

Principled Parentage: Abandoning the Gender-Based Underpinnings of Legal Parentage Analysis as Applied in the Context of Gestational Surrogacy

INTRODUCTION

Who is a legal parent to a child conceived by nontraditional means? Who is not a legal parent, despite some parental tie to the child? The protections given to parents in raising their children are of constitutional dimension.¹ However, as new technologies offer new ways to create a child, the courts continue to struggle with basic questions of parentage.² And application of existing family law to these new scenarios does not always yield the correct result, because traditional gender-based constructions of the natural family obscure the underlying inquiry of whether each party has a valid claim to parentage.

In *K.M. v. E.G.*,³ the California courts struggled with complex parentage questions in the context of a lesbian family.⁴ Mother fought against mother: the woman who had given birth to a set of twins through gestational surrogacy sought to prevent her former partner, the woman who had donated the eggs and raised the children for five years, from gaining parental rights to the children.⁵ The California Supreme Court ultimately concluded that both the gestational mother and the genetic mother were legal parents to the twins.⁶

The court's decision in *K.M. v. E.G.* honored both the genetic tie between parent and child and the parent-child relationship that had developed between the children and the non-birth mother. In so holding, the court found it necessary to consider both parents' gender in evaluating one parent's claim. The court's express assumption, that a child

may have two mothers, is far from universally accepted and could become the basis of a refusal to grant parental rights in other jurisdictions. Also, the *K.M. v. E.G.* dissents offer a number of arguments that other state courts may find persuasive, if the parentage dialogue focuses on gender. Furthermore, other states' case law may pose additional obstacles to a correct parentage finding if the courts' focus is not on each party's individual parentage claim.

This article evaluates the plight of the non-legal parent who has both a genetic and a relational tie to a child, in light of basic legal and social premises about parenthood. Part I will provide the legal background of parentage determinations, discussing the policy considerations and various factual contexts where courts must ultimately grant or deny legal parenthood status. Part II will present a case study of *K.M. v. E.G.*,⁷ including a presentation of the facts of the case and the reasoning of the majority and of the two dissents. Part III will consider the fate of the genetic and functional parent in light of the policies that underlie parentage decisions. More specifically, part III will conclude that a parent who both is a biological parent and has developed a parent-child relationship with a genetic child ought to be considered a legal parent. This conclusion ought not to be vulnerable to attack based on the gender of the other parent; rather, each parent's claims should be evaluated independently. Part IV tests the proposition that each parent's claims should be evaluated individually and without reference to the other party's gender. When gender becomes irrelevant and we abandon the gender-based underpinnings of legal parentage analysis as applied in gestational surrogacy cases, correct parentage decisions can be more easily reached when considering families created by non-traditional means.

I. BACKGROUND

American family law reflects our collective understanding⁸ that children belong with their biological parents whenever possible and that parents should raise their biological children.⁹ The United States Supreme Court has “declared it ‘plain beyond the need for multiple citation that a natural parent’s desire for and right to the companionship, care, custody, and management of his or her children’ is an interest far more precious than any property right.”¹⁰ All fifty states recognize a presumption that children are best off with their natural (i.e. biological) parents.¹¹ Courts protect the parent-child relationship by using one standard to decide custody disputes between parents¹² and another standard to decide custody and visitation disputes between a parent and a third party.¹³ Although courts will look at the best interests of the child in resolving custody disputes between parents,¹⁴ a parent will not lose custody to a third party unless the parent has proven unfit.¹⁵ Therefore, even if a child’s interests arguably might be better served by termination of parental rights, the child will remain with its biological parents as long as the parents are not neglectful or abusive.¹⁶

This preference for a biological tie is evident in several contexts: for example, the way the law treats unwed fathers. Prior to 1972, a conclusive presumption existed that any father of a child born out of wedlock was unfit to raise that child.¹⁷ In *Stanley v. Illinois*, the United States Supreme Court held that, where an unmarried biological father had raised his own children without neglect, a presumption of unfitness violated the United States Constitution.¹⁸ Rather, the state only can remove a child from its biological father after proving the father neglectful or abusive.¹⁹

The preference for biological parents also is reflected in the structure of adoption laws. A biological parent may not effectively surrender a child for adoption before that

child is born, and an adoption consent made within seventy-two hours after birth is revocable.²⁰ Also, one biological parent may not surrender a child for adoption over the objection of the other biological parent even if the objecting parent has no existing relationship with the child.²¹

Biology is far from determinative, however, in allocating parental rights and responsibilities.²² A biological parent who does not have a relationship with a child may not be considered a “legal” parent, and a person who forms a parent-child relationship may be a legal parent despite the lack of a genetic link.²³ A father who later learns he is not a biological parent, for example, may be estopped from denying paternity of a child who the father has raised as his own.²⁴ Legal presumptions help the courts to determine legal parenthood²⁵ and are particularly useful because only one parent, the birth mother, generally is established at the child’s birth.²⁶ Under the presumption of legitimacy, a child presumably is the genetic child of the man married to the birth mother, and therefore the mother’s husband is the child’s legal father.²⁷ In sum, although history and the law both generally equate biological parenthood with legal parenthood, both the parent-child relationship and the legal presumptions established by state law are implicated and can even be determinative, informing the decision of who is, and who is not, a legal parent.

