
What Does It Take To Be A (Lesbian) Parent? On Intent and Genetics

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I. INTRODUCTION

Is the woman who donated her eggs, which were fertilized in vitro and implanted in her lesbian domestic partner, the legal mother of the children born through this process?¹ *K.M. v. E.G.*² is the first lesbian custody

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1. The invasive and time consuming process of oocyte or egg donation consists of several steps: ovarian stimulation, monitoring and egg retrieval and fertilization. The egg donor first takes the drug that reduces the release of hormones controlling the development of the eggs in the ovary. Once the ovarian function is temporarily suspended, daily hormone injections to stimulate ovarian follicles are administered for about two weeks. This phase requires daily monitoring with blood hormone tests and vaginal ultrasounds. When the ultrasound indicates the appropriate level of ovarian stimulation a hormone, called human chorionic gonadotropin, is injected to help the eggs mature. The egg retrieval, which lasts 15-30 minutes, takes place about 34-36 hours after the injection and upon administration of an intravenous anesthetic. Eggs are then taken to the incubator where they are inseminated. Embryos in excess of those needed for transfer are cryopreserved and may be used at a later time in case the conception fails after the transfer or if more children are wanted. The embryo transfer to the uterus is a brief procedure done three days after retrieval. See Mayo Clinic, *The IVF Process*, at <http://www.mayoclinic.org/ivf-sct/process.html> (last visited Feb. 9, 2005).

2. *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Ct. App. 2004), *cert. granted*, 18 Cal. Rptr. 3d 667 (2004). The case received media attention being the first to address the custody dispute between the lesbian egg donor and gestational mother. See Bob Egelko, *Birth Mom Wins Custody Case: Prenatal Agreement Carries Weight, Appellate Court Says*, S.F. CHRON., May 12, 2004, at B1; Mary Vallis, *Lesbian Egg Donor Is Denied Parental Rights: Signed a Waiver: California Ruling Seen As a Major Blow to Same-Sex Couples*, NAT'L POST, May 13, 2004, at A16; Amanda Paulson, *Modern Life Stretching Family Law*, CHRISTIAN SCI. MONITOR, Aug. 10, 2004, at 1; Maura Dolan, *After Gay Parents Split Up*, L.A. TIMES, July 22, 2004, at A1; Peggy Orenstein, *The Other Mother*, N.Y. TIMES, July 25, 2004, § 6, at 24. However, neither the general press nor social science publications have paid much attention to the legal or other aspects of lesbian parenthood such as genetic and gestational mothers. There are no published statistics on egg donation in lesbian couples or on the number of

dispute between an egg donor and a birth mother to reach the highest court of any state. The case is extremely important because the California Supreme Court decision will become a binding precedent for the determination of legal parentage in lesbian couples consisting of genetic and gestational mothers and will serve as a model to other states facing the same issue. Unlike the most frequent scenario in a lesbian custody dispute, where a lesbian who is artificially inseminated using a sperm donor and is a legal mother by virtue of giving birth denies parental rights to her ex-partner after the separation, *K.M. v. E.G.* involves a denial of parental rights to a genetic mother by a non-genetic mother.³ To decide the dispute, the court applied an intent-based parenting doctrine, a judicial device for solving surrogacy cases. The intent to conceive and raise a child alone should never be a dispositive factor in determining parentage because, standing on its own, it makes no difference to the best interest of the child.⁴

By the early 1990s, the custody litigation between separated lesbian partners who had jointly created families was already substantial.⁵ Lesbian custody battles proved to be extremely difficult for both the courts and the

children born this way who may potentially face the hardship caused by the failure of the legal system to recognize one of their parents. The rare piece on the subject of assisted reproductive technologies entitled "18 Ways to Make a Baby" was broadcast by PBS on October 9, 2001. See PBS NOVA, *18 Ways To Make a Baby*, <http://www.pbs.org/wgbh/nova/baby/> (last visited Mar, 1 2005) (featuring Dr. James Grifo, the Director of Reproductive Endocrinology and Infertility at the New York University School of Medicine and the pioneer of human nuclear transfer, who introduced the audience to the numerous ways of conceiving a child using assisted reproductive technology including: artificial insemination, at least ten types of in-vitro fertilization (IVF), cytoplasmic transfer, nuclear transfer and cloning, assisted hatching, fragment removal, co-culture, testicular sperm aspiration (TESA) and many others).

3. *K.M.*, 13 Cal. Rptr. 3d at 139.

4. See Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California To Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 710 (2003).

5. Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 825-26 (2001) [hereinafter *The Impact of Troxel*]. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 462-64 (1990) [hereinafter *This Child Does Have Two Mothers*] (citing *Loftin v. Flournoy*, No. 569630-7 (Cal. Super. Ct., Alameda County., Jan. 2, 1985) the first decision that addressed the issue of parenting where the lesbian couple separated. The case is discussed in E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271 (1986)). The court in *Loftin* found that the partner of a "divorced" lesbian couple was the de facto parent and had standing to seek visitation. The judge used the rationale of general custody law affording custodial visitation rights to nonbiological persons. He said: "I've come to the conclusion that simply because there is no specific statute or case that covers the situation, it does not follow that there isn't a right that can be asserted by Miss. Loftin." E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271, 273 (1986). For a general historical overview of lesbian and gay parent-child relationship case law development see David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 532-542 (1999).

litigants, given the nature of the legal framework within which they had to operate.⁶ The first hurdle for a nonlegal lesbian mother in a child custody dispute is to establish legally recognized status as a parent in order to satisfy the threshold issue of standing to petition for custody.⁷ The second hurdle is to obtain parental rights equal to those already held by the legal lesbian mother by proving that custody and visitation are in the best interest of the child.⁸ The issue in most cases is whether a nonlegal lesbian parent who has no genetic ties and has not given birth to the child can be a legal mother. The courts have used various doctrines in order to grant or deny the status of parent to a nonlegal lesbian mother who petitions for custody and visitation. While the litigation involving lesbian legal and nonlegal mothers arguably resulted in a small step away from biology as a determining factor of parentage,⁹ the compulsive nature of the law continues to force lesbian mothers to assimilate with the heterosexual legal regime if they wish to protect their parental rights. Professor Ruthann Robson examines the process of assimilation as applied to lesbian existence, finding that “[i]t is reciprocal because both sides participate, but it is coercive because only the members of the disadvantaged group must strive to meet the normative standards set by the dominant group, which has the power and the ability to accept or reject members.”¹⁰ This means that a nonlegal lesbian parent will prevail in a child custody and visitation dispute against the legal lesbian mother only if she proves that her conduct successfully imitates the traditional parent-child relationship, and only if the jurisdiction recognizes functional parenting. The courts have developed an equitable principle of functional, de facto or psychological parenthood to award custody to a child’s non legal parent originally defined in *Holtzman v. Knott* by a four prong test requiring that:

1. the legal parent fostered and consented to development of a parent-like relationship between the petitioner and the child;

6. See Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 514-20 (1993) (arguing that lesbian parenthood cannot be addressed by fitting it within the legal system based on heterosexist structure, morality and presumptions).

7. Margaret S. Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 377 (2004).

8. *Id.*

9. Ruthann Robson, *Mostly Monogamous Moms?: An Essay on the Future of Lesbian Legal Theories and Reforms*, 17 N.Y.L. SCH. J. HUM. RTS. 703, 707 (2000) (“Perhaps the revolutionary import of the lesbian nonlegal mother litigation is to dethrone biology and crown ‘reality’ in parenting relations. Or perhaps not. Biology remains primary.”) [hereinafter *Mostly Monogamous Moms*].

10. Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 717 (2002) [hereinafter *Assimilation*].

2. the petitioner and child lived together in the same household;
3. the petitioner assumed the obligations of parenthood by taking responsibility for the child's care, education, and development, including but not limited to financial contribution, and did not expect financial compensation;
4. the petitioner has been in a parent-like relationship a sufficient amount of time to have a bonded relationship.¹¹

A very small number of states recognize lesbian functional parenthood.¹² Most states adhere to the formal statutory definitions of parent—excluding lesbian nonlegal mothers and denying them the protection of the law.¹³ In the battle to gain parental rights for their nonlegal lesbian mother clients, attorneys continue to use the existing law without challenging the underlying concepts and assumptions inherent in the heterosexual structure of society.¹⁴ The need to challenge the underlying principles of the current laws outweighs the need to fit the nonlegal lesbian mother within the law in order to obtain parental rights for any such client. By trying to fit the lesbian mother into the heterosexist legal framework governing parenthood, courts and litigants alike continue to promote a conservative approach to family issues which is removed from reality and which perpetrates gender inequality and discrimination. Even when a genetic relationship between the nonlegal lesbian parent and the child exists, as in *K.M. v. E.G.*, the courts are unwilling to disturb the heterosexual model, which allows for one mother only and favors the one who gave birth regardless of her lack of genetic ties to the child. In order to preserve the traditional family legal framework, judges impose additional and extraneous standards on lesbian litigants, thus perpetuating inequality between lesbian and non-lesbian parents.

