14

Parentage, Adoption, and Child Custody

Sheri E. Cohen
Hon. Margaret S. Johnson
Thomas M. Pinkerton, Jr.

Excerpts of the Parentage section only.

II. PARENTAGE

§14.3 A. Understanding Parentage Issues in Domestic Partner Context

In general, the Domestic Partner Rights and Responsibilities Act of 2003 (DPRRA), also known as "AB 205," makes registered domestic partners equivalent to "spouses" under California law, as of January 1,

2005. See Fam C §297.5(a), (d), (*l*). In particular, under Fam C §297.5(d), the rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses. Thus, the legal parentage of children born to registered domestic partners will be determined by applying the same rules and presumptions that are applied to determine the legal parentage of children born to married couples. See Fam C §297.5(a), (d), (*l*).

In making parentage determinations, the Uniform Parentage Act (UPA) (Fam C §§7600–7730) has a long history of application to both married couples and to unmarried different-sex couples and only fairly recently has been brought into parentage disputes between same-sex couples. *Elisa B. v Superior Court* (2005) 37 C4th 108, 122, 33 CR3d 46. Given the large percentage of same-sex couples who make up the pool of registered domestic partners, this change in the way the UPA is being interpreted represents new opportunities for establishing parenthood for those couples.

Under the UPA, California has in the past recognized (through its presumptions of paternity and the artificial insemination statute) that a man can become a natural or presumed father of a child even though he is not genetically the father. See Fam C §§7540, 7576, 7611, 7613. In addition, under preexisting law, the presumptions applicable to a father and child relationship are to apply to a mother and child relationship insofar as practicable. Fam C §7650; *Elisa B.,* 37 C4th at 122; *In re Salvador M.* (2003) 111 CA4th 1353, 1357, 4 CR3d 705. A married couple can also become the natural parents of a child without being genetically or gestationally related to the child. See *Marriage of Buzzanca* (1998) 61 CA4th 1410, 1421, 1428, 72 CR2d 280.

The artificial insemination statute has also been used to deny a biological father status as a presumed father, despite his sexual relationship with the mother before she became pregnant using his donated sperm, and his development of a father-son relationship with the child. Fam C §7613(b); *Steven S. v Deborah D.* (2005) 127 CA4th 319, 324, 25 CR3d 482. However, when a lesbian partner who signed a consent form indicating she was donating her eggs ended up raising the resulting twins in her partner's household, the egg donor partner was held to be the children's "second mother" based on her biological relationship to them. *K.M. v E.G.* (2005) 37 C4th 130, 142, 33 CR3d 61.

These various principles must now be construed in the context of registered domestic partnerships (see §§14.4–14.8). On application of the UPA to registered domestic partners, see §§14.4–14.8.

B. Application of Parentage Presumptions to Domestic Partners

1. Marital Presumptions

§14.4 a. Overview

Under a liberal reading of the domestic partnership statutes (see Stats 2003, ch 421, §15), the marital presumptions of parentage under the UPA now apply to registered domestic partners. See Fam C §§297.5(d), 7540, 7611(a). Some will prove very useful to lesbian partners if one of the partners gives birth on or after January 1, 2005. Fam C §§297.5(d), 7540, 7611. For same-sex male couples, the artificial insemination statute and surrogacy case law may provide a more direct path to parentage. Because the assistance of a surrogate is necessary for a same-sex male couple to conceive a child, the artificial insemination statute, rather than a marital presumption statute, will typically be the cornerstone of the couple's claim to parentage on the basis of the *intentions* of the partners. See Fam C §7613; *Johnson v Calvert* (1993) 5 C4th 84, 97, 19 CR2d 494; *Marriage of Buzzanca* (1998) 61 CA4th 1410, 1421, 1428, 72 CR2d 280.

PRACTICE TIP➤ Although the marital presumptions of parentage now apparently apply equally to registered domestic partners, advocates are strongly advising registered domestic partners to continue to obtain a court judgment declaring both partners to be the child's legal parents, by obtaining an adoption judgment by a domestic partner "stepparent," or a judgment establishing the child's parentage. Without such a judgment, couples may have difficulties in obtaining recognition of their legal parentage by other states and by the federal government. Oklahoma, for example, has gone so far as to amend its statute regarding recognition of foreign adoptions to provide that its courts "shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction" (10 Okla Stat §7502–1.4.A), though that law is currently being challenged in federal court. See §14.13. Moreover, with respect to gay men who have children through surrogacy, similar to the procedure for married couples, the couple must obtain a court order of parentage before both partners' names can be included on the child's birth certificate.

