

THE SHAPE OF THINGS TO COME

PENDING AND SOON-TO-BE-PENDING PARENTAGE LITIGATION

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1) GENDER NEUTRALITY IN DETERMINING PARENTAGE

The California Family Code provides that the provisions of the Code for determining a father and child relationship shall also apply to determination of a mother and child relationship “insofar as practicable.” (Family Code § 7650.) This statute has been interpreted by the California Supreme Court in *Johnson v. Calvert* (1993) 5 Cal.4th 84, 90) and by the Courts of Appeal (see, e.g., *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410; *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218; *K.M. v. E.G.* (2005) 37 Cal.4th 130), to require that the Family Code be applied in a gender neutral manner where it is reasonably possible to do so. The unresolved question is: to what extent is it practicable to apply parentage statutes gender neutrally?

In a case currently pending in California, a husband had an extramarital affair which resulted in a pregnancy. The birth mother agreed to allow the husband and his wife to raise the baby, but there was never an adoption. When the birth mother decided to reassert her parental rights, the husband and wife objected and are arguing that the wife should be presumed to be the baby’s mother under a gender-neutral application of Family Code section 7540, the conclusive marital presumption. (This exact argument was raised and rejected by the Court of Appeal, Fourth District, Division 3, in *In re Marriage of Moschetta*, *supra*, 25 Cal.App.4th at 1224-1225.)

This case raises interesting questions about the gender neutral application of parentage statutes. The general rule has always been that a child is “born into” the home of its mother – and if the mother is married, and chooses to keep the child and raise it with her husband, the husband will be presumed to be the father whether he is the genetic father or not. This rule is codified in Family Code sections 7611(a) and 7540, both of which further the public policy of supporting the raising of children within the context of the intact, marital home. Where it later turns out that there is another man who is the genetic father of the child, we have only given that man the legal power to interfere with the marital family if he has actually established a parental relationship with the child, presumably with the consent of the mother. The courts have had no sympathy for the genetic father who *wants* a relationship with his genetic child but has been unable to establish such a relationship because the mother and her husband have precluded him from doing so. (See *Dawn D. v. Superior Court* (1998) 17 Cal.4th 932.)

Now take the same case, with a gender-neutral application of the marital presumption. A man has an extra-marital affair with, say, his secretary, and she becomes pregnant. The man admits his affair to his wife, and they resolve their differences and agree to stay together and raise the child in their marital family. The secretary gives birth, the father and his wife arrive at the hospital, pick the baby up and take it home, and the birth mother has no rights whatsoever with regard to that baby. This scenario, which I describe as “accidental surrogacy,” would be the result of a truly gender-neutral application of Family Code section 7540, taken to its logical limit.

In the pending case, the wife has probably attained the status of a presumed mother, based on a gender-neutral reading of Family Code section 7611(d), as required by the decisions of our courts of appeal in *In re Karen C.* (2002) 101 Cal.App.4th 932 and *In re Salvador M.* (2003) 111 Cal.App.4th 1353. The wife has welcomed her husband’s child into her home, has held it out as her own, and has fully embraced her role as mother. Based on these facts, she should be able to establish her parental rights without bringing Family Code section 7540 into the equation.

The gender-neutral reading of Family Code section 7611(d), which is fundamentally a conduct-based statute, makes perfect sense. But to read status-based statutes such as 7540 in a gender-neutral manner would require a finding that mothers and fathers are similarly situated at the moment of their child’s birth – which I would submit they are not. A mother is necessarily present at her child’s birth, and has been intimately connected with the baby to whom she is giving birth for many months already, sharing her oxygen, blood supply and nourishment with that baby round the clock. A genetic father may or may not have been aware of the pregnancy; may or may not have been in any way involved in the process leading up to birth; may or may not be present – or even within the same state or country – when the child is born. To suggest that these people are similarly situated at the moment of birth is to ignore the realities of the different contributions that men and women bring to the processes of pregnancy and childbirth. Based on these realities, some differentiation in the application of parentage laws – and particularly status-based parentage presumptions – to men versus women seems essential – in short, this appears to be an area where gender-neutrality is not practicable.

2) AND BABY MAKES FOUR

With AB 205 (the “Domestic Partner Rights and Responsibilities Act of 2003”) in effect, a lesbian couple giving birth to a child are presumed to be that child’s natural parents. One can find a statutory basis for this presumption in both Family Code section 7613(a) – which, read in the context of domestic partnerships, provides that a domestic partner who consents to her domestic partner’s insemination with donor sperm is treated in law as the natural mother of the child – and Family Code section 7611(a), which – again read in the context of

domestic partnerships – provides that a woman is presumed to be the natural mother of a child if she and the child’s natural mother are or have been registered as domestic partners and the child is born during the partnership or within 300 days after termination of the partnership.

However, an unresolved parentage issue arises when the lesbian couple has conceived their child either “the old-fashioned way” (i.e. by one of the partners having sexual relations with a man) or by donor insemination without physician involvement. In either of these cases, the child will have an alleged father who arguably has a right to establish paternity if he acts promptly to do so. In this context, the issue arises of whether the child has three legal parents; or whether the courts will have to weigh the competing interests and determine whether the partner or the father is the second legal parent of the child.

