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# Mommy and Momma: Determining Parentage in the New Family

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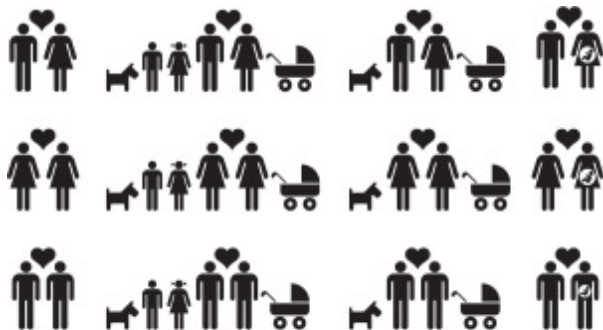
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# Verdict

August 20, 2014

Joanna L. Grossman

## Mommy and Momma: Determining Parentage in the New Family



A woman has recently filed a lawsuit claiming that she gave birth to Beyonce and Jay-Z's daughter, Blue Ivy Carter, and should be recognized as the child's legal mother. There were rumors that Beyonce's baby bump was fake, and that she had relied on a surrogate to carry a child, but it seems unlikely that this suit will go anywhere (or be proven to be based on true facts).

The suit is unusual, however, because challenges to legal maternity are relatively rare; our parentage rules are premised on the fact that we generally know who gave birth to a child, and, outside of an enforceable surrogacy arrangement, the woman who gave birth to a child is that child's mother. Challenges to legal paternity are much more common. But all questions about parentage—who are a child's legal parents—have become increasingly complicated with the rise of non-marital childbearing, parenting by same-sex couples, and reproductive technology.

Among the recurring parentage questions that arise in the new American family is whether a woman who jointly plans for and co-parents a child born to her lesbian partner should be recognized as a legal parent with the same rights and responsibilities as the biological mother. In a recent ruling, *In re Madelyn B.* (<http://law.justia.com/cases/new-hampshire/supreme-court/2014/2013-040-0.html>), the Supreme Court of New Hampshire said yes, under a state statute that grants parental status to a person who has held out a child as her own.

This ruling joins many others that have recognized the rights of a lesbian co-parent in recent years, although there is substantial variation among states in the legal theories that countenance this result. But regardless of the specific theory, parentage is most likely to be recognized when the biological mother clearly consents to the sharing of parental rights, and the co-parent both lives with the child and acts as a genuine co-parent. These criteria have become the focal point as the emphasis has shifted away from identifying a child's biological relationship and towards recognizing the social, economic, and emotional ties that arise from living in a family unit together.

### The Facts, and the Claim at Issue in *Madelyn B.*

Susan and Melissa met and became romantically involved in 1997. Although New Hampshire now permits same-

sex couples to marry, it did not then, and the two women participated in a commitment ceremony in 1998. Melissa took Susan's surname, and they "considered [them]selves to be as fully committed to one another as any married couple." (This case reached the supreme court on a motion to dismiss, which requires the court to view the facts in the light most favorable to the complainant—here, Susan.)

The two women decided to begin a family together, and, toward that end, they jointly bought a house and began the process of identifying a sperm donor for use in artificially inseminating Melissa. They selected a donor who shared Susan's Irish heritage so that she, too, would share some identifiable traits with the baby. In 2002, Melissa gave birth to Madelyn, who was given Susan's middle and last names.

The baby was presented to the world as belonging to both of them—in a birth announcement sent to family and friends and printed in the local newspaper; in a religious "dedication" ceremony; in preschool paperwork; and in medical records.

Susan and Melissa co-parented in every sense of the word for the first six years of Madelyn's life. During that time, they were advised by a lawyer that Susan could not legally adopt Madelyn, but that her relationship to the child could be protected through a guardianship.

After the end of the adult relationship, Susan and Melissa continued to co-parent Madelyn. Susan saw Madelyn every weekend and had overnight visits every other week. She paid weekly child support and helped with additional expenses; she also provided her in-kind support like food and clothing. Meanwhile, Melissa had moved in with a man, Eugene, whom she later married.

