

# Separation Anxiety Among California Courts: Addressing the Confusion over Same-Sex Partners' Parentage Claims<sup>1</sup>

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## Introduction

Family dissolution presents numerous challenges for all parties involved. For adults, separation may be disruptive, often requiring complicated transactions to reorient their formerly routine lives. For children, the transition is just as hard. Their futures depend greatly on critical custody, support, and visitation determinations, which commonly incite contentious and drawn-out divides. California's courts employ well-established standards in adjudicating the competing claims these considerations promote, yet many extraneous factors that frequently arise account for the lingering hardships these children nonetheless confront. Children of same-sex partners have faced far greater difficulties.<sup>2</sup> The challenges that already exist in ensuring equitable resolutions for children in the wake of separation or divorce are compounded by the

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<sup>1</sup> This Article addresses the inconsistent positions taken by California courts of appeal on whether individuals who are neither the biological nor adoptive parents of the children they are or were previously raising with their same-sex partners qualify as lawful parents under state law. The California Supreme Court recently issued decisions responding to these inconsistencies. This Article was written prior to these decisions and takes a more holistic approach to reconciling the lower courts' rulings than the analysis actually employed by the Court. As such, the Conclusion of this Article discusses and reflects on the California Supreme Court's decisions in light of the concerns this Article raises. See *infra*, note 61.

<sup>2</sup> In 2003, California enacted § 9000 *et seq.* of the Family Code, which authorizes same-sex domestic partner adoptions. Adoptive parents are recognized as lawful parents under the Act. See CAL. FAM. CODE § 7610(c). Thus, this Article focuses on children of same-sex partners who have not completed an adoption or otherwise do not qualify for adoptive parent status for reasons discussed *infra* in note 204.

unsettled state of the law on the circumstances under which these children may have two lawful parents who are both the same sex.

Ascertaining who counts as a child's legally-recognized parent is a prerequisite to resolving matters of custody, support, and visitation in the event of separation or divorce.<sup>3</sup> In California, the Uniform Parentage Act ("the Act" or "the UPA," CAL. FAM. CODE § 7600 et seq.) provides courts with a framework for making such determinations as well as useful guidance on resolving various situations in which parentage proceedings arise. Yet the drafters had not specifically contemplated the complete array of modern circumstances that have arisen since they created the Act. The increasing prevalence of families headed by same-sex couples is one such significant contemporary trend. And the disputes that emerge when same-sex partners separate commonly require judicial resolution of their parentage claims.

California courts of appeal were recently divided on whether same-sex partners may both qualify as a child's legal parent under the regulations set forth in the Act. Absent explicit statutory guidance, the courts have embraced different sources of authority and interpreted these sources inconsistently in attempting to adjudicate this issue. The confusion their decisions reflect garnered the attention of the California Supreme Court, which granted review to hear *Elisa B. v. Superior Court*, *K.M. v. E.G.*, and *Kristine H. v. Lisa R.* to formally settle this area of the law.<sup>4</sup>

The governing parentage laws were enacted in order to protect the relationships formed between parents and their children. The lower courts' disparate legal strategies have directly jeopardized these relationships merely because a child happens to have two parents of the same sex. In doing so, the courts have generally misconstrued the law they seek to apply

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<sup>3</sup> See California Courts: Self-Help Center, *Introduction to Parentage*, at <http://www.courtinfo.ca.gov/selfhelp/family/parentage/intro.htm> (last visited June 7, 2005).

<sup>4</sup> *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (2005); *K.M. v. E.G.*, 37 Cal. 4th 130 (2005); *Kristine H. v. Lisa R.*, 37 Cal. 4th 156 (2005).

by overlooking well-established principles that should guide their interpretation of the Act. Taking these principles into account, this Article argues that the Act should be construed according to a gender-neutral approach. Such a method would faithfully effectuate the central precepts of the Act and would serve compelling policy goals that further both private and public interests alike.

Part I of this Article discusses the origins and adoption of the UPA. Part II describes the challenges California's lower courts have faced in the initial parentage proceedings arising between former same-sex partners and describes how they resolved those disputes. Part III presents the recent cases in which California's lower courts have considered how the courts ought to interpret the Act in same-sex partners' parentage disputes. Part IV highlights the courts' disparate approaches to this issue and discusses potential explanations for their typical failure to interpret the Act to allow children to have two legally-recognized parents of the same sex. Part V demonstrates that the inequities the confusion among California's lower courts creates are unnecessary in light of a simple, more sensible gender-neutral approach. The section explains how the fundamental principles of underlying legislative intent, the substance of the Act, overarching constitutional guarantees, and clear public policy goals should inform courts' interpretation of the Act with respect to former same-sex partners' claims. These factors provide numerous rationales that compel courts to employ a gender-neutral reading of the Act which recognizes that children may have two lawful parents who are both the same sex.

### **I. The Uniform Parentage Act**

At common law, ascertaining a child's legal relationship to his or her parents was a simple task. Analysis was confined to the parents' marital relationship to each other at the child's birth or conception.<sup>5</sup> A child was considered

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<sup>5</sup> See Laurence C. Nolan, "*Unwed Children*" and *Their Parents Before the United States Supreme Court from Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U.L. REV. 1, 6

“legitimate” if his or her parents were married at the time of his or her birth or conception and “illegitimate” if they were not.<sup>6</sup> Often referred to as “nullius filius,” or “no one’s son,” illegitimate children had limited rights with respect to their parents and faced distinct disadvantages compared to legitimate children.<sup>7</sup> In most states, illegitimate children received lower levels and shorter durations of paternal support.<sup>8</sup> They could not inherit from their fathers<sup>9</sup> or bring an action for their fathers’ wrongful death.<sup>10</sup> Federal statutes providing benefits to children based on their father’s eligibility offered less comprehensive coverage to illegitimate children compared to their legitimate counterparts.<sup>11</sup> Illegitimate children were likewise prevented from taking their fathers’ last names.<sup>12</sup> In terms of living arrangements, unwed mothers of illegitimate children were the sole legal guardians; fathers of such children were denied the prospects of custody, visitation, and adoption.<sup>13</sup> Despite its especially harsh effects on children who were not responsible for their parents’ actions, this system was long sustained on policy grounds rooted in traditional notions of morality—in particular, the desire to promote fidelity.<sup>14</sup>

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(1999).

<sup>6</sup> In order for a child to have been considered legitimate, the child’s parents must either have been married at the time of the child’s birth or the child must have been born within the gestational period after the marriage ended. In addition, the marriage must have been lawful. At common law, there existed a strong presumption that a child born to a married woman was the child of her husband. This presumption was very difficult to overcome and still persists today. See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 10-17 (1971).

<sup>7</sup> William Blackstone, 1 *COMMENTARIES ON THE LAWS OF ENGLAND* 459 (1765).

<sup>8</sup> See Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act of Legitimacy*, 44 *TEX. L. REV.* 829, 854-55 (1966). See generally Nolan, *supra* note 5 at 8.

<sup>9</sup> See Harry D. Krause, *Equal Protection for the Illegitimate*, 65 *MICH. L. REV.* 477, 478 (1967).

<sup>10</sup> Krause, *supra* note 8, at 856.

<sup>11</sup> Nolan, *supra* note 5, at 8. See Krause, *supra* note 9, at 480-81, 482.

<sup>12</sup> Krause, *supra* note 9, at 480.

<sup>13</sup> Krause, *supra* note 8, at 857.

<sup>14</sup> See Nolan, *supra* note 5, at 7; Joseph C. Ayer, Jr., *Legitimacy and*

Support for the common law system eventually waned. Throughout the latter part of the twentieth century, the unprecedented rise in the divorce rate<sup>15</sup> and out of wedlock childbirth<sup>16</sup> was accompanied by the increasing incidence of illegitimacy.<sup>17</sup> Catalyzed by the civil rights movement beginning in the 1950s, the sociopolitical culture underwent dramatic changes as well.<sup>18</sup> These phenomena contributed to a growing sense of dissatisfaction with and decreased tolerance for the inequities the prevailing system imposed.<sup>19</sup>

In the late 1960s, a series of United States Supreme Court rulings directly invalidated the common law approach, requiring instead that all children receive equal treatment in

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*Marriage*, 16 HARV. L. REV. 22, 23, 37 (1902). *But see* Krause, *supra* note 9, at 489-500; Aleta Wallach & Patricia Tenoso, *A Vindication of the Rights of Unmarried Mothers and their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 KAN. L. REV. 23, 27 (1974).

<sup>15</sup> See ANDREW CHERLIN, THE TRENDS: MARRIAGE, DIVORCE, REMARRIAGE, IN FAMILY IN TRANSITION, 1, 80, 83-84 (Arlene S. Skolnick & Jerome H. Skolnick eds., 5th ed.) (1986) (observing a slow, continuous increase in the divorce rate from the mid-nineteenth century to the mid-twentieth century, with a steeper increase in rate of divorce after the middle of the twentieth century).

<sup>16</sup> In 1963, the Policy Planning Staff at the Department of Labor recognized that out-of-wedlock childbirth was on the rise. See DANIEL PATRICK MOYNIHAN ET AL., THE FUTURE OF THE FAMILY ch.1 (Sage Publications 2004).

<sup>17</sup> See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING, DHH Pub. No. (PHS) 95-1257, 63 (1995), at <http://www.cdc.gov/nchs/data/misc/wedlock.pdf> (last visited Nov. 29, 2005) (reporting a dramatic increase in the number of illegitimate births in the U.S. between 1960 and 1980, compared to that occurring between 1940 and 1960).

<sup>18</sup> Throughout the 1960s and into the mid-1970s, social consciousness concerning substantive entitlements and due process remedies grew considerably. Such outpourings led to the conversion of social harms into protectable legal rights. These advances stimulated dialogues on “rights” talk that became commonplace. L. FRIEDMAN, THE REPUBLIC OF CHOICE (1989).

<sup>19</sup> See David P. Gushee, *A Crumbling Institution*, CHRISTIANITY TODAY, (2004), at <http://www.christianitytoday.com/ct/2004/009/14.42.html> (last visited Nov. 29, 2005) (stating that the “illegitimacy phenomenon came to be viewed as insensitive or oppressive”).

parentage proceedings regardless of their parents' marital status.<sup>20</sup> In 1973, the National Conference of Commissioners on Uniform State Laws ("the Conference") approved and recommended that states enact the Uniform Parentage Act as a comprehensive statutory framework governing determinations of legal parenthood.<sup>21</sup> Consistent with the Supreme Court rulings,<sup>22</sup> the Act's essential premise is that all children are entitled to substantive legal equality irrespective of the marital status of their parents.<sup>23</sup> This basic assumption, as well as scholarship advocating the creation of the Act,<sup>24</sup> informed the Conference's decision to replace the preexisting distinction between legitimacy versus illegitimacy with the notion that all children are born legitimate and that the only remaining issue is to identify the parents.<sup>25</sup> Accordingly, the Act's signature

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<sup>20</sup> See, e.g., *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972) (illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent); *Levy v. Louisiana*, 391 U.S. 68 (1968) (state cannot deny an illegitimate child the right to bring a tort action for wrongful death of a parent if a legitimate child had the same right); *Glonn v. Am. Guar. Co.*, 391 U.S. 73 (1968) (state cannot deny parent of an illegitimate child the right to bring a tort action for wrongful death of the child if parent of a legitimate child had the same right).

<sup>21</sup> See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PARENTAGE ACT (1973), at [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) (last visited Nov. 29, 2005). Though the Conference had publicly endorsed equal rights of support and inheritance in the Paternity Act and the Probate Code, many states continued to deviate significantly in their legal treatment of legitimate and illegitimate children. *Id.*

<sup>22</sup> The Commissioners urged states to adopt the Act since the relevant Supreme Court rulings suggested that the "bulk of current law on the subject of children born out of wedlock [was] either unconstitutional or subject to grave constitutional doubt." See National Conference of Commissioners on Uniform State Laws, UNIFORM PARENTAGE ACT, *supra* note 21.

<sup>23</sup> See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PARENTAGE ACT, *supra* note 21.

<sup>24</sup> In addition to the Supreme Court rulings requiring equal treatment of legitimate and illegitimate children, the Commissioners also relied on Harry D. Krause, *A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966) and HARRY D. KRAUSE, *supra* note 6, in drafting the Uniform Parentage Act.

<sup>25</sup> See Nolan, *supra* note 5, at 7 n.25. The Act states:

provision directs states to evaluate the parent-child relationship when seeking to establish legal parentage in lieu of the former mechanical inquiry regarding marital status.<sup>26</sup>

California adopted the Act in its entirety in 1975 as part of a package of legislation introduced as Senate Bill 347 (“S.B. 347”).<sup>27</sup> Following the bill’s enactment, its provisions were incorporated into the Civil Code.<sup>28</sup> In 1994, the Legislature transferred the Act into the California Family Code (“the Code”), where the provisions are still contained.<sup>29</sup>

Section 7601 of the Act as contained in the Code defines the “parent and child relationship” to mean “the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.”<sup>30</sup> The phrase

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In order to identify the father, the Act first sets up a network of presumptions which cover cases in which proof of external circumstances (in the simplest case, marriage between the mother and a man) indicate a particular man to be the probable father. While perhaps no one state now includes all these presumptions in its law, the presumptions are based on existing presumptions of “legitimacy” in state laws and do not represent a serious departure.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PARENTAGE ACT, *supra* note 21.

<sup>26</sup> “The parent and child relationship extends equally to every child and to every parent, regardless of the parents’ marital status.” See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 21. The relevant provisions were contained in §§ 3-4 of the Act. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 21.

<sup>27</sup> S.B. 347 passed unanimously in the Senate. *Senate Democratic Caucus*, S.B. 347. It passed with an overwhelming majority in the Assembly. Assembly Floor Vote (June 13, 1975).

<sup>28</sup> These statutes were originally contained in §§ 7003-7004 (a)-(c) of the California Civil Code. See *Family Code: Child Custody*, 23 CAL. L. REVISION COMM’N REP. 1, 625-27 (1993); 10 WITKIN SUM. CAL. L. PARENTS & CHILD. § 423.

<sup>29</sup> CAL. FAM. CODE §§ 7600-7750. See *Family Code: Child Custody*, *supra* note 28, at 625-27 (1993); WITKIN, *supra* note 23, at § 423. The Family Code was promulgated in 1992.

<sup>30</sup> CAL. FAM. CODE § 7601.

includes the mother and child relationship and the father and child relationship.”<sup>31</sup> Sections 7610 and 7611 delineate the methods of establishing the parent and child relationship that confers such legal parenthood status.<sup>32</sup> According to § 7610, a woman may establish that she is a child’s natural mother by offering proof of that she gave birth to the child.<sup>33</sup> This provision also provides that a woman may establish motherhood if she fulfills the requirements for establishing fatherhood,<sup>34</sup> which are elaborated in the subsequent provision, § 7611,<sup>35</sup> or adopts the child.<sup>36</sup>

Section 7611 governs fatherhood determinations. Under § 7611, a man may satisfy the presumption of fatherhood in one of three ways: first, if the mother and putative father are married to each other at the time of the child’s birth or are within 300 days of a legal separation; second, if the marriage of the mother and putative father is either void or voidable; and third, if the putative father welcomes the child into his home and openly holds out the child as his own.<sup>37</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at §§ 7610-12.

<sup>33</sup> *Id.* at § 7610(a).

<sup>34</sup> *Id.* at § 7611(d). The “or under this part” provision refers to the tests for fatherhood.

<sup>35</sup> *Id.* at § 7610(b).

<sup>36</sup> *Id.* at § 7610(c).

<sup>37</sup> *Id.* at § 7611. Section 7611 provides that a man qualifies as a presumed father if:

(a) He and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

(b) Before the child’s birth, he and the child’s natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce.

Presumptions of parenthood are not absolute. Section 7612 provides courts with a means of resolving competing claims to parentage under the Act. Courts may accordingly “rebut” one man’s presumption of paternity established according to § 7611 with a judgment of another man’s paternity.<sup>38</sup> Absent such a judgment, one man may rebut another man’s competing presumption arising under § 7611 in appropriate actions by clear and convincing evidence of the former man’s paternity.<sup>39</sup> If the § 7611 presumptions seem to confer legal fatherhood on two men who have competing claims to paternity, courts resolve the conflict in favor of the presumption that “on the facts is founded on the weightier considerations of policy and logic.”<sup>40</sup>

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(2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(c) After the child’s birth, he and the child’s natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

(1) With his consent, he is named as the child’s father on the child’s birth certificate.

(2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

When the Act was modified in 2000, § 7611(d) was refined to provide that: “for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.” Correspondingly, § 7611.5 delineates circumstances that affirmatively preclude a man from qualifying as a natural father. A man may not be presumed the natural father, for example, if he violates CAL. PENAL CODE §§ 261, 261.5 (2004). CAL. FAM. CODE § 7611.5.

<sup>38</sup> *Id.* at § 7612(c).

<sup>39</sup> *Id.* at § 7612(a). Qualifying as a natural father under § 7611 “is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence.” *Id.*

<sup>40</sup> *Id.* at § 7612(b).

## II. Adjudicating Former Same-Sex Partners' Parentage Claims: Past Cases

While the Act provides meaningful guidance on determining parentage in a variety of circumstances, the drafters had not explicitly incorporated provisions related to parentage disputes in the context of same-sex partners. *Curiale v. Reagan*,<sup>41</sup> *Nancy S. v. Michele G.*,<sup>42</sup> *West v. Superior Court*,<sup>43</sup> and *Guardianship of Z.C.W. v. Lisa W.*<sup>44</sup> presented the California courts of appeal with such proceedings. These cases demonstrate how California's lower courts initially addressed the parentage claims between former same-sex partners absent explicit statutory direction.