11. *Holtzman v. Knott*, 533 N.W.2d 419, 435-36 (Wis. 1995). For a discussion of functional parenting see Ruthann Robson, *Making Mothers: Lesbian Legal Theory & the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 23-30 (2000) [hereinafter *Making Mothers*].

12. See *infra* note 28.

13. See NOLO, *Same-Sex Parenting: When Adoption Isn't Possible*, at <http://www.nolo.com/lawcenter/ency/article.cfm/ObjectID/EE2DACCEC-B377-4DE8-B47557414FB9334C/catID/56932A5A-84E0-4902-A048DBF98CB9A78D> (listing the states where courts denied former same-sex partners visitation without considering the relationship with children they raised together with their ex-partners: California, Florida, Illinois and New York).

14. Ruthann Robson, *Mother: The Legal Domestication of Lesbian Existence*, in ADVENTURES IN LESBIAN PHILOSOPHY 186, 188 (Claudia Card, ed. 1994) [hereinafter *Mother*].

This case note will examine the intent-based parenthood doctrine used by the California Court of Appeal in *K.M. v. E.G.*¹⁵ and its application in denying parental rights to a lesbian egg donor after she separated from her partner. In the first part, this case note will provide the legal background against which the lesbian custody and visitation cases operate. It will present a general overview of the doctrines used to resolve the lesbian parentage issues, focusing specifically on the current state of the law in California. The second part will discuss *K.M. v. E.G.*, including the issue presented, the factual and procedural history, the rules and reasoning applied by the court and the policy behind the rules. The third part of this note will critique the case, focusing particularly on the court's inappropriate use of the intent standard in deciding between two equal statutory claims. Finally, the conclusion will argue that there can be no equality for lesbian parents without challenges to the underlying concepts of the laws governing parentage and to the judicial devices that support unequal treatment of lesbians. By adopting imposed legal norms rather than challenging unfair and discriminatory treatment by the existing legal system, lesbian litigants sustain the status quo of inequality.

II. LEGAL REALITY FACED BY THE LESBIAN EGG DONOR FIGHTING FOR HER CHILDREN

The statutory definition of a parent is based on the traditional belief that a child can have only "one mother and one father, neither more nor less."¹⁶ Accordingly, the mother and father are the only persons whose parental rights and responsibilities are legally recognized. These underlying premises of legal parenthood are inconsistent with reality today because they exclude millions of nontraditional families.¹⁷ Lesbian parenting is especially vulnerable because it destabilizes the hegemony of the heterosexual dichotomy. Application of the male-female schema to the female-female based family results in tension and inconsistency in the law. Since the category of mother is legally reserved for only one person, by biology or adoption, the other lesbian in an intra-lesbian child dispute is automatically relegated to the category of a third-party outsider that includes the lesbian nonlegal mother, the sperm donor, grandparents and other relatives.¹⁸

15. *K.M.*, 13 Cal. Rptr. 3d at 139.

16. Polikoff, *This Child Does Have Two Mothers*, *supra* note 5 at 468.

17. See generally Katharine T. Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (suggesting nonexclusive parenthood as an alternative approach to child custody disputes in which the courts should focus on the child's welfare rather than the parent's rights and allow for alternative arrangements to accommodate the variety of situations that fall outside of the nuclear family such as the case of stepparents, psychological parents and unwed fathers).

18. Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian*

The courts have applied different theories in deciding child custody disputes between lesbians. Four main doctrines exist by which a nonlegal lesbian may acquire a legal status as a parent: equitable estoppel (used to require the legally unrecognized parent to pay child support or to maintain an ongoing parent-child relationship);¹⁹ de facto or psychological parenthood (allows a person to seek visitation rights based on the psychological bond with a child);²⁰ in loco parentis (similar to de facto parenthood, recognizes the parental rights of a person who voluntarily provides financial support or assumes custodial duties);²¹ and second-parent adoption (nonbiological mother adopts the biological mother's child without the need for the latter to relinquish her parental rights).²² Although useful in affording parental rights to the nonlegal lesbian parent where no statutory rights exist, these doctrines have been regarded as problematic by some scholars.²³

Professor Robson is especially critical of the functionalist approach embodied in the de facto parenting concept, which she claims sustains "the dyadic nature of parenthood"²⁴ and reinforces the economic stratification model of society.²⁵ The most significant drawback of the functionalist approach is the unequal treatment of a nonlegal lesbian parent. Unlike a man who acquires fatherhood by marriage to a child's mother, or a biological father who has no connection to the child, the lesbian nonlegal parent is required to prove that her parent-like relationship with a child is sufficient to deem her a parent.²⁶ Additionally, de facto parenting depends on the consent of a legal parent to the nonlegal lesbian parent's relationship with the child, therefore favoring biology and using it as legitimate grounds for discrimination.²⁷ However, the doctrines listed above are not available

Legal Theory, 26 CONN. L. REV. 1377, 1377-78 (1994) [hereinafter *Third Parties and the Third Sex*].

19. See Polikoff, *This Child Does Have Two Mothers*, *supra* note 5 at 491.

20. *Id.* at 510.

21. *Id.* at 502.

22. *Id.* at 522.

23. See Robson, *Mother*, *supra* note 14 at 196 (arguing that the legal regime domesticates lesbians when lesbians use the law against each other, sustaining the oppressive power of the law). See also Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 276-78 (1991) (discussing problems with the functional approach such as the unpredictability of judicial decisions, the manipulation of the functional test to obtain family status benefits without taking obligations, historical use of functionalism by those who are not sensitive to cultural diversity and the inconsistency that the case law would produce); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 (1999) (critiquing strategies designed to achieve a short term survival by denying lesbian identity and dividing lesbian community and pointing out the failure of second-parent adoption to challenge the notion that a child can have only two legal parents).

24. Robson, *Third Parties and the Third Sex*, *supra* note 18 at 1400.

25. *Id.* at 1401.

26. Robson, *Assimilation*, *supra* note 10 at 807.

27. *Id.* at 810.

in every state²⁸ and the lesbian nonlegal parent is often left with a formalist, statutory approach, as in the 1991 New York case of *Alison D. v. Virginia M.*²⁹ In that case the highest court of New York State refused to apply de facto or in loco parentis doctrines and held that, despite her relationship with her partner's child, Alison was not a parent for the purposes of the statute and had no standing to seek custody or visitation.³⁰

That same year, the California Court of Appeal decided *Nancy S. v. Michele G.*³¹ The California court upheld the finding that a lesbian partner who was not a natural or adoptive parent had no standing to seek custody.³² The court adhered to the strict interpretation of the statute, rejecting the doctrines of de facto parenthood, in loco parentis, equitable estoppel and the functional approach.³³ Unlike New York and California, some states have recognized de facto parenting in lesbian custody cases, including: New Jersey,³⁴ Wisconsin,³⁵ Maine,³⁶ Washington,³⁷ Massachusetts,³⁸ Pennsylvania,³⁹ Colorado,⁴⁰ New Mexico⁴¹ and Rhode Island.⁴² The

28. See *infra* notes 34-42 (states that as of 2004 recognize de facto parenting in lesbian custody cases: New Jersey, Wisconsin, Maine, Washington, Pennsylvania, Colorado, New Mexico and Rhode Island). See also Human Rights Campaign, *Second-Parent/Stepparent Adoption Laws in the U.S.*, at http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=13383 (current as of 2004 listing of states that allow same sex second-parent adoption by law or court decision: California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Vermont and District of Columbia; states where second-parent adoption is available in some jurisdictions: Alabama, Alaska, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, Washington; states with court rulings that prohibits same sex second parent adoption: Colorado, Nebraska, Ohio, Wisconsin).

29. For a discussion of a formalistic approach to the *Alison D.* case see Ruthann Robson, *Making Mothers*, *supra* note 11 at 24-27. See also Ettlbrick, *supra* note 6 at 522-32.

30. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991).

31. *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (1991).

32. *Id.* at 836.

33. *Id.* at 836-41.

34. *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (holding that a person who acted as a parent for a long time is a psychological parent).

35. *Holtzman v. Knott*, 533 N.W.2d 419, 431 (Wis. 1995) (holding that the trial court had equitable authority to award visitation rights to a person who established a parent-like relationship with a child).

36. *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (holding that a lesbian partner was a de facto parent entitled to parental rights and responsibilities based upon determination of the best interest of the child).

37. *In re Parentage of L.B.*, 89 P.3d 271 (Wash. Ct. App. Div. 1 2004) (holding that a parent who proved the existence of de facto parent-child relationship could petition for shared parentage or visitation).

38. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (holding that a person who lived with a child and participated in the child's life with the consent of a legal parent sharing all parental functions was de facto parent and had standing to seek visitation which was found to be in the best interest of the child).