§14.5 b. "Child of the Marriage" (Fam C §7540)

Family Code §7540 states that, except as provided in Fam C §7541, the child of a wife cohabiting with her husband who is not impotent or sterile is conclusively presumed a child of the marriage. Because Fam

C §7540 is a "conclusive" presumption, and the partners or a presumed parent are the only ones having standing to rebut the presumption under Fam C §7541, this section, along with Fam C §7611(a)–(c), will be important for the lesbian couple who do not have an alternative UPA statute to rely on. DPRRA, in mandating a liberal construction of spousal law as it applies to partners, should give partners the benefit of Fam C §7540. See Stats 2003, ch 421, §15.

Note, however, that Fam C §7540 has not yet been construed in the context of domestic partnership and its wording concerning a "husband not being impotent or sterile" may make its *literal* application problematic for lesbian couples using artificial insemination to conceive a child. A plausible argument for its application might be that one public policy goal of §7540 (in addition to DPRRA) is to preserve the sanctity of the family unit when the partners are physically able to contribute their genetic material to help conceive a child and the requirements of the statute are otherwise met, but no reported decision has so held. On the marital presumption of Fam C §7611(a), see §14.6.

In a planned surrogate pregnancy, the issue of whether Fam C §7540 applies to a same-sex male couple is largely moot, because a surrogate is always necessary to conceive a child. Surrogacy case law, which is rooted in the artificial insemination statute (see Fam C §7613), governs the paternity of the partners. Surrogate births always require a parentage judgment or adoption decree to place a person other than the surrogate (and if she is married, a man other than her husband) on the birth certificate. See generally *Johnson v Calvert* (1993) 5 C4th 84, 97, 19 CR2d 494. On the other hand, under DPRRA, gender-specific terms referring to spouses are to be construed to include domestic partners in order to implement rights of registered domestic partners (Fam C §297.5(*l*)), and therefore an argument for applying Fam C §7540 to a gay male couple may be possible.

§14.6 c. "Marriage" or "Attempt to Marry" (Fam C §7611(a)–(c))

Family Code §7611(a) provides that a man is presumed the father of a child if the child is born during a marriage or within 300 days after the marriage is terminated by death or by a judgment of nullity or marital dissolution, or after a judgment of legal separation. See also *Lisa I. v Superior Court* (2005) 133 CA4th 605, 612, 34 CR3d 927. Under Fam C §7611(b)–(c), additional presumptions of paternity are contained regarding situations in which a man and the natural mother have attempted to marry and a child is born, or after the birth he and

the natural mother marry, or attempt to marry, and he is named on the birth certificate, or he is obligated to pay child support. The issue, however, with the "attempt to marry" portions of subsections (b) and (c) is whether they apply at all to "attempted registrations," because the registration must occur for the spousal language in the presumptions to apply to a domestic partner in the first place. Here again, DPRRA's mandate of "liberal construction" provides a basis for asserting that partners should come within these "attempt to marry" provisions. See Stats 2003, ch 421, §15; Fam C §297.5(d), (*l*).

§14.7 d. Birth Certificate Issue for Same-Sex Couples

When a married woman gives birth, she simply informs the hospital of the name of the father when it comes time to fill out the birth certificate. The State Department of Health has always used this method for married couples because of the marital presumptions of paternity. The Department of Health has issued directives to hospitals informing them that they must apply the same rules regarding birth certificates to children born to registered domestic partners as they apply to children born to married couples. With respect to children born to lesbian couples, hospitals are directed to ask whether the birth mother is in a registered domestic partnership. If she answers "yes," the birth mother's domestic partner should be included as the child's second parent on the child's birth certificate (in the "father" fields). With respect to gay men who have children through the use of a gestational surrogate, hospitals are directed to follow the same rules they follow with respect to married different-sex couples who have a child through the assistance of a gestational surrogate. Specifically, if the gay male couple has a court order of parentage, both men are to be included on the child's birth certificate. See http://www.avss.ucsb.edu/news/ACL04–14Attach.pdf.

However, note that the California Supreme Court has not decided the issue of whether a stipulated prebirth judgment of parentage is a valid court procedure. *Kristine H. v Lisa R.* (2005) 37 C4th 156, 33 CR3d 81. For this reason, trial courts differ in their willingness to issue such judgments. It is, therefore, unclear whether a court order can be obtained in order to get the birth certificate issued.

NOTE➤ On December 21, 2004, the California State Registrar sent an "all-county letter" to "General Acute Care Hospitals" and "Alternative Birthing Centers" entitled "California Domestic Partner Rights and Responsibilities Act of 2003—Effective January 1, 2005." The all-county letter directs that "if the birth mother states she qualifies as 'a state-registered domestic

> partner,' 'no validation or proof' is required of the state-registered domestic partnership, or the partner's name." The letter also describes how the birth mother's partner is registered as the "father" of the child:
>
> > For the "Father of Child" fields, a birth mother may provide her registered domestic partner's name to be inserted in items 6A (first/given name), 6B (middle name) and 6C (last/family name) on the Birth Certificate. If provided, insert the notation "Parent-" (without quotes) in front of the first name of the registered domestic partner[s] in field[s] [6A and] 9A, and then insert the middle and last name in the appropriate fields.

