

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

K.M.,

Plaintiff and Appellant,

v.

E.G.,

Defendant and Respondent.

A101754

**(Marin County
Super. Ct. No. CV 020777)**

**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on May 10, 2004, be modified as follows:

1. On page 1, second sentence of the first full paragraph, the phrase “that only E.G. would be the legal parent” is changed to “that E.G. would be the only parent” so that the sentence reads:

The couple orally agreed that E.G. would be the only parent unless and until there was a formal adoption.

2. On page 2, fourth sentence from the end of the third full paragraph, the phrase “only legal mother” is changed to “only mother” so that the sentence reads:

Eventually, however, E.G. asked K.M. to donate her eggs, provided that K.M. would be a “real donor” and E.G. would be the only mother.

3. On page 2, last sentence of the third full paragraph, the phrase “and made no request to be a legal parent” is deleted so that the sentence reads:

K.M. agreed to E.G.’s terms.

4. On page 4, last sentence of the third full paragraph, the phrase “never changed” is changed to “did not change” so that the sentence reads:

K.M. had a life insurance policy and small retirement plan, but she did not change the beneficiaries to name the children.

5. On page 4, at the end of footnote 1, following the words “her medical history,” add the following sentence:

Not until January 2001 did K.M. add the children as beneficiaries to a life insurance policy obtained through her employer.

6. On page 5, second sentence of the first full paragraph, the phrase “only legal mother” is changed to “only mother” so that the sentence reads:

E.G. asserted she would never tell them and insisted she was their only mother.

7. On page 6, third sentence of the second full paragraph, the phrase “a legal parent” is changed to “a parent” so that the sentence reads:

K.M. also testified, on the one hand, that the parties discussed the need for adoption to make K.M. a parent, and, on the other hand, that she believed adoption was unnecessary because of her genetic connection to the children.

8. On page 7, third sentence of the first full paragraph, the phrase “sole legal parent” is changed to “sole parent” so that the sentence reads:

Further, the court found that the parties agreed E.G. would be the sole parent and their agreement was not modified by their conduct.

9. On the bottom of page 8, first sentence of the paragraph beginning “On the merits,” the phrase “only legal parent” is changed to “only legally recognized parent under the UPA” so that the sentence reads:

On the merits, however, as we explain, the trial court properly concluded after a full evidentiary hearing that E.G. was the only legally recognized parent under the UPA.

10. On page 11, second sentence of the first full paragraph, the phrase “sole legal parent” is changed to “sole parent” so that the sentence reads:

First, K.M. orally agreed before the children were conceived that E.G. would be the sole parent unless and until the parties underwent formal adoption proceedings.

11. On page 12, first sentence of the first full paragraph, the phrase “natural motherhood” is changed to “parenthood” so that the sentence reads:

The ultimate determination of parenthood depends not upon the existence of a binding contract but rather, as *Johnson*

instructs, upon the woman's *intention* to bring about the birth of the child to raise as her own.

12. On the bottom of page 12, second sentence of the second paragraph beginning "In *Johnson*," the phrase "only legal parent" is changed to "only parent" so that the sentence reads:

In the present case, the trial court found in the parties' oral expressions an intention that E.G. would be the only parent unless and until an adoption by K.M.

13. On page 13, last sentence of the paragraph commencing on page 12 and beginning "In *Johnson*," the phrase "her own" is changed to add italics so that the sentence reads:

What is legally relevant is the finding by the trial court that the parties' understanding showed that *they intended* E.G. to be the one to bring about the birth of a child to raise as *her own* child.

14. On the bottom of page 13, sixth sentence of the paragraph beginning "The record contains," the phrase "K.M. never listed" is changed to "until 2001 K.M. did not list" so that the sentence reads:

The evidence was undisputed that until 1999 neither party disclosed to others K.M.'s genetic connection to the children and until 2001 K.M. did not list the children as beneficiaries of her life insurance policy or retirement plan.

15. On page 14, final sentence in the paragraph commencing on page 13 and beginning "The record contains," the phrase "only legal parent" is changed to "only parent" so that the sentence reads as follows:

But evidence that K.M. was E.G.'s domestic partner and helped raise the children does not preclude a finding that K.M. understood and agreed that E.G. would be the only parent.

16. On page 14, last sentence of the first full paragraph, the phrase "sole legal parent" is changed to "sole parent" so that the sentence reads:

The donor consent form confirms that E.G. was intended to be the natural mother and sole parent, while K.M. was the ovum donor.

17. On page 14, last sentence of the second full paragraph, the phrase "the legal mother" is changed to "the mother" so that the sentence reads:

The form simply reflects K.M.'s intention that she would not be the mother of any child formed from eggs donated to E.G.

18. On page 15, first sentence of the first full paragraph, the phrase “who intended to be the sole legal parent” is changed to “with the intent that the recipient be the sole parent” so that the sentence reads:

There is no reason K.M. should be found incapable of making the informed choice to donate her eggs to another woman with the intent that the recipient be the sole parent.

