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# MATRIMONIAL LAW

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## REDEFINING THE MEANINGS OF FAMILY, PARENTHOOD IN SAME-SEX RELATIONSHIPS

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“K.M.” and “E.G.” were a lesbian couple who resided in Marin County, Calif. Five years after twin daughters were born to E.G. -- a product of K.M.'s eggs, E.G.'s uterus, and a fertility clinic sperm donor -- the couple ended the relationship. E.G. moved to Massachusetts with the twins. K.M. went to court for a custody determination.

On May 10, 2004, in *K.M. v. E.G.*, [FN 1] the First District Court of Appeals, San Francisco, Calif., ruled that K.M. has no parental rights to the twins she and E.G. were raising together despite the fact that she was their genetic mother. E.G. the birth mother, was awarded sole custody, the court remarking that "functioning as a parent does not bestow legal status as a parent."

New York law has yet to address the modern-day realities of such a case. That such a day is coming, and soon, is inevitable. [FN 2] Over the past two decades, New York courts have faced issues of child custody and visitation involving same-sex partners [FN 3] with correspondingly greater frequency, [FN 4] leaving the courts with a Pandora's box of conundrums as they were called upon to apply the law of families [FN 5] to those who were not taken into account when those laws were created. In each case, the court had to decide what a family is and whether the parties before it constituted a family.[FN 6]

### **Custody Determination Law**

The magnitude of parental status in custody and visitation proceedings is overwhelming. [FN 7] Three facts presently serve to both define, and bind, the hands of New York courts as concerns who has parental status, and therefore standing as a child's "legal parent:"

- Parenthood is legally determined by biology or adoption. [FN 8]
- A child born to married parents is considered to have two legal parents. [FN 9]
- Since same-sex couples cannot marry, a child born to their relationship is considered to have only one legal parent. [FN 10]

The problem of standing derives from our societal traditions and laws, which hold that the constitutional principles of parental autonomy and privacy should not be lightly intruded upon by third parties. [FN 11] Presently, a legally unrecognized parent in a same-sex custody or visitation dispute is deemed a third party at best [FN 12] and non-existent at worst.

Custody of a child goes far beyond the locale in which the child will rest his or her head at night. It vests authority in the legal parent to make decisions that affect the very foundation of the child's life -- from the right to supervise and determine what is best for the child's welfare, education and general well-being, to the right to control with whom the child associates. [FN 13]

Legal parents have equal powers, rights and duties to rear their child, though those rights are not absolute. [FN 14] Custody disputes, it must be remembered, are not one-sided affairs. [FN 15] They involve equally a parent's right to raise a child and the child's concomitant right to be raised by a parent. [FN 16]

In a matrimonial action, DRL ' 240 (1)(a) requires that the court give such direction, as between the legal parents for the custody and support of the child, as in the court's discretion justice requires, having regard for the circumstances of the case; the respective parties; and the best interests of the child. In a habeas corpus proceeding, as between legal parents, DRL ' 70 requires that the court determine custody based solely on the best interests of the child, and what will best promote its welfare and happiness.

Where there is a dispute between a legal parent and a "non-legal parent," [FN 17] the non-legal parent may not have standing to challenge parental custody, and therefore may be forestalled from triggering an inquiry into the child's best interests.

Moreover, as between a legal parent and a non-legal parent, the issue of the child's best interests is not reached unless and until it is first established that "grievous cause or necessity" exists to transfer custody. [FN 18] Such "cause" has been interpreted to include abandonment or neglect of the child by the legal parent, unfitness of the legal parent, or "other extraordinary circumstances." [FN 19]

### **Visitation, or "Custody-Lite"**

Visitation with a child has been referred to as "a subspecies of custody." [FN 20] It is, in fact, borrowing a colloquialism, "custody-lite." It is the temporary interference with a legal parent's right to determine and control the child for some period of time.

As with custody, it is a right that devolves upon both the parent (non-custodial in this context), and the child. [FN 21] It is the right of a child to maintain a connection to an adult with whom the child has developed emotional and familial bonds. [FN 22] Generally, the non-custodial legal parent has a right to visitation with his/her child absent a showing of exceptional circumstances, [FN 23] the paramount consideration being the best interests and welfare of the child. [FN 24]

Although a non-legal parent may obtain custody in extraordinary circumstances, [FN 25] even where extraordinary circumstances exist, a non-legal parent cannot obtain visitation rights if the parent

is fit and custody is uncontested. [FN 26]

That being so, visitation rights for non-legal parents are, for all intents and purposes, non-existent. At present the Domestic Relations Law only permits visitation orders in cases brought by legal parents, grandparents or siblings. [FN 27]

### **Twenty Years of Cases**

Ask any parent -- parenthood is a complex reality. As society increasingly departs from the "one-mother/one-father" parenthood formula, and more children, whether as a result of surrogacy, open adoption, stepfamilies, extramarital births, or gay-parented families, are raised in relationships once deemed "non-traditional," the myth of a standardized family is being exploded. [FN 28] Family law has been slow to catch up.