39. *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (holding that a lesbian partner had standing under in loco parentis doctrine where the partners jointly decided to conceive and

Washington Court of Appeals in *In re Parentage of L.B.* acknowledged that

[t]he recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parental relationships with both parents, whether those parents are legal or de facto.⁴³

Many courts, however, continue to adhere to the legal construction of motherhood and fatherhood based on the explicit or tacit assumptions of natural law, which posit the normative model of a nuclear family as consisting of biological mother and financially providing father.⁴⁴ Likewise, most of the statutes embody the traditional nuclear family concept and continue to discriminate on the basis of gender, consequently granting parental rights to men who assume the role of a parent while denying them to women who assume the same role.⁴⁵ Ironically, California permits joint and second parent adoption for same-sex couples but retains a statutory model based on biology and the traditional nuclear family.

The California statutory scheme for the determination of parentage is outdated and does not address many issues related to parentage in cases of assisted reproduction.⁴⁶ California adopted the Uniform Parentage Act (hereinafter UPA), codifying it as part of family law in 1975. Since then the UPA was amended in 2002⁴⁷ to include assisted reproduction and

parent the child).

40. *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004) (granting joint custody to a lesbian partner based on the psychological parent doctrine).

41. *A.C. v. C.B.*, 829 P.2d 660 (N.M. App. 1992) (holding that a lesbian partner who had a written agreement but was denied continuing the child had standing).

42. *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (holding that the agreement between the biological mother and former same-sex partner to allow visitation was enforceable).

43. *In re Parentage of L.B.*, 89 P.3d at 284.

44. Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 323 (2003).

45. *Id.* at 319.

46. Miller, *supra* note 4, at 640.

47. UNIF. PARENTAGE ACT (amended 2002), available at <http://www.law.upenn.edu/bll/ulc/upa/final00.htm> (last accessed April 6, 2005)

The amended or revised Act includes under Definitions § 102 (4):

'Assisted reproduction' means a method of causing pregnancy other than sexual intercourse. The term includes:

- (A) intrauterine insemination;
- (B) donation of eggs;
- (C) donation of embryos;
- (D) in-vitro fertilization and transfer of embryos; and
- (E) intracytoplasmic sperm injection.

Although the revision included assisted reproduction (Article 7) and gestational agreements

though approved by the American Bar Association in 2003, only four states have adopted the revised version: Delaware, Texas, Washington and Wyoming.⁴⁸ The main purpose of the UPA was “to eliminate the legal distinction between legitimate and illegitimate children.”⁴⁹ The UPA creates three classes of parents: mothers,⁵⁰ fathers who are presumed fathers,⁵¹ and fathers who are not presumed fathers.⁵² The only section pertaining to assisted reproduction is found in Family Code § 7613, which provides that a husband who consents to his wife’s artificial insemination under the supervision of a physician is treated in law as the natural father.⁵³ There is no provision pertaining to women involved in assisted reproduction or unmarried persons in general. The statute provides three methods of proving a parent-child relationship: natural mother by birth, natural father by rebuttable presumption⁵⁴ and adoptive parent proved by adoption.⁵⁵ The statute lacks a provision about ovum donation and in vitro

(Article 8), it failed to recognize lesbian parentage. Section 702 states: “A donor is not a parent of a child conceived by means of assisted reproduction.” The accompanying Comment to § 702 states:

If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation.

However, Article 8 recognized “intended parent” as a legal parent in surrogacy agreements only. Thus, § 201 provides the following ways to establish mother-child relationship:

- (1) the woman’s having given birth to the child, [except as otherwise provided in [Article] 8];
- (2) an adjudication of the woman’s maternity; [or]
- (3) adoption of the child by the woman; [or]
- (4) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law.

48. *Uniform Family Law Acts Update*, (Oct. 2003), available at http://www.nccusl.org/nccusl/newsletters/FamilyLaw_PrintOct03.pdf (“UPA has been adopted in Delaware, Texas, Washington, and Wyoming, and at least 8 more introductions are planned for 2004.”).

49. *Johnson v. Calvert*, 19 Cal. Rptr. 2d 494, 497 (Cal. 1993).

50. CAL. FAM. CODE § 7610(a) (West 2004).

51. *Id.* § 7611.

52. *Id.* § 7611.5.

53. *Id.* § 7613(a).

54. See *Miller*, *supra* note 4, at 685. Miller notes that California is the only state that maintains the conclusive presumption of paternity, namely that when the married woman has a child, her husband is presumed to be the father if she lived with him at the time of the conception. The constitutionality of the fatherhood presumption was upheld by the Supreme Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In that case the genetic father failed to rebut the presumption by the motion for blood test which could only be done by husband or wife when the natural father filed a paternity acknowledgment within two years of the child’s birth. *Michael H.*, 491 U.S. at 115. California legislature subsequently revised the statute to allow the presumed father to rebut the presumption. CAL. FAM. CODE § 7541(b) (West 2004).

55. CAL. FAM. CODE § 7610(c) (West 2004).

fertilization comparable to Family Code § 7613 (d), which severs the parental rights of a sperm donor.⁵⁶

Under the UPA, a woman can prove that she is a natural mother by giving birth to the child or through a blood test establishing genetic consanguinity.⁵⁷ Assisted reproduction technology makes it possible for a child to have more than one mother who will fit the UPA definition of a natural mother. However, California law recognizes only one natural mother.⁵⁸

The highest court in California resolved the issue of two natural mothers in *Johnson v. Calvert* by applying the intent doctrine of parenthood.⁵⁹ In *Johnson*, a married couple, Crispina and Mark Calvert, sought a declaration that they were the natural parents of the unborn child.⁶⁰ The couple contracted with a gestational surrogate, Anna Johnson, to carry the baby created by in vitro fertilization with Crispina's fertilized egg.⁶¹ When the relationship between the couple and Anna deteriorated, Anna changed her mind and decided to keep the baby.⁶² The court held that where the UPA recognizes giving birth and genetic consanguinity as methods of establishing a mother-child relationship, and where the methods do not coincide in one woman, the one 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 under California law."⁶³ Because each woman had valid proof of maternity, the court turned to the intent of the surrogacy agreement.⁶⁴

Without discussing the general difficulty of determining intent, the court turned to the "but for" test, using the intent at the child's conception as a fixed measure against which everything else had to be balanced: "They affirmatively intended the birth of the child, and took the steps necessary to affect in vitro fertilization. But for their acted-on-intention, the child would not exist."⁶⁵ The court rejected the best interest of the child standard as inapplicable in the case of parentage determination.⁶⁶ Instead, it found support for its intent-based approach in legal scholarship that promotes the

56. See Miller, *supra* note 4, at 668 (citing the only five states with statutory provisions that address the issue of egg donation and in vitro fertilization: Florida, North Dakota, Oklahoma, Texas and Virginia).

57. *Johnson*, 19 Cal. Rptr. 2d at 496-497.

58. *Id.* at 499 n.8 (declining to accept the ACLU invitation to find that the child had two mothers because recognizing parental rights of the third party would diminish the role of the legally recognized mother).

59. *Id.* at 500.

60. *Id.* at 496.

61. *Id.*

62. *Id.*

63. *Johnson*, 19 Cal. Rptr. 2d at 500.

64. *Id.*

65. *Id.*

66. *Id.* at 500 n.10.

intention of those who are creators and originators of the procreative relationship as dispositive in awarding parental rights.⁶⁷ In rejecting the best interest of the child standard, the majority considered parentage and custody as two separate concepts and concluded, “[l]ogically, the determination of parentage must precede and should not be dictated by, eventual custody decisions.”⁶⁸ However, the court did not demonstrate the logic of strict separation between parentage and custody issues, given the co-existing and interdependent relation between the two.

Dissenting Justice Kennard rejected intent as a determinative factor and instead argued that both the woman who gave birth and the woman who provided the ovum had a strong claim to legal motherhood.⁶⁹ Justice Kennard argued for the application of the best interest of the child standard as the most protective of the child’s welfare.⁷⁰ The dissenting opinion included a careful description of the egg retrieval method, which emphasized the emotional and physical burden on a woman undergoing this procedure.⁷¹ The dissent criticized the majority’s use of intent to resolve the parentage dispute because the concept of intent derives from the principles of tort, intellectual property and commercial contract law.⁷² Justice Kennard stated that the major problem with the inflexible intent rule was that its application will not serve the best interest of the child in every case.⁷³

Some saw the decision as groundbreaking,⁷⁴ and one author optimistically noted that the *Johnson* decision opened a possibility for both women in a lesbian couple to be determined mothers.⁷⁵ Others criticized the decision,⁷⁶ pointing out that maternity as defined by the *Johnson* court

67. *Id.* at 500-01 (citing three articles to justify the intent based approach to the determination of motherhood: John Lawrence Hill, *What Does it Mean to Be a “Parent”?: The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990); Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986)).

