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COMMENT

PARENT-CHILD RELATIONSHIP TRUMPS BIOLOGY: CALIFORNIA'S DEFINITION OF PARENT IN THE CONTEXT OF SAME-SEX RELATIONSHIPS

I. INTRODUCTION

Jack's parents met and fell in love two years before he was born.¹ They courted each other, exchanged rings, and soon made plans to have a family. After Jack was born, his parents taught him to walk, talk, and ride his bike. Four years later, his sister Jane was born and the family seemed complete. However, although both parents extended great effort to keep the family together, it did not work out, and they separated when Jack was five and Jane was one. Now, their parents, who are both women, struggle to establish their rights as legal parents. The biological mother of both Jack and Jane wants sole physical and legal custody of the children.² This would give her the exclusive right to custody as well as decision making pertaining to the education and medical care of the children. Jack and Jane's non-biological mother, who nurtured both children, and has a strong parent-child relationship with them, must fight for custody and the opportunity to maintain that relationship.

1. This hypothetical story represents facts similar to those in cases where courts struggle with the rights of non-biological parents in same-sex and opposite-sex relationships.

2.

Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare. . . . Physical custody, on the other hand, means the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody.

McCarty v. McCarty, 807 A.2d 1211, 1213 (Md. App. 2002).

As more same-sex couples raise children outside the context of a domestic partnership or adoption,³ courts struggle to decide who qualifies as a legal parent. State legislatures have attempted to establish statutory guidelines to assist courts in establishing parentage of one or both parents.⁴ However, states have been slow to recognize lesbian and gay couples as families with two parents who are entitled to equal parental rights.⁵ The failure of legislatures and courts to establish a clear definition of parentage in same-sex relationships has left many non-biological parents without a legal basis to assert entitlement to custody of their children.⁶ Nevertheless, over the last fifteen years, California courts and the California legislature have made significant strides in acknowledging non-biological parents in both opposite-sex and same-sex relationships as legally recognized parents.⁷

3. One out of three lesbian couples and one out of five gay male couples are raising children nationwide. LISA BENNETT & GARY J. GATES, *THE COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME-SEX PARENTS* 3 (2004), available at http://www.hrc.org/Content/ContentGroups/Publications1/kids_doc_final.pdf.

4. See, e.g., VT. STAT. ANN. tit. 15, § 308 (2002) (explaining that “[a] person alleged to be a parent shall be rebuttably presumed to be the natural parent” if the parents voluntarily acknowledge parentage, if a genetic test proves a person is the biological parent, or if the child was born to a legally married man and woman); WASH. REV. CODE ANN. § 26.26.116 (West 2005) (explaining that “[a] man is presumed to be the father” if he is married to the mother of the child when the child is born, if he is married to the mother of the child and the child is born within three hundred days after the marriage is terminated, or if, after the child is born, he marries the child’s mother and voluntarily asserts his paternity).

5. See Robin Cheryl Miller, Annotation, *Child Custody and Visitation Rights Arising from Same-Sex Relationship*, 80 A.L.R. 5th 1 (2006).

6. *Id.*

7. See, e.g., CAL. FAM. CODE § 297.5(d) (2004) (“The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.”); *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005) (holding that the biological mother of child born during a lesbian relationship was estopped from challenging the validity of a judgment stating that both lesbian partners were the child’s parents); *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005) (holding that a woman in a lesbian relationship who donated ova to her partner was the child’s parent); *Elisa B. v. Superior Court*, 117 P.3d 660, 622 (Cal. 2005) (holding that the non-biological mother in a lesbian relationship was the parent of children born to her partner after both women raised the children as their own); *In re Nicholas H.*, 46 P.3d 932, 933-36 (Cal. 2002) (holding that a man who took his girlfriend’s

In August 2005, the California Supreme Court ruled on three companion cases that ended the inconsistent rulings among the appellate courts as to who qualifies as a legal parent in the context of lesbian relationships.⁸ Although the court had refined the definition of parental rights of both biological and non-biological fathers in opposite-sex relationships, it never clarified whether these holdings were applicable to both mothers and fathers in same-sex relationships.⁹ This comment contends that the California Supreme Court's rulings in *Elisa B.*, *Kristine H.*, and *K.M.*¹⁰ were correct given the reality of same-sex families today and in light of the decisions in *Nicholas H.*

son in and raised him as his own, but admitted that he was not the biological father, did not rebut the presumption that he was the father); *In re Karen C.*, 124 Cal. Rptr. 2d 677, 678-81 (Ct. App. 2002) (holding that the *Nicholas H.* decision applies equally to women, thus enabling a non-biological mother who took a child in and held her out as her own to establish a presumption of maternity); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214-15 (Ct. App. 1991) (holding that a lesbian partner who was not the biological or adoptive mother was not entitled to custody or visitation because she was not a "parent" under the Uniform Parentage Act); *Curiale v. Reagan*, 272 Cal. Rptr. 520, 521 (Ct. App. 1990) (holding that the lesbian partner to the biological mother of a child born during their relationship had no claim to custody and/or visitation of the child).

8. *Elisa B.*, 117 P.3d at 662 (granting review of this case as well as *Kristine H. v. Lisa R.* and *K.M. v. E.G.*). These decisions came soon after *Koebke v. Bernardo Heights Country Club*, where the court held that same-sex couples legally registered as domestic partners could not be discriminated against on the basis of marital status for purposes of the Unruh Civil Rights Act. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1214 (Cal. 2005). The court intimated that same-sex couples would only be afforded certain protections if they were legally registered as domestic partners. *Id.* However, the court in *Elisa B.* acknowledged that it is possible for both parents of a child to be women under current domestic partnership statutes. 117 P.3d at 666. The court avoided any discussion on whether domestic partnership registration should be required to establish parentage; this may be evidence that the court finds protecting the interest of the child more important than enforcing parental rights.

9. See *In re Zacharia D.* 862 P.2d 751, 753 (Cal. 1993) (holding that the biological father of a child born during an opposite-sex relationship was not the presumed father and thus did not have a right to reunification services or custody); *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992) (holding that an unwed biological father who was not a presumed father has a right to withhold his consent for his child's adoption if he shows a full commitment to parental responsibilities).

10. In cases in which children are involved, the court does not fully name the parties in order to protect the identities of the children.

and *Karen C.*¹¹ Additionally, the California Supreme Court's holdings properly protect the economic and emotional interests of children in non-traditional families while conferring rights to non-biological parents. Now, the non-biological mother of Jack and Jane has the same legal and custodial rights as their biological mother. Accordingly, these holdings should be applied equally to male same-sex relationships.

This comment will discuss the importance of legal parent status for non-biological parents in same-sex relationships. Part II will give a brief history on the determination of parentage through the Uniform Parentage Act and the California Family Code, and on the progression of the definition of "presumed parent" to include non-biological parents. Part III will examine the reasoning of the California Supreme Court in *Elisa B.*, *Kristine H.*, and *K.M.* and the significance of the court's decision in the context of same-sex relationships. Part IV will discuss the importance of the *Elisa B.* decision in providing financial and emotional support to children and the court's holding as it would be applied to male same-sex relationships. Part V will address the concerns regarding a non-biological parent's ability to gain legal status as parent. This comment concludes that the court's decisions in *Elisa B.*, *Kristine H.*, and *K.M.* are evidence of the evolution of family and dependency law and the court's critical role in protecting the rights of children and parents in today's changing families.

II. THE DEFINITION OF PARENT: RELATIONSHIP VS. BIOLOGY

The Uniform Parentage Act (UPA), promulgated in 1973 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), created rules for the presumptions of parentage.¹² The original intent of the UPA was to eliminate the unequal treatment of children "without regard to marital status of the parents."¹³ Over the

11. *See supra* note 7 and accompanying text.

12. UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 296 (2001). *See also* Press Release, Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Parentage Act Revised (Aug. 3, 2000), <http://www.nccusl.org/nccusl/pressreleases/pr8-3-00-3.asp>. The NCCUSL revised the 1973 UPA in 2000 primarily to make parentage determinations more clear. *See* CAL. FAM. CODE §§ 7600-7750 (West 2004).

