

CASE NOTE

Can We Buy Out of Parentage?

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*Parentage is a very important profession;
but no test of fitness for it is ever imposed in the interest of children.
George Bernard Shaw (1856–1950)*

I. Introduction

Courts face situations where individuals seek to define parenthood in non-traditional ways. Advanced technology now allows conception via a surrogate mother that has no genetic link to the child, or a sperm donation in which a child has an anonymous and non-accountable biological father. Parents who seek alternative conception methods are often anxious to have their parental rights established before the child is born. They may use preconception agreements to create or terminate parental obligations so there will be no misunderstandings between the parties involved. Preconception agreements are relatively new to the courts¹ and while the legislature has not been active in this area, there are some general rules of treatment and interpretation that the courts follow when presented with such agreements.

In *Kristine M. v. David P.*, 135 Cal.App.4th 783 (2006), the parties challenged the routine invalidation of post-birth agreements that affected the future rights of the child by comparing post-birth with preconception agreements. This case poses the question: if parties may determine who will bear rights and obligations to the child before conception, why may the parties not determine such issues post-birth?

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1. First appellate review of pre-conception agreements involving surrogacy appeared *In re: Moschetta*, 25 Cal App 4th 1222 (1991).

II. Historical Perspective

A. Post-birth Agreements

Stipulations, such as those in this case, are not new as they date back to the late nineteenth century.² The most common stipulation is that the non-custodial parent agrees to pay a lump sum in exchange for the termination of parental rights and obligations, relieving the non-custodial parent of any required future support. The courts uniformly overturn such stipulated agreements and in some of the earliest cases they relied heavily on statutes to invalidate such agreements. In *Wilson v. Wilson*, 45 Cal. 399 (1873) the court determined that, pursuant to statute, it retained the power to issue decrees as to the child's support, maintenance, and education, irrespective of prior agreements between the parents³.

As more parental agreements were reviewed, the courts no longer required a statute to explicitly provide the authority to issue support decrees that were contrary to the parents' stipulations. In *Lewis v. Lewis*, 174 Cal. 366 (1917), the court found that, "[a]s a general proposition, no one would doubt that parents are under an obligation to support their minor children. This duty rests on fundamental natural laws and has always been recognized by the courts in the absence of any statute declaring it."⁴

The legal invalidation of contracts foreclosing on parental support was eventually challenged as an unconstitutional impairment of contract.⁵ In *Fernandez v. Aburrea*, 42 Cal.App.4th 131 (1919), the mother of the minor child accepted a settlement amount in exchange for the termination of the father's future support obligation, and then subsequently sued for financial support on behalf of that child.⁶ The father defended the suit on grounds that the statute authorizing it unconstitutionally impaired his obligations under the contract with the mother. A California Court of Appeals held that the contract was void since the mother did not have the power to release the father from his parental obligations.⁷

Public policy in the area of stipulated termination of parental rights and obligations is guided by the Uniform Parentage Act (UPA).⁸ The UPA expressly establishes a "compelling state interest in establishing paternity for all children,"⁹ and provides that parents may not limit by agreement the

2. *Wilson v. Wilson*, 45 Cal. 399 (1873).

3. *Id.* at 403.

4. *Lewis v. Lewis*, 174 Cal. 366, 340 (1917).

5. *Fernandez v. Aburrea*, 42 Cal.App. 4th 131 (1919).

6. *Id.* at 132.

7. *Id.*

8. Fam Code §§7600 et. seq. "The UPA provides a comprehensive scheme for judicial determination of paternity, and was intended to rationalize procedure, to eliminate constitutional infirmities in then existing state law, and to improve state systems of support enforcement." *Michael M. v. Giovanna F.*, 5 Cal. App. 4th 1272, 1278 (1992),

9. UPA §7570, (a).

child's right to establish paternity.¹⁰ Courts have interpreted the UPA as legislative recognition of the “. . . value of having two parents . . . as a source of both emotional and financial support . . .”¹¹ Courts have applied the UPA, coupled with the constitutional right to establish paternity under the Fourteenth Amendment Due Process clause, precluding contracts that waive or limit a child's right to establish paternity and support.

