K.M. V. E.G.: BLURRING THE LINES OF PARENTAGE IN THE MODERN COURTS

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I. INTRODUCTION

Emily and Kate, the parties in *K.M. v. E.G.*, met in 1992.[1] By 1993, they were romantically involved, and by 1994, they were living together as registered domestic partners in California.[2] Emily had always wanted children and told Kate that she planned to adopt a child as a single mother.[3] Soon after, she began to attempt artificial insemination.[4] However, she was unsuccessful because she was unable to produce sufficient ova.[5] Then, with the advice of a fertility doctor, Emily agreed to have Kate's ova implanted in her uterus. However, she insisted that Kate sign a "Consent Form for Ovum Donor (Known)."[6] Emily was skeptical about lesbian relationships, and had seen them break up in the past.[7] She wanted Kate to know that she intended to raise this child on her own, and that Kate would not even be allowed to adopt the child for at least five years, when Emily was sure the relationship would endure.[8] Kate signed the form, which stated that she "waive[d] any right and relinquish[ed] any claim to the donated eggs or any pregnancy or offspring that might result from them."[9] The form further stated that Kate "agree[d] that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children."[10] However, at trial, Kate testified that she did not fully understand the form and believed that signing it was only a necessary step in the process of having children with Emily.[11] She fully believed that she would be an active participant in raising the child and that the child would belong to both of

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1. Emily and Kate are fictional names used to represent K.M. and E.G.
2. K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).
3. *Id.*
4. *Id.* at 675–76.
5. *Id*. at 676.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

them.[12] Emily eventually gave birth to twins.[13] Their birth certificates listed Emily alone as the mother, and did not reflect a father's name.[14] Kate and Emily agreed that neither of them would tell anyone that Kate was the biological mother of the children.[15]

Kate and Emily ended their relationship in 2001 when the twins were five years old.[16] Soon after, Kate filed a petition to establish a parental relationship with the twins.[17] She also filed a motion for custody of and visitation with the twins.[18] In response, Emily filed a motion to dismiss, based on Kate's signing an agreement, relinquishing any claim to resulting children.[19] The superior court granted the motion to dismiss.[20] Explaining its decision, the superior court stated that the consent form Kate signed was valid, thus eradicating her parental rights.[21] The court further found that the couple had decided, prior to conception, that Emily would be the sole parent.[22] Additionally, the court found Kate's position similar to that of a sperm donor.[23] Thus, she should be treated like a sperm donor under California's Family Code statute, section 7613(b), the section of California's version of the Uniform Parentage Act (hereinafter "the UPA"), which deals with parental rights of sperm donors.[24]

Typically, when a male donates sperm, he does not retain parental rights to the child conceived using that sperm.[25] The court reasoned that Kate should therefore not retain them either.[26] The court further held that Kate had not met the criteria of California Family Code § 7611(d), which states that a father is a "presumed father" if he "receives the child into his home and openly holds out the child as his natural child."[27]

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 677.
17. *Id.* at 675–77.
18. *Id.* at 675.
19. *Id.*
20. *Id.* at 677.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. S*ee* CAL. FAM. CODE § 7613(b) (2005).
26. *K.M. v. E.G.,* 117 P.3d at 677.
27. CAL. FAM. CODE § 7611(d) (2005). This statute was later found to be unconstitutional by the court in *In re Jerry P.,* 116 Cal Rptr. 2d 123, 137 (Cal. Ct. App. 2002), because it allows for a mother or a third party to prevent a father with good intentions from having right to his child. If a mother prevents a father from bringing the child into his home, the statute does not presume him to be the father. The

Kate did not hold the children out as her natural children. The children were received into the home as Emily's, and the parties kept secret Kate's biological relationship to the children.[28] Kate appealed the decision.[29] On appeal, the court affirmed the superior court's ruling, stating that Emily intended to have a child to raise on her own without Kate. Thus, Kate had no meritorious legal claims.[30]

The Supreme Court of California granted review of the case and reversed the findings of both the Superior court and the Court of Appeals. The Supreme Court concluded that Kate's situation differed from that of a sperm donor. The court found that she was the biological mother of the children and should not be treated as an anonymous sperm donor.[31] As evidence, the court pointed out that she did not intend to "donate" her ova, as she believed she was going to raise the children in her own home along with Emily. Therefore, the court found that Kate could bring a claim of parentage.[32] Because the court found that §7613(b), the sperm donor statute, did not apply to Kate, the contract that she signed giving up her rights to the children resulting from the artificial insemination was not valid, since a parent cannot contract away obligations of support to offspring.[33] She thus could be considered a parent to the twins based on her genetic relationship, and therefore an analysis under §7611(d), the "presumed father" statute, was unnecessary.[34]

The issues of sperm donation, artificial insemination, and lesbian co-parents have blurred the rules of parentage that have traditionally applied in custody and visitation disputes. Though many new issues arise in artificial insemination situations, Part II of this Casenote will be limited to an attempt to describe how traditional parentage principles, including the UPA, have been applied to sperm donation cases and how intent-based parentage principles seem to be growing. Part III will discuss how the court in *K.M. v. E.G*. refused to apply intent-based principles to Kate and Emily's situation. Part IV will discuss the "intent" test and why it should have been applied in *K.M. v. E.G.,* the inconsistencies in the court's decision between sperm and ovum donors, and how this decision will affect the artificial insemination decisions

court held that this was a violation of a father's constitutional right to equal protection and due process.

28. *K.M. v. E.G.,* 117 P.3d at 677.

29. *Id.*

30. *Id.*

31. *Id.* at 679.

32. *Id.*

33. *Id.* at 682.

34. *Id.*

made by non-traditional families in California. Part V will conclude that consistency in dealing with non-traditional families is necessary, and that amending the UPA will achieve this consistency, thereby allowing those wishing to start non-traditional families to rely on firm law.

II. STATUTORY PROVISIONS AND RELATED CASES

A. The Uniform Parentage Act

Artificial insemination and other forms of reproductive technology have changed the face of conception and reproduction. One television special aired on the Public Broadcasting System revealed that, in today's rapidly changing world, there are at least "18 Ways to Make a Baby."[35] The advent of these 18 ways has helped many couples and singles who would otherwise be unable to conceive a child. However, it has also brought with it a plethora of new legal issues affecting persons who choose to take advantage of artificial insemination or surrogacy technology.

The Uniform Parentage Act,[36] initially drafted in 1973,[37] attempted to unify varying state laws regarding parentage principles. Since the UPA was drafted, 19 states have adopted it,[38] including California in 1975.[39] The UPA was amended in 2002 to address more of the complex issues

35. These 18 ways include: 1) natural sex, 2) artificial insemination—mother inseminated with husband's sperm, 3) artificial insemination—mother inseminated with donor sperm, 4) Artificial insemination—using mother and father's reproductive material in a surrogate, 5) In Vitro Fertilization (IVF) using mother and father's genetic material 6) IVF with Intra-Cytoplasmic Sperm Injection, 7) IVF with frozen embryos, 8) IVF with Preimplantation Genetic Diagnosis, 9) IVF with sperm donor, 10) IVF with ovum donor, 11) IVF with egg and sperm donor, 12) IVF with surrogate using both parents' genetic material, 13) IVF with surrogate and egg donor, 14) IVF with surrogate and sperm donor, 15) IVF with surrogate using her egg and father's sperm 16) IVF with surrogate using egg and sperm donors, 17) Cytoplasmic Transfer (experimental and currently not available), and finally, 18) Nuclear Transfer and Cloning. Additional methods are being discovered every day, and the list would be much longer if it included all of the experimental methods that are currently unavailable to the general public. *See* PBS, NOVA, *18 Ways to Make a Baby*, http://www.pbs.org/wgbh/nova/baby/ (last visited Nov. 1, 2005).

36. UNIF. PARENTAGE ACT (1973) (amended 2002), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa7390.pdf. The Uniform Parentage Act was drafted by the National Conference of Commissioners on Uniform State Laws.

37. *Id.;* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Remain the Focus*, 37 FAM. L.Q. 527, 532 (2004).

38. Erika M. Hiester, *Child Support Statutes and the Father's Right Not to Procreate*, 2 AVE MARIA L. REV. 213, 218 (2004) (citing UNIF. ACT OF PARENTAGE (1973) Refs. and Annos. Prefatory note, 9B U.L.A. 296 (2000)).