In *Curiale*, a California court of appeal dismissed a former lesbian partner's parentage claim for lack of standing.<sup>45</sup> Though it acknowledged that the Act grants standing to any interested person seeking to bring an action to establish the existence of a parent-child relationship under § 7650, the court held that a lesbian partner of a biological mother was a nonparent and therefore not an interested party.<sup>46</sup> Based on this observation, it concluded that the former partner lacked standing to assert a right to custody or visitation against a child's natural mother after she left the relationship.<sup>47</sup> The court reasoned that

Jurisdiction to adjudicate custody depends upon some proceeding properly before the court in which custody is at issue such as dissolution, guardianship, or dependency . . . . The Legislature has not conferred upon one in plaintiff's position, a nonparent in a same-sex bilateral relationship, any right of custody or visitation upon termination of the relationship."<sup>48</sup>

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<sup>41</sup> *Curiale v. Reagan*, 222 Cal. App. 3d 1597 (1990).

<sup>42</sup> *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (1991).

<sup>43</sup> *West v. Superior Court*, 59 Cal. App. 4th 302 (1997).

<sup>44</sup> *Guardianship of Z.C.W. v. Lisa W.*, 71 Cal. App. 4th 524 (1999).

<sup>45</sup> *Curiale*, 222 Cal. App. 3d at 1560.

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

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

<sup>48</sup> *Id.* at 1600.

In *Nancy S.*, the court similarly denied a lesbian partner the right to seek custody or visitation from the biological mother on the basis that she lacked standing.<sup>49</sup> As in *Curiale*, the court maintained that a lesbian partner who was not the biological or adoptive parent of children conceived during a lesbian relationship was ineligible to establish lawful motherhood under the Act.<sup>50</sup> The court rejected the argument that the former partner's role in facilitating the child's birth and assumption of parental duties enabled her to qualify as a lawful mother—even if she were considered a de facto parent, the court maintained that “custody can be awarded to a de facto parent *only* if it is established by clear and convincing evidence that parental custody is detrimental to the children.”<sup>51</sup> The *West* court similarly denied a woman parentage status with respect to the child she had raised with her former lesbian partner, holding too that courts do not have jurisdiction to consider the petition of a nonparent in a lesbian relationship for purposes of custody and visitation rights.<sup>52</sup>

In *Guardianship of Z.C.W.*, the court denied a petition for guardianship filed by a woman seeking visitation rights with two children with whom she had previously lived while involved in a lesbian relationship with their mother.<sup>53</sup> The

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<sup>49</sup> *Nancy S.*, 228 Cal. App. 3d at 836.

<sup>50</sup> *Id.* The court considered Nancy a valid de facto legal parent based on the role she assumed as a loving mother to her former lesbian partner's biological children, which entitled her to intervene in a guardianship or dependency proceeding. *Id.* at 836-37. Nevertheless, because Nancy was neither the biological nor the adoptive parent, the court would not grant her natural parent status and thereby prevented her from obtaining custody or visitation without her former partner's consent. *Id.* at 836.

<sup>51</sup> *Id.* The court dismissed the contentions that equitable adoption and functional parenthood theories applied to entitle the former partner to parentage status. The court stressed that equitable adoption was traditionally invoked for purposes of inheritance, not parentage determinations, and that resorting to a functional definition of a parent was unjustified absent express legislative action formalizing this approach. *Id.* at 839-42.

<sup>52</sup> *West*, 59 Cal. App. 4th at 306-09 (concluding that the former lesbian partner's lack of a genetic or adoptive connection barred her from qualifying as an interested party under the Act).

<sup>53</sup> *Guardianship of Z.C.W.*, 71 Cal. App. 4th at 524-29.

court followed the rulings in the three prior cases that a lesbian partner who is not a biological or adoptive parent is not entitled to custody of a child conceived during the same-sex relationship,<sup>54</sup> denied a nonparent's ability to attain de facto parent status if the biological parents objected, and maintained that even establishing de facto parent status does not entitle one to custody.<sup>55</sup>

In sum, these decisions strictly construed the notion of a mother to prevent former lesbian partners from having parental rights to the children they played a significant role in raising. The courts consistently characterized these partners of the biological mothers of their children as nonparents. Based on this assumption, the courts simply dismissed the former partners' actions for lack of jurisdiction.

In doing so, the decisions took for granted the notion that two women raising children together in a lesbian relationship could not both qualify as lawful parents. The courts failed to engage in any substantive analysis of perspectives suggesting that a former lesbian partner might qualify as a lawful mother. Rather, the reasoning and ultimate rulings merely follow from the basic narrow premise that two women in a same-sex relationship may not both qualify for maternity under the Act without closely examining the validity of their assumption.<sup>56</sup>

### III. The Recent Cases

California courts continue to confront parentage disputes involving former same-sex partners. Yet, their

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<sup>54</sup> *Id.* at 527.

<sup>55</sup> *Id.* at 528. The court noted that de facto parenthood originated in the juvenile dependency system and generally refers to foster parents caring for dependent children. The court also recognized the limited instances in guardianship and custody proceedings in which clear and convincing evidence established that parental custody would be detrimental to a child. It declined to employ the theory, however, since "California courts have not accorded de facto parent status to a nonparent over the objection of the biological parents." *Id.*

<sup>56</sup> See generally *Curiale*, 222 Cal. App. 3d; *Nancy S.*, 228 Cal. App. 3d at 836; *West*, 59 Cal. App. 4th at 306.

approaches to these disputes have evolved. Compared with the initial determinations that simply assumed that two same-sex partners could not both qualify as lawful parents, courts have more recently espoused conflicting methods for deciding how these disputes should be resolved. The “atmosphere of uncertainty” in this important area of the law has resulted in conflicting holdings among the lower courts that have considered cases regarding former same-sex partners’ claims.<sup>57</sup>

The recent cases *Elisa B. v. Superior Court*,<sup>58</sup> *K.M. v. E.G.*,<sup>59</sup> and *Kristine H. v. Lisa R.*<sup>60</sup> illustrate the lower courts’ divergent approaches. In 2004, the California Supreme Court granted review to hear these cases to address the inconsistencies their decisions reflect.<sup>61</sup> The following

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<sup>57</sup> Blythe J. Leszkay, The Lesbian and Gay Lawyers Association of Los Angeles, *Civil Rights Advocacy*, at <http://www.lhr.org/civilrights.htm> (last visited June 7, 2005).

<sup>58</sup> *Elisa B.*, 118 Cal. App. 4th 966.

<sup>59</sup> *K.M.*, 118 Cal. App. 4th 477.

<sup>60</sup> *Kristine H.*, 120 Cal. App. 4th 143.

<sup>61</sup> *Summary of Cases Accepted During the Week of August 30, 2004*, Release Number: S.C. 36/04, at <http://www.courtinfo.ca.gov> (last visited June 7, 2005). The California Supreme Court heard all three cases together on Tuesday, May 24, 2005. See Supreme Court of California Oral Argument Calendar, at <http://www.courtinfo.ca.gov/courts/calendars/documents/SMAYE05.PDF> (last visited June 7, 2005). The Court combined these cases to evaluate the following three specific questions: (1) whether the presumption in § 7611(d) of the Family Code may be applied to a birth mother’s same-sex partner when both women decide to have a child, receive the child into their home and hold out the child as their own, and agree to support the child; (2) whether, under *Johnson*, 5 Cal. 4th 84, discussed *infra*, both same-sex partners may be considered the legal parents of children conceived as a result of artificial insemination and born during their domestic partnership; and (3) whether a woman who donates ova that are fertilized in vitro and implanted in her domestic partner’s womb that results in the birth of a child must file an adoption petition in order to be a parent of the child under *Johnson v. Calvert*. See Supreme Court of California Oral Argument Calendar, at <http://www.courtinfo.ca.gov/courts/calendars/documents/SMAYE05.PDF> (last visited June 7, 2005). These inquiries are based on the single underlying question of whether a child may have two lawful parents who are the same sex. See *supra* note 4 for citations to the California Supreme Court’s recent decisions on these cases.

discussion presents the three cases and how the courts dealt with former same-sex partners' claims to parentage given the lack of explicit statutory guidance delineating the appropriate treatment according to the Act.

*A. Elisa B. v. Superior Court*

Elisa and Emily had lived together and maintained a monogamous lesbian relationship long before deciding to co-parent.<sup>62</sup> They had exchanged rings to symbolize their union, established a joint bank account, and shared household expenses.<sup>63</sup> Four years into their relationship, both women were inseminated by the same sperm donor; Elisa gave birth to a boy, and Emily gave birth to twins.<sup>64</sup> Elisa and Emily attended each other's childbirth, jointly chose the children's names, hyphenated their last names as the children's surname, and presented themselves as both the parents of all three children.<sup>65</sup> The two women agreed that Emily would stay at home with the children while Elisa, the higher wage earner of the two, would work to support the family financially, assume expenses for dependent medical insurance coverage for the three children, and claim them as dependents for income tax purposes.<sup>66</sup> Neither Elisa nor Emily adopted one another's birth children despite their discussion of the possibility.<sup>67</sup>

When Emily and Elisa separated, Elisa agreed to provide Emily and the twins with support payments of \$1,000 per month.<sup>68</sup> The women did not discuss the length of Elisa's financial commitment, but Emily later testified that Elisa had promised that she would always provide Emily and the twins with a home.<sup>69</sup> Approximately one and a half years later, Elisa informed Emily that she was no longer employed full time and

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<sup>62</sup> *Elisa B.*, 118 Cal. App. 4th at 971.

<sup>63</sup> *Id.*

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

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 972.

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

could no longer provide financial support.<sup>70</sup> The county filed a complaint against Elisa to establish her parentage in order to require her to support the twins so as to relieve them from dependency on public assistance.<sup>71</sup> In response, Elisa alleged that she was not the twins' parent, that "a lesbian partner who is neither the biological nor adoptive parent is not entitled to custody of children conceived during a same-sex bilateral relationship," and that the court's inability to award her custody or visitation of the twins also precluded it from ordering her to pay child support.<sup>72</sup>

The trial court held that "Elisa was accountable as a de facto legal parent for the support of [the twins]" and that her role in consenting to and encouraging the twins' creation prevented her from disclaiming financial responsibility for their care and support.<sup>73</sup> The court based these conclusions on its recognition that "Elisa should be 'held to the same legal duty and responsibility of a man found to be a presumed father' under the UPA."<sup>74</sup> The court also considered support obligations appropriate pursuant to principles of promissory or equitable estoppel.<sup>75</sup>

Reversing the trial court's decision, the court of appeal construed the Act to only recognize one natural mother per child.<sup>76</sup> The court then employed the intent test to determine which of the two women qualified as the mother.<sup>77</sup> The court observed that whereas Elisa was not genetically related to the

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

<sup>71</sup> *Id.*

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

<sup>73</sup> *Id.* at 970.

<sup>74</sup> *Id.* at 972.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 973. Emily urged the court to hold that Elisa was a lawful co-parent under § 7613(a) of the California Family Code instead of § 7611(d). Under § 7613(a), Elisa qualified from the moment Elisa and Emily "caused the children to be conceived, with the intention of being their parents," whereas § 7611(d) is "applied retroactively based on the presumed parent's conduct after a child is born." Opening Brief of Real Party in Interest Emily B. at 5-6, *Elisa B. v. Superior Court*, 97 P.3d 72 (Cal. 2004) (No. S125912).

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

twins, did not give birth to them, and did not adopt them, Emily conceived, gave birth to, and intended to raise the twins as her own.<sup>78</sup> Accordingly, it held that Emily was the twins' sole natural mother and that Elisa was not responsible for their care and support.<sup>79</sup>

The court likewise rejected Emily's argument that Elisa qualified as an intended parent under § 7611.<sup>80</sup> The court maintained that the intended parent doctrine only applies where no other putative father or mother is claiming parentage and was available to care for and support the child, and the non-biological mother or father is willingly seeking a declaration of parenthood along with the rights and obligations parenthood status entails.<sup>81</sup> Since Emily is a natural mother

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<sup>78</sup> *Elisa B.*, 118 Cal. App. 4th at 973-74.

<sup>79</sup> *Id.* at 975. The court rejected Emily's argument that *Nicholas H.* and *Karen C.* applied because "they concerned situations where (1) no other competing father or mother was claiming parentage and was available to care for and support the child, and (2) the non-biological 'parent' was willingly seeking a declaration of parenthood, along with the rights and obligations entailed therein," and these facts were critical to the decisions that the putative parents' lack of biological ties did not rebut the presumption of parenthood established under § 7611(d). (In *Nicholas H.*, 27 Cal. 4th 56 (2002), the California Supreme Court held that a man who was not a biological father but who fulfilled the § 7611(d) criteria for establishing parentage and faced no opposition from another person claiming to be the father of the child could qualify as the legal father under § 7611(d). In other words, the Court ruled that the lack of a biological connection does not necessarily foreclose one's status as a parent under the Act. In *Karen C. v. L.A. Dep't of Children and Family Servs.*, 101 Cal. App. 4th 932 (2002), the child's birth mother gave the child to the presumed mother promptly after the child was born, and the presumed mother raised the child as her own. The court of appeal held that the child had standing to bring an action to determine the existence of a mother-child relationship with the presumed mother, citing *Nicholas H.*). *Id.* at 976-77. Thus, the court noted that unlike in those cases, "the twins have a natural, biological mother, Emily, who does not disclaim her maternal rights and obligations, and the children can have only one natural mother." *Id.* at 977 (relying on *Johnson*, 5 Cal. 4th at 92). In addition, the court's characterization of Elisa as an "unwilling candidate" for motherhood led it to conclude that her lack of biological ties could be used to rebut the § 7611(d) presumption on which the county relied. *Id.*

<sup>80</sup> *Id.* at 975-77.

<sup>81</sup> *Id.* at 976-77 (relying on *Nicholas H.* and *Karen C.*).

who did not disclaim her rights and responsibilities, and Elisa is not biologically related to the twins and was an “unwilling candidate” for their parenthood, the court held that the § 7611(d) presumption could not be used to establish that Elisa was a lawful mother.<sup>82</sup> The court also dismissed Emily’s assertion that Elisa was a legal parent based on principles of estoppel. Elisa never made a clear promise to support the twins indefinitely and unconditionally before their birth.<sup>83</sup> As such, the court found that Elisa did not reasonably expect that her statements about financially supporting the family would have led Emily to believe that Elisa would support Emily’s children if the couple ever separated.<sup>84</sup> In addition, since the law does not impose parental obligations on a person in an unmarried relationship who was not a parent or presumed parent and had not agreed in writing to support the child their partner conceived through artificial insemination, the court concluded that it was unreasonable for Emily to believe that Elisa’s promise of child support that was unclear as to post-separation support was reliable.<sup>85</sup>

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

K.M. and E.G. were in a long-term, committed lesbian relationship before registering as domestic partners.<sup>86</sup> Soon thereafter, E.G. was fertilized in vitro with K.M.’s eggs and gave birth to twins.<sup>87</sup> Prior to the procedure, the two women

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<sup>82</sup> *Id.* at 977 (“Nothing . . . even remotely suggests § 7611(d) can be used to establish that a woman in a same-sex relationship is the presumed parent of her partner’s biological children while the mother is still alive, has not abandoned her children, and has not relinquished her parental rights.”). The court also refused to impose a support obligation based on contractual and reliance theories since, in a same-sex relationship, “[a]bsent an express and unambiguous pre-conception or pre-birth agreement to support the children in the event the parties separated (*see, e.g.*, § 7614), we will not create a new means of imposing a child support obligation on a nonparent when the then-existing law did not confer or enforce any parental rights with respect to the child.” *Elisa B.*, 118 Cal. App. 4th at 983.

<sup>83</sup> *Id.* at 981.

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

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

<sup>86</sup> *K.M.*, 118 Cal. App. 4th 482.

<sup>87</sup> *Id.* at 482-85.

agreed orally that E.G. would be the only mother for at least five years, after which E.G. may allow K.M. to adopt the children “when [E.G.] felt the relationship was stable and permanent.”<sup>88</sup> K.M. had also signed the hospital’s standard ovum donor consent form before the procedure in which she explicitly surrendered any claims to parentage.<sup>89</sup> Though K.M. understood the form’s language, she believed that it was inapplicable given her circumstances; unlike in most sperm or egg donation contexts, K.M. was donating to her domestic partner.<sup>90</sup> She also believed that failure to sign would block the procedure.<sup>91</sup>

After giving birth to twins, E.G. listed herself on the twins’ birth and baptismal certificates as their only mother and a single parent.<sup>92</sup> She also added the twins as beneficiaries to her health care, dental, vision, and life insurance and retirement plans; K.M. did not do the same.<sup>93</sup> Nonetheless, both K.M. and E.G. were referred to as “parents” or “both moms” in the hospital records, and the couple’s friends held a baby shower honoring both women as the twins’ parents.<sup>94</sup> E.G. soon proposed marriage to K.M., and the two women exchanged rings.<sup>95</sup> Over the next five years, K.M. and E.G.

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<sup>88</sup> *Id.* at 482.

<sup>89</sup> *Id.* at 483. The form stated:

It is understood that I waive any rights and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them. I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children. . . . I specifically disclaim and waive any rights in or [to] any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof. I waive the right of relationship or inheritance with respect to any child born of this procedure . . . .

*Id.* K.M. never requested any changes in the forms. *Id.* at 486.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 483.

<sup>92</sup> *Id.* at 484.