B. Pre-conception Agreements

It is fairly simple to determine the relationship between children and parents that have conceived via traditional methods, but it is not as obvious when three or more adults have worked in combination to conceive a child. Parties that choose alternative methods of conception often do not have clear ideas as to their parental rights because of the uncertainty of the parentage of the child.¹² The UPA is the legal framework within which disputes regarding parental rights and obligations are decided.¹³

There are situations in which preconception agreements may be used, including artificial insemination and surrogacy. The UPA expressly addresses the former in California Family Code §7613, which provides that an anonymous semen donor is not the legal father of a child thereby conceived. Surrogacy, on the other hand, is a fairly recent phenomena that the California Supreme Court did not review until 1991¹⁴, and a preconception agreement in the surrogacy context was not reviewed until *Johnson v. Calvert*, 5 Cal 4th 84 (1993). In *Johnson* a married couple donated a zygote to a surrogate, who later asserted her parental rights towards the child. This case was especially difficult for the court because application of the UPA rendered a judicial decree of three legal parents, a result that was untenable to the court.¹⁵ The decision ultimately focused on the issue of intent, and awarded parental rights to the parents who initially intended to create and raise the child as their own, which was not the birth mother.¹⁶ The gestational surrogacy agreement was found to be consistent with California public policy, and was used as proof of the parties' intent.¹⁷ The court, however, never concluded whether the surrogacy agreement was enforceable in its own right.¹⁸

In re: Moschetta, 25 Cal App 4th 1218 (1991), the appellate court squarely confronted the enforceability of surrogacy contracts for the first

10. Fam Code §7632.

11. *Elisa B v. Superior Court*, 37 Cal. 4th 108, 123 (2005).

12. *In re: Moschetta*, 25 Cal App 4th 1218, 1228 (1991).

13. *Johnson v. Calvert*, 5 Cal 4th 84, 88 (1993).

14. *Adoption of Matthew B.* 232 Cal. App. 3d 1239 (1991).

15. *Johnson* at 92.

16. *Id.* at 93.

17. *Id.* at 95.

18. *In re: Moschetta* at 1230.

time in California.¹⁹ The facts in *In re: Moschetta* are essentially the same as in *Johnson* except that the egg belonged to the surrogate who agreed to carry the child in exchange for monetary compensation. After the child's birth, both the couple and the surrogate asserted parental rights. Finding that surrogacy agreements are a proper basis on which to determine intent, the court ultimately held that intent would only be examined where parentage could not be established under the UPA.²⁰ Since the surrogate was both the biological and birth mother, maternity could be established under the UPA, and the court awarded physical custody to both the surrogate mother and the biological father. In this case the surrogacy agreement had no bearing on the decision of the court.²¹

III. Procedural Background of Kristine M. V. David P.

In September 2002, Seth M. was born to his unmarried biological parents Kristine M. and David P. Over the next two years, David visited Seth only five times. In 2003, Kristine filed petitions with the Superior Court of Alameda County to establish Seth's paternity and for temporary orders regarding visitation, custody and support. David requested genetic testing, which proved him the father pursuant to the UPA (California Family Code §7600, *et seq.*). David agreed to have his parental rights terminated in exchange for a single payment of \$6,500 for child support and child care arrears. Kristine agreed to waive any future claim of child support.

The parties urged the trial court to issue a decree upholding the stipulations in the agreement on grounds that the father lived in Southern California, was in the Navy, and lacked interest in pursuing a parental relationship with Seth. Kristine argued that it was not in Seth's "best interest to have very sporadic contact with his father"²² and that "public policy does not require every child to have two supporting parents."²³ Kristine's Counsel focused on the issue of ". . . why Kristine should not have the same 'rights' to raise Seth as a single parent as a woman who receives in vitro fertilization by an anonymous donor."²⁴

David agreed with Kristine, arguing that termination of parental rights need not always occur in the context of adoption, and that terminating his rights would prevent him from trying to "reinsert himself into Seth's life after significant periods with no contact and no involvement."²⁵ The parties maintained that the above stipulations were a result of a "knowing and

19. *Id.* at 1228.

