

# **You Can't Force Her to Be a Second Mom: *K.M. v. E.G.***

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## Table of Contents

Introduction.....	480
I. Background.....	483
A. Statutory Law.....	484
B. Case Law .....	487
II. <i>K.M. v. E.G.</i> – Two Mothers, No Father .....	490
III. Analysis .....	492
A. The California Supreme Court Should Have Applied Family Code § 7613(b) in Determining Parentage in <i>K.M. v. E.G.</i> .....	493
1. The Court Lacked Factual Support for Disregarding Section 7613(b).....	493
2. The Statutory History of Section 7613 Suggests the Court Should Have Denied K.M. Parental Status.....	496
3. In Interest of R.C. Suggests that the Court Should Have Decided <i>K.M. v. E.G.</i> Using Section 7613(b).....	499
B. The California Supreme Court Should Have Applied the Johnson Intent Test to Establish that K.M. Was Not a Legal Mother.....	501
1. Applying Johnson to K.M.'s Ova Donation Suggests that E.G. Was the Sole Natural Mother of the Twins .....	501
C. <i>K.M. v. E.G.</i> 's New Rule Reduces Predictability in Artificial Insemination Cases and is Discriminatory .....	507

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1. <i>K.M.</i> 's Rule Will Reduce Predictability in Future Cases .....	508
2. <i>K.M.</i> 's Rule Violates the Statutory Intent of California Family Code Section 7613.....	511
3. The New Rule Established in <i>K.M.</i> is Discriminatory .....	512
Conclusion .....	516

### Introduction

Jill wants a child but is unable to conceive. Her cohabitating lesbian partner, Carol, donates her ova so that Jill can conceive through artificial insemination. Jill wants to be the only mother and Carol wishes to be free of any legal ties to the resulting child. Carol signs a legal release so indicating.<sup>1</sup>

New California case law will encumber Jill's intention to be the child's only mother.<sup>2</sup> Carol will be the child's legal second mother despite her intentions to the contrary.<sup>3</sup> California's new law expanded the way lesbians can become mothers.<sup>4</sup>

In creating the new law, the California Supreme Court recently looked at three cases involving former lesbian partners.<sup>5</sup> The court discussed whether the women were both mothers of children conceived through artificial insemination.<sup>6</sup> In each case, the court held that a child may have two parents,

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<sup>1</sup> This hypo is based on *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

<sup>2</sup> See *infra* Part II (discussing holding of *K.M. v. E.G.* in which California Supreme Court creates new rule determining legal maternal status in this situation).

<sup>3</sup> *Infra* Part II.

<sup>4</sup> See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

<sup>5</sup> See *Id.*, 117 P.3d at 673; *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); see also *Red Maria B. v. Superior Court*, 13 Cal. Rptr. 3d 494 (2004) (holding that lesbian who encourages her partner to give birth via artificial insemination and then holds out child as her own required to pay child support after couple splits up).

<sup>6</sup> See *K.M.*, 117 P.3d at 673; *Elisa B.*, 117 P.3d at 660; *Kristine H.*, 117 P.3d at 690 (discussing holdings).

both of whom are women.<sup>7</sup> In *K.M. v. E.G.*, for example, the court found existing statutory law inapplicable and specified that both the gestational carrier and the ova donor were mothers.<sup>8</sup>

The California Supreme Court previously held in *Johnson v. Calvert* that a child can have only one natural mother.<sup>9</sup> *K.M.*'s holding allows for two natural mothers,

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<sup>7</sup> *K.M.*, 117 P.3d at 677; *Elisa B.*, 117 P.3d at 666; *Kristine H.*, 117 P.3d at 693.

<sup>8</sup> *K.M.*, 117 P.3d at 681; see also *Johnson v. Calvert*, 851 P.2d 776, 778, 782 (Cal. 1993) (determining that wife was "natural mother" of child born from surrogate using wife's egg fertilized by husband's sperm); *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1428 (1998) (granting parental status to married couple that intended to be parents and used surrogate to have child biologically unrelated to them).

<sup>9</sup> *Johnson*, 5 Cal. App. 4th at 781. In lesbian couple situations, however, courts have applied various rules to determine parentage which may result in two mothers. *K.M.*, 117 P.3d at 683. There are four main doctrines that courts have applied in deciding child custody disputes between lesbians. 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, 491 (1990). A lesbian may acquire a legal status as a parent through:

1. Equitable Estoppel (used to require legally unrecognized parent to pay child support or to maintain an ongoing parent-child relationship). *Id.* at 491.
2. De Facto or Psychological Parenthood (allows person to seek visitation rights based on psychological bond with child). *Id.* at 510.
3. In Loco Parentis (similar to de facto parenthood, recognizes parental rights of person who voluntarily provides financial support or assumes custodial duties). *Id.* at 502.
4. Second-parent Adoption (non-biological mother adopts biological mother's child without need for latter to relinquish her parental rights). *Id.* at 522.

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. See Ruthann Robson, *Mother: The Legal Domestication of Lesbian Existence*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL EDUCATION OF MOTHERHOOD* 196 (Martha Albertson Fineman & Isabel Karpen eds., 1995) (arguing that legal regime domesticates lesbians and sustains oppressive power of law);

creating a conflict regarding the legal status of mother.<sup>10</sup> The *K.M.* court justified not applying either statutory law or common law precedent by distinguishing *K.M.*'s facts from *Johnson*. The court, however, should have applied the existing statute or the *Johnson* ruling in *K.M.* to establish predictability of what constitutes a mother.<sup>11</sup>

Part I of this Note provides background information regarding California's statutory law and surveys the most recent case developments of same-sex parenting law.<sup>12</sup> Part II examines the case of *K.M. v. E.G.* in detail.<sup>13</sup> Part III suggests that applying either statutory law or the intent test established in *Johnson* would have created a more favorable state of

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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 functional approach such as unpredictability of judicial decisions, and inconsistency that case law would produce); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, 21 (1999) (critiquing legal strategies that deny lesbian identity and divide lesbian community). Shapiro also points out how second-parent adoption fails to overcome the notion that a child can have only two legal parents. Shapiro, *supra* note 9 at 17-18.

<sup>10</sup> *K.M.*, 117 P.3d at 677. Law traditionally defines mother as a woman who has given birth to ("birth mother"), provided the egg for ("biological mother"), or legally adopted a child. BLACK'S LAW DICTIONARY 1035 (8th ed. 2004). The legal term parent also includes a child's putative blood parent who has expressly acknowledged paternity. *Id.* at 1144. An individual or agency whose status as guardian has been established by judicial decree is also a legal parent. *Id.* at 1144.

With modern genetic-engineering techniques, biological mothers may not be birth mothers, but usually are legal mothers. *Id.* at 1035. The law regarding surrogacy is generally unsettled, with most states having no legislation at all specifically related to the matter. Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567 (2005). Therefore, developing case law is often the only precedent for courts struggling to make a legal determination of parental status in contested surrogacy birth arrangements. *Id.*

<sup>11</sup> *K.M.*, 117 P.3d at 681.

<sup>12</sup> See *infra* Part I (discussing historical background).

<sup>13</sup> See *infra* Part II (discussing *K.M. v. E.G.*).

parenthood law.<sup>14</sup> Part III explores the discriminatory consequences of the holding of *K.M.*<sup>15</sup>

## I. Background

Both statute and case law can determine parentage.<sup>16</sup> Recent advancements in reproductive science have created a growing need for clear standards determining parentage for same-sex couples.<sup>17</sup> An argument has arisen that lesbian parenthood does not fit within the legal system based on heterosexist structure, morality, and presumptions.<sup>18</sup>

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<sup>14</sup> See *infra* Part III (discussing error of *K.M.*'s holding).

<sup>15</sup> *Infra* Part III.

<sup>16</sup> See *infra* Part I.A (discussing statutory law), Part I.B (discussing case law).

<sup>17</sup> See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 342 (2002) (estimating that same-sex parents raise approximately ten million children in United States); see also Ilene Chaykin, *Are Two Moms Better Than One?*, LOS ANGELES MAG., July 1, 2000, at 105 (discussing unprecedented number of lesbian and gay parents); Valerie Kellogg, *How the Children of the Gay Baby Boom Are Faring*, NEWSDAY, July 10, 2001, at B10 (noting American Bar Association estimates of ten million children being raised by same-sex parents).

The number of same-sex parents has grown exponentially, in large part due to the increase of artificial conception technology. See WILLIAM B. RUBENSTEIN, *SEXUAL ORIENTATION & THE LAW* 801 (2d ed. 1997), citing *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 FAM. L. REP. (BNA) 1512, 1513 (1987) (estimating that in 1987, three million lesbians and gay men in United States raised between eight and ten million children); Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U.J. GENDER SOC. POL'Y & L. 207, 208 (2001) (approximating that in 1998, six to ten million lesbian and gay parents raised as many as fourteen million children); Lambda Legal Defense and Education Fund, *Facts & Figures About Marriage, Family, and Same-Sex Couples*, <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1066> (last visited Jan. 24, 2006) (estimating 31% of lesbians and 23% of gay men have children under 18 living at home).

<sup>18</sup> 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 fit within legal system based on heterosexist structure, morality, and presumptions).

Nevertheless, courts must rely on statutory and case law to determine same-sex parentage disputes.<sup>19</sup>

### A. Statutory Law

Courts have traditionally applied statutory law when determining parental status.<sup>20</sup> This practice is true even when

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<sup>19</sup> See *id.* (advocating development of same-sex specific parental law).

<sup>20</sup> UNIF. PARENTAGE ACT § 7610, 9B U.L.A. 287 (1987 & Supp. 1999). Eighteen states have adopted the uniform act. Nancy G. Maxwell & Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples As Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM. L.Q. 623, 650 (2004). The California legislature adopted the Uniform Parentage Act (“UPA”) with a modification. CAL. FAM. CODE § 7610 (West 1994).

The UPA defines the “birth parent” as the biological parent. UNIF. PARENTAGE ACT § 8512. If the child is adopted previously then the statutory definition of “birth parent” also includes the adoptive parent. *Id.*

The “natural parent” is determined under the UPA in the following manner:

For the purpose of determining whether a person is a “natural parent” as that term is used in this chapter:

(a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the UPA.

(b) A natural parent and child relationship may be established pursuant to any other provisions of the UPA, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist:

(1) A court order was entered during the father's lifetime declaring paternity.

(2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own.