39. Sanja Zgonjanin, *What Does it Take to be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN'S L.J. 251, 258 (2005).

of assisted reproduction.[40] Only four states[41] have adopted the revised version.[42] California, the state in which the case of Emily and Kate took place, has yet to adopt this version. The only section of California's version of the UPA regarding assisted reproduction is codified as California Family Code §7613(b), which reads: "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."[43] California's version of the UPA in no way addresses the issue of egg donors and their rights regarding resulting children. Because of this omission, California courts are left without sufficient legislative guidance when addressing the parental rights of lesbian co-parents. As a result, the courts have chosen to compare them to sperm donor situations, and have attempted to analyze them under that framework.[44]

Section 7650 of California's Family Code is also relevant to the discussion of allocating parental rights to lesbian co-parents.[45] This section was modeled after the UPA[46] and it states in pertinent part that "insofar as practicable" that the provisions "applicable" to a father and

40. Under this new version, § 102(4) reads: "'assisted reproduction' means a method of causing pregnancy other than sexual intercourse. The term includes:

(A) intrauterine insemination;

(B) donation of eggs;

(C) donation of embryos;

(D) in-vitro fertilization and transfer of embryos; and

(E) intracytoplasmic sperm injection." UNIF. PARENTAGE ACT § 102(4) (2002); Zgonjanin, *supra* note 40, at 258 n.47.

41. Delaware, Texas, Washington and Wyoming.

42. Zgonjanin, *supra* note 40, at 259.

43. CAL. FAM. CODE § 7613 (2005). Section (a) of the statute is also somewhat relevant to the discussion here and defines the natural father of a child conceived by artificial insemination. It reads:

> If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

Id.

44. *See, e.g*., K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Elisa B. v. Super. Ct, 117 P.3d 660 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

45. CAL. FAM. CODE § 7650 (2005).

46. *Id*. Historical and Statutory notes (Taken from §21 of the Uniform Parentage Act).

child relationship also apply to a mother and child relationship.[47] Therefore, this section can be read to imply that the sperm donation statute, §7613(b), should apply to a woman who is the donor of an ovum, just as it applies to a man who donates his sperm for artificial insemination. However, courts have diverged on this issue, sometimes finding that the interests of an egg donor are different than those of a sperm donor.[48]

B. Cases Dealing With Sperm Donation

California has dealt with novel situations involving lesbian co-parents by analyzing cases involving sperm-donor fathers and their rights to resulting children. While other states have concluded that a sperm-donor's intention to be a father can create some parental rights, one line of California case law concludes that even if a sperm donor is highly involved with the child and intended to become the child's father, §7613(b) precludes that donor from having any parental rights to the child.

One of California's first cases involving a sperm-donor parentage issue was *Jhordan C. v. Mary K*.[49] In that case, a woman, Mary, wished to have a child, secured a sperm donation from Jhordan, and performed the insemination personally in her own home without the aid of a physician.[50] Mary claimed that "she did not want a donor who desired ongoing involvement with the child,"[51] but she did agree in advance to let Jhordan see the child after it was born.[52] Jhordan was active in Mary's life throughout her pregnancy, buying the items necessary to prepare for the coming child and starting a trust fund for him or her.[53] When the child was born, Jhordan was listed as the father on the birth certificate.[54] Mary agreed that Jhordan could see the child monthly.[55] When she attempted to terminate these monthly visits, Jhordan filed an action to establish paternity and visitation rights.[56] Finding that Jhordan

47. CAL. FAM. CODE § 7650(a) (2005).

48. *Compare K.M. v. E.G.,* 117 P.3d 673 (finding a known woman who donated her ovum was entitled to parental rights), *with* Steven S. v. Deborah D.*,* 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005) (finding that a known male sperm donor did not have parental rights).

49. 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

50. *Id.* at 532.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 533.

did have paternal rights to the child, the court avoided any discussion of whether or not the sperm donation statute[57] applied generally to known sperm donors who have maintained at least a somewhat active interest in the child.[58] Instead, the court decided that, since Mary had performed the insemination on her own, and not by way of a licensed physician, §7613(b) did not apply.[59]

Though *Jhordan C.* avoided the controversial issue of parental rights for known sperm donors, a more recent California case, *Steven S. v. Deborah D,* addressed the issue was directly.[60] In this case, Steven and Deborah had an intimate relationship with one another and had been engaging in sexual intercourse for a few months, attempting to have a child.[61] However, no pregnancy had resulted.[62] Deborah decided to use sperm that Steven had provided to a physician in order to conceive a child through an in-patient procedure done at the hospital, and eventually succeeded in her attempt.[63] Though Steven was married to another woman at the same time he was trying to conceive with Deborah, he acted as if the child resulting from Deborah's pregnancy would be his own. He was with her at the hospital when the artificial insemination procedure was completed,[64] he was present at the first ultra-sound, and he attended therapy sessions with Deborah to discuss issues related to their child.[65] When the child was born, Deborah called Steven at work, and proclaimed, "Congratulations! You're a father!"[66] The child even referred to Steven as "Daddy Steve," and Deborah referred to Steven as the child's father.[67] Because of these interactions, Steven claimed that he should be considered the legal father of the child and that the court should find an exception in the statute where a sperm donor has had an intimate relationship with the donee and has in all respects treated the child as if it were his own.[68]

The trial court found that, though Steven was the father through artificial insemination and not by natural means, his interactions with

57. At this time the sperm donation statute was entitled CAL. CIV. CODE § 7005, which later became CAL. FAM. CODE § 7613(b).

58. 224 Cal. Rptr. at 533.

59. *Id.*

60. 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005).

61. *Id.* at 484.

62. *Id.*

63. *Id.*

64. *Id.* at 485.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 486.

Deborah and the child were enough to form a basis for paternity. However, the appellate court strictly interpreted the sperm donation statute and held that it should apply. Accordingly, Steven had no parental right to the child because the statute clearly states that a man who donates sperm to a woman not his wife is not the natural father of the child conceived.[69] The court further explained that the intent of the sperm donation statute was to give women the right to conceive a child by artificial insemination without threat of parental rights being asserted by the donor.[70] The court refused to create an exception in the law for a known sperm donor who had an intimate relationship with the mother and had held himself out as the father of the child.[71]

In contrast to this California decision, other states have come very close to creating an exception to the UPA when a sperm donor has some kind of relationship with the donee, thereby giving the donor parental rights to children resulting from his donation.[72] Colorado, another state that has adopted the UPA, has held that its sperm donor statute, identical to California's, does not apply when a man donates sperm to a woman he knows with the intention of becoming a father.[73] In *In the Interest of R.C.*,[74] J.R. donated his sperm to E.C., an unmarried woman, so that she could have a child.[75] Behaving similarly to the donor in *Steven S. v. Deborah D.*, J.R. acted as if the child resulting from the pregnancy would be his own.[76] He bought clothing, toys and books for the child; opened a college fund for the child; attended birthing classes with E.C. and was present at the birth and took care of the child during the first weeks of his life.[77] E.C. told J.R. that he could not see his son again because the sperm donation statute in Colorado, §19-4-106(2) extinguished his parental rights.[78] J.R. then brought a paternity action in

69. *Id.* at 485;CAL. FAM. CODE § 7613(b) (2005).

70. *Id.* at 486.

71. *Id.* at 487.

72. In the Interest of R.C., 775 P.2d 27 (Colo. 1989); C.M. v. C .C., 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977).

73. *In the Interest of R.C.*, 775 P.2d at 27. The statute used in this case was § 19-4-106 of the Model UPA, which states language identical to CAL. FAM. CODE § 7613 (2005).

74. 775 P.2d at 27.

75. *Id.* at 28.