68. *Id.* at 500.

69. *Johnson*, 19 Cal. Rptr. 2d at 506 (Kennard, J., dissenting).

70. *Id.*

71. *Id.* at 508.

72. *Id.* at 517.

73. *Id.* at 516.

74. *Changing Realities of Parenthood: The Law’s Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2071 (2003).

75. Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL’Y & L. 207, 221 (2001).

76. Janet L. Dolgin, *The “Intent” of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1281 n.63 (1994) (examining *Johnson*, Dolgin noted the class and race issues that were present citing Don J. DeBenedictis, *Surrogacy Contract Enforced*, 77-JAN. A.B.A. J. 32, 33 (1991) which described Anna as part Black, part Native American, part Irish and a welfare recipient).

is very fragile.⁷⁷ The underlying contradiction of identifying motherhood by nature, which excludes intent, compared with identifying motherhood by contractual choice, which is based on intent, remained unresolved by the court.⁷⁸ The majority's decision to use intent as a tie-breaker where two mothers' interests compete and to ignore the best-interest-of-the-child standard also remains problematic.⁷⁹ The question that remained unanswered by *Johnson* is whether the intent rule should be applied in all other cases of assisted reproduction, including those between lesbian co-parents.⁸⁰

III. GENETIC MOTHER V. GESTATIONAL MOTHER

K.M. and E.G. started an intimate relationship in June 1993 and registered as a domestic partnership in San Francisco in October 1994.⁸¹ After telling K.M. about her desire to become a parent, E.G. attempted artificial insemination but was unsuccessful because she was unable to produce enough eggs to become pregnant.⁸² At the suggestion of her doctor, E.G. agreed to in vitro fertilization with K.M.'s eggs, provided that she would be the only mother because she did not want custody battles in the future.⁸³ E.G. stated she would consider adoption by K.M. but not for at least five years. She believed that after five years, the relationship would seem more permanent.⁸⁴ K.M. agreed and in March 1995 started the egg retrieval procedure, after signing the ovum donor consent form.⁸⁵

E.G. gave birth to twin girls on December 7, 1995, and asked K.M. to marry her shortly thereafter.⁸⁶ For the next five years, E.G., K.M. and the twins lived together as a family.⁸⁷ Neither E.G. nor K.M. disclosed to anyone that K.M. was the genetic mother.⁸⁸ In 1998 the couple started arguing about whether to tell the twins they were genetically related to K.M.⁸⁹ K.M. insisted on adoption but E.G. was reluctant.⁹⁰ In March of 2001 the couple separated, and K.M. filed a petition to establish a parental relationship.⁹¹ She dismissed the petition after a short reconciliation but

77. *Id.* at 1295.

78. *Id.* at 1289.

79. Miller, *supra* note 4, at 663.

80. *Id.* at 665.

81. *K.M.*, 13 Cal.Rptr.3d at 139.

82. *Id.* at 140.

83. *Id.*

84. *Id.*

85. *Id.* at 140-41.

86. *Id.* at 141.

87. *K.M.*, 13 Cal.Rptr.3d at 141.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 142.

filed a new one in February 2002 seeking joint custody.⁹² The trial court found that K.M. was not a legal parent because she relinquished her parental rights when she signed the ovum donor consent form.⁹³ Additionally, the trial court held that the parties' oral agreement that E.G. be the sole parent was not changed by their subsequent conduct.⁹⁴ Because K.M. was not a legal parent and consequently lacked standing to seek custody and visitation rights, the trial court granted E.G.'s motion to quash and dismiss the petition.⁹⁵

The issue on appeal was whether K.M. qualified as a parent and was entitled to custody and visitation. The court applied the intent test articulated in *Johnson*. It found that K.M. had standing under the UPA because her genetic consanguinity qualified her as an interested party who can bring an action to determine a mother-child relationship.⁹⁶ However, the court affirmed the trial court's ruling that E.G. was the only legally recognized parent under the UPA.⁹⁷ In discussing the parties' parentage intentions the court considered three factors: the oral agreement between the parties that E.G. would be the only parent;⁹⁸ the ovum donor consent form containing the waiver of the donor's parental rights;⁹⁹ and the parties' relationship at the time of conception.¹⁰⁰ Although the court recognized that the determination of parentage does not depend on the existence of a binding contract, it found the oral agreement significant to the extent that it evidenced an intention that E.G. would be the only parent until the adoption by K.M.¹⁰¹ The court then analogized the ovum donor form with a sperm donor form, finding express intent by K.M. to be only the donor and not the parent of any child created from her eggs.¹⁰² Finally, while recognizing the legal distinction between a mere egg donor and an intending parent, and acknowledging the evidence was conflicting on whether the parties intended joint parenthood or wanted to raise the child solely as E.G.'s child, the court affirmed the trial court's finding that at the time of conception it was E.G. who affirmatively intended to be the mother

92. *Id.*

93. *K.M.*, 13 Cal.Rptr.3d at 143.

94. *Id.*

95. *Id.*

96. *Id.* at 144 (quoting *Johnson*:

The parent and child relationship for the "natural mother" may be established "by proof of her having given birth to the child, or under [the UPA]." (Fam.Code. § 7610, subd. (a).) the California Supreme Court has rejected the notion that only the woman who gives birth to a child qualifies as the "natural" mother: "The disjunctive 'or' indicates that blood test evidence [reflecting genetic consanguinity], as prescribed in the Act, constitutes an alternative to proof of having given birth." (*Johnson*, at 92)).

97. *Id.*

98. *Id.* at 146-47.

99. *K.M.*, 13 Cal.Rptr.3d at 147-48.

100. *Id.* at 148-50.

101. *Id.* at 146.

102. *Id.* at 148.

of the child.¹⁰³

The next step in the court's deliberation was to examine the parties' conduct subsequent to the birth of the child. The court refused to apply a statutory presumption of parentage on the grounds that K.M.'s genetic consanguinity was not disputed.¹⁰⁴ It rejected the concept of the functional parent based on the rationale that functioning as a parent does not confer legal parental rights.¹⁰⁵ It also rejected the doctrine of equitable estoppel citing the policy concerns in *Nancy S. v. Michele G.* that granting equitable estoppel would expose other natural parents to legal action by long term child-care providers, relatives, successive stepparents or other close family friends.¹⁰⁶ The court finally refused to apply the best interest of the child standard, confirming the *Johnson* limitation of that standard only to custody and visitation cases and not to determination of parentage.¹⁰⁷ The trial court's judgment was affirmed.¹⁰⁸ Two judges concurred without publishing a separate opinion.¹⁰⁹

IV. WHAT WENT WRONG IN THE COURT OF APPEAL?

The original Court of Appeal's opinion in *K.M. v. E.G.*,¹¹⁰ decided on May 10, 2004, was modified on June 9, 2004, when the petition for rehearing was denied without a change in the judgment.¹¹¹ The modification consisted of twenty-nine changes deleting the word "legal" in "legal parent," so that, for example, the phrase "only legal mother" was changed to "only mother." The language of the opinion now 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."¹¹² The second sentence of the opinion, which used to read, "The couple orally agreed that only E.G. would be the legal parent unless and until there was a formal adoption,"¹¹³ now reads: "The couple orally agreed that E.G. would be the only parent unless and until there was a formal adoption."¹¹⁴

No one would doubt that there is a fundamental difference between an agreement of two parties that only one would be the legal parent until formal adoption by the other and an agreement that one would be the only

103. *Id.* at 149.

104. *Id.* at 152.

105. *K.M.*, 13 Cal.Rptr.3d at 152.

106. *Id.* at 153 (quoting *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991)).

107. *Id.* at 154.

108. *Id.*

109. *Id.*

110. *K.M. v. E.G.*, 118 Cal. App. 4th 477 (Cal. Ct. App. 2004).

111. *K.M. v. E.G.*, No. A101754, 2004 Cal. App. LEXIS 873 (Cal. Ct. App. Sept. 1, 2004).

112. *Id.* at *1.

113. *K.M.*, 118 Cal. App. 4th at 481.

