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CENTER FOR LAW AND SOCIAL POLICY

MEMORANDUM

TO: Interested People

FROM: Paula Roberts

DATE: December 1, 2005

RE: **Parentage Case Update: Can a Child Have Two Mothers?**

State child support enforcement programs do not often handle parentage issues involving multiple potential parents. However, such cases do arise and are likely to become even more frequent as reproductive technology advances. Depending on the circumstances, a child can have as many as six possible parents: the sperm donor, the egg donor, the gestational mother, the gestational mother's husband, the intended mother and the intended father. This can lead to acrimonious fights about who is the "mother" and who is the "father". Everyone involved may want to claim parentage. See, e.g., *Johnson v. Calvert,* 5 Cal. 4th 84 (1993). Alternatively, all the potential parties may wish to disown the child, especially if the child is handicapped. See, e.g., *In re Marriage of Buzzanca,* 61 Cal. App. 4th 1410 (1998).

Under the Uniform Parentage Act (a version of which has been enacted in every state), courts generally look at three factors in sorting out these cases. The f*irst* factor is the intention of the parties. At the time they used reproductive technology, who did the parties intend to be the child's mother and father? The *second* factor is the parties' behavior. Where does the child live and who has actually assumed the responsibility for caring for the child? The *third* factor is a preference to resolve cases in favor of two parents, not more. Courts try to sort out the equities between the parties so that the child ends up with one mother and one father.

However, new reproductive technologies also raise the possibility that a child can have two mothers. In these cases it is not clear that the UPA applies. If it does not, what law should courts apply? If it does, the third factor can be honored in number, but not in traditional gender terms so courts still have to struggle for an answer.

Recently, the California Supreme Court decided three cases that exemplify different factual scenarios under which the issues can arise. In each, the question confronting the

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Court was can a child can have two mothers? The Court answered in the affirmative. In reaching this conclusion, the Court used both traditional equitable principles and the language of the Uniform Parentage Act (UPA). Taken together, the cases provide an analytic framework that might be helpful to other courts and state child support agencies faced with similar cases. For that reason, detailed case summaries are attached.

The first case involved a couple who obtained a stipulated court order that both would be the parents of a child who had been conceived, but not yet born. As per the order, the child's birth certificate listed the person who gave birth as the mother and listed her partner's name in the space provided for the father. The couple later separated and the birth mother sought to have the stipulated order dismissed so that she would be the child's sole parent. The Court found that her motion should be denied based on the traditional equitable doctrine of estoppel. Having sought an order from a court that had jurisdiction over parentage matters, and having benefited from that order, she could not now challenge it. In other words, a child could have two mothers by agreement of the parties. Once this agreement is officially sanctioned and carried out, it is binding on those parties.

The second case involved a couple one of whom donated her eggs and the other of whom was the gestational carrier. On the record, their intentions as to the role of the egg donor were not clear. However, the Court found that once they took the child into their mutual home it was possible for both to be mothers to the child whatever their intentions. The Court used the UPA language that motherhood can be established through giving birth and through genetic relationship to find that both women met the UPA standard for motherhood. The Court was also clearly influenced by the fact that the couple were registered domestic partners under California law. In other words, a child could have two mothers if one gave birth and the other was genetically related so long as there was a committed relationship between the women and they took the child into their mutual home.

The third case involved a couple both of whom became pregnant using her own ova. One member of the couple had a son and, a few months later, the second gave birth to twins. Here too the record was not clear about their actual intentions. In addition, they neither entered a domestic partnership nor followed through on plans under which each would have adopted the other's children. However, they did live together and hold the children out as their mutual children. After they split up, the mother of the twins began receiving public assistance while the other took her son and left. The county child support agency pursued the woman who left, seeking child support for the twins. The woman countered that she had no legal or genetic relationship with the twins and therefore could not be their parent. The Court again applied the UPA, noting that the Act contains a specific provision stating that, if practicable, the paternity provisions should be used to determination motherhood as well as fatherhood. The Court found that, in this case, it was practicable to do so. It then noted that, under the UPA, a man who takes a child into his home and holds the child out as his natural child is rebuttably presumed to be the father. Applying that principle here, a woman who takes a child into her home and holds the child out as her own should be rebuttably presumed to be the mother. Extending the

analogy, the court noted that the UPA presumption can be rebutted in paternity cases, so it can also be rebutted in maternity cases. However, this is not a case where rebuttal is warranted. Here the woman actively participated in the decision to bring the children into the world, lived with them and held them out as her children, and supported them for a period of time. Just as a man would not be allowed to abandon the children under these circumstances, a woman should not be allowed to do so.

It is also worth noting that, in all three cases, there was no other potential parent on the scene. The sperm donors were not involved with any of the children. So there was no father being ousted from the picture. Indeed, in all three cases, no one's parentage was denied. The mothers named on the birth certificates remained mothers, and the children ended up with the traditional two parents albeit both female. In other words, application of traditional law resulted in traditional orders of parentage even though the basic facts were not at all traditional.

