A TRUE STORY

In May, the Washington State Court of Appeals issued a ruling with far-reaching impact for the parenting rights of gay and lesbian couples. The case is In re the Parentage of L.B. This is the fascinating story of this case.]

In 1989, Sue Ellen and Page became involved and moved in together that year. As their relationship progressed they discussed having a child and in 1994 Page conceived Linda (the child's actual name is not given). She was artificially inseminated with sperm provided by John, who was a good friend and gay. Shortly after Linda's birth, John moved to California and had no contact with the child.

From the moment of her birth, Sue Ellen was actively involved in Linda's life. Both women attended prenatal appointments and child-birthing classes. Sue Ellen sent out birth announcements to friends. Friends threw them a joint baby shower. In Linda's baby book, the "father" entries were replaced with "mother" and Sue Ellen's information. Sue Ellen transported Linda to her day care so that Page could get into work early. Linda referred to Sue Ellen as "Mama" and to Page as "Mommy." In fact, Sue Ellen provided much of Linda's "mothering" during the first six years of her life.

However, things were not well in the women's relationship. Financial differences caused increasing stress and Page complained that Sue Ellen "expected her to pay for everything while (Sue Ellen) enjoyed the glory of being a 'mom'." In 2001, Page decided to separate permanently from Sue Ellen. Initially, Sue Ellen enjoyed fairly frequent visits with Linda, but after a time, Page found them to be "disruptive." Around this time, Page contacted John in California, and introduced him to Linda as her father. Then, after continued disputes with Sue Ellen over parenting issues, Page and John cut off visitation with Sue Ellen altogether for a period of six months.

Many witnesses attested to the distress this caused Linda, yet at the end of the six month period, Page permanently ended all contact between Sue Ellen and Linda. After several more months of no contact, Sue Ellen finally got a lawyer and went to court. Shortly after that, Page married John and the birth certificate, school records and medical records were all changed to designate him as Linda's father.

There are three court levels in Washington - the Trial Court, the Court of Appeals and the Supreme Court. The Trial Court judge, after looking at the present state of Washington Law, as he understood it, "reluctantly" had to dismiss Sue Ellen's legal action. She appealed to the next level. Now her case would be decided by a panel of three appellate judges These panels are pretty much chosen at random from a pool of 10 judges. Hearing this case would be Susan Agid; Mary Kay Becker (who at this writing is a candidate for a vacant Supreme Court seat) and Faye Kennedy. All of these women had many years experience on the Court of Appeals and Judge Kennedy had been a very successful, highly respected family lawyer in Everett before her assignment to the bench.

Parentage actions are a creature of statute - the laws that are passed by the legislature in Olympia. In 2002, the legislature passed a new "Uniform Parentage Act. (UPA)" The UPA, basically sets out the rules and procedures for legally establishing parentage when the parents aren't married. Uniform acts are developed by legal experts and are passed, in almost identical language, in many different states, so there can be "uniformity" on certain issues throughout the country. The UPA has some strict guidelines on who can sue for paternity and a non-biological parental figure in a same sex relationship is not on the list. This is one reason the trial judge had to reluctantly decline Sue Ellen's request for relief under the UPA. Judge Kennedy in her opinion, joined by Judges Becker and Agid, agreed that the UPA didn't give Sue Ellen the "key to the courthouse door.". However, the three judges, when faced with this striking set of facts were as uncomfortable as the Superior Court Judge permitting the elimination of any relationship between Sue Ellen and Linda.

In order to avert what they believed to be a true injustice, the Court turned to the "common law," that is, law that is not addressed one way or the other by a state legislature, but which reflects the society's prevailing sense of equity. The source for this common law has always been the courts and its tradition dates to England, long before the Puritans set foot on the shores of Massachusetts. So, turning to this tradition, Judge Kennedy went on to recognized the legal relationship of *de facto parentage*.

As with all common law, this idea of *de facto parentage* wasn't just plucked out of nowhere - it is a natural extension of years of precedent and other thoughtful opinions. Washington has long acknowledged that a parental relationship is not limited to blood or adoption. For more than 20 years, our courts have recognized the "psychological parent" and custody has at times been awarded to a step parent, aunt or another adult who had established a strong and vital bond with the child. Judge Kennedy noted that "the core of the family interests protected by the Due Process Clause of the United States Constitution is the emotional bond that develops between family members as a result of shared daily lives." The opinion then went on to describe court decisions in other states (Wisconsin, Massachusetts, New Jersey, Alaska, Colorado, Kentucky and Utah) which recognize the psychological parent.

In our first year of law school, perhaps even on the first day, we learn to read a legal opinion for the "holding," which is the bottom line statement of the law as recognized by that particular case. Judge Kennedy made the holding in *Parentage of L.B.* very clear.

> "In sum, recognition of de facto parentage, in appropriate circumstances such as those alleged in this case, is in accord with existing Washington family law and reflects the evolving nature of families in Washington. Accordingly, we hold that a common-law claim of de facto or psychological parentage exists in Washington such that (Sue Ellen) can petition for shared parentage or visitation with (Linda)....we (also) hold that a petition for co-parenting or visitation under this claim will not be entertained unless the petitioner proves the existence of a parent-like relationship with the child as well as a triggering factor, such as the legal parent's denial of visitation with the child. We also hold that the de facto parent-child relationship must have been formed with the consent and encouragement of the biological parent"

The Courts of Washington were very active over the past year exploring the legal relationship of non-biological parents and children who they have partly or completely raised. *Parentage of L.B.* was only one of these decision, but it was arguably the most significant. Of course, the story may not be over for Sue Ellen, Page and Linda, as the Washington Supreme Court may yet accept this case for appeal and if that happens, Judge Kennedy's opinion can be reversed or affirmed. Stay tuned.