FORCING A SQUARE INTO A CIRCLE: WHY ARE COURTS STRAINING TO APPLY THE UNIFORM PARENTAGE ACT TO GAY COUPLES AND THEIR CHILDREN?

I. INTRODUCTION

A couple nervously sits in their doctor’s office awaiting news that will either fill their hearts with joy, or shatter them once again. Like so many other couples, they could not have a baby the customary way. Thanks to modern medicine though, this couple can still have their dreams fulfilled. By taking a little from one and injecting it into the other, a baby could result. This couple has waited long enough. The doctor announces that they are going to have a baby. In fact, they will eventually learn that they are having twin girls. It is a dream come true, as they raise these two little girls together. The love in this household is apparent to all who witness it.

Unfortunately, this couple separates after six happy years together. One parent suddenly wants to preclude the other parent from seeing the two girls indefinitely. She moves to a different state, and declares that she is the only parent to the children they created and raised together for five years, despite the obvious affection the girls have for both parents. Fortunately, the law will not tolerate this behavior. Surely both parents will have rights and obligations towards these children. However, one minor detail has yet to be mentioned: This couple is gay; two women to be more specific. Suddenly, the law is not so clear, although perhaps it should be the same.

Lesbians can love, care for, and be just as much a part of a child’s life as a heterosexual couple; therefore, the answers should be just as obvious as they were before it was revealed that this couple was gay. Courts all over the country have been grappling with this issue for some time, rendering arbitrary decisions that have no predictability. All the while, gay couples are becoming parents more and more with each passing day, while legislation is lagging farther and farther behind. Recently, the California Supreme Court decided three cases in one day involving this exact issue. This note will focus on one of these cases: K.M. v. E.G. Although the outcomes in these cases, which allowed both partners to have rights and obligations towards their children, were correctly made, the use of legislation to reach that conclusion was improperly applied. More specifically, the California Supreme Court misapplied the Uniform Parentage Act (UPA) in reaching its holding.

It is time to face the facts. This note will illustrate that because times are changing, the law needs to...

1. See e.g. West v. Super. Ct. of Cal., 69 Cal. Rptr. 2d 160, 161-62 (Cal. App. 3d Dist. 1997), overruled in part, Elisa B. v. Super. Ct. of Cal., 117 P.3d 660 (Cal. 2005) (holding that a nonparent lesbian could not have any rights to a child that she and her partner decided to raise together, and did raise together for two and one half years; the court also declared that the nonparent did not have standing to bring suit under the Uniform Parentage Act); see also K.M. v. E.G., 13 Cal. Rptr. 3d 136, 147 (Cal. App. 1st Dist. 2004), rev’d, 117 P.3d 673 (Cal. 2005) (wherein the court held that a lesbian parent did not have rights and obligations to her genetic child because she relinquished her rights in an ovum consent form; however, this case was overturned by the California Supreme Court in a decision that will be the focus of this note); but see In re Parentage of L.B., 89 P.3d 271, 279 (Wash. App. Div. 1 2004) (holding that the Uniform Parentage Act did not govern the situation of parentage over a child raised by domestic partners, but that common law governed).


4. 117 P.3d 673.

5. Id. at 678. (The California Supreme Court rejected California Family Code § 7613(b) and instead applied California Civil Code § 7003(1), which provides in relevant part, that between a child and the natural mother a parent and child relationship “may be established by proof of her having given birth to the child, or under [the Act],” (Cal. Civ. Code Ann. § 7003(1) (West 1997) (repealed 1994) (superseded by Cal. Fam. Code Ann. § 7610 (West 2004))).
conform in order to serve its purpose: To presently maintain the rights of individuals and serve as an indicator of predictability to guide citizens in their everyday lives. It follows that, although the California Supreme Court reached the correct outcome, that lesbian partners can both have rights and obligations to their children; the law that was interpreted to reach that conclusion is inapplicable to gay couples because the legislative intent of the UPA only encompasses a child born to a man and a woman.

This note will also address the inequity gay couples and their children endure when courts insist on applying legislation that was developed without them in mind. Further, it will be argued that new legislation needs to be developed to conform to the rapid changes in our society. Lastly, the details of what legislation should reflect as far as the rights of gay couples will also be discussed.

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