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Verdict

April 16, 2013

[Joanna L. Grossman](#)

Parenthood by Contract: The Kansas Supreme Court Enforces a Lesbian Co-Parenting Agreement



How does a person acquire the status of legal parent, with the substantial rights and obligations that come with the title? The answer to that question has become complicated, as children now enter the world in a variety of arrangements that may involve more than two adults, reproductive technology, and/or parents of the same sex. A recurring issue in the law is whether a lesbian co-parent—one who functions as a second parent for her partner’s biological child—can acquire parental or quasi-parental rights that allow her to insist on a parent-child relationship after the adult relationship ends.

In a recent ruling, *Frazier v. Goudschaal* (<http://law.justia.com/cases/kansas/supreme-court/2013/103487.html>), the Kansas Supreme Court held that a lesbian co-parent was entitled to full legal parent status on the basis of a co-parenting agreement that she and her partner had signed in conjunction with the birth of each of two daughters. In this column, I’ll explain the basis for the court’s ruling, as well as the national landscape for lesbian co-parents’ rights.

***Frazier v. Goudschaal*: One Mother or Two?**

Kelly Goudschaal and Marci Frazier jointly decided to have children. Although they had planned to each bear a child conceived with sperm from the same donor, Frazier was unable to get pregnant. Over the course of two years, Goudschaal gave birth to two daughters.

With the birth of each child, the two women entered into a co-parenting agreement, which established that: (1) Frazier would be a “de facto parent;” (2) her “relationship with the children should be protected and promoted;” (3) the parties intended to “jointly and equally share parental responsibility;” (4) the expenses of childrearing should be borne proportionately relative to income. Moreover, importantly to this case, the agreement stated that (5) in the event of a separation, “the person who has actual physical custody would take all steps necessary to maximize the other’s visitation” with the children.

After the two women broke off their relationship, Goudschaal accepted a job in Texas and planned to move there with both girls within a week. Frazier sued in state court to enforce the co-parenting agreement. Goudschaal

resisted, arguing that her constitutionally-protected parental rights, embodied in Kansas law through a “parental preference doctrine,” were such that Frazier could not be recognized as anything other than a legal stranger to the children. Goudschaal argued that the Kansas Parentage Act cannot be enforced to the extent that it allows anyone other than the biological mother to be treated as a natural mother.

The Kansas Supreme Court was then asked to decide whether Goudschaal’s parental rights were strong enough to allow her to exclude Frazier from the children’s lives after the end of the adult relationship, despite the two women’s having agreed by contract to do the opposite when they were a couple.

Parents and Non-Parents: A Distinction of Constitutional Importance

The Fourteenth Amendment to the U.S. Constitution has been interpreted over the course of nearly a century to protect parental rights. A legal parent who has not been proven unfit is entitled to the “care, custody, and control” of her or his child, without undue interference from the state, and without most all forms of interference from third parties. In exchange for these broad rights, the legal parent has potentially onerous obligations, including, of course, the duty to support the child financially.

A non-parent has none of these obligations, but also none of these rights. In *Troxel v. Granville* (<http://supreme.justia.com/cases/federal/us/530/57>) (2000), a plurality of the U.S. Supreme Court wrote that a fit parent must be presumed to act in the best interests of her child, even when she decides to deny visitation with grandparents or other third parties who may have a longstanding and loving relationship with the child. Indeed, a state that wants to allow third-party visitation over the objection of a fit parent must, constitutionally, at the very least, give “special weight” to the parent’s decision to deny visitation and require compelling circumstances to justify overriding it.

One hard question in lesbian co-parent disputes is whether to characterize them as parent (biological mother) versus non-parent (mother’s partner and child’s functional co-parent), or as parent versus parent. Does the intent to parent plus the actual parenting from birth give the co-parent some type of legal status that is either equivalent to the biological mother’s status, or at least superior to the legal status of other third parties?

Rights for Lesbian Co-Parents?

Depending on the state, a lesbian co-parent may or may not have ways to acquire legal parent status, including second-parent adoption, a marital presumption of maternity, de facto parentage, or parentage by contract.

In some states, the lesbian co-parent is a legal stranger to the child of her partner, regardless of any steps that may have been taken to establish a parent—child relationship. There are simply no recognized pathways for a child to have two legal mothers. But in many other states, a lesbian co-parent can gain full legal parent status through a second-parent adoption, provided the biological mother consents to the child’s adoption by the co-parent.

In the growing number of states that allow the celebration of same-sex marriages or civil unions, a lesbian co-parent can sometimes gain legal parent status by virtue of being married to a child’s biological mother. She is, at least presumptively, the legal parent of children born to her spouse or civil union partner—in the same way that a husband is often considered to be the legal father of children born to his wife during their marriage, regardless of whether he possesses or lacks a genetic tie to them.