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

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

<sup>95</sup> *Id.*

purchased a home and raised the twins together.<sup>96</sup> Though E.G. initially signed her twins' preschool enrollment forms and paid the tuition on her own, she explicitly listed K.M. as a co-parent on the twins' school forms.<sup>97</sup> K.M. later contributed to half of the twins' tuition and was listed as a parent on their school forms.<sup>98</sup> K.M. also attempted to adopt the twins, but E.G. had misgivings and prevented her from doing so.<sup>99</sup>

After E.G. and K.M. separated, E.G. continued to list K.M. as a parent on the children's school forms, and K.M. continued to contribute to half of their tuition.<sup>100</sup> K.M. also filed a petition to legally establish a parental relationship and sought joint custody of the twins.<sup>101</sup> E.G. filed a motion to quash and dismiss the petition, alleging that K.M. lacked standing to assert parentage.<sup>102</sup>

The trial court granted E.G.'s motion.<sup>103</sup> It reasoned that that K.M. was not an interested party: she relinquished her claim to parenthood when she "knowingly, voluntarily and intelligently signed the ovum donor consent form."<sup>104</sup> The court further concluded that the women's agreement that E.G. would be the sole parent was effective to deny K.M.'s maternity claim, and that the women's conduct after making the agreement did not alter its terms.<sup>105</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 484-85.

<sup>98</sup> *Id.* at 485.

<sup>99</sup> *Id.* at 484.

<sup>100</sup> *Id.* at 485.

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

<sup>102</sup> *Id.* at 485.

<sup>103</sup> *Id.* at 486.

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

<sup>105</sup> *Id.* The court's fact findings which informed its conclusion remain in significant dispute. K.M. testified that she and E.G. had intended to have children together and that the two women never agreed that E.G. would be the sole parent. K.M. also denied discussing the ovum donor consent form with E.G. before signing it; she testified that she signed it within minutes of first receiving it at the hospital with the understanding that it was necessary to proceed with the procedure. Moreover, K.M. believed that the language indicating her relinquishment of parental rights did not apply to her since she knew the recipient and had never intended to surrender her parental rights. K.M. also denied agreeing with E.G. not to disclose to the

The court of appeal acknowledged that K.M. was an interested party and therefore had standing based on her genetic connection to the children.<sup>106</sup> However, the court denied K.M.'s position on the merits.<sup>107</sup> In doing so, the court revealed its implicit assumption that a child may only have one legal mother when it asserted that "[a]s between the genetic mother and the birth mother, the law recognizes the woman who intended to bring about the birth of the child to raise as her own."<sup>108</sup> The court determined that K.M.'s oral agreement<sup>109</sup> and signature on the donor consent form demonstrated that she had not intended to raise the twins as her own, thereby precluding her from establishing parentage.<sup>110</sup> The court further rejected K.M.'s argument that

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children that they were genetically related to K.M. *Id.* at 485-86.

<sup>106</sup> *Id.* at 487. The court relied on the implied recognition articulated in *Johnson* that a woman with genetic consanguinity to the child qualifies as an interested party in a parentage claim against the birth mother. *See* 5 Cal. 4th at 90, 92-93.

<sup>107</sup> *Id.*

<sup>108</sup> *K.M.*, 118 Cal. App. 4th at 497 (relying on *Johnson*, 5 Cal. 4th at 93). K.M. also argued that her oral contract with E.G. was unenforceable because no consideration existed, it was unconscionable, its terms were indefinite, and it violated the statute of frauds. *Id.* at 489. The court dismissed this argument, stating that parenthood depends "upon the woman's intention to bring about the birth of the child to raise as her own" and not upon existence of a binding contract. *Id.* at 490. *See also Johnson*, 5 Cal. 4th at 93. Thus, since the trial court found that only E.G. intended to be a mother, whether or not the women's oral agreement is enforceable was irrelevant. *K.M.*, 118 Cal. App. 4th at 491. The court of appeal likewise dismissed K.M.'s argument that the ovum donor consent form was invalid based on the trial court's finding that K.M. signed the ovum donor consent "knowingly, voluntarily, and intelligently." *Id.* at 491-92.

<sup>109</sup> *Id.* at 491 ("What is legally relevant is the finding by the trial court that the parties' understanding showed that *they intended* E.G. to be the one to bring about the birth of a child to raise as *her own* child.").

<sup>110</sup> *Id.* at 492, 494-95 (stating "[w]e simply do not have before us the case that K.M. would like it to be – where both the birth mother and the genetic mother mutually intend[ed] joint parenthood."). K.M. argued that her situation was distinct from *Johnson* since she and E.G. had an ongoing relationship, as opposed to a situation in which one partner received an egg from an unknown donor. The court did not find this distinction meaningful. Noting that, according to § 7613 of the California Family Code, a man who merely donates sperm to a woman without the intent to be the child's father is not treated as the natural father, the court maintained that K.M.'s

E.G.'s behavior asserting that K.M. was a co-parent after the children were born indicated the women's intent to jointly parent the children, maintaining that "the focus of inquiry must be on the intentions at the time the child was conceived."<sup>111</sup>

The court also rejected K.M.'s argument that she was able to establish maternity according to the § 7611(d) paternity presumption.<sup>112</sup> The court held that K.M. did not fulfill the statutory presumption because she merely "cohabitat[ed] with the child's mother and welcome[ed] the mother's child" instead of receiving the twins into her home as her own child.<sup>113</sup> The court further dismissed K.M.'s claim that her efforts in jointly raising the children should have afforded her parental status. Recognizing appellate court decisions that a domestic partner of a child's natural mother does not qualify as a parent under the UPA despite playing an integral parental role in the child's life, the court stated that "[f]unctioning as a parent does not bestow legal status as a parent."<sup>114</sup> Based on *Nancy S.*, the court also rejected K.M.'s argument that E.G. should have been estopped by her conduct in misleading the children into believing that K.M. was also their mother from denying K.M.'s maternity.<sup>115</sup>

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status was analogous to such a donor. *Id.* at 493-94 (relying on *Robert B. v. Susan B.*, 109 Cal. App. 4th 1109 (2003)).

<sup>111</sup> *Id.* at 495 (relying on *Johnson*, 5 Cal. 4th at 93). The court rejected "the notion that the intent to be a parent should be assessed and reassessed over time," as "[t]he law requires a fixed standard that gives prospective parents some measure of confidence in the legal ramifications of their procreative actions." *Id.* at 495-96.

<sup>112</sup> *Id.* at 496.

<sup>113</sup> *Id.* at 496. Moreover, the court found that since K.M. is the twins' genetic mother, she need not rely on § 7611 to establish natural mother status. *Id.* at 497.

<sup>114</sup> *Id.* (relying on *West*, 59 Cal. App. 4th; *Nancy S.*, 228 Cal. App. 3d 831 (1991); and *Curiale*, 222 Cal. App. 3d 1597).

<sup>115</sup> *K.M.*, 118 Cal. App. 4th at 498-99. The *Nancy S.* court held that a natural mother's former lesbian partner could not invoke estoppel against a natural mother to establish her parentage even though the birth mother had encouraged and supported the parent-child relationship between her child and former partner for years. The court also rejected the former partner's claim that she acquired parental status because the natural mother created a

The court further declined to take into account the children's best interests in deciding the case. It cited precedent stating that determining parentage according to this standard "raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody" and that "[l]ogically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions."<sup>116</sup> The court was also concerned that such a method would place at risk the parentage of any natural parent who fostered parental bonds between children and a new partner and would promote litigation and instability in children's lives. Accordingly, the court maintained that the best interests standard only applies to custody and visitation disputes, not parentage determinations.<sup>117</sup>

*C. Kristine H. v. Lisa R.*

Registered domestic partners Kristine and Lisa were in a committed long-term relationship<sup>118</sup> when they arranged for Kristine to conceive through artificial insemination.<sup>119</sup> Lisa assisted Kristine with the donor arrangements, accompanied Kristine to every doctor visit throughout her pregnancy, and attended parenting classes in anticipation of the child.<sup>120</sup> The women also obtained a pre-birth judgment declaring themselves "joint intended legal parents" of the child one

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relationship between herself and child that the natural mother intended to be parental in nature: such an "expansion" of the concept of a parent would leave other natural parents vulnerable to litigation brought by close child-care providers, relatives, step-parents, or other close family friends. The court feared that the litigation "would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status." *Nancy S.*, 228 Cal. App. 3d at 839-41.

<sup>116</sup> *K.M.*, 118 Cal. App. 4th 499-500 (quoting *Johnson*, 5 Cal. 4th at 93, n.10.).

<sup>117</sup> *Id.* at 499-500.

<sup>118</sup> *Kristine H.*, 120 Cal. App. 4th at 151-53. The two women had already purchased a home together and opened a joint bank account. *Id.*

<sup>119</sup> *Id.* at 149.

<sup>120</sup> *Id.* at 152.

month prior to its birth.<sup>121</sup> According to the judgment, Kristine was the “biological, genetic and legal mother/parent,” and Lisa was the “legal second mother/parent.”<sup>122</sup> Lisa was named as the child’s father on the birth certificate, and both women financially supported and raised the child.<sup>123</sup> The child refers to Lisa as “momma” and Kristine as “mommy.”<sup>124</sup> Lisa never adopted the child, as she assumed that the pre-birth judgment sufficiently established her parental right.<sup>125</sup>

Kristine and Lisa separated after raising the child together for almost two years.<sup>126</sup> Kristine brought a motion to vacate the pre-birth judgment on the ground that the family court lacked jurisdiction to determine whether Lisa was a second parent under the UPA; the family court denied the motion, and Kristine appealed.<sup>127</sup>

The court of appeal concluded that even though the pre-birth judgment was void since a “determination of parentage cannot rest simply on parties’ agreement,”<sup>128</sup> Lisa was nonetheless entitled to assert parentage under the Act.<sup>129</sup> The court emphasized that the statutory language of the Act “does *not* restrict the parent-child relationship based on gender to a mother and father.”<sup>130</sup> Rather, the “*Act contemplates two legal parents irrespective of their gender*” to assure children the benefits of having two parents and to assure that individuals are responsible for the care and maintenance of their children instead of burdening taxpayers with the task.<sup>131</sup> Moreover, the court observed that § 7650 requires that the

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 153.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 149-150, 153.

<sup>126</sup> *Id.* at 153.

<sup>127</sup> *Id.* at 154.

<sup>128</sup> *Id.* at 150.

<sup>129</sup> *Id.* at 159.

<sup>130</sup> *Id.* at 160.

<sup>131</sup> *Id.* at 161.

parentage provisions of the Act apply equally to both men and women.<sup>132</sup>

The court maintained that construing § 7611(d) in a gender-neutral manner allows a same-sex partner with no biological connection to the child to establish legal parentage.<sup>133</sup> Based on ample evidence of Lisa's conduct, the court held that the family court could conclude on remand that Lisa was indeed "holding out" the child as her own.<sup>134</sup> Lisa participated in the artificial insemination procedure, shared childcare responsibilities, supported Kristine economically and emotionally throughout the pregnancy, and paid for the child's medical insurance.<sup>135</sup> Given that Kristine, Lisa, and the child lived together in the women's shared home, the court maintained that the family court could likewise conclude that Lisa met the "receiving into one's home" requirement.<sup>136</sup> The court further observed that Lisa was an intended parent: the two women acted jointly to cause their child's birth, and their plans to raise the child together led them to obtain a stipulation providing that they were both the legal parents of the unborn

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<sup>132</sup> *Id.* at 160. Section 7650 provides that "[i]nsofar as practicable," provisions applicable to determining the father and child relationship apply in an action to determine when a mother and child relationship exists. CAL. FAM. CODE § 7650.

<sup>133</sup> *Kristine H.*, 120 Cal. App. 4th at 162. Judge Croskey acknowledged that his decision conflicted with prior and other current cases. Commenting on the inconsistency, he stated that "[n]one of [those] cases analyzed the Act in a gender-neutral manner to determine whether a second parent of the same sex could establish parentage under the provisions of the Act that applied to establishing a father-child relationship." *Id.* Judge Croskey also recognized that the decision was consistent with other cases, such as *Nicholas H.*, 28 Cal. 4th at 70, and *Karen C.*, 101 Cal. App. 4th at 936-39. Accordingly, Judge Croskey suggested that Kristine's argument that *Nicholas H.* and *Karen C.* only applied to cases in which "there was no biologically related adult who wanted to assume the role of parent" assumes that the child may not have two parents of the same-sex without legal adoption. The court further noted that it would have construed the statute in the same manner if it had been evaluating a claim by Lisa for child support instead of Kristine's entitlement to custody rights. *Kristine H.*, 120 Cal. App. 4th at 170.

<sup>134</sup> *Id.* at 170-72.

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

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

child as well as a judgment establishing their parental rights.<sup>137</sup> Thus, in holding that both women qualified as the child's lawful parents, the court noted that its decision was "consistent with their own intentions when they took the steps to create [the child] and is based on an application of the Act—the same rules that apply to other parents in their situation who must deal with the legal consequences of their procreative actions long after they have separated."<sup>138</sup>

#### **IV. Confronting the Courts' Confusion**

The lower courts' conflicting approaches to establishing the parentage of same-sex partners under the Act have been cause for concern.<sup>139</sup> Some of the uncertainty is due to the lack of clear statutory guidance or precedent providing clear direction on how the parentage provisions apply. Yet at least as much of the uncertainty derives from the courts' insufficient attention to fundamental precepts that meaningfully bear on their interpretation of the Act. As such, this section highlights how the lower courts have treated same-sex partners' parentage claims inconsistently under the Act and explores some possible underlying rationales for their failure to systematically treat same-sex couples equally to heterosexual couples under the Act.

##### *A. Three Separate Approaches*

Each of the three recent California cases this Article features was decided according to a different approach to determining how the Act ought to be construed in the context of former same-sex partners. This Article refers to these approaches as the "gender-biased," "ambivalent," and "gender-neutral" methods of interpreting and applying the

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<sup>137</sup> *Id.* at 171.

<sup>138</sup> *Id.* at 173-74.

<sup>139</sup> See, e.g., Christian Harlan Moen, *Mom Can be "Dad," California Courts Say*, TRIAL 87, Oct. 2004 (noting that the decision in *Kristine H.* the court "creates a dramatic split with other California appeals courts that have recently used the UPA to address parentage issues in similar cases involving same-sex relationships.").

Act. The following section discusses how the courts have invoked these disparate approaches to resolving the same issue and the difficulties the first two methods entail.

### 1. *The Gender-Biased Approach*

The *Elisa B.* decision exemplifies the gender-biased approach. The court based its statement that a child may only have one lawful mother on a statement made in *Johnson v. Calvert*, a prior California Supreme Court case determining parentage in the context of a surrogacy arrangement.<sup>140</sup> The court took *Johnson's* pronouncement that “California law recognizes only one natural mother” to mean literally that both former lesbian partners could not qualify as lawful mothers.<sup>141</sup> Accordingly, the court dismissed the idea that Emily could establish maternity, construing the “one natural mother” rule to trump the intent test.<sup>142</sup>

Applying the *Johnson* Court’s “one natural mother” rule in the context of same-sex parents is problematic. The *Johnson* Court’s comment that “California law recognizes only one natural mother” is consistent with a gender-neutral interpretation of the UPA to allow a same-sex second parent. Since under § 7610(a) of the Act, a woman may qualify as a natural mother by meeting a presumption in § 7611 as a natural father, and since § 7611(d) is applicable in circumstances concerning same-sex partners, a child could have two natural mothers or fathers under the terms of the Act. In addition, properly contextualizing the statement reveals that it does not apply to the case at hand. In *Johnson*, the California Supreme Court was considering the parentage rights of three potential parents—the child’s father, genetic

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<sup>140</sup> See *Johnson*, 5 Cal. 4th at 84.

<sup>141</sup> *Elisa B.*, 118 Cal. App. 4th at 973.

<sup>142</sup> *Id.* at 979. The court stated that “[n]othing . . . in *Johnson* holds that a woman’s intention to create and raise a child can be used to establish that a child has two mothers. In fact, *Johnson* declined to adopt the suggestion that it find the child therein had two mothers.” *Id.* (citing *Johnson*, 5 Cal. 4th at 92 n.8). “Instead, *Johnson* resorted to the intention to procreate to determine which of the two women vying for a declaration of maternity, the wife or the surrogate, was the child’s mother.” *Id.* (citing *Johnson*, 5 Cal. 4th at 93).

mother, and surrogate gestational mother. Both the genetic and gestational mothers asserted that they were the sole natural mother.<sup>143</sup> In order to avoid the conclusion that the child had two natural mothers and three legal parents, the court declined “to recognize parental rights in a third party with whom the . . . family has had little contact . . . .”<sup>144</sup> In the context of an exclusive lesbian relationship in which no third party asserts a competing claim to parentage, courts need not decide which one of two women has parental rights and responsibilities because the relationship between the two women is similar to that between a married woman and man jointly raising and supporting their children. Thus, the *Elisa B.* court misinterpreted the “one natural mother” statement and mistakenly assumed that it was applicable in the context of same-sex parents.

## 2. The Ambivalent Approach

The *K.M.* court inconsistently invoked rules informed by the gender-biased and the gender-neutral approaches. The court began its analysis not with the provisions of the Act but instead by reading *Johnson* to require that the “ultimate determination of parenthood depends not upon the existence of a binding contract but rather . . . upon the woman’s *intention* to bring about the birth of the child to raise as her own.”<sup>145</sup> Accordingly, unlike the *Elisa B.* court, the *K.M.* court declined to comment on whether *Johnson* means that only one woman may qualify as the legal mother in a parentage determination.<sup>146</sup>

The court next applied the test set forth in § 7611(d) of the Code, which implicitly acknowledged that a child may

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<sup>143</sup> *Johnson*, 5 Cal. 4th at 88.

<sup>144</sup> *Id.* at 92.

<sup>145</sup> *K.M.*, 118 Cal. App. 4th at 490.