20. *Id.* at 1231.

21. *Id.*

22. *Kristine M. v. David P.*, 135 Cal. App. 4th 783, 787 (2006).

23. *Id.*

24. *Id.*

25. *Id.*

voluntary and intelligent decision”²⁶ made by Seth’s parents with his best interest in mind²⁶.

The trial court considered whether the decision regarding parentage might be made after conception. In making its decision, it compared the rights of Kristine and David to enter into a post-birth agreement, with the rights of parties that make such decisions in preconception agreements. After conceding that both parties “appear competent and their decision should be given due weight,”²⁷ the court received David’s health history and terminated his parental rights²⁷. The guardian ad litem for the minor appealed.

The California Court of Appeals for the First District reversed. The appellate court held that public policy, case law, and legislative mandate support the proposition that a child should have two parents.²⁸ The Court not only distinguished between post-birth and preconception agreements, but also challenged the validity of preconception agreements.²⁹ Accordingly, the Appellate Court held that the trial court was without jurisdiction to decree the termination of Seth’s right to financial support and the termination of David’s parental rights in circumstances outside of the statutory scheme.³⁰

IV. The Case

The opinion of the Court of Appeals in *Kristin M.*, 135 Cal.App.4th 783, written by Acting Presiding Judge Reardon, presents the complexity in exploring the different models of reproduction and the status of resulting children. The trial court determined that parents of traditionally conceived children “should have the same ability to decide whether a child is raised by one or two parents as those parents who make that decision prior to conception.”³¹ The Court of Appeals found that the responsibility to take care of and support a child occurs at the moment of conception. The ability to waive away that right is not in the child’s best interest and is against public policy. In our case, “the law has deemed [David] to have intended the natural consequences of his actions.”³² The relationship between parent and child is a fundamental right that the child possesses and is “equated in importance with personal liberty and the most constitutional rights.”³³ The Court of Appeals believed that Kristine and David had come to these terms as a matter of personal convenience and not truly in the best interest of their son, Seth.³⁴ Whereas in terms of a deliberate, acted-on pregnancy that re-

26. *Id.*

27. *Id.* at 788.

28. *Id.* at 789.

29. *Id.* at 791.

30. *Id.* at 792.

31. *Id.* at 789.

32. *Id.* at 792.

33. *Id.*

34. *Id.* at 791.

quired medical assistance, the court found that no child would have been born *if not for* the determination of the intended parents. This is where a preconception agreement is necessary to delineate exactly who are legally the intended parents.

In *Kristine M. v. David P.* this is not the situation. Kristine and David swayed the trial court with their arguments in that they should have the ability to determine whether or not they wish to be parents. The Court of Appeals stated:

Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including . . . social security, health insurance, survivor's benefits, military benefits and inheritance rights."³⁵

David insisted on having paternity established when Kristine sought temporary orders regarding visitation, custody and support.³⁶ Once the paternity test established that David was in fact Seth's father, David did not contest it. Both of the parents decided that David should be left out of Seth's life. "The UPA protects the child's right to establish paternity and obtain support irrespective of a parent's intent to foreclose on that right."³⁷ Neither David nor Kristine had the legal right to deny Seth the right to support by his father. According to the court, "a decision to terminate parental rights is one of the gravest a court can make."³⁸ There are only a few instances where a court may terminate parental rights, . . . "special proceedings related to implementation of permanent plans in dependency cases (*Welf. & Inst. Code* § 366.26), actions to declare a minor free from parental custody and control (§ 7800 *et seq.*) and adoptions (§§ 7660 *et seq.*, 8600 *et seq.*). The circumstances giving rise to such proceedings are not present in this case."³⁹

IV. Convergence

According to the court in *Kristin M v. David P.*, a post-birth termination of parental rights under the above circumstances could not be sustained. There may have been a different result if the parties had entered into such an agreement *before* the child was conceived. If the parties in *Kristine M.* had supplied an egg and sperm to be implanted in a surrogate, rather than conceiving by traditional means, case law would uphold a termination of the surrogates parental rights based on a preconception agreement.⁴⁰ But the inconsistency in legal treatment between preconception and post-birth

35. *Id.* at 789.