The key case supporting the rights of the donor/alleged father in this context is *Jhordan C. v. Mary K.* (1986) 179 Cal.App.3d 386, where it was held that a donor was entitled to bring a paternity action and to seek visitation and shared custody where the provisions of Family Code § 7613(b) – providing for sperm donation under physician supervision – were not strictly complied with. However, in that case the mother was neither married nor part of a registered domestic partnership (neither option existing for same-sex couples at the time) at the time of her child’s conception or birth. In addressing an equal protection argument raised by Mary C. in that case, the court noted: “In the case of the married woman her husband is the presumed father ... and *any* outsider – including a semen donor, regardless of physician involvement – is precluded from maintaining a paternity action unless the mother ‘relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the child.’” (*Jhordan C.* at 395.)

In other words, both *Jhordan C.* and *Dawn D.* should protect an intact, registered lesbian couple from interference by a donor under a gender-neutral reading of the marital presumptions discussed above, as long as the donor has not established an actual relationship with the child. However if, with the women’s consent, the donor/alleged father actually establishes a parental relationship with the child, that child potentially will have three parents; or the competing presumptions of 7611(a) and 7611(d) will have to be resolved by a court using Family Code §7612(b) [“If two or more presumptions arise under 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”].

3) THIRD PARTY CHALLENGES TO JUDGMENTS OF PARENTAGE

In *Kristine H. v. Lisa R.* (2005) 37 Cal.4th 156, the California Supreme Court reviewed a judgment whereby a trial court had found that a child had two natural mothers based on application of *Buzzanca* to a lesbian couple who had intentionally conceived a child together with the intent to both be parents. The

Supreme Court found that the women were themselves estopped from challenging the judgment; however, in a footnote the court noted that its holding applied only to the actual parties: “We address only whether Kristine is estopped from challenging the validity of the judgment. Nothing we say affects the rights or obligations of third parties, whatever they may be.” (*Kristine H.* at 162, fn. 2.)

Although there has been considerable speculation as to what third parties would have standing to challenge a parentage judgment (many believe the court had the sperm donor in mind, since no physician was used and his status with regard to the child has never been adjudicated by any court – see section 2 above), there is already at least one case pending in a trial court where a third party litigant is attempting to have a “*Kristine H.*” parentage judgment set aside.

In the pending case, a lesbian couple went into court while one of them was pregnant and obtained a judgment that both were natural and legal parents. However, the relationship of the mothers only lasted for approximately six months after the baby was born, after which time the biological mother took up residence with another woman. The three women have been functionally co-parenting the child ever since. However, taking the Supreme Court up on its invitation from *Kristine H.*, the subsequent partner has now petitioned the court to set aside the original parentage judgment and declare her the child’s second legal mother in lieu of the original partner, basing her argument on the alleged invalidity of the original judgment, as well as on her status pursuant to Family Code section 7611(d) and the presumed parentage cases.

In *Kristine H.*, the California Supreme Court found that the trial court had subject matter jurisdiction over the parentage action when it rendered its judgment that Kristine and Lisa were both parents. A final judgment of parentage should be immune from collateral attack as long as the court had fundamental subject matter jurisdiction. Under the *res judicata* doctrine, a final judgment on the merits precludes relitigation of the same cause of action in a subsequent suit. (*Mycogon Corp. v. Monsanto Co.* (2002) 24 Cal.4th 888, 896.) Collateral estoppel, which is an aspect of *res judicata*, precludes relitigation of issues decided in prior proceedings. (*Id.*) “The consistent application of the traditional principle that final judgments, even erroneous ones ... are a bar to further proceedings based on the same cause of action is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of individual plaintiffs....” (*Slater v. Blackwood* (1975) 15 Cal. 3d 791, 797.)

This is especially well settled in the family law arena. For example, in *In re Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, the court rejected a woman’s collateral attack on a stipulated judgment of parentage, reaffirming the general principle that a judgment cannot be set aside for nonjurisdictional errors: “Nancy’s argument confuses errors that exceed a trial court’s jurisdiction with errors of substantive law that are within its jurisdiction. Jurisdiction is the power

to hear and determine a matter and is not at all dependent upon the judge's ability to reason correctly or to act incorruptibly."

In *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, the child's grandparents sought to challenge a prior judgment declaring a man to be the child's legal father. The court held that, even though the grandparents were not parties to the paternity determination, they were precluded from collaterally attacking the prior judgment of parentage. "Clearly, in a further action brought by the county, [the father] would be estopped by the doctrines of *res judicata* and collateral estoppel from asserting that he was not the father of Claralyn. ... Is it fair to bind Gary to the finding of paternity but not bind others? We do not think so, especially since Claralyn is old enough to have established a relationship with her father, Gary." (*Id.* at p. 85; see also *Estate of Camp* (1901) 131 Cal. 469 [emphasizing the importance of finality with respect to parentage determinations and noting that "[o]therwise the existence of this fact and the status of the children would be always uncertain"]; *Estate of Griswold* (2001) 25 Cal.4th 904, 922 ["California courts generally recognize the importance of a final determination of paternity."].)