<sup>146</sup> *Id.* at 495. Because it held that only E.G. had the requisite intent to procreate the child as her own, the court stated, “we need not . . . decide here whether the determination of natural motherhood in a dispute between the genetic mother and the birth mother always compels the selection of one woman to the exclusion of the other or whether a child can, in an appropriate case, have two natural mothers.” *Id.* at 496.

have two lawful mothers.<sup>147</sup> It construed K.M.'s behavior with respect to the twins as falling outside the purview of the section.<sup>148</sup> In doing so, it drew a fine distinction between receiving a child into one's home and the similar but not equivalent situation of welcoming a child while cohabitating with his or her mother.<sup>149</sup> Though it asserted this distinction, the court failed to articulate why K.M.'s behavior was closer to the latter alternative despite the existence of substantial evidence that she held out the twins as her own.<sup>150</sup> The opinion then noted that invoking § 7611 was unnecessary, since "both K.M. and E.G. qualif[ied] to be the natural mother."<sup>151</sup> Yet, it read *Johnson's* statement that "when two women have acceptable proof of maternity, the ultimate determination of legal parentage is made by examining the parties' intentions" to require that the legal mother be the woman who intended to bring about the child's birth or raise it as her own.<sup>152</sup> This statement further complicated the opinion. The court implied that it must only grant maternity to one of the women, which is based on the further implicit assumption that they may not both qualify for maternity under the terms of the Act. However, its discussion of § 7611 implied that two women may both qualify under the Act, and earlier in the opinion it had declined to address the question at all. Thus, the court provided the implicit assumption that a child may have two legal mothers, the implicit assumption that a child may not have two legal mothers, as well as the explicit statement that it would not decide the issue.

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<sup>147</sup> *Id.* at 496. § 7611(d) provided the effective answer to the question the court had just declined to answer. *See supra* note 145.

<sup>148</sup> *Id.* at 496.

<sup>149</sup> *Id.*

<sup>150</sup> *See K.M.*, 118 Cal. App. 4th at 496. The court's reasoning is dubious, however. K.M.'s role in raising the children as her own, contributions to their tuition, and attempt to adopt them strongly indicate that K.M. behaved more like a parent than a cohabitant who simply welcomed her partner's children. *See id.* at 485.

<sup>151</sup> *K.M.*, 118 Cal. App. 4th at 497. The court noted that K.M.'s genetic consanguinity and E.G.'s gestation qualified them to be considered natural mothers. *Id.*

<sup>152</sup> *Id.*

The opinion added yet another layer of confusion to its analysis. The court concluded that K.M.'s parentage could not be established despite her role as a parent and her cultivation of a parent-child relationship with the children because "[f]unctioning as a parent does not bestow legal status as a parent."<sup>153</sup> In so stating, the court contradicted its own analysis of § 7611(d), in which it concluded that § 7611(d) affords one parentage status based on his or her functioning as a parent.

### 3. *The Gender-Neutral Approach*

In contrast to *Elisa B.* and *K.M.*, the *Kristine H.* court explicitly adopted a gender-neutral approach. In *Kristine H.*, the court more clearly adjudicated the issue according to the Act's substance. It began by interpreting § 7650 as requiring a gender-neutral reading of the Act.<sup>154</sup> The court also noted that no statutory prohibition precludes a finding that a child may have two lawful parents of the same sex<sup>155</sup> and that § 7570(a) stresses the advantages of two parents and supports finding two parents wherever possible.<sup>156</sup> Unlike *Elisa B.* and *K.M.*, the court did consider several relevant policy issues, discussed *infra* in Part V.D., which further vindicate its interpretation of the Act.<sup>157</sup>

In sum, the *Elisa B.* court adhered to a gender-biased reading of the Act based simply on its misappropriation of the *Johnson* rule that originated in the surrogacy context. By contrast, in *K.M.*, the court explicitly evaded the question of whether the Act should or should not be construed in a gender-neutral manner while simultaneously invoking standards that are implicitly based on conflicting positions on the issue. It also set forth the intent test as the threshold question for determining whether one may establish parentage instead of first looking to the provisions of the Act itself for guidance on making the decision. *Kristine H.* directly opposed *Elisa B.* By looking to the provisions of the Act as well as important

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<sup>153</sup> *See id.*

<sup>154</sup> *Id.* at 160.

<sup>155</sup> *Id.* at 161.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

policy goals, it analyzed the Act to conclude that it should be construed gender-neutrally.

### *B. Potential Rationales*

A mélange of social, political, ideological, and moral forces may ultimately explain courts' reluctance to find that children may have two parents of the same sex under the Act. In recent decades, acceptance of gay and lesbian individuals and their families has grown dramatically.<sup>158</sup> Nonetheless, and in part as a consequence of this trend, issues touching on gay rights continue to generate heated controversy, which demonstrates that the pressures from opposing factions remain strong.

Though society has progressed considerably over the course of the last few decades, many retain the ideological view that families should conform to the traditional nuclear model.<sup>159</sup> This view is prominent among many members of Congress and other conservative and religious commentators who remain convinced that allowing same-sex marriage would threaten the well-entrenched institution of heterosexual marriage and the moral underpinnings on which the future of our social order depends.<sup>160</sup> These notions have had significant

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<sup>158</sup> The 2003 California Field Poll found that 44 percent of those surveyed favor gay marriage, whereas just 28 percent approved of same-sex marriage in 1977. Rachel Gordon, *Acceptance of Gay Marriage Growing in State*, S.F. CHRON., Feb. 26, 2004, at A1. The 2003 Poll also found that 61 percent support allowing committed, same-sex couples to receive benefits from one another. Bill Ainsworth, *The New Frontier for Gay Politics*, ST. NET CAPITOL J., 7 SNCJ SPOTLIGHT, Feb. 9, 2004.

<sup>159</sup> See Randy Frances Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 185-86 (1994); Susan Gembrowsky, *U.S. Census; Settling in; After Decades of Change, America Gets Comfortable with Household Diversity*, S.D. UNION TRIB., Dec. 29, 2001, at E-1.

<sup>160</sup> See Doug Ireland, *Republicans Relaunch the Antigay Culture Wars*, NATION, Oct. 20, 2003, at 18; *Frist Backs Constitutional Ban on Gay Marriage*, U.S.A. TODAY, June 29, 2003, at [http://www.usatoday.com/news/washington/2003-06-29-frist-gay-marriage\\_x.htm](http://www.usatoday.com/news/washington/2003-06-29-frist-gay-marriage_x.htm) (last visited Nov. 29, 2005); *Congregation for the Doctrine of the Faith, Considerations Regarding Proposals to Give Legal Protection to Unions Between Homosexual Persons*, June 3, 2003, at

repercussions in the political realm. In 1996, Congress affirmed its support for the conservative conviction when it passed the Defense of Marriage Act, which prohibits federal recognition of same-sex marriages and authorizes states to disregard them if recognized by any other state.<sup>161</sup> In 2000, President Bush stated that all children should be raised by a married heterosexual couple.<sup>162</sup> In February 2004, the President publicly announced his support for a constitutional amendment banning gay marriage, reasoning that marriage cannot be separated from its “cultural, religious and natural roots.”<sup>163</sup> These actions indicate that at the federal level, a clear agenda reflecting disapproval of same-sex families still enjoys considerable support.<sup>164</sup>

Prevailing views at the state level exhibit similar concerns. In spite of California’s reputation as one of the most liberal states in the nation, a majority of Californians oppose same-sex marriage,<sup>165</sup> and many remain staunchly opposed to any efforts—especially legal initiatives—that support same-sex couples.<sup>166</sup> In March 2000, 61 percent of California voters

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[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual\\_unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual_unions_en.html) (last visited Nov. 29, 2005).

<sup>161</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. 7 (2000) and 28 U.S.C. 1738C (2001)).

<sup>162</sup> See, e.g., Associated Press, *Still Undecided? Read Up: An At-a-Glance Look at Where Bush and Gore Stand on the Issues*, SEATTLE TIMES, Nov. 5, 2000, at A3.

<sup>163</sup> See Richard Lacayo, *For Better or For Worse?*, TIME, Mar. 8, 2004, at 26; Elizabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1; see also *New Fuel for the Culture Wars*, THE ECONOMIST, Feb. 28, 2004, at 29.

<sup>164</sup> See Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771 (2001) (observing that many oppose legal efforts that promote same-sex couples’ rights).

<sup>165</sup> While opinion polls indicate that a majority of Californians favor equal rights for gays and lesbians, a majority also opposes same-sex marriage. Bob Egelko, *S.F. Gay Marriages Head to Court*, S.F. CHRON., Dec. 21, 2004, at A1.

<sup>166</sup> See Press Release, *Campaign for California Families, Statement on Governor Davis’ Signing of AB 25* (Oct. 14, 2001), at <http://www.savecalifornia.com/press/newsreleases/release.cfm?nrId=PR01>

approved Proposition 22,<sup>167</sup> commonly known as the “Knight Initiative,” which declared that “only marriage between a man and a woman is valid or recognized in California.”<sup>168</sup>

Given the precarious political situation, it should be no surprise that courts are reluctant to make decisions that may be seen as actively promoting gay rights. Courts may fear that a ruling which is favorable to same-sex families could be viewed as just another step along the slippery slope to validating gay marriage.<sup>169</sup> Judges may also seek to avoid generating backlash that could detrimentally affect their reputations and careers.<sup>170</sup>

The persisting presence of homophobia among the judicial system at large may also account for courts’ reservations.<sup>171</sup> Scholars point out that some judges’ decisions

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1014A (last visited Nov. 29, 2005).

<sup>167</sup> See *Sen. Feinstein Issues Statement on Proposed Federal Marriage Constitutional Amendment*, ST. NEWS SERV., Mar. 23, 2004.

<sup>168</sup> CAL. FAM. CODE § 308.5.

<sup>169</sup> Evan Wolfson, marriage project director at Lambda Legal Defense and Education Fund, has remarked that “[a]ny time we [gays] have asked for anything by way of family recognition, no matter how small, [our opponents] would accuse us of knocking apart marriage.” E.J. Graff, *Wedding March: How the Right’s Campaign Against Same-Sex Marriage May Get Derailed in California*, AM. PROSPECT, Feb. 28, 2000, at 32.

<sup>170</sup> For instance, Judith McConnell’s nomination for a U.S. District Court judge position was withdrawn after controversy arose about a decision in which she had awarded custody of a sixteen-year-old boy to his deceased father’s male lover instead of to his mother. Tony Perry, *2 Sponsored by Boxer for U.S. Judgeship Withdraw from Consideration*, L.A. TIMES, Jan. 21, 1995, at B3.

<sup>171</sup> See generally, Darren L. Hutchinson, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 AM. U.J. GENDER SOC. POL’Y & L. 13 (2003). See also Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 799-800 (1979) (presenting one of the pioneering and comprehensive studies of judicial homophobia); Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation and Dissemination Efforts*, 41 WAYNE L. REV. 1, 37 n.135 (1994) (maintaining that homophobia is prevalent throughout the judicial system); Lawrence Goldyn, *Gratuitous Language in Appellate Cases Involving Gay People: “Queer Baiting” from the Bench*, 3 POL.

are colored by bias and prejudice against lesbians and gay men.<sup>172</sup> Alternatively, courts may be concerned with the potential stigmatization of children raised in gay or lesbian households.<sup>173</sup> A closely related explanation is that courts may be concerned with making “morally correct” decisions, which would adversely affect their likelihood of considering lesbians and gay men in former same-sex relationships as parents.<sup>174</sup> Based on the assumption that homosexuality is immoral, then, courts may be hesitant to issue a ruling that endorses, or could be perceived as endorsing, such a practice. In *Roe v. Roe*, for example, the Supreme Court of Virginia reversed an award of joint custody of a divorced couple’s daughter, granting full custody to the heterosexual mother.<sup>175</sup> The court reversed the award because the father was cohabitating with his male lover while in custody of his daughter. Even though the court admitted that no evidence suggested that the father’s conduct adversely affected his daughter,<sup>176</sup> it concluded that the “father’s continuous exposure of the child to his immoral and

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BEHAV. 31 (1981).

<sup>172</sup> Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and their Children*, 71 IND. L.J. 623, 660-64 (1996).

<sup>173</sup> See *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980). Courts may fear that such stigmatization would include teasing or harassment of children by their peers or by community members. Some courts are concerned that children will feel embarrassed. Shapiro, *supra* note 172, at 651 n.161. Courts may see the stigma as a harm in and of itself or as a factor leading to harm. *Id.* at 651. *But see id.* at 651-52; *Thigpen v. Carpenter*, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987); *Jarrett v. Jarrett*, 400 N.E.2d 421 (Ill. 1979), *cert. denied*, 449 U.S. 927 (1980); *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985). This rationale is largely unfounded. Shapiro, *supra* note 172, at 652, 654. *Id.* at 654. Shapiro further urges courts to consider the overall costs of endorsing others’ intolerance before allowing potential stigma to become a relevant factor in custody determinations. *Id.* at 654.

<sup>174</sup> Shapiro, *supra* note 172, at 654-60 (1996). See, e.g., *Thigpen*, 730 S.W.2d at 514; *White v. Thompson*, 569 So. 2d 1181, 1183-84 (Miss. 1990); *G.A. v. D.A.*, 745 S.W.2d 726, 728 (Mo. Ct. App. 1987); *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 165-66 (Mo. Ct. App. 1987); *Collins v. Collins*, No. 87-238-II, 1988 Tenn. App. LEXIS 123 at \*9-\*30 (Mar. 30, 1988) (Tomlin, J., concurring); *Dailey v. Dailey*, 635 S.W.2d 391, 394-95 (Tenn. Ct. App. 1981); *Roe v. Roe*, 324 S.E.2d 691, 693-94 (Va. 1985).

<sup>175</sup> *Roe*, 324 S.E.2d 691.

<sup>176</sup> *Id.* at 692.

illicit relationship renders him an unfit and improper custodian as a matter of law.”<sup>177</sup>

While any number of the foregoing factors may underlie a given decisionmaker’s construction of the Act, the fact remains that courts are commonly excusing themselves from the responsibility for potentially interpreting laws in favor of same-sex couples’ rights. Courts are reluctant to “expand” the class of persons entitled to assert parentage given the “complex practical, social and constitutional ramifications” of the issues involved.<sup>178</sup> They have therefore simply deferred to the Legislature, which they have purported is better situated to modify the preexisting laws given the public policy dimensions involved.<sup>179</sup>

To date, the Legislature has not taken action in response to same-sex partners’ concerns about the parentage provisions of the Act. Though many reasons may account for the Legislature’s failure to directly address the issue now before the California Supreme Court, “[u]nlike legislatures, courts cannot avoid controversies.”<sup>180</sup> That the Legislature has

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<sup>177</sup> *Id.* at 694.

<sup>178</sup> *West*, 59 Cal. App. 4th at 306; *Nancy S.*, 228 Cal. App. 3d at 841; *Curiale*, 222 Cal. App. 3d at 1600-01 (stating that the issue is too “complex and socially significant” for the court to resolve). In *Nancy S.*, the court stated:

By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.

<sup>179</sup> *Elisa B.*, 118 Cal. App. 4th at 979 (endorsing the Washington Court of Appeals’ statement that “[i]f the marriage statute, adoption statute, UPA presumptions or surrogacy statute are inadequate when an unmarried couple, same gender or not, conceive artificially, it is up to the Legislature to make any changes” in *State ex rel. D.R.M.*, 109 Wn. App. 182, 195 (2001)); *West*, 59 Cal. App. 4th at 305-06; *Nancy S.*, 228 Cal. App. 3d at 840; *Curiale*, 222 Cal. App. 3d at 1600-01.

<sup>180</sup> Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other*

yet to consider the concerns raised by recent cases thus offers courts no excuse—courts must still strive to resolve the legal issues of parentage under the Act. And doing so would be simple, sensible, and equitable if they heeded the fundamental guiding principles that demonstrate the appropriateness and value of adopting the gender-neutral interpretation of the Act.

### **V. Resolving the Diverging Decisions: Adopting the Gender-Neutral Approach**

The wide discrepancies among the lower courts' approaches needlessly confound the application of parentage principles to former same-sex partners. Basic governing principles meaningfully address the confusion the lower courts' determinations have only served to enhance. Such principles make clear that the gender-neutral approach is the proper method for construing and applying the Act in the context of same-sex couples' claims. As such, this Part demonstrates that construing the Act in a gender-neutral manner would better effectuate established legislative intent, the substance of the Act, and important constitutional and policy considerations than does resorting to inapplicable legal principles that yield inequitable resolutions of these contemporary disputes.

#### *A. Effectuating Legislative Intent*

Courts must commonly construe statutory language when the plain meaning of the law is ambiguous, susceptible of more than one interpretation, or fails to precisely address specific issues at hand. The California Supreme Court has acknowledged that information gleaned from legislative intent critically assists courts in properly construing such provisions.<sup>181</sup> Examining the legislative intent in the context of same-sex partners' claims to parentage under the Act is

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*Nontraditional Families*, 78 GEO. L.J. 459, 574 (1990).

<sup>181</sup> *People v. Fuhrman*, 16 Cal. 4th 930, 937 (1997); *see also* *People v. Thomas*, 42 Cal. App. 4th 798, 801 (1996). The California Supreme Court has articulated the “fundamental rule” that its “primary task in construing a statute is to determine the Legislature’s intent.” *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 724 (1989).

especially useful. Though no provision of the Act explicitly states that a child may have two lawful parents of the same sex, this interpretation is necessary to effectuate the legislature's desired objectives motivating the creation of the Act and more recent legislative activity in the area of same-sex family affairs.