(3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence.

dealing with artificial insemination situations.<sup>21</sup> The Uniform Parentage Act (“UPA”), or state statutes modeled after it, is the dominant statute that determines parentage.<sup>22</sup> The UPA defines the parent and child relationship as extending equally to every child and parent.<sup>23</sup> Marital status of the parents is irrelevant.<sup>24</sup> Conflicts still arise, however, when determining

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(c) A natural parent and child relationship may be established pursuant to Section 249.5.

CAL. PROB. CODE § 6453 (West 2005). California allows genetic consanguinity to determine parentage. CAL. FAM. CODE § 7610. Receiving a child into one’s home and openly holding him or her out as one’s natural child can also establish parentage. CAL. FAM. CODE § 7611(d). K.M. failed to meet this statutory means of becoming a mother by failing to hold the child out as her own. *K.M. v. E.G.*, 117 P.3d 673, 677 (Cal. 2005).

<sup>21</sup> See *Johnson v. Calvert*, 851 P.2d 776, 781 (holding surrogate mother had claim as natural mother by having given birth to child); see also Sanja Zgonjanin, *What Does it Take to be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN’S L.J. 251, 254 (2005) (noting that courts are reluctant to disturb heterosexual model for lesbian artificial insemination situations). Even when a genetic relationship between non-legal lesbian parent and child exists, as in *K.M. v. E.G.*, courts are unwilling to disturb heterosexual model. Zgonjanin, *supra* note 21, at 254. Zgonjanin asserts that the heterosexual model allows for one mother only and favors the woman who gave birth, regardless of her lack of genetic ties to the child. *Id.* In order to preserve the traditional family legal framework, judges impose additional and extraneous standards on lesbian litigants. *Id.* This perpetuates inequality between lesbian and non-lesbian parents. *Id.*

<sup>22</sup> UNIF. PARENTAGE ACT § 7610; see, e.g., CAL. FAM. CODE § 7610 (noting genetic consanguinity can be basis for maternity and paternity); CAL. FAM. CODE § 7611(d) (noting statutory definition of “presumed” parent as “He receives the child into his home and openly holds out the child as his natural child.”). There are thirty-four states which have statutory provisions dealing with artificial insemination. Nanette Elster, *Who Is the Parent in Cloning?*, 27 HOFSTRA L. REV. 533, 537 n.14 (1999).

<sup>23</sup> UNIF. PARENTAGE ACT § 7602. But see Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 22 (1999) (noting difficulties that same-sex parents have in gaining parental status under present construction of UPA).

<sup>24</sup> UNIF. PARENTAGE ACT § 7602.

parental status in situations involving artificial insemination and surrogacy.<sup>25</sup>

In defining parental status in artificial insemination situations, the UPA makes a distinction based the recipient's marital status.<sup>26</sup> A sperm donor is not the father under the UPA if the donated semen impregnates a woman married to someone other than the donor.<sup>27</sup> The sperm donor is the father, however, if the semen impregnates an unmarried woman.<sup>28</sup>

California's version of the UPA, California Family Code section 7613 ("section 7613"), omits the word "married."<sup>29</sup> The omission allows unmarried women to avail themselves of artificial insemination without the sperm donor becoming the father.<sup>30</sup> This new statutory language expanded rights, but created some uncertainty as well.<sup>31</sup> It became unclear how the California statute would apply when a man donated sperm to his unmarried female partner with the intent to jointly raise the child.<sup>32</sup> The ambiguity of section 7613

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<sup>25</sup> See, e.g., *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1423 (1998) (holding that child could conceivably have several "parents"). The California Appellate Court determined in *Buzzanca* that parents who entered into contract with surrogate were legal parents, even though they had no genetic relationship to the child. *Id.*

<sup>26</sup> UNIF. PARENTAGE ACT § 7613(b); *K.M. v. E.G.*, 117 P.3d 673, 679 (Cal. 2005).

<sup>27</sup> UNIF. PARENTAGE ACT § 7613(b).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* In 1975, the California legislature originally adopted the model UPA with verbatim UPA language, limiting its reach to "married women." *Id.* The legislature amended it later that same year to delete the word "married." *K.M.*, 117 P.3d at 679.

<sup>31</sup> See *infra* Part III.A.2 (discussing expanded rights of CAL. FAM. CODE § 7613).

<sup>32</sup> *K.M.*, 117 P.3d at 680. A similar ambiguity exists in Colorado. In *In Interest of R.C.*, the Colorado Supreme Court held that a similar statute did not apply. 775 P.2d 27, 29 (Colo. 1989). In *R.C.* the court determined the sperm donor was the father based on an agreement that he would be a parent. *Id.* See *infra* Part III.A.3 for a comparison of *K.M.* to *In Interest of R.C.* But see *Steve S. v. Deborah D.*, 127 Cal. App. 4th 319, 326 (2005) (holding section 7613(b) applied and sperm donor was not father when impregnated woman knew and had sexual relationship with donor).

increases when courts apply the statute to determine parentage of women couples.<sup>33</sup>

Application of section 7613 extends beyond sperm donor situations.<sup>34</sup> California Family Code section 7650 dictates that mother and child relationships should be determined in the same manner as father and child relationships, insofar as practicable.<sup>35</sup> Thus, section 7613 may also resolve ova donor situations.<sup>36</sup>

California also has a statutory test of “presumed” parent.<sup>37</sup> This test is two-pronged.<sup>38</sup> To be a presumed parent, one must: 1) receive the children into one’s home; and, 2) hold them out as his or her natural children.<sup>39</sup> There are, therefore, several ways statutory law can determine parental status, but in California, courts also rely on case law to determine parental status.<sup>40</sup>

### B. Case Law

Because California legislation determining parentage in artificial reproduction has not evolved with scientific advancements, case law plays a crucial role.<sup>41</sup> Case law is also necessary to fill the legislation’s silence on same-sex parental rights.<sup>42</sup> *Loftin v. Flournoy* was the first decision in

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<sup>33</sup> The UPA is applicable to determine the parental status of women, though the language is more clear for men. CAL. FAM. CODE § 7650 (West 2005).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 782 n.10 (Cal. 1993).

<sup>37</sup> CAL. FAM. CODE § 7611(d).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See* Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 642 (2003) (noting need for judicial gap-filling in California parental law due to lack of legislation).

<sup>41</sup> *Id.* at 639 (explaining that pre-scientific notions still control determination of parentage in California’s legislation).

<sup>42</sup> *See id.* at 642 (noting that while many states allow same-sex couples to adopt, law governing parental rights emerged long before considering same-sex couples’ rights). California’s legislature enacted Bill 205 in

California to address the issue of parental status where a lesbian couple separated.<sup>43</sup> The recent California case, *Johnson v. Calvert*, further challenged the status of mother in a surrogate mother situation.<sup>44</sup>

In *Johnson*, a married couple used the husband's sperm to artificially inseminate the wife's egg.<sup>45</sup> A doctor then implanted the fertilized egg in a surrogate mother.<sup>46</sup> When the child was born, both women, the biological egg donor and the gestational carrier, claimed to be the child's mother.<sup>47</sup> The court opined that under these facts both women held potentially valid claims to being the natural mother.<sup>48</sup>

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January 2005 and seeks to eliminate discriminatory effects that many current laws have on lesbians, gays, and bisexuals. Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified at Cal. Fam. Code §§ 297-299.3 (Deering Supp. 2005)); see also Zgonjanin, *supra* note 21, at 266 (noting legislative purpose behind enactment of Bill 205).

<sup>43</sup> Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 825-26 (2001); see Polikoff, *supra* note 9, at 462-64 (citing first decision, *Loftin v. Flournoy*, that addressed issue of parenting where lesbian couple separated). The court in *Loftin* found that the partner of "divorced" lesbian couple was the de facto parent and had standing to seek visitation. *Loftin v. Flournoy*, No. 569,630-7 (Cal. Sup. Ct., Alameda Cty, Jan. 2, 1985); E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 J. FAM. L. 271, 273 (1986) (providing general historical overview of lesbian and gay parent-child relationship case law development). The judge in *Loftin* used the rationale of general custody law affording custodial visitation rights to nonbiological persons. *Id.* 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." *Id.*

<sup>44</sup> *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 781 n.8. The Court based the wife's claim as mother on her genetic relation to the child. See *supra* note 20 and accompanying text. Surrogate's claim was based on her giving birth to child. *Supra* note 20 and accompanying text. Both claims can establish parentage under the UPA. See note 20 and accompanying text.

To determine which woman was the sole mother, the court looked at the UPA and the intent of both women.<sup>49</sup> The court determined that the UPA did not apply because the couple did not intend to “donate” their semen and ova to the surrogate mother.<sup>50</sup> Rather, the husband and wife intended to produce a child that they would then raise together.<sup>51</sup> After ruling out the UPA, the court applied an intent test.<sup>52</sup>

Looking at the parties’ intent, the court found that the wife was the child’s natural mother.<sup>53</sup> This was because she intended to be the mother at the time she allowed the implantation of her fertilized egg into the surrogate.<sup>54</sup> The court denied the surrogate mother in *Johnson* legal maternal status despite her potential claim as mother under the UPA.<sup>55</sup> The UPA allows the person who gives birth to claim mother status.<sup>56</sup> The court held that the intent test determines legal mother status when the UPA does not apply.<sup>57</sup> Since the court had determined that the UPA did not apply in *Johnson*, the wife’s claim under the intent test trumped the surrogate’s UPA claim.<sup>58</sup> Thus, in some situations, intent can actually be more predicative in determining legal maternal status than giving birth.<sup>59</sup>

*Johnson* involved one biological claimant and one gestational claimant.<sup>60</sup> *Johnson*’s intent test should resolve similar situations when the court finds the UPA not

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<sup>49</sup> *Johnson*, 851 P.2d at 782 (“Because the two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties’ intentions . . .”).

<sup>50</sup> *Id.* at 781.

<sup>51</sup> *Id.* at 782.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 781-82 n.10

<sup>56</sup> CAL. FAM. CODE § 7613 (West 2005) (noting that giving birth establishes mother status).

<sup>57</sup> *Johnson*, 851 P.2d at 782.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 782-83.