In the absence of statutory or case law explicitly granting non-legal parents custodial or visitation rights, litigants seeking such relief have sought to invoke the doctrine of equitable estoppel so as to prevent a legal parent from denying them parental rights.

Nearly 20 years ago, in *Karin T. v. Michael T.*, [FN 29] in a case that has often been called an "anomaly in the gay-parent dissolution scenario," [FN 30] the Department of Social Services brought a proceeding for child support against Michael T. under the Uniform Support of Dependents Act.

Michael T., it turns out, was a woman (born Marlene) who had lived her life as a man. In the late 1970s Michael T. commenced a relationship with Karin T. The couple obtained a marriage license, and participated in a marriage ceremony.[FN 31] Thereafter, Karin T. gave birth to two children, conceived through artificial insemination. The physician who performed the procedure, prior to the procedure, had both parties execute an agreement that provided, in pertinent part, that Michael T. "' ... was the husband ... and the child or children [resulting from the insemination] are his own legitimate child or children ... "[FN 32]

Michael T. interposed an affirmative defense to the proceeding based upon DRL ' 32, averring that she was female, could not biologically be the parent, and had not formally adopted the children. [FN 33]

Nonetheless, the court ordered Michael T. to pay child support, relying upon the agreement she had signed and the Black's Law Dictionary definition of "parent" as "one who procreates, begets or brings forth offspring." [FN 34] The court concluded: "The actions of this respondent in executing the [a]greement ... certainly brought forth these offspring as if done biologically. The contract and the equitable estoppel which prevail in this case prevent the respondent from asserting her lack of responsibility by reason of lack of parenthood. This Court finds that under the unique facts in this case, respondent is indeed a ' parent'...." [FN 35]

In reaching its decision in *Karin T.*, the court relied on *Wener v. Wener* [FN 36] and *Gursky v. Gursky*. [FN 37]

In *Wener*, the husband and wife agreed to adopt a child, but separated prior to the finalization of the adoption. The husband was held liable for the support of a child, the court reasoning that "the [wife] would not have acquired the child and brought her into their home in the absence of the [husband's] consent to adoption.' [FN 38]

In *Gursky v. Gursky* (decided prior to enactment of DRL '73, which legitimizes children born of artificial insemination to married women), the court held the husband liable for the support of a child born to his wife through artificial insemination, reasoning that the husband's consent to the insemination "was in its terms a request ... for the express purpose of providing a child for the mutual happiness of the parties.' [FN 39]

### **At the Opposite End**

Two years following *Karin T.*, and at the other extreme, is *Ronald FF. v. Cindy GG.*, [FN 40] where the Court of Appeals denied visitation rights to a man who had indisputably and selflessly functioned as a child's father, and had been the object of a child support proceeding.

Ronald and Cindy had dated for two years. Cindy then began seeing another man. A few months later, and now pregnant, she reconciled with Ronald. Cindy informed Ronald that it was possible that he was the father. The two lived together during the pregnancy. They attended childbirth classes together, and Ronald was present at the birth. He was listed on the child's birth certificate as the father, and he even selected the child's first name.

For the next year or so Ronald and Cindy lived together periodically. Even when they lived apart Ronald continued to see the child on a regular basis. It was undisputed that both parties considered Ronald the child's father and held him out as such. When the child was about one year old Cindy stated that she was moving to Texas with the child. Ronald commenced a proceeding to stop the removal and to secure visitation rights.

Blood-grouping tests showed that Ronald was not the child's biological father. The Family Court nonetheless awarded visitation based on the child's best interests and case law permitting a biological stranger to obtain custody under extraordinary circumstances. [FN 41] The Appellate Division agreed. [FN 42] The Court of Appeals however, overturned that decision, [FN 43] finding that:

... no one questions the mother's fitness to raise her child and no one seeks to change custody.... thus our inquiry is directed solely to the State's power to interfere with the right of this mother to choose those with whom her child associates. The State may not interfere with that fundamental right unless it shows some compelling State purpose, which furthers the child's best interests. [citation omitted]. No such compelling purposes are present in this case.

