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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

A.G., Plaintiff and Appellant, v. D.W., Defendant and Respondent.	B175367 (Los Angeles County Super. Ct. No. BD399555)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roy Paul, Judge. Reversed and remanded.

National Center for Lesbian Rights, Shannon Minter and Courtney Joslin for Plaintiff and Appellant.

Pat Murphy for Defendant and Respondent.

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Appellant A.G. appeals from a judgment entered after the trial court granted respondent D.W.'s motion to dismiss her petition for visitation of the minor C.M. on the basis that she lacked standing. A.G. and D.W. are former same-sex partners.

With technological advances, same-sex couples as well as heterosexual couples who were previously unable to conceive children can now plan the conception of a child with increasing ease. As these couples split up, issues of parentage are coming to the forefront in the dependency and family courts.

Three cases involving the issue of parentage in same-sex relationships are currently pending before the California Supreme Court. In *Elisa B. v. Superior Court*, review granted September 1, 2004, S125912, the Third District held that a same-sex partner is not a parent within the meaning of the Uniform Parentage Act (Fam. Code, § 7600[1] et. seq.;[2] hereinafter referred to as the UPA). Division Three of this district held the opposite view in *Kristine H. v. Lisa Ann R.*, review granted September 1, 2004, S126945; namely, that by reading the UPA in a gender-neutral fashion, the UPA provides a basis upon which parentage can be established in same-sex unions. In *K.M. v. E.G.*, review granted September 1, 2004, S125643, the First District held that while a same-sex partner had standing to bring an action to determine parentage under the UPA, sufficient evidence existed to support the trial court's finding that the ovum donor consent form indicated that she had waived her parental rights; evidence existed supporting the finding that the partner was the only natural mother; the statutory presumption of parentage did not apply; the partner was not estopped by her conduct from denying the woman's parentage; and the best interests of children standard did not apply.

We hold that under the UPA, A.G. may establish both standing and parentage. We reverse the judgment of dismissal of the trial court.

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[1] All further statutory references are to the Family Code unless otherwise noted.

[2] We note that former Civil Code sections 7000-7002 embodied the provisions currently contained in the Family Code.

CONTENTIONS

A.G. contends that: (1) she is a legal parent under the UPA; and (2) discriminating against children born through artificial insemination based on their parents' marital status, gender, or sexual orientation violates the children's constitutional right to equal protection.

FACTS AND PROCEDURAL BACKGROUND

A.G. first met D.W. in 1982, when D.W. was 16 years old. A.G. and D.W. began a lesbian relationship in 1995, and in 1997 jointly arranged for D.W.'s artificial insemination. A.G. paid for the medical procedure; was present at C.M.'s birth in 1998; informed family and friends that she would be adopting C.M.; jointly issued a birth announcement; decorated the nursery; and purchased baby items. A.G. and D.W. set up a household in Los Angeles with C.M., as well as D.W.'s children from a previous heterosexual marriage. A.G. added C.M. to her insurance as her son; took him to his medical appointments; paid for daycare; and gave C.M. her last name. She also claimed C.M. as her son on her tax returns. However, she did not adopt him.

In September 2000, A.G. and D.W. separated. A.G. continued to provide C.M.'s health insurance, take him to medical appointments, and purchase clothes. A.G. had visitation with C.M. on alternate weekends and holidays, and provided support through 2002.

A dependency petition was filed against D.W. in January 2003, based on allegations that D.W. had physically abused her older daughter. The dependency court found that A.G. was a de facto parent and granted her unmonitored visitation with C.M. After the dependency action was closed, A.G. filed the current petition, in which she sought visitation with C.M. In the meantime, D.W. entered into a heterosexual marriage.

D.W. filed a demurrer on the basis that a nonparent cannot bring a petition seeking visitation. The trial court found that under *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831 (*Nancy S.*), *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597 (*Curiale*),

and *West v. Superior Court* (1997) 59 Cal.App.4th 302 (*West*), A.G. lacked standing to bring the petition, and dismissed the petition.