The all-county letter indicates that similar changes will be made to the State Birth and Death Registration Handbook (used by all hospitals and birthing centers in California) within a short time. Also expect to see the birth certificate itself revised to contain terms that incorporate domestic partnership law. See Govt C §14771(a)(14).

§14.8 2. Nonmarital Presumption—"Receipt of Child Into Home" (Fam C §7611(d))

Under Fam C §7611(d), a man is the presumed father of a child if "[h]e receives the child into his home and openly holds out the child as his natural child." This presumption may be helpful to partners as additional authority to establish parentage but is designed to provide a presumption of paternity when a child is born outside a marriage or, in the context of domestic partnership law, outside a partnership.

The California Supreme Court has determined that this presumption can be applied with gender neutrality to establish the parentage of a nonbiological, "second parent" lesbian partner (*Elisa B. v Superior Court* (2005) 37 C4th 108, 122, 33 CR3d 46), just as it has found a biological sister could have status as a presumed mother. *In re Salvador M.* (2003) 111 CA4th 1353, 1357, 4 CR3d 705.

C. Role of Assisted Reproductive Technology in Family Planning for Domestic Partners

§14.9 1. Assisted Reproductive Technology Defined

The Centers for Disease Control's definition of assisted reproductive technology "includes all fertility treatments in which both eggs and sperm are handled. In general, assisted reproductive technology procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and

returning them to the woman's uterus or transferring to another woman's uterus." The medical procedure of combining a woman's eggs with sperm outside the woman's body (usually in a petri dish in the laboratory) is referred to as in vitro fertilization. ("IVF"). See CDC, *Assisted Reproductive Technology Success Rates, National Summary and Fertility Clinic Reports*, App B (2003) (http://www.cdc.gov/ART/ART2003/appixb.htm).

For purposes of this section, assisted reproductive technology includes IVF and artificial insemination of a woman with sperm. The term "artificial" means that the insemination did not occur as a result of sexual intercourse. Existing paternity statutes under California's current UPA did not contemplate the myriad ways in which a child can be conceived with today's medical technology. The only "assisted reproduction" mentioned in the UPA is artificial insemination. See Fam C §7613. In California surrogacy cases, the courts have used the artificial insemination statute as a starting point to sort out the parentage of a child born to a surrogate. See, *e.g., Marriage of Buzzanca* (1998) 61 CA4th 1410, 1418, 72 CR2d 280. But see *K.M. v E.G.* (2005) 37 C4th 130, 138, 141, 33 CR3d 61 (although K.M. signed consent form waiving her parental rights when donating ova for implantation of resulting embryos into domestic partner, court found she was also twins' mother because she was genetically related to them and she and E.G. lived together and intended at conception (through IVF embryo transfer) that any child born would be raised in their joint home); *Steven S. v Deborah D.* (2005) 127 CA4th 319, 324, 25 CR3d 482 (Fam C §7613(b) controls even though mother who became pregnant by donated sperm had brief sexual relationship with donor and for some time permitted him to act as father to resulting child).

§14.10 2. Multiple Options for Conception

Consider the options available today to a same-sex couple to conceive a child. A lesbian couple may use the following methods: artificial insemination of one or even both partners (see *Kristine H. v Lisa R.* (2005) 37 C4th 156, 33 CR3d 81; *Elisa B. v Superior Court* (2005) 37 C4th 108, 33 CR3d 46); IVF using one partner's eggs combined with donor sperm; artificial insemination of a surrogate using donor sperm; IVF using donor sperm in which one partner contributes the egg and the other partner carries the child (*K.M. v E.G.* (2005) 37 C4th 130, 33 CR3d 61); and finally surrogacy using artificial insemination or IVF with donor sperm, donor egg, or both. The vast majority of lesbian couples simply obtain donor sperm from a known donor or a sperm bank. In order for the sperm donor and

couple to have the protections of the artificial insemination statute, the insemination must be accomplished through a licensed physician. Fam C §7613. Because registered domestic partners are now governed by §7613, a lesbian partner who consents to her partner's artificial insemination with donor sperm through a licensed physician should be treated in law as the natural parent of the resulting child. Fam C §§297.5(d), (*l*), 7613.