76. *Id.*

77. *Id.*

78. Id.; *see* COLO. REV. STAT. § 19-4-106(2) (1989) (amended 1994, 2003). Though the statute in Colorado was amended in 1994 and again in 2003, section 19-4-106(1) reads the same as the previous statute. However, section (2) is now different from California's UPA and reads:

> (2) A donor is not a parent of a child conceived by means of assisted reproduction, except as provided in subsection (3) of this section.
>
> (3) If a husband provides sperm for, or consents to, assisted reproduction by his wife as

Colorado Juvenile Court.[79]

The case eventually reached the Colorado Supreme Court.[80] The Supreme Court found that the language of the Model UPA was "ambiguous with respect to the rights and duties of known donors and unmarried recipients."[81] Although remanding the case, the court held that if J.R. and E.C. had an agreement that the child would be J.R.'s, then the statute would not apply, and J.R. would have parental rights to the child.[82] Though the court remanded to determine whether the parties had agreed that J.R. would be the father, the court implied that J.R.'s actions toward the child and his intent to become a parent could be used as proof of such an agreement.[83]

Similarly, New Jersey has also allowed for consideration of a donor's intent to become a parent where a known sperm donor gave semen to an unmarried woman who artificially inseminated herself without the aid of a licensed physician.[84] In that case, C.M. and C.C. were in a dating relationship and decided to conceive a child. However, C.C. did not want to have pre-marital sex, so they decided to conceive through artificial insemination.[85] Though it did not mention the UPA specifically, the New Jersey court stated that to find C.M. was the natural father was in the child's best interest because C.M. "fully intended to assume the responsibilities of parenthood" and because no other man intended to assume the role of the father.[86] Because he was deemed the natural father of the child, the court found that he was entitled to visitation rights.[87]

Pennsylvania, though a state that has not adopted the UPA,[88] has

provided in subsection (1) of this section, he is the father of the resulting child.

Id. Though there has been no significant case law on the issue since *In the Interest of R.C.*, the new statutory language seems to suggest that Colorado has chosen to exclude unmarried sperm donors from obtaining parentage rights. However, in *In the Interest of R.C.*, the court interpreted the previous statutory language to indicate that there may be a right for known sperm donors to assert a right to parentage. 775 P.2d at 27. Since California still uses that statutory language, cases prior to the change in Colorado are more relevant to the issue at hand.

79. *In the Interest of R.C.,* 775 P.2d at 28.

80. *Id.* at 29.

81. *Id.* at 34.

82. *Id.* at 35.

83. *Id.*

84. C.M. v. C .C., 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977).

85. *Id.* at 821.

86. *Id.* at 824.

87. *Id.* at 825.

88. UNIF. PARENTAGE ACT, Refs. and Annos. Prefatory note (2000)(amended 2002). The 1973 Uniform Parentage Act has only been adopted in the following states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. *See* Uniform Matrimonial, Family, and

found that sperm donors whom the donee knows possess parental rights and obligations to children resulting from their donation. The Superior court of Pennsylvania in *Ferguson v. McKeirnan* decided that even when a known sperm donor has contracted his parentage away with a sperm-donation contract, he may still be liable for child support.[89] In that case, a man and a woman who were in a dating relationship decided to have a child together, though the woman was married to another man at the time.[90] She could not conceive naturally, however, because she had had a tubal ligation.[91] She convinced her boyfriend to donate the sperm that she needed to conceive, and promised that he would not have any obligation whatsoever to the resulting child.[92] The procedure was successful, and the woman gave birth to twins. Three years later, the woman requested child support from the boyfriend, though she had named her husband as the father on the children's birth certificates. The court found that the boyfriend was the true father and that he owed support to the children, even though he intended to be merely a sperm donor and not the father of the children.[93] The decision suggests that even a traditional sperm-donation contract may not be enforceable in Pennsylvania when a known donor has had a relationship with the donee.

Thus, some courts have considered a sperm donor's intent when the donor is known to the donee. Yet, California has refused to follow that route, as *Steven S. v. Deborah D.* demonstrates. This refusal has created a strong disconnect between cases dealing with sperm donation and the recent cases dealing with ovum donation.[94]

C. The "Intent Test" and Lesbian Co-Parents

In today's world of non-traditional families, biology alone is an insufficient means for determining parental rights. Sometimes, the biological parents' having custody of the child does not serve the child's best interests. Since the introduction of artificial insemination, many cases have attempted to clarify parental rights and create a test to determine which party or parties have such rights and which do not. A

Health Laws Locator, *available at* http://www.law.cornell.edu/uniform/vol9.html (last visited Nov. 4, 2005).

89. 855 A.2d 121, 123 (Pa. Super. Ct. 2004).

90. *Id.* at 122.

91. *Id.*

92. *Id.*

93. *Id.* at 123.

94. *See* discussion of *K.M. v. E.G., infra* at Part III.

large number of cases have decided that a party's intent may be an extremely important factor in determining parentage rights.

i. *Johnson v. Calvert*

The *Johnson v. Calvert*[95] court was the first California court to apply intent-based parenting principles in a sperm-donation/surrogacy contract situation. In *Johnson*, a married couple, Mark and Crispina Calvert, wished to have a child.[96] However, they were unable to conceive a child naturally, since Crispina had previously undergone a partial hysterectomy.[97] In 1990, Crispina and Mark decided to implant their genetic material (Mark's sperm and Crispina's egg) into Anna, a woman who had offered to be a surrogate for the couple.[98] For her services, Anna would be paid $10,000.[99] Relations deteriorated between Anna and the couple, and before the child was born, Mark and Crispina filed a lawsuit seeking a declaration that they were the legal parents, and Anna filed a similar action, claiming to be the child's mother.[100] The court faced multiple issues. First, the court faced the question of how to determine maternity under California law. California Civ. Code § 7003, a portion adopted directly from the UPA, stated that a parent and child relationship "may be established by proof of [a woman] having given birth to the child or under [the UPA]."[101] Since the version of the UPA adopted in California is silent as to how to determine motherhood, other than in §7003, the court found that when maternity is in dispute, the same principles that apply to paternity should also apply to maternity.[102] Thus, because the UPA allows a genetic tie to establish paternity, a genetic relationship may also be used to establish maternity.[103]

The court then faced the question of how to determine, when the birth mother and the genetic mother are different, which of them is the 'natural' mother and which of them should have parental rights to the child. The court decided that since Crispina, and not Anna, had intended at the time of conception to be the child's mother, that she had rights to the child and Anna did not. The court went on to state that "[the woman] who intended to procreate the child—that is, she who intended

95. 851 P.2d 776 (Cal. 1993).
96. *Id.* at 778.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 780.
102. *Id.*
103. *Id.* at 781.

to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[104] Though the court did not discuss what would be required to demonstrate sufficient intent, the court used a simple "but-for" test, stating that "but for [Mark and Crispina's] acted-on intention, the child would not exist."[105]

The court refused to use the "best interests of the child" test and defended the new "intent" test by quoting a commentator who stated that "the interests of children . . . are 'unlikely to run contrary to those of adults who choose to bring them into being.'"[106] Additionally, the court stated that this "intent" test would aid in bringing some stability to a child's life in the rare situation that neither the genetic mother nor the birth mother wished to claim the child after its birth.[107] In this manner, the intent test would satisfy the rights of parents who conceive a child while still keeping the best interests of the children in mind.

Since the *Johnson* decision, the "intent" test has grown in popularity. Courts have applied it beyond the specific fact pattern present in *Johnson* to a variety of different situations dealing with artificial insemination and surrogacy.

ii. *Buzzanca v. Buzzanca*

Johnson v. Calvert set out the "intent test," but *Buzzanca v. Buzzanca*,[108] applied this test to the previously unexplored situation in which a child had no known biological parents. In that case, a married couple agreed to have an embryo that was biologically unrelated to either of them implanted in a surrogate mother.[109] Prior to cases such as *Johnson* dealing with artificial insemination, California statutory provisions defining motherhood as giving birth and contributing genetically to the child served as the only methods for establishing parentage.[110] Pursuant to California statute, in a case of artificial insemination, a husband can be considered a "natural father" even if he is not biologically related to the child.[111] However, the *Buzzanca* court found that, in this instance, where the woman intended to become a parent to the child but was biologically unrelated to it, the statute

104. *Id.* at 782.
105. *Id.*
106. *Id.* at 783.
107. *Id.*
108. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
109. *Id.* at 282.
110. CAL. FAM. CODE § 7610 (2005).
111. CAL. FAM. CODE § 7613 (2005).

governing paternal rights in insemination cases applied to her as well. Thus, the court reasoned that means other than biology and physically giving birth to a child could establish fatherhood, other means should be able to establish motherhood as well.[112]

The court further found that parties can establish non-biological parentage rights when both parties *intended to cause* the birth of the child, even though they have no biological connection with the child.[113] The court went so far as to say that both motherhood and fatherhood could be established by "virtue of consent" to an artificial insemination procedure.[114] Combining these two ideas—intent and equality between men and women—the court opined that "there is . . . no reason to distinguish between husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being."[115] Thus, even parents who are not biologically related to a child may be treated as parents of that child when they intend to become parents. However, the situation becomes less clear when lesbian co-parents are involved because these kinds of couples challenge many more of the traditional notions of parentage. These couples ask the question that *Johnson v. Calvert* answered in the negative, that is, whether a child have two mothers.

