My Two Dads: Challenging Gender Stereotypes in Applying California's Recent Supreme Court Cases to Gay Couples

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I. Introduction

Due to advances in reproductive technologies, increasing numbers of gay and lesbian couples are raising children within their homes.[1] Of almost 600,000 same-sex households, over fifty percent were raising children.[2] In California alone, same-sex parents are raising more than 70,000 children.[3] However, the legal system has been slow to recognize these families, which do not fit the traditional nuclear family mold, thus denying them many of the benefits families receive.

Most states do not recognize same-sex marriage[4] and many do not per-

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1. Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination & the Legal Construction of Marriage*, 9 MICH. J. GENDER & L. 261, 321–22 (2003).

2. U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 9 (2003), *available at* http://www.census.gov.prod/2003pubs/censr-5.pdf. The number of same-sex households is likely higher than that reported. *See* M. V. LEE BADGETT & MARC A. ROGERS, INST. FOR GAY AND LESBIAN STUDIES, LEFT OUT OF THE COUNT: MISSING SAME-SEX COUPLES IN CENSUS 2000 (2003), *available at* http://www.iglss.org/media/files/c2k_leftout.pdf. Reasons for the underestimate include concerns about revealing sexual orientation, confusion over meaning of terms used in census form, and lack of appropriate options for same-sex couples. *Id.* at 15.

3. Gary Gates et al., *Race & Ethnicity of Same-Sex Couples in California: Data from Census 2000*, THE WILLIAMS PROJECT ON SEXUAL ORIENTATION L. & PUB. POL'Y, 6 (2006) *available at* http://www.law.ucla.edu/williamsinstitute/publications/Race_and_ethnicity_of_same-sex_couples_in_california.pdf.

4. Currently, only Massachusetts allows same-sex couples to marry. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). California, Connecticut, District of Columbia,

mit same-sex second parent adoption.[5] As a result, it is often difficult for nonbiological parents in same-sex relationships to establish their parental rights despite actively participating in the decision to create a family and nurturing, loving, and supporting children born within the relationship. While some states recognize nonbiological parents as a *de facto*[6] or *in loco parentis*,[7] these statuses do not encompass all the rights of a legal parent, such as the right to make medical and educational decisions, provide the child with Social Security benefits,[8] or to seek visitation when the relationship ends.[9]

Three 2005 decisions by the California Supreme Court will likely make it easier for same-sex partners to assert their parental rights under the Uniform Parentage Act (UPA).[10] In *Elisa B. v. Superior Court*,[11] *K.M. v. E.G.*,[12] and *Kristine H. v. Lisa R.*,[13] the court held that both partners in a lesbian relationship may have legal status as parents of children born during the relationship. These cases involved lesbian couples who raised children together but later separated. The court, however, did not specifi-

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Maine, New Jersey, and Vermont recognize civil unions or domestic partnerships and grant same-sex couples some of the same benefits that married couples enjoy. CAL. FAM. CODE § 297.5 (2005); CONN. GEN. STAT. § 46b-38nn (2005); D.C. CODE § 32-701-710 (2001); ME. REV. STAT. ANN. tit. 19 § 701 (2005); N.J. STAT. ANN. § 26:8A-4 (2004); VT. STAT. ANN. tit. 15, § 1201(4) (2005).

5. Courts in Colorado Nebraska, Ohio, and Wisconsin have held that state law does not permit second-parent adoptions. *See In re* Adoption of Luke, 640 N.W.2d 374 (Neb. 2002); *In re* Adoption of Jane Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998); Matter of Adoption of T.K.J., 931 P.2d 488 (Colo. 1996); In Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994). In a second-parent adoption, a person is permitted to adopt her partner's child without the legal parent having to terminate her parental rights. Sharon S. v. Super. Ct., 73 P.3d 554, 558 n. 2 (Cal. 2003). Florida, Mississippi, and Utah do not allow homosexual couples to become adoptive parents. FLA. STAT. § 63.042(3) (WEST 2005); MISS. CODE ANN. § 93-17-3(2) (2004); UTAH CODE ANN. § 78-30-1(3)(b) (2002). Establishing parentage under the Uniform Parentage Act is preferred over second-parent adoption because it is quicker and less expensive than adoption. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 353–54 (2002).

6. A *de facto* parent is a person who "on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his physiological need for affection and care." *In re* B.G., 523 P.2d 244, 253 (Cal. 1974).

7. In loco parentis "depends on an individual's continuing intent to care for and support a child . . . [as] one acting in loco parentis may terminate her obligations at will." Carmel B. Sella, Note, *When a Mother Is a Legal Stranger to Her Child: The Law's Challenge to the Lesbian Nonbiological Mother*, 1 UCLA WOMEN'S L.J. 135, 156 (1991).