<sup>60</sup> *Id.* at 778.

applicable.<sup>61</sup> Despite the *Johnson* rule, however, recent California cases have failed to implement an intent test and have created extrinsic rules to establish parentage.<sup>62</sup> *K.M. v. E.G.* was one such case.<sup>63</sup>

## II. *K.M. v. E.G.* – Two Mothers, No Father

In 1994, K.M and E.G., a lesbian couple, registered as domestic partners in California.<sup>64</sup> E.G. wanted to be a mother and had unsuccessfully attempted to conceive through artificial insemination.<sup>65</sup> K.M. agreed to donate her ova to E.G. with an oral agreement that E.G. would be the only parent of any resulting children.<sup>66</sup> The couple discussed the option that K.M. might later formally adopt the children, but E.G. insisted that K.M wait at least five years before doing so.<sup>67</sup>

K.M. donated her ova to E.G. and signed a donor form renouncing any legal claim to any resulting children.<sup>68</sup> E.G. later gave birth to twin girls using K.M.'s egg and an anonymous donor's sperm.<sup>69</sup> K.M. never told anyone that her ova produced the twins.<sup>70</sup> After five years, K.M. and E.G.

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<sup>61</sup> See *id.* at 782 n.10 (suggesting an intent test determine parentage in true “egg donation” situations).

<sup>62</sup> See cases cited *supra* note 5.

<sup>63</sup> *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005).

<sup>64</sup> *Id.* at 683.

<sup>65</sup> *Id.* K.M was unable to become pregnant due to low egg count. *Id.*

<sup>66</sup> *Id.* E.G.'s physician suggested that she obtain ova from K.M. *Id.*

<sup>67</sup> *Id.* at 677; see *infra* note 103 and accompanying text (discussing K.M.'s facts concerning adopting twins).

<sup>68</sup> *K.M.*, 117 P.3d at 683. The trial court found that K.M. agreed by signing the ova donor form prior to the children's conception that E.G. would be the only parent. *Id.* The court also found that by signing the ova recipient form, E.G. intended to be solely “responsible for the support and maintenance of any children born.” *Id.* Trial court also noted that K.M. failed to show that she had no choice but to sign this ova donor form as opposed to one that specified her as “an intended parent.” *Id.*

<sup>69</sup> *Id.* at 683.

<sup>70</sup> *Id.*

separated and dissolved their domestic partnership.<sup>71</sup> K.M. then sought to establish a legal parental relationship with the twins.<sup>72</sup>

The superior court dismissed K.M.'s parentage action using the *Johnson* intent test.<sup>73</sup> The trial court found that both women intended that E.G. be the only parent of the twins at the time K.M. donated her ova.<sup>74</sup> Furthermore, K.M. did not meet the statutory definition of a presumed mother because she did not hold the children out as her own.<sup>75</sup>

The California Court of Appeal upheld the trial court's holding despite using a different rationale.<sup>76</sup> The appellate court did not apply the *Johnson* intent test to K.M. because it determined that statutory law applied.<sup>77</sup> The court of appeal held that sections 7613(b) and 7650 of the California Family Code applied in K.M.<sup>78</sup> The court determined that section 7613(b) applied in a situation involving an egg donation to an unmarried woman regardless of the existence of a lesbian relationship.<sup>79</sup> The California Supreme Court reversed K.M.'s holding, disagreeing with the rationales of both lower courts.<sup>80</sup>

The California Supreme Court disregarded the *Johnson* intent test as applied by the trial court because K.M. involved a

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<sup>71</sup> *Id.* Only after their relationship began to falter did K.M. begin telling others that the twins were produced using her ova. *Id.*

<sup>72</sup> *Id.* at 677.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* Statutory test of "presumed" parent sets forth a two prong test of: (1) receiving the children into one's home, and, (2) holding them out as her natural children. CAL. FAM. CODE § 7611(d) (West 2005).

<sup>76</sup> *K.M.*, 117 P.3d at 683.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* Section 7613(b) states: "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." CAL. FAM. CODE § 7613(b) (West 2005). Section 7650 states that insofar as is practicable, the provisions applicable to a father and child relationship should determine a mother and child relationship. CAL. FAM. CODE § 7650 (West 2005).

<sup>79</sup> *K.M.*, 117 P.3d at 678.

<sup>80</sup> *K.M.*, 117 P.3d at 675-76.

lesbian couple.<sup>81</sup> The supreme court also rejected the statutory application favored by the appellate court because *K.M.* did not constitute a true egg donation situation.<sup>82</sup> Instead, it created a new rule.<sup>83</sup>

Under *K.M.*'s rule, a lesbian woman who donates ova to her partner intending to raise the resulting child in a joint home with the gestational mother is legally a second mother to the child.<sup>84</sup> This is true irrespective of her intent to be a parent.<sup>85</sup> The rule applies even if the lesbian couple clearly intends the donating partner not be a mother.<sup>86</sup>

### III. Analysis

The California Supreme Court should have decided *K.M. v. E.G* using statutory law or the intent test.<sup>87</sup> If the UPA or a corresponding California statute applies, it should control parental determinations.<sup>88</sup> If the court found the UPA or California statutory law inapplicable, it should have then applied the *Johnson* intent test to decide *K.M.*<sup>89</sup> Instead of applying either statutory law or the *Johnson* intent test,

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<sup>81</sup> *K.M.*, 117 P.3d at 675, 681. The California Supreme Court concluded that section 7613(b) does not apply when a lesbian provides her ova to impregnate her partner and they raise the children in a joint home. *Id.* at 678. The court specified that both the woman who provides her ova and her partner who bears the children are the children's parents. *Id.* at 675.

<sup>82</sup> See *infra* Part III.A.1 (discussing what constitutes "true egg donation" situation and why court rejected *Johnson* intent test in *K.M.*).

<sup>83</sup> *K.M.*, 117 P.3d at 681.

<sup>84</sup> *Id.* at 675.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 679. The California Supreme Court noted that E.G. and K.M.'s intentions for K.M. to be a mother were irrelevant. *Id.* The fact that the couple lived together and intended to bring the child into their joint home was sufficient to establish a parental tie. *Id.*

<sup>87</sup> See CAL. FAM. CODE § 7613(b) (West 2005) (explaining California statutory law regarding parental status); see also *infra* Part III.B (arguing California Supreme Court should have applied *Johnson* intent test).

<sup>88</sup> See Miller, *supra* note 40, at 665 (noting that in California statutory provisions determine parentage).

<sup>89</sup> See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (applying intent test when UPA held inapplicable).

however, the California Supreme Court created a new rule in *K.M.* which is discriminatory.

*A. The California Supreme Court Should Have Applied  
Family Code § 7613(b) in Determining Parentage in  
K.M. v. E.G.*

Under California Family Code section 7613(b), a man is not a father if he provides semen to inseminate a woman who is not his wife.<sup>90</sup> Section 7650 applies section 7613(b) to mother and child relationships as long as it is practical, or in situations that are sufficiently similar.<sup>91</sup> Section 7613(b) should thus dictate that a woman who provides ova to a physician to impregnate a woman to whom she is not married has no claim as a parent.<sup>92</sup> The California Supreme Court nevertheless failed to apply section 7613(b) to *K.M. v. E.G.*<sup>93</sup>

1. *The Court Lacked Factual Support for  
Disregarding Section 7613(b)*

The California Supreme Court concluded that section 7613(b) did not apply in *K.M. v. E.G.* because it was not a true egg donation situation.<sup>94</sup> A true egg donation situation occurs when the gestational mother intends to raise the child as her own.<sup>95</sup> The court asserted that *K.M.* did not intend to simply

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<sup>90</sup> CAL. FAM. CODE § 7613(b). This statute specifically applies where a man provides semen to a physician to inseminate a woman who is not his wife. *Id.* Self-insemination carries with it its own voluminous case law which exceeds the scope of the present topic.

<sup>91</sup> CAL. FAM. CODE § 7650 (West 2005).

<sup>92</sup> See *K.M.*, 117 P.3d at 684 (Werdegar, J., dissenting) (finding it practicable to treat men and women donors similarly). In January 2005, the “Domestic Partner and Responsibility Act” granted domestic partners the same benefits rights as married couples. Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified at Cal. Fam. Code §§ 297-299.3 (Deering Supp. 2005)). Under the reasoning of this new law, section 7613 may result in domestic partners having parental claim to artificially produced children. See 33 CAL. JUR. 3d *Family Law* § 129 (2005) (noting application of Domestic Partner and Responsibility Act).

<sup>93</sup> *Id.* at 682.

<sup>94</sup> *Id.*

<sup>95</sup> *Johnson v. Calvert*, 851 P.2d 776, 782 n.10.

donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she lived.<sup>96</sup> The court concluded that since K.M. lived with E.G. at the time of the donation, she planned on raising the children in a joint home with E.G.<sup>97</sup> The facts cannot support these assertions and fail to justify the court's dismissal of section 7613's applicability.<sup>98</sup> The appellate court, on the contrary, found abundant facts indicating K.M. was a true egg donor and section 7613 should apply.<sup>99</sup>

The facts in *K.M.* support applying section 7613. K.M. donated her ova to another woman to whom she was not married.<sup>100</sup> The recipient of K.M.'s donated ova was her lesbian partner with whom she was living.<sup>101</sup> The trial and appellate courts determined that neither K.M. nor E.G. intended for K.M. to be a legal mother of the children.<sup>102</sup> E.G. explicitly did not want K.M. to be the children's mother until possibly at some future point when K.M. might legally adopt them.<sup>103</sup> K.M. signed a waiver releasing any rights as a parent

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<sup>96</sup> *K.M.*, 117 P.3d at 682.

<sup>97</sup> *Id.* at 679.

<sup>98</sup> *See Id.* at 675-77. The court relied on facts suggesting that K.M. was not an actual ova donor and that section 7613(b) should not apply. *Id.* This included the fact that E.G. referred to K.M. and her family as the twins' mother, grandparents, uncles, and aunts. *Id.* The court also relied on extrinsic evidence, beyond party testimony, to support its conclusion. *Id.* Shortly after the twins' birth, E.G. proposed to K.M. and they exchanged rings. *Id.* The court assumed, therefore, that K.M. and E.G. would also have made similar commitments to each other regarding raising the twins together. *Id.* The court also noted that school forms listed both K.M. and E.G. as the twins' parents. *Id.* Finally, the court relied on the fact that the nanny referred to both K.M. and E.G. as the babies' mothers. *Id.* Yet, the court placed little weight on the fact that K.M. never admitted to others that she was in fact the twins' biological mother. *Id.* Neither E.G. nor K.M. told anyone that K.M. had donated the ova, including their friends, family, and twins' pediatrician. *Id.*

<sup>99</sup> *Id.* at 677.

<sup>100</sup> *Id.* at 675.