This appeal followed.

DISCUSSION

I. Whether A.G. is a legal parent under the UPA

A. Standard of review

The appellate court assumes the truth of all properly pleaded material allegations of the complaint, and gives "the complaint a reasonable interpretation by reading it as a whole and its parts in their context [citation]." (*Silberg* v. *Anderson* (1990) 50 Cal.3d 205, 210.) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action; when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If the complaint can be cured, the trial court has abused its discretion. (*Ibid*.)

"To meet the plaintiff's burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.]" (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1386 (*Careau*).) "However, such a showing need not be made in the trial court so long as it is made to the reviewing court." (*Ibid*.)

B. Standing

D.W.'s first contention that A.G. never raised the issue of parental status below, and therefore waived the issue on appeal, is belied by A.G.'s reply to D.W.'s motion to dismiss the petition, in which A.G. argued that she had standing to file the petition, as a parent of C.M. Moreover, the trial court based its finding that A.G. lacked standing on A.G.'s nonparental status. D.W.'s complaint that A.G. should have filed a petition for determination of parental status rather than a petition for custody and visitation was not raised below and is therefore waived. (*Western Oil & Gas Assn. v. Monterey Bay*

Unified Air Pollution Control Dist. (1989) 49 Cal.3d 408, 427, fn. 20 ["A party may not for the first time on appeal change its theory of relief"].) Accordingly, the issue of parental status is properly before us.

C. The gender-neutral requirement of the Family Code

The UPA was passed with the objective of eliminating the legal distinction between legitimate and illegitimate children. (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 87 (*Johnson*).) As part of the UPA, section 7602 was enacted, which extends the parent-child relationship to every child and parent regardless of the marital status of the parents. (*Johnson*, *supra*, 5 Cal.4th at p. 89.)

Relying on section 7650,[3] which states that the provisions of the UPA relating to the father and child relationship shall be applied, if practicable, to determine the existence of a mother and child relationship, the *Johnson* court held that the UPA must be administered in a gender-neutral manner. (*Johnson*, *supra*, 5 Cal.4th at p. 89.) In *Johnson*, a married couple contracted with a surrogate mother to carry an embryo created by the sperm of the husband and the egg of the wife. The relationship between the surrogate mother and the couple deteriorated, and the couple filed a lawsuit seeking a declaration that they were the legal parents of the unborn child. The court found that because there was no question as to who was claiming the mother and child relationship, there was no need to resort to section 7611 which establishes a presumption of paternity based on the man's conduct toward the child, or his marriage or attempted marriage to the child's mother. However, the court found that "by parity of reasoning," former Evidence Code section 892,[4] which provided that genetic

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[3] Section 7650, subdivision (a) provides: "Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply."

[4] Former Evidence Code section 892 is now codified in Family Code section 7551, and states that: "In a civil action or proceeding in which paternity is a relevant

evidence derived from blood testing may be used to prove paternity, may also be dispositive of the question of maternity. (*Johnson, supra*, 5 Cal.4th at p. 90.) Finding that both women had presented acceptable proof of maternity, the court held that the wife who had intended to procreate the child was the natural mother under California law. (*Id.* at p. 93.)

Thus, "It was only by a parity of reasoning from statutes which, on their face, referred only to *paternity* that the court in *Johnson v. Calvert* reached the result it did on the question of *maternity*." (*In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 1416 (*Buzzanca*).) In *Buzzanca*, the husband of a couple who arranged for a surrogate mother to be implanted with an embryo genetically unrelated to either one of the couple disclaimed parentage of the child. The *Buzzanca* court also applied the UPA in a gender-neutral fashion, stating that the wife was "situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child. Her motherhood may therefore be established 'under this part,' by virtue of that consent." (*Id.* at p. 1421.)

While *Johnson* and *Buzzanca* did not involve same-sex couples, there is no reason why the same "parity of reasoning" cannot be applied in the instant case. In fact, application of the UPA promotes the State's compelling interest in establishing parentage and providing children with equal rights and access to benefits. (§ 7570, subd. (a).)[5]

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fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to genetic tests."

