Families by Design

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Over the past 40 years, while TV Pop Culture has gone from The Cleavers in their traditional nuclear family, through Different Strokes with adoptive families, One Day at Time with single parent families, through to the blended family of The Brady Bunch and now to the truly unique structure of The New Normal with surrogate and/or contracted family arrangements and Modern Family, a true mix of what I like to call "happenstance," our Courts in many states have actually mimicked the same patterns in the recognition of diverse family structure.

We've moved from the stereotypical nuclear family paradigm of the 1960s, through the expansion of the concept of "family." More and more, the Courts have begun to recognize that more than blood or legal relationship make up a family and some are trying to protect those relationships in the best interest of the children involved in them. Moreover, many Courts have recognized that a person's sexuality is an issue independent of their ability to parent---despite attempts by embittered exes to use their coparent's sexuality as a reason to prevent parent-child contact.

Family structure outside a two-parent paradigm is on the rise. While, previously, persons outside of the legal parentage of origin of a child were simply parents-by-permission of the legal parent, these legally unrelated parental figures have increased rights across many states in the United States. This is because of the upwards trend of recognizing the importance of the relationship of persons to a child, with equitable solutions to maintain the same in the face of adversity instead of leaving those relationships sustainable if expressly permitted by a legal parent.

Certain states still do no permit second parent recognition in a female same-sex marriage where one spouse has born a child and further, certain states still will not allow a same-sex couple to adopt a child together (or allow one partner to adopt the legal child of the other). We do not know for sure how this situation will change upon nationwide recognition of same-sex marriage, but one would assume that if all marriages are recognized universally, that the same protections and assumptions for parentage provided to fathers in different sex couples will eventually at least extend to the non-carrying spouse of a female same-sex couple.[1]

At the present time, the basics of parentage protections would indicate to us that regardless of marital status, because of the lack of uniformity across states and nations, an adoption should be completed (if permitted). This provides satisfactory legal protections for a two-parent traditional household (regardless of gender of the parents). However, when you are dealing with a situation that involves other family formations beyond a two-parent household, the legal rights of persons

[1] Because the UPA has parentage presumptions that arise from a birthmother, the 'other' parent would be either the spouse of the birthparent or a biological father. Same-sex male couples would be afforded parentage rights under the adoption or surrogacy statutes, if same applied in a particular state.

to assert parentage claims, and the rights of the child to have solidarity of family are far more complex.

Certain states recognize equitable parentage rights such as de facto and/or psychological parentage wherein a person can develop visitation or custodial rights to a child based upon their actual relationship with a child. This is a benefit to the child because if they have an established relationship with a parental figure, it cannot just be ripped from under them by a disgruntled legal parent. An example of this type of 'equitable' parentage can be found in New Jersey where it has been in place for 15 years. In V.C. v. M.J.B., 163 N.J. 200 (2000), the Court determined that a person acting as a parent to a child (who was not otherwise a legal parent through birth or adoption) could be deemed equal to that child's legal parent(s) based upon the satisfaction of 4 elements: (1) The biological or adoptive parent consented to, and fostered, the would-be parent's establishment of the parent-like relationship with the child; (2) the child resided with the would-be parent; (3) the would-be parent assumed the obligations of parenthood; and (4) the would-be parent has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

While psychological parentage may exist in New Jersey, in other states just a few miles away like New York, no such equitable parentage principals exist. In fact, on May 20, 2015, in a case that really highlighted this inequity, the New York Supreme Court, Appellate Division, affirmed that the non-biological/non-legal mother of a child had no standing to even bring an action for visitation with the child she had known as her own from his birth in 2011. Jann and Jamie Paczkowski have been embroiled in a legal battle regarding their son for two years. The couple determined to have a child together, the child was born in November 2011, and the parties married when he was two months old. However, because they were not married at the time of his birth, Jann, the non-carrying mother, was not permitted to place her name on the birth certificate. The couple never completed a second parent adoption to confirm Jann's parentage of the child. The couple ultimately broke up and developed a written agreement that they would share joint legal custody and outlined parenting time for Jann.[2] However, when Jann filed a petition for joint legal custody in late 2013, she was denied same for lack of standing as the Court would not recognize her as a parent. The Appellate Division affirmed on May 20, 2015.[3] So the mother who went into the creation of this child as an intended parent and participated in his upbringing was simply left to the mercy of the kindness of her ex-spouse as to the ability to have any sort of relationship with the child.