Five years after the break-up, when Madelyn was 11, Melissa stopped cashing the child support checks and blocked visitation as well as any Internet contact between Susan and Madelyn. Melissa then moved to terminate Susan's guardianship, claiming that it was no longer necessary because Madelyn no longer wanted to have a relationship with Susan. The trial court terminated the guardianship on the theory that Melissa's husband was now the logical choice to step in to care for Madelyn if Melissa could not for any reason. Melissa also began proceedings to allow her husband to adopt Madelyn.

Susan responded by intervening in the adoption proceeding and filing her own petition to establish parentage. The trial court ruled against Susan in both matters. All these competing proceedings turn on the same issue: whether Susan is a legal parent to Madelyn. If she is, she has rights that cannot be unilaterally terminated by Melissa, and she is not "adoptable" since she already has two legal parents. (Departing from the rule in most states, California **changed its law** (<http://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents>) in 2013 to allow for recognition of more than two legal parents in appropriate cases.)

### **Is Susan a Parent? And, if so, Why?**

Susan's parentage petition was premised on a New Hampshire statute, **RSA § 168-B:3** (<http://law.justia.com/codes/new-hampshire/2013/title-xii/chapter-168-b/section-168-b-3/>), which presumes a man to be a father if he is married or has attempted to marry the child's mother or if he "receives the child into his home and openly holds out the child as his child." This statute, which is based on the Uniform Parentage Act and is similar to statutes in many other states, is designed to identify a child's legal father. These statutes were drafted and enacted in most states after the U.S. Supreme Court ruled in a series of cases in the 1970s and 1980s that unwed fathers had constitutionally protected parental rights, which could not be categorically disregarded by state parentage and custody laws.

Susan argued that she should be treated as a legal parent of Madelyn because she received Madelyn into the couple's joint home and openly held out the child as her own.

Now the most obvious potential problem in applying this statute to Susan is that she is neither a man, nor a father. And, indeed, Melissa claimed that the statute could not be used to identify a child's second mother (or first, for that matter).

The Supreme Court of New Hampshire decided, however, that the parentage statute could be applied in a gender-

neutral manner, which means it can be used to assign maternity as well as paternity. Most courts have reached the same conclusion on this question, although some were interpreting parentage statutes that included a provision directing the gender-neutral application of statutes where appropriate. New Hampshire's parentage code does not include such a provision. However, the underlying statutory purpose is to identify a child's true parents—those adults who have committed themselves fully to the child's welfare and can provide both legitimacy and support.

The court concluded that since the statute allowed paternity to be established based on conduct rather than a biological connection—it is well established in New Hampshire as in other states that a non-biological father can seek rights, or be subjected to obligations, based on a holding-out provision—the legislature would want all adults who meet the criteria to be recognized as parents. It is the state's interest in the child's welfare and the integrity of the family that must be protected, especially when a non-biological parent and child lived together for years and developed a true familial relationship. Thus, Susan was not barred from seeking status as a presumed parent—nor would other women be in future cases, despite the language of “men,” “fathers,” and “paternity.”

The question, then, is whether Susan met the criteria as a presumed parent. Again, because of the procedural posture of the case, the court had to construe the facts most favorably to Susan. In that posture, the court had no trouble concluding that she had held out Madelyn as her own child and received her into her home. Susan and Melissa lived together with Madelyn for the first six years of Madelyn's life, and Susan was integrally involved in the decision to conceive a child and the preparation for parenting. Melissa was “Mommy,” and Susan was “Momma.” As discussed above, she was held out to the world as the child of both women, including in such symbolic ways as on a family tree showing her relatives on Susan's and Melissa's sides of the family. She also participated in every aspect of parenting—from the tedium of feeding, clothing, bathing, and diaper changing, to the loftier decision-making that is also essential to parenting.

Although the holding-out provision focuses on the conduct of the non-biological parent, it must be applied in a way that respects the constitutionally protected parental rights of the biological parent (here, Melissa). But when the biological mother has actively sought to create and encourage a parent-child relationship between her child and her partner, and they began the process of becoming parents with intent to share parenting and parental rights, it is fair to recognize them both as legal parents, with co-equal rights.

Given the court's conclusion that the holding-out provision can be applied to women and that Susan has made a colorable claim of parentage, the case was remanded for a hearing to adjudicate any disputed facts and, assuming she is still eligible for parental status, to make appropriate orders regarding custody and visitation.