8. Jacobs, *supra* note 5, at 346–47. *See also* Maggie Manternach, *Where Is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers & Their Children*, 9 J. GENDER RACE & JUST. 385, 407 (2005).

9. *Id.* at 412–14.

10. UNIFORM PARENTAGE ACT (1973), 9B U.L.A. 377 (2001)[hereinafter UPA].

11. Elisa B. v. Superior Ct., 117 P.3d 660 (Cal. 2005).

12. K.M. v. E.G. 117 P.3d 673 (Cal. 2005).

13. Kristine H. v. Lisa R. 117 P.3d 690 (Cal. 2005).

cally apply its rulings to same-sex couples in which both partners are men. Therefore, it is unclear whether gay couples can establish parentage under the UPA. The absence of a legal mother contradicts history and gender norms. Yet analyzing the purpose of the UPA and recent holdings by California courts suggest the UPA must also apply to gay couples raising children.

Part I of this essay provides an overview of the UPA and its framework for determining parentage. Next, the essay examines how California courts apply the UPA to cases involving assisted reproductive technologies. Part III discusses the courts' decisions in *Elisa B.*, *K.M.*, and *Kristine H.* and their significance; explores gender roles in the context of raising a family; and concludes with an argument for applying the reasoning of these cases to establish parentage in those cases involving gay couples.

II. The Uniform Parentage Act

Under common law, the parents' relationship defined a child's legal status, recognizing as legitimate children born to married parents and illegitimate those born out of wedlock.[14] Illegitimate children had limited rights; for instance, they could not inherit from their father or take his name.[15] Moreover, the common law recognized unwed mothers as the legal guardians of their illegitimate children and denied fathers custody, visitation, and adoption rights.[16]

In the late 1960s, the United States Supreme Court began to strike down laws that based a child's legal status on his parents' marital relationship.[17] In response to the Supreme Court's rulings, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the UPA to eliminate distinctions between legitimate and illegitimate children and to promote the equal treatment of all children regardless of their parents' marital status.[18] In 1975, California adopted the UPA in its entirety and later codified it in California's Family Code.[19] The Family Code sets forth a framework for establishing parentage based on the parent–child relationship rather than the marital status of the parents. Defined as "the legal relationship existing between a child and the

14. Laurence C. Nolan, "*Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 6–8 (1999).

15. *Id.* at 7–9.

16. *Id.* at 9.

17. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972); Glona v. Am. Guar. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

18. UPA, *supra* note 10.

19. CAL. FAM. CODE §§ 7600–7750 (West 2004).

child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations," the parent–child relationship includes both mother–child and father–child relationships.[20] A woman may establish a mother–child relationship by showing that she gave birth to the child or adopted the child.[21] Section 7611 sets forth the presumptions of fatherhood. A man is presumed to be the father of a child if he is married to the mother at the time of the child's birth, attempted to marry the child's mother before or after the child's birth, or if he "receives the child into his home and openly holds out the child as his natural child."[22]

III. Application of the UPA to Cases Involving Assisted Reproduction

With the increasing use and success of assisted reproductive technologies (ARTs)[23] courts have had to apply the UPA to family forms not anticipated by the drafters of the UPA. In *Johnson v. Calvert*, the California Supreme Court established a new test for determining parentage of children conceived through assisted reproduction.[24] Two women, the genetic mother and the gestational mother, both claimed rights as a legal mother because of their biological ties to the child.[25] While finding that each woman had equally valid claims to motherhood, the court nonetheless held that California only recognized one legal mother.[26] Therefore, the court set forth a new rule to resolve competing claims to maternity: "she

20. CAL. FAM. CODE § 7601.

21. *Id.* at § 7610.

22. *Id.* at § 7611. In 2002, the UPA was revised and amended. Amended in 2002, UNIF. PARENTAGE ACT, art. 2, § 204, (2002). Only Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming have adopted the revised UPA and none of these states adopted the revised UPA in its entirety. NCCUSL.org.org/publications/uniform_parentage.pdf).

23. ART describes "all fertility treatments in which both eggs and sperm are handled," such as in-vitro fertilization. CDC, 2003 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, 11 (2005) *available at* http://www.cdc.gov/ART/ART2003/download (last visited Jan. 20, 2006). Since 1996, the number of ART cycles performed in the United States has almost doubled. *Id.* at 63. The number of live-birth deliveries in 2003 from the use of ART (35,785) increased two and a half times the number of live-birth deliveries in 1996 (14,507). *Id.* at 52.

24. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). The Calverts, a married couple, entered into a surrogacy contract with Johnson, who agreed to be implanted with the wife's egg, carry the child, and relinquish her parental rights to the couple after the child's birth. *Id.* at 778.

25. *Id.* at 779–80. Calvert claimed to be the mother because of her genetic relationship to the child, while Johnson's claim to motherhood was based on giving birth to the child. *Id.* at 779.

26. *Id.* at 781. Under these circumstances, the court declined to find that the child had two mothers because recognizing "parental rights in a third party with whom the Calvert party has had little contact since shortly after the child's birth would diminish Crispina's [Calvert] role as a mother." *Id.*

who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother."[27] The court held that Calvert was the legal mother of the child because she had intended to be the mother from the beginning and "but for [the Calverts] acted on intention, the child would not exist."[28] Thus, when parties have competing claims to parentage, the couple who intends to have the child with the use of assisted reproduction will be the legal parents of the child so conceived.

Similarly in *Buzzanca v. Buzzanca*, the court utilized an intent-based analysis and applied a gender-neutral interpretation of the UPA in order to determine maternity.[29] Relying on the finding in *Johnson* that statutes setting forth presumptions of fatherhood applied equally to claims of maternity, the court held that California's artificial insemination statute used to establish fatherhood also applied to a mother who was neither genetically related to the child nor had given birth to the child.[30] The court interpreted the artificial insemination statute broadly and ignored the gender-specific language.[31] Noting the similarity between insemination and surrogacy procedures, the court ruled that the intended mother and father could establish legal parentage under this statute through their consent to the artificial insemination of another woman in order to produce a child that the couple would raise.[32] The court held that the wife, although not biologically related to the child, was the child's legal mother because she initiated the surrogacy arrangement that caused the birth of the child and

27. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993). The court found that the UPA did not specify how women were to establish a mother–child relationship. *Id.* at 780. Interpreting the UPA in a gender-neutral manner, the court considered applying the UPA's presumptions of fatherhood to determine maternity. *Id.* However, the court ruled that these presumptions did not apply in cases where the parties' intentions are known. *Id.* at 781.

28. *Id.* at 782. "Intentions that are voluntarily chosen, deliberate, express and bargained-for ought to presumptively determine legal parenthood." *Id.* at 783 (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 309 (1990).

29. Buzzanca v. Buzzanca, 61 Cal. App. 4th 1410 (Ct. App. 1998). The Buzzancas agreed to implant an embryo created by anonymously donated sperm and egg in a gestational surrogate and planned to raise the child. *Id.* at 1412.

30. *Id.* at 1421. Section 7613 of California's Family Code provides that a man who consents to the artificial insemination of his wife is the child's legal father. CAL. FAM. CODE § 7613(a) (West 2004).

31. *Buzzanca,* 61 Cal. App. 4th at 1426. There is "no reason to distinguish *between* husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being." *Id.*

32. *Id.* at 1421. "Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie." *Id.* at 1418. "In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents." *Id.* at 1413.

clearly intended to be the mother of the child.[33] Likewise, the court held that the husband was also the child's legal parent because of his consent to the insemination and surrogacy arrangement.[34]

In *Dunkin v. Boskey*,[35] the court found that the artificial insemination statute also could extend to unmarried couples even though the statute's language specifies "husband" and "wife."[36] Given the purpose of the UPA, to treat children equally without regard to the marital status of their parents, the court concluded that the statute applied to an unmarried man who had consented to his female partner's artificial insemination.[37]

IV. Applying the UPA to Same-Sex Couples

In January 2005, the California Registered Domestic Partner Rights and Responsibilities Act of 2003 became effective.[38] This Act recognizes registered domestic partners as legal parents and provides their children with the same rights as children of married couples.[39] While this Act protects children born to registered domestic partners after January 1, 2005, it fails to protect the rights of children born to same-sex couples before the Act's effective date and those born to couples who do not register with the program. Therefore, the three recent decisions by the California Supreme Court are important because they define the rights and parentage of children the Act fails to protect.