13. UNIF. PARENTAGE ACT (2000), 9B U.L.A. 296.

years, courts have struggled to interpret the Act's intent and to apply its parental presumptions to non-biological parents in opposite-sex families as well as same-sex families.¹⁴

A. *The Uniform Parentage Act*

As of 2000, nineteen states, including California, had adopted the full text of the UPA and many others had adopted significant portions of the Act.¹⁵ The original Act's parental presumptions included that a man is the father of a child born during the marriage; and a man is the father of a child if the man and the mother are married after the birth of the child and the man acknowledges his paternity in writing or is named as the father on the birth certificate.¹⁶ In addition, the original UPA created a paternity presumption that a man who "receives the child into his home and openly holds out the child as his natural child" is a legal father.¹⁷ However, in 2002, this presumption was amended to create a two-year period in which the father had to live with the child for the presumption to take effect.¹⁸

California codified the UPA in 1975,¹⁹ and incorporated its provisions into the California Family Code (Family Code) in 1992.²⁰ The

14. See cases cited *supra* notes 7-9 and accompanying text.

15. UNIF. PARENTAGE ACT (2000), 9B U.L.A. 296.

16. UNIF. PARENTAGE ACT (1973) § 4(a)(1), 4(a)(3)(i)-(ii) (amended 2000), 9B U.L.A. 393-94 (2001).

17. UNIF. PARENTAGE ACT (1973) § 4(a)(4), 9B U.L.A. 394. The UPA permits a man and woman to "sign an acknowledgment of paternity with intent to establish the man's paternity." UNIF. PARENTAGE ACT (2000) § 301, 9B U.L.A. 313. Because a man who signs such an acknowledgment is merely declaring that he is the genetic father, it is not applicable to fathers who admit that they are not biologically related to the child. § 301 cmt., 9B U.L.A. 313-14. Therefore, this portion of the UPA is outside the scope of this note.

18. UNIF. PARENTAGE ACT (2000) §204 cmt. (amended 2002) 9B U.L.A. 17 (Supp. 2006) ("Because there was no time frame specified in the 1973 act, the language fostered uncertainty about whether the presumption could arise if the receipt of the child into the man's home occurred for a short time or took place long after the child's birth.").

19. B.E. WITKIN, 10 SUMMARY OF CALIFORNIA LAW 72 (10th ed. 2005). "California's Uniform Parentage Act was enacted in 1975 as former C.C. 7000 et seq. . . . In 1992, the Civil Code provisions were replaced by Family C. 7600 et seq." *Id.*

current Family Code includes the parental presumptions of the original UPA.²¹ The presumption relevant to non-biological parents, known as the “hold out” presumption, is that a man is presumed the father if he receives the child into his home and holds the child out as his own.²² Family Code section 7610(a) establishes the parentage of a mother.²³ However, the Family Code presumptions to establish the parentage of a father are also applicable in determining the mother and child relationship.²⁴

The legal rights associated with a presumed parent are important to further facilitate the parent-child relationship. A presumed mother or father is deemed a “parent” under California statutory and case law and is entitled to all the rights and obligations inherent in that designation.²⁵ In custody proceedings a presumed mother or father is entitled to custody of the child unless the court finds placement would be detrimental to the interests of the child.²⁶ In dependency proceedings, where the state may remove a child from the home, a presumed parent

20. *Id.* See generally CAL. FAM. CODE §§ 7600-7750 (West 2004). These sections of the Family Code “may be cited as the Uniform Parentage Act.” § 7600.

21. See, e.g., § 7611(a)-(f).

22. § 7611(d). Most states, including California, which create the “hold-out” presumption, do so in the form of the original 1973 UPA. Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 833 (2004).

23. § 7610(a), (c) (“[I]t may be established by proof of her having given birth to the child . . . [or] by proof of adoption.”).

24. § 7650(a) (“[T]he provisions of . . . [the UPA] applicable to the father and child relationship apply . . . [to the] existence or nonexistence of a mother and child relationship.”).

25. See CAL. FAM. CODE § 3010(a) (West 2004) (providing that a mother and presumed father have equal rights to custody); CAL. FAM. CODE § 7500(a) (providing that a mother and presumed father have equal rights to the services and earnings of their unemancipated child); CAL. FAM. CODE § 8604(a) (West Supp. 2004) (requiring that a presumed father must consent to his child’s adoption if the presumption was established before the mother’s consent becomes irrevocable or her parental rights have been terminated); *Adoption of Kelsey S.*, 823 P.2d 1216, 1218-19, 1229-1233 (Cal. 1992). See also CAL. FAM. CODE § 3900 (West 2004) (establishing the duty of both parents to provide support for their children).

26. See CAL. FAM. CODE §§ 3040-3041 (West 2004). Section 3040 sets out the order of preference in granting custody, beginning with “both parents jointly.” *Id.* § 3040(a). Section 3041 permits placement with a non-parent only after a finding that placement with the parent would be “detrimental to the child.” *Id.* § 3041(a).

is entitled to reunification services and custody.²⁷ In contrast, a biological parent who has not taken steps to establish a relationship with his child is not considered a legal parent and is not entitled to reunification services or custody of the child.²⁸

The rights afforded to a presumed parent in California are particularly important to non-biological parents. However, not all states afford non-biological parents the same presumed parent status. For example, in Washington, a non-biological parent who lives with the child for a significant period, takes on the obligations of parent, and develops a parent-child relationship is considered a “de facto parent” rather than a presumed parent.²⁹ De facto parent status does not give the non-biological parent parental privileges as a right but instead allows the court to determine parental rights in the best interest of the child.³⁰ The Washington Supreme Court stated that although Washington’s UPA is not directly controlling regarding the rights of non-biological parents, it does provide policy directives relevant to the interests and rights of de facto parents.³¹ Although status as a de facto parent provides some rights to the non-biological parent, full exercise of those rights is controlled by the discretion of the court.

27. *In re Sarah C.*, 11 Cal. Rptr. 2d 414, 419-20 (Ct. App. 1992). See also CAL. WELF. & INST. CODE §§ 361.2(a), 361.5(a) (West 1998). Although dependency proceedings are controlled by the Welfare and Institutions Code, the California Supreme Court held that in “[a]pplying the UPA definition [of parent] to the dependency context, . . . only a presumed, not a mere biological, father is a ‘parent’ entitled to reunification services” *In re Zacharia D.*, 862 P.2d 751, 762 (Cal. 1993).

28. *Zacharia*, 862 P.2d at 761-62. See also *Sarah C.*, 11 Cal. Rptr. 2d at 420.

29. *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005). The non-biological mother in *L.B.* sought determination of parentage for her seven year-old daughter after the biological mother unilaterally terminated her contact with the girl. *Id.* at 164. Both women had jointly decided to conceive and raise a child; after a daughter was born to one of the mothers, they shared parenting responsibilities and raised their daughter until she was six. *Id.* at 164. The court held that if the non-biological mother can establish herself as a “de facto” parent she may petition the court for parental rights subject to a finding that it is in the “best interest of the child.” *Id.* at 176-77.

30. *Id.* at 177.

31. *Id.* at 170 (“Specifically, the legislature established that questions of parentage are to be considered without differentiation on the basis of the marital status or the gender of the child’s parent.” (citing WASH. REV. CODE ANN. §§ 26.26.106, 26.26.051)).

In California, *de facto* parent status holds similar limitations. “A person becomes a *de facto* parent . . . when he or she has participated in the day-to-day care and rearing of the child over an extended period of time.”³² A *de facto* parent may participate in dependency proceedings to assist the court in determining the proper care and custody of the child, but the *de facto* parent does not have the same rights as a legal parent.³³ Specifically, a *de facto* parent does not have a right to reunification services³⁴ in dependency court or rights to custody.³⁵ Therefore, in order to maintain meaningful familial relationships, the law should afford non-biological parents more rights than those of *de facto* parents.