114. *K.M.*, 13 Cal. Rptr. 3d at 139.

parent until formal adoption. The attribute “only” is exclusionary; it presumes “the only parent” to mean the sole parent without any possibility of the other person having the same role. On the other hand, the qualifier “legal” is a classifying attribute rather than an exclusionary one and does not seem to preclude the collateral existence of other forms of parentage. For example, being a legal parent of a child does not prevent the existence of a stepparent¹¹⁵ or foster parent¹¹⁶ at the same time. The modified statement of the agreement that E.G. would be the “only parent” is more difficult to challenge than the statement that E.G. would be the “legal parent.” The court seemed to have decided at the outset that E.G. would prevail, because when it changed “legal parent” to “only parent” it failed to address the apparent contradiction of a mother who intended to be the only parent nonetheless allowing the other party to assume parental duties and responsibilities for six years. In an example of a similar modification, “sole legal parent” was changed to “sole parent” in the following phrase: “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.”¹¹⁷ Other changes include the replacement of “natural motherhood” with “parenthood”¹¹⁸ and “second legal parent” with “second parent.”¹¹⁹

Two more changes were detrimental to K.M.’s case. First, in the sentence, “[t]hat evidence showed that the parties intended to maintain their relationship into the future and, at least implicitly, planned to raise together any child formed from K.M.’s donated eggs,” the court modified “raise together” to read “provide a home together.”¹²⁰ The court will use this change to support its finding that K.M. did not intend to raise the children but only to donate her eggs and “facilitate the procreation of a child for E.G.”¹²¹ Second: “E.G.’s testimony that K.M. orally agreed to E.G.’s sole parenthood was confirmed by the conduct of both parties after the birth of the children in keeping K.M.’s genetic connection secret for years.” The court added to this sentence the following: “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.”¹²² This added sentence reflects the same contradiction mentioned above between

115. The terms are defined as follows: “stepfather. The husband of one’s mother by a later marriage.” and “stepmother. The wife of one’s father by a later marriage.” BLACK’S LAW DICTIONARY 1425 (7th ed. 1999).

116. *Id.* at 1137 (defining “foster parent. An adult who, though without blood ties or legal ties, cares for and rears a child, esp. an orphaned or neglected child that might otherwise be deprived of nurture.”).

117. *K.M.*, 13 Cal. Rptr. 3d at 145.

118. *K.M.*, No. A101754, 2004 Cal. App. LEXIS 873 at *3.

119. *Id.* at *7-8.

120. *Id.* at *6.

121. *K.M.*, 13 Cal. Rptr. 3d at 149.

122. *K.M.*, No. A101754, 2004 Cal. App. LEXIS 873 at *7.

the intention to be the only parent and conduct permitting the other party to assume the role of the parent for years. However, the court refused to discuss the parties' conduct or circumstances after the birth of the children.¹²³

The negative effect that these changes will have on K.M. is evident. Interestingly, K.M.'s counsel barely mentions this detrimental change that affected their client in the Appellant's Petition for Review.¹²⁴ Perhaps they did this because they also put forward the fact that Assembly Bill 205, which went into effect in January 2005, would provide that "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."¹²⁵ Although Bill 205 is not retroactive, the legislative purpose behind its enactment is clearly the elimination of discrimination and discriminatory effects that many current laws have on lesbians, gays and bisexuals.¹²⁶ However, here as in many other litigations concerning lesbian parental rights, the immediate goal of providing desired relief to a client is paramount and the means used to achieve it cannot fall outside of the dominant legal framework.¹²⁷ In order to succeed in their claim, lesbians are compelled to use legal strategies and tools familiar to judges but not designed for lesbians. They are expected to adjust their claims to a legal framework that does not recognize lesbians. They are compelled to adopt the concepts governing the existing legal framework even if those concepts are inapplicable to lesbian existence. To

123. *K.M.*, 13 Cal. Rptr. 3d at 151 (dismissing entirely the parties' conduct and the development of the relationship between the parties and between the parties and their children. In a two-sentence paragraph entitled "IV. Effect of the Parties' Subsequent Conduct," the court, without providing any justification or adequate reasoning, stated: "K.M. has suggested that we should alternatively consider circumstances occurring after birth of the child, namely, the parties' 'social, psychological and functional parental relationships' with the child and the best interest of the child. We cannot agree.")

124. *See K.M. v. E.G.*, No. S125643, 2004 WL 2108127, at *12 (Cal. Ct. App. Sept. 1, 2004) (citing the language from the original opinion that "the parties planned to raise together any child formed from K.M.'s donated eggs.")

125. *Id.* at *6 (citing CAL. FAM. CODE § 297.5(d) (West 2004)).

126. The Bill states:

The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together. Many of these couples have sought to protect each other and their family members by registering as domestic partners with the State of California and, as a result, have received certain basic legal rights. Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.

A.B. 205, 2003-2004 (Cal. 2003-04).

127. *See Shapiro, supra* note 23, at 18 (arguing that "strategies aimed at short-term survival rely on the denial of lesbian identity.").

secure their basic rights, lesbian parents need to fit into traditional categories of the hetero-normative structure. It is not sufficient that a genetic mother satisfies the statutory requirement for parental status; she has to do more.¹²⁸ Unlike a sperm donor, who would be entitled to the status of father in a custody dispute with a lesbian birth mother,¹²⁹ a lesbian egg donor must resort to proving that she qualifies as the “presumed father.”¹³⁰ To prevail, lesbians are willing to adopt nonlesbian legal categories, thereby sustaining their inequality and confirming the validity of the existing judicial practices.

The uncritical adoption of the rules of law and its manipulation through litigation strategy to achieve a favorable result in a particular case is criticized by Professor Robson. She asserts that lesbians are domesticated¹³¹ by law when they internalize the legal regime of the dominant culture without challenging its underlying notions.¹³² Robson concludes: “If we are ever to move beyond our domestication and ensure lesbian survival on lesbian terms, we must theorize against the dominant discourse of the legal regime, including the legal regime that codifies the category mother.”¹³³

A. IMPOSING THE STANDARD

The decision of the appellate court in *K.M.* suffers from many flaws. The biggest one is the imposition of an unjustified and unnecessary additional standard on a parent who qualifies as a natural mother under the UPA to petition for custody and visitation.¹³⁴ Another problem with the opinion is that the court does not explain why it applied the *Johnson* intent test in the case of an egg donor who was the genetic mother of the children and who had an established parent-child relationship with them for the first six years of their lives. Other than stating “[b]ecause we believe that the ‘intention’ test set out in *Johnson v. Calvert* . . . governs,”¹³⁵ the court does not even hint at why it thinks this rule, formulated to address the surrogacy case, applies to a lesbian genetic mother who developed a parent-child

128. *K.M.*, 13 Cal. Rptr. 3d at 144-45.

129. Robson, *Mother*, *supra* note 14, at 192.

130. *K.M.*, 13 Cal. Rptr. 3d at 151-52.

131. Robson defines “domestication”:

The law can interfere with both the tangible and intangible types of survival in many ways, one of which is a process I call domestication. Domestication is similar to other political processes that have been named colonization and imperialism. Yet both imperialism and colonization describe concrete historical processes that have resulted in slavery, death, and destruction, and I have come to prefer the term ‘domestication’ to connote the law’s hegemony over lesbian survival. Domestication is connotatively gendered.

Robson, *Mother*, *supra* note 14, at 186.

132. *Id.* at 186-87.

133. *Id.* at 197.

134. *K.M.*, 13 Cal. Rptr. 3d at 143-44.

135. *Id.* at 139.

relationship with the children for six years while living with them. This is not surprising given that the court in *Johnson* never explicitly said why it used that test.¹³⁶ Even the language announcing the test is similar to the *Johnson* opinion: “[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties’ intentions as manifested in the surrogacy agreement.”¹³⁷ The only similarity between *Johnson* and *K.M.* is the presence of a genetic and gestational mother. The factual background and surrounding circumstances are entirely different, making it more difficult to understand why the surrogacy case standard was applied to a non-surrogacy situation. The *K.M.* court fails to address the crucial distinction between the parentage dispute in *Johnson* and the one in *K.M.*, namely the different number and nature of interested parties: three in *Johnson* involving the “third party” and two in *K.M.* not involving the “third party.” As the word indicates, the third party doctrine developed as a way to preserve the traditional heterosexual family model of two parents, one mother and one father, thus keeping any third party out of this model.¹³⁸ The third party doctrine operated in the *Johnson* surrogacy case, eliminating the third party surrogate in favor of the husband and wife, to preserve the father and mother heterosexual dyad.

Although the California statute is silent on surrogate motherhood, the courts generally endorse gestational surrogacy.¹³⁹ Rather than enforcing the surrogacy contract, the court in *Johnson* opened the door to confusion and subsequent misapplications of the intent test. It seemed that the *Johnson* court replaced biology with intent as a ground for maternity. Actually, the court only found a different tool to support the traditional nuclear family consisting of a husband and wife who cannot conceive the child on their own.¹⁴⁰ This replacement is consistent with the legislative intent to protect the role of the father by including under the UPA the presumed father provision granting parental status to husbands who are not “natural” fathers.¹⁴¹ The *Johnson* court ruled in favor of the genetic mother who was married, creating a presumption that because she intended to be the mother, she would also be the better mother.¹⁴²

136. Miller, *supra* note 4, at 663.

137. *Johnson*, 19 Cal. Rptr. 2d at 500.

138. Robson, *Third Parties and the Third Sex*, *supra* note 18, at 1390.

139. Miller, *supra* note 4, at 670-72.

140. See Dolgin, *supra* note 76, at 1286-87 (arguing that the notion of intent used by the court in *Johnson* was designed to preserve the traditional understanding of the natural connection on which the family is based making the intent productive of familial connections. In essence, the court did nothing more than replace the assumption of the traditional family in case of the blood connection with a new assumption of traditional family with intent as a foundation.)