Advances in reproduction technology and new alternative reproduction options have further complicated our understanding of who are a child’s legal parents.²⁸ Conception through sperm donation²⁹ is an option both for married women whose husbands are infertile and for single women who wish to conceive a child without a legal father. Under the Uniform Parentage Act,³⁰ a man who donates sperm through a licensed

physician for the purpose of conception will not be a legal parent to a resulting child.³¹ Conversely, a man who provides sperm directly to a woman for the purpose of conception, even if conception occurs through artificial insemination with the participation of a physician, may still be a legal father.³² When a married woman chooses artificial insemination, the presumption of legitimacy vests parental rights in the woman's husband although the husband necessarily lacks any biological tie to the child.³³

Only one state's highest court has considered the case of the man who donates sperm through a physician with the intent and expectation that the donor will be the father of a child so conceived.³⁴ In *In re R.C.*, the donor provided sperm to a woman for artificial insemination.³⁵ By receiving the sperm from a licensed physician, the woman evidently intended to extinguish the donor's parental rights.³⁶ The donor, however, believed that he was to be a legal parent; the donor had donated his sperm only upon the mother's promise that he would be a parent and the donor had provided for the child financially and in other ways.³⁷ The Colorado Supreme Court ruled that, had the parties actually intended the donor to be the father, then the UPA provision extinguishing the donor's rights would not apply and the donor actually would be a legal parent.³⁸

For some couples, surrogacy and gestational surrogacy also are nontraditional options for having a child. Surrogacy may be appropriate for a couple when the wife is infertile; the couple solicits a third party, the surrogate, to conceive a child through artificial insemination and to carry that child to term.³⁹ The surrogate, who also is the biological mother to the child, then surrenders that child to the biological father.⁴⁰ A second type of surrogacy, technically described as a gestational surrogacy, results when one woman's eggs are fertilized and implanted in the uterus of another woman (the

gestational surrogate) and the gestational surrogate carries the child to term.⁴¹ A gestational surrogacy may be appropriate in two different situations: either the biological mother cannot carry a child of her own and seeks a surrogate to bear that child,⁴² or the surrogate cannot conceive with her own eggs yet still desires to give birth to a child of “her own.”⁴³ Thus the intended mother of a child gestated in this manner may be either the genetic mother or the gestational mother.

The legality and enforceability of surrogacy contracts varies by state. In *In re Baby M.*, the New Jersey Supreme Court invalidated a surrogacy agreement, likening the contract to “baby selling.”⁴⁴ By statute, some states have criminalized surrogacy agreements, some fail to enforce them and some regulate them carefully.⁴⁵ The revised UPA also carefully regulates surrogacy agreements, yet the revised regulations themselves are premised on the heterosexual model of a male and female as “intended” parents of a resulting child.⁴⁶ Regardless of the validity of any surrogacy agreement, Professor Coleman has identified three types of tests that may be applied to determine parentage in the surrogacy context: tests based on genetic contribution, tests based on gestation, and tests based on the parties’ intent.⁴⁷

Lesbian couples that choose to have a child also often choose conception through artificial insemination with donated sperm, although gestational surrogacy provides a second option.⁴⁸ The lesbian birth mother, like most birth mothers, will be considered the natural mother of that child.⁴⁹ The birth mother’s lesbian partner will not acquire parental rights through a presumption of legitimacy because lesbian couples cannot, in most states, legally marry. Therefore, the lesbian partner who neither is a birth mother nor is a presumptive parent generally has third-party status, rendering the lesbian non-

biological parent a legal stranger to the child.⁵⁰ In resolving later custody disputes between lesbian partners who conceived through sperm donation, the California Supreme Court found it “tragic” that the non-genetic, non-gestational lesbian parent may have no parental rights.⁵¹ Other courts have struggled to apply various doctrines to protect the parent-child relationship between a child and a lesbian parent who is not the birth mother.⁵²

To explain this tragic outcome, scholars have pointed to the “heterosexual legal regime” that forces alternative families to conform to normative standards set by the dominant heterosexual group.⁵³ In other words, because many courts make parentage determinations only through the express assumption that a “natural” family consists of one man and one woman,⁵⁴ lesbian families simply may not be “natural” despite the fact of their existence. Even if not “natural” based on tacit assumptions about natural law,⁵⁵ however, these individuals still may have valid claims to parentage.

Into the legal quagmire surrounding sperm donors, surrogates, and lesbian parentage disputes comes *K.M. v. E.G.*⁵⁶ The combination of new reproductive technologies and social developments make this case possible. Yet none of the rules developed to address one situation are adequate where several different factual situations converge.

II. *K.M. v. E.G.*⁵⁷: A CASE STUDY

A. The Facts

K.M. v. E.G. is a custody dispute between two lesbian partners, both of whom claim to be legal parents to the children born to EG.⁵⁸ KM, the petitioner, sought to establish that she was a legal parent to five-year-old twin girls because she was the girls’

genetic mother.⁵⁹ EG, the respondent, moved to dismiss the petition, arguing that EG was the girls' sole legal parent.⁶⁰

KM and EG met in 1992 and became a couple in 1993.⁶¹ In 1994, EG and KM began living together and registered as domestic partners in San Francisco.⁶² In 1993, EG both applied for adoption and attempted artificial insemination.⁶³ EG attempted artificial insemination over a dozen times in 1993 and 1994, and KM joined EG at many of these appointments.⁶⁴ In late 1994, EG consulted with a specialist and, at the specialist's recommendation, EG asked KM to donate her eggs to EG so that EG might yet become pregnant.⁶⁵ KM agreed to supply the eggs that EG needed.⁶⁶ The couple selected the sperm donor together and agreed that they would not tell anyone that KM was the egg donor.⁶⁷ In early 1995, EG became pregnant with two embryos that had formed from KM's eggs.⁶⁸

Much of the parties' testimony at trial conflicted. EG had wanted to be a parent even before she met KM.⁶⁹ According to EG, she always had intended to become a single parent and she had made her intent clear to KM.⁷⁰ EG claimed that she only accepted KM's eggs because the couple had agreed that KM "would really be a donor."⁷¹ EG also relied on KM's signed consent form, whereby KM had waived her rights to her eggs and any resulting children.⁷² In contrast, KM claimed that she only agreed to donate her eggs because the couple had intended to raise a child together.⁷³ Also, KM claimed that she did not understand the implications of the consent form and did not believe that she waived any rights by signing it.⁷⁴