B. “Natural” Parent Within the Meaning of California Family Code Section 7611

The California Family Code defines the parent-child relationship as the “relationship existing between a child and the child’s *natural* or adoptive parents.”³⁶ Under Family Code section 7611(d), a man is presumed to be the *natural* father if “[h]e receives the child into his home and openly holds out the child as his natural child.”³⁷ This presumption “may be rebutted in an appropriate action only by clear and convincing evidence.”³⁸ If two or more conflicting presumptions arise

32. Clifford S. v. Superior Court, 45 Cal. Rptr. 2d 333, 335 (Ct. App. 1995) (citing *In re B.G.*, 523 P.2d 244, 253 n.18 (Cal. 1974) (“[T]he term ‘*de facto* parent’ [is used] to refer to that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child’s physical needs and his psychological need for affection and care.”)).

33. *Clifford S.*, 45 Cal. Rptr. 2d at 335.

34. Reunification services are the services a dependency court provides or orders once a child is removed from the home pursuant to California’s Welfare and Institutions Code. See CAL. WELF. & INST. CODE § 361.5(a) (West 1998) (“[W]henver a child is removed from a parent’s or guardian’s custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child’s mother and statutorily presumed father or guardians.”).

35. *Clifford S.*, 45 Cal. Rptr. 2d at 335.

36. CAL. FAM. CODE § 7601 (West 2004) (emphasis added).

37. *Id.* § 7611(d) (emphasis added). Although this presumption was amended in the 2002 UPA, the California Family Code did not adopt the new amendment. See *supra* notes 18, 22 and accompanying text.

38. *Id.* § 7612(a). See, e.g., *In re T.R.*, 34 Cal. Rptr. 3d 215, 221-22 (Ct. App. 2005) (citing CAL. FAM. CODE § 7611(a)) (holding that the presumed father status

under section 7611, the presumption which is based on the “weightier considerations of policy and logic” will control.³⁹ Additionally, a “presumption under Section 7611 is rebutted by a judgment establishing paternity of the child by another man.”⁴⁰ The language in section 7611(d) is not clear as to whether “natural father” means the biological father or is more dependent on the relationship between the father and child. As a result, California appellate courts have made conflicting holdings as to whether a presumption under 7611(d) is rebutted if the man is not the biological father.⁴¹

During the early 1990s, California courts began hearing more cases involving same-sex parents who had children during the course of the relationship but where one of the parents was not biologically related to the children.⁴² Courts and litigants struggled to determine parental rights in the context of same-sex families because previously both the courts and the legislature had provided little guidance.⁴³ *Curiale v. Reagan* held that a “nonparent in a same sex bilateral relationship, [did not have] any right of custody or visitation upon the termination of the relationship [with the biological parent].”⁴⁴ The court found that de facto parent status did not give custody rights to a non-

was rebutted upon a showing that the presumed father molested the child, was not the biological father, and did not begin a relationship with the child until she was three years old).

39. CAL. FAM. CODE § 7612(b).

40. *Id.* § 7612(c).

41. *Compare Barkaloff v. Woodward*, 55 Cal. Rptr. 2d 167, 170-71 (Ct. App. 1996) (concluding that a section 7611(d) presumption was rebutted by a stipulated judgment that established that another man was the biological father), and *In re Olivia H.*, 241 Cal. Rptr. 792, 795 (Ct. App. 1987) (holding that presumptive father status was rebutted by paternity tests showing that the defendant was not the biological father), with *Steven W. v. Mathew S.*, 39 Cal. Rptr. 2d 535, 538-39 (Ct. App. 1995) (holding that the presumption that a non-biological father who had raised his child from birth was the father was not rebutted by a man who came forward as the biological father but who had no relationship with the child).

42. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991), *disapproved of in Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Ct. App. 1990), *disapproved of in Elisa B.*, 117 P.3d 660.

43. Sanja Zgonjanin, Note, *What Does it Take to be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN'S L.J. 251, 252-53 (2005).

44. *Curiale*, 272 Cal. Rptr. at 522 (referring to the non-biological parent as a “nonparent”).

parent over the objections of the biological parent.⁴⁵ The court additionally stated that the courtroom was not the place to create social policy.⁴⁶ The court's refusal to extend parental rights to non-biological parents evidenced its reluctance to address the reality of same-sex parenting. As a result, a non-biological mother who had raised and developed a relationship with the child did not have any rights.⁴⁷

Although same-sex relationships seemed to pose social policy considerations beyond what the courts were prepared to address, parentage in the context of opposite-sex relationships evolved more readily through the courts. In 2002, the California Supreme Court accepted the *Nicholas H.* case to determine whether a man who had met the presumption under Family Code section 7611 but admitted he was not the biological father, could establish legal parental rights.⁴⁸ In that case, the Alameda County Social Services Agency took Nicholas into custody because his mother failed to adequately care for him.⁴⁹ The mother's boyfriend, Thomas, "obtained temporary custody of Nicholas after filing a petition to establish a parental relationship."⁵⁰ Although Thomas was not the biological father of Nicholas, he lived with Nicholas for significant periods of time, financially supported him, and "consistently referred to and treated Nicholas as his son."⁵¹

The court of appeal concluded that Thomas qualified as a presumed father under section 7611(d) because he had taken Nicholas into his home and held Nicholas out as his own, but also found the presumption was rebutted under section 7612 because Thomas was

45. *Id.*; accord *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005).

46. *Curiale*, 272 Cal. Rptr. at 522. ("Given the complex practical, social and constitutional ramifications of the [de facto parent] doctrine, we believe the Legislature is better equipped to consider expansion of current California law should it choose to do so." (quoting *In Re* Marriage of Lewis and Goetz, 250 Cal. Rptr. 30, 33 (1988) (alteration in original))).

47. A California court of appeal addressed the same issue in *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 214-15 (Ct. App. 1991). Although the court acknowledged that both partners in a lesbian relationship intended to raise their children together, it explicitly declined to expand the definition of presumed parent to the non-biological mother. *Id.* at 219.

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

49. *Id.* at 934.

50. *Id.*

51. *Id.* at 935.

not the biological father.⁵² In reversing, the California Supreme Court held this was an incorrect reading of section 7612 because “[t]he courts have repeatedly held, in applying paternity presumptions, that the extant father-child relationship is to be preserved at the cost of biological ties.”⁵³ Thomas had developed a father-child relationship with Nicholas and no other man had come forward to claim paternity; therefore, the court concluded this was not “an appropriate action” in which the presumption of section 7611(d) should be rebutted.⁵⁴ The court reasoned that the “appropriate action” would be one in which another person is attempting to perfect his claim by rebutting a section 7611(d) presumption.⁵⁵

Thus, the court made clear that “actual biological paternity” was only a factor in rebutting a paternity presumption and was no longer determinative of paternity in the context of opposite-sex relationships.⁵⁶ Additional factors are considered in determining whether there is “an appropriate action” to rebut a presumption under section 7611(d). The court considers whether additional parties are seeking parental rights and the length and nature of the adult-child relationship.⁵⁷ As applied to cases where a non-biological father seeks parental rights, as in *Nicholas H.*, the fact that the man has no biological connection to the child would not automatically rebut a presumption under section 7611(d) but would be a factor the court would consider in determining his legal rights as a parent.

In 2002, the California Court of Appeal expanded the definition of presumed parent by applying a gender-neutral interpretation of section

52. *Id.* at 936.

53. *Id.* at 938. The court looked to *Steven W. v. Mathew W.*, where two men qualified as presumed fathers; one man qualified because he had taken the child into his home and held the child out to be his own, and one man qualified because he was married to the mother of the child at the time of birth and was biologically related to the child. *Id.* at 937 (citing *Steven W. v. Mathew W.*, 39 Cal. Rptr. 2d 535, 538-39 (Ct. App. 1995)). The *Steven W.* court held that the man who took the child into his home and held the child out to be his own was the legal presumed father because he had developed an ongoing father-child relationship. *Nicholas H.*, 46 P.3d at 937 (citing *Steven W.*, 39 Cal. Rptr. 2d at 539).

54. *Nicholas H.*, 46 P.3d at 941.

