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Verdict

October 15, 2013

[Joanna L. Grossman](#)

California Allows Children to Have More Than Two Legal Parents



California Governor Jerry Brown recently signed into law a measure that allows a child, in an appropriate case, to have more than two legal parents. This is a truly novel development, as states have otherwise uniformly taken the view that three parents is a crowd that cannot be tolerated. Ever.

The California bill was passed in reaction to a 2011 case, *In re M.C.* (<http://law.justia.com/cases/california/court-of-appeal/2011/b222241>), in which two women and a man each seemed to meet the criteria to be a legal parent of the same child. But the state appellate court held that, given many prior pronouncements from the state’s highest court on the subject, it could not award that status to all three. However, it invited the legislature to reconsider the so-called “rule of two,” an invitation that was accepted.

In this column, I’ll discuss the ruling that brought this question into focus—a disturbing case of a child who had not a single stable parent, despite having three adults potentially holding parental rights with regard to the child—and the potential implications of the legislature’s change to the parentage code.

***In re M.C.*: A Mess From Beginning to End**

M.C. was born into a complicated situation. Her mother, Melissa, was involved, prior to her pregnancy, with another woman, Irene. The two women had lived together, although not happily, in a relationship marked by mutual physical abuse, mental illness, and drug use. Nonetheless, they became registered domestic partners in 2008 (which, at the time was the only status available for same-sex couples in California). They separated within a few months, and Melissa shortly thereafter became involved with a man, Jesus, with whom she conceived a child.

From the outset, Jesus knew he was the child’s biological father, and he was supportive of Melissa during the pregnancy. For a few months of the pregnancy, Melissa lived with him and his family and accepted his support.

While still pregnant, she filed the paperwork to dissolve her domestic partnership with Irene—as a domestic partnership status could then be unilaterally dissolved. Melissa also sought and obtained a temporary restraining order (TRO) based on Irene’s alleged physical abuse of her.

But within two months, and still during Melissa’s pregnancy, Melissa and Irene reconciled. Melissa left Jesus and said that she was going back to Irene, who had promised to care for her and the baby. The two women at least briefly lived together in a car and without a cellphone. Melissa did not provide Jesus with any contact information. Melissa and Irene then were married in California in October 2008, during the six-month window between court rulings when same-sex marriage was legal in California. (It became legal again in 2013 after the U.S. Supreme Court’s ruling in *Hollingsworth v. Perry*, briefly discussed [here](http://verdict.justia.com/2013/06/26/doma-is-dead) (<http://verdict.justia.com/2013/06/26/doma-is-dead>.)

When M.C. was born in March 2009, only Melissa was listed on the birth certificate. Melissa, Irene, and M.C. lived together after the birth for three to four weeks, until Melissa and M.C. moved out. Jesus did not know their whereabouts and had no contact with Melissa or the child. A series of conflicts followed, including Irene’s filing for custody and visitation, Melissa’s obtaining a restraining order against her, and Melissa’s re-establishing contact with Jesus and sending some modest support payments.

But what was merely a complicated situation became a devastatingly complicated one in September 2009. Melissa’s new boyfriend attacked Irene with a knife, causing severe stabbing injuries. He fled, but Melissa was apprehended and charged as an accessory to attempted murder. Melissa admitted later that she and her new boyfriend had followed Irene, and that her boyfriend had befriended Irene with the intent to use violence to “scare her” into dropping her pursuit of custody of, or visitation with, M.C. With Melissa in jail, M.C. was removed from Melissa’s custody and placed in foster care.

Presumed Parents Under California Law

The question of parentage—that is, the question whether a person is the legal parent of a child—can arise in any number of circumstances. For M.C., it became most pressing when she was placed in foster care, because only legal parents have the right to be notified of, and to participate in, child welfare proceedings and to petition for custody or visitation. In M.C.’s case, who had these rights?

As the genetic mother who gave birth to M.C., Melissa was clearly entitled to legal-parent status. But she was incarcerated and, in addition, was dealing with a range of issues including bipolar disorder and a lengthy history of substance abuse.

What about Jesus or Irene? This is where the law gets as complicated as the facts. Beyond the biological mother, whose parentage is obvious in the absence of an enforceable surrogacy arrangement, California law sorts out competing parentage claims by relying on a series of presumptions.

Under the Uniform Parentage Act, which California has adopted by statute, biological mothers and “presumed parents” have parental rights. (These rights are fiercely protected by the U.S. Constitution and include the right of “care, custody, and control” and a virtually unfettered right to exclude non-parents from the child’s life.)

Among the ways a man can gain presumed parent status is by marriage to the mother on a date that is near in time to the child’s birth, or by receiving the child into his home and openly holding out the child as his own; if his paternity has been adjudicated or acknowledged. The adjudication or acknowledgment of paternity are additional ways to gain presumed parent status. Even without meeting one of the specified statutory criteria, an unwed, biological father may also have the constitutional right to be treated as a legal father if he has grasped the opportunity to assert parental rights but has been thwarted by the unilateral conduct of the mother or that of a third party.

Can a woman other than the biological mother of a child be a presumed parent? The statute provides that the parentage laws should be applied in a gender-neutral fashion to the extent practicable. This provision has been interpreted to mean that, for example, the female spouse of a biological mother is entitled to a presumption of

parentage, despite the clear lack of a biological connection. And, in several cases, California courts have recognized that lesbian co-parents, who were not able to marry until recently, could nonetheless acquire presumed parent status by openly holding out a child as their own and receiving the child into their homes.

To Whom Does M.C. Belong?