<sup>101</sup> *Id.* at 677.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* K.M. and E.G. agreed prior to the conception of the children that E.G. would be the sole parent unless K.M. later adopted the children. *Id.*

of the resulting children when she donated her ova to E.G.<sup>104</sup> This waiver expressly indicated that K.M. did not intend to raise the children as her own.<sup>105</sup>

Furthermore, despite the California Supreme Court's conclusion, there is no evidence that K.M. actually intended to jointly raise the children.<sup>106</sup> The fact that K.M. and E.G. lived together at the time of the twin's conception does not establish such a conclusion.<sup>107</sup> E.G. also added the twins to her health insurance and purchased additional life insurance with the children as the beneficiaries.<sup>108</sup> That K.M. did not do similar overt parental acts undercuts her claim that she intended to jointly raise the children. The waiver and other facts surrounding K.M.'s donating her ova to E.G. suggest that section 7613 should apply.

The fact that K.M. and E.G. lived together at the time of the egg donation fails to establish that K.M. intended to raise the children as her own.<sup>109</sup> On the contrary, there is persuasive factual evidence to support holding section 7613 applicable in this case.<sup>110</sup> The California Supreme Court also looked to statutory history to justify not applying section 7613 to K.M.'s situation.<sup>111</sup>

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E.G. specifically told K.M. prior to K.M.'s ovum donation that she (E.G.) would not consider an adoption until some years later. *Id.*

<sup>104</sup> *Id.* at 676.

<sup>105</sup> *See Id.* at 683 (Kennard, J., dissenting) (noting that by signing ova donor form, K.M. renounced any claim to her donated ova, any fetus, or child born from her ova). Signing the ova form clearly signaled K.M.'s intent that E.G. be a sole parent. *Id.*

<sup>106</sup> *See id.* at 675-76; *see also* discussion *infra* Part III.B (discussing K.M.'s intent); *supra* note 98 (noting facts court relied on).

<sup>107</sup> *See supra* note 98 and accompanying text (noting facts court relied on).

<sup>108</sup> *K.M.*, 117 P.3d at 677.

<sup>109</sup> *See supra* note 98 and accompanying text (noting court's reliance on cohabitation of couple).

<sup>110</sup> *See K.M.*, 117 P.3d at 675-77 (noting K.M. never admitted biological tie to twins and discussing oral agreement with E.G. that K.M. not be legal mother).

<sup>111</sup> *Id.* at 679-80.

2. The Statutory History of Section 7613 Suggests the Court Should Have Denied K.M. Parental Status

The California Supreme Court cites the history of section 7613 to support its conclusion that section 7613 should not apply in K.M.'s case.<sup>112</sup> The court notes that when California adopted the UPA, it expanded the provision to allow unmarried women to avail themselves of artificial insemination without having the sperm donor considered the father.<sup>113</sup> Omitting the word "married" from the statute created this expansion.<sup>114</sup> Section 7613 thus allows men and women to donate semen and ova to a woman to whom they are not married without becoming a parent.<sup>115</sup> Changing the statute also allowed a single woman to accept donated sperm

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<sup>112</sup> *Id.* at 679.

<sup>113</sup> *K.M.*, 117 P.3d at 679-80. Under Model UPA language, a sperm donor would not be the father if his sperm impregnated a woman married to someone other than the donor. UNIF. PARENTAGE ACT § 7610, 9B U.L.A. 287 (1987 & Supp. 1999). The statute would not apply, however, if the sperm impregnated an unmarried woman, and the sperm donor would be the father of the resulting child. *Id.*; *K.M.*, 117 P.3d at 679.

California's version of the UPA equalizes the status of legitimate and illegitimate children. *Shin v. Kong*, 95 Cal. Rptr. 2d 304, 309 (2000). It also concerns the legal paternity of children conceived by artificial insemination. *Id.* at 309-10. California Civil Code section 7005(b) affords both married and single women a vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534 (1986). Section 7005(b) may also provide men with a vehicle for donating semen to married and unmarried women alike without fear of liability for child support. *Id.*

<sup>114</sup> The legislature originally proposed Senate Bill no. 347 (1975-1976 Reg. Sess.) with the exact UPA language. Three months after its initial proposal, the Senate amended the bill to delete the word, "married" from the bill. S.B. 347, 1975-76 Leg., Reg. Sess. (Cal. 1976).

In addition to California, seven other states have removed the word "married" in front of part "b." See COLO. REV. STAT. § 19-4-106 (1997); ILL. COMP. STAT. ANN. § 750 40/1 (West 1999); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN. § 40-11-6 (West 1989); OHIO REV. CODE ANN. § 3111.30-.38 (West 1996); WASH. REV. CODE ANN. § 26.26.050 (West 1997); WIS. STAT. ANN. § 891.40 (West 1997); WYO. STAT. ANN. § 14-2-103 (1999).

<sup>115</sup> CAL. FAM. CODE § 6713 (West 2005); *K.M.*, 117 P.3d at 679-80.

or ova without the donor becoming a legal parent.<sup>116</sup> This law empowers women to become single mothers through artificial insemination.<sup>117</sup> By eliminating the word “married” from the statute, the California Legislature intended to increase flexibility, not restrict it.<sup>118</sup>

Proponents of *K.M.*'s holding might counter that the statute's modified language did not increase its scope to address ova donations. They might argue that section 7613 should not apply to *K.M.* at all as it was never intended to apply to ovum donation situations.<sup>119</sup> This is best evidenced by the fact that the legislature drafted the act in 1973, long before artificial insemination and gestational surrogacy became common.<sup>120</sup> However, even if the legislature did not originally intend section 7613 to apply to ovum donation situations, it should apply now. Section 7613(b) explicitly applies to women so far as practicable.<sup>121</sup> With improvements in fertilization science, until new legislature deals specifically with ova donors, women must rely on existing statutes.<sup>122</sup>

The California Supreme Court asserted that the modified language of the statute expanded its scope, but the statute still applied restrictively in certain circumstances.<sup>123</sup>

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<sup>116</sup> CAL. FAM. CODE § 6713; *see also K.M.*, 117 P.3d at 679-80 (discussing statutory language).

<sup>117</sup> *See K.M.*, 117 P.3d at 680 (discussing amendment of Senate Bill and resulting modified language of section 7613). While this result is not directly noted in the history of the bill, the goal of the amendment suggests that the legislature most likely contemplated and accepted it. *See infra* Part III.C.2 (discussing statutory intent).

<sup>118</sup> *See supra* note 113 and accompanying text (discussing legislative intent behind section 7613 modification).

<sup>119</sup> *K.M.*, 117 P.3d at 689.

<sup>120</sup> UNIF. PARENTAGE ACT §5, 9B U.L.A. 287 (1987 & Supp. 1999) Prefatory Note, 297; *see also K.M.*, 117 P.3d at 689 (Werdegar, J., dissenting) (surveying this argument).

<sup>121</sup> CAL. FAM CODE § 7650 (West 2005).

<sup>122</sup> *See K.M.*, 117 P.3d at 685-86 (Werdegar, J., dissenting) (noting importance of predictability in parentage disputes); *see also Johnson v. Calvert*, 851 P.2d 776, 782-83 (Cal. 1993) (emphasizing importance of ensuring persons who bring children into world through assisted reproduction can determine in advance who will and will not be parents).

<sup>123</sup> *K.M.*, 117 P.3d at 680.

The court noted the statute would apply if a man provided semen to impregnate his unmarried partner to produce a child they intended to raise in their joint home.<sup>124</sup> The court then extended this reasoning to K.M.'s case.<sup>125</sup> Because K.M. provided ova to produce a child she "intended" to raise, the court concluded section 7613(b) does not apply.<sup>126</sup> The problem with the court's argument is that the court presupposed that K.M. intended to raise the children despite the factual evidence to the contrary.<sup>127</sup>

The California Supreme Court's conclusion that K.M. was a parent severely restricts the expansion of the statute contemplated by the California Legislature.<sup>128</sup> The California Legislature omitted the word "married" from the UPA language specifically to expand women's rights.<sup>129</sup> K.M.'s rule, however, prohibits unmarried women from becoming single mothers if they use a donor with whom they live.<sup>130</sup> In K.M.'s holding, therefore, the California Supreme Court restricted women's rights, possibly infringing on their constitutional rights.<sup>131</sup> The legislative history of section 7613

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<sup>124</sup> *Id.* The court relied on a Colorado Supreme Court case to support this reading of the statute. See *infra* Part III.A.3 (comparing Colorado case to *K.M. v. E.G.*).

<sup>125</sup> *K.M.*, 117 P.3d at 681.

<sup>126</sup> *Id.* The court concluded that because section 7613 did not apply, the usual provision of the UPA would determine K.M.'s parentage. *Id.* Therefore, the court held that K.M.'s genetic relationship to twins constituted evidence of mother and child relationship. *Id.*

<sup>127</sup> See *supra* notes 98, 103, 106 and accompanying text (discussing factual determinations of lower courts and California Supreme Court); see also *infra* notes 186-191 and accompanying text (noting contractual and oral agreements between K.M. and E.G. as well as K.M.'s silence regarding her biological tie to children).

<sup>128</sup> See *K.M.*, 117 P.3d at 679-80 (noting that in adopting model act, California legislature specifically expanded reach of UPA to allow single women to use artificial insemination).

<sup>129</sup> See *supra* notes 113, 128 and accompanying text (discussing legislative intent behind section 7613 adoption).

<sup>130</sup> The rule would force a woman who wishes to be a single mother through artificial insemination to accept a cohabitating donor as father. See *supra* Part III.A.2 (noting expansion of statute allows single parents).

<sup>131</sup> See *infra* Part III.C.3 (discussing constitutional consequences of *K.M.*'s holding).

suggests that the court should have deferred to statutory language when deciding *K.M.*<sup>132</sup> Applying the statute would enable E.G. to gain single-parent status.<sup>133</sup> Comparing *K.M.* to a recent Colorado Supreme Court case also leads to this same conclusion.

3. *In Interest of R.C. Suggests that the Court Should Have Decided K.M. v. E.G. Using Section 7613(b)*

In *In Interest of R.C.*, the Colorado Supreme Court interpreted a statute identical to section 7613(b).<sup>134</sup> In *R.C.*, a man donated semen to impregnate an unmarried friend.<sup>135</sup> The Colorado Supreme Court determined the donor was the father of the resulting child.<sup>136</sup> The court determined that the statute did not apply in this situation because the donor had the understanding that he would be the child's father at the time he donated the sperm.<sup>137</sup> This case illustrates that intent to be a parent can determine applicability of statutory law.<sup>138</sup>

The California Supreme Court analogized *K.M.* to the sperm donor in the Colorado case to reinforce its conclusion that *K.M.* was not a true egg donor.<sup>139</sup> There are, however, key facts that distinguish the Colorado case from *K.M.* The most important distinguishing fact is that the donor in *In Interest of R.C.* intended to become the child's father.<sup>140</sup> The Colorado Supreme Court held that the sperm donor statute did not apply when both parties agreed that the donor would be the father of

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<sup>132</sup> See *supra* notes 112-118 and accompanying text (discussing expansion of statute).