55. *Id.*

56. GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS PRACTICE AND PROCEDURE § 2.60[2][c] (2006).

57. *Id.*

7611(d) in *In re Karen C.*⁵⁸ There, a minor child requested that the juvenile court declare the existence of a mother-child relationship between her and Leticia, who she had lived with since birth.⁵⁹ The court concluded that the principles of *Nicholas H.* “should apply equally to women.”⁶⁰ Where no birth mother comes forward to contest maternity, a presumption created by the fact that a woman takes a child into her home and holds the child out to be her own is not necessarily rebutted by the fact that she is not the biological mother.⁶¹

The holdings of *Nicholas H.* and *Karen C.* developed legal reasoning that provided courts with some guidance in establishing the legal rights of parents in non-traditional families. *Nicholas H.* set parameters around the type of appropriate action under which a presumption should be rebutted under section 7612(a). *Karen C.* applied this principle equally to women. Although neither court addressed the issue of same-sex relationships, the confluence of these two holdings set a new paradigm for non-biological parents’ rights in same-sex relationships.

III. MY TWO MOMS

In August 2005, the California Supreme Court handed down three decisions that solidified the definition of parent as set out in *Nicholas H.* and *In re Karen C.* and applied these principles to same-sex families.⁶² While all factually different in some respects, each case involved same-sex partners in which one partner gave birth during the course of the relationship.⁶³ With conflicting appellate court holdings on the proper application of the statutory presumptions of parentage to

58. *In re Karen C.*, 124 Cal. Rptr. 2d 677 (Ct. App. 2002).

59. *Id.* at 678. Karen’s biological parents had given her to Leticia after an unsuccessful third-trimester abortion. *Id.* Leticia told Karen that she was adopted and Karen had no contact with her biological parents. *Id.* When Karen was ten, child protective services removed her from Leticia’s care. *Id.*

60. *Id.* at 681 (citing *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993)).

61. *Karen C.*, 124 Cal. Rptr. 2d at 681.

62. *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005) (granting review on August 22, 2005 in this case as well as *K.M. v. E.G.* and *Kristine H. v. Lisa R.* “to consider the parental rights and obligations, if any, of a woman with regard to a child born to her partner in a lesbian relationship”).

63. See discussion *infra* Part III.A.–C.

same-sex relationships,⁶⁴ the court used a gender-neutral interpretation of case law and the Family Code to arrive at its conclusions.

A. *Elisa B. v. Superior Court*

Elisa B. v. Superior Court held that a person who participates in parenting a child and holds the child out to be her own may have legal status as parent regardless of her sexual orientation or her biological connection to the child.⁶⁵ Elisa and Emily had been in a lesbian relationship for six years, during which the two women lived together and exchanged rings.⁶⁶ Both women decided to become pregnant through the assistance of a sperm bank.⁶⁷ In 1997, Elisa gave birth to one child, and in early 1998, Emily gave birth to twins.⁶⁸ All three children received both last names of the women and were raised jointly by both women in the same household.⁶⁹ Because Elisa made significantly more money than Emily, Emily stayed home with the children while Elisa worked to support their family.⁷⁰

Emily and Elisa separated in November 1999.⁷¹ Elisa continued to provide some financial support to Emily and the twins until she lost her job in 2001.⁷² In the meantime, Emily applied for state aid.⁷³ The El Dorado County District Attorney filed a complaint to establish Elisa as parent of the twins born to Emily in order to compel Elisa to pay child support.⁷⁴ The superior court found Elisa and Emily in-

64. *See supra* Part II.B.

65. *Elisa B.*, 117 P.3d at 670.

66. *Id.* at 663.

67. *Id.*

68. *Id.* Emily and Elisa also chose the same donor so their "children would 'be biological brothers and sisters.'" *Id.*

69. *Id.* The court further described the relationship both women had to the children: Elisa treated all three children as her own and told a prospective employer that she had triplets, and Elisa and Emily identified themselves as parents of the child with Down's Syndrome at an organization arranging his care. *Id.*

70. *Id.*

71. *Id.* at 663-64.

72. *Id.*

73. *Id.*

74. *Id.* at 662-63. The California Family Code mandates that each county shall have a child support agency that enforces child support obligations and establishes

tended to have children and to raise them as a couple.⁷⁵ Reasoning that parentage was not determined exclusively by biology, the superior court “found that Elisa was obligated to support the twins.”⁷⁶ The California Court of Appeal, however, held that Elisa was not a parent within the meaning of the Family Code,⁷⁷ and directed the superior court to vacate the order and dismiss the action.⁷⁸

The California Supreme Court took the case on review to decide whether, under the Family Code, Elisa was the legal parent of twins born to her lesbian partner.⁷⁹ The court indicated the Family Code was intended to be gender neutral.⁸⁰ Additionally, the court held a child could have two parents who were both women.⁸¹ In light of *Nicholas H.*, the court concluded that Elisa held the twins out to be her own children as their natural mother, and this was not “an appropriate action” to rebut the presumption that Elisa was not a biological parent.⁸² Because Elisa participated in causing the children to be born and raised them as her own with their birth mother, she was held to be a legal parent and therefore was obligated to pay child support.⁸³

paternity for children born out of wedlock. *Id.* at 663 n.2 (citing CAL. FAM. CODE § 17400(a)).

75. *Elisa B.*, 117 P.3d at 664.

76. *Id.* The superior court made this determination on a theory of equitable estoppel, holding that Emily had children with Elisa and had relied on Elisa’s promise to raise and support the children. *Id.* The court noted that application of this doctrine was particularly important because one parent abandoned the family, leaving the county financially responsible for family maintenance and the special needs of one of the twins. *Id.*

77. The pertinent section of the California Family Code is known as the California Uniform Parentage Act. CAL. FAM. CODE § 7600 (West 2004).

78. *Elisa B.*, 117 P.3d at 664.

79. *Id.* at 662.

80. *See id.* at 665.

81. *Id.* at 665-66. The court distinguished *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), in which the court ruled that a child could not have two mothers (one surrogate mother and one mother who provided her ovum) as well as a father. *Elisa B.*, 117 P.3d at 665-66. The *Elisa B.* court reasoned that a child could not have three parents, but could have two mothers. *Id.* Additionally, the court found that because same-sex partners could adopt and have children within a state recognized domestic partnership, there is no reason why a child could not have two parents, both of whom are women. *Id.* at 666.

82. *Elisa B.*, 117 P.3d at 668.

83. *Id.* at 669-70.

B. Kristine H. v. Lisa R.

In *Kristine H. v. Lisa R.*, one of the companion cases to *Elisa B.*, the California Supreme Court determined whether a biological mother could challenge the validity of a stipulated judgment that declared her lesbian partner a legal parent.⁸⁴ In 2000, Kristine and Lisa jointly filed a “Complaint to Declare Existence of Parental Rights,” alleging that Kristine was pregnant and that Kristine and Lisa were “the only legally recognized parents” of the unborn child.⁸⁵ A judgment, filed in superior court, declared Kristine as the biological mother of the unborn child and Lisa, her partner, as the child’s other legal parent.⁸⁶ The child was born in October 2000, and Kristine and Lisa separated in September 2002.⁸⁷

In December 2002, Kristine filed a motion to set aside the stipulated judgment.⁸⁸ Kristine argued that the stipulated judgment was void because the superior court did not have subject matter jurisdiction to determine the parentage of an unborn child.⁸⁹ The superior court denied the motion, and the court of appeal reversed on different grounds, concluding that parentage could not be based solely on the stipulation of the parties.⁹⁰ The California Supreme Court held that Kristine was estopped from challenging the order because she invoked the jurisdiction of the superior court, stipulated to the judgment, and enjoyed its benefits for two years.⁹¹ The court further noted that not only would it be unfair to both Lisa and the child to allow Kristine to challenge the judgment, it “would also contravene the public policy

84. *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005).

