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[Published in The Los Angeles Daily Journal, August 9, 2004]

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### IT IS TIME FOR CALIFORNIA COURTS TO START PROTECTING THE CHILDREN OF SAME-SEX COUPLES

By Deborah Wald, Esq.

For children with heterosexual parents, California courts do not hesitate to act to protect established parent-child relationships and ensure that children have two legal parents whenever possible. For children with same-sex parents, the courts routinely separate children from their parents and leave children with only one legal parent, no matter how senseless the result or how profound the damage to the children involved. (See, e.g., *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831, recognizing the "tragic" result for the children of finding that one of the women who raised them is not a legal mother.)

In *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, the California Supreme Court unequivocally affirmed that a child in California can have two legal mothers through adoption. The Legislature has unequivocally stated, in AB 205 -- due to go into effect on January 1, 2005 -- that children born to registered same-sex domestic partners are to be treated the same by the law as children born to married couples. Together these legal pronouncements created an expectation that the children of same-sex couples would be protected by the courts just as the children of heterosexual couples are.

Yet, this summer, three different California courts of appeal have rendered three different opinions on same-sex parentage, in all of which children who were born into two-parent families were found to have only one legal parent, because both parents upon whom the children had relied happened to be female. This rash of cases has proved that the children of same-sex couples still are not being treated fairly by the courts.

In the past decade, California courts have applied the California Uniform Parentage Act to protect children of heterosexual parents in a wide variety of circumstances, regardless of marriage or biology. In *In re Nicholas H.* (2002) 28 Cal.4th 56, for example, a man became involved with a woman who was already pregnant by another man. When the child was born, the man welcomed the child into his home and cared for him as his own, despite knowing that he was not the child's biological father. The court held that, regardless of biology, the child was entitled to legal recognition of the established father-child relationship. In *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, a married woman lived with her boyfriend but continued to have sexual relations with her husband without her boyfriend's knowledge. When the woman became pregnant, she told both men that they were the child's father. The boyfriend lived with the mother and child and raised the child as his own. When the couple broke up more than two years later, the former boyfriend continued to visit with and support the child. Blood tests subsequently proved that the husband was the child's biological father. Both men asserted paternity. The Court of Appeal resolved the conflict in favor of preserving the child's established parent-child relationship with the mother's former boyfriend, rather than with her husband and the biological father, stating: "[t]his social relationship is much more important, to the child at least, than a biological relationship of actual paternity."

In *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, an infertile married couple used donor eggs and donor sperm and a contractual surrogate to conceive a child. Neither the husband nor wife was genetically related to the baby, nor did the wife gestate the baby. The couple divorced before the child was born, and the former husband argued that he should not be held responsible for child support because he had no biological relationship to the child. The Court of Appeal rejected this argument and held the former husband legally responsible as a parent based on his conduct in using reproductive technology to deliberately bring a child into the world. The court noted that although the Uniform Parentage Act does not specifically address a situation in which both spouses in a married couple are infertile, the Act must be liberally construed to resolve the parentage of all children born through assisted reproduction.

In these and other decisions, California courts have applied the parentage statutes broadly to protect children born to heterosexual parents in a variety of "non-traditional" situations - regardless of biology or marital status, and regardless of whether the UPA specifically contemplates the situation at hand. In stark contrast, the recent appellate decisions addressing children born to same-sex couples have refused to protect the children of these families by preserving existing parent-child relationships and assuring each child the support of two parents.

In *Elisa B. v. Superior Court* (2004) 118 Cal.App.4th 966, both women in a lesbian couple used the same anonymous sperm donor to become pregnant. Prior to the children's birth, the women agreed that they would raise the children together as siblings in a two-parent family. Elisa gave birth to one child; Emily, her partner, gave birth to twins, one of whom is severely disabled. After the children's birth, Emily stayed home to care for the children, and Elisa supported the family financially. Elisa left the relationship when the twins were approximately two years old, taking her biological child with her. Emily, who was left with two children -- one of them disabled -- and no means of support, applied for public assistance from El Dorado County, and the county in turn sued Elisa for child support. In late May of this year, the Court of Appeal, Third District held that Elisa was not a legal parent. As a result, the twins are left with only one legal parent and with a future of requiring public assistance to support them.

In *Kristine H. v. Lisa R.* (6/30/2004) 2004 Daily Journal D.A.R. 8053, a lesbian couple decided to have a child together through artificial insemination. Prior to the child's birth, the couple obtained a judgment holding that both women were the child's legal parents, based on the holdings in *Johnson v. Calvert* (1993) 5 Cal.4th 84 and *Buzzanca* and on a broad construction of Family Code section 7613. The couple separated two years later. In a decision issued on June 30, 2004, the Court of Appeal, Second District, Division 3, invalidated the original judgment. Notwithstanding the holdings in *Johnson* and *Buzzanca* that couples who use reproductive technology to procreate are legal parents, the Court of Appeal found that the judgment of parenthood in *Kristine H.* was "void and of no legal effect." Contrary to the holding in *Elisa B.*, the court did suggest that the non-biological mother could petition for parenthood under Family Code section 7611(d), which provides that a man who welcomes a child into his home and holds the child out as his own is presumed to be the father of the child.

In *K.M. v. E.G.* (2004) 118 Cal.App.4th 477, the Court of Appeal, First District, Division 5, examined the case of a lesbian couple where one woman provided eggs, which were inseminated in vitro using donor sperm and then implanted into the uterus of the other woman. The two women -- one the genetic mother and the other the gestational mother -- raised the resulting twins together for more than five years. The twins looked to both of them as parents, as documented in the record. Yet, the court found that the genetic mother had only intended to be an egg donor at the time of conception, and held her to this intent, ignoring the parent-child relationship she established over 5 years of acting as a full-time, in-home parent.

In general, media discussion of these cases has centered on the rights of lesbian and gay couples to have their adult relationships legally recognized. This is not surprising, given the current national focus on the issues of civil unions, domestic partnerships and marriage equality. However, the recent appellate cases are actually about the rights of the children of same sex couples. And, distressingly, reading these cases together leads inescapably to the conclusion that the California courts are interpreting the law to hold that children of same sex couples are not entitled to the same protections as children of opposite sex couples. The Uniform Parentage Act was adopted by California in an effort to end the status of "illegitimacy" for the children of unwed heterosexual California couples. The recent cases noted above show that children of same-sex couples have become the new "illegitimate" children of our state. It is time for this practice to end.

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