Presumed Parentage for Same-Sex Couples

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In the ever-evolving law regarding the appropriate standard to use when evaluating who qualifies as a "presumed parent," the subject is particularly confusing with regard to evaluating the presumption among same-sex couples. However, a recent case has been published which helps to articulate and clarify the current standard, without regard to the respective genders of each parent.

In the recent case of "E.C. v. J.V.," (No. C064745, Court of Appeal of California, Third District, San Joaquin, Filed January 19, 2012), the Plaintiff and Appellant is "E.C." the former same-sex partner of "J.V.", who is the biological parent of a minor child, a daughter, "L.V." While pregnant with the minor child, J.V. ended her relationship with the minor child's biological father and then became good friends with E.C. During J.V.'s pregnancy, E.C. accompanied her to her doctor's appointments, was her Lamaze childbirth preparation class partner and the two often spent time at each other's homes. E.C. was with J.V. during the minor child's birth and cut the minor child's umbilical cord.

When the minor child was first born in 2003, J.V. lived at her mother's house. However, when the minor child was three months old, they moved into E.C.'s house. Sometime thereafter, E.C. and J.V.'s relationship became sexual. E.C. and J.V. remained in a committed relationship with each other for the following 5 years, although it took them approximately one year to tell their families about it.

During their relationship, E.C. gave J.V. a ring and they discussed entering into a domestic partnership. E.C. took the minor child to her doctor's appointments and extracurricular activities. E.C. signed up the minor child for Kindergarten and listed herself as the minor's "step-parent or legal guardian" on the registration forms. In August 2005, E.C. joined the Air Force and when she had to leave town on assignment, she moved J.V. and the minor child to her own mother's home.

The minor child's biological father visited the minor child a few times when she was an infant, but he was not involved in her life; he never paid any financial support for the minor child, nor did he ever try to establish paternity.

In April 2008, E.C. and J.V. ended their relationship. At the time, the minor child was almost 5 years old. When they separated, the Parties agreed that E.C. would have "visitation" with the

minor child and that they would share the holidays. However, in February 2009, the Parties' communications "broke down" and J.V. then prevented the minor child from visiting with E.C.

Soon afterwards, E.C. filed a Petition to Establish a Parental Relationship, seeking joint custody of the minor child and visitation. J.V. opposed these requests and stated that E.C. was only the minor's "godmother" and not a co-parent.

At the Hearing on the matter, E.C.'s mother testified that when the minor child was born, she perceived E.C., J.V. and the minor child to be a "family unit," and that E.C. told people that the minor child was her daughter. For her part, E.C.'s mother also testified that she treated the minor child as her own granddaughter and attended her extracurricular activities. Other friends, family and coworkers all testified that E.C. and J.V. were living with the minor child as a "family unit" and that E.C. referred to the minor child as her daughter. At that Hearing, J.V.'s family and friends all testified that E.C. was referred to as the minor child's "Godmother and nothing more."

At the Hearing, J.V. testified that she did not consider appellant to be the minor's parent, and that although E.C. "was there for [the minor] since day one" she never intended for E.C. to be the minor's other parent.

At the conclusion of the Hearing, the Trial Court ordered temporary visitation to E.C. of one Saturday every other week, pending their decision. Nearly three months later, the Trial Court issued a written ruling that E.C. had failed to prove by a preponderance of the evidence that she was the presumed parent.

The Trial Court's decision was based on the Court's findings that the Parties had never registered as domestic partners, had not participated in a commitment ceremony, had not made a conscious decision to have a child and raise it as theirs before the minor child was born, and that the minor child did not have E.C.'s last name, nor was she claimed as a dependent on her tax returns. The Trial Court also based its decision on the Court's findings that the Parties were only "good friends" when the minor child was born, that they did not live together immediately after the minor child was born or continuously throughout their relationship, and that for the first part of the minor child's life their families believed that they were simply good friends. The Trial Court ultimately found that, as per her testimony, J.V. never intended E.C. to be another parent and that E.C. was simply J.V.'s girlfriend and the minor child's "godmother."

In deciding the case, the Court of Appeal reversed the Trial Court's decision and held that the Trial Court erred in its application of the governing law, Family Code Section 7611(d).

Under Family Code Section 7611(d), a [woman] is presumed to be the natural [mother] of a child if [she].....receives the child into [her] home and openly holds out the child as [her] natural child [Emphasis added].

The Court of Appeal noted the extensive case law, (which historically only applied to fathers) which discusses the presumption of parentage found in Family Code Section 7611(d). The Court notes, "A [woman] who claims entitlement to presumed [mother] status has the burden of establishing by a preponderance of the evidence the facts supporting [her]

entitlement....[Emphasis added]. Additionally, "....The Family Code section 7611(d) presumption, once it arises....may be rebutted in an appropriate action only by clear and convincing evidence." (In re J.O. (2009) 178 Cal.App.4th 139, 147-148, quoting § 7612, subd. (a).)[Emphasis added].

