

“AREN’T YOU LUCKY YOU HAVE TWO MAMAS?”: REDEFINING  
PARENTHOOD IN LIGHT OF EVOLVING REPRODUCTIVE  
TECHNOLOGIES AND SOCIAL CHANGE

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INTRODUCTION

Karen and Meg, a lesbian couple in a committed, long-term relationship, decided to have a child together.<sup>1</sup> Karen attempted to conceive a child via *in vitro* fertilization with the support and assistance of Meg, who donated the ovum to be fertilized with sperm from an anonymous donor. The procedure was successful and the couple proceeded together through the familiar yet profound rituals of pregnancy and labor, culminating in the birth of a daughter. Karen, the gestational mother, had no genetic relationship to the child, whereas Meg, who donated the ovum, had the same genetic relationship to the child as any other “natural” parent would. The child grew, looking to both Karen and Meg for the love and security she required as much as food, clothing, and shelter. However, over the course of time the relationship between the couple began to dissolve, and they parted acrimoniously. Karen, who carried the child, claimed the right of a parent to custody and acted to prevent Meg from seeing the child. Meg, the genetic mother whose role as loving parent continued from conception through the changing of diapers and beyond, found herself being denied the company of a child she helped raise just as much as her former partner. The child, without understanding why, found herself deprived of Meg, to whom, with Karen, she always looked for the security and comfort of parental love.

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1. The names and particular details of this scenario are fictional, but are based on the facts of a number of cases discussed in this Note, particularly *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Ct. App. 2004) *rev'd*, 117 P.3d 673 (Cal. 2005).

Unhappy scenarios similar to this are finding their ways more and more frequently into the state courts. In 2004 there were almost 300,000 households in the United States with a female householder living with a female partner, a majority of which are presumably lesbian couples.<sup>2</sup> Approximately one-third of those female same-sex households had one or more children, either biologically or by adoption.<sup>3</sup> The advent and increasing employment of *in vitro* fertilization, egg harvesting, and associated reproductive technologies indicate that the option to have children will be increasingly used by both heterosexual and homosexual couples wishing to have a family.<sup>4</sup> Moreover, changing social attitudes concerning same-sex relationships are reshaping the legal definition of what it means to be an American family in the twenty-first century. Such changes include the advent and general acceptance of domestic partnerships, the expansion of adoption laws to include single individuals and same-sex couples as adoptive parents, and the potential imminence of officially sanctioned same-sex marriage in several states.<sup>5</sup> These emergent technologies and changing societal attitudes have given rise to new challenges for the law in defining the term “parent.”

Given the frailty of human nature, however, many of these same-sex relationships are bound to fail, resulting in disputes between the former partners over custody of, or visitation with, the children they have brought into the world and nurtured in a family unit. With both former partners

2. The U.S. Census Bureau lists 293,365 households with a female householder and a female partner. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 2 tbl.1 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>. Although the sexual orientation of householders is not explicitly recorded in that census, the 2000 census has similar numbers (293,000) of female-female households with individuals identifying themselves as having a “close personal relationship” rather than simply sharing housing. *Id.* at 1.

3. *Id.* at 9 tbl.4.

4. A survey conducted by the National Center for Disease Control determined that 9,156 *in vitro* fertilizations (or related fertilization procedures) were performed in 2000, 6,731 from live (nonfrozen) embryos and 2,425 from frozen embryos (383 clinics reporting). CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2000 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES (2000), available at <http://apps.nccd.cdc.gov/art00/nation00acc.asp>. Of the live embryo transfers, 43.4 percent resulted in live births, whereas 23.5 percent of frozen embryo transfers resulted in live births. *Id.* An average of three embryos were transferred per procedure (the mean was 2.9 for live, 3.0 for frozen embryos), *id.*, indicating that approximately 3,052 procedures occurred resulting in approximately 3,491 births (including multiple births). *Id.*

5. Some estimate that there may be as many as 14 million children in the care of homosexual parents. Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. SOC. ISSUES 29, 36 (1996) (noting that estimates of the number of children of such households range between 6 million and 14 million). Note that this study is almost ten years old. Florida is the only state in the nation that categorically bans adoption by homosexuals. See FLA. STAT. ANN. § 63.042 (West 2005). Mississippi and Utah have prevented adoptions by same-sex couples; however homosexual individuals are not prohibited from adopting a child in those states. See MISS. CODE ANN. § 93-17-3 (West 2005); UTAH CODE ANN. § 78-30-1(3)(b) (West 2005) (prohibiting adoption by persons cohabitating in a relationship generally).

claiming parental rights, the courts are faced with a Solomon-like dilemma. Who is a parent in the eyes of the law? Does a biological relationship constitute the only real determinant of parental status? If so, does a gestational relationship to a child trump a genetic relationship, or vice versa? Do a person's historical actions in the role of parent, both pre- and postpartum, carry any weight regarding the determination of parenthood? Can a child, who has looked upon an adult as a parent for his or her entire life, be suddenly denied the company of that adult because a court determines that only a biological or legal adoptive relationship determines parenthood, and that individuals lacking such a relationship have no parental rights at all?