EG gave birth to twins in December, 1995, and the two women told no one that KM was the egg donor.⁷⁵ KM acted as the twins' parent despite this nondisclosure.⁷⁶

The couple's nanny viewed KM as a parent and KM was listed as a parent on the twins' school forms.⁷⁷ Also, the twins referred to KM's parents as their grandparents and to KM's siblings as their aunt and uncle.⁷⁸ In 2001, the couple's relationship ended and KM sought legal recognition of her parental status.⁷⁹

The California trial court dismissed KM's petition, applying California Family Code § 7613(d).⁸⁰ Section 7613(d), which expressly applies to sperm donors, states that a donor is a legal stranger to a child if the donor provided genetic material through a licensed physician.⁸¹ The trial court held that KM's status was that of a donor, and thus she was not the twins' legal parent.⁸²

The California Court of Appeal affirmed.⁸³ The appellate court relied on the test announced in *Johnson v. Calvert*, which considered the parties' intent at conception to be the "tie-breaker" when two women had competing claims to parentage.⁸⁴ In *Johnson*, the court had awarded legal parentage to the genetic mother, noting that the genetic mother originally had intended to parent the child and that "for any child California law recognizes only one natural mother."⁸⁵

B. The California Supreme Court majority opinion: KM is a legal parent.

Overtaking the California Court of Appeal, the California Supreme Court⁸⁶ held that KM, the twins' genetic mother, was a legal parent alongside EG, the twins' birth mother.⁸⁷ First, the Court noted that the Uniform Parentage Act defines the parent-child relationship and, because the rules governing sperm donors did not apply, the Court

found that both KM and EG were legal parents of the twins.⁸⁸ Second, the Court found the intent test in *Johnson v. Calvert* inapplicable because *Johnson* was factually distinguishable, thereby rejecting the appellate court's reasoning.⁸⁹

The *K.M.* Court first looked to the California Family Code and the UPA, noting that code provisions relevant in evaluating a father-child relationship also should be applied to evaluate a mother-child relationship.⁹⁰ In *Johnson v. Calvert*, the court had interpreted the UPA to provide "that 'genetic consanguinity' could be the basis for a finding of maternity just as it is for paternity."⁹¹ Therefore the genetic tie between KM and the twins was evidence that KM was a parent under the California Family Code and the UPA.⁹²

In finding that KM was a legal parent, the court declined to apply § 7613(b). California Family Code Section 7613(b), which expressly applies to sperm donors, extinguishes the parental rights of donors who have donated genetic material.⁹³ Although the court agreed that § 7613(b) could apply to an egg donor, the court reasoned that KM's was not a "true egg donation situation."⁹⁴ Like the egg donor in *Johnson*, KM was not a true donor because she had donated her eggs to produce a child that she would help raise in her own home.⁹⁵ Also, the court considered the statute's legislative history⁹⁶ and determined that § 7613(b) never was intended to apply to these facts.⁹⁷ The court also analogized KM to the sperm donor in *In re R.C.* who gave his sperm to impregnate an unmarried female friend under the assumption that the resulting child would be his own.⁹⁸ The court agreed with the *In re R.C.* court in finding that the sperm donor provision did not universally apply to donors who acted with the expectation of a future parental relationship with the resulting child.⁹⁹

The court relied on the proposition that a child may have two parents, both of whom are women. This rule was announced in *Elisa B. v. Superior Court*,¹⁰⁰ a companion case decided simultaneously with the *K.M. v. E.G.* decision. In *Elisa B.*, the court cited the California domestic partnership statutes, which vest both partners with the same rights as spouses with respect to any child of either of them.¹⁰¹ Also, the court noted that, in the adoption context, a child may have two female parents.¹⁰² Significantly, the statement in *Johnson*, that a child could have only one natural mother, did not apply; *Johnson*'s holding and reasoning were limited to the case where three different parties claimed legal parentage.¹⁰³

In *K.M. v. E.G.*, the court similarly found the *Johnson* intent test inapplicable because, unlike the women in *Johnson*, KM and EG's claims were not mutually exclusive.¹⁰⁴ Specifically, the genetic mother in *Johnson* was found to be the legal parent *instead of* the birth mother; here, KM claimed to be a legal parent *in addition to* EG.¹⁰⁵ Because this was not a case where three people claim legal parenthood and "a tie" must be broken between two, the court declined to apply the *Johnson* intent test.¹⁰⁶ The court also pointed out that intent to parent generally is irrelevant outside the gestational surrogacy context.¹⁰⁷

C. The two dissents

The two dissents, authored by Justices Kennard and Werdegar, offer a variety of arguments designed to prevent KM, a parent in every sense aside from law, from being found a legal parent. These arguments can be grouped into several broad categories.

First, the dissents both argued that the majority had misapplied the existing law. The dissents viewed *K.M. v. E.G.* as misapplying the UPA because KM donated her eggs in the same manner that, had she donated sperm under § 7613(b), would have severed her parental rights.¹⁰⁸ By declining to view KM as a donor, the dissents reason that the court has treated an egg donor differently than sperm donors.¹⁰⁹ Also, the dissents argued that the court improperly applied a “best interest of the child” standard in deciding the case.¹¹⁰ Finally, the dissents argued that the Johnson intent test was governing law and should have applied directly to this case, rather than creating a new test under which the court evaluated the parties’ intent to *participate in raising* a child rather than the parties’ intent to become legal parents.¹¹¹