[5] Section 7570, subdivision (a) provides: "There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights. Knowledge of family medical

We are not convinced otherwise by D.W.'s citation to *Nancy S., supra,* 228 Cal.App.3d at page 835, *Curiale, supra,* 222 Cal.App.3d at page 1600, and *West, supra,* 59 Cal.App.4th at page 306 for the proposition that a biologically unrelated woman cannot be an "interested person" under section 7650. We note that the Third District in both *Curiale, supra,* 222 Cal.App.3d at page 1600 and *West, supra,* 59 Cal.App.4th at page 306, determined that as an unrelated person, the nonparent in a same sex relationship did not have standing under the UPA to obtain custody or visitation of the child. Division One of the First District, in *Nancy S., supra,* at page 835, footnote 2, however, determined that the court had jurisdiction, because under the UPA, it has power to render a decision over the subject in dispute, citing *In re Marriage of Halpern* (1982) 133 Cal.App.3d 297, 309. It found that the nonparent had "always maintained the position that she was a parent of the child and therefore was entitled to custody and visitation," and therefore the court had jurisdiction under the UPA. (*Nancy S., supra,* at p. 835, fn. 2.) Our thoughts regarding standing are more in line with the First District in *Nancy S.*

We do not agree, however, with the conclusion reached by the *Nancy S.* court that the nonparent was not entitled to seek custody. The court reached its conclusion on grounds other than the gender-neutral analysis which we employ. First, the court rejected the nonparent's arguments that she was a de facto parent entitled to seek custody. The court noted that "custody can be awarded to a de facto parent *only* if it is established by clear and convincing evidence that parental custody is detrimental to the children. [Citations.]" (*Nancy S., supra,* 228 Cal.App.3d at p. 837.) Similarly, the court rejected the concepts of "in loco parentis," and equitable estoppel as methods of conferring rights of parenthood on nonparents. (*Id.* at pp. 838-842.)

The viability of the holdings of *Nancy S., Curiale,* and *West* is in doubt since they predate *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, in which our Supreme

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history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development."

Court held that a same sex, nonparent may adopt a child conceived through artificial insemination, because, among other reasons, "California's adoption statutes have always permitted adoption without regard to the marital status of prospective adoptive parents." (*Id.* at p. 433.) We find the gender-neutral analysis of *Johnson, supra,* 5 Cal.4th at page 89 to be much more persuasive in reaching our conclusion that A.G. has standing to bring the action, and that section 7611, subdivision (d) may apply.

D. Section 7611, subdivision (d)

Viewing the UPA in a gender-neutral manner compels us to conclude that the presumption of section 7611, subdivision (d), may well apply here, as A.G urges. That section states that a man is presumed to be the natural father of a child if he "receives the child into his home and openly holds out the child as his natural child" (§ 7611, subd. (d)) and may be rebutted by a judgment establishing paternity of the child by another man, or in an appropriate action by clear and convincing evidence. (§ 7612.)

The presumption of section 7611, subdivision (d) applies to a presumed father who is not the biological father. (*In re Nicholas H.* (2002) 28 Cal.4th 56, 58-59; *In re Jesusa V.* (2004) 32 Cal.4th 588, 604-607 [biological paternity is not necessarily determinative of competing presumptions].) We recently applied the presumption of section 7611, subdivision (d) in a gender-neutral fashion in order to find the existence of a mother and child relationship between a nonbiological woman and the child whom she had raised since birth, and held out as her own. (*In re Karen C.* (2002) 101 Cal.App.4th 932, 938-939.) The Fifth District reached the same result in *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1357-1358, concluding that a woman who had raised her half-brother as her own son from the age of three, when their mother died in a car accident, was the presumptive mother, under section 7611, subdivision (d).