iii. Three Cases Dealing With Visitation Rights

At least three cases have dealt with visitation rights in which California courts have applied a test similar to the intent test used in *Johnson v. Calvert*, though they have stopped short of defining that test in as an "intent test." These courts have held that when a lesbian parent intends to be the parent of a child, she may be entitled to certain visitation rights. In *E.N.O v. L.M.M.,*[116] a birth mother's former same-sex partner filed a suit seeking to enforce the parties' agreement that the partner would adopt the child and assume joint custody.[117] She also sought visitation rights to the child. In this case, an express agreement between the parties stated that they intended to co-parent the child.[118] Applying the best interests of the child standard, the Supreme Judicial Court of Massachusetts found that the ex-partner should be granted

112. *Buzzanca,* 72 Cal. Rptr. 2d at 282.
113. *Id.* at 286.
114. *Id.* at 288.
115. *Id.* at 291.
116. 711 N.E.2d 886 (Mass. 1999).
117. *Id.* at 886.
118. *Id.* at 889.

temporary visitation rights as a de facto parent because she had participated in the birth of the child as a father would; had clearly intended to be a parent to the child; and was very involved in the child's life.[119]

The Supreme Court of Wisconsin reached a similar result in *In re Custody of H.S.H.-K*.[120] In this case, a lesbian ex-partner sued for custody and visitation rights to the biological mother's child. The court found that though the relevant statute did not apply to visitation of lesbian co-parents, the court could use its equitable powers to allow visitation rights when the non-biological partner's relationship to the child is "parent-like" and when "a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[121] The "triggering event" could merely be the biological parent's interference with the parenting rights of the partner.[122]

The third case dealing expressly with this issue is *V.C. v. M.J.B*.,[123] in which the same basic set of facts existed as in the previous two cases. The Supreme Court of New Jersey came to a similar conclusion, holding that when a lesbian co-parent forms a bond with the child, that person can become a "psychological parent," and can bring an action to establish visitation with the child.[124] The court found that the "psychological parent" doctrine had historically been evoked when a person not biologically related to the child stepped in because the biological parent was in some way unfit. However, in this case, the court extended the doctrine to a situation in which neither parent was unfit, but the non-biological and biological parent had raised the child together, and the non-biological parent and formed a close bond with the child.[125] This case, like *H.S.H.-K.* before it, found that a parent is a "psychological parent" when she has "foster[ed] the relationship between the third party and the child; . . . lived with the child; . . . perform[ed] parental functions for the child to a significant degree; and most important, [forged] a parent-child bond . . . ."[126]

These three cases emphasize de facto or psychological parenthood, a status that can be obtained by meeting a test that emphasizes the intent

119. *Id.* at 890–92.

120. 533 N.W.2d 419 (Wis. 1995).

121. *Id.* at 435.

122. *Id.* at 436.

123. 748 A.2d 539 (N.J. 2000).

124. *Id.* at 555.

125. *Id.* at 549–550.

126. *Id.* at 551.

of the parties involved pre- and post- birth of the child.[127] These cases, therefore, tend to show that intent can sometimes determine certain parentage rights. Courts have not, however, stretched the rule of intent so far as to apply it to *custody rights*, but only to *visitation rights*.[128]

iv. The Companion Cases Dealing With Lesbian Co-Parents

On the same day it decided K.M. v. E.G., the California Supreme Court decided two companion cases, *Elisa B v. Superior Court,*[129] and *Kristine H. v. Lisa R.*[130]. These two cases were similar to *K.M. v. E.G.* in that they dealt with lesbian co-parents vying for a children resulting from artificial insemination. In contrast to K.M. v. E.G., both of these companion cases presented situations in which the parties were very clear that their intention was to raise the children as a couple. Therefore the court did not reach some of the pressing questions that *K.M. v. E.G.* presents.

In *Kristine H. v. Lisa R.*, the parties were lesbian partners who decided to have a child.[131] Kristine received sperm from a friend and inseminated herself. Lisa was in no way genetically related to the child, but Lisa and Kristine agreed that they would raise the child together as a couple.[132] To that end, the couple filed and obtained a legal judgment in the California Superior Court that Lisa would be a joint parent to the child.[133] However, when the parties separated, Kristine attempted to challenge that order. The court ruled that she was estopped from challenging the judgment because the parties had relied upon it for two

127. In order for de facto parenthood to apply, these four factors must all be met: 1) the legal parent fostered and consented to development of a parent-like relationship between the petitioner and the child; 2) the petitioner and child lived together in the same household; 3) the petitioner assumed the obligations of parenthood by taking responsibility for the child's care, education, and development, including but not limited to financial contribution, and did not expect financial compensation; 4) the petitioner has been in a parent-like relationship a sufficient amount of time to have a bonded relationship. *See* Zgonjanin, *supra* note 40, at 253–54. This is similar to "psychological parentage," discussed above.

128. In custody cases, the standard is much more stringent than in visitation actions, arguably because custody actions will have a longer-lasting impact on a child's life than visitation rights. Additionally, visitation only infringes on a custodial parent's rights for a short amount of time, and custody decisions can completely take away those rights. Sarah R. David, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 931 (2005).

129. 117 P.3d 660 (Cal. 2005).

130. 117 P.3d 690 (Cal. 2005).

131. *Id.* at 692.

132. *Id.*

133. *Id.*

years and it would be unfair for Kristine to overturn it now.[134] Because of the simplicity of the case, the court ruled on only one controversial issue, refusing to void a judgment that a child could have two mothers.[135] The court never reached the difficult issue of determining parentage when there was not a prior agreed upon and explicit court-ordered judgment that both partners would have parental rights.

Elisa B. v. Superior Court[136] was also very different from *K.M. v. E.G*. In *Elisa B*., the parties were a lesbian couple, but unlike the couple in *K.M. v. E.G.,* the couple agreed to have children and raise them together. The couple even agreed to a financial arrangement whereby Elisa would be the breadwinner of the family and Emily would stay at home and raise the children.[137] They both got pregnant from sperm from the same man that they obtained at a sperm bank. As a result of the insemination, Elisa had one child and Emily had two.[138] The parties subsequently split up, and Emily brought an action to obtain child support from Elisa.[139] The court held that the children could have two mothers and that Elisa was the mother of Emily's children.[140] However, it did not reach the issues presented by *K.M. v. E.G*. and the California statute dealing with sperm donation because it did not deal with a conflict in which one woman was the birth mother and the other was the biological mother. Elisa and Emily had both conceived and delivered children and the parties had *clearly* declared their intent to become parents to all of the children conceived, even though they were not all biologically related.

Accordingly, these two cases, though helpful in clarifying whether a child can have two mothers, do very little to clarify whether the intent-based principles of *Johnson* would also apply to a genetic mother who has signed a waiver of her rights to any children resulting from insemination processes. *K.M. v. E.G*. attempts to deal with the confusion that these cases, combined with the sperm donation cases, create.

134. *Id.* at 696.
135. *Id*. at 692.
136. 117 P.3d 660 (Cal. 2005).
137. *Id.* at 663.
138. *Id*.
139. *Id.* at 664.
140. *Id.* at 667.

III. *K.M. V. E.G.*[141]

The case of *K.M. v. E.G.* deals with many of the same issues as the previously discussed cases. However, the situation is novel, and the decision is unlike other cases that California courts have decided. The California appellate court, following the *Johnson* precedent, originally held that Kate (K.M.) was not the legal parent of the children, because the signed waiver of her parental rights and the oral agreement between Kate and Emily indicated that Kate did not *intend* to be the parent of the children resulting from the in vitro procedure.[142] The Supreme Court of California, however, reversed this decision, rejecting the Johnson "intent" test in this situation.[143] The court did retain parts of *Johnson*, but ultimately limited the *Johnson* holding to its specific situation. The court first compared Kate's relationship to the children to the relationship of the intended mother in *Johnson*. Since the court in *Johnson* held that genetic consanguinity could be a basis for establishing parenthood, Kate's genetic relationship to the children could also be considered evidence of a mother and child relationship.[144]

Because the UPA states that the provisions of the statute applicable to a father and child relationship also apply to a mother and child relationship,[145] the question then remained as to Kate's status under the sperm donation section California's version of the UPA, which dictates that sperm donors (or in this case, egg donors) are not to be treated as the "natural fathers" (or in this case, "natural mothers") of children resulting from their donation.[146]

In finding that the sperm donation statute did not apply, the Supreme Court examined legislative intent.[147] The court discussed the history of the statute and found that, in enacting the Model UPA, the California legislature purposefully omitted the word "married" so as to make it applicable to unmarried women who wished to conceive a child through artificial insemination.[148] However, the court pointed out that there is no

141. 117 P.3d 673 (Cal. 2005).

