THE NEVADA CASE INDICATING A CHILD CAN HAVE "TWO MOTHERS"

I. THE LEGAL CONTEXT

On September 21, 1996, the United States adopted a federal "Defense of Marriage Act" ("DOMA") prohibiting judicial or legislative recognition of a same-sex marriage.[1] Such laws were proposed throughout the country. In Nevada, a constitutional amendment was proposed by initiative petition and ratified at the 2000 and 2002 general elections, amending the Nevada Constitution to add a DOMA provision.

While Nevada did not have published case law from this era denying to same-sex couples the right to be equal co-parents, to adopt children, etc., such cases were common throughout the country in states lacking protection for same-sex couples.

On July 1, 2000, Vermont enacted a law permitting same-sex couples to obtain most of the benefits and legal status changes of marriage by way of a "Civil Union." On June 10, 2003, Ontario, Canada, legalized same-sex marriage. Nevada adopted a "domestic partnership" law open to same-sex couples on October 1, 2009.

On October 27, 2014, the Ninth Circuit Court of Appeals overturned Nevada's DOMA in *Latta v. Otter*,[2] and on June 26, 2015, the United States Supreme Court decided *Obergefell v. Hodges*,[3] striking down all states' DOMAs and effectively legalizing same-sex marriage in the United States, holding that equal protection demands that same-sex couples be afforded "the

---

[1] *See* Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

[2] *Latta v. Otter,* 771 F.3d 456 (9th Cir. 2014).

[3] *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584; 192 L.Ed.2d 609 (2015).

constellation of benefits that the States have linked to marriage" as "personal choices central to individual dignity and autonomy."

Of course, real people had actual relationships, with and without children, before, throughout, and after those decisions. In modern America, countless millions of households consist of unmarried opposite-sex and same-sex cohabitants, either with or without children. According to the government, one-third of all children in the United States reside with only one biological parent.[4]

II. THE PARTIES AND THE AGREEMENT

Sha'Kayla St. Mary and Veronica Lynn Damon, two women, became romantically involved during the years that same-sex marriage was legally unavailable. When they decided to have a child, they determined that they would use a sperm donor to fertilize Damon's egg and that St. Mary would carry the fertilized egg and give birth to the child.

They began the process in October of 2007 and drafted and signed a co-parenting agreement shortly after, which provided in part that both parties would jointly share in the responsibilities and decision-making of the child and that if the couple ended their relationship, they would continue to share the responsibilities and privileges of being the child's parent.

---

[4] United States Census Bureau, *Majority of Children Live With Two Biological Parents* (Feb. 20, 2008) (based on 2004 data, available at http://www.census.gov/newsroom/releases/archives/children/cb08-30.html, last visited Feb. 20, 2011). The report indicates that 19.1 million children lived in single-parent homes (mostly with their mothers), and another 4.1 million lived with their biological mothers and step-fathers.

III. THE CHILD AND THE LAWSUIT

The child was born in June of 2008, listing only St. Mary as the child's mother on the birth certificate but with a hyphenated last name of St. Mary-Damon. For the first several months after the child was born, St. Mary stayed home during the day caring for the child while Damon worked.

St. Mary signed an affidavit declaring Damon as the biological mother, and in 2009 Damon filed a petition to establish maternity and be added to the birth certificate as the child's mother. The District Court ordered the birth certificate to be amended to add Damon as the mother.

When the child was about a year old, however, the parties' relationship ended and the two entered into a dispute regarding custodial rights over the child. St. Mary filed a complaint to establish custody, visitation, and child support. Damon argued that her biological connection should entitle her to sole custody of the child, and attached the 2009 order listing her as the biological mother. Relying on that 2009 order, Damon also filed a motion to limit the scope of proceedings to only consider "third-party visitation" for St. Mary.[5] The court determined that it would only consider third-party visitation, believing that Damon's status as sole legal mother was already determined, and that St. Mary was a "mere surrogate."

Despite not ever being asked to provide an agreement during the in vitro fertilization process and resulting birth, they still completed one after the procedure was complete. During the court hearing, the parties gave conflicting testimony regarding the purpose of the co-parenting agreement and their intentions in having a child together. St. Mary testified that both women wanted to be related to the child and that they drafted the co-parenting agreement thinking that the fertility clinic required it. Damon testified that the parties had orally agreed that St. Mary was only acting as a

[5] For an explanation and discussion of "third party" rights to custody and visitation, see the materials and links posted at https://www.willicklawgroup.com/child-custody-and-visitation/.

surrogate to the child and that the co-parenting agreement was created to satisfy the requirement of the fertility clinic and for insurance coverage, but was never intended to be an enforceable co-parenting agreement between them.

