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Home

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Adoption

Divorce & Dissolution

Public Speaking

Media & Publications

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Upcoming Events

Contact Us

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PARENTAGE CASES OFFER COURT CHANCE TO BANISH ILLEGITIMACY

By Deborah Wald, Esq.

On January 1, 2005, the California Domestic Rights and Responsibilities Act of 2003 went into effect. Under this Act, the same presumptions apply to children born into registered same-sex domestic partnerships as apply to children born into marriages. As a matter of California state law, this Act will give much broader protections to children born to same-sex domestic partners than were previously available - but what of children born to unregistered same-sex couples?

Ironically, the Uniform Parentage Act - introduced to California as Senate Bill No. 347 in 1975 - was incorporated into the California Family Code for the explicit purpose of preventing the parentage of children from depending on the marital status of their parents. (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 88.) In fact, section 7602 of the Family Code provides that: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." But under current appellate interpretations of the Family Code, the parent and child relationship of children born to same-sex couples rests entirely on the domestic partner registration status of the parents. How can this be right?

California appellate courts consistently have held that children born to same-sex couples have a right to only one parent, unless the second parent in the home adopts them. (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.) Last summer, this position was affirmed in two more cases, both of which are now before the California Supreme Court. (See *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.) In a third opinion, also currently before the California Supreme Court, the Second District, found that a child born to a same-sex couple may have the right to a legally recognized relationship with both parents based on a gender-neutral reading of the "holding out" provisions of Family Code section 7611(d), whereby a man who "received the child into his home and openly holds out the child as his natural child" is presumed to be a father. But the "natural" language in this section has been used before against second mothers in the home, on the grounds that a child can only have one "natural" mother.

What this means is that the Uniform Parentage Act, specifically designed "to eliminate the legal distinction between legitimate and illegitimate children" in the State of California (*Johnson v. Calvert*, supra, 5 Cal.4th at 88), now threatens to serve as the basis for differentiating between "legitimate" and "illegitimate" children of same-sex couples, based on the domestic partner status of the parents.

The California Supreme Court has the power, through its rulings on the cases now before it, to prevent this from happening. By applying the rules currently in effect for determining the parentage of children born to heterosexual couples using alternative reproductive technologies (e.g., Family Code section 7613(a) and *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410); of children born to heterosexual parents who conceived them during extra-marital relationships (e.g., Family Code section 7611(d), *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108 and *Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36); and for children in the dependency system (e.g., *In re Nicholas H.* (2002) 28 Cal.4th 56), the Supreme Court can protect all California children, regardless of both the marital status of their parents and the gender of the parents to whom they were born. Let's hope that when the Supreme Court rules on the cases now before it, California really will become a state in which no child is "illegitimate" in the eyes of the law.

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