

Parentage - January 2013

There were numerous parentage cases from the Court of Appeal in 2012. Modern courts have to deal with complex issues arising from evolving advances in reproductive technology. Such new legal issues raise questions including who is the legal mother of a child, who qualifies as the legal father, surrogacy disputes, and conflicting statutory presumptions. Concepts of legal status and nuanced terminology create a new lexicon: What is the meaning and status of a “*de facto*” father, an alleged father, a natural father, a presumed father [see, *In re Jerry P* (2002) 95 Cal.App.4th 793]. Can there be two mothers, parentage issues relating to same-sex unions; how about the status of a child conceived after the death of a parent (*Probate Code* section 249.5 *et seq.*)? These complicated and emotionally burdened issues frame rapidly changing social mores and involve not only legislative intervention and judicial interpretation, but medical innovation, bio-ethics, strongly held religious beliefs, and public policy concerns, all of which form an integral part of the contextual framework.

A generation ago, many of these issues were not part of the legal discourse, but that is where we must start to put the current state of affairs in proper context. Twenty years ago, in *Johnson v. Calvert* (1993) 5 Cal 4th 84, the California Supreme Court faced a situation where a married couple supplied an embryo to be carried to term by a surrogate. When a dispute arose between the biological parents and the surrogate birth mother, the court had to determine who was the child's "natural mother" under California law, and whether a surrogacy agreement contravened public policy. The court's majority held the husband and wife biological parents were the child's natural parents based primarily on the intent of the parties as manifested in the surrogacy agreement, which was determined to be valid and not offensive to the state or federal constitution or public policy. A spirited dissent would have placed the determination of parentage not upon the intent of the fertilized egg donors, but rather on the best interests of the child. *Johnson v. Calvert's* holding that a child can have only one legal mother was expanded 10 years later in *Sharon S v. Superior Court* (2003) 31 Cal 4th 417, where the court held that *both* parents of an adopted child could be woman. Two years later, in *Elisa B v. Superior Court (Emily B)* (2005) 37 Cal 4th 108, the court distinguished *Johnson v. Calvert* by holding that a child can have two legal parents, both of whom are woman. When there exist competing claims for fatherhood based upon presumed father status, *Family Code* section 7612(b) requires the presumption which on the facts is founded on the weightier considerations of policy and logic to control. And when the claim pits bio-dad who signed a Voluntary Declaration of Paternity under section 7571 against a claimed presumed father, section 7575(b)(1) requires the court to examine numerous enumerated factors which bear on the relationships involved and the best interest of the child. To end 2012 on an instructive parentage note, *J.R. vs. D.P.*, decided December 21, 2012 [\_\_\_ Cal. App 4<sup>th</sup> \_\_\_], held that where two men, neither married to the child's mother (one the bio-dad and the other mother's intimate partner who signed a Voluntary Declaration of Paternity) could both qualify as presumed fathers, it was correct to set aside the Voluntary Declaration of Paternity, that bio-dad had standing to bring the paternity action, and that section

7612(b) was the statutory mandate to resolve the conflict in favor of bio-dad. This recent case is worth reading for an up-to-date review of applicable parentage law.

The debates and the parentage controversies continued unabated in 2012. A selection of representative cases:

*Paternity Judgment for Child Support Purposes Rebutts Section 7611(d) Presumption, but Does Not Establish Man with Judgment as Presumed Father*

In *In re Cheyenne B.* (2012) 203 Cal. App. 4th 1361, 138 Cal. Rptr. 3d 267, the appellate court held that a judgment establishing a man's paternity for child support purposes was a paternity judgment within the meaning of *Family Code* section 7612(c) and thus precluded another man from establishing that he was the presumed father under section 7611(d). However, the court held that the trial court was not required to find that the man with the prior paternity judgment was the child's presumed father.

*Alleged Father's Name on Birth Certificate Did Not Give Rise to Presumption that Voluntary Declaration of Paternity Had Been Executed*

In *In re D.A.* (2012) 204 Cal. App. 4th 811, 139 Cal. Rptr. 3d 222 (May), the mother told two different men that they were the child's biological father and both men sought presumed father status. The appellate court held that the biological father, who had been prevented from forming a relationship with the child, was the child's presumed father under *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. The appellate court reversed the trial court's finding that the man whose name appeared on the child's birth certificate and who had taken care of the child for nearly two years after the child was detained from his mother was the presumed father.

*Adoptive Mother Could Not Rebut Presumption that Former Lesbian Partner Was Child's Second Mother*

In *L.M. v. M.G.* (2012) 208 Cal. App. 4th 133, 145 Cal. Rptr. 3d 97, the appellate court held that a single parent adoption decree did not preclude a determination under the Uniform Parentage Act that the adoptive mother's former same-sex partner was the child's second mother, when there was no evidence that the issue of whether the child could have only one parent was raised in the adoption proceeding. Moreover, the UPA proceeding was not an appropriate proceeding to rebut the presumption of parentage in favor of the petitioner.

*Nonbiological "Father" Does Not Have Protected Interest in Forming Relationship with Child*

In *In re D.M.* (2012) 210 Cal. App. 4th 541, 148 Cal. Rptr. 3d 349, the appellate court held that the trial court erred in finding that the mother's boyfriend was the presumed father of her child, who was taken into protective custody at the hospital after he was born. The boyfriend was not the child's biological father, was not married to the mother, and did not satisfy the requirements of the section 7611(d) presumption, because he had not received the child into his home. Although the boyfriend came forward promptly and did everything he could under the circumstances to form a bond with the baby, he was not a presumed father under *Kelsey S.* and *Jerry P.* because he had insufficient contact with the child to form a familial bond with him.

## NEW PARENTAGE STATUTES EFFECTIVE JANUARY 1, 2013

New Family Code section 7962 requires that a surrogate mother and intended parents are required to be independently represented by separate counsel of their choosing prior to executing what will now be called an “assisted reproduction agreement for gestational carriers” [ARAGC]. The agreement must contain certain specified information and be executed by the parties and notarized or otherwise witnessed. The parties to such agreement cannot begin an embryo transfer procedure or commence injectable medication for assisted reproduction until the agreement has been fully executed. An action to establish the parent-child relationship can be filed before the child’s birth.

Family Code section 7630 is amended to provide for a surviving parent to file an action to determine paternity after the other parent has died.

Parentage cases are highly fact-intensive and colored with intense emotion. Above and beyond these understandable concerns, however, the legal complexities involved include the legal nuances of conclusive and rebuttable presumptions, DNA testing as a sophisticated replacement of HLA blood tests, questions of estoppel and time limitations, the overlay of guardianship and adoption proceedings, intersection of family court and probate court jurisdiction, the rights of concerned grandparents, not to mention the financial obligations and responsibility for child support...the list goes on. Careful, concerned, competent and compassionate counsel must keep these developments in mind in order to perceive the issues and provide sound legal guidance as well as wise counsel to clients set adrift in these unsettled seas.

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