<sup>133</sup> See *supra* notes 115-117 and accompanying text (noting revised statutory language allows for single parents).

<sup>134</sup> *In Interest of R.C.*, 775 P.2d 27, 29 (Colo. 1989).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 29, 35. The sperm donor and the recipient woman had an agreement that the man would be the resulting child's father. *Id.* at 35.

<sup>138</sup> *Id.* at 27.

<sup>139</sup> *K.M. v. E.G.*, 117 P.3d 673, 680 (Cal. 2005).

<sup>140</sup> *R.C.*, 775 P.2d at 31.

the resulting child.<sup>141</sup> K.M.'s situation lacked this explicit agreement of parentage.<sup>142</sup>

K.M. did not intend to be a mother of the children until possibly later, if and when she adopted the twins.<sup>143</sup> There was, however, immediate intent to become a parent in the Colorado case, which made the statute inapplicable.<sup>144</sup> Absent this clear intent, the Colorado case contradicts the California Supreme Court's holding that the statute does not apply in *K.M.*<sup>145</sup>

*In Interest of R.C.* actually undermines *K.M.*'s holding that section 7613 does not apply. Considering the factual differences in the cases, *In Interest of R.C.* suggests that section 7613 should have applied in *K.M.*<sup>146</sup> The Court thus erred by not applying section 7613 to *K.M.*<sup>147</sup> Even without applying section 7613, however, the court would have reached the same outcome by applying the *Johnson* intent test.<sup>148</sup>

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<sup>141</sup> *Id.* at 35.

<sup>142</sup> See *infra* notes 168, 172 and accompanying text (discussing K.M.'s intent).

<sup>143</sup> *K.M.*, 117 P.3d at 680. K.M. apparently intended to raise the children in a joint home, although even this intention is uncertain from the facts. *Id.*

<sup>144</sup> *R.C.*, 775 P.2d at 31.

<sup>145</sup> *Id.* at 35.

<sup>146</sup> One key factual difference is that the Colorado donor did not live with the recipient. *R.C.*, 775 P.2d at 27. Therefore, the Colorado case is not entirely on point with *K.M.*

<sup>147</sup> *K.M.*, 117 P.3d at 679. The California Supreme Court summarily concluded that even if section 7613(b) applies to women who donate ova, the statute does not apply under K.M.'s circumstances. *Id.* The court concluded that K.M. did not donate her ova, but supplied them to produce children she would raise in her home. *Id.* Based on this factual interpretation, the court, erroneously, held that K.M. and E.G.'s situation was not a true egg donation situation. *Id.*; see also *Id.* at 686 (Werdegar, J., dissenting) (noting that majority created new law to justify its holding since facts did not justify it).

<sup>148</sup> See *infra* Part III.B for a more complete discussion of the *Johnson* intent test.

*B. The California Supreme Court Should Have Applied the Johnson Intent Test to Establish that K.M. Was Not a Legal Mother*

The California Supreme Court's ruling was also improper because it did not follow existing case law.<sup>149</sup> *Johnson v. Calvert* established an intent test to decide parentage in ova donor situations.<sup>150</sup> *K.M.*'s facts fell within the scope of the *Johnson* rule.<sup>151</sup> Instead of applying this rule, however, the court changed the law by creating a new rule.<sup>152</sup> The court's dismissal of the existing rule violated established judicial norms.<sup>153</sup>

1. *Applying Johnson to K.M.'s Ova Donation Suggests that E.G. Was the Sole Natural Mother of the Twins*

In *Johnson*, the California Supreme Court pronounced two non-statutory rules to determine maternity when a woman receives and gestates ova other than her own.<sup>154</sup> In a true egg donation situation, where the gestational woman intends to raise the child as her own, the court concluded that the birth mother is the natural mother.<sup>155</sup> In situations other than true egg donations, where the biological mother merely permits the implantation of her ovum in another woman while intending to raise the child as her own, the biological mother is the true

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<sup>149</sup> *K.M.*, 117 P.3d at 679.

<sup>150</sup> *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

<sup>151</sup> See III.B.1 (discussing facts of *K.M. v. E.G.*).

<sup>152</sup> *K.M.*, 117 P.3d at 675.

<sup>153</sup> Under the doctrine of *stare decisis*, courts adhere to established principles of law where the facts are substantially the same. 20 AM. JUR. 2D *Courts* § 129 (2005). See also *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (noting that doctrine of *stare decisis* allows society to presume legal foundation, rather than individual proclivities, determine principles); *Herrera v. Quality Pontiac*, 73 P.3d 181, 188 (N.M. 2003) (noting that *stare decisis* contributes to integrity of our constitutional system of government).

<sup>154</sup> *Johnson*, 851 P.2d at 776, 782 n.10.

<sup>155</sup> *Id.*; see also, *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1415 (1998) (establishing genetic consanguinity as basis for legal parentage).

natural mother.<sup>156</sup> Therefore, applying *Johnson* requires a fact-sensitive determination of whether a case is a true egg donation situation.

The California Supreme Court held that *K.M.*, like *Johnson*, was not a true egg donation situation.<sup>157</sup> In *Johnson*, it was undisputed that the ovum donor intended to raise the child as her own.<sup>158</sup> There was a contract that so indicated.<sup>159</sup> In *K.M.*, there was also a contract.<sup>160</sup> *K.M.* signed the Consent Form for Ovum Donor (Known) before she donated her ova.<sup>161</sup> This form clearly indicated that *K.M.* would have no legal claim as a parent of children born from her donated ova.<sup>162</sup> This waiver of parental rights indicates that *K.M.* had no intention of jointly raising the children produced from her ova.<sup>163</sup> The court, however, did not find this waiver as authoritative as the contract in *Johnson*.<sup>164</sup>

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<sup>156</sup> *Johnson*, 851 P.2d at 782. The court concluded that both genetic consanguinity and giving birth can establish a mother and child relationship. *Id.* When two women can claim parental status, however, she who intended to raise the child as her own is the natural mother under California law. *Id.*

<sup>157</sup> *K.M.*, 117 P.3d at 679; *see also Johnson*, 851 P.2d at 782 (establishing egg donor status). In *Johnson*, a married couple contracted with another woman to gestate and give birth to the couple's embryo. *Johnson*, 851 P.2d at 782. The wife's ova and husband's sperm created the embryo. *Id.* The contract clearly indicated that the couple intended to raise the child as their own after the surrogate mother gave birth to the child. *Id.* at 778-79.

<sup>158</sup> *Johnson*, 851 P.2d at 778.

<sup>159</sup> *Id.* The contract provided that the couple would implant their embryo in the surrogate and the child born would go to the couple's home as their child. *Id.* The surrogate agreed to relinquish "all parental rights" to child in favor of the couple. *Id.* In return for carrying the child, the surrogate would receive \$10,000 and a \$200,000 life insurance policy. *Id.*

<sup>160</sup> *K.M.*, 117 P.3d at 676.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 677. The superior court granted *E.G.*'s motion to dismiss based on the fact that *K.M.* had voluntarily signed the ova donor consent form. *Id.* By signing the form, *K.M.* relinquished any parental rights. *Id.*

<sup>164</sup> Instead, the California Supreme Court insisted that parents can not waive a child's right to support. *Id.* at 682.

In *Johnson*, the facts left no question that the biological mother intended to raise the child.<sup>165</sup> Therefore, the court unhesitatingly accepted the contract as binding.<sup>166</sup> In *K.M.*, however, the parties dispute intent.<sup>167</sup> K.M. argued that she intended to be a parent of the children E.G. gave birth to using her ova.<sup>168</sup> K.M. asserted that she signed the contract without intending to relinquish any parental rights.<sup>169</sup> E.G., on the other hand, contended that there was an agreement from the beginning that E.G. would be a single mother.<sup>170</sup> E.G. insisted that K.M. demonstrated her intent not to be a parent by signing the donor contract.<sup>171</sup> E.G. alleged K.M. was a true ova donor and could only gain parental rights at a later time through adoption.<sup>172</sup>

The superior court found E.G.'s testimony more reliable.<sup>173</sup> It found K.M.'s testimony regarding her execution of the ovum donor form contradictory and not always credible.<sup>174</sup> The superior court concluded that K.M. knowingly and voluntarily relinquished her parental claim by signing the ovum donor form.<sup>175</sup> The appellate court affirmed

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<sup>165</sup> *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993); see text accompanying *supra* note 157-159 (discussing facts in *Johnson*).

<sup>166</sup> *Johnson*, 851 P.2d at 778.

<sup>167</sup> *K.M.*, 117 P.3d at 676-77; see *infra* notes 168, 172 and accompanying text (discussing facts in *K.M.* that indicate intent).

<sup>168</sup> K.M. testified that she and E.G. planned to raise the children together, and she only agreed to donate her ova because of this agreement. *K.M.*, 117 P.3d at 676. K.M. also asserted that she only saw the consent form ten minutes before signing it. *Id.* She further insists that she did not intend to waive her parental rights by signing it. *Id.*

<sup>169</sup> *Id.* at 676.