Whether or not a state allows second-parent adoption by a same-sex co-parent, it may recognize the doctrine of de facto parentage, through which a co-parent gains quasi-parental rights because she has functioned as a parent in a relationship that was actively facilitated by the biological mother. This doctrine has been expressly adopted in a handful of states and expressly rejected in a handful of others (including New York, as I have written about in a [previous column](http://writ.news.findlaw.com/grossman/20100511.html) (<http://writ.news.findlaw.com/grossman/20100511.html>)). Where recognized, this doctrine requires a court to make a fact-intensive decision about the nature of the co-parent’s relationship with the child and whether that relationship can be preserved over the objection of the biological mother.

This doctrine also differs from state to state, not only as to which factors are necessarily to establish de facto parentage, but also as to the rights that arise from it. Most states allow the de facto parent to petition for

visitation, but not for sole or shared custody. A few states, however, treat the de facto parent as having legal rights on par with those of the biological mother.

Finally, a small number of states—now, including Kansas—have given rights to lesbian co-parents by enforcing co-parenting agreements.

Parental Rights by Agreement: A New Trend?

Before the ruling in *Frazier*, the highest courts in North Carolina and Ohio had issued opinions in which they denied more traditional bases for a lesbian co-parent's parental status, but allowed for the possibility of joint custody by virtue of an agreement with the biological mother.

In 2009, in *Boseman v. Jarrell* (<http://law.justia.com/cases/north-carolina/court-of-appeals/2009/080957-1.html>), the North Carolina Supreme Court overturned a second-parent adoption, ruling that state law did not permit such adoptions (despite the fact that trial courts had been routinely granting them). The *Boseman* court held that the co-parent was not a legal parent, and yet was entitled to seek joint custody because the biological mother had acted inconsistently with her legally endowed "paramount status" vis-à-vis the child. This was not, in other words, a typical parent-versus-non-parent dispute (in which the parent typically wins). There was only one legal parent, but the court held nonetheless that there were two women who were entitled to share custody of the child in question.

In a case with similar facts, *In re Mullen* (<http://law.justia.com/cases/ohio/supreme-court-of-ohio/2011/2011-ohio-3361.html>), the Ohio Supreme Court ruled against the lesbian co-parent. But in doing so, it made clear that it would have been willing to enforce a co-parenting agreement. The problem, in this case, was that the co-parent had insufficient proof that the biological mother had voluntarily agreed to share custody with a non-parent.

There were limits to the court's willingness to recognize parental rights granted by contract. The court made clear that a legal parent cannot confer legal parent status on a third party such as a lesbian co-parent, but he or she can confer custodial rights by virtue of an enforceable shared-custody agreement. The court held that a "parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-parenting agreement," the essence of which "is the purposeful relinquishment of some portion of the parent's right to exclusive custody of the child." Such an agreement, the court explained, "recognizes the general principle that a parent can grant custody rights to a nonparent and will be bound by the agreement."

Under the Ohio court's ruling, a valid shared-parenting agreement is enforceable as long as (1) the co-parent is a "proper person to assume the care, training, and education of the child," and (2) the agreement serves the child's best interests. This second requirement makes clear the differences between custodial rights and parental rights: Fit parents are presumed to act in their children's best interests, but their status does not depend on their actually doing so, decision by decision. Parents do not gain or lose their status based upon whether their presence in a child's life serves the child's best interests.

Despite the Ohio court's willingness to recognize custodial rights for a same-sex co-parent, the partner in this case did not prevail. She did not, in the court's view, present sufficient evidence of a shared parenting agreement. Although Mullen had granted Hobbs some rights and responsibilities relating to parenting through various legal documents, those rights, the court found, were both revocable and revoked. And there was evidence to suggest that Mullen had "consistently refused to enter into or sign any formal shared-custody agreement when presented with the opportunity to do so." For future cases, the court cautioned that "the best way to safeguard both a parent's and a nonparent's rights with respect to children is to agree in writing as to how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent. . . ."

Thus, the co-parent had no rights as a parent, and insufficient evidence to overcome the presumption that the biological mother was acting in her child's best interests by unilaterally severing ties between her former partner and her child. *Mullen* was a sad case, which perhaps reached the wrong outcome on the facts. The biological mother clearly intended, at least initially, to allow her partner to share in childrearing. As one judge wrote in

dissent, “Is filial love something to be dangled and then snatched away, promised and then reneged upon? Once a natural parent promises a co-parenting relationship with another person and acts on that promise, she has created a relationship between the coparent and the child that has its own life. The natural parent cannot simply declare that relationship over.” The judge found the doctrine, which allows such unilateral exclusion of a social parent,” to be “not only harmful to the co-parent and the child,” but an offense against “common decency.”