The District Court upheld the previous order that had recognized Damon as the child's legal mother, granting her rights to be added onto the child's birth certificate as the mother, and determined that St. Mary was a "surrogate" entitled to third-party visitation but not custody.

Relying on NRS 126.045 (which was subsequently repealed by the 2013 Legislature),[6] the District Court refused to uphold the co-parenting agreement that the parties had signed, finding it null and void because under the statute "a surrogate agreement is only for married couples, which only include one man and one woman."[7]

St. Mary appealed the District Court's findings that she was a surrogate and the court's refusal to uphold the parties' co-parenting agreement.

The Supreme Court of Nevada held that the District Court erred in determining that St. Mary was a surrogate with no legal rights as a parent to the child, relying on NRS 126.041(1) which states that a mother-child relationship can be established by "proof of [the mother] having given birth."[8] Finding nothing in the record of the case demonstrating whether St. Mary was intended to be a mother to the child or a mere surrogate without legal rights, the Court remanded that question to the lower court to hold an evidentiary hearing on that issue.

---

[6] *See* Nev. Stat., ch. 213, § 36, at 813 (repealing NRS 126.045).

[7] NRS 126.045. This is how the Nevada DOMA impacted this custody case.

[8] NRS 126.041(1).

The Supreme Court also held that if, on remand, it was determined that both parties are legal parents, the parties' co-parenting agreement should be considered in determining custody, stating that "when two parents, presumptively acting in the child's best interest, reach an agreement concerning post-separation custody, that agreement must not be deemed unenforceable on the basis of the parents being of the same sex."[9]

IV. IMPACT OF THE DECISION: ESTABLISHING MATERNITY

In Nevada, courts must look to the Nevada Parentage Act to determine legal parentage. In adopting the Nevada Parentage Act, the Legislature recognized that there are both fundamental societal and constitutional dimensions to the relationship between a parent and a child. All of the "rights, privileges, duties and obligations" of parenthood are conferred onto any person with that parent-child relationship, regardless of the marital status of the parents.[10]

A surrogate, however, does not have the same parental rights and privileges. In 2013, Nevada's parentage (previously, "paternity") statutes were overhauled to redirect the relevant inquiry from biology to intention. NRS 126.045 defines a surrogate as "an adult woman who enters into an agreement to bear a child conceived through assisted conception for the intended parents."[11] The Court went into detail defining such terms because whether St. Mary was to be treated as a legal mother or a surrogate was very important to the outcome of the case.

---

[9] *St. Mary v. Damon*, 129 Nev. 647, 309 P.3d 1027 (2013).

[10] NRS 126.021(3).

[11] NRS 126.045; *see* 2013 Nev. Stat., ch. 213, §§ 10, 23, 27 at 807-08, 810-11 (replacing the term "surrogate" with "[g]estational carrier" and defining her as a woman "who is not an intended parent and who enters into a gestational agreement," wherein she gives up "legal and physical custody" to the intended parents and may "relinquish all rights and duties as the parent of a child conceived through assisted reproduction").

While new technological advances may make it more difficult to determine and prove legal parentage,[12] traditionally paternity could be established in a number of different ways. NRS 126.051 states that paternity may be established through marriage and cohabitation, openly receiving a child into the home as a parent, by genetic testing, and even by voluntary acknowledgment.[13]

In a case where two women offer evidence to establish their maternity, it can be more difficult. St. Mary argued that, because she gave birth to the child, she is the child's legal mother. Damon argued that she had a genetic relationship to the child because her egg was used during the in vitro fertilization procedure, and therefore she was the legal mother to the child.[14] Both women offered evidence that has traditionally been used to establish legal maternity. Therefore, the immediate issue in this case was whether two women can split the functions of creating a child, giving the child two legal mothers.

When the District Court determined that Damon was the exclusive legal mother to the child, it implied that children created through artificial insemination may not have two mothers under the law, which conflicts with the policy of "intention" primacy set out in the current Nevada Parentage Act.

Nevada law focuses on the best interest of the child when determining custody and care of children.[15] Both the Legislature and the Supreme Court have previously acknowledged that two

---

[12] Technologies already exist that permit genetic material from three people to be combined in a single embryo, so a child may have not just three legal parents, but three biological parents. The law will have to continue playing "catch-up" with science to remain relevant, and just.

[13] NRS 126.051(1)(a)-(d) & (2); NRS 126.053.