Second, both dissents voiced concerns about predictability and other parties’ reliance on the *Johnson* intent test. Specifically, Justice Kennard noted that “an unknown number of Californians have made procreative choices in reliance on” the Johnson intent test.¹¹² In support of his claim, Justice Kennard cited the prebirth stipulated judgment in the companion case of *Kristine H. v. Lisa R.*,¹¹³ where the parties had obtained a judgment declaring the two women the “*joint intended legal parents* of the child born to one of them.”¹¹⁴ However in *Kristine H.*, another lesbian custody dispute, the court still relied on the judgment to rule that the biological mother was estopped from contesting her partner’s claim to parenthood.¹¹⁵ Justice Werdegar also cited the existence of other gestational surrogacy agreements, noting that the parties had attempted to create certainty at the time of conception and further observing that, at least in *K.M. v. E.G.*, parenting intent at conception was not dispositive.¹¹⁶

Third, Judge Werdegar argued in his dissent that the majority's rule "inappropriately confers rights and imposes disabilities on person because of their sexual orientation."¹¹⁷ Justice Werdegar cited the majority's use of the word "lesbian" several times throughout its opinion and also cited the majority's observation that it only could announce the rule applicable to the facts of this case.¹¹⁸ Also, Justice Werdegar noted the majority's failure to clarify whether the same rule would apply had the parties not been registered domestic partners.¹¹⁹

Fourth, Justice Werdegar offered several constitutional arguments. Because, in his opinion, the case treats lesbians differently than others, Justice Werdegar opined the rule announced in *K.M. v. E.G.* was subject to challenge under the Equal Protection clause of the California constitution.¹²⁰ Justice Werdegar also cited *Troxel v. Granville*¹²¹ for the proposition that granting any rights to others can only be done at the expense of the legal parent's right to make decisions concerning the child.¹²² Therefore, he argued, the birth mother's rights would necessarily be curtailed by a finding that another woman also had parental rights, thus violating the substantive aspect of the Due Process clause of the United States Constitution.¹²³

III. THE PROVISION OF RIGHTS TO A PARENT WHO IS BOTH A GENETIC AND A BIOLOGICAL PARENT IS CONSISTANT WITH OUR BASIC LEGAL AND CULTURAL UNDERSTANDING OF PARENTHOOD.

Neither the rules surrounding sperm donation, nor the rules surrounding surrogacy, nor the rules surrounding lesbian co-parenting are adequate to determine whether KM, and others like her, are legal parents. Rather, we must return to fundamental family law principles to answer the question of whether a woman who both is the genetic parent of a child and has established a parent-child relationship with that

child should be considered a “legal” or “natural” parent to that child. Moreover, the analysis of a parentage claim made by one party need not include any consideration of the other parent’s gender.

- A. The combination of genetic parentage and a parent-child relationship lead to the conclusion that KM is a natural parent.

K.M. must be viewed as something more than an egg “donor.” A true donor gives up genetic material, either eggs or sperm, in order that another person may become a parent. However, a true donor does so with no interest in retaining parental rights or in establishing a parent-child relationship with a resulting child. At the time of egg donation, KM’s position might have been in some way analogous to that of the surrogate in *Johnson*. The surrogate in *Johnson* had agreed to the surrogacy with no intent to maintain a relationship with the child she produced.¹²⁴ Similarly, KM did waive her legal rights to her eggs when she donated them.¹²⁵ Perhaps if KM had sought parental rights at birth, the court might have viewed this case as a kind of “tie” between two mothers, invoking the *Johnson* intent test. As in *In re R.C.*, the court only would have examined the parties’ initial intent because no subsequent evidence of parental relationship would have been available. Until birth, a genetic mother who has not gestated her own child has had no opportunity to form any relationship or bond with that child. In a true donor situation, no such opportunity ever arises and no relationship ever forms between the donor and the child. Further, if an intended parent seeks to prevent a donor from making any claim to the child, then that parent never will allow any relationship to form between a child and its genetic donor parent.

Once a parent-child relationship *has* formed between a genetic donor parent and the child conceived of the donated material, an entirely different set of rules must apply.

The child no longer is an infant, and the parties' intent at conception no longer is the overriding concern. Now the child has formed a parent-child bond with two parents, and the dispute more closely resembles a lesbian custody case than a question of who ought to be a legal parent to a newborn baby. In a case such as *K.M. v. E.G.*, even the doctrines under which lesbian custody cases are decided will be insufficient to resolve questions of parentage. Although both parties are women, each has a legitimate physical tie to the child. Each supplied a necessary component for conception, KM the eggs and EG the uterus, and both women had a parent-child relationship with the child.¹²⁶ Neither parent's claim is intrinsically superior, and the relational aspect of both parents' claims must be honored.

The significance of the parent-child relationship is clear if United States Supreme Court's reasoning in *Lehr v. Robinson*¹²⁷ applies in the context of maternal rights and gestational surrogacy. If, as *Lehr* suggests, a genetic tie plus the existence of a parent-child relationship create a parent, then a donor who subsequently acts as a parent may not be denied legal parent status and protections. The *Lehr* Court relied on the Due Process Clause of the United States Constitution in its analysis, ultimately concluding that a biological father who lacked a parent-child relationship did not have constitutionally-protected parental rights.¹²⁸

Unfortunately, substantive Due Process claims under the Fourteenth Amendment invoke far from a mechanical analysis. Indeed, the subsequent parentage case of *Michael H. v. Gerald D.*,¹²⁹ decided by the United States Supreme Court in 1989, demonstrates vehement disagreement between the Justices as to the appropriate analysis of unenumerated rights the substantive Due Process Clause of the United States

Constitution. In *Michael H.*, the Court upheld a statute that acted to deny parental rights to a biological father based on a conclusive presumption of paternity in favor of the mother's husband.¹³⁰ Writing for the plurality in *Michael H.*, Justice Scalia presented a narrow construction of the liberty interest in parentage.¹³¹ He reasoned that substantive due process protections are not available to all parents, but rather protect only those types of relationships that historically have received attention and protection.¹³² In a passionate dissent, Justice Brennan questioned whether such specificity truly was the hallmark of substantive due process analysis.¹³³ Given the current state of the law and composition of the Supreme Court, the ultimate resolution of the constitutional question presented in *K.M. v. E.G.* is absolutely impossible to predict.