A. Elisa B. v. Superior Court

In *Elisa B. v. Superior Court*,[40] Elisa and Emily, a same-sex couple, each used the same anonymous sperm donor to give birth to children who were biologically related to one another. The women gave each child a hyphenated surname consisting of both of their surnames and both women breast-fed the three children.[41] The couple raised the children together. Emily stayed home to care for the children, and Elisa worked outside the home in order to provide financial support for the family. After the couple separated and Elisa stopped providing Emily with support, Emily applied

33. *Id*. at 1420–25.
34. *Id.* at 1420.
35. Dunkin v. Boskey, 82 Cal. App. 4th 171 (Ct. App. 2000).
36. *Id.* at 188.
37. *Id.* Dunkin did not seek to establish parentage under § 7613(a); rather, he brought a breach-of-contract claim against his former partner. *Id.* at 178. The court, however, maintained that Dunkin could be declared the child's legal parent under the statute. *Id.* at 188.
38. CAL. FAM. CODE § 297.5 (West 2005).
39. *Id.* at § 297.5(d).
40. Elisa B. v. Superior Ct., 117 P.3d 660 (Cal. 2005).
41. *Id.* at 663. Elisa gave birth to a son, and two years later Emily gave birth to twins. *Id.*

for public assistance and the state sought child support from Elisa.[42]

Distinguishing this case from the facts of *Johnson*, the court held that a child could have two legal parents of the same-sex.[43] Noting the recent enactment of the Domestic Partner Rights and Responsibilities statute recognizing the rights of registered domestic partners and its prior decision upholding a woman's right to adopt her lesbian partner's child, the court concluded that there was no reason to preclude a child from having two parents of the same sex.[44] Furthermore, the court ruled that the statutory presumption of paternity permitting a nonbiological father to establish fatherhood by presenting evidence that "[h]e receive[d] the child into his home and openly h[eld] the child out as his natural child" also applied to nonbiological mothers.[45]

Proof that Elisa was not the child's biological mother did not rebut the presumption of parentage because she "actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child or children would be raised by Emily and her as coparents."[46] Moreover, the court reasoned that if it rebutted the presumption that Elisa is the children's parent, the children would only have one parent. The court found it important for a child to have two parents who could provide emotional and financial support.[47]

B. K.M. v. E.G.

In *K.M. v. E.G.*, a woman, K.M., donated her ova to her lesbian partner, E.G.[48] Although biologically related to the child, K.M. agreed not to reveal to others that she was the ova donor. K.M. and E.G. raised the child together until the couple separated. After their separation, K.M. sought a determination of her parental rights.[49]

The court reversed the lower courts' holdings that K.M. was a donor and not a parent. Considering the intent of the parties, the court reasoned

42. *Id.* at 663–64.

43. Whereas *Johnson* involved three people claiming to be the child's parents, in *Elisa* there were only two potential parents. *Id.* at 665–66. The court stated that, "A person who actively participates in bringing children into the world, takes the children into her home and holds them out as her own, and receives and enjoys the benefits of parenthood, should be responsible for the support of those children—regardless of her gender or sexual orientation." *Id.* at 670.

44. *Id.* at 666. *See also* Sharon S. v. Super. Ct., 73 P.3d 554 (Cal. 2003).

45. *Elisa B.,* 117 P.3d at 667.

46. *Id.* at 669.

47. *Id.*

48. K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).

49. *Id.* at 675. E.G. argued that K.M. was not the legal parent of the child because she had orally agreed that E.G. would be the only parent and K.M. signed an ovum donation form waiving her parental rights to the child. *Id.* at 677.

that K.M. did not intend simply to be a donor.[50] Rather, both K.M. and E.G. lived together and "intended to produce a child that would be raised in their own home."[51] The court held that Section 7613(b), which provides that a man who donates semen to be inseminated in a woman other than his wife is not a father does not apply when a couple intends to raise the child together "in their joint home."[52] Both K.M. and E.G. could establish evidence of a mother and child relationship and their claims were not mutually exclusive; therefore, the court found that both K.M. and E.G. were legal mothers.[53]

C. Kristine H. v. Lisa R.

In *Kristine H.*, a lesbian couple decided to have a child together and Kristine was artificially inseminated.[54] Before the child's birth, the couple sought and received a judgment declaring both Kristine and Lisa legal parents of the child. Kristine and Lisa raised the child together until they separated two years after the child's birth. Kristine filed an action to set aside the judgment declaring both her and Lisa parents while Lisa filed an action seeking custody of the child.[55]

Finding that "Kristine invoked [subject matter jurisdiction to determine the child's parentage], stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years," the court ruled that Kristine was estopped from denying that Lisa was the child's parent and noted that public policy favored a finding that a child has two parents rather than one.[56]

V. How the Recent Rulings Impact Gay Couples

With the holdings in these three cases, the California Supreme Court confirmed that a person's status as a presumed parent may be established regardless of biology, gender, sexual orientation, or marital status.[57] However, these cases all involved lesbian couples; therefore, the status of nonbiological fathers in gay couples remains unclear. While the court held

50. *Id.* at 678, 679.

51. *Id.*

52. *Id.* at 680.