85. *Id.* Kristine stated that she and Lisa began a relationship in 1992 and that Kristine had paid a friend \$500 every three months to provide his semen so she could get pregnant. *Id.* The male friend agreed that he would not seek custody or visitation if a child was conceived. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 693. The court of appeal noted that Lisa “‘may be able to establish parentage’ . . . as a presumed parent under a gender-neutral application of [the] Family Code” and held that a child could have two parents of the same sex. *Id.*

91. *Id.* at 696. Because the court decided Kristine was estopped from the challenging the stipulated judgment, it did not need to decide whether such judgment was valid. *Id.* at 695.

favoring that a child has two parents rather than one.”⁹² By establishing parentage in the context of same-sex relationships, the court’s holding in this case was consistent with the holding in *Elisa B.*

C. K.M. v. E.G.

In *K.M. v. E.G.*, the other companion case to *Elisa B.*, the California Supreme Court held that both lesbian partners were parents of the children conceived by one of the partners⁹³ and that the statute preventing sperm donors from having standing to assert parental rights did not apply to this situation.⁹⁴ In March of 2001, K.M. filed a petition to establish a parental relationship with five-year old twins born to her former lesbian partner E.G.⁹⁵ K.M. and E.G. began dating in June 1993, and, in March 1994, they began living together and registered as domestic partners.⁹⁶ After several unsuccessful attempts for E.G. to become pregnant through in vitro fertilization, K.M. agreed to donate her ova to E.G.⁹⁷ K.M. signed a four-page “Consent Form for Ovum Donor (Known)” in which she agreed to have her eggs taken and “‘donated to another woman.’”⁹⁸ E.G. claimed that she would not have accepted the ova from K.M. unless K.M. signed the consent forms; however, K.M. claimed that she thought the form was “‘odd’ and did not pertain to her.”⁹⁹ The form stated that K.M., as the ova donor, relinquished any right to the donated eggs or to any child that may be born, and agreed not to attempt to discover the identity of any child born.¹⁰⁰ E.G. gave birth to twins in 1995,¹⁰¹ and the two women raised the children as a family.¹⁰²

92. *Id.*

93. *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005).

94. *Id.* at 678-79.

95. *Id.* at 675.

96. *Id.*

97. *Id.* at 676.

98. *Id.* (quoting the donor consent form).

99. *Id.* E.G. stated that she only accepted K.M.’s ova on the condition K.M. would act as a donor and E.G. would “be the mother of any child.” *Id.* However, K.M. and E.G. agreed that they would not tell anyone that K.M. had donated her ova. *Id.* K.M. claimed that she only agreed to donate because she and E.G. had planned to raise any child together. *Id.*

100. *Id.*

K.M. and E.G. separated in March 2001,¹⁰³ and in April 2001, K.M. filed a motion for custody and visitation with the twins.¹⁰⁴ The superior court found that K.M. had waived any right to legal parentage by executing the ova donation document.¹⁰⁵ The court of appeal affirmed, holding that K.M. was not a parent and that her status was “consistent with the status of sperm donor under the [California Family Code].”¹⁰⁶ On appeal, the California Supreme Court held K.M. was a legal parent of the twins and the sperm donor statute was not applicable under these circumstances.¹⁰⁷ The court reasoned that K.M. was a presumed mother under the Family Code because of her biological relationship to the twins. Further, it determined that Family Code section 7613(b), which does not treat a semen donor as the natural father,¹⁰⁸ did not apply to a woman who supplies her ova to “her lesbian partner in order to produce children who would be raised in their joint home.”¹⁰⁹

Although these three cases are factually and procedurally distinct, the holdings in each have a significant impact on a non-biological parent’s ability to maintain a relationship with her child. Additionally, the interests of the state and the rights of children in non-traditional families are protected.

IV. PRESERVING FAMILIES AND THE INTERESTS OF CHILDREN

The holdings in *Elisa B.*, *Kristine H.*, and *K.M.* evidence the California Supreme Court’s progression in providing adequate protection for the rights of children in non-traditional families. Affording parental rights to non-biological parents in the context of same-sex relation-

101. *Id.*

102. *See id.* at 676-77. K.M. and E.G. exchanged rings in a ceremony shortly after the twins were born. *Id.* at 676. Additionally, K.M. and E.G. told their parents that they were grandparents and K.M.’s siblings that they were aunts and uncles. *Id.* at 677.

103. *Id.* at 677

104. *Id.* at 675.

105. *Id.* at 677.

106. *Id.*

107. *Id.* at 682.

108. CAL. FAM. CODE § 7613(b) (West 2004).

109. *K.M.*, 117 P.3d at 678.

ships preserves the parent-child relationship and provides children with needed economic and emotional support. Although not contemplated by the court, its holdings in these cases should have equal application in male same-sex relationships in order to further protect the rights of children born into these non-traditional families.

A. State Interest in Providing Financial and Emotional Support for Children

Although *Elisa B.* greatly expands the definition of parent, the reasoning of the court remains in line with the holdings of *Nicholas H.* and *Karen C.* and the intent of the UPA to eliminate discrimination towards children in non-traditional families.¹¹⁰ The California Supreme Court has significantly broadened the legal rights and responsibilities of parents in same-sex families. These changes inevitably impact the welfare of the children involved¹¹¹ and are consistent with the “state[‘s] interest in preserving the integrity of the family and legitimate concern for the welfare of the child.”¹¹² “The state has an ‘interest in preserving and protecting the developed parent-child . . . relationships which give young children social and emotional strength and stability.’”¹¹³ Expanding who is a parent under the Family Code to accommodate the change in American families addresses these state interests and remains consistent with the Family Code’s intent to eliminate discrimination against children born into non-traditional families.¹¹⁴

110. See UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 296 (2001); see also Maggie Manternach, Note, *Where is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, 9 J. GENDER RACE & JUST. 385, 394 (2005).

111. Zgonjanin, *supra* note 43, at 278 (citing *Johnson v. Calvert*, 851 P.2d 776, 799 (Cal. 1993) (Kennard, J., dissenting) (arguing that the “best interest of the child” standard should be applied in determining who should “assume the social and legal responsibilities of motherhood for a child born of a gestational surrogacy arrangement”).

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

113. *Id.* (quoting *Susan H. v. Jack S.*, 37 Cal. Rptr. 2d 120, 122 (Ct. App. 1994)).

114. See discussion *supra* Part II.A; Deborah L. Forman, *Married with Kids and Moving: Achieving Recognition for Same-Sex Parents under the Uniform Par-*

The interests of the child are protected by the court's interpretation of the Family Code. Children with a parent who is not biologically related but who has maintained a parent-child relationship are able to receive the benefits flowing from that relationship.¹¹⁵ These benefits include both the relationship itself and the benefits associated with financial support.¹¹⁶ The concern for the rights of the child is found to be just as significant as a concern regarding the rights of the parents involved. In most cases in which the court is determining parentage of a non-biological parent, its overarching concern is with the custody rights of that parent.¹¹⁷ However, *Elisa B.* espoused that courts must also consider the issue of providing financial support for the child in any parentage determination involving a non-biological mother or father.¹¹⁸

In order to avoid paying child support, the non-biological parent in *Elisa B.* did not want to continue the parent-child relationship with two of the children.¹¹⁹ The court held that declaring one parent a non-legal parent simply because she is not biologically related to the children would leave the children without a second parent who could provide financial support.¹²⁰ "There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first

entage Act, 4 WHITTIER J. CHILD & FAM. ADVOC. 241, 266 (2005). Under the current UPA, a man who takes the child in and holds the child out to be his own "for the first two years of the child's life" is a presumed father. UNIF. PARENTAGE ACT (2000) § 204(5) (amended 2002) 9B U.L.A. 16 (Supp. 2006). The NCCUSL added this two-year time period to better "serve the goal of treating nonmarital and marital children equally." § 204 cmt. 9B U.L.A. 17.

115. "[U]nless the [parent] wishes to develop a long-term parental relationship with the child, it does not serve the child's best interests to find that a [person] who is not the biological [parent] must serve as the child's legal [parent]." Kathryn E. Krug, *Who is My Father? The Case for Early Determination of Paternity in California Juvenile Dependency Proceedings*, 18 T. JEFFERSON L. REV. 143, 156 (1996).

116. Brief for Children of Lesbians and Gays Everywhere et al. as Amici Curiae Supporting Respondent 21-22, *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (No. S-126945).

117. See *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

118. *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005).

119. *Id.* at 662-63.

120. *Id.* at 669.

step toward a child support award”¹²¹ By establishing the paternity of a non-biological parent who has benefited from the relationship with the child, the state is fulfilling this interest by providing the child with financial and emotional support.