The Kansas Case: A Broad Ruling in Favor of Co-Parenting Agreements

In its ruling in *Frazier v. Goudschaal*, discussed at the beginning of this column, the Kansas Supreme Court upheld the trial court’s award of rights to Frazier, the co-parent. The court first settled a dispute about standing—that is, the right to go to court—and then concluded that, under the Kansas Parentage Act, a woman “can make a colorable claim to being a presumptive mother of a child without claiming to be the biological or adoptive mother” and therefore can claim standing to establish the existence of a mother-and-child relationship.

The Kansas Supreme Court then moved to the heart of the matter—whether Goudschaal could sever ties between Frazier and the two children unilaterally, or whether she was bound to share custody and parenting time based on the co-parenting agreement. The court ruled that the agreement could be enforced. Although Goudschaal’s rights were initially paramount—which was the legal privilege of being the biological mother—she had exercised her “parental preference” (the doctrinal name Kansas gives to these protected rights) by entering into a co-parenting agreement with her partner. Parental preference can be waived, the court reasoned, and “courts should not be required to assign to a mother any more rights than that mother has claimed for herself.”

The right to exclude protected by *Troxel* and other rulings also covers the right to include. “If,” the court explained, “a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference, then that parent should have the right to enter into a co-parenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children.”

As a policy matter, it was important to Kansas’ high court that denying enforcement to the co-parenting agreement would consign the children to having only one parent, which many other statutes and precedents counsel against. Enforcement, the court explained, means that children of a lesbian couple can be treated on par with children of a traditional heterosexual marriage, as well as on par with children of opposite-sex, unwed parents who gained the right to the recognition of two parents through a series of federal constitutional cases about illegitimacy and unwed fatherhood in the 1970s.

Having concluded that the co-parenting agreement was enforceable, the Kansas Supreme Court upheld the district court’s power to issue orders relating to custody, parenting time (visitation), and child support.

This ruling is even broader than the ones in Ohio or North Carolina. The court not only allows for an award of shared custody to Frazier, but also speaks of her as a second parent, and orders her to pay child support (which she was not contesting). It does suggest that the agreement must serve the children’s best interests, which is more consistent with a grant of quasi-parent rather than parent status. But, still, one might conclude that the rights and obligations Frazier earns through this ruling are tantamount to legal parentage.

Conclusion

The Kansas Supreme Court expressly concludes by embracing a proposition that courts in many other contexts have only danced around—the proposition that a parent’s constitutionally protected right to be in charge can be diluted or shared by consent. All mechanisms through which a co-parent might gain legal protection revolve around the consent of the primary parent. Second-parent adoption cannot proceed without the primary parent’s joining the petition. Marriage or civil union does not occur without both parties’ consent (although whether consent to marry should be synonymous with consent to share parental rights is a question worthy of separate consideration). De facto parentage, as the doctrine is spelled out in most cases, cannot occur without the primary parent’s active creation and fostering of the relationship between co-parent and child. It is only natural, then, for courts to give effect to co-parenting agreements, particularly those that are memorialized in writing, in which the

primary parent makes clear her intent and willingness to share parental responsibilities and rights with another adult.

One interesting question opened by this ruling is this: What will happen to William Marotta? The subject of many news articles in the past few months, Marotta is a Kansas man who answered an ad placed by two lesbian women on Craigslist who were seeking sperm. Marotta provided the sperm, with which one of the women was inseminated, and the three adults signed a written agreement making clear that Marotta had relinquished any and all parental rights to children that might be produced by the use of his sperm. The agreement also specified that the two women would share parental rights and duties.

A child was produced, the two women broke up, and the biological mother eventually sought welfare assistance from the state. As part of standard procedure, the State of Kansas insisted that she reveal the identity of the biological father of her child, and has gone after him for child support. Although sperm donors are generally protected by non-paternity laws, the applicable Kansas law only protects donors when the insemination is done by a physician. In this case, the insemination was, instead, done by the two women at home.

The co-parent in this case has filed a claim for recognition of her parental or quasi-parental status, for which the ruling in *Frazier v. Goudschaal* provides powerful new support. But does the ruling also mean that a co-parenting agreement can be enforced when it relinquishes parental rights (the Marotta case) or only when it grants them? Some Kansas court is going to face the tough decision whether to enforce Marotta's agreement as a matter of consistency with *Frazier*, or whether to insist that Marotta is the legal father because of the circumstances of the insemination. If the latter path is taken, then the child at issue potentially will have three legal parents, an outcome that has been rejected by virtually every court in the United States to consider it.



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