Discerning the legislative intent behind the specific UPA provisions governing the establishment of parentage is a straightforward task. The California Supreme Court routinely looks to the intent underlying the entire Act and proceeds to construe its specific provisions with reference to and consistently with the overall statutory scheme—not simply the section it seeks to interpret.<sup>182</sup> It applies this rule of construction to even those situations the drafters did not contemplate, such as maternity determinations and those involving reproductive technology.<sup>183</sup> Thus, in construing §§ 7610 and 7611, courts must consider the overall goals and ambitions of the Act. Courts must interpret any ambiguity in the Act's provisions with respect to same-sex partners' parentage claims in a manner that furthers the entire statutory framework's ultimate aims.

A clear set of goals animated the Conference's promulgation of the Act. The impetus behind the UPA was to ensure equal treatment for children regardless of their parents' marital status.<sup>184</sup> In particular, it was enacted to eliminate any legal distinction between legitimate and illegitimate children and in order to prevent the "cruel and outmoded" label of illegitimacy from limiting some children's legal rights or those of their parents.<sup>185</sup> Accordingly, the UPA's drafters replaced all existing statutory references to "legitimacy" and "illegitimacy" with references to the "parent and child

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<sup>182</sup> *Johnson*, 5 Cal. 4th at 89 (relying on *Griffith v. Gibson*, 73 Cal. App. 3d 465, 469-70 (1977)).

<sup>183</sup> *Id.* The UPA is an important aid to courts in determining parentage in a circumstance the Act does not expressly address "albeit one not specifically tooled for it." *Id.*

<sup>184</sup> Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 8 (1974).

<sup>185</sup> See *Johnson*, 5 Cal. 4th at 89; see generally NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, [supra](#) note 21.

relationship.”<sup>186</sup> In making these revisions, the drafters of the Act established that the rights and responsibilities of parents and children ought to depend on a functional assessment of the relationship between a putative parent and his or her child, not on a mechanical inquiry regarding the marital status of the individuals who decided to have children.<sup>187</sup> Moreover, the drafters emphasized that this clarification of the Act was intended to improve enforcement of child support and parental care.<sup>188</sup> As such, the California Legislature included a statement in § 7570(a) indicating that the provision should ensure that children receive from two parents all necessary financial as well as psychological support.<sup>189</sup>

In sum, the Act was established to achieve various interrelated underlying goals: to ensure equal treatment for all children in parentage proceedings, to remove the consideration of marital status from parentage claims, to focus on

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<sup>186</sup> See, e.g., CAL. FAM. CODE § 7601 (discussing and defining the parent and child relationship.) See also CAL. FAM. CODE § 7602 (“The parent child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”).

<sup>187</sup> See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 21; see also *Johnson*, 5 Cal. 4th at 89.

<sup>188</sup> “[I]t is expected that this Act will fulfill an important social need in terms of improving the states’ systems of support enforcement.” See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 21.

<sup>189</sup> CAL. FAM. CODE § 7570(a) provides:

The Legislature hereby finds and declares as follows: [P]...There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors’ benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one’s father is important to a child’s development.

Though the language specifies “father” and “paternity,” the section articulates the Legislature’s underlying aim to ensure that a child have a second parent to provide these important means of support—not to ensure that an opposite-sex parent, as opposed to a same-sex parent, provides such support.

relationships as probative of parentage, and to facilitate children's access to the support and care of two parents. These objectives all indicate the Conference's intent to liberalize qualifications for lawful parent status.

In addition, while the Conference may not have contemplated the same-sex parentage disputes per se, the Conference did evince its intent to account for changing circumstances giving rise to previously unanticipated forms of disputes. For example, Section V of the Act deals specifically with determining parentage in newly emerging artificial insemination cases.<sup>190</sup> In the Comment accompanying this provision, the Conference acknowledged that, although it was unable to enact laws that would resolve every issue in which such recently developed technology could result, "it was . . . useful, however, to single out and cover in this Act at least one fact situation that occurs frequently."<sup>191</sup> In the revised Act of 2002, the drafters stated that "the incredible scientific advances in parentage testing since 1973 warrant a thoroughgoing revision of the Act."<sup>192</sup> Moreover, the drafters expressed their intent to consider other legal aspects of artificial insemination based on commentators' recommendations in that Comment.<sup>193</sup> Such statements confirm the drafters' ambition to address situations it had not yet contemplated but have become frequent contributors to parentage disputes. Therefore, any contention that the Conference's failure to include a provision dealing with same-sex partners indicates the Conference's desire to omit them from the Act is unfounded. Rather, the Conference's goal to expand its consideration of newly emerging circumstances and trends commonly giving rise to parentage disputes indicates that it likely would not oppose considering revisions that account for these family arrangements that are now much more pervasive than they were in the early 1970s.

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<sup>190</sup> NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *supra* note 21.

<sup>191</sup> *Id.* at § 702 Comment (2002).

<sup>192</sup> *Id.* at § 5 Comment (1973).

<sup>193</sup> *Id.* (referring to Walter Wadlington, *Artificial Insemination: The Danger of a Poorly Kept Secret*, 64 NW. U. L. REV. 777 (1970)).

Examining the goals and interests motivating the Act compels courts to construe the parentage provisions to allow children to have two legal parents of the same sex. The Legislature promulgated the Act specifically to ensure that children would have two parents despite their marital status, would not be disadvantaged merely as a result of their illegitimacy, and would attain the same access to support and care of children whose parents were married, interpreting the Act to recognize same-sex lawful parents furthers these express aims. Children of same-sex parents may not have a third “parent figure” of the opposite sex. For example, in *Elisa B., K.M.*, and *Kristine H.*, the lesbian partners were raising the children jointly without the assistance of a male functioning as the equivalent of a father. As in these cases, the only parents children of same-sex partners may ever know are those that jointly raised them before terminating their relationship. Denying one of these partners the legal status of a parent would ultimately defeat the very purposes the Act was expressly created to achieve.

Failing to construe the Act in a gender-neutral fashion would also contravene more recent efforts by the California Legislature that evince its aim to equate same-sex relationships and parenting arrangements with those of heterosexual couples. In 1999, the Legislature established domestic partnership as a recognized legal relationship when it enacted the Domestic Partnership Act.<sup>194</sup> Shortly following the Act’s passage, the California Legislature further expanded domestic partners’ rights.<sup>195</sup> In 1999, it granted domestic partners hospital visitation rights and offered health benefits to domestic partners of state employees.<sup>196</sup> In 2001, the

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<sup>194</sup> CAL. FAM. CODE § 297. The Domestic Partnership Act authorized two persons to register as domestic partners if they were adults sharing a common residence, they agreed to be jointly responsible for each other’s basic living expenses, and they were either (1) both persons of the same sex, or (2) persons of the opposite sex, who were both over the age of 62 and eligible to receive social security.

<sup>195</sup> See Equality California, *AB 205 Fact Sheet*, at [http://www.eqca.org/atf/cf/{687DF34F-6480-4BCD-9C2B-1F33FD8E1294}/factsheet\\_ab205.pdf](http://www.eqca.org/atf/cf/{687DF34F-6480-4BCD-9C2B-1F33FD8E1294}/factsheet_ab205.pdf) (last visited Nov. 29, 2005).

<sup>196</sup> See *id.*

Legislature granted domestic partners the right to sue for wrongful death, recover for negligent infliction of emotional distress, administer a decedent's estate,<sup>197</sup> care for an ill partner or partner's child under employee sick leave provisions, make medical decisions on an incapacitated partner's behalf, and receive unemployment benefits if required to relocate for a partner's job.<sup>198</sup> In 2002, domestic partners obtained the right to automatically inherit a portion of a partner's separate property in the event that his or her partner died without a valid will.<sup>199</sup> Domestic partners were further exempted from provisions restricting a person from benefiting from a will or trust that he or she helped draft<sup>200</sup> and were granted six weeks or paid family leave to care for an ill partner.<sup>201</sup>

In 2003, the Legislature codified the California Supreme Court's ruling in *Sharon S.*<sup>202</sup> to provide that a domestic partner may adopt the child of his or her domestic partner under the same procedure used for a stepparent adoption with the consent of the child's birth parent.<sup>203</sup> That same year, the Legislature amended the domestic partnership laws again when it passed Assembly Bill 205, the California Domestic Partner Rights and Responsibilities Act, which directly addresses the parental interest of a same-sex partner who is not a biological or adoptive parent.<sup>204</sup> In drafting the Domestic Partner Rights and Responsibilities Act, the

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<sup>197</sup> Assembly Committee on Judiciary, *Committee Analysis of AB 205* (Apr. 1, 2003).

<sup>198</sup> *See* Equality California, *supra* note 195.

<sup>199</sup> *See id.*

<sup>200</sup> *See id.*

<sup>201</sup> *See id.*

<sup>202</sup> *Sharon S.*, 31 Cal. 4th at 417.

<sup>203</sup> CAL. FAM. CODE § 9000.

<sup>204</sup> 2003 Cal. Stat. 421. The Domestic Partner Rights and Responsibilities Act confers numerous additional rights on registered domestic partners as well, such as: protections regarding financial support during and after the relationship and community property ownership protections; legal claims dependent upon family status, including claims for victim's compensation; and access to family court for dissolution of relationships for long-term partners, couples with children, and couples with significant assets. *Id.*; *see also* Equality California, *supra* note 195.

Legislature explicitly incorporated clear statements of intent to equalize same-sex and heterosexual relationships and family structures into the language of the provisions.<sup>205</sup> Section 297.5(a) of the Domestic Partner Rights and Responsibilities Act equates the legal entitlements and obligations of registered domestic partners with those of spouses.<sup>206</sup> Thus, it provides that

(a) This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Sections 1 and 7 of Article 1 of the California Constitution by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.<sup>207</sup>

Correspondingly, subdivision (b) of that section places a premium on expanding the notion of family to account for gay and lesbian households.<sup>208</sup> Pursuant to subdivision (d), “[t]he

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<sup>205</sup> Senate Judiciary Committee, *Committee Analysis of AB 205*, at 4 (July 1, 2003).

<sup>206</sup> CAL. FAM. CODE § 297.5(a) (enacted by 2003 Cal. Stat. 421).

<sup>207</sup> 2003 Cal. Stat. 421, § 1(a).

<sup>208</sup> It provides:

The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together. Many of these couples have sought to protect each other and their family members by registering as domestic partners with the State of California and, as a

rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.”<sup>209</sup>

To facilitate these aims, the Domestic Partner Rights and Responsibilities Act provides implementing guidelines that propose gender-neutral classifications with respect to committed adult relationships. Thus, the legislation requires the Director of California’s State Forms Management Program to inform state agencies and other relevant organizations to include appropriate references to “domestic partner,” “parent,” or “domestic partnership” on forms where terms such as “spouse,” “husband,” “wife,” “father,” “mother,” “marriage,” or marital status” are listed.<sup>210</sup>

California’s lawmakers unambiguously desire domestic partners to have the same rights and responsibilities concerning family life as heterosexual couples possess. The statutes’ straightforward language, as well as the Legislature’s trend to confer successively broader rights and responsibilities on same-sex partners, overwhelmingly indicates that the Legislature supports liberalizing the traditional conception of families to accommodate gay and lesbian-headed households. In light of these declarations, construing the Act to allow only one lawful mother and one lawful father—and thereby denying the possibility that same-sex partners may both be their children’s legally recognized parents—undermines the Legislature’s explicit intent. Therefore, to ensure that courts

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result, have received certain basic legal rights. Expanding the rights and creating responsibilities of registered domestic partners would further California’s interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.

*Id.* at § 1(b).

<sup>209</sup> *Id.* at § 4(d).

<sup>210</sup> CAL. GOV’T CODE § 14771(a)(14) (amended by 2003 Cal. Stat. 421).

apply the Act consistently with official legislative priorities and do not frustrate the objectives recent lawmakers' efforts have sought to achieve, provisions must be interpreted and applied in a gender-neutral manner to enhance, rather than stifle, the corresponding effectiveness of contemporary legal reforms.

Taken together, the drafters' underlying intent in enacting the UPA and recent activity by the California Legislature in the area of domestic partnership law compel courts to construe the parentage provisions of the Act as enabling two same-sex parents to both establish parentage. Rejecting this approach directly defeats the Act's desire to ensure that children of same-sex couples receive the same benefits and support of having two parents as children raised by heterosexual partners and thwarts the Legislature's clearly-defined interests in providing gay and lesbian couples with the same parenting rights and responsibilities as those opposite-sex couples retain.

In sum, while the language utilized in the Act may be ambiguous with respect to its treatment of same-sex couples as parents, the documented intent bearing on its proper interpretation could not be clearer. All relevant sources indicate that the Act should consider both partners in same-sex couples the legal parents of their children.<sup>211</sup> The goals motivating the enactment of the Act should guide courts' interpretations of its provisions when dealing with situations the drafters did not expressly contemplate or address. Accordingly, courts must construe the parentage provisions to allow for a child to have two lawful parents of the same sex to fulfill the well-defined goals the Act was promulgated to achieve and that the Legislature continues to vigorously promote.

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<sup>211</sup> See Diana Laurreta, *Protecting the Child's Best Interest: Defending Second-Parent Adoptions Granted Prior to the 2000 Enactment of California Assembly Bill*, 33 GOLDEN GATE U.L. REV. 173, 195 (2003) (noting that "[i]t would be illogical for the California Supreme Court to sever a parent-child relationship because the legislature, at the time, had not expressly permitted it.").

*B. Conforming to the Substance of the Act*

In *Kristine H.*, Judge Croskey maintained that although his ruling “may not be a result that the Legislature *expressly* contemplated, the Act does mandate that [courts] read the provisions in a gender-neutral manner and that mandate compels our conclusion.”<sup>212</sup> In other words, in order to conform to the provisions of the Act, courts must construe the parentage requirements gender-neutrally. While no provision contained in the Act proscribes the finding that a child may have two parents of the same sex, various sections affirmatively require courts to construe the Act to this effect.

Courts may find support for their position that a child may not have two parents of the same sex based in the Act’s references to a child’s “natural mother” and “natural father.”<sup>213</sup> However, taking this language to mean that a child may not have two lawful parents of the same sex is unjustified in light of the substance of the Act. These terms were simply included because practically all parentage determinations at the time arose in the context of heterosexual relationships.<sup>214</sup> Thus, even though the sections refer to opposite-sex parents, these references do not explicitly foreclose the possibility of a gender-neutral interpretation. Rather, they merely reflected the reality that parentage determinations arising at the time the Act was created involved opposite sex partners and do not indicate that same-sex partners cannot both qualify as parents.

At the same time that the Act itself does not forbid the possibility of recognizing same-sex lawful parents, a textual analysis of the provisions supports this result. According to § 7610(a), a woman may establish the parent and child relationship conferring natural parent status either by proving

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<sup>212</sup> *Kristine H.*, 120 Cal. App. 4th at 150.

<sup>213</sup> See CAL. FAM. CODE §§ 7610-7611.

<sup>214</sup> At the time the Act was drafted, same-sex relationships were widely viewed as lacking legitimacy. It was not until 1973 that the American Psychological Association removed homosexuality from the list of official mental disorders. See Marc E. Elovitz, *Adoption By Lesbian and Gay People: The Use and Misuse of Social Science Research*, 2 DUKE J. GENDER L. & POL’Y 207, 216 (1995).

that she gave birth to the child or by qualifying under § 7610(b).<sup>215</sup> According to the latter method, then, a woman can establish the requisite relationship by meeting the requirements set forth in § 7611 that guide determinations of fatherhood.<sup>216</sup> Under the Act's language, partners in a same-sex couple may both establish lawful parentage under the Act. For example, one woman may qualify under § 7610(a) by giving birth to a child while her domestic partner may simultaneously qualify under § 7611(d) by receiving the child into her home and openly holding it out as her natural child. Similarly, two men may both qualify as a child's natural fathers by satisfying the § 7611(d) requirement. Thus, §§ 7610 and 7611 provide literal support for a gender-neutral reading in making parentage determinations; they expressly eliminate any distinction between the requirements that a man and a woman must fulfill in order to establish parentage under the Act.

Section 7650 offers further textual support for the gender-neutral approach. This section specifies that interested persons are eligible to bring an action to determine whether or not there exists a mother and child relationship.<sup>217</sup> The second sentence of the section provides that in making this determination, "[i]nsofar as practicable, the provisions of this part applicable to the father and child relationship apply."<sup>218</sup> Thus, this section explicitly endorses courts' application of the paternity presumptions to maternity determinations, which is essentially equivalent to directing courts to adopt a gender-neutral interpretation of the Act.

Objectors may rely on § 7612 to maintain the Act is not capable of a gender-neutral interpretation. Accordingly, they may argue that the section prevents two men from simultaneously establishing paternity, as one man's

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<sup>215</sup> CAL. FAM. CODE § 7610(a). The language "or under this part" in § 7610(a) provides for the possibility that a woman may qualify under § 7610(b). A woman may also establish the relationship by proof of adoption. *Id.* at § 7610(c).

<sup>216</sup> *Id.* at §§ 7610(b), 7611.

<sup>217</sup> *Id.* at § 7650(a).

<sup>218</sup> *Id.*

presumption is rebutted by a judgment establishing another man's paternity.<sup>219</sup> This assertion relies on a fundamental misinterpretation of the provision. Section 7612(a) provides that a presumption of paternity may be only rebutted "in an appropriate action."<sup>220</sup> Section 7611(b) states that if *conflicting* presumptions exist, the presumption that is weightier on policy and logical grounds controls.<sup>221</sup> These sections do not imply that the Act should be construed to mean that a child may not have two legal parents of the same sex. Same-sex partners who both claim maternity or paternity under the Act and are the only parents a child knows do not present an action that is "appropriate" for courts to use one presumption to rebut another.<sup>222</sup> In addition, the fact that two men or two women who jointly raised a child as partners both seek to establish parentage does not mean that their presumptions conflict; rather, they are likely complementary and necessary to ensure that a child has two lawful parents. Moreover, the specification that considerations of policy and logic control when conflicting presumptions arise further suggests that the Act ultimately seeks to attain equitable resolutions of parentage claims. Authorizing same-sex couples to simultaneously fulfill the presumptions is consistent with this goal.