[14] *See K.M. v. E.G.*, 117 P.3d 673, 678 (2005) (explaining that evidence of genetic relationship could also be a basis for establishing maternity).

[15] NRS 125.480(1).

actively involved parents would best serve those interests.[16] The Legislature has also expressly stated that children born to a same-sex couple have the same right to have two parents as do children born to a heterosexual couple.[17] Further, NRS 128.005(1) states that "the preservation and strengthening of family life is a part of the public policy of this State."[18] It is here that preconceptions and predispositions about what constitutes a "family" can lead people to different conclusions.[19]

The Nevada Supreme Court often looks to California regarding issues that have not been litigated in Nevada; this includes determining maternity between two women who have used assisted reproduction. The California Supreme Court has determined that its laws allow for two women to both be legal mothers to a child.[20] In *K.M. v. E.G.*, the court held that when one woman provides her eggs to her lesbian partner for the partner to bear the children by in vitro fertilization, both women are legal mothers to the child.[21] Precedent from California is persuasive for Nevada because of the strong similarities in the statutory schemes of both states.

When the District Court followed the 2009 order establishing Damon *as* the child's legal mother, it falsely read into the order that St. Mary was therefore *not* the child's legal mother. Rather, the order simply established Damon's maternity to the child and added her to the birth certificate. The Supreme Court held that, because the 2009 order in no way determined *St. Mary's* maternity and

---

[16] *See Mosley v. Figliuzzi*, 113 Nev. 51, 62-65, 930 P.2d 1110, 1117-18 (1997).

[17] *See* NRS 122A.300(1) and (3)(b) (addressing dissolution of domestic partnerships).

[18] NRS 128.005(1).

[19] *See*, *e.g.*, Marshal Willick, *The Evolving Concept of Marriage and its Effect on Property and Support Law*, Nev. Lawyer, May, 2011, at 6.

[20] *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005).

[21] 117 P.3d at 675.

no evidentiary hearing was held to determine this, the District Court erred in its conclusion that St. Mary was a surrogate with no custody rights.

V. THE INCREASED IMPORTANCE OF AGREEMENTS

At the time of the District Court's determination, NRS 126.045 governed contracts between a married couple and a surrogate using assisted reproduction. St. Mary argued that the co-parenting agreement showed the intent to share custody of the child and that the District Court erred in holding that the agreement was invalid under NRS 126.045. Damon argued that the co-parenting agreement was prohibited by the statute because it was determining parentage and child custody between two unmarried people, one being the intended parent and the other being a surrogate.[22]

The Supreme Court noted that the co-parenting agreement between St. Mary and Damon lacked the characteristics of the type of agreement that would legitimately fall within the scope of NRS 126.045, including language referencing St. Mary as a surrogate or that she was relinquishing her rights as a mother to the child. Instead, the co-parenting agreement discussed the two women sharing parental duties and decision regarding the child.

In the context of family law, parties are permitted to contract in any lawful manner.[23] "Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy."[24] Public policy favors agreements resolving child issues such as

---

[22] NRS 126.045 (2009).

[23] *Holyoak v. Holyoak*, No. 67490, Order of Affirmance (Unpublished Disposition, May 19, 2016), citing *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009).

[24] *Id*.

"custody, care, and visitation."[25] Voiding a co-parenting agreement solely on the basis of the gender of the parents directly conflicts with the public policy set out in the Nevada Parentage Act.

The Nevada Supreme Court found the co-parenting agreement between St. Mary and Damon to be directly in line with the policy of Nevada and the best interest of the child. It is for those reasons that, if St. Mary was found on remand to be a legal mother of the child along with Damon, the District Court was required to look to their co-parenting agreement when deciding child custody.

VI. CONCLUSIONS

Family law has changed a great deal in a relatively short period of time, and if anything the rate of change is accelerating. At this moment, several trends seems clear.

Sexual orientation is not a legitimate determiner for case outcomes. The rights of parties are not to be different based on their gender – where there could be a presumption of paternity, there can be a presumption of maternity, and parentage in modern cases is going to be far more dependent on the agreement of the parties involved than in traditional examination of strict biology, which itself may be less and less a rational basis for determining the legal parentage of a child.

A child in modern Nevada can have two mothers, or two fathers, and perhaps can have more than two "parents." The ramifications for decisions regarding child custody, and support, are going to have to be resolved, either legislatively or by case law. And in these decisions, along with those not yet brought into focus, "the best interest of the child" remains the primary concern.

[25] *Rennels v. Rennels*, 127 Nev. 564, 257 P.3d 396, 399 (2011).