141. CAL. FAM. CODE § 7611 (West 2004).

142. *Johnson*, 19 Cal. Rptr. 2d at 500.

The case of *K.M.* is factually different from *Johnson* because *K.M.* is the unmarried genetic mother who, jointly with her partner, decided and participated in the creation of her family and acted as a parent to her children for the six years after they were born, clearly establishing a socially recognized parent-child relationship. In *Johnson*, neither Crispina nor Anna had any other relationship to the child other than biological: one was the gestational and the other was the genetic mother. The issue was being resolved before the child was born, while the issue in *K.M.* was being resolved when the children were six years of age and the parental relationship between the genetic mother and the children was already well established. Unlike Anna in the *Johnson* case, who contracted her services with the Calverts in exchange for \$10,000, *K.M.* did not have a surrogacy agreement or any other contract with E.G. and was not compensated for donating her eggs. Also unlike Anna, who was a stranger to the Calverts before she contracted with them and became their adversary during her pregnancy, *K.M.* had a long-term familial relationship with the recipient of her eggs. This relationship was acknowledged by the court: "For the next five years, E.G. and *K.M.* and the twins continued to live together as a family unit."¹⁴³ Unlike Anna, who was a third party and had no existing relationship with the Calverts before the birth in *Johnson*,¹⁴⁴ *K.M.* was not a third party and had a legally recognized relationship with her partner. These differences were entirely ignored by the court in *K.M.*

The court in *K.M.* used intent in the same fashion in which it was used in *Johnson*, by applying it to preserve the concept of the traditional family that allows only for one mother: here the one who bore the child. Had the court not disregarded *K.M.*'s explicit oral and implied intent to create the family and the subsequent conduct confirming that intent, it would have found in favor of *K.M.*, a genetic mother who, just like genetic mother Crispina, intended to create and bring up the children as her own. The inequality of treatment is unjustified considering the fact that the *Johnson* court was willing to afford parental status to a married genetic mother before the child was even born, while the court in *K.M.* denied that status to a genetic mother who raised her children for six years in a legally recognized relationship. The only difference between the two women is that *K.M.* was a lesbian. Both *Johnson* and *K.M.* are consistent with traditional court decisions: the *Johnson* court awarded parentage to the well-situated Filipina married to a white husband over the Black-Native American mother,¹⁴⁵ while the *K.M.* court awarded the lesbian birth mother

143. *K.M.*, 13 Cal. Rptr. 3d. at 141.

144. 19 Cal. Rptr. 2d at 499 n.8 ("To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.")

145. Dalton, *supra* note 44, at 303 (citing Janet Dolgin, *Just a Gene; Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 676 (1993)).

custody over the genetically-related lesbian mother who was neither married nor gave birth.¹⁴⁶ However, while the court in *Johnson* based its decision on the intent of the genetic mother to procreate and raise the child, as evidenced by the surrogacy contract,¹⁴⁷ the court in *K.M.* disregarded the intent of K.M. to procreate and raise the child and based its decision on the alleged intent of the birth mother.¹⁴⁸

By choosing to apply the intent standard without providing a policy-based justification for its use as a dispositive factor for the determination of parentage in an assisted reproduction case with a lesbian egg donor, the court created uncertainty and the potential for confusion in future applications of the standard. Without establishing clear guidelines as to whose intent is being reviewed, the exact objective of intent, and what precise timing of the intent is required, the court embarked on a dangerous path to disastrous future decisions depriving individuals of their parental rights and, more importantly, deprive children of their parents.

B. INTENT AS A DETERMINING FACTOR OF PARENTAGE

The subjective and loose intent standard should not have been applied by the court in *K.M. v. E.G.* Once the court determined that K.M. satisfied the statutory requirement of establishing a mother-child relationship, thus acquiring the status of a parent, the court should have proceeded with the best interest of the child standard in solving the issue of custody and visitation. The court unjustifiably burdened K.M. with an additional standard devised to solve the custody dispute between a genetic and gestational mother in a surrogacy case. As articulated by the dissent in *Johnson*, the intent test used as a tie breaker in the determination of parentage was inappropriate in that case because both the woman who provided eggs and the woman who gave birth had "substantial claims to legal motherhood."¹⁴⁹ Even in *Johnson*, the court should have proceeded with the best interest of the child analysis after it determined that both women satisfied the statutory definition of mother.

The concept of intent is not incorporated as a determinative factor in any provision of the California UPA.¹⁵⁰ Although words of consent appear in provisions about the presumption of fatherhood and the artificial insemination of a married woman, there is no intent requirement in any of the methods of establishing parentage. Judicial use of intent as the ultimate

146. See Dolgin, *supra* note 76 at 1284 n.74 ("See Appellant's Reply Brief at 4, Anna J., 286 Cal. Rptr. 369 (No. 6010225) (arguing that class differences between parties informed trial court decision: 'The trial court's knowledge of the Calverts was essentially limited to their economic wealth i.e. their ability to afford a new Mercedes Benz automobile which impressed the trial court.')").

147. 19 Cal. Rptr. 2d at 500.

148. *K.M.*, 13 Cal. Rptr. 3d at 139.

149. *Johnson*, 19 Cal. Rptr. 2d at 506 (Kennard, J., dissenting).

150. *Id.* at 513.

determinative factor of parentage in assisted reproduction cases is misplaced because, without clear guidelines on the identification of intent, the courts will be bound to misapply the test, resulting in inconsistencies with devastating consequences for parents.¹⁵¹

The court did not indicate whose intent controls when two women both qualify as mothers under the UPA and what other factors determine who prevails if both qualified mothers demonstrate intent. What if neither qualified mother satisfies the intent requirement? The court assumed that one party would always be able to demonstrate the presence of intent while the other would not. The court also neglected to explain what the intent has to relate to: intent to procreate; intent to raise the children; intent to procreate and raise the children independently; intent to procreate and raise children together; intent to procreate and raise the children but not be a legal mother; or some other intent. It further failed to specify the exact time when the required intent must be present: prior to conception; at the conception; during pregnancy; after birth of children; at the time of the alleged dispute or some combination of all these time periods.

The intent inquiry in *Johnson* focused on the surrogacy contract between Anna and Crispina that was negotiated and prepared by an attorney and signed by both parties.¹⁵² It provided for monetary compensation of \$10,000 to Anna in return for her waiver of parental rights.¹⁵³ Although the court in *Johnson* did not address the issue of contract enforcement, it was nevertheless able to consider the parties' intent based on its nature, reasoning that "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."¹⁵⁴

The *K.M.* case is distinguished because the ovum donor form signed by K.M. in the hospital was no more than a preprinted medical form providing for the patient's consent to the procedure.¹⁵⁵ Unlike the surrogacy contract, this form is not a bargained-for exchange between the donor and provider. Even more significantly, it does not contain any provision or explicit intent that E.G. would be the only legal parent of the children. The consent form concerned the patient-hospital relationship and was not an intended, voluntarily chosen agreement between the egg donor and recipient. As the

151. Dolgin, *supra* note 76, at 1274.

152. *K.M.*, No. S125643, 2004 WL 2108127 at *21-22, *petition for rev. filed* (citing Andrew E. Vorzimer, *The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract*, 21 WHITTIER L. REV. 415, 416 (1999)).

153. *Johnson*, 19 Cal. Rptr. 2d at 496.

154. *Id.* at 514 (quoting Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (1990)).

155. The ovum donor consent form was provided by the U.C.S.F. Medical Center and was signed by K.M. at the hospital in order to begin the egg retrieval procedure. *K.M.*, 13 Cal. Rptr. 3d at 141-42.

Appellant's Petition for Review points out, the reliance of the *K.M.* court on the egg donor form as evidence of the intent of either K.M. or E.G. "is inconsistent with public policy."¹⁵⁶ K.M. and E.G. did not participate in the creation of the form, and the form did not reflect their relationship. Thus the court's conclusion that "[t]he donor consent form confirms that E.G. was intended to be the natural mother and sole parent, while K.M. was the ovum donor"¹⁵⁷ was erroneous. Even though K.M. signed the form, it was entirely inappropriate for her situation because it contained the provision requiring that she not attempt to discover the identity of the recipient of her egg,¹⁵⁸ despite the fact that she had a registered partnership with E.G. and that the only reason why she was consenting to the egg retrieval was their joint decision to procreate and raise the children.