For Jesus, his claim to legal fatherhood was based on the constitutional claim. Although he always admitted that he was the father of M.C., and provided at least modest financial support for her, he never physically received the child into his home (primarily because he lived in Oklahoma and the child lived in California). He was thus unable to meet the statutory criteria for presumed father status. However, he sought to establish a relationship with the child, but was thwarted at several turns by Melissa, who moved without providing contact information and did not maintain a phone line.

For Irene, her claim of presumed parenthood was rooted in the statutory presumptions. As the spouse of Melissa at the time of M.C.'s birth, Irene was entitled to a presumption of parentage.

The juvenile court, which had jurisdiction because M.C. had been removed and placed in foster care, saw no reason to pick two from among M.C.'s three possible parents. Thus, it held that (1) Melissa was a legal mother because of biology; that (2) Irene was a presumed mother because she was married to Melissa at the time of M.C.'s birth; and that (3) Jesus was a presumed father because he was the biological father and he had attempted to establish a relationship with the child. In that court's view, all three persons were thus entitled to the rights and obligations of parenthood.

Can a Child Have More Than Two Legal Parents?

A fundamental problem with the juvenile court's ruling was the existence of longstanding precedent in California (and everywhere else) that a child can have no more than two legal parents. The state's highest court reached that conclusion in cases involving surrogacy, lesbian co-parentage, and competing paternity claims over a child conceived in adultery. (Some of these cases are discussed [here](http://writ.lp.findlaw.com/grossman/20040309.html) (<http://writ.lp.findlaw.com/grossman/20040309.html>) and [here](http://writ.news.findlaw.com/grossman/20050906.html) (<http://writ.news.findlaw.com/grossman/20050906.html>).

Yet, the statutory scheme for determining parentage makes it possible for more than two people to have so-called "presumed parent" status. If a woman is married to one person and impregnated by another who then establishes a relationship with the child, there may be two other people—as there were in this case—who are entitled to presumed parent status. When this happens, the statute provides that the "presumption which on the facts is founded on the weightier considerations of policy and logic controls."

In this case, M.C. argued for recognition of all three parents (despite the fact that none of them seem obviously equipped to raise a child). And while the appellate court was sympathetic to the need for parentage law to adapt to "novel parenting relationships," it concluded that the legislature would have to make the first move. The court wrote:

We agree these issues are critical, and California's existing statutory framework is ill equipped to resolve them. But even if the extremely unusual factual circumstances of this unfortunate case made it an appropriate action in which to take on such complex practical, political and social matters, we would not be free to do so. Such important policy determinations, which will profoundly impact families, children and society, are best left to the Legislature.

Stuck with the two-parent cap, the court in *M.C.* remanded the case for a determination as to whether Jesus or Irene had the stronger claim to parentage. For Jesus, a favorable ruling would mean that the child could be placed with him immediately. For Irene, who was deemed not immediately capable of custodial parenting, a favorable decision would entitle her to reunification services with a goal of eventually placing M.C. with her. For Melissa, her legal parent status was secure and, whether Jesus or Irene gained the legal right to be her parental counterpart, she still retained rights to supervised visitation.

The Legislature's Response

In a bill that was signed into law recently, the California legislature lifted the judicially-imposed two-parent cap. The legislative findings state specifically that the purpose of the bill is to abrogate the ruling in *In re M.C.* to the extent that it held that no more than two people could be deemed legal parents of the same child. And while most children will have no more than two legal parents, the bill opens up the possibility of more than two when a court deems that limiting the number of adults with legal ties to the child would be detrimental to the child.

In its technical respects, the bill amends provisions regarding custody and child support to explain how existing rules would apply in cases of more than two parents. With respect to child support, for example, a child would be presumptively entitled to the same dollar amount of support, with allocation among all legal parents, but the sheer number of parents may justify deviating from the guideline amount. For custody, the bill makes clear that the presumption of joint custody does not apply to cases of three or more parents.

The bill then gets to its main purpose and amends the parentage provisions to state explicitly that a court may find a child to have more than two legal parents. But the court does not have to reach that conclusion just because more than two are entitled to a presumption of parentage. In most cases, courts will still weigh the relative strength of presumptions, and choose one parent over others. But when this process is harmful to the child, the court can elect to treat them equally and grant legal parent status more broadly.

In the legislature's words, "Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm."

Can Bad Facts Make Good Law?

There's an old adage that says "Bad facts make bad law," a reference to the sometimes tortured precedents that result when courts apply law to very unusual situations. But could this be a case in which bad facts have actually led to good law? It's hard to imagine that the situation that is described above animated a legislature that is concerned about children who "have more than two people who are that child's parent in every way" and who would be devastated by separation from any one of them. From a distance, it's impossible to know what attachments M.C. does or does not have. Surely, the attachments cannot be that strong to the three adults who claim her, given that she's spent most of her life in foster care with only limited visitation with her three putative parents. But there may well be other children whose lives fit the legislature's image—who are conceived and raised in situations in which a two-parent cap is the source of harm and deprivation. While the very existence of such families may seem novel, or even scary to the traditionalists, they are a reality of modern life. And children should not suffer due to the law's desire to cling to the past.

One caution for courts as they navigate these uncharted waters: Do not recognize additional parents lightly. There are costs to the rights of existing parents that are incurred by recognizing additional ones. Indeed the very notion that parentage brings the right to exclude is challenged by the notion of three (and even more) parents. There are also potentially costs to children, whose attachments to adults may be stretched too thin by the legal recognition of additional ones. But with careful application of the new standard, which is correctly focused on the child's well being, courts should be able to prevent harm to some children without creating harm for others.



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