Moreover, the court is holding parents accountable for children that they bring into the world whether or not they are biologically related to the child.¹²² In *Elisa B.*, *Kristine H.*, and *K.M.*, the court recognized that all partners were willing participants in the conception of their children.¹²³ Given the technology currently available to conceive a child,¹²⁴ the fact that a parent is not biologically related to the child does not mean that she or he was not an integral participant in the conception of the child. The court recognized that declaring a non-biological parent a non-parent alleviates any financial responsibility of that parent to the child and would potentially leave the state liable to provide financial support.¹²⁵

121. *Id.* (quoting the language found in section 7570 of the California Family Code).

122. *Elisa B.*, 117 P.3d at 670.

123. *See* *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673, 676 (Cal. 2005); *Elisa B.*, 117 P.3d at 664.

124. *See generally* Department of Health and Human Services, Centers for Disease Control and Prevention, Assisted Reproductive Technology, <http://www.cdc.gov/ART/index.htm> (last visited Oct. 24, 2006) (providing basic information and links to reports on the success of fertility treatments and procedures involving “surgically removing eggs from a woman’s ovaries, combining them with sperm in the laboratory, and returning them to the woman’s body or donating them to another woman”).

125. *See Elisa B.*, 117 P.3d at 669. Although outside the scope of this comment, the state interest in seeking child support may have been a motivating factor for the court to address same-sex parental rights. *See* Sara R. David, Note, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 934-37 (2005). If the court did not give the non-biological mother parental rights in *Elisa B.*, the county would not have been able to seek child support from the non-biological mother, and the costs to the state would increase greatly. *See* CAL. FAM. CODE § 4002(a) (West 2004) (“The county may proceed on behalf of a child to enforce the child’s right of support against a *parent*.” (emphasis added)).

Additionally, children have an interest in maintaining a relationship with two parents both for emotional and financial support.¹²⁶ California Family Code section 7611(d) establishes a presumption of parentage for those parents who are not biologically related but who have lived with the child and maintained a relationship as if the child were his or her own.¹²⁷ Although the circumstances of *Elisa B.*, *Kristine H.*, and *K.M.* are distinct, they all share important facts relevant to the court's determination of parentage. All three lesbian couples maintained committed relationships with each other and lived together for a significant amount of time.¹²⁸ Additionally, in all three families the women planned for a pregnancy during the course of their relationships,¹²⁹ raised the children together,¹³⁰ and presented themselves to the public as a family.¹³¹

In *K.M.*, the partners were in a relationship for eight years and their children were five years old when the women separated.¹³² The children's schools listed both partners as "the twins' parents," their nanny referred to them both as "the babies' mother," and the non-biological mother "added the twins to her health insurance policy, [and] named them as her beneficiary . . . [on] her life insurance [pol-

126. Brief for Children of Lesbians and Gays Everywhere et al. as Amici Curiae Supporting Respondent 40, *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (No. S-126945). See also *Kristine H.*, 117 P.3d at 696; *Elisa B.*, 117 P.3d at 669.

127. Section 7611(d) states that a man is the presumed father if "[h]e receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE § 7611(d) (West 2004).

128. *Elisa B.*, 117 P.3d at 663; *Kristine H.*, 117 P.3d at 692; *K.M.*, 117 P.3d at 675. Further, in *Elisa B.*, the couple together "decided that Emily 'would be the stay-at-home mother' and Elisa 'would be the primary breadwinner for the family.'" 117 P.3d at 633.

129. *Elisa B.*, 117 P.3d at 663; *Kristine H.*, 117 P.3d at 692; *K.M.*, 117 P.3d at 675-76. Although the couples in *Elisa B.* and *Kristine H.* mutually planned their pregnancies, in *K.M.* "K.M. testified that she and E.G. planned to raise the child together, while E.G. insisted that, although K.M. was very supportive, E.G. made it clear that her intention was to become 'a single parent.'" 117 P.3d at 676.

130. *Kristine H.*, 117 P.3d at 692; *K.M.*, 117 P.3d at 679; *Elisa B.*, 117 P.3d at 663.

131. *Kristine H.*, 117 P.3d at 692; *K.M.*, 117 P.3d at 676-77; *Elisa B.*, 117 P.3d at 663.

132. *K.M.*, 117 P.3d at 675-77.

icy].”¹³³ Both women functioned as parents to the children for a significant and critical time in the children’s lives.

Similarly, in *Elisa B.*, Elisa and Emily were partners for six years during which they “introduced each other to friends as their ‘partner,’ exchanged rings, [and] opened a joint bank account.”¹³⁴ Both women attended each other’s prenatal appointments and birthing classes, and breast-fed all three of their children.¹³⁵ Elisa treated all of the children as hers: she claimed them as dependents on her tax returns and named Emily as the beneficiary of her life insurance so that “all three of the children would be ‘cared for.’”¹³⁶ Both Emily and Elisa were dependent on each other and developed a significant relationship with the children.

In *Kristine H.*, Kristine and Lisa were likewise involved in a long-term, committed relationship, and after eight years Kristine became pregnant through artificial insemination.¹³⁷ The court’s stipulated judgment, filed when Kristine was seven months pregnant, declared that both Kristine and Lisa, as the legally recognized parents, “take full and complete legal, custodial and financial responsibility of said child.”¹³⁸ Further, after the child was born, the couple named the child by combining their two last names¹³⁹ and “co-parented the child . . . for nearly two years.”¹⁴⁰

These cases reveal that in same-sex relationships in which both partners make the decision to have children, a two-parent family is created. The children of these non-traditional families should have the same rights as children born in opposite-sex families to be raised, supported, and cared for by both parents. If non-biological parents are not afforded legal rights as parents, children can be denied important protections. For example, a non-legal parent will not be able to make medical decisions regarding the child in an emergency, and the child will not receive Social Security survivor benefits of the non-biological

133. *Id.* at 677.

134. *Elisa B.*, 117 P.3d at 663.

135. *Id.*

136. *Id.*

137. *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005).

138. *Id.*

139. *Id.*

140. *Id.* at 696.

parent.¹⁴¹ In some cases a child may also be denied employee-sponsored health insurance if the non-biological parent does not have a recognized legal relationship with the child.¹⁴² Further, a child may not be able to maintain inheritance rights with a non-biological parent.¹⁴³ Giving the child two legal parents in an appropriate situation is entirely consistent with states' policy interests to promote the best interests of the child.

The California Supreme Court has also recognized that children are not merely *chattels* of their parents.¹⁴⁴ A child's fundamental interest in having a stable home may conflict with the interests of the parents in some circumstances.¹⁴⁵ In the cases of *K.M.* and *Kristine H.*, the birth mothers sought to prevent their partners from having parental rights, including a right to custody.¹⁴⁶ Biological parents in same-sex relationships in which both partners intend to raise children as a family should not be able to unilaterally terminate the child's right to a stable family merely because of their own selfish desires. Moreover, if the courts followed a more strict statutory interpretation of the UPA, it would lead to the incongruous result of allowing biological parents to abandon the family they created.¹⁴⁷

In sum, the California Supreme Court's ruling in *Elisa B.* furthers the state's interest in providing financial and emotional support for

141. BENNETT & GATES, *supra* note 3, at 7.

142. *Id.* at 9.

143. Olga V. Kotlyarevskaya & Sara B. Poster, *Separation Anxiety Among California Courts: Addressing the Confusion Over Same-Sex Partners' Parentage Claims*, 10 U.C. DAVIS J. JUV. L. & POL'Y 153, 212 (2006).

144. *In re Angelia P.*, 623 P.2d 198, 202 (1981). "Historically, the parental right or preference doctrine originated with the concept that a parent's right 'in his child was akin to that of a property owner in his chattel.'" *Id.* (quoting *In re B.G.*, 523 P.2d 244, 254 (1974)).

145. *See In re Marilyn H.*, 851 P.2d 826, 833-35 (1993) (holding that a child's interest in a stable and permanent home takes priority over a parent's interest in the care and custody of the child once reunification is unsuccessful).

146. *See Kristine H. v. Lisa R.*, 117 P.3d 690, 692-93 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005).