In sum, a child may have two parents of the same sex under the literal language of §§ 7610 and 7611 to the extent that both of those individuals can fulfill the provisions' requirements. The Act's use of the "natural mother" and "natural father" terminology simply reflects the parentage disputes arising at the time it was drafted. This recognition, as well as the substantive provisions of the Act, however, is more probative than the inclusion of such terms in demonstrating

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<sup>219</sup> *Id.* at § 7612(c).

<sup>220</sup> *Id.* at § 7612(a).

<sup>221</sup> *Id.* at § 7612(b).

<sup>222</sup> An "appropriate action" would refer to a case in which two men claim to be a child's father despite the obvious discrepancy in father-figure responsibilities assumed by the two men and in which the child concerned also has a mother.

that courts should construe the statutes in a gender-neutral manner.

*C. Safeguarding Constitutional Guarantees*

The California Supreme Court expressly frowns on readings of statutes in ways that potentially conflict with the Constitution.<sup>223</sup> Yet, lower courts' decisions have disregarded this standard. Significant rulings in which California's lower courts have attempted to construe the Act have turned largely on technicalities. And they have done so by overlooking overarching constitutional authority that more meaningfully bears on the interpretations they make. In particular, they have ignored the longstanding constitutional principle of equal protection that provides substantial guidance on the precise issues they face.

The Equal Protection Clause of the United States Constitution guarantees all individuals equal protection of the law.<sup>224</sup> Article I, § 7 of the California Constitution is effectively the state equivalent of the Clause.<sup>225</sup> The Supreme Court has held that the Clause requires the government to treat every person equally unless it has a strong justification for doing otherwise.<sup>226</sup> Declining to construe the Act in a gender-neutral manner affording a child two parents of the same sex commits multiple violations of these basic constitutional guarantees. That approach denies children of same-sex partners the care and support of two lawful parents,

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<sup>223</sup> Cal. Hous. Fin. Agency v. Elliott, 17 Cal. 3d 575, 594 (1976).

<sup>224</sup> U.S. CONST. amend. XIV.

<sup>225</sup> "A person may not be . . . denied equal protection of the laws." CAL. CONST. art. 1, § 7(a). Article I, § 7 is "substantially the equivalent of the equal protection clause of the Fourteenth Amendment" of the U.S. Constitution. Children's Hosp. & Med. Ctr. v. Bontá, 97 Cal. App. 4th 740, 769 (2002) (quoting Dep't of Mental Hygiene v. Kirchner, 62 Cal.2d 586, 588 (1965)).

<sup>226</sup> Lehr v. Robertson, 463 U.S. 248, 265 (1983). The level of scrutiny for this justification depends on the strength of the interest infringed and on the class of persons subjected to disparate treatment. Children's Hosp. & Med. Ctr. v. Bontá, 97 Cal. App. 4th 740, 769 (2002). The California and federal tests for equal protection are substantially the same. County of L.A. v. S. Cal. Tel. Co., 32 Cal.2d 378, 389 (1948).

discriminates against putative parents based on their gender, and denies gay and lesbian partners equal status to those of heterosexual partners vis-à-vis parenting rights and responsibilities.<sup>227</sup> The lack of any rational justification for employing a non-gender-neutral interpretation prevents courts from legitimately declining to fulfill the constitutional guarantees.

The United States Supreme Court has consistently rejected distinctions that disadvantage some children due to the circumstances of their birth on equal protection grounds. In *Pickett v. Brown*, for example, the Court held unconstitutional a statute barring paternity suits brought on behalf of illegitimate children more than two years after their birth.<sup>228</sup> Observing that “no child is responsible for his birth,”<sup>229</sup> the Supreme Court in held that the “Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.”<sup>230</sup> In *Gomez v. Perez*, the United States Supreme Court similarly found that states may not deny children’s right to support from natural fathers who have not married their mothers.<sup>231</sup> In so finding, it condemned the practice by which states “invidiously discriminate[d] against illegitimate children by denying them substantial benefits accorded children generally” as “illogical and unjust.”<sup>232</sup>

Adopting a gender-biased interpretation of the Act violates equal protection under *Pickett* and *Gomez* since it disadvantages them based solely on the circumstances of their

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<sup>227</sup> Though Cal. Fam. Code §§ 7610 and 7611 do not facially discriminate against children and same-sex partners who have children, the U.S. Supreme Court has established that discrimination in the enforcement or administration of a statute fair on its face denies equal protection just as much as a statute which explicitly discriminates. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

<sup>228</sup> *Pickett v. Brown*, 462 U.S. 1 (1983).

<sup>229</sup> *Id.* at 7.

<sup>230</sup> *Id.* at 8 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972)).

<sup>231</sup> *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

<sup>232</sup> *Id.* at 538 (quoting *Weber*, 406 U.S. at 175).

birth.<sup>233</sup> This method denies children of same-sex partners the care and support of a second lawful parent to which children born to heterosexual couples are entitled. Such an approach is tantamount to stating that children of same-sex couples are not entitled to the full rights enjoyed by other children merely because they do not have parents of the opposite sex. As absurd as this outcome may seem, courts have clearly held that it is correct. In doing so, they have evaded the equal protection principle and United States Supreme Court precedent directly outlawing their essential penalties in children imposed simply because the two people raising and caring for them are the same sex.

Failing to adopt a gender-neutral interpretation of the Act also violates equal protection insofar as it constitutes gender discrimination. In the heterosexual context, the two parents who have a child encounter no difficulties in being considered eligible for lawful parentage under §§ 7610 and 7611 of the Act. In the context of same-sex partners, reading the Act in a gender-biased manner precludes one parent in a same-sex couple from similarly establishing legal parentage according to those same provisions. A simple “but for” analysis illuminates the gender-based discrimination such an approach promotes. Accordingly, but for the partner’s sex, he or she would have been entitled to establish legal parentage under the Act. In other words, if a woman in a lesbian relationship was instead a man, she would have no trouble establishing legal parentage status. The fact that she is a woman, however, prevents her from attaining lawful parenthood under a strict interpretation of the Act. Such denial of legal parentage to persons similarly situated based solely on

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<sup>233</sup> California’s strict scrutiny standard of review for potential equal protection violations minimizes the likely constitutionality of this deprivation. California courts of appeal have applied the Equal Protection Clause of the United States Constitution to the parent and child relationship. Thus, they have noted “the establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights.” *Ruddock v. Ohls*, 91 Cal. App. 3d 271, 277-78 (1979); *Susan H. v. Jack S.*, 30 Cal. App. 4th 1435, 1441(1994).

their sex is therefore a denial of equal treatment under the law by way of an improper construction of the Act.

The landmark United States Supreme Court decision in *Romer v. Evans* conclusively invalidated state sanctioned discrimination on the basis of sexual orientation under the Equal Protection Clause.<sup>234</sup> In *Romer*, the Supreme Court considered the constitutionality of an amendment to Colorado's Constitution that repealed various ordinances which had previously been enacted to prohibit discrimination on the basis of sexual orientation.<sup>235</sup> Maintaining that a state may not "deem a class of persons a stranger to its laws," the Court held that Colorado could not single out homosexuals by enforcing the amendment which would simply subordinate them to all other classes of persons.<sup>236</sup>

A gender-biased reading is inconsistent with the *Romer* ruling. This recognition underscores the third violation of the Clause. Interpreting the Act to prevent same-sex partners from both establishing legal parentage while enabling all partners in heterosexual couples such status singles out gay and lesbian citizens as ineligible for the parentage provisions of the Act. Specifically, it sends the signal that gay and lesbian individuals are not as entitled to parenthood status as are their similarly situated heterosexual counterparts. Critics will argue that gays and lesbians remain eligible to establish parentage by having a child with an opposite-sex partner, for example, which entitles them to be legal parents. They will contend that, under this reasoning, gays and lesbians may not successfully establish equal protection violations to the extent that they are not singled out for any particular disadvantage. This reasoning is flawed. Maintaining that a gay or lesbian person is equally entitled to legal motherhood or legal fatherhood *only* in the context of a heterosexual relationship singles out these individuals as inferior, and, as described in *Romer*, relegates the class of individuals in same-sex relationships who have children with their partners collectively "a stranger to [the]

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<sup>234</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>235</sup> *Id.* at 623-24.

<sup>236</sup> *Id.* at 635.

laws.” It further degrades the basic livelihoods of same-sex partners by preventing them from qualifying for parentage unless they make special arrangements to have children in a different context, which consists of numerous burdens that heterosexuals are never required to endure. Analyzing this situation from the reverse angle is helpful here as well and illustrates the absurdity of the gender-biased approach in assessing parentage claims. Clearly, a law that prevented both partners in heterosexual relationships from establishing parentage would be viewed as discriminatory towards heterosexuals. Requiring heterosexual individuals to have same-sex relationships in order to qualify as lawful parents would be considered an impermissible, discriminatory burden.

The law has consistently supported positive accommodations for members of suspect classes in order to remedy the challenges they face—i.e., the endorsement of affirmative action in limited circumstances and the assistance afforded disabled persons in their daily affairs. Denying homosexuals the right to establish legal parentage in the context of same-sex relationships seems only to exacerbate the challenges this class must confront. Thus, if the foregoing analysis is unpersuasive, surely the erection of additional barriers to this suspect class while seeking to deconstruct those very hurdles for other such classes would amount to discrimination based on sexual orientation which violates the Clause.

In short, the gender-biased reading of the Act treads dangerous ground. Such an interpretation violates the guarantees embodied in the Clause: denying individuals in same-sex relationships parental rights and responsibilities under the law simply because they form relationships they find satisfying and worthwhile amounts to discrimination on the basis of sexual orientation, as it strikes at fundamental aspects of their existence in ways that specifically disadvantage their class compared to all other persons.

The lack of any legitimate government interest in maintaining the gender-biased interpretation further supports the criticism that the lower courts actions are not

constitutionally sound.<sup>237</sup> California has not enacted any state laws or policies recently that express disapproval of same-sex couples' parenting arrangements. At the same time, however, California has already formally conveyed a legitimate government interest in affording same-sex partners parental status. In 2003, the California Supreme Court granted same-sex partners who adopt the same parental rights and responsibilities afforded to heterosexual couples who have their own children.<sup>238</sup> The Legislature's enactment of A.B. 205, which also granted parental rights to same-sex domestic partners,<sup>239</sup> reinforced this interest.<sup>240</sup> As such, claiming that a

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<sup>237</sup> Since California considers gender a suspect classification, gender discrimination is subject to strict scrutiny. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20 (1971). Thus, in order to maintain the non-gender-neutral interpretation in the gender discrimination context, the state must have a compelling need to support gender-based distinctions. *Westbrook v. Mihaly*, 2 Cal. 3d 765, 784-85 (1970). By contrast, under federal law, gender discrimination is subject to heightened, or intermediate, scrutiny, which focuses on whether the statute is "substantially related to an important government interest." *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

<sup>238</sup> See Opening Brief of Real Party in Interest Emily B. at 28, *Elisa B. v. Super. Ct.*, 97 P.3d 72 (Cal. 2004) (No. S125912). See also *Sharon S. v. Super. Ct.*, 31 Cal. 4th 417, 437-38 (2003) ("Second parent adoptions benefit children by providing a clear legal framework for resolving any disputes that may arise over custody and visitation.").

<sup>239</sup> Enacted by A.B. 205, CAL. FAM. CODE § 297.5.

<sup>240</sup> See Opening Brief of Real Party in Interest Emily B., *supra* note 238, at 28. While A.B. 205 confers vastly greater rights to registered domestic partners and their children, it does not ensure that all children of same-sex couples have equal rights. A.B. 205 legally recognizes domestic partners as parents and seeks to ensure that they and their children have equal rights. However, the legislation does not protect the children of same-sex couples who have already been born or who will be born to parents who do not register as domestic partners. Since its effective date of January 1, 2005, § 297 of the legislation, discussed *supra*, children of same-sex couples that are registered as domestic partners must receive treatment that is equal to children of opposite-sex couples. Given that the retroactivity of § 297.5 is unclear, the section may be interpreted to recognize two legal parents for children born to registered domestic partners only after January 1, 2005. In addition, children of couples who do not register as domestic partners will not receive A.B. 205's protections and equal treatment guarantees. The numerous reasons for why opposite-sex couples do not marry also apply to same-sex couples' decisions not to register as domestic partners. In fact,

legitimate state interest compels courts to deny lawful parentage status to two same-sex partners under the UPA is entirely unfounded.<sup>241</sup> In sum, then, maintaining that two same-sex partners may not both qualify as lawful parents under the Act is nothing more than “a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”<sup>242</sup>

Simply stated, construing the Act to prevent same-sex partners from both qualifying as lawful parents necessarily creates status-based distinctions that offend the fundamental constitutional guarantees for which our nation is renowned. This approach directly undermines the safeguards against irrational discrimination and the concept that all citizens are entitled to receive equal protection of the law.

#### *D. Promoting Public Policy Goals*

The lower court decisions do not engage in comprehensive, well-reasoned discussions of the policy considerations at stake. Given the level of confusion about parentage for same-sex couples, this oversight is problematic. Analysis of these policy considerations greatly clarifies the

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same-sex couples may even have more reasons. For example, registering as domestic partners could result in one losing their job in the military. *See* 10 U.S.C. § 654(b) (2005), or the “don’t ask, don’t tell” policy. However, children’s rights to equal protection and support should not depend on their parents’ failure to register as domestic partners. *See* Opening Brief of Real Party in Interest Emily B., *supra* note 238, at 30.

<sup>241</sup> *See* Opening Brief of Real Party in Interest Emily B., *supra* note 238, at 28. In light of the clear legitimate government interest in accommodating same-sex parents, discriminatory treatment under the Act could only survive strict scrutiny and qualify as constitutional if a compelling state interest supports the added requirement of the Act that could be interpreted to mean that a partners may qualify by adopting the child. No authority suggests that the state has a compelling interest in requiring that same-sex partners adopt as opposed to qualifying for the rights and responsibilities the legislative sources describe as constituting the basis for enhancing same-sex partners’ parental rights. Further, well-settled United States Supreme Court precedent has established that “a bare...desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.” *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

<sup>242</sup> *Romer*, 517 U.S. at 635.

compelling reasons for interpreting the Act in a gender-neutral manner. Thus, this section sets forth the underlying policy rationales for embracing this approach as a sensible solution to effectuating formally identified goals.

Families headed by same-sex couples have become increasingly prevalent nationwide.<sup>243</sup> Their presence is particularly prominent in California, where many such couples reside. According to the 2000 Census, California is home to over 90,000 same-sex couples.<sup>244</sup> And these couples are collectively raising over 70,000 children.<sup>245</sup> Such numbers alone convey the pressing reality of California's increasingly diverse demographics to which decisions concerning the proper application of the UPA have been slow and poorly crafted to respond.

Aside from the numbers, features that uniquely characterize same-sex families shed further light on the realities of the demographic the laws at issue concern. Children of same-sex parents in California are already disproportionately disadvantaged compared to children being raised by heterosexual couples: they are more likely to be under the age of five,<sup>246</sup> disabled,<sup>247</sup> and adopted.<sup>248</sup> Individuals in same-sex partnerships likewise face distinct disadvantages compared with their heterosexual counterparts. Significantly, they are more economically interdependent on one another

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<sup>243</sup> According to the 2000 U.S. Census, there exist 594,391 same-sex unmarried partner households in the United States. TAVIA SIMMONS & MARTIN O'CONNELL, MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000, CENSUS 2000 SPECIAL REPORTS 2 (2003), *available at* <http://www.census.gov/prod/2003pubs/censr-5.pdf> (last visited Nov. 29, 2005). The Census also reveals that 163,035 of these couples are raising children. *Id.* at 10.

<sup>244</sup> M.V. Lee Badget & R. Bradley Sears, *Same-Sex Couples and Same-Sex Couples Raising Children in California* 1 (May 2004) <http://www1.law.ucla.edu/williamsproj/publications/CaliforniaCouplesReport.pdf> at 1 (last visited Nov. 29, 2005) (relying on data from the 2000 Census).

<sup>245</sup> *Id.* at 2.

<sup>246</sup> *Id.* at 14.

<sup>247</sup> *Id.* at 14.

<sup>248</sup> *Id.* at 14.

than are heterosexual partners.<sup>249</sup> Same-sex couples also have fewer economic resources available to support their children than do married couples: they have lower household incomes, lower home ownership rates, and less valuable homes.<sup>250</sup> In addition, these parents are disproportionately racial minorities, Hispanic, Spanish speakers, non-citizens, and/or disabled compared with married parents.<sup>251</sup> Given these facts, then, it is no surprise “that these parents are more likely to face discrimination in employment or the housing and rental markets, making it more difficult for them to provide for their children.”<sup>252</sup> This preexisting difficulty is only exacerbated in the event of separation. Same-sex couples’ lack of access to the benefits marriage affords leaves them particularly vulnerable financially if their relationships end.<sup>253</sup> By extension, this situation presents even more troubling implications for their children who depend on them for critical means of support.

The California Supreme Court has established a commitment to make decisions that are responsive to contemporary social trends and the realities they present. In the landmark ruling *Marvin v. Marvin*, the California Supreme Court maintained that the principles of contract law and equity jurisprudence ought to govern disputes when cohabitators had disputes in an ordinary civil action.<sup>254</sup> Writing for the Court, Justice Tobriner provided a prelude to the opinion, in which he noted that “[d]uring the past 15 years, there has been a substantial increase in the number of couples living together without marrying.”<sup>255</sup> He acknowledged the census figures that demonstrated that in 1970, eight times as many couples were living together as cohabitating couples out of wedlock as had done so in 1960.<sup>256</sup> Seeking to reconcile the law with the reality, he stated:

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<sup>249</sup> *Id.* at 1.