<sup>170</sup> *Id.* at 675-77.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 676. E.G. testified that she would not have accepted K.M.'s donated eggs unless K.M. agreed to truly be a donor. *Id.* E.G. further testified that she and K.M. had reviewed the consent form together for several months prior to the donation. *Id.* E.G. testified that she would not have accepted K.M.'s ova if K.M. had not signed the consent form. *Id.* E.G. insisted on being a single mother to the resulting offspring. *Id.*

<sup>173</sup> *Id.* at 677.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* The superior court found K.M.'s testimony regarding execution of the ovum donor form inconsistent and unreliable. *Id.*

the superior court's factual finding concluding that E.G. had intended to raise the child as a single parent.<sup>176</sup> Based on the factual findings of the lower courts, K.M. constituted a true ova donor, and she did not intend to be a parent.<sup>177</sup>

Thus, the California Supreme Court should have applied the *Johnson* intent test to find E.G. the sole natural mother.<sup>178</sup> Appellate courts must defer to the trial court's version of the facts unless they are clearly erroneous.<sup>179</sup> The trial court adopted E.G.'s assertion that K.M. donated her ova to E.G., agreeing that E.G. would be the sole parent.<sup>180</sup> The California Supreme Court acknowledged the lower court's finding but concluded certain facts justified disregarding it.<sup>181</sup> The supreme court determined it was undisputed that the couple lived together and that they both intended to bring the child into their joint home.<sup>182</sup> Without deferring to the lower court's conclusions, the supreme court improperly ruled that

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* The California Supreme Court concluded, however, that K.M. was not a true ova donor. *Id.* at 679. Rather, the court held that she provided the ova to her cohabitating lesbian partner with the intent of raising any resulting children in their joint home. *Id.* The court insisted that even accepting E.G.'s version of facts as true, K.M. was not true ova donor. *Id.* A considerable discrepancy results between the lower courts' and California Supreme Court's findings of fact. *Id.*

<sup>178</sup> *Id.* at 685-90. Intent is not an adequate test as this would require a later judicial determination of intent made years after the birth of the child. *Id.* The court noted that application of an intent test to determine maternity was consistent with public policy. *Id.*

An argument has been raised, however, that the Supreme Court of California should not allow an intent test to remain dispositive in solving disputes between lesbian parents. Zgonjanin, *supra* note 21, at 279. This would create inconsistencies and confusion that will result in harsh consequences for children and parents in lesbian families. *Id.*

<sup>179</sup> See *Reliance Steel Prod. Co. v. Nat'l Fire Ins. Co. of Hartford*, 880 F.2d 575, 576 (1st Cir. 1989) (noting that appellate courts defer to trial court's express or implied findings of fact, including intent, when supported by substantial evidence).

<sup>180</sup> K.M. testified that she did not intend to simply donate her ova to E.G. *K.M.*, 117 P.3d 679. Rather, she provided her ova to her lesbian partner so that E.G. could give birth to a child that E.G. would raise in their joint home. *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

K.M. was not a true ova donor.<sup>183</sup> The California Supreme Court made this assertion despite the absence of any clear errors in the trial court's facts.<sup>184</sup>

The California Supreme Court thus interpreted the facts to show intent by K.M. and E.G. to raise the children in a joint home.<sup>185</sup> The court, however, could have interpreted the same facts differently.<sup>186</sup> For example, the fact that E.G. did not want K.M. to adopt the children for at least five years is compelling evidence that E.G. did not intend to jointly raise the children with K.M. permanently.<sup>187</sup> E.G. explained that the reason for this wait was to be sure the relationship was stable and lasting.<sup>188</sup>

In addition, the fact that K.M. did not push to gain legal rights as a parent before the present litigation may indicate K.M. hesitated to commit to jointly raising the children.<sup>189</sup> K.M.'s silence about being the twins' biological

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<sup>183</sup> Appellate courts should defer to such fact-intensive findings absent clear error. *Reliance Steel Prod. Co.*, 880 F.2d at 576. In reviewing the trial court's findings, the Court of Appeal defers to the trial court's findings of intent when supported by substantial evidence. *Id.*; see also *Stern v. Thompson & Coates*, 517 N.W.2d 658, 664 (Wis. 1994) (noting appellate court must accept reasonable inference drawn by trial court from established facts).

<sup>184</sup> *K.M.*, 117 P.3d at 679. The California Supreme Court noted the heated dispute between K.M. and E.G. regarding their intentions of E.G. being a sole parent. *Id.* The court noted that K.M. and E.G. lived together and intended to bring a child into their joint home. *Id.* The court thus concluded that it was not a true egg donation. *Id.* Just because the couple intended to raise the children in a joint home, did not mean that K.M. could not donate her ova to her lesbian partner.

<sup>185</sup> See *supra* note 177 and accompanying text (discussing facts court relied on).

<sup>186</sup> *Id.* at 679 (noting disputed claims between K.M. and E.G.).

<sup>187</sup> *Id.* at 676.

<sup>188</sup> *Id.* E.G. explained that she had seen too many lesbian relationships end quickly, and she did not want to have a custody battle over the children. *Id.*

<sup>189</sup> The most compelling reason for the timing of the commencement of legal action for custody is that E.G. and the twins moved to Massachusetts. *Id.* at 677.

mother also supports this view.<sup>190</sup> Finally, as previously discussed, K.M. signed a form waiving any claim to parental rights.<sup>191</sup> This is persuasive evidence that K.M. had no intention of jointly raising the children produced from her ova.<sup>192</sup>

Contrary to the California Supreme Court's holding, the facts of *K.M.* indicate that *K.M.* did entail a true ova donation situation.<sup>193</sup> The factual findings of the lower courts in *K.M.*, as well as a comparison to the facts in *Johnson* support this finding.<sup>194</sup> Assuming K.M. donated her ova to E.G., the court should have applied the *Johnson* intent test to determine that E.G. was the sole natural mother of the twins.<sup>195</sup>

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<sup>190</sup> See *Id.* at 683; *supra* notes 70 and 98 and accompanying text (discussing K.M.'s silence regarding being biological mother).

<sup>191</sup> See *supra* notes 160-164 and accompanying text (discussing waiver).

<sup>192</sup> See *supra* notes 160-164 and accompanying text (noting waiver K.M. signed should be enforced).

<sup>193</sup> See *supra* note 184 and accompanying text for a more complete discussion.

<sup>194</sup> See *supra* note 184 and accompanying text (discussing factual findings of lower courts and California Supreme Court).

<sup>195</sup> Regarding intent test generally, one theorist argues that the intent-based test is morally correct because: (1) intended parents were the but-for cause of the child being procreated; (2) parties should maintain their promises, especially in light of reliance of intended parents from the beginning; and, (3) parties should avoid uncertainty as to the parentage of child from conception. 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, 414-18 (1991); see also Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 678 (2002) (arguing that intent should define parentage regardless of marriage status). Storrow argues:

[I]ntentional parenthood has been a status accorded only to married couples who are incapable of bearing children by traditional means. This approach to intentional parenthood is perpetuated in the revised UPA, leaving large segments of society, who have important procreative choices to make, excluded from recognition as intentional parents. Despite calls to acknowledge and undo this injustice, it will likely continue without a

C. *K.M. v. E.G.'s New Rule Reduces Predictability in Artificial Insemination Cases and is Discriminatory*

In *K.M.*, the court held that the *Johnson* intent test did not apply when a woman supplies ova to impregnate her lesbian partner and intends to raise the resulting child in their joint home.<sup>196</sup> Instead, the court created a new rule which dictates that a woman donating ova to her lesbian partner and intending on raising the child in their joint home is a mother of the children.<sup>197</sup> The court thus rejected one intent test while creating a new one.

The new test in *K.M.* determines parentage based upon whether the donor and recipient of donated ova intend to raise the resulting child in a joint home.<sup>198</sup> Under this new test, it becomes irrelevant whether the donor and recipient intend for both to be parents of the offspring as long as they live together.<sup>199</sup> The deciding factor of maternal status thus hinges on intent to raise the child in a joint home.<sup>200</sup>

The court limited this rule to lesbian partners who intend to bring a child into a joint home and raise the child together.<sup>201</sup> The implications of the rule, however, will potentially affect many people beyond the narrow scope

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framework strongly suggesting the need for its reversal. Storrow, *supra* note 193, at 678.

For arguments that intent test should not have been applied in *K.M.*, see Zgonjanin, *supra* note 21, at 270 (arguing intent standard is subjective and loose). Zgonjanin suggests that the court should have proceeded with the best interest of the child standard. *Id.*

<sup>196</sup> *K.M.*, 117 P.3d at 681; see also Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 149-50 (2000) (criticizing intent-based approach for determining legal maternity for lack of credence it gives to genetics and gestation involved in conception).

<sup>197</sup> *K.M.*, 117 P.3d at 681; see also *supra* notes 84-86 and accompanying text (discussing *K.M.*'s holding).

<sup>198</sup> *K.M.*, 117 P.3d at 682.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 681.

intended by the court.<sup>202</sup> In addition, even if the rule only applies to cohabitating lesbian couples, it violates statutory intent and may be discriminatory.<sup>203</sup>

1. K.M.'s Rule Will Reduce Predictability in Future Cases

K.M.'s holding will reduce predictability in at least six possible situations.<sup>204</sup> One may assert the rule under the same

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<sup>202</sup> Professor Anthony Miller proposed changes in California law that would have prevented necessity of K.M.'s new law. Miller, *supra* note 40, at 711. He advocated creating a three part test to determine parentage:

First, the genetic-biological relationship should be considered the baseline for the determination of a child-parent relationship. In all situations, the genetic-biological relationship should serve as the basis of the parent and child relationship unless another person is designated as the parent by operation of law. This proposal does not mean that presumptions no longer play a role in determining the parent-child relationship, but that California should abolish the conclusive presumption and make all other presumptions regarding paternity and maternity fully rebuttable.

Second, for situations involving assisted conception other than artificial insemination, there should be a bright-line rule analogous to that in adoption law to determine when someone other than the genetic-biological parent should be designated as the natural parent. California should enact legislation requiring that there be a written contract among donors, surrogate mothers, and intended parents; for this contract to be enforceable, it must be judicially validated prior to the conception of the child. This legislation should include specific requirements, which should be designed to insure the welfare of the child, and which must be met in order for courts to approve or validate such contracts.

Finally, for all situations of assisted conception where there is no enforceable pre-validated contract, the court must determine the parentage of the child according to the best interest of the child standard. *Id.*

<sup>203</sup> See *infra* Part III.C.2-3 (discussing discriminatory potential of K.M.'s holding).

facts of K.M. but where: 1) the co-habiting lesbians are not registered domestic partners; 2) the lesbian couple does not live together but intends to jointly raise the child; 3) the co-habiting women are heterosexual; 4) the lesbian couple also lives with the sperm donor; 5) there are more than two lesbians living together, each intending to help raise the child; and, 6) other surrogate/donor situations.<sup>205</sup> Perhaps most interestingly, the new rule opens the door for a child to have two mothers and a father.<sup>206</sup>

In *Johnson*, the California Supreme Court expressly rejected the idea that a child in a situation with two mothers

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<sup>204</sup> See *infra* note 205 and accompanying text for examples.

<sup>205</sup> For example:

#1, 2: The rule reduces predictability most for lesbian couples. The rule may be argued to apply when a lesbian couple lives together but are not registered partners. The rule may also be raised if a lesbian couple does not live together, but intends to jointly raise the child.