A few more years passed until 1991, and the Court of Appeals' decision in *In the Matter of Alison D. v. Virginia M.*, [FN 44] in which the Court affirmed the trial court's judgment dismissing a habeas corpus proceeding to obtain visitation rights with a child born during the course of the parties' same-sex relationship.

The Court of Appeals held that a biological stranger to a child, despite her one-time live-in relationship with the child's mother, was not a "parent," within the meaning of the statute allowing "either parent" to apply for a writ of habeas corpus to determine issues of visitation rights. [FN 45]

It is then-Associate Judge Judith S. Kaye's dissent in *Matter of Alison D.* that is the most oft-quoted aspect of the case. First, Judge Kaye politely chastised her legal brethren for: "fixing biology ... as the key to visitation rights." [FN 46] She then focused on the fact that [DRL ' 70](#) does not define the word "parent." Though Judge Kaye did not propose any particular definition of the word, she invited the Court's attention to the then-recent decision of *Spells v. Spells*, [FN 47] where the Superior Court of Pennsylvania fashioned a test requiring that the petitioner "demonstrate actual assumption of the parental role and discharge of parental responsibilities .... That the relationship with the child came into being with the consent of the biological or legal parent, and that the petitioner at least have had joint custody of the child for a significant period of time." [FN 48]

### **The Tide Begins to Change**

Four years later, the Court of Appeals delivered its landmark decision in *Matter of Jacob and Matter of Dana*, 86 N.Y.2d 661 (1995), granting same-sex couples the right to adopt and determining that under [DRL ' 117](#) the unmarried partner of a child's biological mother/father who is raising the child with the biological parent may become the child's adoptive parent, without termination of the rights of the biological parent.[FN 49]

Though changes clearly appeared to be in the offing, the appellate courts either would not, or could not follow on their own, and so in 2002, in *Matter of Janis C. v. Christine T.*, [FN 50] they threw down the gauntlet at the Court of Appeals' feet.

In *Matter of Janis C. v. Christine T.*, the Family Court invoked the doctrine of equitable estoppel to give Petitioner the right to seek visitation with the children of her same-sex former domestic partner, determining that she had become a "psychological parent" to the children and that visitation would be in their best interests. The Appellate Division reversed, stating that:

Although the doctrine of equitable estoppel has been applied as a defense in various proceedings involving paternity, custody, and visitation, it does not apply in the present case. The outcome of this case is governed by this court's decision in *Matter of Speed v. Robins*, [citations omitted], which followed the precedent set in *Matter of Alison D. v. Virginia M.*, [citations omitted] ... Any extension of visitation rights to a same sex domestic partner who claims to be a "parent by estoppel," "de facto parent," or "psychological parent" must come from the New York State Legislature or the Court of Appeals.

The challenge having thus been made, are there even more changes yet to come? For some, the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), decided two years before *Matter of Janis C.*, provides the springboard -- a giant leap in the recognition of the rights of gay-parented families. To others the ramifications of *Troxel* remain unclear.

## **What Does 'Troxel' Mean?**

Though the Troxel Court never specifically mentioned gay-parented families, it is the Court's discourse on the diverse variety of the contemporary family that appeared to many family law practitioners and gay rights activists to be promising.

At issue in *Troxel* was a Washington State law that allowed grandparents -- or any other person -- to ask the courts to allow visitation with a child. The facts were simple.

Mr. and Mrs. Troxel sought to maintain regular contact with their granddaughters following the death of their son who had fathered the girls out of wedlock. The children's mother limited visitation. The Troxels sued to obtain greater visitation rights.

The Supreme Court held the statute unconstitutional as applied to the legal mother, because it gave "no special weight" to the legal mother's determination of her children's best interests, which in turn "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." [FN 51]

Some commentators believe that the Court's language, Justice John Paul Stevens' dissent in particular, could be used to support a non-legal parent's contention that his/her relationship with a child deserves constitutional protection and that the Court should recognize a liberty interest in children to maintain family or family-like bonds. [FN 52]

Justice Stevens stated in his dissent: [FN 53]

While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds ... it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

Justice Stevens also reminded the plurality that: [FN 54]

... the parental liberty interest was a function, not simply of "isolated factors" such as biology and intimate connection, but of the broader and apparently independent interest in family.

Finally, Justice Stevens noted that: [FN 55]

[W]e should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.

Given the interest and debate that the *Troxel* decision has generated to date, it is likely that it will have a ripple effect on a wide spectrum of human relationships, both heterosexual and homosexual in the years to come.

## What's Next

A challenge appears to lie ahead for our legislature and courts. A new definition of family, and thus parenthood, may be necessary to adapt to the complexities of modern families. [FN 56] It is now up to our lawmakers and the courts to determine whether a new definition of family would truly be in the best interests of our children.