53. K.M. was genetically related to the children, and E.G. gave birth to them. *Id.* at 680.

54. Kristine H., 117 P.3d 690, 692 (Cal. 2005).

55. *Id.* Kristine argued that the judgment was invalid because it was issued before the child was born. *Id.*

56. *Id.* at 696.

57. *See In re* Nicholas H., 46 P.3d 932, 938 (Cal. 2002) (noting that a parent-child relationship with a nonbiological parent can be more palpable than a biological relationship); *In Re* Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002) (holding that § 7611 presumptions of fatherhood also apply to women without a biological connection to the child).

that a child could have two legal mothers, it did not hold that a child could have no legal mother.

A. Gender Roles and Gay Stereotypes

Historically, society identified women as mothers, caretakers of the family.[58] On the other hand, the primary role of the man was to provide the family with financial support.[59] This view was so pervasive that even during the twentieth century, doctors stressed that mothers were more important to a child's mental and emotional development than fathers were.[60] The Supreme Court, however, recently rejected the argument that the maternal relationship is more important than a child's relationship with his father.[61]

Yet in *Nevada Department of Human Resources v. Hibbs*,[62] the United States Supreme Court acknowledged that these gender stereotypes continue to exist. The Court found that employers rarely granted new fathers paternity leave.[63] On the other hand, many states offered women leaves extending well beyond the typical four to eight weeks needed to recover from giving birth.[64] Similarly, scholars have noted the difficulty fathers often encounter while trying to obtain sole or joint custody due to court biases in favor of mothers.[65] Thus, the idea that mothers are better caretakers than fathers persists today.

The number of fathers, including gay fathers, raising children is growing.[66] Male couples constitute twenty-two percent of same-sex households raising children.[67] When gay men become fathers, they are not

58. *See* Stephanie C. Bowee, *The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011, 1019 (2001) ("historical gender roles dictate that women bear most of the domestic responsibilities for the family"). *See also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003).

59. *See* NANCY E. DOWD, REDEFINING FATHERHOOD (2000).

60. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 938 (2005).

61. Caban v. Mohammed, 441 U.S. 380, 389 (1979). The Court, however, did note that the maternal relationship may be stronger than the paternal relationship when the child is an infant. *Id.*

62. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

63. *Id.* at 730–34.

64. *Id.* at 731.

65. Maldonado, *supra* note 60, at 967–73. *See also* Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523, 529 (1996).

66. *See* David Usborne, *Gay With Children*, N.Y. MAG., Nov. 3, 2003, *available at* http://newyorkmetro.com/nymetro/urban/gay/features/n_9427/index.html (discussing the "gay baby boom"); Ginia Bellafante, *Two Fathers, With One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A1 (describing the increasing number of gay men leaving the workplace to become stay-at-home parents).

67. CENSUS BUREAU, *supra* note 2, at 9.

adopting the traditional role of a father. Gay men become nurturers and caretakers of their children, roles typically assigned to women.[68] One study found that gay fathers are "more likely to endorse parental nurturance" and "less likely to emphasize economic support as a central aspect of fathering."[69] In addition to challenging stereotypes based on gender, gay fathers also face marginalization by the gay culture itself.[70] Society and, to some extent, gays themselves promote an identity that conflicts with the notions of fatherhood. Although gays are often characterized as self-absorbed, hypersexual, and effeminate, gay fathers often do not fit this description. They typically are in stable, committed relationships. Furthermore, like other parents, gay fathers are committed to raising their children.[71]

B. Application to Gay Couples

In order to have a child, gay couples typically recruit a surrogate who is artificially inseminated with one of the men's sperm.[72] Surrogacy is an expensive process; therefore, the children are planned for and very much wanted.[73] Upon the child's birth, the surrogate relinquishes her parental rights and gives the child to the biological father and his partner.[74] Although the law recognizes the biological father as the child's legal father, the nonbiological parent has no parental rights unless he adopts the child.[75]

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68. *See* Marla J. Hollandsworth, *Gay Men Creating Families Through Suro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 192–95 (1995). "Nurturance has most often been associated with femininity. Indeed, it is usually called 'mothering' rather than 'parenting' because of the mistaken assumption that fathers simply do not parent." Lynda Henley Walters & Steven F. Chapman, *Changes in Legal Views of Parenthood: Implications for Fathers in Minority Cultures, in* FATHERHOOD & FAMILIES IN CULTURAL CONTEXT 83, 86 (Frederick W. Bozett & Shirley M. H. Hanson eds., 1991) (quoting HENRY BILLER & DENNIS MEREDITH, FATHER POWER 106 (1975)).