### **Other Paths to Lesbian Co-Parentage**

Women in other states have also successfully used holding-out provisions to establish legal parentage. In California, for example, the state's highest court, in *Elisa B. v. Superior Court* (<http://law.justia.com/cases/california/supreme-court/2005/s125912.html>) (2005), applied a similar provision to recognize a lesbian co-parent who, like Susan in the New Hampshire case, had participated in every aspect of the child's conception, birth, and rearing and lived in a joint home with the child's biological mother. As these two cases illustrate, when two people together decide to have a child, bring about its birth, and carry out the plan to co-parent, courts have been willing to recognize them as equal stakeholders in the child's upbringing.

Depending on state law, there may be other ways for a lesbian co-parent to obtain recognition as a legal parent.

In some states, the lesbian co-parent can gain full or quasi-parental rights based on the doctrine of de facto parentage, which allows courts to recognize and protect the social and emotional tie between a non-biological parent and a child. This doctrine functions similarly to statutory holding-out provisions, but the standards vary more from state to state depending on the cases in which the theory has been developed and applied. Central to recognition of de facto parentage, however, is the active consent and fostering of the established legal parent and the true and full participation in caretaking by the de facto parent. (Some discussion of this doctrine can be found [here](http://writ.news.findlaw.com/grossman/20100511.html) (<http://writ.news.findlaw.com/grossman/20100511.html>) and [here](http://writ.news.findlaw.com/grossman/20100525.html) (<http://writ.news.findlaw.com/grossman/20100525.html>).

In some states, the lesbian co-parent can gain full “legal parent” status, by virtue of a so-called “second-parent adoption.” (A handful of states expressly disallow such adoptions, however, and, in many others, courts have simply never considered the question.) This is the most secure way to seek recognition, since adoption decrees are given full faith and credit across state lines, and the formal decree eliminates expensive, fact-intensive litigation about the non-biological parent’s parenting and the biological parent’s consent to the sharing of parental rights.

In an increasingly large number of states that allow same-sex couples to marry (nearing 20), a lesbian co-parent can 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. Those presumptions are either un rebuttable by statute or rebuttable only in narrow circumstances (and typically not based solely on proof that the spouse and child lack a genetic tie).

In a smaller group of states, courts have recognized lesbian co-parents based on a co-parenting agreement with the biological mother. These rulings often avoid the parentage question altogether and simply hold that a sufficient agreement between the parties can result in enforceable custody and visitation rights, even if the second parent is not fully recognized as a legal parent. The Supreme Court of Ohio, for example, in *In re Mullen* (<http://law.justia.com/cases/ohio/supreme-court-of-ohio/2011/2011-ohio-3361.html>) (2011) 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 crux of which “is the purposeful relinquishment of some portion of the parent’s right to exclusive custody of the child.” The court imposed relatively strict requirements (the agreement must be in writing, serve the child’s best interests, and the person with whom parenting is being shared must be up to the task), which protect both the child and the parental rights of the established legal parent. (This case is discussed in more detail [here](http://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights) (<http://verdict.justia.com/2011/08/23/do-lesbian-co-parents-have-rights>).

The Supreme Court of North Carolina issued a similar ruling in *Boseman v. Jarrell* (<http://law.justia.com/cases/north-carolina/supreme-court/2010/416pa08-2-12.html>) (2010), in which it overturned a second-parent adoption by a lesbian co-parent as unauthorized by statute, but nonetheless enforced her rights as a co-parent by agreement. Likewise, the Kansas Supreme Court recently reached the same conclusion in *Frazier v. Goudschaal* (<http://law.justia.com/cases/kansas/supreme-court/2013/103487.html>) (2013), holding that a biological mother could effectively waive her paramount parental status by entering into a co-parenting agreement with her partner to share parental rights. (This case is discussed in more detail [here](http://verdict.justia.com/2013/04/16/parenthood-by-contract) (<http://verdict.justia.com/2013/04/16/parenthood-by-contract>).

## Conclusion

While these various statutory and doctrinal parentage rules may seem at odds with one another, they tend to produce similar results in many cases. They all represent a quest to broaden our definition of parentage, without sacrificing the interests of children or the adults who actively participate in their conception, birth, and upbringing. The New Hampshire court is just one more voice in the chorus of change.



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