The court in its opinion made statements difficult to comprehend, including: "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."¹⁵⁹ If all the evidence leads to the conclusion that there is a legally recognized long-term relationship during which two parties jointly procreate and raise children, the basis of the court's finding remains a mystery. The court never elaborates. The court also failed to mention any constitutional concerns¹⁶⁰ arising from the use of a preprinted egg donor form to waive parental rights without the representation of an attorney or adequate notice about the implications of such a waiver even after it concluded that under the UPA, K.M. qualified for the status of parent.¹⁶¹

The court in *K.M.* quickly dismissed any inquiry into the oral agreement between K.M. and E.G. about their intentions regarding the birth of the child and about raising children together. It accepted the trial court's

156. *K.M.*, No. S125643, 2004 WL 2108127 at *23.

157. *K.M.*, 13 Cal. Rptr. 3d at 148.

158. *K.M.*, No. S125643, 2004 WL 2108127 at 21-23 n.8.

159. *K.M.*, 13 Cal. Rptr. 3d at 148.

160. This case note does not address constitutional issues of nonlegal parents and children as that would be a separate topic in itself. For a general background on the discussion of constitutional aspects of custody and visitation cases as applied to lesbian nonlegal parents, see generally Polikoff, *The Impact of Troxel*, *supra* note 5 (analyzing *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) and *Gestl v. Frederick*, 754 A.2d 1087 (Md. Ct. Spec. App. 2000); discussing successful cases recognizing de facto parenthood supported by the ALI Principles affording full parental rights to a parent by estoppel who is not legally recognized). Polikoff argues that the courts should distinguish lesbian and gay nonlegal parents from third parties and should afford them parental status while protecting at the same time parent-child relationship from the intrusion of unwanted strangers. According to Polikoff, this approach would not be inconsistent with *Troxel*.; Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245 (2000-2001) (articulating constitutional arguments and proposing three constitutionally-based models for custody, visitation and child support disputes in dissolved lesbian-parented families). See also Robson, *Making Mothers*, *supra* note 11, at 21-23.

161. *K.M.*, 13 Cal. Rptr. 3d at 144.

finding of intent that E.G. would be the only parent unless and until an adoption by K.M. occurred¹⁶² The court emphasized that it was irrelevant whether the oral agreement was enforceable or not and that the determination of parentage did not rest upon a binding agreement between K.M. and E.G.¹⁶³ Nevertheless, the determination of parentage rested exclusively on the intent, as the court perceived it, contained in that agreement. Why one element of something irrelevant may be used as a determining factor of parentage, entailing constitutionally-protected interests, depriving a person of her children and children of their mother, was neither clarified nor justified by the court. The court further misapplied the intent test by considering the subjective belief of E.G. about her and her partner's legal status and not whether the parties intended to conceive and raise the child together. The facts clearly demonstrate that both parties intended to procreate and to raise the children together, which they did for six years. The fact that they did not reveal K.M.'s genetic connection is not inconsistent with the testimony that they agreed to tell the children eventually when E.G. decided it was appropriate.¹⁶⁴ None of this precludes the conclusion that they intended to create and raise the children together, and the court does not show any conduct indicating the opposite.

The court prematurely rejected the subsequent conduct of the parties that clearly demonstrated that K.M. acted as a parent with the full consent of E.G. Like the teacher who, in the children's story "Heather Has Two Mommies,"¹⁶⁵ told Heather that it is pretty special to have two mommies, E.G. told the children after they came from school one day inquiring why they did not have a father, "Aren't you lucky you have two mamas?"¹⁶⁶ Even if E.G. originally did not intend K.M. to be the legal parent, her subsequent conduct allowing K.M. to fully assume parental duties and responsibilities and the conveyance of her belief to her children are entirely inconsistent with that intent. The court is deeply confused by the concept of intent, not being certain what evidence would suffice to prove it or what

162. *Id.* at 146.

163. *Id.*

164. *Id.* at 140.

165. LESLÉA NEWMAN, *HEATHER HAS TWO MOMMIES* (2d ed., 2000). Together with MICHAEL WILLHOITE, *DADDY'S ROOMMATE* (1990), this book enraged the religious and cultural conservatives who reacted by pursuing various means to ban the book. The homophobic activities ranged from censorship in school and public libraries to an amendment proposed by Senator Smith (R-N.H.) on Aug. 1, 1994 to the bill entitled Improving America's Schools Act of 1993. The purpose of the amendment was "[t]o prohibit Federal funds for instructional materials, instruction, counseling, or other services on school grounds, from being used for the promotion of homosexuality as a positive lifestyle alternative." S.Amdt. 2433 103rd Cong. (1994). A somewhat more detailed amendment was proposed the same day by Senator Helms (R-N.C.): S. Amdt. 2434 103rd Cong. (1994). Although the Senate voted in favor of the amendment, measures in the bill were indefinitely postponed by unanimous consent.

166. *K.M.*, No. S125643, 2004 WL 2108127 at *7 n.4.

impact the conduct of the parties would have on it. It states that subsequent functioning as a parent could prove the intent at the conception:

We do not mean to imply that the conduct of the parties after the birth of a child and the parental roles the parties played have no legal significance. Such evidence would be relevant to confirm or refute proof of the parties' parentage intentions at conception under the *Johnson* test.¹⁶⁷

If the court adhered to this proposition it would conclude that K.M.'s conduct at the time of conception and subsequent to the birth of the children demonstrated that she functioned fully as a parent, which would in turn prove her intent to be a parent at conception. Further, if the court strictly applied the *Johnson* rule it would have to find that but for K.M.'s intention there would be no children.¹⁶⁸ Instead, the court concluded that "[t]he method available to K.M. for acquiring parental rights was adoption."¹⁶⁹ This reasoning merely begs the question why a person who was determined by the court to be the natural mother of the child would need to use adoption to obtain parental rights that are automatically conferred to those who satisfy a statutory requirement and remained unaddressed by the court.

The court also declined to consider K.M. as a co-parent. In rejecting functional parenting, the court cited *Nancy S.* for the proposition that the status of the de facto parent does not make a natural parent under the UPA. The court concluded accordingly that K.M. could not acquire the status of natural mother by functioning in a parental role,¹⁷⁰ seeming to forget that as a threshold, the court decided the question of standing based on K.M.'s qualification as a natural mother for the purposes of the UPA.

The uncritical following of the *Johnson* court is an example of how an unsupported statement becomes internalized and unchallenged by subsequent decisions as something that logically flows from the assumptions of natural law so deeply embedded in the law. The *Johnson* court stated that "for any child California law recognizes only one natural mother"¹⁷¹ without citing any supporting authority.¹⁷² Relying on that

167. *K.M.*, 13 Cal. Rptr. 3d at 152 n.13.

168. See *Johnson*, 19 Cal. Rptr. 2d at 500 (examining the Calverts' intent, the court concluded: "They affirmatively intended the birth of the child, and took steps, necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.").

169. *K.M.*, 13 Cal. Rptr. 3d at 152.

170. *Id.*

171. *Johnson*, 19 Cal. Rptr. 2d at 499.

172. The court's statement, unsupported by statute, case law or any other authority resembles Justice Scalia's statement in *Michael H.*, proffering natural law as the starting point of his legal analysis: "California law, like nature itself, makes no provision for dual fatherhood." *Michael H.*, 491 U.S. at 118.

statement, the *K.M.* court was forced to find another way of balancing the parental interests of two women who are both natural mothers. The dissent in *Johnson* explained the problem:

Faced with the failure of current statutory law to adequately address the issue of who is a child's natural mother when two women qualify under the UPA, the majority breaks the 'tie' by resort to a criterion not found in the UPA – the 'intent' of the genetic mother to be the child's mother.¹⁷³

The case of *K.M.* was a unique opportunity for the court to break the traditional approach to parenting based on the nuclear family consisting of a mother and father. Where the interest of the state is in finding two parents for the child whenever possible, and when the statutory provisions are applied in a gender-neutral manner, it follows logically that two women who are both "natural" mothers (by virtue of genetics or giving birth) are also both legal mothers according to the law. Once the court found that *K.M.* qualified as a "natural" mother under the UPA, the next step was to apply the best interest of the child standard in determining custody and visitation rights. The court's assumption of single motherhood as the normative and only acceptable model led the court to impose the double threshold for establishing parentage for lesbian mothers, which amounts to gender-based discrimination. The courts do not impose the intent standard in a child custody dispute where a sperm donor claims parental status.¹⁷⁴ They do not impose such a standard where two men, one of which is genetic father, are involved in a custody dispute. The California statutory scheme specifically provides:

If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed.¹⁷⁵

Considering that the UPA provisions applicable to the father and child relationship apply to the mother and child relationship,¹⁷⁶ the best interest of the child was required to follow the determination of *K.M.* as a natural

173. *Johnson*, 19 Cal. Rptr. 2d at 513 (Kennard, J., dissenting).

174. See generally Miller, *supra* note 4, at 643-58 (discussing the establishment of paternity under the California statutory scheme).

175. CAL. FAM. CODE §7611(d) (West 2004).

176. *Id.* § 7650.

mother. The different treatment of a lesbian genetic mother in this case is unjustified, and K.M. should have challenged it.