Although *Lehr* may not apply to a lesbian genetic parent's claim to parentage based on a narrow interpretation of the parent's substantive due process rights, a parent such as KM must not be denied rights to her child. A general understanding of our Supreme Court precedent and our cultural values and norms still demand that a parent who is a parent both genetically and relationally, ultimately in every sense but law, ought not to be denied legal parentage and legal rights to that parent's own child. Any other outcome would be a denial of rights to a parent who, but for the unusual circumstances created by advances in assisted reproduction technology, would have had unquestionable parental rights. Our legal system has not kept pace with technology in this area, and our family law structure may not have entirely kept pace with social change and alternative families.¹³⁴ But denying parentage to parents such as KM convolutes our understanding of what it means to be a parent, and calls into question the general claim that biology plus a parent-child relationship creates a family.

- B. Natural parents such as KM ought not to be forced to rely on alternative means for acquiring rights in their own children.¹³⁵

In establishing her parental rights, KM should not have to rely on adoption laws. Second parent adoption is one way in which non-legal lesbian partners have assured themselves of parental rights and have created future security of the children whom they are raising.¹³⁶ Adoption by a mother's lesbian partner is not, however, permissible in every jurisdiction.¹³⁷ Also, adoption requires the existing parent's permission,¹³⁸ and EG's failure to allow an adoption in *K.M. v. E.G.* was one of the underlying controversies between the parties.¹³⁹ Rather, KM's parental rights should be the product of genetics plus a parent-child relationship, arising independently of EG's consent to a legal proceeding. An adoption proceeding would be wholly unnecessary and superfluous to secure a genetic mother's rights in such cases.

Alternate theories of parenting, such as de facto or functional parenting, also should not be the basis of KM's parental rights. Some courts, after recognizing the changing shape of the modern family, have resorted to such legal fictions to vest parental rights in an individual who had no tie to a child at conception.¹⁴⁰ Although these doctrines have been helpful in granting some lesbians parental rights in some circumstances, they also are not available in all jurisdictions.¹⁴¹ Furthermore, doctrines such as de facto parenting begin with the assumption that the individual is not a "natural" parent to the child;¹⁴² in other words, these theories begin with the assumption that the individual and the child have no biological or gestational tie and that there are no presumptions in play that would provide a more direct route to parental rights. However, in the case of KM, she is a genetic mother without whom the children would not exist at

all. KM cannot properly be considered a legal stranger to a resulting child, and these doctrines begin with the premise that the individual is a legal stranger.

C. Reshaping the analysis of parentage claims: a proposed change to the UPA.

The structure of the UPA remains tied to two historical family norms: that every “natural” family has two “natural” parents, and those two parents include one man and one woman.¹⁴³ Yet the validity of KM’s claim to parentage can be tested and confirmed without any reference to the gender of the twins’ other parent. Indeed, the entire analysis of KM’s rights is independent of the possible rights of any other legal parent, regardless of whether that analysis is made under the United States Constitution or, more loosely, under the basic understanding that a parent is made through a (usually genetic) involvement in conception plus the existence of a parent-child relationship. If, as the court in *K.M. v. E.G.* observed, KM’s rights arose concurrently with the gestational mother’s rights,¹⁴⁴ then EG’s gender is entirely irrelevant to the parentage inquiry. Therefore, where only two legal parents exist,¹⁴⁵ each party’s parental rights ought to be tested without reference to the gender of the other party. This approach eliminates gender biases inherent in our family law scheme while also responding to the changing shape of the modern family.

IV. STRIPPING GENDER FROM THE PARENTAGE ANALYSIS WILL CHANGE THE DIALOGUE AND PROTECT ALL PARENTS.

In gestational surrogacy cases where only two parents claim parental rights, the parentage claims of each party ought to be evaluated without consideration of the gender of the other party and, ideally, without consideration of the other party’s claim at all. By

eliminating gender from the dialogue entirely, the *K.M. v. E.G.* court's assumption that a child may have two mothers is not a legal prerequisite to a grant of rights. Also, the arguments presented by the *K.M. v. E.G.* dissents are of less weight when the analysis is altered. Moreover, such a change in dialogue will avoid additional barriers to parentage that might be presented through the case law of other jurisdictions.

- A. Evaluating parentage claims without reference to a parent's gender avoids reliance on the assumption that a child can have two parents of the same gender.

Although California now provides that a child can have two parents, both of whom are women, this is not the law in all jurisdictions. If another jurisdiction seeks to follow the analysis and outcome in *K.M. v. E.G.*, that jurisdiction must expressly accept the proposition that a child may have two parents of the same gender. However, if each prospective parent's rights were evaluated without respect to gender, then no such assumption is necessary. By changing the dialogue, the court may effectively allow a child to have two female parents while not expressly relying on the normative assumption that a family with two female parents is "natural" to support an award of parental rights. Thus, where two parents both claim rights in addition to each other, each parent's claim may stand or fall without any intrinsic gender bias present in the analysis. Parents in non-traditional families like KM and EG's family will be assured of rights, but courts will not even have to address a proposition with which some courts are very uncomfortable: the notion that a "natural" family need not consist of a man and a woman. Avoidance of the gender dialogue can be criticized as a compromise between alternative families and a conservative legal system. However, in reality the change actually is an

evolution, changing the focus from an outdated model of the “natural” family to a more realistic consideration of individual rights and each person’s liberty interest in parentage.