If such dilemmas exist for married couples and two-parent families, one can imagine the complexities that arise from those situations where more than two parental figures are involved. Across the nation, various questions have arisen as to the rights of parties who may have acted as a parent to a child when the child already has two legal parents in place. The question became whether a child could have MORE than two parents. While some jurisdictions remain particularly conservative on this point, others have been dealing with the idea of the multi-parent family for decades. For example:

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[2] http://www.nytimes.com/2014/09/14/nyregion/after-a-same-sex-couples-breakup-a-custody-battle.html?_r=0

[3] Matter of Paczkowski v Paczkowski 2015 NY Slip Op 04325 Decided on May 20, 2015 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431 http://law.justia.com/cases/new-york/appellate-division-second-department/2015/2014-07355.html

- **Jacob v. Shultz-Jacob, 2007 PA Super. 118 (Pa. Super. Ct. 2007)**: The Pennsylvania Appellate division decided that a child may have three parents in a scenario where a lesbian couple and the man who donated the sperm and had parental involvement with two children.

- **In re Adoption of A.L. and E.L., Circuit Court of the State of Oregon, Multnomah County Case 9207-65717 (1992):** In this case, two three parent adult adoptions were granted with neither consenting birth parent relinquishing parental rights. In this matter, a divorced mother had been granted custody to two minor children. She later began an intimate relationship with another woman who helped co-parent the children. After the children became adults, although the women had then separated, the women petitioned the Court to permit the non-legal mother to become a legal parent while the legal father retained his parental rights. The Court issued an Order recognizing the relationship between all three parents and the adult children.

- **In re Adoption of Anisha Oksoktaruk Lumiansky, Alaska Superior Court, First Judicial District of Juneau, No. 1JU-85-25 P/AS (1985):** Judge Walter L. Carpeneti allowed a third adult to become a child's adoptive parent without requiring that the natural parents of the adopted person be relieved of all parental rights and responsibilities.

- **Merrill v. Berlin, 316 Mass. 87, 89 (1944)**: A Massachusetts Court found that it was in the best interest of a child to be raised by three persons (all of the same sex), namely his deceased mother's aunt and two cousins.

- **A.A. v. B.B., 2007 ONCA 2:** Canadian case wherein the Court determined that there were three legal parents for a child. The Court opined that a declaration of legal parentage permits rights and responsibilities that are not attached to a finding of psychological parentage. Those include, *inter alia*, that it is an immutable declaration of status; that it determines lineage; that it ensures the child will inherit on intestacy; that the child may receive social security benefits through that parent; that the parent may register the child in school; and that the parent may assert health care related rights as to the child (and that later in life, the child can assert health care related rights as to the parent).

In California, the Court was faced with a situation involving competing presumptions to formulate the parentage of a child which ultimately led to the Legislature enacting a statute that allows for multi-parent families.

- **In re MC *(*Los Angeles County Super. Ct. No. CK790 91) 2011:** In re MC was a case where there was a biological mother, her spouse (by marriage which occurred during the 6 months it was permitted in California in 2008), and a biological father. The biological mother had rights as the birth mother under the parentage statute, the biological father had rights under the parentage statute,

and the spouse had rights under both the marital presumption and holding out provision of the California statute. The trial level court decided to name all three individuals as parents. The Appellate Court reversed stating that only two parents were "allowed" to be deemed legal parents to the child and they remanded for the Trial Court to decide who's presumption---biological father's or biological mother's spouse---was stronger.