This Note examines the legal definitions of parentage and the arguments used to support such definitions currently employed by several states. This Note grapples with these complex issues and suggests a model by which one can approach such challenging cases. Part I of this Note briefly examines the range of criteria that states have historically employed in defining parenthood, including analyses of the Uniform Parentage Acts of 1973 and 2000. These Acts were based on common law definitions and were intended to act as a template for the states in approaching legal issues concerning parenthood, including the definition of "parenthood." Part II describes cases with similar fact patterns that have arisen in different states, and it contrasts the approaches that these states have employed in determining parenthood. Specifically, these cases examine the efforts of same-sex partners who have participated in the conception and birth of a child, and who have acted in a parental role to the child, to establish rights as a parent. Finally, the Part III proposes a new definition of parenthood that includes not only genetic and gestational relatedness but also the intentions and behavior of both partners before and after birth. Such a definition, combining biological concepts of relatedness with the party's intentions, may be useful to state legislatures when drafting statutes defining family rights and obligations.

#### I. DETERMINING PARENTAGE: HISTORY, COMMON LAW, AND THE UNIFORM PARENTAGE ACT

Historically, the legal determination of the identity of a child's parent was fairly simple, at least with respect to the mother. The mother of a newborn infant was invariably the woman who had successfully carried it to term and delivered it. Although there was no definitive method for conclusively establishing the identity of the father, a man married to, or cohabiting with, the mother was presumed to be the father, a presumption that

continues in legal codifications of parenthood to this day.<sup>6</sup> Such a presumption of paternity could be rebutted, but these rebuttals were difficult and rare, requiring some sort of direct evidence or testimony indicating that the man could not have fathered the child due to incapacity or lack of access to the mother.<sup>7</sup> Furthermore, only a parent could rebut the presumption of paternity; an outsider to the family unit claiming paternity could not claim substantive parental rights even if very strong biological evidence indicated that he was in fact the father.<sup>8</sup> Thus, the legal definition of motherhood has historically been *biological* in nature, based on gestation. Paternity, on the other hand, has been largely *socially* defined; the man living with the woman at the time of putative conception and birth was presumed by the law to be the father, and his legal right was protected against other men—it could only be challenged by himself or by the mother.<sup>9</sup> These legal definitions of maternity and paternity emerged, with adoption laws, early in the common law in an era when the degree of genetic relatedness between a child and a putative parent could not be definitively established. In most cases these legal definitions were satisfactory for determining parental status.

Until the advent of reproductive technologies such as *in vitro* fertilization in the late 1970s and early 1980s, most laws specifically dealing with issues of parenthood addressed adoption and the legal status of children born to unmarried heterosexual couples. In early English common law, the legitimacy of a child born in wedlock was not open to dispute: the husband was presumed to be the father and the presumption could not be rebutted.<sup>10</sup> This ancient doctrine was later repudiated, and by the eighteenth century it was possible for a man to attack the legitimacy of a child born to his wife, although to do so required proof beyond a reasonable doubt.<sup>11</sup> Even so, the presumption of paternity was so strong that a man who acknowledged a child as his own was accepted as the father. Under the common law, any man who thus took a child into his home and “held it out to the world as his own” was the father, regardless of any actual biological relationship.

6. See UNIF. PARENTAGE ACT (1973) prefatory note (amended 2000), 9B U.L.A. 369, 379 (2001).

7. *Id.* See also *Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989).

8. See, e.g., *Michael H.*, 491 U.S. at 125–26.

9. This is hardly surprising given both the historic difficulty in definitively assigning paternity absent genetic technology and society’s interest in protecting the family unit as well as the legal mechanisms of inheritance.

10. See *Wartone v. Simon*, (1307) 32 Edw. I 60 (allowing claimant to recover an estate at an assize of mort d’ancestre, even though the putative father was “beyond the seas” preceding and during pregnancy and could not possibly have been the father).

11. See *Pendrell v. Pendrell*, (1732) 93 Eng. Rep. 945, 945 (K.B.); *Bosville v. Attorney Gen.*, (1887) 12 P.D. 177, 183.