142. *K.M. v. E.G.*, 13 Cal.Rptr.3d 136, 145–48 (Cal. Ct. App. 2004), *rev'd*, 117 P.3d 673 (Cal. 2005) .

143. 117 P.3d at 681–682.

144. *Id.* at 678.

145. UNIF. PARENTAGE ACT § 106 (2000) (amended 2002). *See also* CAL. FAM. CODE § 7650 (2005).

146. CAL. FAM. CODE § 7613(b) (2005).

147. 117 P.3d at 678.

148. *Id.* at 679–80. The Model UPA only allowed men who donated sperm to a *married* woman to give up their rights and responsibilities to a resulting child. Section 7613(b) was enacted in California originally as section 7005(b) and was taken almost verbatim from the model UPA, with the exception of omitting the word "married."

indication that the legislature wished to expand the meaning of the statute to allow a 'donor' who lived with the unmarried donee and raised the child in her home to give up rights and responsibilities to a resulting child.[149] Additionally, even though Kate had signed a traditional ovum-donation contract in which she gave up her rights to any resulting offspring, Kate was not a "true egg donor," as contemplated by the statute because she was not anonymous; she and Emily (E.G.) were domestic partners and lived together. By Kate's testimony, she had not intended to give up her rights to the child by signing the contract, just as the couple in *Johnson* had not "intended" to donate their genetic material to the surrogate mother.[150] Because the sperm donation statute did not apply, the ovum-donation contract signed by Kate was not valid, as case law in California does not allow parents to waive parental responsibilities, unless they are signing a sperm donation contract in regards to the sperm donation statute.[151] The court further stated that when the sperm donation statute does not apply, traditional UPA principles are used to determine parentage.[152] The court held that Kate's genetic tie to the child could therefore be used to establish a maternal relationship under the UPA.[153]

The court also compared Kate and Emily's situation with the situation raised in *In the Interest of R.C*[154]. The court relied on this case to support its decision that the sperm donation statute should not apply.[155] In *R.C.,* the Colorado Supreme Court found that the Colorado statute dealing with sperm-donation situations (which was identical to California's statute) did not apply to a sperm donor who knew the donee and believed that he would be the father of the child.[156] Similarly, Kate and Emily knew each other and Kate was seemingly under the impression that she would be a part of the children's lives. Kate and Emily's intent to become parents was even stronger than in *In the Interest of R.C*., because Kate and Emily lived together and had raised

149. *Id.* at 680.

150. *Id.* at 678–79.

151. *Id.* at 682. "It is well established that parents cannot, by agreement, limit or abrogate a child's right to support." Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998).

152. 117 P.3d at 681.

153. *Id.* In *Johnson*, the court combined two provisions of the UPA to find that genetic consanguinity can be the basis for a mother and child relationship. First, sections 7140–7150 indicate that genetic tests can be used to establish paternity. Section 7650 states that provisions of the UPA that apply to paternity also apply to maternity. Therefore, genetic tests should also be used to prove maternity.

154. *See* discussion *supra* at Part II.B.

155. 117 P.3d at 680.

156. *Id. See also* discussion *supra* at Part II.B.

the children together for five years.[157] Thus, in following the Colorado court decision, as opposed to other decisions from California, the court in *K.M. v. E.G.* recognized a national trend to analyze a party's intent to become a parent rather than merely deciding parentage based on a genetic connection. However, the court went on to point out that they were not using the *Johnson* "intent test," which emphasized pre-birth intent, because that test should control only when, as in *Johnson*, the parties have a surrogacy agreement and two mothers are competing against each other for the same maternal role.[158] The court stated that pre-birth intent alone should not be used to determine parentage in Kate and Emily's situation, since it is not generally used to support a denial of parental responsibilities when a party does *not* intend to become a parent.[159]

A. Dissent I

There were two dissents in *K.M. v. E.G*. These dissents posited that the intent test should not have been so easily dismissed by the majority. Though agreeing that a child could legally have two mothers, the dissents argued that the majority's analysis should have considered the intent test.

The first dissent in the case argued that California's sperm donation statute[160] and its statute stating that the provisions "applicable" to a father and child relationship also apply to a mother and child relationship[161] should be applied as written. Since Kate knowingly signed a waiver declaring her intention to give up her parental rights, she should not be considered the mother of the children.[162]

Because the dissent said the statute should apply, the dissent then analyzed the situation under § 7611, which states that a man is a "presumed father" if he 1) receives the child into his home and 2) holds the child out as his own.[163] Kate did not meet both of these prongs because she had kept the fact that she was the donor of the egg a secret and had not held the child out as her own.[164] Further, Kate was a "true egg donor," since she knowingly signed away her rights in a traditional

157. *Id.*
158. *Id.* at 681.
159. *Id.*
160. CAL. FAM. CODE § 7613 (2005).
161. CAL. FAM. CODE § 7650 (2005).
162. 117 P.3d at 682–683.
163. *Id.* at 683;CAL. FAM. CODE § 7611 (2005).
164. 117 P.3d at 683.

egg-donation contract.[165] The dissent emphasized that the court should find "no reason to treat ovum donors as having greater claims to parentage than sperm donors."[166] The dissent argued that the majority had ignored the intentions of the parties at time the children were conceived. In effect, the dissent stated that the majority had rewritten the statutory language so as to make a sperm-donor a father when he "intended that the resulting child would be raised in [the couple's] joint home."[167]

Additionally, the dissent pointed out that public policy dictates that the *Johnson* holding should be followed, as many California citizens have relied on it when making procreative decisions.[168] According to the dissent, the court's holding could greatly,, and most likely negatively, affect these choices..[169]

B. Dissent II

The second dissent, written by Justice Werdeger, agreed with the majority's position that a child can have two mothers when no natural or adoptive father exists.[170] However, Justice Werdeger argued that in this instance the children do not in fact have two mothers.[171] He emphasized the importance of predictability in the law so that, in the face of a rapidly changing sexual and scientific environment, individuals can rely on specific laws when making family choices.[172] He pointed out that one of the main aims of the *Johnson* court was to create expectations for individuals who wanted to use reproductive technology.[173] Justice Werdeger argued that this intent test of *Johnson* should be followed in this case.[174] Hence, the dissent concluded that since the trial court found that Emily intended to become the children's known mother and that Kate did not, the appellate court should defer to the trial court's findings of fact and conclude that Emily is the only mother of the children.[175]

Justice Werdeger agreed with the majority that, absent a situation in which the sperm donation statute directly applies, parental rights should

165. *Id.* at 684.
166. *Id.*
167. *Id.* at 685.
168. *Id.* at 684.
169. *Id.* at 685.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 688.
174. *Id.* at 686.
175. *Id.*

not be able to be contracted away. However, he made the persuasive point that "Johnson's intent test does not *enforce* ovum donation and gestational surrogacy agreements; it merely directs courts to consider such documents, along with all other relevant evidence, in determining preconception intent."[176]

This dissent also pointed out that the majority opinion may violate equal protection. It treated lesbian parents differently than other individuals, because this case was decided differently than other ovum donation cases not dealing with lesbians. He stated that lesbians should have the same right as any other women to receive an ovum without receiving the donor as a co-parent.[177]

The dissent also stated that the majority erred in emphasizing the importance of the intent to raise a child. Justice Werdeger gave many examples of times when people become unintended parents. Many people who have children do not originally intend to raise them.[178] In the case of Kate and Emily, Kate did intend to give the child care, but that should not be a factor the court considers. The intent to raise a child is nothing without also the intent of a person to hold the child out as his or her own.[179]

The dissent concluded that courts should not decide cases such as this on a case by case basis with the child's best interest in mind.[180] The *Johnson* court explicitly refused to decide cases like this with the best interests of the child in mind so as to protect the interests of the intended parents in surrogacy agreements. This decision, as the dissent stated, places the court in an awkward position with no set rule for determining what should be done in situations like this.[181]

IV. DISCUSSION

Assisted reproduction is growing. In fact, the assisted reproduction services sector is one of the fastest growing services in relation to advances in genetics.[182] A 2001 article stated that "several thousand children are born each year as a result of assisted reproduction."[183] The

176. *Id.* at 687.