In reaction to the In re MC Appellate Court decision, the California legislature stepped in and **California developed a STATUTE[4] that specifically allows for a child to have three legal parents.**

Recently, in another New Jersey psychological parent case, KAF v DLM 437 N.J Super. 123 (App. Div, 2014), the Court explored the standard in V.C. v. M.J.B., 163 N.J. 200 (2000) as applied to a same-sex couple and the issue of whether consent of both legal parents was necessary to meet the first prong of the V.C. v. M.J.B. psychological parent analysis and determined that consent of one legal parent alone is sufficient. This indicates, again, that the Court accepts the notion that a child can have more than two parental figures and more than two people can develop legal rights to a relationship with a child and how the child got to that point is less important that maintaining the relationships that **do** exist, when the same maintenance is in the protection of the child's best interest.

This construct provides significant hope for families who exist outside a traditional two-partner structure. This may provide an outlet for extending the equities of parentage to polyamorous families or those persons who desire to coparent, tri-parent, or quad-parent by contractual relationship, without a legal relationship as and between the parents. By way of example, one can examine the options for a polyamorous triad that would like to have a child together and develop a tri-parenting written agreement with two parties being biologically related to the child and placed on the birth certificate and the other not being biologically or legally related. For the purposes of this article, I will address this scenario in two different states comparatively:

In New York: two parties would be placed on the birth certificate. Those two parties would be the birthmother plus either the legal spouse of the birthmother or the biological father of the child. The partners placed on the birth certificate would be deemed the legal parents of this child. As seen in the recent Paczkowski case out of New York, there are no protections afforded to an individual who is participating in the child's life as a parent but not named on the birth certificate (or by other order of parentage or adoption). Instead, one hopes that in formulating a tri-parenting agreement, all parties will be honorable and act with the intentions of the best interest of the child in mind. The parents on the birth certificate would have the rights of inheritance, etc. extended to them and the other would have to arrange his or her estate planning in such a manner to protect the relationship with the child but no automatic rights would be afforded.

In New Jersey: the partners placed on the birth certificate, with the biological connection, would be deemed the legal parents of the child. However, should the parties have a written contract

[4] CA Family Code Section 7601 (2013)

including a third party, that same contract would go to the intent of the parties to include that third person as a parent and satisfy the first prong of V.C. Thereafter, if the legal parents attempted to upset that parent's relationship with the child, that person would have protections under V.C. and (if determined to be a psychological parent) would rise to a level in parity with the legal parents for custodial determination purposes.

With the expansion of family, various Courts have recognized that not every family is made up of one mom and one dad, but that there can be really any combination of individuals who are connected in a parent-like way to a child. Therefore, the focus should, and often does, remain on what relationships are most advantageous to maintain in furtherance of the best interest of the subject child and the task shifts to finding ways to create legal security and permanency for the child in those relationships.

There is very little, if any, specific case law on point for pre-determined multi-parent families. We, instead, as zealous advocates, take bits and pieces of prior cases and cases from other jurisdictions and extrapolate, compare, contrast, and put them all together in a Frankenstein-like fashion in order to justify the decisions that are made. While this may be appealing to those of us who enjoy dealing with Bar Examination-type hypotheticals on a daily basis (this author is guilty as charged), it is often impractical for families to have to endure such uncertainty and experimentation, while daily life hangs in the balance.

However, if we can take those same arguments and principles and carefully pair them with the child-centered practicalities of what works for these families in real life (not just on paper) in an effort to foster and forward the best interests of the child(ren) involved, then the whole family benefits. In a heartfelt effort to conclude this thought while chasing rainbows[5]: the side effect of working with alternative dispute resolution and family planning methodologies in these unique family situations is that the parents set expectations and learn to better co-parent (or tri- or quad-parent, as the case may be,) and the family ultimately owns and accepts their own destiny for the pure and unadulterated benefit of the child.

[5] (Pun fully intended)