerbated the harm to Jill. *Id.* Rose did not allow Jill to contact Hunter, she told Jill that Hunter was not her parent but a "friend," and referred to Hunter as "the person," "someone," "Amy," or even "dickwad." *Id.* Rose also specifically asked that their other child, Mia, not be present during Hunter's web camera sessions with Jill, and even asked the court to order that Hunter not refer to herself as "mommy" during these video chat sessions. *Id.* at 863-64.

[40] *Id.* at 864.

[41] *See id.* (detailing ways in which Hunter supported Jill's relationship with Rose). Hunter respected Rose's role as Jill's other parent, referred to her as "Mommy Miko," and kept a picture of Rose in Jill's bedroom. *Id.*

[42] *See id.* at 864.

[43] *Hunter*, 975 N.E.2d at 864. Not only was Michigan far away, but Rose had no ties or relationships what so ever in the state. *Id.* (noting only family Rose had in the area was a three-hour drive away). As a result of the constant moving and lack of support system, Jill was placed in the care of at least five different providers. *Id.* The judge found that the job Rose took in Michigan "was not 'even [a] bona fide' career choice." *Id.* The court decided that a move to Michigan would put Jill in an "unfamiliar environment," while Rose worked extraordinarily long hours, and also noted that Rose could not manage Jill's care on her own without significant support. *Id.*

flexible hours."[44] In light of all of these factors, it was clear to the court that Hunter was able to put Jill's needs above her own and that granting sole physical custody to Hunter was in Jill's best interest.[45]

During oral arguments, both parties agreed that what was in the child's best interest was the most important factor, however Rose's attorney argued that what was truly in Jill's best interest was not evaluated properly by the trial judge.[46] Hunter's attorney conceded that Rose's relationship with Jill was indeed strong, but there were still eighty-eight pages worth of findings that favored the award of physical custody to Hunter.[47] In the end, the SJC found for Hunter and agreed that even though she was the non-biological parent, she should be awarded sole physical custody of Jill.[48]

With the increasing number of states allowing same-sex marriage or similar alternatives, problems circulating around these family issues are bound to continuously come up across the country.[49] In regards to it's first holding, the SJC made a logical decision by treating the registered domestic partnership in California as a marriage in Massachusetts, since virtually all the rights were the same, and in turn held Rose accountable for her obligations.[50] But the most significant decision, the child custody issue, has

---

[44] *Id.* (emphasizing Hunter's job enabled her to be far more accessible to Jill than Rose).

[45] *See id.* at 865. Hunter even managed to maintain a loving and supportive relationship with Jill despite the distance between them. *Id.* The court recognized that Rose deliberately created the geographical distance in this case, but still awarded her frequent contact with Jill, rendering the argument about Jill's potential unhappiness due to their separation meritless. *See id.*

[46] Oral Argument at 8:30, Hunter v. Rose, 975 N.E.2d 857 (Mass. 2012) (SJC-11010), *available at* http://www2.suffolk.edu/SJC/archive/2012/SJC_11010.html. Rose's attorney stated that the court improperly evaluated what was in the child's best interests by not putting any value on Jill's strong relationship with Rose. *Id.* at 8:40. Attorney Foskett also argued that the court holding that Jill was "more likely then not" harmed by the move to Oregon is not a finding of harm and should not be persuasive. *Id.* at 9:45. But these two factors were not significant enough to outweigh the many others that contributed to the court's final holding. *See Hunter*, 975 N.E.2d at 864-65 (discussing trial court's findings).

[47] Oral Argument, *supra* note 46, at 28:00, 29:15. Hunter's attorney also explained that the trial court took "extensive measures" to sustain the relationship between Jill and Rose by granting joint legal custody and awarding Rose with considerable visitation with Jill, and their relationship was by no means being terminated. *Id.* at 28:15. Attorney Loewy established that the trial court did in fact do a thorough job examining all the facts needed to decide what was in the best interest of Jill by making and analyzing eighty-eight pages of findings. *Id.* at 29:15.

[48] *Hunter*, 975 N.E.2d at 865 (upholding trial court's award of custody).

[49] *Cf. Civil Unions & Domestic Partnership Statutes*, *supra* note 23 (showing states that allow same-sex marriages, civil unions, and domestic partnerships); O'Bryan, *supra* note 3, at 1116-17 (discussing unique parentage issues faced by same-sex couples).