Also, by changing the dialogue, the courts no longer will be bound by the heterosexual legal regime that is our family law when deciding parentage questions in the gestational surrogacy context. Instead, potential parents’ rights arise by virtue of the connections between that party and the child, and need not be affected by the gender of the other person. Elimination of gender as the basis of a core assumption allows the courts to recognize each “natural” parent’s rights. In this manner, lesbian parents’ rights will be honored if they meet the same criteria as other parents. Lesbian parents will receive parental rights if they have a genetic, biological, or presumptive parental status plus a parent-child relationship with the child. This rule in no way treats lesbians or women different from others. Instead, it will consistently honor the three relevant factors involved in parentage decisions: genetics and biology, relationships, and presumptions.

- B. By removing gender from the dialogue altogether, the concerns voiced by the dissents are further eroded.

The dissents offered four key arguments to deny rights to KM, yet each of these arguments fails if each party’s parentage claim is evaluated independently and without reference to the other party’s gender. First, the dissents argued that the *KM* court misapplied existing law. Certainly the statute that the majority rejects and the dissent cites is open to multiple interpretations. Yet if each parent’s claim is evaluated individually, the result will always honor the core parentage considerations that are present in all areas of family law. K.M., for example, demonstrates evidence of parenthood by virtue of her genetic tie to the child. Although she may have waived rights to the eggs before conception, applicable law here is not limited to the sperm donor

statute that the dissents would apply. Courts historically have considered the subsequent development of a parent-child relationship in resolving more common questions of parentage. Further, as the *K.M. v. E.G.* court points out, intent at conception generally is not relevant to parentage determinations that occur years later. The dissent's first argument is circumvented by the changed dialogue, which invokes different legal rules. KM may be a natural parent under these rules, and the consequence that the children have two female parents is irrelevant to protecting KM's rights.

Second, the dissents argue that other parties have relied on the *Johnson* intent test. However, a party's reliance on an incorrect and discriminatory legal test, which improperly considers the gender of one parent to determine the rights of the other, does not justify maintenance of that legal test. Each party's parental rights are the primary concern and focus of the parentage inquiry. Even where other parties are affected by a change in the law or the analysis to be applied, the only impact will be to vest legal parentage in individuals who otherwise are parents notwithstanding their non-traditional families. Changing the dialogue, while it may affect other families created by gestational surrogacy, will ensure the correct result in future cases.

Third, Justice Werdegar argued that the *K.M. v. E.G.* holding was inherently incorrect because it involved a consideration of the parties' gender and sexual orientation. This claim is incorrect for two reasons. First, the facts of this case are rather unique and call for a unique resolution. Women play two roles in creating a child: the genetic contribution and the fetal gestation. Through a gestational surrogacy, only women, and not men, can share biological responsibility for a child at birth. Second, because a

parent-child relationship usually only arises within a family setting, it is unlikely that this type of dispute would arise outside of the context of a lesbian family.

Regardless, the omission of gender from the parentage dialogue eliminates Justice Werdegar's concern entirely. Where gender is not even discussed, it certainly cannot be the basis for uneven application of the law. This same analysis applies to the dissent's constitutional argument based on *Troxel*. *Troxel* involved a parent and a third party, not two individuals with claims of parental rights. Each of two individuals with claims to parenthood, if each claim is valid, may have parental rights to the child that are different in kind from the rights of third parties. Conversely, to consider gender in the parentage decision is to suggest that one claim of parental rights is more valid than the other. Our family law is based on the notion that parents' rights are equally valid.

C. Changing the dialogue also avoids arguments that could arise from the law in other jurisdictions.

Two additional arguments that can be made to deny a second woman parental rights in her child concern, first, standing and, second, the notion that parental relationships and rights ought not to be honored in jurisdictions where state constitutional amendments prohibit marriage between same-sex couples.

The first argument against granting parental rights to women in the same position as KM is that the lesbian partner of a child's natural mother does not have standing to seek legal parentage under the UPA.¹⁴⁶ Although "any interested person" may seek legal parentage under the UPA, lack of standing was the basis on which the trial court initially dismissed KM's petition.¹⁴⁷ However, as the appellate court recognized, KM's genetic tie provides an independent basis for her to claim standing to seek parentage.¹⁴⁸ By changing the dialogue to focus only on the nature of KM's claim to parentage, without

reference to a child's other parent, no court can validly deny standing. Any party who has a biological parental relationship to a child ought to have standing to seek parentage. The fact that a child already has a "natural" mother is irrelevant to KM's claim and, if her claim is evaluated without reference to another "natural" mother, then no standing argument will be cogent.

The second argument that could be used to deny parental rights to lesbian parents such as KM is that, in states where same-sex unions are not legally recognized, no parentage decisions can legitimize that union. In Ohio, for example, one lesbian seeking to invalidate a custody order has argued that the order has been invalidated by such a constitutional amendment.¹⁴⁹ However, if each parent's rights are the primary concern and are to be determined without reference to the gender of the other party, then even states with constitutional amendments will maintain the proper focus. Courts will look at each parent alone to determine rights, and no legal recognition of any relationship between the parents is necessary. Avoiding the gender dialogue thus will assure every parent of rights even in states that most rigidly would reject the assumption that a child can have two legal parents. Instead, parents' rights must be protected, regardless of whether or not the resulting family has two mothers.

V. Conclusion

As the face of the modern family changes and as new reproductive options alter our traditional notions of who are "natural" parents, the courts have been faced with new parentage questions that cannot be resolved by the traditional gender-based family law model. *K.M. v. E.G.* is one example of such a parentage claim; in *K.M. v. E.G.*, two women had both genetic/biological ties to the children and parent-child relationships with

the children. Thus, both women could assert parentage claims over the twins. Based on basic family law principles that instruct that biology plus relationship makes a parent, both women are parents. Further, the assumption that a child may have two mothers is unnecessary in protecting the parental rights of both parents. Instead, courts must evaluate both parties' parentage claims without regard to the other party's gender. If gender is eliminated from the dialogue, then courts will more uniformly protect parental rights in cases outside the "natural" family, ultimately protecting all families regardless of the parents' gender.