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Endnotes:

1. K.M. v. E.G., A 101754, Ct. of Appeal of the State of California, First Appellate District, Division Five (Marin County Super. Ct. No. CV 020777).
2. It is estimated that between eight and 10 million children have at least one gay parent. See, Kyle C. Velte, "Towards Constitutional Recognition of the Lesbian-Parented Family," 26 N.Y.U. Rev. L. & Soc. Change 245 (2000-2001); Nancy D. Polikoff, "This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families," 78 Geo. L.J. 459 (1990).
3. Matter of Alison D. v. Virginia M., 77 N.Y.2d 651 (1991); Matter of Janis C. v. Christine T., 294 A.D.2d 496 (2d Dept. 2002).
4. Josephine Ross, "The Sexualization of Difference: A Comparison of Mixed- Race and Same-Gender Marriage," 37 Harv. C.R.-C.L. L. Rev. 255, 263-64 (2002).
5. Id.
6. David B. Cruz, "Just Don't Call It Marriage: The First Amendment and Marriage as an Expressive Resource," 74 S. Cal. L. Rev. 925, 927 (2001).
7. See, Polikoff, supra.
8. DRL ' ' 31 and 33.
9. DRL ' ' 33, 110, and 117.
10. New York, as of the writing of this article, does not recognize gay marriage.
11. See, Troxel v. Granville, 530 U.S. 57 (2000); Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923); Jacobs, "Micah Has One Mommy and One Legal Stranger," 50 Buff. L. Rev. 341 (Winter 2002).
12. Polikoff, supra.
13. Matter of Alison D., supra., citing to Matter of Ronald FF., v. Cindy GG., 70 N.Y.2d 141 (1987); see, also, Matter of Bennett v. Jeffreys, 40 N.Y.2d 543, 549 (1976).
14. Velte, supra., at 254; DRL ' ' 81; Scheinkman, McKinney's Practice Commentary, DRL ' ' 240:2.
15. Judge Kaye (dissenting) in Matter of Alison D., supra., and citing to Matter of Bennett v. Jeffreys, supra.
16. Judge Kaye, (dissenting) in Matter of Alison D., supra.
17. Persons who are neither biological nor adoptive parents.
18. Matter of Ronald FF., v. Cindy GG., supra., see, also Matter of Bennett v. Jeffreys, supra.
19. Matter of Alison D. v. Virginia M., supra.; Matter of Ronald FF., v. Cindy GG., supra.; see, also, Matter of Bennett v. Jeffreys, supra.
20. Matter of Ronald FF., v. Cindy GG., supra., at 144.
21. Weiss v. Weiss, 52 N.Y.2d 170 (1981).
22. See the Family Court decision in Matter of Janis C., supra., at In the Matter of J.C. v. C.Y., 184 Misc.2d 935 (Fam. Ct., West. Co., 2000).
23. DRL ' ' 240; Scheinkman, McKinney's Practice Commentaries, C 240:20.
24. Id.
25. See, Bennett v. Jeffreys, supra.
26. See, Ronald FF., v. Cindy GG., supra.
27. DRL ' ' 70, 71 and 72.
28. Polikoff, supra.
29. 127 Misc.2d 14 (Fam. Ct., 1985).
30. Velte, supra., at 265.
31. 127 Misc.2d at 15.
32. Id. at 15-16.
33. Id. at 15.
34. Id. at 19. (Black's Law Dictionary 1003, 5th ed. 1979).
35. Id.
36. 35 A.D.2d 50 (2d Dept.1970).
37. 39 Misc.2d 1083 (Sup. Ct. Kings Co., 1963).
38. 35 A.D.2d at 53.
39. 39 Misc.2d at 1088.
40. 70 N.Y.2d 141 (1987).
41. Id. at 143, 517 N.Y.S.2d at 933, citing to Matter of Bennett v. Jeffreys, supra.

42. [117 A.D.2d 332](#).
43. [70 N.Y.2d at 144-145](#).
44. [77 N.Y.2d 651 \(1991\)](#).
45. [Id. at 656-657](#).
46. [Id. at 658](#).
47. [250 Pa. Super 168 \(1977\)](#).
48. [Id. at 662](#).
49. [DRL '117](#); Scheinkman, Practice Commentaries, C117:1, p.290.
50. [294 A.D.2d 496 \(2d Dept. 2002\)](#).
51. [530 U.S. 57 \(2000\)](#).
52. [Velte, supra](#).
53. [530 U.S. at 88](#).
54. [Id. at 88](#).
55. [Id. at 90](#).
56. [Polikoff, supra](#).

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