

Parental Rights and Assisted Reproduction

with Professor Douglas NeJaime (Yale Law School)

CASES DISCUSSED

- [Michael H. v. Gerald D.](#)

Found that a biological father does not have a fundamental right to obtain parental rights after the presumptive father has exercised significant responsibility over the child.

- [V.L. vs. E.L.](#)

Obtaining a judgment of parentage in one state carries over in other states. V.L. (non-biological parent) was approved for adoption of their child with E.L. in Georgia. V.L. and E.L. separated up after moving to Alabama, and the Supreme Court ruled that Alabama must still recognize V.L. as a parent due to the full faith and credit clause.

- [Jason P. v Danielle S.](#)

Jason P was the biological father, however, CA court did not grant parentage on these grounds, rather based on his involvement in the child's life.

- [C.A. vs C.P.](#)

A child was born out of an affair between the wife and a coworker. The husband, wife, and biological father (coworker) all maintained a parental relationship with the child. When the married couple tried to force the biological father out, the court denied their request, ruling that the biological father, along with the husband and wife were parents.

- [In Re C.K.G](#)

Egg donor was determined not to be by the mother. The woman who gave birth was confirmed as the mother.

1. What is a parent and how is parenthood generally established?

- Birth certificates do not establish parental rights just act as evidence
 - Birth
 - Genetics
 - Marriage (marriage to the birth parent at the time of birth)
 - Intent (assisted reproduction)
 - Function (forming a parent-child relationship and parenting the child)

2. Non-biological parental rights

- Parental rights are established in the following ways:
 - Coparent
 - Adoption
 - Acknowledgments of parentage
 - Judgments of parentage; confirmatory adoptions
 - Adoption
 - Otherwise determined by a court

3. Sperm Donor. In most states, sperm donors are not considered to be parents. In some states, sperm donors are not considered to be parents only if the birth mother is married. And in others, sperm donors are not considered parents only if the sperm is handled by a licensed physician. Anonymous sperm donors circumvent parentage issues, since the donors do not know who their child is, they cannot press for rights.

- Cases or examples.
 - [Jason P. v Danielle S.](#): Jason P was the biological father, however, CA court did not grant parentage on these grounds, rather based on his involvement in the child's life.

4. Egg donor. Many states define the rights of egg donors as the same as those of sperm donors. However, the licensed physician requirement that some states have matters less since egg donation cannot be done at home.

- Cases or examples.
 - [In Re C.K.G.](#): Woman who gave birth was declared the mother, not the egg donor.

5. Surrogacy

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Do surrogates have parental rights?

- Generally surrogates have rights over their own bodies during the pregnancy.
 - California example – surrogate carrying triplets, parent asked for selective reduction; surrogate refused. The courts ruled in favor of the surrogate.
 - In some states, biological surrogates will be treated as the mother until after the pregnancy.
 - In other states, parents can obtain a judgment of parentage prior to the birth of the child establishing parental rights.
 - Most jurisdictions – no legislation on surrogacy which does not ban their use.
 - Examples:
 - AB are a same sex couple in California who wish to have a child using a surrogate ("S") and donor eggs from "D".
 - If S delivers the child in Tennessee: California treats AB as parents. Tennessee may treat XS as the parents.

- B (non biological parent) may need to legally adopt in Tennessee or to get a court judgement in CA.

6. What's on the horizon

- Increasing recognition of intent over biology and birth.
 - Prof. NeJaime believes that an increasing number of states will pass legislation focused on the intent of the parents. Yet, he notes that until then, families in states without this type of legislation, non biological parents can find themselves at risk of contested parental rights.
- Increasing recognition of more than two legal parents.
 - Prof. NeJaime highlights a recent trend of states being more likely to allow a child to have more than two parents. In [C.A. vs C.P.](#) a child was born out of an affair between the wife and a coworker. The husband, wife, and biological father (coworker) all maintained a parental relationship with the child. When the married couple, years later, tried prevent the biological from visiting the child, the court denied their request, ruling that the biological father, along with the husband and wife all had some parental rights.

Additional Material

[*The Constitution of Parenthood*](#), 72 *Stanford Law Review* 261 (2020).

[*The Story of Brooke S.B. v. Elizabeth A.C.C.: Parental Recognition in the Age of LGBT Equality*](#), in *LAW STORIES: REPRODUCTIVE RIGHTS AND JUSTICE* (Reva Siegel, Melissa Murray, & Kate Shaw eds., Foundation Press 2019).

[*The Family's Constitution*](#), 32 *Constitutional Commentary* 413 (2017). (Invited symposium essay)

[*The Nature of Parenthood*](#), 126 *Yale Law Journal* 2260 (2017).

[*Marriage Equality and the New Parenthood*](#), 129 *Harvard Law Review* 1185 (2016).

[*Before Marriage: The Unexplored History of Nonmarital Recognition and its Impact on Marriage*](#), 102 *California Law Review* 87 (2014).

Marriage and Non-Marriage After Windsor, in *Civil Rights Litigation and Attorney Fees Annual Handbook* 417 (edited by Steve Saltzman and Cheryl I. Harris, Clark Boardman, 2013).