#3: K.M.'s rule also puts women who donate ova to a platonic friend with whom they live in a position where they may be forced to be a mother even when they do not intend to be. Likewise, the gestational mother may be forced to accept a second mother for the children despite planning on being an only parent. This may be true even if the ova donor legally waives her maternal rights to the children. It would not be a far stretch to extend the rule to heterosexual women. The fact that biological and gestational mothers are not lesbian partners may be irrelevant as the focus of the rule is on intent to raise children in a joint home.

#4: Discussed *infra* text

#5: Suppose a lesbian couple intends to jointly raise a child, and uses a surrogate mother to carry the biological offspring of one of the women. If the surrogate lives with couple, K.M.'s rule leaves room for the surrogate to argue that she also intended to jointly raise the child and thus be a mother.

#6: Suppose a man donates sperm to a platonic friend, regardless of whether or not the man lives with the recipient. Although there is statutory and case law that deals with this situation, K.M.'s rule may be argued to establish new precedent, affecting the man's parental status.

<sup>206</sup> Such a situation is not unheard of. See, e.g., *LaChappelle v. Mitten*, 607 N.W.2d 151, 161 (Minn. Ct. App. 2000) (granting joint legal custody to child's birth mother and former lesbian partner and limited parental rights to gay male sperm donor); Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor With Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (1996) (discussing situations where sperm donor has sought parental rights after donating sperm to lesbian couple).

and a father could have three parents.<sup>207</sup> Under this new ruling, however, such a result is within reach. Suppose a lesbian couple that wants to have a child also lives with a man. The couple uses the man's sperm to fertilize the ovum of one of the women, which the other woman then carries to birth. The resulting child would legally have two mothers and a father, as long as they intend to raise the child in their joint home.<sup>208</sup>

*K.M.*'s rule diminishes predictability in many ova donation scenarios.<sup>209</sup> Yet, with advances in reproductive science, predictability in artificial insemination cases is vital.<sup>210</sup> Without clear standards of parentage in artificial insemination cases, many women may forgo the opportunity to be a mother to avoid uncertainty.<sup>211</sup> Many of the consequences envisioned as a result of *K.M.*'s rule also limit women's ability to be a single mother.<sup>212</sup> This effect of the

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<sup>207</sup> *K.M.*, 117 P.3d at 681; *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993);

<sup>208</sup> No contention is made as to the value of such a result. The court simply should have made a holding that would not leave the answer to such an important area ambiguous. Cf. Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 124 (1992) (proposing several methods for avoiding ambiguity and addressing problems that ambiguity creates).

<sup>209</sup> See *supr0061* note 205 and accompanying text (citing examples).

<sup>210</sup> See RUBENSTEIN, *supra* note 17, at 801 (discussing advancements in reproductive technology).

<sup>211</sup> See Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, Lambda Legal, at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/115.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/115.pdf) (last visited Feb. 14, 2006) (noting that many people have skewed understanding of their legal rights and liabilities with artificial insemination); see also Rob Stein, *Health Workers' Choice Debated: Proposals Back Right Not to Treat*, WASHINGTON POST, Jan. 30, 2006, at A1 (noting proposed laws that would enable medical service providers to deny lesbians artificial insemination for moral or religious reasons).

<sup>212</sup> SEE CAL. FAM. CODE § 7613 (enabling sperm donation without legal responsibility as parent); CAL. FAM. CODE § 7650 (applying section 7613 to women and egg donations); see also *K.M.*, 117 P.3d at 679-80 (discussing statutory language change allowing single women to donate ova without becoming legal mother); *supra* note 114 (noting legislative history of statute). California's version of the UPA concerns the legal

rule is counter to the statutory intent of expanding California Family Code section 7613.

2. *K.M.'s Rule Violates the Statutory Intent of California Family Code Section 7613*

When California adopted the UPA, it purposefully expanded section 7613 to allow single women to receive artificial insemination without having the sperm donor declared the father.<sup>213</sup> *K.M.* limits a woman's freedom of choice to raise a child alone, as sole parent, when conception occurs under certain circumstances.<sup>214</sup> Such a limiting rule is contrary to the legislature's expansion of section 7613.<sup>215</sup>

California Family Code section 7613 grants women the right to donate ova to someone without becoming a mother.<sup>216</sup> Women also have the right to accept an ova donation from another woman without the donor becoming a co-parent.<sup>217</sup> This right should exist even if the donor and recipient live together and both plan to help raise the child. Imposing an unintended second parent violates a single parent's

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paternity of children conceived by artificial insemination. *Shin v. Kong*, 95 Cal. Rptr. 2d 304, 309-10 (2000). California Civil Code section 7005(b) affords both married and single women a vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534 (1986). Section 7005(b) may also provide men with a vehicle for donating semen to married and unmarried women alike without fear of liability for child support. *Id.* See also *infra* Part III.C.3 (discussing discriminatory nature of *K.M.*'s holding).<sup>213</sup> *K.M.*, 117 P.3d at 680 (noting that California intended to expand protection of model act so that unmarried women could avail themselves of artificial insemination); see also *supra* notes 112-114 and accompanying text (discussing expansion of section 2713).

<sup>214</sup> While these circumstances are narrowly construed in *K.M.*, expanding the rule could impose restrictions on a broader demographic. See *supra* note 205 and accompanying text (citing several examples).

<sup>215</sup> See *supra* note 213 and accompanying text (noting California legislature's intent to expand model act to include unmarried women).

<sup>216</sup> See *supra* note 213 and accompanying text (discussing expansion of California's version of model act). Section 7650 applies section 7613 to women as far as it is practicable. CAL. FAM. CODE § 7650 (West 2005).

<sup>217</sup> See *supra* notes 112-114 and accompanying text (discussing expansion of model act to include unmarried women in California).

fundamental right to make decisions concerning the care, custody, and control of her children.<sup>218</sup> By conceding that an unintended parent has equal rights in determining children's well-being, *K.M.*'s rule also violates constitutional rights.

3. *The New Rule Established in K.M. is Discriminatory*

In *K.M.*, the California Supreme Court created a law that violates the Due Process Clause of the United States Constitution.<sup>219</sup> The Due Process Clause protects a parent's fundamental right to make decisions concerning the care, custody, and control of her children.<sup>220</sup> The rule in *K.M.* inappropriately takes this right from a woman and forces her to share the custodial responsibility with another.

*K.M.*'s rule also discriminates based on sexual orientation and violates the Equal Protection Clause of the United States Constitution.<sup>221</sup> The Equal Protection Clause of

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<sup>218</sup> See *infra* Part III.C.3 (discussing discriminatory result of *K.M.*'s rule).

<sup>219</sup> See *K.M. v. E.G.*, 117 P.3d 673, 688 (Cal. 2005) (Werdegar, J., dissenting) (noting constitutional issue with majority holding).

<sup>220</sup> See U.S. CONST. amend. XIV; see also, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (recognizing parents' right to direct upbringing of their children); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (recognizing relationship between parent and child is constitutionally protected); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (noting interest of parent in care, custody, and management of children); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (noting primary role of parents in upbringing parents).

<sup>221</sup> See U.S. CONST. amend. XIV; see also, *Romer v. Evans*, 517 U.S. 620, 631-36 (1996) (noting sexual orientation impermissible grounds for discrimination); *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 467-75 (1979) (opposing sexual orientation based discrimination); see also

*K.M.*, 117 P.3d at 688 (noting Equal Protection issue in *K.M.*). The rule may also be discriminatory against gay men. See *Connerly v. State Personnel Bd.*, 2 Cal. App. 4th 16, 40 (2001) (noting that broad generalizations about gender differences are insufficient rationale for gender classifications). If the court expands how lesbians can be parents, then it must equally expand parental rights of gay men. See *Koire v. Metro Car Wash*, 40 Cal. App. 3d 24, 37 (1985) (noting that unequal treatment of men and women cannot be justified by public policy).

The statutory protection of assisted reproductive technologies that many states provide only to married individuals may violate gay men's and

the Constitution's Fourteenth Amendment prohibits states from denying any person within its jurisdiction equal protection of the laws.<sup>222</sup> The Equal Protection Clause thus provides equal application of the laws.<sup>223</sup>

*K.M.*'s rule, however, inappropriately confers rights and imposes limitations on persons because of their sexual orientation.<sup>224</sup> The rule in *K.M.* creates an unfair distinction between heterosexual and lesbian couples that seek to donate or receive ova.<sup>225</sup> *K.M.*'s rule makes it impossible for a lesbian to donate her ova to her cohabitating partner without becoming a parent herself.<sup>226</sup> Heterosexual women can sign an ovum donation form which allows them to donate ova without being held legally liable for the resulting child.<sup>227</sup> *K.M.*'s holding makes the same agreements invalid when the

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lesbian's equal protection rights. Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproduction Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 180 (2000).

A compelling counter-argument is that some gender differences cannot be discriminatory. See George P. Choundas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of its Gender-Based Victims*, 44 EMORY L.J. 1069, 1169 (1995) (noting that greater differences between men and women justifies more relaxed level of scrutiny).

The fact that it is possible to have a biological and gestational mother does not make it discriminatory that you cannot have two fathers the same way. See *Id.* at 1170 (noting legal models subject biological differences to less scrutiny than conventional female/male classifications). Nevertheless, if the court expands the rights of lesbians, it should enlarge the scope of gay men's rights to be joint fathers. See *Koire*, 40 Cal. App. 3d at 37 (noting that public policy cannot justify unequal treatment of men and women).

<sup>222</sup> See U.S. CONST. amend. XIV; see also, *Romer v. Evans*, 517 U.S. 620, 631-36 (1996); *Gay Law Students Ass'n. v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 467-75 (1979).

<sup>223</sup> See U.S. CONST. amend. XIV; *Romer*, 517 U.S. at 631-36 (discussing Equal Protection Clause).

<sup>224</sup> *K.M.*, 117 P.3d at 687 (Werdegar, J., dissenting).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

parties to agreement are lesbian.<sup>228</sup> It is unfair to determine validity of ovum donor forms based on sexual orientation.