177. *Id.*

178. *Id.* at 688.

179. *Id. See also* CAL. FAM. CODE § 7611 (2005).

180. 117 P.3d at 689.

181. *Id.*

182. Suzanne Holland, *Selecting Against Difference: Assisted Reproduction, Disability and Regulation*, 30 FLA. ST. U. L. REV. 401, 403–04 (2003).

183. Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 75 (2001).

legal confusion that assisted reproduction and surrogacy agreements have caused is troubling and seemingly impossible to navigate. Each jurisdiction has dealt with these cases in its own way, with little continuity between states, or even within a state.[184] As a front runner in progressive law, California should be ready to establish a law upon which individuals who wish to create families in non-traditional ways can rely. Currently, the UPA has a provision that deals with paternity of sperm donors (§ 7613(b)) but not one that deals with maternity of ovum donors. Courts or legislatures must establish some stability so that individuals can make decisions, knowing that they have rights to the children that they intend to parent. Though some commentators have argued otherwise, the only way to establish this stability is for courts to reevaluate the existing case law, and find that the intent test laid out years ago by *Johnson v. Calvert* is the sole means of fairly and effectively evaluating parental rights. Accordingly, the decision in *K.M. v. E.G.,* though correct in recognizing non-traditional families and establishing that a child can have two mothers, should have been decided according to the *Johnson* intent test. Since the trial court, which followed the *Johnson* intent test, chose to believe that Emily had a stronger intent to become a single mother, her rights should have been protected and Kate should not have been given rights to the child. If the intent test were codified in California statutory law, the court in *K.M. v. E.G*. would not have been able to ignore the pre-birth intent of the parties, and thus would not have been able to ignore Emily's right to raise a child alone.

Another major problem with the court's decision *K.M v. E.G*. is that it creates a strong disconnect between cases dealing with lesbian co-parents and cases dealing with heterosexual couples such as *Steven S. v. Deborah D,* a sperm donation case in which the court found a sperm donor to have no parental rights.[185] Courts must either couch the new lesbian co-parent cases in terms of the old sperm-donation cases, or begin to decide sperm donation cases differently in light of the new lesbian co-parent cases. Alternatively, a better solution would be to uniformly apply the intent test of *Johnson* in both situations, and amend the UPA to apply the intent test to both sperm and ovum donors. Fairness dictates that egg donors and sperm donors should be treated the

184. *See, e.g*., *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005) (finding that a gestational carrier of triplets who had received an egg from an anonymous donor and sperm from a known father did have parentage right to the triplets.); *In Re* Parentage of J.M.K., 119 P.3d 840, 848–49 (Wash. 2005) (finding that a statute intended to prevent unintended paternity though artificial insemination did not apply to in vitro fertilization).

185. Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005). *See* discussion *supra* at Part II.B.

same under California case law and under the UPA. Though differences exist between sperm and egg donors, these differences are small in comparison to the similar interests that these two groups of people share.

A. Applying the Intent Test

The court in *K.M. v. E.G.* decided not to adhere to the line of cases following the *Johnson* intent test, and instead focused on the parties actions post-birth of the twins. The court stated that pre-conception or pre-birth intent should not be the only factor considered, since it is not generally used to support a denial of parental responsibilities when a party does *not* intend to become a parent.[186] However, this logic is faulty because it likens artificial insemination situations to traditional conception cases. The court found that in traditional conception cases, i.e., those in which a child is conceived through sexual intercourse, intent is not generally used to support a denial of parental responsibilities, so it should also not be used at all in artificial insemination cases.[187] However, cases in which parties rely on reproductive technology to conceive a child confront completely different issues from cases where parties conceive through sexual intercourse. When two individuals choose to have sex, they are not necessarily contemplating the birth of a child. However, the only purpose of artificial insemination is creation of a baby, so the parties are by definition contemplating a child. The intent test is the most logical way to deal with lesbian co-parent and artificial insemination situations because intent is central to the decisions that are being made. Therefore, the court should have applied the intent test in *K.M. v. E.G.*

Many commentators have suggested that the "intent test" presented in *Johnson* is flawed for several reasons. However, without more specific statutory language to define these new situations, the intent test remains the best way to deal with parentage issues of lesbian and heterosexual parents.

Melanie Jacobs contends that, "If the parties did not intend to coparent pre-birth, but actively coparented the child for a period of time thereafter, . . . the initial intent should not be used to preclude parentage determination and the current intent to coparent should be considered as an element of functional parenthood."[188] However, this approach presents multiple problems. First, if courts determine that pre-birth

186. *K.M. v. E.G.*,117 P.3d at 681–82.

187. *Id.*

188. Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 438 (2005).

intent is less important for determining parentage rights than post-birth activities, the law is likely to expand inappropriately. A variety of individuals who care for children post-birth, and are instrumental in raising a child should never have claims to parentage. For instance, a babysitter or nanny often spends more time with a child than the parents do, and has a large role in raising the child. Courts would be quick to reject a claim that the babysitter had parental rights to the child because courts favor the rights of intended biological parents so highly over non-parents.[189] Some may argue that the situation presented in *K.M. v. E.G.* is different because the individual seeking parentage is actually a biological parent of the child. However, with the advent of artificial insemination, genetics has played less of a role in determining parentage.[190] The sperm donation statute in California specifically provides that when a man donates sperm, he has no claim to the child, despite his genetic tie to it.[191] Additionally, because the goal of artificial insemination is to allow those who are biologically unable to conceive to become parents, artificial insemination gives rise to situations in which neither parent is genetically related to the child and only the anonymous donors have a biological tie.[192] Therefore, genetics should play less of a

189. In California, a non-parent can prevail in a custody dispute against a parent only when there has been a finding that residing with the parent would harm the child and the only way to avert this harm would be to place the child with the non-parent. *See In re* B.G., 523 P.2d 244, 258 (Cal. 1974).

190. Many times, a child conceived through artificial insemination is biologically related to an anonymous person. Sperm donation statutes have sprouted in many states so as to prevent anonymous donors from returning and claiming parental rights to biological children resulting from their donation. A 1994 comment cites these states as having statutes dealing with sperm donation: ALASKA CODE § 26-17-21 (1993); ALASKA STAT. § 25.20.045 (1993); ARIZ. REV. STAT. ANN. § 12-2451 (1993); ARK. CODE ANN. § 9-10-201 (Michie 1993); CAL. FAM. CODE § 7613 (West 1994); COLO. REV. STAT. § 19-4-106 (1993); CONN. GEN. STAT. §§ 45A-774 to 775 (1992); FLA. STAT. ANN. § 742.11 (West 1993); GA. CODE ANN. § 19-7-21 (1993); IDAHO CODE ANN. § 39-5405 (1993); 750 ILL. COMP. STAT. ANN. 40/2 (Michie 1993); KAN. STAT. ANN. § 23-129 (1992); LA. CIV. CODE ANN. art. 188 (West 1992); MASS. ANN. LAWS ch. 46 § 4B (Law. Co-op.1993); MICH. COMP. LAWS § 333.2824 (1993); MINN. STAT. § 257.56 (1993); MO. ANN. STAT. § 210.824 (Vernon 1992); MONT. CODE ANN. § 40-6-106 (1993); NEV. REV. STAT. ANN. § 126.061 (Michie 1993); N.H. REV. STAT. ANN. §§ 168-B:3(II) and B:11 (1993); N.J. STAT. ANN. § 9:17-44 (West 1993); N.M. STAT. ANN. § 40-11-6 (Michie 1993); N.Y. DOM. REL. LAW § 73 (Consol.1993); N.C. GEN. STAT. § 49A-1 (1993); N.D. CENT. CODE §§ 14-18-03, 14-18-04 (Michie 1993); OKLA. STAT. ANN. tit. 10, §§ 552, 554, 555 (1993); OR. REV. STAT. §§ 109.239, 109.243 (1991); TENN. CODE ANN. § 68-3-306 (1993); TEX. FAM. CODE ANN. § 12.03 (West 1993); VA. CODE ANN. § 32.1-257(D) (Michie 1993); WASH. REV. CODE ANN. § 26.26.050 (West 1992); WIS. STAT. § 891.40 (1992). Megan D. McIntire, *The Potential for Products Liability Actions When Artificial Insemination by an Anonymous Donor Produces Children With Genetic Defects*, 98 DICK. L. REV. 519, 519 (1994). *See also In re* Joshua R., 128 Cal. Rptr. 2d 241, 245–46 (Cal. Ct. App. 2002) (holding that since presumed fatherhood is based on a parental relationship and not a genetic tie, a father who had waited three years to file an paternity action and did not have any kind of relationship with the child, could not now bring a claim of paternity based only on genetics).