69. Heather Fann Latham, *Desperately Clinging to the Cleavers: What Family Law Courts Are Doing About Homosexual Parents, & What Some are Refusing to See*, 29 LAW & PSYSCHOL. REV. 223, 235 (2005) (quoting Devon Brooks & Sheryl Goldberg, *Gay & Lesbian Adoptive & Foster Care Replacements: Can They Meet the Needs of Waiting Children?*, 46 SOC. WORK 147, 147 (2001)).

70. *See* ROBERT L. BARRET & BRYAN E. ROBINSON, GAY FATHERS 16 (2000) (describing gay fathers as "a minority within a minority").

71. *See* E. Gary Spitko, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood & Gay Identity*, 24 ST. LOUIS U. PUB. L. REV. 195, 209–10 (2005).

72. This enables at least one of the parents to have a biological link to the child. John A. Robertson, *Gay & Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 359 (2004).

73. *See* Spitko *supra* note 71, at 212; Latham, *supra* note 69, at 237.

74. Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 3 (1999).

75. *Id.* Not all states permit second-parent adoptions, and some prohibit same-sex couples

California's recent decisions represent the first time a court has used the UPA to recognize both partners in a same-sex relationship as legal parents of a child born during the couple's relationship. Although each case involved lesbian couples, courts can use a similar analysis in order to apply the UPA to gay couples raising children. The purpose of the UPA and the courts' application of the UPA in assisted reproduction cases support recognizing the parental rights of gay fathers. Section 7613 grants parental rights to a husband who consents to the artificial insemination of his wife with semen donated by another man.[76] Reading this statute in a gender-neutral manner without regard to the marriage-specific language, a gay partner who consents to an artificial insemination and surrogacy arrangement can be recognized as the legal parent of the child.

First, the purpose of the UPA and existing case law support interpreting section 7613 to apply to gay couples despite the use of the terms "husband" and "wife." By adopting the UPA, the legislature intended to eliminate legal distinctions between children based on the circumstances of their birth.[77] Refusing to apply the UPA to gay couples creates a new class of stigmatized children by distinguishing children solely because their parents are both men.[78] This clearly undermines the intent of the UPA to promote equal treatment of all children regardless of their parents' marital status.

Furthermore, the court has extended Section 7613 to unmarried couples of the opposite sex. In *Dunkin*, the court noted that even though he was not the biological father and was not married to the child's mother, Dunkin, nevertheless, "stands in a position at least tantamount to a lawful father in an artificial insemination case, who, although without biological relationship to the child, has given permission along with the mother for procreation of the child."[79] Therefore, the use of the terms "husband" and "wife" in Section 7613 should not prevent the statute's application to gay couples.

In addition, California courts mandate a gender-neutral interpretation of Section 7613. In *Johnson*, the California Supreme Court held that courts must apply the UPA in a gender-neutral manner, even where the language of the statute is gender specific.[80] Furthermore, the court in

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from adopting. *See supra* note 5 and accompanying text.

76. CAL. FAM. CODE § 7613 (West 2004).

77. *See supra* notes 15–23 and accompanying text. *See also* CAL. FAM. CODE § 7602 (West 2004) ("The parent child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.").

78. Brief for Center of Children's' Rights at Whittier Law School et al. as Amici Curiae Supporting Respondents at 3, Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005).

79. Dunkin v. Boskey, 82 Cal. App. 4th at 190.

80. Johnson v. Calvert, 851 P.2d at 779–80. *See also In re* Karen C., 101 Cal. App. 4th 932 (2002) (applying the paternity presumptions of § 7611 to find that a woman was a presumed mother).

Buzzanca rejected a literal interpretation of Section 7613 in its holding that a wife was "situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child."[81] The *Johnson* and *Buzzanca* decisions both support applying the artificial insemination statute without regard to the consenting partner's sex. Like the wife in *Buzzanca*, a man who, with his partner, consents to the artificial insemination of a surrogate is situated like a husband who agrees to the artificial insemination of his wife. Thus, under Section 7613, the nonbiological parent in a gay relationship is the legal parent of the child born as a result of artificial insemination.

In both *Johnson* and *Buzzanca*, the courts emphasized the intent of the parties to parent the child.[82] The court in *Johnson* used intent to determine whether the genetic mother or the gestational mother was the child's legal mother.[83] In *Buzzanca*, the court stated that when establishing parentage, the consideration of intent was "not limited to just *Johnson*-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have been born 'but for the effort of the intended parents.'"[84] Therefore, the court concluded that a parental relationship may be established where intended parents initiate and consent to medical procedures that lead to the birth of a child, even when the child does not share a biological link to the intended parents.[85]

Surrogacy requires intent. It is an expensive, time-consuming process.[86] In a typical situation, both partners decide that they want to start a family.[87] Together they seek out a surrogate and egg donor, arrange the medical procedures, and prepare and plan for the birth of their child.[88] But for the intentions and actions of this couple, the child would not exist. The intentions of a married couple and a gay couple who use assisted reproduction to have a child are not significantly different. Both couples intend to raise the child even though they may not have a biological relationship with the child. Interpreting Section 7613 in a gender and marriage-neutral manner, the nonbiological parent who consents to the artificial insemina-

81. *Buzzanca,* 61 Cal. App. 4th at 1421.