The majority refutes any claims that its decision discriminates based on sexual orientation.<sup>229</sup> The court emphasized that it decided only the case before it, which involved a lesbian couple who registered as domestic partners.<sup>230</sup> The court said it was not expressing any view regarding the rights of others.<sup>231</sup> Indeed, proponents of *K.M.* might argue that imposing parental responsibility on both parties in *K.M.*'s situation is not discriminatory, but rather an expansion of equality.<sup>232</sup>

Arguably, this rule does not unjustly impose maternal status on cohabitating lesbians.<sup>233</sup> The rule makes it impossible for a lesbian couple living together to jointly raise a child without both being legally considered the child's mother when each has either biological or gestational ties to the child.<sup>234</sup> This mandated responsibility may be no different than when two heterosexuals engage in sex and produce a child.<sup>235</sup> The intent of the parties is irrelevant in the heterosexual situation.<sup>236</sup> The law simply holds that both individuals are the parents whether one, both, or neither

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* (arguing that majority's decision inappropriately confers rights and imposes disabilities on persons based on sexual orientation).

<sup>230</sup> *Id.* at 678 n.3.

<sup>231</sup> *Id.*

<sup>232</sup> Zgonjanin, *supra* note 21, at 279 (suggesting *K.M.* expands equal treatment for lesbian parents and further advocates challenging underlying assumptions of existing heterosexist legal model).

<sup>233</sup> Parent often must share their right to determine care and control of children. See *In re Cheryl E.*, 161 Cal. App. 3d 587, 606 (1984) (noting that parents retain fundamental liberty interest of care, custody, and management of children even, without custody). The fact that both parents are the same gender should not diminish the role of either party responsible for creating the child. See *Elisa B. v. Superior Court*, 117 P.3d 660, 665 (Cal. 2005) (noting that same-sex couples have same responsibilities to children as heterosexual couples).

<sup>234</sup> *K.M.*, 117 P.3d at 675.

<sup>235</sup> See *supra* note 20 (noting ways parentage is established for heterosexuals).

<sup>236</sup> See *supra* note 20 (determining parenthood under California statute).

intended to become such.<sup>237</sup> Just as in heterosexual situations, one could argue that a lesbian couple need not intend to be the parent in order to establish legal duty. If one parent does not wish to share the parental responsibility, she cannot simply abdicate the rights of the other parent.<sup>238</sup> Likewise, it was proper to prevent E.G. from excluding K.M.'s parental involvement with the children produced together.<sup>239</sup>

This argument fails, however, upon expanding the comparison. There are situations in which it is possible, with heterosexual couples, for one or both of the parties to voluntarily relinquish parental responsibility.<sup>240</sup> Similarly, in K.M.'s case, she voluntarily relinquished her parental rights through signing the ova donor form.<sup>241</sup> Yet the court determined that she could not waive her responsibility to support the twins.<sup>242</sup> Thus, the rule in *K.M.* impedes a lesbian from abrogating parental responsibility where a heterosexual is not so impeded.<sup>243</sup> Such discrimination based on sexual

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<sup>237</sup> See *supra* note 20 (noting lack of intent element in statutory definition of parenthood).

<sup>238</sup> See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (noting the mere existence of biological link does not merit constitutional protection for parents); Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising From Surrogacy Contracts*, 27 J. Fam. L. 585, Part E.III.B (1988-89) (noting that when heterosexual parents are not married, father's constitutional rights as parent exist only when he has established relationship of responsibility for child); see also Charles W. Gerdes, Note, *Juvenile Curfew Challenges in the Federal Courts: A Constitutional Conundrum Over the (Less Than) Fundamental Rights of Minors*, 11 ST. THOMAS L. REV. 395, 432 (1999) (noting parental custody is superior to state authority and, absent compelling reasons, states cannot limit parental responsibility).

<sup>239</sup> Both the gestational and biological creators share responsibility since but for the involvement of both parties, a child would not have been born. See *Elisa B.*, 117 P.3d at 665 (noting legal responsibilities of same-sex parents).

<sup>240</sup> See *In re Bridget R.*, 41 Cal. App. 4th 1483, 1506 (1996) (noting parents may waive their constitutional rights, provided waiver is knowingly and intelligently made).

<sup>241</sup> See *supra* note 68 (discussing K.M.'s signing of donor form).

<sup>242</sup> *K.M.*, 117 P.3d at 682.

<sup>243</sup> See *supra* note 227 and accompanying text (discussing inconsistent standard). Comparing sperm donors to cohabitating lesbians who donate

orientation is unjust and violates the United State's Constitution's Equal Protection Clause.<sup>244</sup>

Despite the court's attempt to severely limit the rule in *K.M.*, the language of the holding remains subject to interpretation by other courts.<sup>245</sup> The California Supreme Court specifies that neither *K.M.*'s nor *E.G.*'s claim to parentage preceded the other's claim.<sup>246</sup> *K.M.* has a valid claim to be the twins' mother because her ova produced them.<sup>247</sup> *E.G.* has an equally valid claim to be the twins' mother because she gave birth to them.<sup>248</sup> The language of *K.M.*'s rule has the potential of extending beyond the expressly intended limits of lesbian partners. The rule's reasoning, therefore, has powerful implications to influence future conflicts between both biological and surrogate mothers.<sup>249</sup>

### Conclusion

The California Supreme Court should have applied existing statutory law or, alternatively, the *Johnson* intent test to *K.M.* Both California Family Code section 7613(b) and *Johnson* provide adequate means of determining parentage in

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ova provides a more compelling example. By signing the sperm donor form, the sperm donor waives his parental rights. CAL. FAM. CODE §7613(b) (West 2005); *See also* Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. Cal. Rev. L. & Women's Stud. 219, 231 (1994) (noting anonymous sperm donors retain no parental rights despite genetic ties to resulting children). Following *K.M.*, the lesbian ova donor may sign the same form, but retains her parental rights and obligations. *See K.M.*, 117 P.3d at 685 (Kennard, J., dissenting) (concluding that sperm donor waiver would be invalid if sperm donor lived with recipient and intended to raise child).

<sup>244</sup> *See supra* notes 221-223 (discussing Fourteenth Amendment of U.S. Constitution and discrimination issues).

<sup>245</sup> *See K.M.*, 117 P.3d at 678 n.3 (limiting *K.M.*'s holding).

<sup>246</sup> *Id.* at 681.

<sup>247</sup> *See supra* notes 10, 20 (discussing *K.M.*'s legal parental claim).

<sup>248</sup> *See supra* notes 10, 20 (discussing *E.G.*'s legal parental claims).

<sup>249</sup> *See supra* note 205 and accompanying text (providing examples of discriminatory results).

artificial insemination cases.<sup>250</sup> There was no need for the court to create a new rule simply because the dispute involved a lesbian couple.

The California Supreme Court's desire to award parental rights to both women is understandable.<sup>251</sup> K.M. and

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<sup>250</sup> See *infra* Part I.A (discussing statutory law), Part I.B (discussing case law).

<sup>251</sup> Heather A. Crews, *Women Be Warned, Egg Donation Isn't All It's Cracked Up to Be: The Copulation of Science and the Courts Makes Multiple Mommies*, 7 N.C. J. L. & TECH. 141, 155 (2005). By awarding maternity to both K.M. and E.G., the court provided the twins with two parents as opposed to just one, a goal supported by historical family law precedent. See Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 945 (2001) (noting that concept of traditional nuclear family is "breaking down").

Research has demonstrated that gay people contribute to society in a similar manner to that of heterosexual people. ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 141-48 (1978); Gary B. Melton, *Public Policy and Private Prejudice*, 44 AM. PSYCHOLOGIST 933, 936 (1989).

Empirical studies have also shown that gay people work productively in a wide range of occupations and professions. See M.V. LEE BADGETT & M.C. KING, *LESBIAN AND GAY OCCUPATIONAL STRATEGIES*, IN *HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE* 73 (A. Gluckman & B. Reed eds., 1997) (discussing employment of homosexuals); R.A. BUHRKE, *A MATTER OF JUSTICE: LESBIANS AND GAY MEN IN LAW ENFORCEMENT* 261 (1996) (recounting struggles of openly gay criminal justice personnel); J.D. WOODS & J.H. LUCAS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 255 (1993) (noting homosexuals in major professions as well in church, charity, and government agencies).

Scientific research indicates that gay parents are similar to heterosexual parents. See G. DORSEY GREEN & FREDERICK W. BOZETT, *LESBIAN MOTHERS AND GAY FATHERS*, IN *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 197, 213 (J.C. Gonsiorek & J.D. Weinrich eds., 1991) (noting that lesbian and gay parents are at least equal as heterosexuals in providing quality home-life for children); see also Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1026 (1992) (reviewing studies); Mary B. Harris & Pauline H. Turner, *Gay and Lesbian Parents*, 12 J. HOMOSEXUALITY 101, 104 (1986) (reporting study of gay, lesbian, and heterosexual parents); Susan Golombok et al., *Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD. PSYCHIATRY. 787,

E.G. were a couple at the time the twins were born, and K.M. helped E.G. raise the twins until they were five years old.<sup>252</sup> To reach its conclusion, however, the court disregarded statutory and case law precedent. The court further ignored the lower courts' factual findings.<sup>253</sup>

K.M. would not be a mother under either statutory law or the *Johnson* intent test.<sup>254</sup> The court, therefore, erred in holding that K.M. was the twins' mother.<sup>255</sup> In so doing, the court opened the door for future confusion regarding artificial insemination and surrogacy cases.<sup>256</sup> *K.M.*'s new rule also discriminates based on sexual orientation, and is thus unconstitutional.<sup>257</sup> The court's desire to give the twins two parents should not have come at the cost of creating a new law at the blatant expense of existing legal rules and principles.<sup>258</sup>

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789 (1997) (finding parenting skills of lesbians and female heterosexuals comparable).

<sup>252</sup> *K.M. v. E.G.*, 117 P.3d 673, 685 (Cal. 2005) (Kennard, J., dissenting).

<sup>253</sup> See *supra* notes 180-183 (discussing California Supreme Court's factual analysis).

<sup>254</sup> See *supra* Parts III.A, III.B (applying statutory and case law to K.M. respectively).

<sup>255</sup> *Id.*

<sup>256</sup> See *supra* Part III.C.1 (discussing reduced predictability in future cases).

<sup>257</sup> See *supra* Part III.C.3 (discussing discriminatory effect of *K.M.*).

<sup>258</sup> Currently in California, marriage is not an option for lesbian and gay couples. See *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 495 (Cal. 2004) (concluding same-sex marriages performed violated state law and were invalid). The United States Code currently defines marriage as the legal union between one man and one woman. 1 U.S.C.A. § 7 (West 2005). Congress has also passed the "Defense of Marriage Act," which enables states to avoid giving full faith and credit to same-sex marriages performed in other states. 28 U.S.C.A. § 1738C (West 2005).