

## CALIFORNIA SUPREME COURT RULES ON TRIO OF LESBIAN CUSTODY CASES

By Deborah Wald, Esquire  
© September 2005

On August 22, 2005, the California Supreme Court ruled on a trio of lesbian custody cases. These cases all involved lesbian couples who lived together and had children together and then broke up without doing adoptions or otherwise resolving the parentage of the children. In each of the three cases, the children were born into two-parent homes and raised in these homes -- by two women both acting as mothers -- for over a year. In two of the cases, when the couples dissolved one of the mothers took the position that her ex-partner was not a legal mother and should have no legal rights; in the third case, one of the women herself tried to walk away from the children and stop paying child support for them, and was sued by the county as -- essentially -- a "deadbeat mom."

The Supreme Court issued three separate rulings on the cases, having requested briefing on all three cases (instead of consolidating them and treating them as one big case) and heard oral argument on each case independently of the others. The three decisions offer our community one huge victory: it is now absolutely clear that a child born in California can have two legal parents of the same sex. Further, it is clear that the fact of parentage won't rest on domestic partner status of the parents, just as the fact of parentage for children born to heterosexual parents doesn't rest on marital status of the parents. This is a *huge victory* for same-sex families, following years of heartbreaking losses as children raised by two moms had one of them found by the courts to be a "legal stranger" with no right to joint custody or even minimal visitation.

Yet, as with all such things, the devil is in the details, and there are some areas where the court clearly could have done better by our families. For starters, in the one case where a lesbian couple had gone to court under the Uniform Parentage Act (UPA) to obtain a pre-birth judgment of parentage based on their joint intent to conceive and parent children together, the court declined to rule on the validity of this judgment. (*Kristine H. v. Lisa R.* -- to read the opinion, go to: <http://www.courtinfo.ca.gov/cgi-bin/opinions.cgi?Courts=S> and scroll down to the listing for 8/22/05.) While finding that both women in the case before it were mothers, the court relied on a legal theory of "estoppel" rather than ruling on whether the judgment itself was valid or not. (Estoppel, as used in this case, is defined by Black's Law Dictionary in the following way: "Term means that when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as judgment or decree stands unreversed.")

While this ruling helped the child in *Kristine H.* -- and will help the children of lesbian and gay couples who already used the UPA procedure to secure judgments of parentage -- it leaves us in the dark as to how to proceed in the future. This is particularly true because, in a footnote, the court explicitly said that while both Kristine and Lisa were estopped from challenging the judgment, third parties would not be. (Visions of

health insurers challenging UPA judgments when asked to pay out claims for children whose parentage relies on them dance through my head....) So even though the UPA procedure appeals to me on a philosophical and political level, I'll be continuing to recommend adoptions for the time being.

A second problem with the Supreme Court rulings will have the most serious impact on my gay male clients using surrogacy. In *K.M. v. E.G.*, the Supreme Court looked at the case of a lesbian couple where one of the women provided the eggs and the other woman carried the babies (twins) to term. In that case, the women stayed together and raised the twins together for almost 6 years; nevertheless, it is unclear what their intents were as to parentage at the time of the twins' conceptions. In resolving the conflict between the two women, the Supreme Court reiterated their language from a prior ruling (*Johnson v. Calvert*) that where there is a tie between two women, both claiming maternity, the "tie breaker" is intent at the time of conception. But they also reiterated that where there is no "tie" that needs breaking -- either because only one woman is claiming maternity or because both women can be found to be legal mothers, as in *K.M.* -- the intent of the parties is not relevant. So where does this leave gay men using surrogates?? In the situation of a gay couple using a surrogate -- whether she's the genetic mother of the baby she's carrying or not -- the surrogate will be *the only woman with a claim to maternity*. So, under the reasoning of *Johnson* and *K.M.* a surrogate who changes her mind may well be found to be a legal mother, regardless of intent or the provisions of the surrogacy contract, because there will be no "tie" to break.

So there you have it! We have won a big victory by having our highest state court confirm the fundamental right of same-sex families to exist -- and the fundamental right of children born to same-sex couples to have two parents, just like their friends born to opposite-sex couples. But we still have a long way to go, and I'm afraid we'll be seeing a lot more same-sex custody battles before these issues are finally resolved.