147. *See Rachel E. Shoaf*, Note, *Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law*, 12 WM. & MARY J. WOMEN & L. 267, 293 (2005) (discussing how non-biological parents may be able to use a stricter interpretation of the law to "sidestep the legal relationship" they intended to undertake with their partners in creating a child).

children by maintaining a two parent household where possible. Consistent with the original intent of California's Uniform Parentage Act, children of unmarried same-sex parents are provided the same rights afforded to children of opposite-sex parents.

B. As Applied to Male Same-Sex Relationships

Elisa B., *Kristine H.*, and *K.M.* were decided in the context of same-sex relationships in which both partners were women. Although the court did not address the issue, these holdings should have a gender-neutral application in male same-sex relationships in which one partner is biologically related to the child and the other partner is not. Male same-sex couples can have children through an arrangement with a surrogate mother, resulting in one biological father and one non-biological father.¹⁴⁸ Similar to the biological mother's conduct in *Kristine H.* and *K.M.*, a biological father may, upon separation, attempt to prevent the non-biological father from having parental rights, or, as in *Elisa B.*, the non-biological father may refuse to financially support the child. The state's interest in protecting the economic and emotional rights of children does not end with female same-sex relationships.

The *Elisa B.* court held that because same-sex couples are legally permitted to have children in the context of adoption and domestic partnerships, there was no reason why a child could not have two parents who are both women outside of the legal protection of adoption or a domestic partnership.¹⁴⁹ Additionally, the *Elisa B.* court concluded that *Johnson v. Calvert*,¹⁵⁰ in which the court held that two women with competing claims for parental rights could not both be parents when there is also a legal father, did not bar two women from having equal parental rights in the context of same-sex relationships.¹⁵¹ It would then follow that because adoption and domestic

148. Michael Shernoff, *Gay Men Choosing to be Fathers*, in HUMAN SERVICES FOR GAY PEOPLE: CLINICAL AND COMMUNITY PRACTICE 49 (Michael Shernoff ed., 1996), available at <http://www.gaypsychotherapy.com/fathers.htm>.

149. *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005).

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

151. *Elisa B.* 117 P.3d at 665 (citing *Johnson*, 851 P.2d at 781).

partnership laws are gender-neutral,¹⁵² a child could have two male parents.

However, there are additional obstacles that a non-biological father may encounter in attempting to establish paternity in a same-sex relationship. The male partner who provides his semen to a surrogate and raises the child as his own would qualify both as the biological father and a presumed father under California Family Code section 7611(d).¹⁵³ His partner, who also raises the child as his own, would be considered a presumed father as well.¹⁵⁴ Under section 7612(b), if two such presumptions arise under section 7611, the presumption that is based on “weightier considerations of policy and logic controls.”¹⁵⁵ It appears from this language a California court could be prohibited from granting presumptive parental rights to both men. Indeed, in *In re Jesusa V.*, the court recognized that “[a]though more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, there can be only one presumed father.”¹⁵⁶ As a result, a court may be compelled to find that a man who is biologically related to the child and who also takes the child into his home and raises the child as his own would prevail over a man whom merely takes the

152. See CAL. FAM. CODE § 8503 (West 2004) (“‘Adoptive parent’ means a *person* who has obtained an order of adoption of a minor child or, in the case of an adult adoption, an adult.”) (emphasis added); CAL. FAM. CODE § 8542 (West 2004) (“‘Prospective adoptive parent’ means a *person* who has filed or intends to file a petition . . . to adopt a child.”) (emphasis added); CAL. FAM. CODE § 297(a) (West 2004) (“Domestic partners are two *adults* who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”) (emphasis added).

153. See CAL. FAM. CODE § 7611(d) (West 2004).

154. See *id.*

155. CAL. FAM. CODE § 7612(b) (West 2004).

156. *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004) (quoting *In re Kiana A.*, 113 Cal. Rptr. 2d 669, 675 (2001)). The court did not terminate the biological father’s parental rights when it recognized another man as the presumed father. *Id.* at 16. The court found that when there are competing presumptions under Family Code section 7611, it should consider “all relevant factors—including biology—in determining which presumption was founded on weightier considerations of policy and logic.” *Id.* at 15. By its decision here, the court “left the child with a mother, a presumed father, and a biological father—three legally recognized parents.” SEISER & KUMLI, *supra* note 56, § 2.60[2][c].

child into his home and raises the child.¹⁵⁷ This would leave one of the fathers without legal parentage status.

Although the paternity presumptions are rebuttable, they are only rebuttable in “an appropriate action” under Family Code section 7612(a).¹⁵⁸ In *Elisa B.*, the court held that it was not an appropriate action to rebut a presumption under section 7611(d) when a lesbian partner in a same-sex relationship intends to bring a child into the world and raise the child as her own, but is not biologically related to the child.¹⁵⁹ Similarly, in male same-sex relationships the intent of both parties to have and raise a child together is important in determining whether it is an appropriate action to rebut the presumption. The original rebuttable presumptions were intended to prevent two competing fathers from having equal parental rights.¹⁶⁰ In situations in which there are only two men from a same-sex relationship vying for parental rights, section 7612 would not be applicable. In the absence of a competing third party, it would not be an appropriate action to rebut a section 7611(d) presumption merely because two presumptions arise.

The holding in *Johnson v. Calvert* provides additional support for the parental rights of non-biological fathers in same-sex relationships. In *Johnson*, a husband and wife contracted with a surrogate to have their zygote¹⁶¹ implanted for reproductive purposes.¹⁶² Relations be-

157. See *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 614-15 (2004) (holding that the biological father who established presumed father status under Family Code section 7611(d) may rebut the presumed father status established by the non-biological father under section 7611(a)). Section 7611(a) establishes a presumption of fatherhood if the man “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 judgment of separation is entered by a court.” CAL. FAM. CODE § 7611(a) (West 2004).

158. See *supra* Part II.B.

159. *Elisa B. v. Superior Court*, 117 P.3d 660, 668, 670 (Cal. 2005).

160. *In re Nicholas H.*, 46 P.3d 932, 941 (Cal. 2002) (“[T]he Legislature had in mind an action in which another candidate is vying for parental rights and seeks to rebut the section 7611(d) presumption in order to perfect his claim.”).

161. A zygote is “[t]he cell formed by the union of a male sex cell (a sperm) and a female sex cell (an ovum).” MedicineNet.com, Medical References for Patients, <http://www.medterms.com/script/main/art.asp?articlekey=6074> (last visited Oct. 25, 2006). In this case, it was the egg of the wife and the semen of the husband. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

tween the married couple and the surrogate deteriorated and the surrogate threatened to keep the child.¹⁶³ The married couple filed suit to determine their parental rights.¹⁶⁴ The court held that the biological mother was the legal mother over the surrogate mother because the biological mother “intended” to have the child.¹⁶⁵

As one author pointed out in her analysis of the *Johnson* case, “[i]t should not matter that the two people who initiated the [medical] procedures and shared procreational intentions . . . were a man and a woman.”¹⁶⁶ In male same-sex relationships only one man would be biologically related to the child, but both men would have intended the birth of the child. The intent of the non-biological parent to have a child and the intentional action of raising the child as his own should provide sufficient justification for the court to grant parental rights to male non-biological fathers in same-sex relationships.

The court’s ruling in *Elisa B.* is important to both male and female same-sex relationships and should be applied accordingly. Giving non-biological male parents in same-sex relationships parental rights further protects the interests of the child to receive emotional and economic support from two parents. Additionally, affording parental rights to non-biological parents maintains parent-child relationships and prevents intended parents from abandoning parental responsibilities.

162. *Johnson*, 851 P.2d at 778.