<sup>250</sup> *Id.* at 15.

<sup>251</sup> *Id.* at 16.

<sup>252</sup> *Id.* at 2.

<sup>253</sup> *Id.* at 9.

<sup>254</sup> *Marvin v. Marvin*, 18 Cal. 3d 660 (1976).

<sup>255</sup> *Id.* at 665.

<sup>256</sup> *Id.* at 665.

Although we recognize the well-established public policy to foster and promote the institution of marriage, perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy.

In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the so-called unlawfulness of the meretricious relationship to the instant case.<sup>257</sup>

The Court concluded that because “[t]he mores of society have indeed changed so radically in regard to cohabitation,” it could not therefore “impose a standard based on alleged moral considerations that have apparently been abandoned by so many.”<sup>258</sup> As a result, the plaintiff was permitted to proceed in the trial court with an action for breach of contract and to seek equitable remedies as well. The status of unmarried cohabitant would no longer bar judicial relief when such a relationship dissolved.

Justice Tobriner’s analysis reflects the notion that the law derives its legitimacy from its ability to equitably address the circumstances they have been enacted to govern. As such, Tobriner’s analysis attempts to validate courts’ departure from applying the literal language of dated statutory provisions when dealing with novel situations.

The California Supreme Court has applied these values to modern, unanticipated parentage determinations arising under the Act. In *Johnson*, the California Supreme Court heard a maternity dispute in the surrogacy context. Specifically, the Court had to resolve the question of who qualified as a lawful mother under the Act when two women—a genetic mother

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<sup>257</sup> *Id.* at 683.

<sup>258</sup> *Id.* at 684.

and surrogate—set forth competing claims to maternity based on their biological connections to the child.<sup>259</sup> Had the Court decided the question by adhering to the literal language contained in § 7610, the surrogate would have been deemed the mother. However, the Court instead looked to the parties' intentions as manifested by the surrogacy agreement.<sup>260</sup> Accordingly, it recognized the genetic mother as the natural mother because she had intended to bring about the birth of the child and raise it as her own from the outset, whereas the surrogate mother merely "agreed to facilitate the procreation of [her and her husband's] child."<sup>261</sup> In doing so, the Court looked beyond the literal wording of the statute to reach the equitable result in a context the drafters had not anticipated would arise under the Act.

The *Johnson* decision also emphasizes another dimension of fairly responding to the reality of modern parenting arrangements. The Court's focus on intent in *Johnson* should be applicable in cases concerning same-sex parents as well. Just as in heterosexual relationships, same-sex partners who intend to jointly co-parent make subsequent decisions based on their expectations concerning their commitments. For example, one partner may function as a stay at home mother in reliance on the other partner's plans to work in order to financially support the family. Absent these intentions, the former partner might otherwise have worked and advanced her earning capacity and career opportunities and therefore be in a better position financially in the event of a separation. When such partners separate unexpectedly, it is inequitable to penalize one of them by not viewing their situation as equivalent to that of heterosexual partners.

The California Supreme Court would therefore be well-advised to clarify that all parentage rights and responsibilities attendant opposite-sex couples apply to all same-sex couples as well. Such a pronouncement would harmonize the law and the reality to reach a fully equitable

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<sup>259</sup> See *Johnson*, 5 Cal. 4th at 93 n.9.

<sup>260</sup> *Id.* at 93.

<sup>261</sup> *Id.* at 93.

rule just as the California Supreme Court has done in the past. The dramatically greater number of individuals in same-sex relationships, the prevalence of children in the households those couples head, and the unique disadvantages they face even in the absence of separation should bear strongly on how broadly—or narrowly—the California Supreme Court continues to apply the Act. Failure to account for these concerns in efforts to clarify the proper scope of the Act will leave the law unresponsive to the needs and concerns of many California citizens and ill equipped to adapt to the social change it ceaselessly confronts.

Aside from the value in applying laws in ways that respond to and accommodate the realities they are designed to govern, concrete and instrumental goals likewise provide compelling rationales for construing the Act along gender-neutral lines. One such significant goal is the promotion of children's best interests. The California Supreme Court adheres to the basic precept that "[t]he public policy of the State of California is to protect the best interests of children whose parents have a custody or visitation matter within the family courts."<sup>262</sup> Bridging this standard to changing family forms, Professor Nancy D. Polikoff urges courts to prioritize the child's interests when disputes within nontraditional families arise.<sup>263</sup>

California adheres to this standard in adoption proceedings.<sup>264</sup> In these cases, courts invoke § 8612 of the California Family Code to grant an adoption if they believe that the decision will promote the best interests of the child.<sup>265</sup> California courts likewise make decisions that protect

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<sup>262</sup> California Courts Self-Help Center, Supervised Visitation Information, <http://www.courtinfo.ca.gov/selfhelp/family/custody/visitation.htm> (last visited June 9, 2005).

<sup>263</sup> Polikoff, *supra* note 180, at 483.

<sup>264</sup> *See, e.g.*, *Guardianship of Henwood*, 49 Cal. 2d 639 (1958); *Adoption of Lenn E.*, 182 Cal. App. 3d 210 (1986); *Adoption of Thevenin*, 189 Cal. App. 2d 245 (1961); *Adoption of Bird*, 183 Cal. App. 2d 140, 146-47 (1960); *Adoption of McDonald*, 43 Cal. 2d 447 (1954).

<sup>265</sup> CAL. FAM. CODE § 8612(c).

children's best interests when adjudicating custody matters<sup>266</sup> and dependency proceedings.<sup>267</sup>

Nonetheless, California courts' approaches to same-sex parentage cases have been far less attentive to this concern. In *K.M. v. E.G.*, the court explicitly declined to decide parentage based on the best interests standard, fearing that this approach would "put at risk the rights of any natural parent who entered into a relationship and encouraged the formation of parental bonds between the children and the new partner."<sup>268</sup> The court further asserted that the standard "would foster litigation and promote instability in the children's lives."<sup>269</sup> Based on these considerations, the *K.M.* court maintained that the standard is limited to custody and visitation issues and may not be applied to the parentage question it faced.<sup>270</sup>

The *K.M.* court's arguments are unsatisfactory. Parentage determinations necessarily place parent-figures' rights and responsibilities at risk, yet the very purpose of these proceedings is to determine who should retain such rights and obligations. Further, placing these entitlements at risk is often for the best; such privileges and responsibilities are only valuable insofar as they further desirable ends. Moreover, while litigation and instability may increase in the short run, considering best interests is likely to decrease these forms of disruption from continuing to occur and promoting even more disputes in the long run. In addition, the *K.M.* court failed to acknowledge that most forms of proceedings—especially custody and dependency cases in which the best interests standard invariably operates—encourage litigation and enhance instability as well. Taking the court's argument seriously would therefore place much of the legal system and its avenues for dispute resolution at risk, as extending this logic could render them obsolete. Accordingly, in order to fully conform with its own mission statement governing

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<sup>266</sup> *Id.* at § 3040(b).

<sup>267</sup> CAL. WELF. & INST. CODE § 202.

<sup>268</sup> *K.M.*, 118 Cal. App. 4th at 500.

<sup>269</sup> *Id.* (citing *Johnson*, 5 Cal. 4th at 93-94).

<sup>270</sup> *Id.*

custody and visitation policies, as well as the independent policy consideration that parentage laws should serve to further children's best interests, the California Supreme Court should carefully consider this issue in adjudicating future parentage actions involving same-sex partners' claims.

In considering the factors that promote a child's best interests, a court must, as a preliminary matter, explore the implications its decision will have on the child's financial support. An adjudication of parentage under the Act entitles a child to numerous financial resources. They are eligible to receive child support payments<sup>271</sup> and to qualify as a dependent on his parent's health insurance.<sup>272</sup> The child may also collect survivors' benefits, social security benefits, and military benefits. It may likewise maintain inheritance rights.<sup>273</sup> An individual denied parentage cannot provide a child legally not recognized as his or her own with these means of support. Therefore, failing to recognize that same-sex couples may both qualify as parents jeopardizes the financial security of some children that other children with two legal parents receive as a matter of course. In order to ensure that children of same-sex couples receive equal and sufficient financial support, then, interpreting the Act to enable a child to have two mothers or two fathers would seem a prudent approach.

Children who have two recognized parents are advantaged in a number of other important ways as well. Significantly, parents have unique rights and responsibilities with respect to their children's educational and medical affairs.<sup>274</sup> If a child is absent from school without permission,

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<sup>271</sup> Parents have a legal obligation to provide their children with "the necessities of life." CAL. PENAL CODE § 270. CAL. FAM. CODE § 4035. CAL. PENAL CODE § 270. *See also* CAL. FAM. CODE § 7570(a).

<sup>272</sup> *Id.* at § 7570(a).

<sup>273</sup> *See id.*

<sup>274</sup> *See, e.g., id.* at § 3003 ("'Joint legal custody' means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child."); CAL. FAM. CODE § 6550(b) (providing that a parent or person who has legal custody of child retains ultimate authority to consent or refuse medical or dental care for a minor insofar as the decision does not jeopardize the minor's life, health, or

for example, schools must notify his or her parents in a timely manner.<sup>275</sup> Parents and guardians also have the right to access their children’s school records.<sup>276</sup> Children below seventh grade may not be excused from school to obtain medical services without a parent’s consent, and school districts have discretion to apply this rule to students in grades seven and above as well.<sup>277</sup> In addition, school district governing boards may require parents or guardians to provide information of others they authorize to care for their child in emergency situations in which the parents or guardians cannot be reached.<sup>278</sup> Further, students must submit a parental request for assistance in administering medication if they require such assistance at school.<sup>279</sup> Schools must receive parents’ informed written consent before testing children for behavioral, mental, or emotional difficulties.<sup>280</sup> Schools may also require a parent or guardian to attend a portion of the school day in his or her child’s classroom if the child has been suspended and is scheduled to return to class.<sup>281</sup>

Parents also have special responsibilities if their children make mistakes that lead to involvement with the law. For example, delinquent “children in need of supervision”<sup>282</sup> who have been taken into custody by the state must be returned to a parent when practicable.<sup>283</sup> Parents are also held liable for various damages their children cause.<sup>284</sup>

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safety).

<sup>275</sup> CAL. EDUC. CODE § 51101(a)(4).

<sup>276</sup> *Id.* at § 51101 (a)(10).

<sup>277</sup> *Id.* at § 46010.1.

<sup>278</sup> *Id.* at § 49408.

<sup>279</sup> *Id.* at § 49423.

<sup>280</sup> *Id.* at § 49091.12. A parent also has the right to receive information about psychological testing the school does involving their child and to deny permission to administer the test. *Id.* at § 51101(a)(12).

<sup>281</sup> *Id.* at § 48900.1.

<sup>282</sup> CAL. WELF. & INST. CODE § 601.

<sup>283</sup> *Id.* at § 281.5. In the alternative, they may be placed with a relative if it is in the child’s best interest and would help keep the family together. *Id.*

<sup>284</sup> CAL. EDUC. CODE § 48904; CAL. CIV. CODE § 1714.1; CAL. PENAL CODE § 594(d); CAL. GOV’T CODE § 38772; CAL. PENAL CODE § 594(c); *Id.* at § 490.5(b); CAL. CIV. CODE § 1714.1.

Given the restrictions on such critical rights and responsibilities to legally recognized parents, children of former same-sex partners face unique dangers. By failing to acknowledge that both former partners may qualify as parents notwithstanding the fact that they are both the same sex, the lawful parent may completely sever ties between the former partner and the children. This could leave a child vulnerable to inconvenient situations that children of heterosexual couples are less likely to experience as a matter of course. For example, if the child requires authorization to leave school to obtain medical care and the custodial parent cannot be reached, the former partner may not provide the necessary consent. In addition to the benefits of having two lawful parents in urgent situations, it goes without saying that a child's access to the benefits administered in the form of general care and support in ordinary, non-emergency situations that are enhanced by having two legally recognized parents should be factored into such decisions as well.

Aside from the advantages two parents provide in terms of tangible forms of support, the California Legislature has made clear the state's priority to "assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship."<sup>285</sup> This policy consideration is important, as children's psychological needs are chief factors in any comprehensive evaluation of how their best interests ought to be fulfilled. While courts typically account for children's tangible needs, such as food, housing, clothing, health care, and education, they have often failed to consider their emotional well-being. Commentator Joseph Goldstein has thus observed that decision makers

have been slow to understand and to acknowledge the necessity of safeguarding a child's psychological well-being. While they make the interests of a child paramount over all other claims when [a child's] physical well-being is in jeopardy, they subordinate,

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<sup>285</sup> CAL. FAM. CODE § 3020(b).

often intentionally, his psychological well-being to, for example, an adult’s right to assert a biological tie. Yet both well-beings are equally important, and any sharp distinction between them is artificial.<sup>286</sup>

One significant component of a child’s emotional and psychological well-being is his or her ability to establish and maintain close relationships. Speaking to this concern, Goldstein has noted that “[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child’s normal development. Since they do not play the same role in later life, their importance is often underrated in the adult world.”<sup>287</sup> Nonetheless, courts have commonly misunderstood, undervalued and ignored these fundamental interests.<sup>288</sup>

The gravity of these oversights cannot be emphasized enough. Longstanding research in developmental psychology reveals the importance of stable and secure primary relationships for children; they are greatly harmed by the loss of ongoing intimate relationships with the few adults who provide for their nurture and care.<sup>289</sup> Such harm includes significant negative repercussions that affect much of their future lives.

Detailed in psychological and psychiatric studies for the past fifty years, attachment theory affirms the importance of solid parent-child ties.<sup>290</sup> Attachment theory maintains that

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<sup>286</sup> JOSEPH GOLDSTEIN ET. AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 4 (Free Press 1973).

<sup>287</sup> *Id.* at 31-32.

<sup>288</sup> Eleanor Willemsen & Michael Willemsen, *The Best Interest of the Child: A Child’s Right to Have Stable Relationships Must Be Central to Custody Decisions*, 11 MARKKULA CENTER FOR APPLIED ETHICS 7 (2000), available at <http://www.scu.edu/ethics/publications/iie/v11n1/custody.html> (last visited June 9, 2005).

<sup>289</sup> *Id.* at 6. This is especially true of young children. *Id.* The authors urge the state to “protect children from serious psychological harm resulting from severed relationships that are centrally important to their lives.” *Id.* at 10.

<sup>290</sup> Martin Maldonado-Durán et al., *Child Abuse and Neglect: Reactive Attachment Disorder*, EMEDICINE, May 18, 2005,

the unique and exclusive relationship between a caregiver and a child after its sixth month of life is the critical attachment that affects the person's relationships for the rest of his or her life.<sup>291</sup> While children may develop other attachments with people with whom they routinely interact, i.e., grandparents, aunts, or uncles, "the relationship with the primary caregiver(s) plays the most critical role in determining the child's basis for future attachments."<sup>292</sup>

Once ongoing, important relationships of attachment have been established, disruptions to these relationships trigger alarming, irreparable harm, which typically consists of a pattern of difficulties known as "attachment disorder."<sup>293</sup> Psychological studies demonstrate that these disruptions impair children's relationships with others and new adult caregivers, undermine their communication skills, diminish their ability to play and learn independently, and have lasting impacts on their adult relationships in marriage and at work.<sup>294</sup> Children may be affected by a disrupted relationship with a parent, for example, by reacting with a heightened need to control any relationships they happen to form.<sup>295</sup> Thus, a child may become preoccupied with retaining extra attention from caregivers, teachers, and friends at the expense of improving his or her own self-confidence. A child may alternatively experience difficulty establishing confident expectations.<sup>296</sup> This difficulty may lead to formation of insecure attachments, wound self-confidence, and/or diminish children's tendency to trust others.<sup>297</sup> It could further foster the erection of psychological defenses such as avoidance or ambivalence.<sup>298</sup> Studies demonstrate that these defenses could cause a child to

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<http://www.emedicine.com/ped/topic2646.htm> (last visited June 10, 2005).

See JOHN BOWLBY, ATTACHMENT AND LOSS (1969).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* See also JOHN BOWLBY, CHILD CARE AND THE GROWTH OF LOVE (Mary D. Salter ed., Penguin Books 2d ed. 1965).

<sup>293</sup> Willemsen & Willemsen, *supra* note 289, at 6.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> Maldonado-Durán et al., *supra* note 291.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

devalue relationships at the expense of focusing exclusively on independent activities and achievements.<sup>299</sup> Any one of these patterns is associated with adulthood difficulties with close relationships, parenting, and attaining the healthy balance between independence and intimacy that is critical to sound mental health.<sup>300</sup> Thus, for developmental psychologists,

early successful attachment becomes the working model of how to relate to other people while being an independent person, as well. [Society] must protect children's rights to continue their close relationships with nurturing adults."<sup>301</sup> Failure to do so "is thought to contribute to a negative working model in relationships that leads to insecurity for the rest of a child's life."<sup>302</sup>

Courts should construe the Act in a gender neutral manner to preserve parent-child relationships, and, by extension, children's best interests in the typical case. When same-sex partners separate, a court order denying one of them the status as a lawful parent could facilitate various scenarios that increase the likelihood of disruption. One partner may simply forbid his or her former partner from maintaining any contact with the child they had jointly raised while they were together, for example. By abruptly severing the attachment in the form of a parent-child relationship the child once had with the other partner, then, this situation could severely hinder the child's future interpersonal relationships and his or her mental health for much or even his or her entire life.

Conservative opponents claim that families headed by same-sex couples are contrary to children's best interests, as same-sex parents are inferior to those of heterosexual couples.<sup>303</sup> Extensive research has resoundingly disproved

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<sup>299</sup> Willemsen & Willemsen, *supra* note 289, at 6-7.

