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CALIFORNIA IS BEHIND THE TIMES WHEN IT COMES TO GRANTING CUSTODY TO SAME-SEX PARENTS

By Deborah Wald, Esq.

People tend to think of California as being ahead of the curve on family law issues. After all, aren't we the "palimony" state, famous for *Marvin v. Marvin* (1976) 18 Cal.3d 660? And who can forget the recent same-sex marriage scenes from San Francisco City Hall, broadcast all over the world, declaring our willingness to embrace marriage equality while most of the country was only just beginning to talk about the issue.

In fact, however, when it comes to the rights of lesbian and gay parents, California lags behind most other states that have addressed the issue. In California, no appellate court has ever, yet, awarded visitation or custody rights to the same-sex partner of a lesbian mother, regardless of how involved the partner was in the child's conception and regardless of how central a parenting role the partner has played in the child's life after birth, unless the partner has legally adopted the child. (These issues are currently before the California Supreme Court in a trio of cases: *K.M. v. E.G.* (2004) previously published at 118 Cal.App.4th 477; *Elisa Maria B. v. Superior Court* (2004) previously published at 118 Cal.App.4th 966; and *Kristine Renee H. v. Lisa Ann R.* (2004) previously published at 120 Cal.App.4th 143.)

Appellate courts in about twenty other states have addressed the issue of whether the same-sex partner of a lesbian mother has a right to petition for joint custody and/or visitation, where the partner has lived with the family and stood in the role of a parent for a significant period of time but has not completed an adoption. While California has routinely said "no" to the question (see, e.g., *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597; *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831; *West v. Superior Court* (1997) 59 Cal.App.4th 302), at least 13 of the 20 states that have addressed the question have answered it differently.

These states have relied a variety of theories in awarding custody and/or visitation rights to non-biological, non-adoptive lesbian mothers: psychological parenthood, de facto parenthood, in loco parentis and equitable parenthood.

In a lesbian custody dispute where the non-biological mother had not adopted the child, New Jersey recognized the non-biological mother as a psychological parent, which the court defined as "one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs." In concluding that courts must protect a child's relationship with a psychological parent, the New Jersey court cited what it termed the "thoughtful and inclusive definition of de facto parenthood" enunciated by the Wisconsin Supreme Court in *Custody of H.S.H.-K.*, 193 Wis.2d 649, 533 N.W.2d 419, 421 (1995).

Under the test established by the Wisconsin Supreme Court, "[t]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." (*Custody of H.S.H.-K.*, supra, 533 N.W.2d at 421 (footnote omitted).) Similarly, in New Jersey, the court held that "the legal parent must consent to and foster the relationship between the third party and the child; the third party

must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged. We are satisfied that that test provides a good framework for determining psychological parenthood in cases where the third party has lived for a substantial period with the legal parent and her child." (V.C. v. M.J.B. (2000) 163 N.J. 200, 223; 748 A.2d 539, 551-552; , cert. denied, 531 U.S. 926.)

More recently, a Colorado court of appeal found that the former domestic partner of a child's legal mother had standing to seek joint custody, based on her status as the child's psychological parent, even though she had no legally recognized relationship with either the legal parent or the child. The court found that "proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights." The court then concluded that "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent." The court concluded that even though the legal mother had a constitutionally protected parental right and her ex-partner did not, the State of Colorado had a compelling state interest in protecting the child from the harm that would result from termination of her relationship with her psychological parent. (In the Interest of E.L.M.C. (2004) 2004 WL 1469410.)

Other states have reached similar conclusions. In T.B. v. L.R.M. (2001) 567 Pa.222, 786 A.2d 913, the Pennsylvania Supreme Court found that the lesbian former partner of a child's biological mother could seek partial custody and visitation based on her standing in loco parentis to the child. In that case, the biological mother argued that her ex-partner did not have standing to seek visitation because she had not adopted their child. The court responded that a biological parent's rights "do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." (T.B. v. L.R.M., supra, 567 Pa.2d at 232, quoting from J.A.L. v. E.P.H. (1996) 453 Pa.Super. 78, 682 A.2d 1314.)

Missouri has also granted visitation rights to the lesbian ex-partner of a biological mother, noting that: "An award of custody or visitation to a non-biological parent necessarily affects the biological parent's rights of control, but a child is a person and not chattel over which a biological parent has an absolute possessory interest." The court made numerous findings -- including a finding that "Courts must re-examine the theory that a child may have only biological parents and adopt a more flexible 'functional approach,' as opposed to the traditional, stricter, 'formal approach,' for defining family" -- based upon which it adopted the doctrine of "equitable parent," which it found "analogous to the doctrine of 'equitable adoption.'" The court then applied this doctrine to the facts before it and found that the ex-partner had established herself as the equitable parent of the child, and was therefore entitled to shared custody and visitation. (In the Matter of T.L. (1996) 1996 WL 393521.)

Other states that have awarded visitation and/or custody to lesbian ex-partners include Connecticut, Maine, Massachusetts, Minnesota, Rhode Island, Washington and Wisconsin. Why, then, has California failed to take this step? In the trio of cases decided by California courts of appeal this summer (see citations above), the courts denied visitation to a genetic lesbian mother who had lived with and raised twins with her partner -- the gestational mother of the twins -- for more than five years, despite the acknowledged parental relationship she had established with the children; and to a non-biological lesbian mother who had actually sought a court order of parentage, along with the biological mother, and whose name appeared on the daughter's birth certificate. The Court of Appeal, Third District also found that a lesbian mother had no obligation of child support despite having participated in the procreation of twins with the intent to raise them and having borne their half-sibling, even though this left the twins dependent on public welfare.

The California Supreme Court will soon be ruling on these issues. They would do well to look to the thoughtful and well-reasoned decisions of their sister courts in other states, and adopt a position that protects the rights of fit parents while simultaneously protecting all children equally, including those who happen to have two parents of the same gender. In California, this could be accomplished most directly through a gender-neutral application of Family Code sections 7611(d) and 7613(a), which already have been applied by lower California appellate courts to protect children's relationships with non-biological parents in *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108 [holding that under Family Code section 7611(d) the boyfriend of a married woman was the legal father of her child, even though her husband was the biological father, given that the boyfriend had developed a strong parental relationship with the child and the husband had not] and *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410 [holding that Family Code section 7613(a) could be applied to render a woman who consents to the implantation of an embryo into a surrogate a legal mother]. By applying the Uniform Parentage Act without regard to gender or sexual orientation, the California Supreme Court has the opportunity to bring California into line with the majority of other states that have considered these issues. Our proud history of being on the forefront of the law on issues such as these requires no less.

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