163. *Id.*

164. *Id.*

165. *Id.* at 782. The court stated that the biological parents “affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.” *Id.*

166. Manternach, *supra* note 110, at 402.

V. CONCERNS ABOUT THE “FUNCTIONAL PARENT”¹⁶⁷ DEFINITION

Defining a parent based on an established parent-child relationship instead of biology has sparked concern regarding the potential for multiple parents and forcing parenthood upon an unwilling partner.¹⁶⁸ One such concern is that the court has expanded the functional definition of parent without setting clear limitations on who can become parent.¹⁶⁹ “[I]f children are benefited by interaction with two adults regardless of the sex of the adults, would it then follow that three ‘parents’ would be better than two?”¹⁷⁰ However, the California courts have made it clear that a three parent household is disfavored.¹⁷¹

In *Johnson v. Calvert*, the California Supreme Court addressed the situation in which three people made a claim as the child’s parent.¹⁷² The court rejected the argument that both the surrogate and the wife could be the child’s mother, stating that a child can only have one mother.¹⁷³ However, in *Elisa B.*, the court expressly stated that the concern over having two mothers was only applicable in so far as the child could not have three parents.¹⁷⁴ The real concern becomes not how many parents a child can have, but rather who intended the child to be born, and who has developed a parent-child relationship with the child. When the court concentrates more on the relationship between parent and child and less on biology, the interests of the child are better served and the rights of the parents are protected.

Concerns may also arise relating to forcing full legal responsibilities of parenthood upon an unwilling partner who has participated in

167. William C. Duncan, *Don't Ever Take a Fence Down: The Functional Definition of Family—Misplacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57, 75 (2001). The author describes a trend in U.S. law towards a “functional” definition of the family, which gives “legal recognition to non-traditional relationships.” *Id.* at 57. For example, the Massachusetts Supreme Court has “characterized the partner of the biological mother as the child’s ‘functional parent’ and held that the law did not preclude a child being adopted by a ‘non-standard family.’” *Id.* at 63 (referring to *Adoption of Tammy*, 619 N.E. 2d 315 (Mass. 1993)).

168. Duncan, *supra* note 167, at 75.

169. *Id.*

170. *Id.*

171. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

172. *Id.* at 777-78.

173. *Id.* at 781.

174. *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (2005).

some of the childrearing but is not the biological parent.¹⁷⁵ The court in *Nicholas H.* opined that a presumption of parentage is appropriately rebutted if “a court decides that the legal rights and obligations of parenthood should devolve upon an unwilling candidate.”¹⁷⁶ However, the *Elisa B.* court distinguished *Nicholas H.* because although the non-biological mother in *Elisa B.* was unwilling to financially support her partner’s biological children following their separation, she had taken an active role in assisting her partner in becoming pregnant and had raised the children together with her partner for several years.¹⁷⁷ The non-biological mother “helped cause the children to be born, and having raised them as her own, [she] should not be permitted to later abandon [them].”¹⁷⁸ This language points to the significance of the non-biological parent’s willingness to develop a relationship with the child during a significant portion of the child’s life.

The court stressed that because the non-biological parent took part in causing the children to be born, her “present unwillingness to accept her parental obligations does not affect her status as the children’s mother based upon her conduct during the first years of their lives.”¹⁷⁹ Thus, a partner who is not biologically related to a child and who wishes to remain a non-parent can be insulated from the obligations of parenthood; she is free to create whatever relationship with the child that she wants. The court seemed to concern itself with the status of partners who make a joint decision to have children and then, upon separation, one party wants to change the rights or obligations of the non-biological party.

Where same-sex partners make the decision to have children in order to create a family unit, with only one partner potentially having a biological connection to the children, both partners should have equal legal rights as parents. Proof of the intent of the parties to conceive a child and raise the child together is even more compelling than that of a man who has “a one-night stand” with a woman and uninten-

175. *Id.* at 669.

176. *Id.* (citing *In re Nicholas H.*, 46 P.3d 932, 941 (Cal. 2002)).

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

178. *Id.* at 670.

179. *Id.* at 669.

tionally conceives a child.¹⁸⁰ If the courts are willing to impose financial obligations and give parental rights to these biological fathers, then it would certainly follow that a non-biological same-sex partner should have the same parental obligations and enjoyments.

Additional concerns pertain to the constitutional rights of biological parents. The United States Supreme Court has recognized that parents have a constitutionally protected right to the custody of their children under the Due Process Clause of the Fourteenth Amendment.¹⁸¹ Granting custody rights to non-biological parents may interfere with the constitutional rights of biological parents in that they are denied the right to full custody of their child. However, by giving non-biological parents in same-sex relationships legal status as parents, the California Supreme Court is essentially recognizing that non-biological parents have the same constitutional rights to custody of their child as do biological parents. According to the California Family Code, there is a presumption that “joint custody is in the best interest of a minor child” when the parents are in agreement.¹⁸²

To some, there are additional concerns about the potential negative effects on children living in same-sex families.¹⁸³ However, the California Supreme Court did not address these issues in *Elisa B.*, *Kristine H.*, or *K.M.* By sticking to a purely statutory analysis of the Family Code, the court declined to address arguments based on dis-

180. See Sara R. David, Note, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 949 (2005) (pointing out that “there is no exception to child support obligations for children born as a result of a one-night stand, . . . [and therefore,] a same-sex parent who participates to the point of conception in her partner’s pregnancy should be considered a parent for the purposes of child support.”).

181. *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (holding that, following the death of their natural mother, the children’s biological father, who was not married to the mother, was constitutionally entitled to a hearing on his fitness as a parent before the state could remove the children from his custody).

182. CAL. FAM. CODE § 3080 (West 2004). See also CAL. FAM. CODE § 3010(a) (West 2004) (“The mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are equally entitled to the custody of the child.”).

183. See Duncan, *supra* note 167, at 76; Carey Goldberg, *Gain for Same-Sex Parents, at Least*, N.Y. TIMES, Dec. 5, 1996, at 16; Erica Goode, *A Rainbow of Differences in Gays’ Children*, N.Y. TIMES, July 17, 2005, at F1.

crimutory interpretations of same-sex parenting.¹⁸⁴ California law allows same-sex partners to adopt¹⁸⁵ and affords registered domestic partners the same “rights and obligations with respect to a child of either of them . . . as those of spouses.”¹⁸⁶ Evidently, the California legislature and courts do not seem concerned with any potential negative effects on children who have two parents of the same sex.

IV. CONCLUSION

As same-sex parenting becomes more common, courts and the legislature are inclined to adjust the definition of parent in the best interests of the child and promote the rights of the non-biological parents involved. In light of *Nicholas H.* and *In re Karen C.*, the California Supreme Court properly held in *Elisa B., K.M.*, and *Kristine H.* that a woman who takes the child into her home and holds the child out to be her own is a presumed mother regardless of her lack of a biological connection or the fact that the biological parent is of the same-sex. This holding advances the state’s interest in providing emotional and financial support for children as well as providing children with two parents. In addition, the rationale of *Elisa B.* should apply equally to male same-sex relationships to further protect the interests of the child.

As courts and legislatures in other states struggle to determine parental rights in the context of same-sex relationships, California’s decisions and statutory interpretations should provide guidance. The supreme court’s holding in *Elisa B., K.M.*, and *Kristine H.* demonstrate a

184. For example, see *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818-27 (11th Cir. 2004), for a discussion on the state’s interest in having heterosexual households. In *Lofton*, the court concluded that it was rational for the Florida legislature to prohibit adoption by homosexual couples on the basis that they would not provide adopted children with adequate education and guidance as to their sexual development. *Id.* at 822. Additionally, the court found the premise that “the [heterosexual] marital family structure is more stable than other household arrangements” is an “unprovable assumption’ that nevertheless can provide a legitimate basis for legislative action.” *Id.* at 819-20 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62-63 (1973)). The court went on to hold there is no constitutional protection against a state policy judgment that homosexuals are not compatible to adopt. *Id.* at 827.

185. CAL. FAM. CODE § 9000(b) (West 2004).

186. CAL. FAM. CODE § 297.5(d) (West 2004).

natural progression in the protection of children born into non-traditional families. Beginning first with children born out of wedlock, the court now has made an effort to protect those children born to families in which both parents are of the same sex. Through a gender-neutral analysis of the Family Code, the court defines a parent based on the relationship to the child absent any biological connection or concern over sexual orientation. Parental rights that are based on a relationship to the child instead of on a biological connection address the reality of current family structures and permit the court to avoid discussion regarding the potential differences in opposite-sex and same-sex parenting.

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