<sup>300</sup> *Id.* at 7.

<sup>301</sup> *Id.* at 7.

<sup>302</sup> Maldonado-Durán et al., *supra* note 291.

<sup>303</sup> The Alliance Defense Fund has declared that "[n]o same-sex couple, regardless of how much they love a child or how good they are at parenting, can provide a child the benefits of his or her own biological

these beliefs. Studies conclusively show that children are just as well off with gay or lesbian parents as they are with heterosexual parents.<sup>304</sup> Further, even if children are better off

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parents.” Egelko, *supra* note 165.

<sup>304</sup> Graff, *supra* note 169 (referring to research by Stanford University’s family law professor Michael Wald which culminated in a report issued in December 1999). In 2002, the American Pediatrics’ Committee on Psychosocial Aspects of Child and Family Health issued a report that constitutes the most recent comprehensive review of gay parenting studies. The report found no meaningful differences between children raised by gay parents and those raised by heterosexual parents. American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002), available at <http://aappolicy.aapublications.org/cgi/reprint/pediatrics;109/2/341.pdf> (last visited Nov. 29, 2004). See also Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992) (concluding that “there is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.”); J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 29 DEVELOPMENT PSYCHOL. 124 (1995); Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 AM. PSYCHOL. 941 (1989); David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and their Children*, 31 DEVELOPMENTAL PSYCHOL. 105 (1995); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 CHILD PSYCHOL. & PSYCHIATRY 551 (1983) (finding no significant differences on gender role measures between children of lesbian mothers and control group children); Julie S. Gottman, *Children of Lesbian and Gay Parents*, 14 MARRIAGE & FAM. L. REV. 177 (1989); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696 (1978) (finding no significant difference in gender role or identity); Beverly Hoeffler, *Children’s Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981); Mary E. Hotvedt & Jane B. Mandel, *Children of Lesbian Mothers*, HOMOSEXUALITY: SOC., PSYCHOL., AND BIOLOGICAL ISSUES 275 (1982); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 18 J. HOMOSEXUALITY 123, 132-33 (1989); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Study*, 51 AM. J. ORTHOPSYCHIATRY 545 (1981) (finding no significant difference in gender role identity); Karen G. Lewis, *Children of Lesbians: Their Point of View*, 25 SOC. WORK 198 (1980) (describing how children of lesbian mothers talk about their adjustment to knowledge of

with straight parents, this argument does not undermine the case for gender-neutrality. Absent a gender-neutral interpretation of the Act, many decisions could easily result in a child's loss of a parent and all the support and benefits that parent would otherwise have provided. Thus, ensuring that these children have a second parent certainly serves their best interests more than does having only one parent. Given the well-established recognition that gay or lesbian parents do not "harm" children in any meaningful way,<sup>305</sup> as well as evidence demonstrating certain unique benefits of being raised by same-sex parents,<sup>306</sup> the concerns voiced by opponents of gay and lesbian parenting are insignificant in determining how courts should properly construe the Act. In any event, California has already taken an official position on this matter in authorizing

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their mothers' lesbianism); Laura Lott-Whitehead & Carol T. Tully, *The Family Lives of Lesbian Mothers*, 63 SMITH C. STUD. SOC. WORK 265 (1993) (demonstrating no negative effect on self-esteem and social adjustment); Ann O'Connell, *Voices from the Heart: The Development Impact of a Mother's Lesbianism on Her Adolescent Children*, 63 SMITH C. STUD. SOC. WORK 281 (1993) (finding no correlation between parents' sexual orientation and sexual orientation of child); Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity*, LESBIAN AND GAY PSYCHOL.156 (1994) (studying children born to or adopted by lesbian mothers); Charlotte J. Patterson, *Families of the Lesbian Baby Boom: Parents' Division of Labor and Children's Adjustment*, 31 DEVELOPMENTAL PSYCHOL. 115 (1995); Charlotte J. Patterson, *Sexual Orientation and Human Development: An Overview*, 31 DEVELOPMENTAL PSYCHOL. 3 (1995); see also Elizabeth D. Gibbs, *Psychosocial Development of Children Raised by Lesbian Mothers: A Review of Research*, 8 WOMEN & THERAPY 65 (1989) (reviewing literature).

<sup>305</sup> American Academy of Pediatrics, *supra* note 304.

<sup>306</sup> Empirical research reveals that children of gay or lesbian couples are more tolerant of diversity and more nurturing toward younger children than children who have heterosexual parents. American Academy of Pediatrics, *supra* note 304 (citing A. Steckel, *Psychosocial Development of Children of Lesbian Mothers*, in GAY AND LESBIAN PARENTS (F.W. Bozett ed., 1987); J. Stacey & T.J. Biblarz, *How Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159-83 (2001)). Research also demonstrates that children of lesbian parents see themselves as more lovable and were viewed by parents and teachers as more affectionate, responsive, and protective of younger children than children who have heterosexual parents. American Academy of Pediatrics, *supra* note 304.

domestic partner adoptions<sup>307</sup> and endorsing same-sex parenting arrangements.<sup>308</sup> Therefore, to maintain consistency with existing state policy, courts should not consider these arguments persuasive.

The California Supreme Court maintains that “the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.”<sup>309</sup> In cases concerning the potential parentage rights and responsibilities of same-sex partners, this guiding principle must influence future decisions the California Supreme Court makes. While no clear harmful impacts on a child would result from affording all same-sex partners legal parentage under the Act, the numerous substantial disadvantages that failing to afford individuals in this class their appropriate parentage status will promote should compel the Court to construe the Act in a gender-neutral fashion regardless of the particular nuances raised.

In addition to viewing issues surrounding parentage determinations from the angle of what decisions would promote the child’s best interests, California likewise recognizes the duty to support one’s child as an important policy goal. In fact, this duty is one of the oldest provisions of California law.<sup>310</sup> The California Family Code assigns to both parents of any child—the father and the mother when the law was established—an equal and continuing responsibility to support their child.<sup>311</sup> The statutes setting forth these obligations collectively demonstrate the state’s commitment to enforcing the duties of both parents to support the child.<sup>312</sup> Such support ensures individual accountability for one’s

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<sup>307</sup> CAL. FAM. CODE §§ 9000(b), 9000(f), 9006(b).

<sup>308</sup> *Id.* at § 297.5.

<sup>309</sup> *In re Marilyn H.*, 5 Cal. 4th 295, 307 (1993) (relying on *Stanley v. Illinois*, 405 U.S. 645, 649 (1972)).

<sup>310</sup> *See* CAL. FAM. CODE, § 3900, 3901 (previously codified as CAL. CIV. CODE, §§ 206, 242, 248).

<sup>311</sup> *Id.* at § 3900 (previously codified as CAL. CIV. CODE, §§ 196, 196a, 242).

<sup>312</sup> *See* CAL. FAM. CODE, § 7570(a).

children and prevents the burden of supporting such children from falling onto the state.

In order to hold individuals financially responsible for their children and thereby fulfill this policy, their parentage must be established. The California Supreme Court recognizes this as a compelling interest.<sup>313</sup> Thus, in *In re Buzzanca*, a case regarding a non-biological father's evasion of parental responsibility, the court noted that "the Legislature has declared its preference for assigning *individual* responsibility for the care and maintenance of children; not leaving the task to the taxpayers."<sup>314</sup> In light of these policy concerns, it is nonsensical to increase the financial burdens imposed on the state and on children merely because two men or two women are responsible for a child's birth. The *Buzzanca* court also emphasized that "the Legislature has made it perfectly clear that public policy (and, we might add, common sense) favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility."<sup>315</sup>

Interpreting the Act gender-neutrally furthers this important public policy goal. Such an interpretation would ensure that partners in same-sex couples do not evade responsibility for their children's support.<sup>316</sup> This decision would promote California's public policy in favor of individual, parental accountability for one's children, minimize the tax burden on the state, create incentives for more responsible parenting and relationships among same-sex couples, and increase predictability and planning when same-sex partners enter into relationships that they will know could lead to responsibilities as a legal parent. Moreover, conservative opponents may be persuaded of the merits of construing the Act in a gender-neutral manner in order to effectuate this specific set of objectives.

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<sup>313</sup> *In re Buzzanca*, 61 Cal. App. 4th at 1423.

<sup>314</sup> *Id.* at 1424.

<sup>315</sup> *Id.*

<sup>316</sup> See CAL. FAM. CODE § 7570 et seq. (creating a system of voluntary declaration of paternity to "increase . . . the number of children who have greater access to child support and other benefits . . ." since avoiding "a lengthy and expensive court process . . . is in the public interest.").

Construing the Act in a gender-neutral manner also emphasizes the notion that same-sex partners and their families are integral, valued members of the community. Affording them legal parent status equivalent to that afforded heterosexual parents is just one of the necessary steps that must be taken to improve social attitudes toward gay and lesbian-headed households and reduce discriminatory stigmas about their relationships and families.<sup>317</sup> Such a position is also consistent with, and essential to carry out, California's longstanding policy of accommodating the diversity the state's families reflect. As early as 1987, a joint task force of California senators and state assemblypersons observed that "greater recognition is being given to gay or lesbian life partners for what they are: family relationships."<sup>318</sup> The task force also recommended that, "[i]t should be the policy of the government and all private institutions to accept diversity as a source of strength in family life which must be considered in planning policy and programs."<sup>319</sup> The enactment of recent legislation, discussed supra, is one prominent example of how California has been acting to promote this stated goal. Agreeing with California's policy of eradicating harmful social stigmas associated with nontraditional families, Professor Polikoff stated:

When parents create a nontraditional family, that family becomes the reality of the child's life. The child may experience some stigma, but courts should delegitimize, not condone, disparaging community attitudes. The courts should protect children's interests within the context of nontraditional families, rather than

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<sup>317</sup> See Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U.L. REV. 223, 257 (1994).

<sup>318</sup> California Joint Select Task Force on the Changing Family, *California Couples: Recognizing Diversity and Strengthening Fundamental Relationships* 34, 35 (Oct. 1988).

<sup>319</sup> 2 California Joint Select Task Force on the Changing Family, *California Couples: Recognizing Diversity and Strengthening Fundamental Relationships, Couples Workgroup Preliminary Report* 276 (Oct. 1988).

attempt to eradicate such families by adhering to a fictitious, homogenous family model.<sup>320</sup>

The gender-neutral approach responds directly to the call to embrace the diversity that enriches California as a state: it broadens the definition of a legitimate family consistently with the emergence of these alternative models, thereby legitimating and improving the image of gay and lesbian citizens and their parenting abilities.<sup>321</sup> It also responds to recognitions that the traditional nuclear family is no longer the exclusive ideal.<sup>322</sup> These affirmations are critical to accommodate families headed by gay and lesbian couples in accordance with existing state policy and realize further social progress in eradicating the harmful stigmas unrecognized families commonly experience.<sup>323</sup>

### Conclusion

The California Supreme Court's recent rulings reconciled the lower court decisions and established that former lesbian partners may, in some instances, both qualify as a child's parents under the Act. In so doing, they respond to some of the foregoing concerns. In *Elisa B.*, the Court reversed the appellate court's "gender biased" holding based on the specific provisions of the Act and the lack of genuine support within case law for its analysis.<sup>324</sup> The Court observed that according to § 7650, the § 7611 fatherhood presumptions apply to the mother and child relationship as well.<sup>325</sup> The Court then recognized that the *Johnson* holding that "a child can

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<sup>320</sup> Polikoff, *supra* note 180, at 482.

<sup>321</sup> Martha A. McCarthy & Joana L. Radbord, *Family Law for Same Sex Couples: Chart(er)ing the Course*, 15 CAN. J. FAM. L. 101 (1998) (contending that the definition of a "family" must be expanded to account for same-sex families).

<sup>322</sup> See *Moore v. City of E. Cleveland*, 431 U.S. 494, 500-06 (1977) (maintaining that constitutional protection applies not only to nuclear families but also to extended families); *Moore Shipbuilding Corp. v. Indus. Accident Comm'n*, 185 Cal. 200, 207 (1921).

<sup>323</sup> McCarthy & Radbord, *supra* note 322.

<sup>324</sup> *Elisa B.*, 37 Cal. 4th 108.

<sup>325</sup> *Id.* at 116.

only have one natural mother” does not apply in the context of lesbian partners.<sup>326</sup> The Court further acknowledged that nothing affirmatively prevents a child from having two parents that are women—especially in light of the current domestic partnership statutes and the Court’s prior decision in *Sharon S.*<sup>327</sup> Accordingly, it maintained that Elisa qualified as a parent under § 7611: she received the children into her home and openly held them out as her own.<sup>328</sup> Moreover, the presumption could not be rebutted by evidence that Elisa is not the biological mother because she was instrumental in the children’s conception, possessed the understanding that she and Emily would jointly raise them as their own, voluntarily assumed parental rights and obligations after the children were born, and no competing claims to her being the children’s second parent exist.<sup>329</sup> The Court’s decision in *K.M.* reached a similar result. The Court held that K.M. is a parent because she supplied her ova to impregnate her partner for the purpose of producing children she would jointly raise with her partner in their home.<sup>330</sup> Specifically, it recognized that K.M. qualifies as a mother under the Act because she is genetically related to the children.<sup>331</sup> As in *Elisa B.*, the Court further explained that a child can have two mothers notwithstanding the language in *Johnson* that others have construed to preclude such a result.<sup>332</sup> In *Kristine H.*, the Court reversed the court of appeal’s holding but affirmed its assumption that the Act may be interpreted in a gender-neutral manner. Thus, the Court concluded that Kristine was estopped from challenging the judgment. The Court stated that Kristine and Lisa R. were the parents of the child to whom she gave birth.<sup>333</sup> While the opinion depended centrally on the rules of estoppel, its intermediary ruling that the superior court had subject matter jurisdiction to issue the

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<sup>326</sup> *Id.* at 117.

<sup>327</sup> *Id.* at 117-18.

<sup>328</sup> *Id.* at 116.

<sup>329</sup> *Id.* at 116.

<sup>330</sup> *K.M.*, 37 Cal. 4th at 144.

<sup>331</sup> *Id.* at 140.

<sup>332</sup> *Id.* at 142.

<sup>333</sup> *Kristine H.*, 37 Cal. 4th at 161.

judgment relied on its holding in *Elisa B.* that a child can have two parents who are both women.<sup>334</sup>

These decisions offer considerable clarification on the issue of whether children may have two mothers in the context of same-sex partners. They resolve the inconsistencies among the lower courts' decisions primarily by reference to the language contained in the Act. While the rulings represent progress in this area of the law, however, their holdings are disappointingly limited in effect. A cursory review of the opinions reveals that they are narrowly tailored; their holdings are strictly confined to the questions raised before the Court, and their analysis casts a constricted net. As a result, a number of important related questions that could generate future controversy remain officially unresolved.

Examples of such issues are readily apparent. For instance, the Court stops short of pronouncing that all parties in same-sex relationships may qualify as parents under the Act. None of the decisions discuss the fatherhood status of men in same-sex relationships. Similarly, none of the decisions discuss the potential parentage rights of a woman who was not instrumental in producing her lesbian partner's children but later formed a relationship with her and assumed a maternal role for those children. Furthermore, the decisions do not address the converse situation of a woman who helps produce children with her partner but subsequently fails to receive the children into her home or openly hold them out as her own. Nor do they concretely establish the bounds of these parental rights and responsibilities—i.e., whether same-sex partners who are considered parents have *all* the rights and responsibilities as do partners in heterosexual relationships. The Court's failure to address these issues leaves loopholes that lower courts could conceivably exploit in considering such claims.

The Court's rulings likewise fail to rely on the historical, constitutional, and policy-based justifications that this piece has discussed at length. Though the Court in *Elisa*

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<sup>334</sup> *Id.* at 163.

*B.* made passing reference to the origins of the Act as a vehicle for preventing illegitimacy and the notion that children's interests should count, the Court de-emphasized and did not consider these issues essential to its judgments. This relative disregard further exemplifies the limitations of the Court's rulings, which serve to restrain same-sex partners' ability to effectively utilize the law. Had the Court relied on the legislative intent behind the Act, the Court's rulings necessarily would allow greater recognition of the parentage rights of same-sex partners. Similarly, had the Court even acknowledged the significant constitutional dimensions of the issues at stake, the decisions would have more meaningfully advanced children's and same-sex partners' rights. Such an affirmation would have strengthened the foundation upon which future efforts in these areas needing further reform could draw. It also would have sent a clear message that the guarantees of equal protection and commitment to combat unlawful discrimination must be fully enforced.

The Court properly reconciled the diverging opinions generated by the courts of appeal. Yet, the broader contours of the law surrounding parentage determinations involving same-sex couples remains a work in progress. Fundamental principles of legislative intent, the substantive provisions of the Act, broad constitutional guarantees, and clearly-defined policy goals independently justify interpreting the Act so as to afford same-sex partners rights and responsibilities of parentage on par with their heterosexual counterparts. They likewise demonstrate the law's responsibility for assuring that children are not denied the right to have two parents on the basis of one potential parent's sex. Thus, while the Court's decisions significantly clarify this area of the law, the analysis the Court employed is regrettably incomplete. Whereas the Court invoked the least support necessary to establish the parentage rights of the women in the limited circumstances presented by the facts of the cases, its analysis should have instead focused more generally the factors this Article has addressed. Had it done so, the Court would have provided more meaningful direction to lower courts as they attempt to apply the Act to situations they are sure to confront in the

future. Such analysis would contribute to the continuing efforts to afford same-sex partners the same treatment accorded those in heterosexual relationships and the endeavor to ensure that all children are entitled to the benefits that legal recognition of two same-sex partners as lawful parents entails.