191. CAL. FAM. CODE § 7613(b) (2005).

192. *See*, *e.g*, Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (neither parent in

role in determining parentage in artificial insemination cases than it does in traditional conception cases.

A second problem with Jacobs's approach is that, as purported by the dissent in *K.M. v. E.G.,* the position espoused by the majority that post-birth actions should be more important than pre-birth intentions would substantially infringe upon the rights of parents who intend to be the sole parent of a child conceived by artificial insemination.[193] For instance, in *K.M. v. E.G.,* Emily's rights to the child, which the legislature clearly intended to give her, were substantially diminished by the court's decision allowing Kate to have partial custody of the child.[194] Emily intended to be the only mother of the child and raise it on her own, yet lost that right because the court decided to base its decision on what happened after the child was born. As the majority noted, the California legislature, in adopting the UPA, chose to exclude the word "married" from its provisions.[195] By making this exclusion, the legislature implied that a woman should have the right to parent a child on her own, without a companion, if she so wishes.[196] Her rights should not be diminished because of relationships in which she is involved after her child's birth. Emily did not want to share parentage rights with Kate because she believed that lesbian couples had notoriously short relationships.[197] Court decisions based on events that happen post-birth, such as considering the fact that Kate lived with Emily and they raised the child together for a time, completely negate initial intentions. Furthermore, such decisions would negate the legislature's intent that a woman should have the right to parent a child alone.

A third problem with Jacobs's approach is that the law becomes much more unpredictable. The intent test makes couples' reliance on the law easier when they are making decisions prior to the child's conception.[198] For example, manifesting intent is easier before the child is born than afterward because many unexpected issues may arise. Couples can sign contracts[199] (which may or may not be enforceable, but still demonstrate

that case was genetically related to the child).

193. K.M. v. E.G., 117 P.3d 673, 684 (Cal. 2005) (Werdeger, J., dissenting).

194. *Id.*

195. *Id.* at 679–80.

196. *Id.* at 680.

197. *Id.* at 676.

198. *Id. at* 685 (Werdegar, J., dissenting).

199. One commentator has suggested that in all cases not involving the sperm donation statute, a judicially pre-validated contract should be required, as it provides significantly greater certainty than the "intent test" rule. However, he suggests that if a contract is not signed pre-birth, intent should not be used at all and instead, the court should only look to the best interests of the child. Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637 (2003). His point is well taken, and a judicially

manifest intent), discuss how the child will be raised, set up funding for the child, etc. If parents were aware that their parentage rights could later be taken away if they did not intend to parent a child, couples could manifest their intentions in many ways before the child is born. The intent test would give prospective parents a law on which to rely when deciding when and how to conceive a child.

Some commentators have criticized the *Johnson* opinion for failing to define "intent" or to identify what is necessary to show "intent."[200] However, that question does not seem very difficult to answer in most artificial insemination cases. Judicial discretion would control in many instances, and *K.M. v. E.G.* and the preceding cases have indicated various factors on which courts might base a decision.[201] Previous cases have used intent based principles to solve many parentage issues.[202] In *K.M. v. E.G.,* Kate's having signed an egg donation waiver indicates that she may not have intended to raise the child.[203] Additionally, Kate and Emily did not reveal the fact that Kate was the biological mother of the child.[204] Moreover, Emily provided testimony that she would never have attempted to conceive a child had she been unable to become the sole parent of the resulting child.[205] These facts provide additional support for the proposition that Kate and Emily did not intend to become parents together, and, had the court used the intent test of *Johnson*, it could have used these factors to determine the intent of the parties.

Finally, the fourth problem with Jacobs's approach is that it suggests that the best interests of the child should be considered in deciding parentage issues, since it focuses on post-birth care for the child and emphasizes the fact that the child would not benefit from losing

pre-validated contract may help pre-empt possible issues that may arise in artificial insemination custody disputes. However, since artificial reproduction is so prevalent today, it would put a major strain on judicial resources to force the courts to approve the contracts of every single couple who wishes to conceive in this manner.

200. Discussing the ambiguities in intent-based principles for determining parentage, Dolgin states that "people's intentions are rarely uni-dimensional or everlasting, and it is rarely possible to identify a person's one, true intent." Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1294 (1994).

201. For example, in *Buzzanca v. Buzzanca*, the court held that direct "actions taken pursuant to an oral agreement . . . envision[ing] . . . fertilization, implantation and ensuing pregnancy" constituted sufficient proof of an intent to parent a child. 72 Cal. Rptr. 2d 280, 291 (Cal. Ct. App. 1998). Additionally, in *E.N.O v. L.M.M,* 711 N.E.2d 886, 889 (Mass. 1999), the parties had an express agreement that they would co-parent their children. This was proof of intent in that case.

202. For example, courts have used intent based principles along with de facto parentage principles to decide visitation in *In re Custody of H.S.H.-K.,* 533 N.W.2d 419 (Wis. 1995); *E.N.O. v. L.M.M*., 711 N.E.2d 886 (Mass. 1999); and *V.C. v. M.J.B*., 748 A.2d 539 (N.J. 2000).

203. *K.M. v. E.G.,* 117 P.3d at 676.

204. *Id.*

205. *Id.*

someone who had been living with him or her for five years. Though some commentators have argued that the best interests of the child should be the governing standard,[206] the courts have not adopted this position. In fact, the court in *Johnson* explicitly rejected using the best interest standard, since it did not take into account the rights of intended parents.[207] The intent test, on the other hand, sufficiently protects the rights of persons involved in artificial insemination cases, while not ignoring the child's interests.[208]

Some critics of the "intent" test argue that it should not apply in a lesbian co-parent relationship because *Johnson* dealt with a conflict between two individuals who were both competing for the same maternal role, and the court directly pointed out that "California law recognizes only one natural mother."[209] These critics argue that *Johnson* did not use the intent test as "the sole means of establishing maternity; rather, as between two competing options, the court used intent as a tie-breaker to choose one mother."[210] Because courts now recognize more than one natural mother, these critics argue that *Johnson's* intent test is irrelevant to lesbian co-parents.[211] However, the *Johnson* court did not decide whether or not the intent test should be used in a lesbian co-parent situation because that issue was not before the court at the time.[212] Though the *Johnson* court held that a child could not have two mothers when competing interests are present,[213] applying the intent test to modern situations of lesbian co-parents does not preclude a determination that a child has two mothers. When a mother who donates an ovum expressly intends to be the mother of the child and raise it as her own, then she should be determined to be a legal mother of that child.

206. "The intent to conceive and raise a child alone should never be a dispositive factor in determining parentage because, standing on its own, it makes no difference to the best interest of the child." Zgonjanin, *supra* note 40, at 252.

207. The court in *Johnson* concluded that the best interest standard was inappropriate for a variety of reasons including: 1) it is repugnant to the right of privacy, 2) its use confuses concepts of parentage and custody; and 3) the best interest standard fosters instability during litigation. 851 P.2d 776, 782 n.10 (Cal. 1993). For the proposition that Johnson explicitly rejected the "best interest" standard, *see* Zgonjanin, *supra* note 40, at 260.

208. *Johnson v. Calvert* also cites various commentators who have proposed that "the interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.'" 851 P.2d at 782 n.10 (citing Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397 (1990)).

209. *Id.* at 781.

210. Jacobs, *supra* note 186, at 439.

211. *Id.*

212. Zgonjanin, *supra* note 40, at 262.

213. 851 P.2d at 781.