19. On the bottom of page 16, third sentence of the paragraph commencing with “In the present case,” the phrase “raise together any child formed from K.M.’s donated eggs” is changed to “provide a home together for E.G.’s child as long as their relationship continued” so that the sentence reads:

That evidence showed that the parties intended to maintain their relationship into the future and, at least implicitly, planned to provide a home together for E.G.’s child as long as their relationship continued.

20. On the bottom of page 16, fourth sentence of the paragraph commencing with “In the present case,” is deleted and replaced with the following sentence:

The evidence was conflicting on whether the parties intended joint parenthood of a child formed from K.M.’s donated eggs or whether the parties intended to raise the child as E.G.’s own child.

21. On page 17, last sentence of footnote 10, the phrase “a legal parent” is changed to “a parent” so that the sentence reads:

Under the particular facts of this case, the trial court found, based on substantial evidence, that, despite their relationship at conception and their plans to remain a couple after E.G. gave birth, the parties did *not* intend that K.M. would be a parent.

22. On page 17, at the end of the first full paragraph, following the words “secret for years,” add the following sentence:

Moreover, after the children grew older, K.M.’s assertions that she wanted to adopt them constituted an implied concession that until adoption E.G. was the only parent.

23. On page 18, second sentence of the second full paragraph, the phrase “sole legal parent” is changed to “sole parent” so that the sentence read:

The trial court found to the contrary that E.G. did not intend by her conduct to confer legal parental status on K.M. and that the parties did not modify their agreement that E.G. was to be the sole parent.

24. On page 18, fifth sentence of the second full paragraph, the phrase “sole legal parent” is changed to “sole parent” so that the sentence reads:

The parties’ pre-conception intention that E.G. would be the sole parent until adoption impliedly contemplated that the parties would remain together as a couple and that the children and others might regard K.M. as a second parent.

25. On page 19, first sentence of the first full paragraph, the phrase “second legal parent” is changed to “second parent” so that the sentence reads:

Had E.G. changed her mind after the children were born and agreed with K.M. that K.M. should be a second parent, the couple could have proceeded to adoption.

26. On page 20, the first full paragraph beginning “The Supreme Court,” including footnote 12, is deleted and replaced with the following two paragraphs and new footnote 12:

K.M., however, does not qualify for the presumption under Family Code section 7611, subdivision (d). The concept of receiving a child into one’s home as one’s *own child* must be distinguished from cohabiting with the child’s mother and welcoming the *mother’s child*. (*Miller v. Miller* (1998) 64 Cal.App.4th 111, 118.) The trial court found from the conflicting evidence that K.M. received the twins as E.G.’s children, agreeing not to disclose her own genetic connection to the children or to attain parental status until adoption. The presumption does not arise from these facts.

In any event, the presumption under Family Code section 7611, subdivision (d), is superfluous here. As we understand the Supreme Court’s explanation in *Johnson*, both the genetic mother and the surrogate birth mother in that case were qualified to be the natural mother. There was no need to apply an evidentiary presumption to determine which woman had a prima facie claim of maternity.¹² So, too, in the present case, both K.M. and E.G. qualify to be the natural mother: K.M. has undisputed genetic consanguinity while E.G. gestated and gave birth to the twins. K.M. need not rely upon the presumption from Family Code section 7611, subdivision (d), to advance her claim as the natural mother. Rather, as *Johnson* further instructs, when two women have acceptable proof of maternity, the ultimate determination of legal parentage is made by examining the parties’ intentions. As between the genetic mother and the birth mother, the law

recognizes the woman who intended to bring about the birth of the child to raise as her own. (*Johnson, supra*, 5 Cal.4th at p. 93.)

¹² The *Johnson* court explained as follows: The presumptions of paternity in Family Code section 7611 “describe situations in which substantial evidence points to a particular man as the natural father of the child. [Citation.] In this case, there is no question as to who is claiming the mother and child relationship, and the factual basis of each woman’s claim is obvious. Thus, there is no need to resort to an evidentiary presumption to ascertain the identity of the natural mother. Instead, we must make the purely legal determination as between the two claimants.” (*Johnson, supra*, 5 Cal.4th at p. 91.)

27. On the bottom of page 20, first sentence of paragraph beginning “K.M. argues,” the phrase “as a legal co-parent” is changed to “as a co-parent” so that the sentence reads as follows:

K.M. argues that she should be recognized as a co-parent because she played a joint parental role with E.G. in raising the children.

28. On page 23, first sentence of the first full paragraph, the phrase “as a natural mother” is changed to “as a parent” so that the sentence reads:

Because there is substantial evidence supporting the trial court’s finding that K.M. intended any child born of E.G. to be E.G.’s own child, K.M. does not qualify as a parent under the *Johnson* test.

29. On page 24, second sentence of footnote 15, the phrase “the natural parent” is changed to “a parent” so that the sentence reads:

These arguments presuppose that K.M. is a parent.

There is no change in the judgment.

The petition for rehearing is denied.

JONES, P.J.