However, that is not what K.M. is arguing in her appeal to the Supreme Court of California.¹⁷⁷ Instead of denouncing the intent standard and arguing for the recognition of two mothers, the petition argues that K.M. is a presumed parent under California Family Code § 7611(d) Status of Natural Father; Presumptions; Conditions.

C. PRESUMPTION OF PARENTAGE

Another erroneous part of the decision in *K.M.* was the court's rationale for rejecting the presumption of parentage claim. Because K.M. established that she qualified as a natural mother, the court said she need not rely on the claim of presumption of fatherhood under Family Code § 7611 (d).¹⁷⁸ This section creates an evidentiary presumption of paternity for a man when "[h]e receives the child into his home and openly holds out the child as his natural child."¹⁷⁹ The court in *Johnson* clearly said the UPA must be applied in a gender-neutral way where the language of the statute uses the gender-specific language.¹⁸⁰ Applying this principle, the court in *K.M.* analogized K.M.'s status under the ovum donor consent form with a sperm donor status under the UPA, concluding that the two were consistent.¹⁸¹ However, the court refused to apply the same principle to find consistency between K.M.'s conduct and the presumption of fatherhood requirement under the Family Code § 7611(d). Even assuming, *arguendo*, that the court was right that K.M. needed not invoke this section, she was certainly entitled by law to do that and the court was obligated to address her claim. Similarly, the court manipulated the fact that K.M. was a natural mother under the UPA: on the one hand conferring standing, and on the other, precluding her claim under the presumption of parenthood. Not allowing K.M.'s claim to proceed under Family Code § 7611(d) was a clear error of law and it was erroneously justified by the court's finding of distinction between the concept of "receiving a child into one's home as one's own child" and "cohabiting with the child's mother and welcoming the mother's child."¹⁸² Clearly, K.M. received her own children since she

177. The Appellant's Petition for Review relied on the analysis of the *Johnson* case in Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 16-19 (1999). The Petition followed the usual pattern of trying to fit the arguments into a legal framework that refuses to recognize the existence of lesbian families.

178. *K.M.*, 13 Cal. Rptr. 3d at 151.

179. CAL. FAM. CODE § 7611(d) (West 2004).

180. *Johnson*, 19 Cal. Rptr. 2d at 498 ("provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship. (CIV. CODE, § 7015.)").

181. *K.M.*, 13 Cal. Rptr. 3d at 148.

182. *K.M.*, 13 Cal. Rptr. 3d at 151 (citing *Miller v. Miller*, 64 Cal. App. 4th 111, 118 (1998)). In *Miller* a woman with three children divorced her husband and married his

was undisputedly their natural mother, having proven genetic consanguinity.

The analogy with a sperm donor in *K.M.* was inappropriate. The court was ready to analogize the status of K.M. as an ovum donor to the status of a sperm donor under the UPA in respect to the waiver of parental rights on the donor consent form, but failed to discuss why the same analogy would not apply in the parentage claim had K.M. been a sperm donor to his unmarried partner who gave birth to the child conceived with his sperm. As pointed out by Polikoff in her comment about the case: “the court would have no trouble saying that child has one mother and one father, regardless of what the couple initially decided. Courts are focused on that model and go to great lengths to enforce it.”¹⁸³

The unnecessary and humiliating judicial analogy between a lesbian mother and a presumed father is a typical example of an attempt of the majority to impose its own views and forcibly assimilate or domesticate those who do not fit within the parameters of the dominant legal regime. Lesbian advocates must resist the temptation of using the oppressing legal regime’s tools to achieve immediate goals at the expense of long term gender and sexual equality.

D. BEST INTEREST OF THE CHILD

The best interest of the child should have been applied in *K.M.* to resolve the custody and visitation dispute between former lesbian partners who both qualified as mothers under the UPA. Ironically, in denying K.M. her parental rights, the court concluded:

We join the trial court in recognizing the harsh consequences of this decision for the children in this case, who will suffer significantly from the inability of the parties to agree on sharing their parental roles. As the trial court found, the interests of the children will be ‘disserved’ by the loss of a loving mother figure.¹⁸⁴

In criticizing the court’s application of the intent concept to determine parentage, dissenting Justice Kennard pointed out:

brother. The first husband was a legal parent of the last child until two years later when he was told that his brother was actually the parent of that child. The mother filed a claim seeking to establish that the second husband is the parent of the child under the presumption of fatherhood. The court refused to entertain the claim because the second father waited four years after he was told he was the father to establish paternity and accepted the child support for that child from the first husband during that period without any objection. *Miller*, 64 Cal. App. 4th at 118. The *Miller* case is inapposite to *K.M.* and does not support the *K.M.* court’s justification for refusing to apply the presumption provision.

183. Orenstein, *supra* note 2, at 29 (quoting Nancy Polikoff).

184. *K.M.*, 13 Cal. Rptr. 3d at 153-54.

[W]e are deciding the fate of a child. In the absence of legislation that is designed to address the unique problems of gestational surrogacy, this court should look not to tort, property or contract law, but to family law, as the governing paradigm and source of a rule of decision. The allocation of parental rights and responsibilities necessarily impacts the welfare of a minor child. And in issues of child welfare, the standard that courts frequently apply is the best interest of the child.¹⁸⁵

The court in *K.M.* relied on dicta in a *Johnson* footnote,¹⁸⁶ where the court stated that the determination of parentage must precede and should not be dictated by the custody decision, to reject the best interest of the child standard. The *Johnson* court did not provide a citation for this proposition, but instead based it on the fear that the split custody between the natural father and the gestator (if recognized as the natural mother) in that particular case would not benefit the child.¹⁸⁷ Although the court in *Johnson* argued that it was not appropriate to use the best interest of the child in the determination of parentage, it failed to show why it was appropriate to use the intent test. Since custody determination directly follows the parentage decision, the logical connection of these two interconnected issues is obvious. There is nothing in the UPA that precludes the use of the best interest of the child to determine parentage. Moreover, the best interest of the child standard is expressly included in the UPA under various other provisions¹⁸⁸ while intent is not.¹⁸⁹

Most of the courts recognize that the child's best interests are a policy goal and not a strict standard with definite rules to fit every case.¹⁹⁰ Devastating are the implications of the decision to deny parental rights to the lesbian mother who is not only genetically related to the children but has been their caretaker for the first six years of their lives. They are entirely inconsistent with the policy goals of the state to promote the welfare of children.

The counsel for K.M. does not argue the denial of the best interest of the child standard in their Petition for Review. Taking for granted that the courts reserve it for custody and visitation disputes only, the appellant tacitly approves the majority's assumptions, which have no grounds in

185. *Johnson*, 19 Cal. Rptr. 2d at 517 (Kennard, J., dissenting).

186. *K.M.*, 13 Cal. Rptr. 3d at 154 (quoting *Johnson*, 19 Cal. Rptr. 2d at 500 n.10).

187. *Johnson*, 19 Cal. Rptr. 2d at 500 n.10.

188. *Id.* at 517 (Kennard, J., dissenting).

189. *Id.* at 513.

190. Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 15-16 (2002).

statutes or common law. While arguing that the children had no control over the way their family was created and only know that they have two mothers, the Petition avoids the language of the best interest standard to describe the devastating tragic impact that the loss of one mother will have on them.¹⁹¹

The court in *K.M.* erred in not applying the best interest of the child standard in this case because once the natural mother status of K.M. was established, the custody and visitation issues were the next to be resolved. While the advocates of nontraditional family rights include intent as an approach to solving parentage disputes between lesbian parents, it is clear that the intent must not be the determinative factor considered in isolation.¹⁹²

V. CONCLUSION

The paramount policy goal of resolving parentage and custody disputes is the same: protecting the best interests of the child. If the Supreme Court of California allows the intent test to remain the dispositive factor in solving disputes between lesbian parents it will do an enormous injustice to children from lesbian families as well as lesbian parents who are not recognized by the law. The courts will be left without any clear guidelines on the application of the test and the underlying public policies and subsequently will create inconsistencies and confusion that will result in harsh consequences for children and parents in lesbian families. As the case of *K.M.* demonstrates, the only way to achieve equal treatment for lesbian parents is to challenge the underlying assumptions of the existing legal regime, founded on the heterosexist social model whose goal is to foster and preserve the majority's traditional moral views. Whether there could be two mothers, one genetic and the other gestational, in California depends on the willingness of the lesbians to challenge the current discriminatory legal system.

191. *K.M.*, No. S125643, 2004 WL 2108127 at *7-8.

192. See Polikoff, *This Child Does Have Two Mothers*, *supra* note 5, at 491 (arguing that in their development of the new definition of parenthood the courts should focus on what would best serve the interest of children by using two criteria: a person's performance of parental functions and the child's view of that person. Additionally the court may look at the actions and intent of the legal parents in creating an additional parental relationship).

* * *