82. *See supra* notes 24–34 and accompanying text; *see also* Schultz, *supra* note 29 (supporting the use of intentional agreements to establish parentage in assisted reproduction cases). *But see* Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 FAM. L.Q. 691, 700 (arguing that using intent to determine parental rights is unnecessary and even "dangerous").

83. *See* Schultz, *supra* notes 28–29 and accompanying text.

84. *Buzzanca,* 61 Cal. App. 4th at 1425 (quoting *Johnson,* 851 P.2d at 783).

85. *Buzzanca,* 61 Cal. App. 4th at 1413.

86. *See* Usborne, *supra* note 66 (describing both the adoption and surrogacy process as "laborious" for gay couples).

87. Doskow, *supra* note 74, at 19.

88. *Id.*

tion of a surrogate with his partner's sperm and intends to raise the child can be conferred with legal parental rights just as his partner who is genetically related to the child.[89] Under this gender-neutral, intent-based approach, a gay couple's intent to raise the child would override any claims a gestational mother may have to parental rights. Although it may seem harsh to ignore the nine months of care a gestational surrogate invests in a child and grant parental rights to a party who has no biological connection to the child,[90] California has done so in the past. In *Buzzanca*, the court relied on the nonbiological mother's intent in order to declare her the legal parent rather than grant parental rights to the gestational mother.[91] An intent-based approach also allows for a truly gender-neutral approach to establishing parentage under the UPA. In the past, a man obtained parental rights through his relationship with the child's mother while genetic relationship established a woman's maternity.[92] Relying on intent and consent eliminates gender distinctions in establishing parental rights and allows men to establish parentage through their own actions and intentions.

Moreover, recognizing the gestational surrogate as a legal mother is not gender-neutral, in fact, it is gender-specific.[93] Those who advocate for a gestation-based rule for determining maternity emphasize the bond that forms between the surrogate and child while the child is *in utero*.[94] Such an approach relies on and reinforces stereotypes of women as nurturers and caretakers.[95] In contrast, an intent-based approach recognizes that

89. In order to eliminate confusion, couples relying on § 7613 must express their intentions in a written agreement. CAL. FAM. CODE § 7613(a) (West 2004). Section 7613 currently requires a written agreement including the husband's consent to the artificial insemination. *See id.* A written agreement prevents parties from being declared parents of a child whom they did not intend to parent and eliminates disputes that may arise after the couple's relationship ends.

90. *But see* BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD (2000). Rothman rejects intent and genetics in favor of gestation. *Id*. at 91, 168. According to Rothman, "Any pregnant woman is the mother of the child she bears. Her gestational relationship establishes her motherhood." *Id*. at 167. The revised UPA recognizes the gestational surrogate as the legal mother unless a court validates the gestational agreement. UPA 2002, *supra* note 23, at § 201(a)(1).

91. *See supra* notes 29–34 and accompanying text.

92. *See* CAL. FAM. CODE § 7611 (West 2004). *See also* Janet Dolgin, *Just a Gene: Judicial Assumptions about Parenthood,* 40 UCLA L. REV. 637, 649–50 (1993).

93. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 913 (2000).

94. *See id*. at 914–16 (exploring arguments in favor of a gestation-based standard); Rothman, *infra* note 105, at 170 (arguing the relationship formed during pregnancy has "more weight" than genetics or a contract).

95. Garrison, *supra* note 93, at 914. According to Marjorie Schultz, recognizing the relationship formed during gestation as creating a claim to parental rights inevitably results in a Catch-22 for intending fathers. Schultz, *supra* note 28, at 392. "Because of his sex, he has no developed relationship. Because he has no developed relationship, he has no protectable right to create one." *Id.*

both sexes are capable of providing a child with love and nurturance.