CASE SUMMARIES

***1. Kristine H. v. Lisa R.*, 37 Cal.4th 156 (2005) –** A lesbian couple lived together. During their co-habitation, one of the partners (Kristine) conceived a child through artificial insemination. Prior to the child's birth, the couple went to court and obtained a stipulated judgment declaring that Kristine was the "biological, genetic and legal mother/parent" of the unborn child and that Lisa was the second mother/parent. Under the stipulated judgment, the couple has joint custody and are the only legally recognized parents of the child. Moreover, the stipulated judgment ordered that the child's birth certificate list Kristine as the mother and that Lisa's name be listed in the space provided for the father's name and this was done. Two years later, the couple separated and Kristine filed a motion to set aside the stipulated judgment. Lisa filed a separate action for custody of the child. The trial court denied Kristine's motion, but the Court of Appeals reversed.

The California Supreme Court reversed the Court of Appeals. Citing a long line of California family law cases, the Supreme Court found that Kristine was estopped from challenging the validity of the stipulated judgment. The Supreme Court acknowledged that issuing court had subject matter jurisdiction under the California version of the Uniform Parentage Act (UPA) and that the UPA specifically allows an action to be brought prior to birth. It noted:

> "Given that the court had subject matter jurisdiction to determine the parentage of the unborn child, and that Kristine invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years, it would be unfair to both Lisa and the child to permit Kristine to challenge the validity of that judgment.

***2. K.M. v. E.G.*, 37 Cal. 4th 130 (2005) –** E.G. and K.M. lived together and were registered as domestic partners. E.G. wished to become a mother and made several attempts at in vitro fertilization. These efforts were not successful as she was unable to produce sufficient ova. K.M. offered to donate her ova. Before she did so, she signed documents similar to those signed by sperm donors who donate their sperm with no intention of assuming legal, emotional or financial responsibility for any resulting offspring. EG ultimately gave birth to twin girls who lived with KM and EG. By this time, the couple had gone through a wedding ceremony. Six years later, the couple separated and E.G. moved to Massachusetts with the twins. K.M. then filed a petition to establish a parental relationship with the twins, alleging that she was their biological parent. A hearing was held. The testimony did not clarify the parties' intent. E.G. alleged that she always intended to be a single parent; K.M alleged that she would not have donated her eggs had she not intended to be a parent to the children. The Superior Court found E.G. to be more credible, and dismissed the action. The Court of Appeals affirmed.

The California Supreme Court reversed. The Court held that the Family Code section that applies to sperm donors does not apply to ovum donors when they donate their ova to a partner in a lesbian relationship in order to produce children who will be raised in their joint home. Since that section of the Family Code did not apply, the California version of

the Uniform Parentage Act (UPA) did. K.M.'s genetic relationship to the children constitutes clear evidence of a mother and child relationship as contemplated by that Act. E.G.'s giving birth to the children is also evidence of the mother-child relationship under the UPA. Thus, both K.M. and E.G. are mothers of the twins under the UPA.

The Supreme Court went on to note that the donor contract K.M. signed does not affect the parentage determination. Just as a man who deliberately brings a child into the world cannot by agreement limit or abrogate that child's right to support, a woman who supplies ova to her lesbian partner , with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a waiver effectively cause that woman to relinquish parental rights.

There were two dissents. Both agreed that a child could have two mothers. However, both felt that the issue should be decided based on the intent of the parties as enunciated in *Johnson v. Calvert*, 5 Cal. 4th 84 (1993). Since there was disagreement about the intent, and the trial court had found E.G. to be more credible (no intent to co-parent), the dissenters felt that K.M should not be found to be a mother to the twins.

***3. Elisa B. v. Superior Court of El Dorado County,* 37 Cal. 4th 108 (2005)** – Elisa and Emily were partners in a lesbian relationship. Both became pregnant through artificial insemination by a common sperm donor. Elisa gave birth to a son and –a few months later-- Emily gave birth to twins. One of the twins had serious medical problems. The couple raised the children together for about 18 months. Elisa supported the household and Emily stayed home and cared for the children. While they discussed adopting each other's children, they did not do so. Nor did they register as domestic partners. Then they separated. Elisa continued to provide informal support. After about a year, she stopped doing so. Emily applied for cash assistance and Medicaid and the county child support agency pursued Elisa for child support. The Superior Court found Elisa to be obligated to support the twins under the doctrine of equitable estoppel. The Court of Appeals reversed, concluding the Elisa had no obligation to pay support because she was not a parent of the twins within the meaning of the California Uniform Parentage Act (UPA).

The California Supreme Court reversed. It agreed with the Court of Appeals that the question of the twin's parentage was governed by the UPA. Emily was the twins' mother under the UPA, but so was Elisa. The Court reached this conclusion by noting that the UPA provides that the provisions applicable to determining a father-child relationship shall also be used to determine a mother-child relationship insofar as practicable. One provision of the UPA creates a rebuttable presumption a man is the natural father of a child if he receives the child into his home and holds the child out as his natural child. It is practicable to apply this provision to the case at hand. Since it is undisputed that Elisa took the twins into her home and held them out as her own, this presumption can be used.

The presumption can be rebutted in an appropriate case. However, this is not such a case. Relying on precedent from heterosexual cases, and citing *In re Nicholas H.*, 28 Cal. 4th 56 (2002) and *In re Salvador M.*, 111 Cal. App. 4th 1353 (2003) , the Court noted that under California precedent biology alone is not determinative of parentage. In this case, despite

the lack of a biological link, Elisa actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the second parent. She is therefore also a mother of the twins.