¹ *Lehr v. Robertson*, 463 U.S. 248 (1983).

² Maren Minnaert & Melissa Tai, *Fourth Annual Review of Gender and Sexuality Law: Family Law Chapter: Assisted Reproductive Technology*, 4 *Geo. J. Gender & L.* 299 (2002) (providing a general overview of current legal issues in the area of assisted reproduction).

³ 117 P.3d 673 (Cal. 2005) (*reversing* *K.M. v. E.G.*, 118 Cal. App. 4th 477 (2004)).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 681.

⁷ 117 P.3d 673 (Cal. 2005).

⁸ John L. Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 *N.Y.U.L Rev.* 353, 389-390 (1991) ("The blood bond between parent and child has achieved both historical and mythical significance in every culture").

⁹ *See* *Lehr v. Robertson*, 463 U.S. 248 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity . . . he may enjoy the blessings of the parent-child relationship.")

¹⁰ *Santosky v. Kramer*, 455 U.S. 745 (1982) (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (using the term "natural" to discuss the rights of biological parents)).

¹¹ Hill, *supra* note 8, at 399.

¹² *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986).

¹³ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁴ *See* *Burchard v. Garay*, 724 P.2d 486. In *Burchard*, the California Supreme Court upheld the trial court's application of the best interest standard to a custody dispute between two biological parents but found fault with the trial court's application of that standard. *Id.* at 488. The court defined the standard as "a true assessment of the emotional bonds between parent and child, upon an inquiry into the heart of the parent-child relationship . . . the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. It must reflect also a factual determination of how best to provide continuity of attention, nurturing, and care." *Burchard*, 724 P.2d at 492 (internal quotation and citation omitted).

¹⁵ *Santosky v. Kramer*, 455 U.S. 745 (1982) (a child only may be removed from a legal parent's custody upon a showing of unfitness). Resolution of third-party visitation disputes must at least include a

consideration of the parent's fitness, and a fit parent is presumed to act in the best interest of the child. *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁶ See, e.g., *In re H.G.*, 757 N.E.2d 864 (Ill. 2001) (children returned to mother who was found to be fit, best interest of children not relevant).

¹⁷ *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁸ *Id.* at 333.

¹⁹ *Id.*

²⁰ See, e.g., ILL. COMP. STAT. 50/9 (West 2005).

²¹ *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (biological father could prevent natural mother's surrender of his child for adoption by a third party).

²² See, e.g., *In re Cheryl*, 746 N.E.2d 488 (Mass. 2001) (legal father who later proved that he was not the genetic father was still liable for child support).

²³ *Lehr v. Robertson*, 463 U.S. 248 (1983).

²⁴ See, e.g., *In re Cheryl*, 746 N.E.2d 488 (Mass. 2001) (declining to set aside a judgment of paternity when the legal father later proved that he had no biological tie to the child).

²⁵ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (ruling that the father with a relationship with the child and a presumption of paternity was the legal father, and that the genetic father who also had a relationship with the child was not).

²⁶ *Hill*, *supra* note 8, at 370.

²⁷ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

²⁸ See *Hill*, *supra* note 8; *Minnaert*, *supra* note 2; Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Reproduction*, 17 *Cardozo L. Rev.* 497 (1996) [hereinafter *Gestation, Intent, and the Seed*].

²⁹ Also known as artificial insemination, conception through sperm donation occurs by the introduction of sperm into the birth canal using artificial means. *Colman, Gestation, Intent, and The Seed*, *supra* note 28, at 497 n.6.

³⁰ Uniform Parentage Act (amended 2002) (the "UPA"), as codified by Cal. Fam. Code § 7600 *et. seq.*

³¹ Cal. Fam. Code § 7613(b) (West 2005).

³² *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (1986).

³³ *Hill*, *supra* note 8, at 374-75.

³⁴ *In re R.C.*, 775 P.2d 27 (Colo. 1989).

³⁵ *Id.* at 28.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 35.

³⁹ See, e.g., *In re Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988).

⁴⁰ See *id.*

⁴¹ See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

⁴² See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

⁴³ See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

⁴⁴ *In re Baby M.*, 530 A.2d 1227, 1246 (N.J. 1988).

⁴⁵ *Minnaert*, *supra* note 2, at 308.

⁴⁶ *Id.* at 310-11.

⁴⁷ *Coleman, Gestation, Intent, and the Seed*, *supra* note 28, at 505.

⁴⁸ Sanja Zgonjanin, Comment, *What Does it Take to be a (Lesbian) Parent? On Intent and Genetics*, 16 *Hasings Women's L.J.* 251 (2005).

⁴⁹ *Hill*, *supra* note 8, at 369.

⁵⁰ Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 *Conn. L. Rev.* 1377 (1994).

⁵¹ *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (1991)

⁵² See *Zgonjanin*, *supra* note 48, at 256 (identifying and discussing four doctrines that have been drawn upon to grant parental rights to a non-biological lesbian parent).

⁵³ *Zgonjanin*, *supra* note 48, at 253.

⁵⁴ Susan Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 *Mich. J. Gender & L.*, 261, 323 (2003).