PRACTICE TIP➤ In practice, lesbian clients should be advised to comply fully with the terms of the artificial insemination statute, Fam C §7613. For example, a sperm donation made directly to the couple (not through a licensed physician) may deny the partners and the sperm donor the protections of the statute and result in the sperm donor being deemed the natural father. The attorney may also recommend a review of the physician's consent forms to ensure that the clients' intent is accurately reflected in those forms. See *K.M. v E.G.* (2005) 37 C4th 130, 138, 141, 33 CR3d 61 (lower court found signing of consent form precluded K.M. from becoming parent; however, supreme court reversed, finding she was also twins' mother because she was genetically related to them and because she and E.G. lived together and intended at conception, through IVF embryo transfer using K.M.'s ova and donor sperm, that any resulting child would be raised in their joint home).

A gay man may use artificial insemination of a surrogate with his sperm or his partner's sperm (or both); IVF combining one or both partners' sperm with a donor egg or surrogate's egg; or IVF combining donor sperm with a donor egg or surrogate's egg. These varied scenarios make for a tangled web for the legal practitioner to sort out. Nevertheless, DPRRA gives partners the same parentage protections as married couples under the UPA and accompanying case law. See generally Fam C §297.5(d), (*l*).

§14.11 3. Gestational Surrogacy

Typically, a couple will sign an agreement with a "gestational" surrogate under which she agrees to carry a child with whom she has no genetic relationship. The intended parent(s) will provide the egg for IVF and, if a donor egg is needed, also sign an egg donation agreement with another woman in which the egg donor agrees to donate all eggs retrieved by a physician as a result of one egg retrieval procedure. A physician retained by intended parents will treat the egg donor with fertility medication in order to stimulate production of multiple eggs, and retrieve all of the eggs produced by the egg donor

that month. The egg donor's cycle is manipulated by the physician so that her eggs are retrieved at a precise time during her menstrual cycle so that the maximum number of mature eggs is retrieved, fertilized, and resulting embryos transferred to the surrogate's uterus when her uterus is most receptive to implantation.

Johnson v Calvert (1993) 5 C4th 84, 97, 19 CR2d 494, held, among other things, that a married couple who contributed their own genetic material were the natural parents of the resulting child born to their chosen surrogate. The surrogate had sued to establish that she was the natural mother of the child because she had given birth. The intended mother claimed she was the natural mother because of her genetic relationship to the child. In its reasoning, the court found that both women had presented satisfactory claims to be the natural mother of the child under the UPA. 5 C4th at 92. In resolving the competing claims between intended mother and surrogate, the court looked to the surrogacy agreement to establish the intent of the parties and concluded that where two women have competing maternity claims, the woman who "intended to bring about the birth of a child that she intended to raise as her own… is the natural mother under California law." 5 C4th at 93. In footnote 10, the court noted that a woman who gives birth to a child created with a donor egg and who intends to raise the child as her own is the natural mother of the child. 5 C4th at 93.

Marriage of Buzzanca (1998) 61 CA4th 1410, 1418, 72 CR2d 280, held that a husband and wife (who conceived a child through IVF using donor sperm, donor egg, and a surrogate—also known as a "five-way" in current surrogacy parlance) were the natural parents of the resulting child because of their consent to the IVF procedure that resulted in the birth of the child. More significantly, the *Buzzanca* court found its statutory authority under the artificial insemination section of the UPA. 61 CA4th at 1417. Under DPRRA, the *Buzzanca* holding, by virtue of its direct application to married couples, should now directly apply to partners. See Fam C §297.5(a), (d), (*l*).

§14.12 4. Traditional Surrogacy

A traditional surrogate is genetically related to the child she carries. The parental rights of parties to a traditional surrogacy agreement are not fully developed in California at this time. Although the Fourth District Court of Appeal, in *Marriage of Moschetta* (1994) 25 CA4th 1218, 1221, 30 CR2d 893, held that the traditional surrogate was the mother of a child conceived through artificial insemination using the intended father's sperm, the same court in *Buzzanca* limited its prior decision to its facts, noting that in *Moschetta,* the intended mother had

given up her claim to the child. *Marriage of Buzzanca* (1998) 61 CA4th 1410, 1422, 72 CR2d 280.

Some argue that the traditional surrogate's rights should be terminated by the intended parents through adoption, rather than relying on the paternity statutes in light of the Fourth District's holding in *Moschetta,* even though the same Fourth District in *Buzzanca* left the door open for an intended mother to establish her maternity as a natural mother against a traditional surrogate's competing claim. Because of the potential emotional bonding between a traditional surrogate and child, and because the surrogate's parental status is unsettled at this time, traditional surrogacy is used less frequently than gestational surrogacy. The most common reason couples use traditional surrogacy is lower medical cost and no egg donor fee. As a result, some prospective parents will continue to conceive children though traditional surrogacy.