As previously discussed, the application of section 7611, subdivision (d) to same-sex couples is pending before our Supreme Court. We conclude that a fair interpretation of the statutory scheme mandates application of that section in this case.

A preliminary review of the facts indicates that there is evidence to show that A.G. held out C.M. as her son and received him into her home. A.G. planned the insemination of D.W.; paid for the medical procedure; was present at the birth; decorated the nursery; informed family members that she was going to adopt C.M.; took C.M. to medical appointments; put him on her health plan as her son; and paid child support after she separated from D.W.

Accordingly, we reverse the judgment of dismissal and remand to the trial court with instructions to permit A.G. to amend her petition to seek a determination of presumed parent status pursuant to section 7611, subdivision (d) in order to obtain visitation.

E. The intended parent doctrine

A.G.'s contention that the intended parent doctrine further supports a finding of parentage is persuasive, and supports our conclusion that section 7611, subdivision (d) applies. Under the intended parent doctrine, parents who intend to procreate a child through artificial means are held to be the legal parents to the child. (*People v. Sorensen* (1968) 68 Cal.2d 280 [husband obligated to pay child support for a child conceived through artificial insemination because he intended to cause the birth of the child]; *Johnson, supra,* 5 Cal.4th at p. 93 [woman whose egg was used in conjunction with husband's sperm to form zygote, which was then implanted in surrogate mother, intended to procreate the child and was the natural mother]; *Buzzanca, supra,* 61 Cal.App.4th at p. 1412 [child would not have been born had not husband and wife agreed to have fertilized egg implanted in a surrogate].)

D.W.'s citation to *Robert B. v. Susan B.* (2003) 109 Cal.App.4th 1109, does not assist her argument that existing law provides no ground by which A.G. may seek visitation. In that case, a fertility clinic improperly implanted a single woman with an embryo created by a husband's sperm and an anonymous ova donor. The Sixth District found that the wife had no standing in a subsequent parentage action, declining to extend "*Buzzanca* to a situation in which (1) a woman has no genetic or gestational

relationship to the child, (2) she has no status comparable to that of a presumed father under section 7611, subdivision (d), and (3) another woman does assert a legally recognized claim. (Cf. *In re Nicholas H.* (2002) 28 Cal.4th 56.)" (*Id.* at pp. 1116-1117.) While in that case, the single mother raised the child on her own and was not informed of the clinic's error until the child was 10 months old, A.G. intended to procreate the child, and may have status comparable to that of a presumed father under section 7611, subdivision (d).

We do not, however, agree with A.G.'s argument that section 7613, subdivision (a),[6] which treats a husband as if he were the natural father of a child who was born through artificial insemination of the wife, applies here. By a plain reading of its language, that statute applies to a married couple. There is no evidence that A.G. and D.W. ever entered into a domestic partnership agreement, which under section 297.5 gives registered domestic partners the same rights, protections, and benefits as well as obligations, granted to spouses.

F. Whether discriminating against children born through artificial insemination based on their parents' marital status, gender, or sexual orientation violates the children's constitutional right to equal protection

A.G. next raises the issue that C.M.'s constitutional right to equal protection would be violated if we refuse to apply the parentage rules equally to C.M. First, this issue was not raised before the trial court and cannot be raised for the first time on appeal. (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.*, *supra*, 49 Cal.3d at p. 427, fn. 20.) Second, A.G. does not have standing to raise

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6 Section 7613, subdivision (a) provides, in pertinent part: "If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of the child thereby conceived. The husband's consent must be in writing and signed by him and his wife."

constitutional issues on behalf of C.M., since she has not yet been adjudicated a parent or guardian.

DISPOSITION

We reverse the judgment of dismissal and remand to the trial court with instructions to permit A.G. to amend her petition to seek a determination of presumed parent status pursuant to section 7611, subdivision (d) in order to obtain visitation. Appellant shall receive costs on appeal.

NOT FOR PUBLICATION.

_____, J.*

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We concur:

_____, Acting P.J.

DOI TODD

_____, J.

ASHMANN-GERST

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.