⁵⁵ *Id.*
⁵⁶ 117 P.3d 673 (Cal. 2005).
⁵⁷ 117 P.3d 673 (Cal. 2005).
⁵⁸ *Id.*
⁵⁹ *Id.* at 675.
⁶⁰ *Id.*
⁶¹ *Id.*
⁶² *Id.*
⁶³ *Id.*
⁶⁴ K.M., 117 P.3d at 676.
⁶⁵ *Id.*
⁶⁶ *Id.*
⁶⁷ *Id.*
⁶⁸ *Id.*
⁶⁹ *Id.*
⁷⁰ *Id.*
⁷¹ *Id.*
⁷² *Id.*
⁷³ *Id.*
⁷⁴ *Id.*
⁷⁵ *Id.*
⁷⁶ K.M., 117 P.3d at 677.
⁷⁷ *Id.*
⁷⁸ *Id.*
⁷⁹ *Id.*
⁸⁰ *Id.*
⁸¹ *Id.*
⁸² *Id.*
⁸³ K.M. v. E.G., 13 Cal. Rptr. 3d 136 (2004).
⁸⁴ *Id.* at 145 (citing Johnson v. Calvert, 851 P.2d 776 (1993)).
⁸⁵ K.M. v. E.G., 13 Cal. Rptr. 3d at 144 (internal quotation omitted).
⁸⁶ In a majority opinion written by Moreno, J., with George, C.J., Baxter, J. and Chin, J., concurring. K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
⁸⁷ K.M. v. E.G., 117 P.3d 673, 682 (Cal. 2005).
⁸⁸ *Id.* at 680-81.
⁸⁹ *Id.* at 681.
⁹⁰ *Id.* at 678.
⁹¹ *Id.* at 678 (citing Johnson, 5 Cal. 4th at 92; In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (1994)).
⁹² *Id.*
⁹³ Section 7613(b) provides that “[t]he donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” Cal. Fam. Code § 7613(b) (West 2005).
⁹⁴ K.M. v. E.G., 117 P.3d 673,679 (Cal. 2005).
⁹⁵ *Id.*
⁹⁶ As written, the Model Act only extinguished the parental rights of a donor when the recipient was a married woman other than the donor’s wife. K.M., 117 P.3d at 679. Under the scenario envisioned in the Model Act, the donor almost certainly would have no intent to be a parent. *Id.* Although the California Legislature extended the protection of this provision to unmarried women, the court saw nothing to indicate that the provision ought to extinguish the rights of a donor who otherwise intended to be a parent. *Id.*
⁹⁷ K.M., 117 P.3d at 681.
⁹⁸ *Id.* at 682.
⁹⁹ *Id.* at 680 (citing In Interest of R.C., 775 P.2d 27 (Colo. 1989)).
¹⁰⁰ 117 P.3d 660 (Cal. 2005) (ruling that a lesbian partner who had supported the birth mother’s artificial insemination and pregnancy, and who had held the resulting twins out as her own, was a presumed mother, liable in an action for child support).

¹⁰¹ *Id.* at 666.
¹⁰² *Id.*
¹⁰³ *Id.* at 665-66.
¹⁰⁴ K.M., 117 P.3d at 681.
¹⁰⁵ *Id.*
¹⁰⁶ *Id.* (citing *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (1994) (“Johnson intent test does not apply when ‘[t]here is no ‘tie’ to break.”)).
¹⁰⁷ *Id.* at 682.
¹⁰⁸ *Id.* at 684 (Kennard, J., dissenting).
¹⁰⁹ *Id.*
¹¹⁰ *Id.* at 689 (Werdegar, J., dissenting).
¹¹¹ *Id.* at 688.
¹¹² *Id.* at 684 (Kennard, J., dissenting).
¹¹³ 117 P.3d 690 (Cal. 2005)
¹¹⁴ K.M., 117 P.3d at 684 (quoting *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005)) (internal quotation omitted).
¹¹⁵ *Kristine H.*, 117 P.3d 690.
¹¹⁶ K.M., 117 P.3d at 688 (Werdegar, J., dissenting).
¹¹⁷ *Id.* at 687.
¹¹⁸ *Id.*
¹¹⁹ *Id.*
¹²⁰ *Id.*
¹²¹ 530 U.S. 57 (2000). *Troxel* found unconstitutional a state statute that obligated parents to allow visitation to third-parties, such as grandparents).
¹²² *Id.* at 688.
¹²³ *Id.*
¹²⁴ *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).
¹²⁵ K.M., 117 P.3d at 676.
¹²⁶ *Id.*
¹²⁷ *Lehr v. Robertson*, 463 U.S. 248 (1983), discussed *supra*, note 9.
¹²⁸ *Id.*
¹²⁹ 491 U.S. 110 (1989).
¹³⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989).
¹³¹ *Id.* at 123.
¹³² *Id.*
¹³³ 491 U.S. at 139 (Brennan, J., dissenting) (“If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result.”)
¹³⁴ *See Dalton*, *supra* note 54.
¹³⁵ *See, generally*, *Dalton*, *supra* note 54.
¹³⁶ *See Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (1991) (noting that the non-legal lesbian petitioner had not adopted her partner’s children, and holding that the petitioner therefore was not entitled to parental rights).
¹³⁷ Patricia M. Logue, *The Rights of Lesbian and Gay Parents and Their Children*, 18 Am. Acad. Matrimonial Law 95 (2002).
¹³⁸ *See id.*
¹³⁹ K.M., 117 P.3d 673.
¹⁴⁰ *Zgonjanin*, *supra* note 28, at 253.
¹⁴¹ *Id.*
¹⁴² *Id.*
¹⁴³ *See Dalton*, *supra* note 54.
¹⁴⁴ K.M., 117 P.3d at 682.
¹⁴⁵ Any consideration of parentage claims where there are more than two possible legal parents is outside the scope of this proposition and, indeed, entirely outside the scope of this article, which deals only with gestational surrogacy situations where two women, and no one else, claim parentage.
¹⁴⁶ *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 143 (Cal. App. 2004).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Queery.com, *Lambda Legal Files Brief Defending Ohio Lesbian Mother's Right to Custody Against Attack Based on Antigay Constitutional Amendment* (Nov. 18, 2005) available at <http://www.queery.com/sybfusion.cgi?templ=q-item2.tpl&category=News&idx=97976>.