[50] *See Hunter*, 975 N.E.2d at 861 (recognizing parties' California RDP under principles of comity). Failure to recognize the domestic partnership would have allowed Rose to avoid things like child support. *See generally* Singer, *supra* note 24, at 28-29 (discussing how non-recognition of legal relationships allows a spouse to avoid obligations). Singer explains how marriage is not

strong merit as well and has already been cited to from another case in Massachusetts.[51] Even though *Hunter* has only been cited in a few other cases thus far, it should affect more future decisions as long as the core inquiry of child custody remains the same.[52] Courts around the country should follow suit and begin to legally recognize complex parenting arrangements that are bound only to increase with time.[53]

In *Hunter*, the SJC made a courageous and forward thinking decision in treating children of same-sex couples the same as children of heterosexual couples for purposes of determining custody.[54] Currently, the legal system disproportionately denies children born from gay, lesbian, and transgender couples a relationship with one of their parents after a separation—usually the non-biological one.[55] Courts are beginning to recognize that what defines a parent has nothing to do with a person's gender or any sort of biological relation.[56]

Furthermore, practitioners should aim their litigation strategy after the respondent's counsel in this case and remember to gather as much evi-

---

a typical contract. *See id.* (asserting marriage confers rights and obligations parties cannot abandon without judge's decision). Singer continues to say that Massachusetts has a continued interest in having couples who are married within the state to carry out their marital obligations properly. *See id.*

[51] *See* Custody of Lyndon, No. 12-P-1679, 2013 WL 5377148, at *3 (Mass. App. Ct. Sept. 27, 2013). This case cited *Hunter* because the Massachusetts Appeals Court awarded custody to the parent who is most likely to keep the other parent involved in the child's life in a meaningful and positive way. *See id.* Similar to what happened in *Hunter*, one parent clearly wanted the other one out of the child's life regardless of the strong connection that the parent and child had previously developed. *See id.*

[52] *See* source cited *supra* note 30 and accompanying text (explaining "touchstone inquiry" of child custody is what is in the best interest of child). There were many factors in *Hunter* that assisted the court in deciding what placement would be in Jill's best interest. *See Hunter*, 975 N.E.2d at 863-66.

[53] *See* Nancy D. Polikoff, *This 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, 573 (1990) ("[C]ourts should redefine parenthood to include anyone in a functional parental relationship that a legally recognized parent created with the intent that an additional parent-child relationship exist."). Polikoff tries to prepare the legal system to review the rights and responsibilities of two parents of the same-sex once they split up and have a child from their relationship. *See id.*

[54] *See* O'Bryan, *supra* note 3, at 1160 (arguing child adversely affected when court does not give custody or visitation to non-biological parent). By awarding sole physical custody to Hunter and still granting visitation to Rose, the SJC allowed them both to be in Jill's life. *See Hunter*, 975 N.E.2d at 865.

[55] *See* O'Bryan, *supra* note 3, at 1160 (discussing impact of current legal system on children of same sex couples).

[56] *See* Polikoff, *supra* note 53, at 483 (advocating for development of new definition of legal parent). Courts must protect parent-child relationships by recognizing that a rigid legal definition of "parent" only protects a small number of children, and children who live in nontraditional families deserve this same interest. *See id.* at 574-75.

dence possible to demonstrate what is in the best interest of the child.[57] Also, in the early stages of filing for divorce, if there is a child from the union, litigators should discuss with their clients all of the factors that came up in *Hunter* for determining how custody is awarded so they are aware that custody is no longer automatically given to the biological parent.[58] In states other than Massachusetts, attorneys should not rest on the fact that their client is the biological parent, because that no longer means the custody of the child is set in stone.[59] Attorneys in more conservative states should develop tactics to educate judges about homosexuality and to further show how a child may not necessarily be harmed by living with the non-biological gay or lesbian parent.[60]

Nancy Polikoff said it best in her article: "It is cause for optimism that courts, legislatures, and scholars are struggling to devise new doctrines to address the needs of children in families that do not fit the one-mother/one-father model."[61] The law must begin to willingly recognize and preserve the relationship between parent and child even in nontraditional families as these types of families are becoming more prevalent. The holding from *Hunter v. Rose* is groundbreaking and will be sure to influence future cases before the SJC, and in other courts, for years to come. The country is progressing towards equality for everyone regardless of sexual orientation, and therefore our law should follow suit. A child should not be left without a mother just because the relationship between the adults has ended and an angry ex-spouse wants to seek revenge. Although traditionally in the eyes of the law, the non-biological gay or lesbian parent is often seen as a legal stranger, more courts should start to recognize that a "parent" is defined by more than biology.

Linden K. Nash

---

[57] *See* Oral Argument, *supra* note 46, at 29:15. Defense counsel for Ms. Hunter presented eighty-eight pages of findings made by authorized agents which showed that living with Hunter was in the child's best interest. *Id.* This argument was obviously the most effective and held significant weight with the justices. *See Hunter*, 975 N.E.2d at 863-866.

[58] *See* sources cited *supra* notes 39-45 and accompanying text (explaining numerous factors that are weighed in determining who should be awarded custody). By informing the client how custody may be awarded to the non-birth parent, they will be conscious of the fact that it is very possible for the biological parent to lose custody.

[59] *See Hunter*, 975 N.E.2d at 865 (awarding non-biological parent sole physical custody of child). *Hunter* is a prime example of how Massachusetts is truly looking to what is in the child's best interest, not just biological ties. *See id.* The SJC did not just assume that because Jill was genetically tied to Rose, that Rose should automatically receive custody. *See id.*

[60] *See generally* Polikoff, *supra* note 53, at 544-49 (emphasizing need to eliminate preconceived notions about gay and lesbian parents).

[61] *Id.* at 490.