The Court of Appeal further notes that, "To be a presumed parent, a person does not have to be married to the other parent (Johnson v. Calvert (1993) 5 Cal.4th 84, 88-89) or registered as his or her domestic partner (Elisa B., supra, 37 Cal.4th at pp. 114, 125). [Emphasis added]. In fact, "A presumed parent need not have ever lived with the child's other parent (In re A.A. (2003) 114 Cal.App.4th 771, 784 (A.A.)) and may not have even known the other parent (In re Salvador M. (2003) 111 Cal.App.4th 1353, 1355-1356, 1358 (Salvador M.)). [Emphasis added].

Nevertheless, the Court of Appeal explained that, "...a presumed parent is not just a casual friend of the other parent, or even a long-term boyfriend or girlfriend, but someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child's well-being, regardless of his or her relationship with the child's other parent. (See In re Sabrina H. (1990) 217 Cal.App.3d 702, 708 (Sabrina H.); see also In re T.R. (2005) 132 Cal.App.4th 1202, 1211-1212 (T.R.).)[Emphasis added].

Additionally, the Court of Appeal explains that the above-cited law is important because it furthers the well-establish public policy of the State of California that, "whenever possible, a child should have the benefit of two parents to support and nurture him or her." (Librers v. Black (2005) 129 Cal.App.4th 114, 123.) [Emphasis added].

In applying the facts of this case to the applicable law, as articulated above, with regard to the Family Code Section 7611(d) standard of whether or not E.C. "Received the minor into her home," the Court of Appeal made it clear that the Trial Court erred in several important ways.

First, the Court of Appeal held that "the trial court wrongly relied on facts regarding the nature and quality of the relationship between appellant and respondent." [Emphasis added]. The Court of Appeal makes it clear, that whether or not E.C. and J.V. had a sexual relationship when the minor was born is not a relevant factor in determining E.C.'s commitment to the minor child. Instead, the relevant factors the Court of Appeal listed is that E.C. took J.V. to her prenatal appointments, was her Lamaze partner, was in the delivery room when the minor child was born, she cut the umbilical cord, and she took J.V. and the minor child into her home when the minor was three months old. According to the Court of Appeal, these facts do demonstrate E.C.'s commitment to the child.

Additionally, the Court of Appeal also found it irrelevant and inappropriate that the Trial court considered as a factor the timing of when E.C. and J.V. decided to tell their families that their relationship had turned from friendly to sexual. In fact, the Court of Appeal held that even had the Parties never told their families the sexual nature of their relationship, it would not affect the analysis. The appropriate factor the Trial Court should have considered is the fact that each of the Parties' families witnessed E.C. supporting the minor child throughout her entire life.

The Court of Appeal also found that the Trial Court had erred in considering that the Parties did not live together continuously throughout their relationship. The Court of Appeal states, "That factor is not critical in determining whether appellant held out the minor to be her natural child. Whether the parents live together and for how long demonstrates their commitment to each other, not to the child. (See A.A., supra, 114 Cal.App.4th at p. 784.) Accordingly, section 7611(d) does not include a cohabiting requirement. (A.A., at p. 784.)" [Emphasis added].

In any case, the Court of Appeal found that during part of the time the Parties were not living together, it was because E.C. was in the military, and she had "secured shelter" for the minor child and for J.V. with her mother while she was away. According to the Court of Appeal, this factor "...tends to show appellant was committed to the minor's well-being, not the contrary."

As to the factor that the Trial Court relied upon that J.V. never "intended" for E.C. to be the natural parent of the minor child, the Court of Appeal explains that J.V.'s intent is only relevant if "...she manifested that intent through her conduct and precluded appellant from holding out the minor as her natural child." Quite to the contrary, the Court of Appeal found that "the record is replete with evidence that she allowed, even encouraged, appellant to coparent the minor from the beginning."

The Trial Court also cited the Parties's failure to plan for the child prior to her conception as a factor to deny E.C. her presumed parent role. However, the Court of Appeal found this too to be in error. The Court of Appeal states, "As with heterosexual couples, the failure to plan for a child does not demonstrate an alleged parent's lack of commitment to that child's well-being; it is the alleged parent's conduct after the child's conception and birth that does so." Although the Court of Appeal did acknowledge that for homosexual couples, it is biologically impossible to conceive accidentally, and thus, children are often conceived after much "planning and process," evidence of which would be relevant to determining an alleged parent's commitment to that child. Nevertheless, the Court concluded that just because a parent does not engage in the planning and process of conception, does not mean that he or she is any less committed to the child once it is born.

For the reasons listed herein, the Court of Appeal reversed the Trial Court's decision and remanded the matter to allow the trial court to "exercise its discretion with a clear understanding of the law and determine whether appellant held out the minor to be her natural child." [Emphasis added].

As this Court articulates, a presumed parent is not just a"casual friend of the other parent, or even a long-term boyfriend or girlfriend..." but rather, a presumed parent is "...someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child's well-being..."

This case is important because not only does it help clarify the correct standard for applying the presumption of parentage, but it also demonstrates how fact-specific the particular findings in each case must be. As family law attorneys advising couples in a relationship where one party is not the biological parent of their child, it is important to identify and distinguish factors which can give rise to the presumption of parentage. As in "E.C. v. J.V.," the "intention" of the

biological parent will not trump the many factors which can show that the non-biological parent "receives the child into [his or her] home and openly holds out the child as [his or her] natural child" (Family Code Section 7611(d)).