In light of these cases, and the solid legal principles upon which they rest, the judgment in the pending case should not be subject to collateral attack.

There is a second reason that the attack on the parentage judgment is improper: the new partner stands in the shoes of a stepparent, and should be required to use the stepparent adoption procedures if she wishes to transform herself into a full legal parent instead. The National Center for Lesbian Rights has written an amicus brief in support of the original judgment, expressing concern about the implications of applying the parentage presumptions of Family Code § 7611(d) in the context of what is essentially a step-parent relationship, a copy of which is attached. For more on this issue, see below.

4) THE INTERPLAY BETWEEN PARENTAGE PRESUMPTIONS AND ADOPTION

As Family Code §7611(d) is currently being interpreted by our courts of appeal, it potentially creates standing to assert parentage in any person who has welcomed a child into their home and held the child out as a natural child. This functional approach to establishing parentage has been applied by the Supreme Court in *Nicholas H.* and *Elissa B.*, and by our courts of appeal in *Karen C.*, *Salvador M.*, and *Librers v. Black*. While this approach makes good sense in many contexts, it also has the potential to interfere with – and significantly undermine – our adoption statutes, if not handled carefully.

In the case discussed immediately above, allowing a subsequent partner of the natural mother to assert herself as a legal parent under §7611(d) would undermine the stepparent adoption procedures established by our state. Another

example of this issue has already come up in another court, in a completely different context.

In the other case, a woman consented to the adoption of her baby, and denied any knowledge of the baby's paternity. Later, after the time had run to withdraw her consent, she completed a Voluntary Declaration of Paternity with the baby's biological father, who asserted paternity and contested the adoption. The trial court found that the genetic father had achieved the status of a "presumed father" by submitting the POP declaration; but the court also found that the potential adoptive father had achieved the status of "presumed father" by virtue of his having received the child into his home and held it out as his own from the time of the child's birth. The court therefore found there were competing presumptions, and found that it was empowered to resolve these presumptions based on considerations of policy and logic as required by § 7612.

In order to adopt a child, a person must meet certain very specific requirements. At a minimum, there must be some type of court investigation or home study; the consent of the biological parents must be obtained or their rights terminated based on abandonment, unfitness, or some other legal justification; and the court must find that the adoption is in the best interests of the child. Family Code §7611(d) has no such requirements – any person who has received a child into their home and held the child out as their own can potentially use §7611(d) to establish parentage without a home study, without parental consent, and without a formal best interests finding by any court.

There is no doubt that California's children have been well-served by the liberal interpretation of §7611(d) to find parents for children who would not otherwise have any (as in *Nicholas H.* and the other dependency cases that followed) or to recognize that children born to lesbian couples can have two mothers (as in *Elissa B.*). But courts need to think long and hard about the limitations on §7611(d) – especially in contexts where adoption statutes would generally apply and the parentage claim may be being used specifically to avoid consent requirements or home studies where such statutorily-mandated procedures would better serve the needs of the children.

5) THE IMPORTANCE OF ALLOWING DOMESTIC PARTNERS TO ADOPT THEIR OWN CHILDREN

As noted above, under the Domestic Partner Rights and Responsibilities Act of 2003, a child born into a registered domestic partnership is presumed to be the child of both partners. Family Code § 297.5(d) provides that: "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses." Clearly, then, as a matter of California state law, a child born into a registered domestic partnership will be presumed to be a child of the partnership, based on Family Code §§ 7540, 7611(a) and/or 7613(a) – and the state Department of Vital Records is now

issuing birth certificates for babies born to lesbian couples listing the names of both mothers as a matter of course.

The problem arises when one considers federal law and the laws of other states. The federal Defense of Marriage Act (DOMA), 28 USC 1738C, says: "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." To the extent that a claim of parentage "arises from" a same-sex domestic partnership, it is almost certain that states and the federal government will be free to disregard such claims – in fact, this has already happened in Virginia, regarding a child born into a Vermont civil union.

In *Miller-Jenkins v. Miller-Jenkins*, the State of Virginia is currently refusing to recognize as a parent the non-biological mother of a child born to a lesbian couple who entered into a civil union in the State of Vermont before the child's birth. The Vermont civil union statute provides that the "rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." (See 15 Vermont Statutes Annotated § 1204(f).) This language is substantially the same as that of California Family Code § 297.5, quoted above. Nevertheless, the Virginia court has refused recognition of the parent-child relationship despite the fact that the child was born into an intact Vermont civil union, as well as the fact that a Vermont court had previously taken jurisdiction of the case and made appropriate custody and child support determinations.

Some concern has been expressed that the California Supreme Court case of *Marshall v. Marshall* (1925) 196 Cal. 761 precludes adoptions of children where legal parentage has already been established. A brief directly addressing this argument, and explaining why *Marshall* does not preclude adoptions by lesbian and gay couples wishing to protect their children, is attached.

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