A gender and marriage-neutral interpretation of the UPA allows gay couples to obtain parental rights at the time of the child's birth just as opposite-sex couples can.[96] Previously, a nonbiological parent in a same-sex relationship had to wait until the child's birth before beginning a second-parent adoption, with no guarantee that a court would approve the adoption.[97] This proceeding typically lasted six to ten months, included a home study, and required an amendment of the birth certificate to reflect the nonbiological parent's new status.[98] This extra step is not required for married couples and now even lesbian couples do not have to resort to second-parent adoptions in order to obtain parental rights. Continuing to require gay couples to pursue second-parent adoptions suggests the law does not provide equal rights and responsibilities for gay couples as it does for married and lesbian couples. Furthermore, this extra step likely conflicts with the recently enacted Domestic Partners Rights and Responsibilities Act, which grants same-sex couples the same rights as married couples with respect to children.[99] Establishing parentage under Section 7613 eliminates any additional obligations gay couples must fulfill before they can obtain parental rights of a child they planned for and intended to raise together.

Applying Section 7613 to gay couples also supports the state's interests in the welfare of children and the integrity of the family.[100] California courts have expressed a preference for children having two parents rather than one.[101] The state also has an interest in determining parentage in order to hold parents, rather than taxpayers, responsible for the care of children.[102] An early determination of parentage through the UPA prevents the harm a child may experience from losing the bond he has formed with the nonbiological parent. As the court noted in *Elisa B.*, a same-sex parent who "help[s] cause the children to be born and [raises] them as her own. . . should not be permitted to later abandon [the children] simply because her relationship with [her partner] dissolved."[103] Denying chil-

96. Ordinarily, a gestational surrogate must relinquish any parental rights after the child's birth before the intended parent may establish his rights through a second-parent adoption. Doskow, *supr*a note 74, at 3.

97. Jamie Stroops, *Law and Its Impact on Non-Traditional Families*, 34 Sw. U. L. Rev. 597, 601 (2005).

98. *Id.* at 602.

99. Cal. Fam. Code § 297.5(d) (West 2005).

100. *See In re* Nicholas H., 46 P.3d 932, 938 (Cal. 2002).

101. *See* Elisa B. v. Super. Ct., 117 P.3d 660, 669 (Cal. 2005) (providing a history of cases that emphasize the importance of two parents).

102. *In re* Marriage of Buzzanca, 61 Cal. App. 4th 1410, 1424 (1998).

103. *Eliza B.,* 117 P.3d at 670.

dren of gay couples the emotional and financial security of two parents solely because their parents are both men defeats these state interests.

Furthermore, extending the UPA to establish parentage for gay couples promotes stability and certainty. Consistent rules for determining parentage reduce litigation concerning custody and visitation when a relationship ends[104] because the parties' have set forth their intentions in a written agreement.[105] The UPA provides a consistent and uniform means of establishing parental rights and promotes the state interests in protecting the welfare of children; therefore, the law should not deny gay couples the opportunity to use the UPA to obtain legal parental status of a planned for child.

VI. Conclusion

Although three recent California cases did not explicitly apply their holdings to gay couples, a review of the UPA and its application in assisted reproduction cases strongly suggests that gay fathers can also utilize the UPA to gain legal parental rights. Previous interpretations of the UPA by California courts indicate their preference for applying its provisions regardless of biology, sex, marital status, or sexual orientation. These cases illustrate that applying the UPA to gay couples is not farfetched. In addition, recognizing two parents enhances the financial and emotional support a child receives while growing up.[106] Denying a child this support simply because his parents are the same sex is unfair to the child and disregards findings by both the California Supreme Court and the California legislature.[107] When a man actively participates in the decision to have a child, consents to the insemination process, and intends to raise the child, Section 7613 should entitle him to legal parental status.

During the last few decades, the composition of the family changed dramatically. Even Justice Sandra Day O'Connor noted the difficulty in defining an average American family in today's world, acknowledging that the "composition of families varies greatly from household to household."[108] Although the drafters of the UPA may not have contemplated situations involving separating genetic contributions from gestation or freezing embryos for future use, judges have encountered such fact patterns in

104. The three recent cases decided by the California Supreme Court all involved disputes after relationships ended. *See supra* notes 42–47, 53–56, 63–66 and accompanying text.

105. *See* Sharon S. v. Super. Ct., 73 P.3d 554, 568–69 (Cal. 2003). *See also* CAL. FAM. CODE § 7570(b) (West 2004) ("A simple system. . . [will allow for]. . . an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process.").

106. *Elisa B.,* 117 P.3d at 669.

107. *See supra* notes 101–05 and accompanying text.

108. Troxel v. Granville, 530 U.S. 57, 63 (2000).

their courtrooms. By relying on the UPA's purpose of promoting equal rights of children, courts have interpreted its provisions to establish parentage in these new families. Recent decisions by the California Supreme Court signify California's commitment to adapting the UPA to recognize nontraditional families and ensuring that these parents and children will also benefit from the rights and protections granted through the establishment of parentage.