36. *Id.* at 788.

37. *Id.* at 790.

38. *Id.* at 792.

39. *Id.*

40. *Johnson v. Calvert*, 5 Cal 4th 84, 95 (1993), which considers pre-conception agreements as evidence of intent where a fertilized egg was implanted in a surrogate.

agreements may be misleading. In both cases, the UPA is dispositive on the issue of parentage.⁴¹ Whether made before or after the child's conception, agreements that foreclose on the future rights and obligations of the legally defined parents are invalid.⁴²

The Court in *Kristin M. v. David P.* asserted that California public policy prefers two legal parents.⁴³ While the UPA has been interpreted to reflect such a preference,⁴⁴ its provisions provide a viable avenue for single women to become parents. Cal Fam. Code 7613(b) (formerly Ca Civil Code section 7005) provides that anonymous sperm donors are not the legal parent of a child thereby conceived. Although Cal. Civil Code section 7005 was borrowed from the Model UPA, lawmakers purposely deviated from the Model UPA language so that the provision would apply to single women⁴⁵. While the California Legislature may assert the importance of two parents for every child, it acted to ensure the unfettered right of single women to parent alone.

It appears that a key difference between the two agreements is that, while pre-conception agreements attempt to clarify parentage, post-birth agreements of the type at issue here seek to terminate *established* parental relationships. It is arguable that pre-conception agreements clarifying parentage are not void on the same grounds as post-birth agreements, because the former does not effect a termination of parental rights and obligations. While the latter argument may lead to a finding of no legal rights, where the law would otherwise confer such rights.

Although California jurisprudence clearly places limits on parental rights to stipulate to financial and care arrangements of minor children, the parties in *Kristin M. v. David P.* presented the legal inconsistency: why may parties legally agree to obviate parental rights and obligations only before and not after the child's birth?

In comparing both types of agreements at least one goal of the parents in either agreement is the same: to provide for a legally sanctioned, long-term, plan for the physical, emotional and financial upbringing of the child. In struggling with the best means to fit this end, parents may agree that only one parental influence is necessary or preferable. One can understand a variety of circumstances in which the parent raising the child would seek to ensure that the other parent would not re-enter the child's life during his or her minority. These circumstances may fall short of statutory grounds for termination of parental rights and obligations, and yet be a valid reflection of the child's best interests.

41. *In re: Moschetta* at 1229.

42. *K.M. v. E.G.*, 37 Cal. 4th 130, 144 (2005).

43. *Kristin M v. David P.*, citing *Eliza Maria B. v. Superior Court*, 37 Cal. 4th 108, 123 (2005).

44. *Eliza B.* referencing Cal Fam. Code section 7570.

45. 9A West's U. Laws Ann. (1979) Parentage Act, hist. note 579.

Technology will undoubtedly allow further permutations to traditional reproduction, and as more exceptions are made to the statutory scheme, the more difficult it will be to overturn post-birth agreements on the ground that termination of parental rights may not be effected outside statutory delineations.

V. Conclusion

Public policy and precedent support the conclusion reached by the Court in *Kristine M v. David P.* . In distinguishing between preconception agreements and post-birth agreements, it is the ambiguous relationships among those that collaborated to bring the child into the world that necessitates an examination of factors not normally considered. However, it remains to be seen how the continuing evolution in reproductive technology will change societal views on the definition of 'parent' and on single parenthood. As more people seek out new reproductive technology, preconception agreements may gain more legal validity and could be more persuasive in the future on the matter of enforcing post-birth agreements.