Though this Casenote has argued that the intent test as applied in *K.M. v. E.G.* would have resulted in the children not having two mothers because it should preclude Kate from having parental rights, applying the intent test in the companion cases of *Kristine H.* and *Elisa B.* would not preclude the children in those cases from having two mothers. For instance, in *Kristine H. v. Lisa R.*, the couple filed and obtained a legal judgment in the California Superior Court that Lisa would be a joint parent to the child.[214] This demonstrates a clear intent to parent, and if the intent test were applied, Kristine and Lisa would still both be parents to the child. Additionally, in *Elisa B. v. Superior Court*, the couple agreed to a financial arrangement whereby Elisa would be the breadwinner of the family and Emily would stay at home and raise the children.[215] They also clearly contemplated raising the children together, thereby manifesting their intent to become parents. The intent test would therefore not bar a determination that their children could have two mothers. Additionally, applying the intent test in *K.M. v. E.G.* would not necessarily require a different result in that case because the court should have applied judicial discretion. The facts of *K.M. v. E.G.* were in dispute.[216] If a court determined that Kate's intention to become a mother outweighed Emily's intention to raise the child alone, then Kate would be entitled to parentage rights. The job of a trial court is to make these findings of fact. In *K.M. v. E.G.*, the district court believed Emily's version of the facts, and its decision fits clearly within the court's discretion.[217]

B. The Need for Equality between Sperm and Ovum Donors

If courts are to apply the *Johnson* intent test to ovum donors in lesbian co-parent relationships, they must also strictly apply it to sperm donors of heterosexual couples. The court's decision in *K.M. v. E.G.* displays the inconsistency between how courts have dealt with determining maternity as opposed to paternity in assisted reproduction situations. The California courts, most recently in *Steven S. v. Deborah D.,* have refused to use the intent test to determine parentage when the sperm donor is known and has the expectation that he will be a parent to

214. 117 P.3d 690, 692 (Cal. 2005).

215. 117 P.3d 660, 663 (Cal. 2005).

216. Emily believed that she was going to become the sole parent of the child and intended to raise it on her own in the event that she and Kate separated. Kate, on the other hand, stated that she also intended to parent the child. She believed that by signing the egg-donation contract, she was not giving up her rights to the child and that she and Emily were going to raise the child together. K.M. v. E.G., 117 P.3d 673, 676 (Cal. 2005).

217. *Id.* at 677.

a child resulting from artificial insemination.[218] In *Steven S.,* the facts were very similar to *K.M. v. E.G.*, with two exceptions: the couple was heterosexual and the court was deciding paternity[219] rather than maternity as in *K.M.*[220] These exceptions should not be dispositive of whether or not a parent has rights to a child.

The main reason why courts should use the intent test to decide these cases is because the interests of male sperm donors who intend to parent a child and the interests of ovum donors who also intend to parent are substantially similar. Though the situations can differ, the fundamental interests remain the same. For example, sperm donation is a very simple process that can a couple or a woman by herself can perform without the assistance of a physician, as occurred in *Jhordan C. v. Mary K.*[221] Ovum donation, on the other hand, is a complex process that requires the aid of a trained doctor.[222] Because of this difference, some argue that a different method for determining paternity should apply in sperm donation cases because the facts can be more convoluted than in a regulated situation where a physician performs the procedure.[223] However, the interests of the parties remain constant despite the way in which the procedure is carried out. A man who intends to be the parent of a child, and is promised that right by the mother, as was Steven S., should not lose his rights to a child through the sperm donation statute[224] when an ovum donor in the same situation would not.

Secondly, § 7650 of the California's UPA states that the provisions apply uniformly to maternity and paternity alike.[225] Though this § 7650 may not mean that the legislature intended *every* section dealing with

218. 25 Cal. Rptr. 3d 482, (Cal. Ct. App. 2005)

219. *Id.* at 484.

220. 117 P.3d 673 (Cal. 2005).

221. 224 Cal. Rptr. 530, 532 (Cal. Ct. App. 1986).

222. An ovum donation procedure is lengthy, requiring administration of medication for a few weeks prior to donation to stimulate ovum production. The recipient also must take medication so as to prepare her for implantation of a foreign ovum. Additionally, extraction of the ovum from the donor requires an invasive procedure by which a needle is inserted into the vagina and an egg is extracted via a suction device connected to the end of the needle. *See* The Northern California Fertility Center website, http://www.ncfmc.com/eggdon.htm (last visited Nov. 20, 2005).

223. The court in *Jhordan C.,* 224 Cal. Rptr. at 534, distinguished situations in which a physician is involved from those that do not involve a physician and found that a "physician can serve to create a formal, documented structure for the donor-recipient relationship, without which . . . misunderstandings between the parties regarding the nature of their relationship and donor's relationship to the child would be more likely to occur." This justification would always be satisfied in an ovum-donation situation, since the aid of a physician is always required.

224. CAL. FAM. CODE § 7613(b) (2005).

225. The court in *Johnson v. Calvert*, for example, found that since the statue states that the provisions that apply to paternity should also apply to maternity, blood testing should be allowed to prove maternity, since statutorily, it is allowed to prove paternity. 851 P.2d 776, 779–81 (Cal. 1993).

paternity to also deal with maternity,[226] at the very least, it shows that where a statute is silent regarding maternity, disputes over maternity should be governed by the provisions dealing with paternity where it would be practicable to do so.[227] The UPA is silent as to ovum donors in artificial insemination situations, and § 7613 only deals with sperm donation.[228] Impliedly, therefore, the legislature intended for the provisions governing paternity to govern maternity when the statute is silent. Therefore, courts should apply § 7613(b), the sperm donation statue, to maternal situations involving ovum donation because the statue is silent as to ovum donors. *K.M. v. E.G.* however, refused to apply this rationale, thereby differentiating heterosexual relationships from lesbian ones, and putting males and females on unequal ground.[229] If a court strictly enforces the sperm donation statute in cases involving heterosexual relationships, as the *Steven S. v. Deborah D*. court did, it must do the same in cases involving lesbian relationships. Alternatively, if courts have decided, by way of *K.M. v. E.G.* to not extend the sperm donation statute to situations in which lesbian couples know each other and intend to parent together, courts must not apply the sperm donation statute where a man donates his sperm with the intention of raising a child with the donee.

V. CONCLUSION: AMENDING STATUTORY CODE

K.M. v. E.G. and its companion cases have been hailed as a substantial victory for lesbian parents,[230] as well they should be. Lesbian parents have been fighting for years to obtain the same rights that are given to heterosexual couples.[231] The court's ruling in *K.M. v. E.G.* and

226. K.M. v. E.G.,117 P.3d 673, 689 (Cal. 2005) (Werdeger, J., dissenting).

227. *Id.* at 683–84 (Kennard, J., dissenting).

228. Ovum donation is not mentioned once throughout California's revised code. CAL. FAM. CODE § 7613(b) deals with sperm donation.

229. The dissent by Justice Werdeger points out that the majority's decision discriminates between lesbian parents and all other persons because it "decides only the case before us, which involves a lesbian couple who registered as domestic partners." This decision gives preferential treatment to those couples who are in lesbian relationships. 117 P.3d at 687 (dissent II, quoting majority at 678 n.3).

230. *See* The National Center for Lesbian Rights website, http://www.nclrights.org/cases/kmeg.htm (last visited Nov. 17, 2005) (celebrating the "victory" of *K.M. v. E.G.*).

231. As evidence of this, there are a plethora of gay and lesbian rights organizations that continually fight for equality of gays and lesbians. For example, The International Gay and Lesbian Rights Commission, http://www.iglhrc.org/site/iglhrc/ (last visited Nov. 17, 2005); The National Center for Lesbian Rights, http://www.nclrights.org/ (last visited Nov. 17, 2005); The Gay and Lesbian Rights Lobby, http://www.glrl.org.au/ (last visited Nov. 17, 2005); and the National Gay and Lesbian Task Force, http://www.thetaskforce.org/ (last visited Nov. 17, 2005).

its companion cases that a child can have two mothers was the correct decision. However, the method in which the court decided this case leaves the law of ovum and sperm donation on untenable grounds. Applying the *Johnson* intent test would have enabled the courts to reach the same decision, while creating a precedent on which both nontraditional and traditional parents could rely. An additional problem the decision creates is that egg donors—as in *K.M. v. E.G.*—are treated differently from sperm donors—as in *Steven S. v. Deborah D.* An amendment to California's version of the UPA codifying the *Johnson* intent test and creating a provision for egg donors similar to the current provision for sperm donors would rectify both of these problems. Currently, courts are forced to interpret California statutory law that does not even make mention of ovum donation or the intent test, which has been applied in so many cases. Because couples are increasingly choosing to conceive by artificial insemination, the statutes must include clear language, containing provisions related to ovum donation as well as sperm donation. The statute must lay out a detailed test so that parties can rely on predictable law when making decisions regarding artificial insemination. Therefore, though the decision in *K.M. v. E.G.* may have been a landmark case in the area of lesbian equality and rights, it fails to establish a clear precedent for the courts when dealing with artificial insemination cases. Unless California amends its statutory law is amended to include both the intent test and clearer language as to ovum donors, the tangles in this area of the law may never be unraveled.