The stigma and penalties of being illegitimately born were strong in the common law, and such penalties persisted in the United States in state common law and statutory codes until the 1960s.<sup>12</sup> A series of Supreme Court decisions in the late 1960s and early 1970s rendered many of those state laws unconstitutional.<sup>13</sup> The logic underlying these decisions was a simple one: penalizing children who have no power over the circumstances of their birth is both "illogical and unjust."<sup>14</sup> Thus the Court, through these decisions, exorcised at least the legal stigma attached to illegitimacy that had been used throughout the ages as a means of social condemnation of nonmarital relationships. More immediately, the decisions required states possessing laws establishing different legal status for legitimate and illegitimate children to develop new statutes.<sup>15</sup>

In response to the Supreme Court's rulings, the National Conference of Commissioners on Uniform State Laws proposed the Uniform Parentage Act of 1973, which became the first uniform act defining parentage to be adopted by a substantial number of states.<sup>16</sup> The proposed Act represented a revolutionary step forward by the Conference, proposing substantive legal equality for all children, regardless of the marital status of their parents.<sup>17</sup> This stood in stark contrast to the then-current laws of many of the states, which treated very differently those children born in wedlock and

12. See Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967). Dealing with the legal status of children born outside of the traditional marital relationship between a man and a woman was the subject of recurrent efforts throughout the twentieth century by the National Conference of Commissioners on Uniform State Laws. UNIF. PARENTAGE ACT (1973) prefatory note, 9B U.L.A. at 378. The Uniform Illegitimacy Act of 1922, the Blood Tests to Determine Paternity Act of 1952, the Uniform Paternity Act of 1960, and various provisions of the Uniform Probate Code of 1969 were all efforts to define the legal status of children born outside of state-sanctioned wedlock. *Id.* However, the Uniform Illegitimacy Act was withdrawn by the Conference, and few of the other proposed acts were adopted by the various states. *Id.*

13. In *Weber v. Aetna Casualty & Surety Co.*, the Supreme Court struck down the Louisiana statutory scheme, holding that the Equal Protection Clause of the Fourteenth Amendment permitted the Court to strike down all discriminatory laws relating to the status of a child's birth where such a classification serves no state interest, compelling or otherwise. 406 U.S. 164, 176 (1972). In *Gomez v. Perez*, the Court found a Texas law preventing illegitimate children from claiming child support unconstitutional, holding that "there is no constitutionally sufficient justification for denying . . . an essential right to a child simply because its natural father has not married its mother." 409 U.S. 535, 538 (1973).

14. *Gomez*, 409 U.S. at 538 (citing *Weber*, 406 U.S. at 175).

15. See UNIF. PARENTAGE ACT (1973) prefatory note, 9B U.L.A. 378 ("[T]he states need new legislation on this subject because the bulk of current [1973] law on the subject of children born out of wedlock is either unconstitutional or subject to grave constitutional doubt.").

16. The Uniform Parentage Act had its origins in a 1969 article by Professor Harry D. Krause of the University of Illinois College of Law, entitled "A Proposed Uniform Act on Legitimacy." *Id.* The Act has been adopted by Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. *Id.* at 377 tbl. Rhode Island has adopted major provisions of both the Uniform Paternity Act of 1960 and the Uniform Parentage Act of 1973 into its code. *Id.* at 377 n.1.

17. *Id.* at 378-79.

those born to unwed parents.<sup>18</sup> A further important social aim of the Act was the improvement and regularizing of state laws and mechanisms that enforce obligations of financial support for children.<sup>19</sup> Importantly, the Act also provided a series of definitions of “parenthood” that expanded and refined the three common law definitions of giving birth, marriage to the mother, or acknowledgment by the father.

To establish paternity, the Act established a series of rebuttable presumptions (collected from various state laws used to establish “legitimacy”) for use in cases where the external circumstances indicate that a particular individual is possibly the father.<sup>20</sup> These presumptions arose from circumstances such as whether the presumed father was married to or attempted to marry the woman at the time the child was conceived, and whether the presumed father had taken the child into his home and held it out to the world as his own.<sup>21</sup>

The Uniform Parentage Act of 1973 was embraced, with variations, by more than a quarter of the states, but differing interpretations of the adopted Act by various state courts led to inconsistencies in the Act’s application.<sup>22</sup> Furthermore, the explosive development and widespread application of scientific technology, both for the identification of putative fathers via DNA technology and for assisting in conception and carrying a child to term, necessitated revision of the Act of 1973.<sup>23</sup> The Uniform Parentage Act of 2000 (amended in 2002) was just such an attempt. The most significant changes in the Act of 2000 were the incorporation of new scien-

18. *Id.* at 378.

19. *Id.* at 380.

20. The relevant section states:

The father-child relationship is established between a man and a child by: (1) an un rebutted presumption of the man’s paternity of the child under Section 204; (2) an effective acknowledgment of paternity by the man under [Article] 3, unless the acknowledgment has been rescinded or successfully challenged; (3) an adjudication of the man’s paternity; (4) adoption of the child by the man; [or] (5) the man’s having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child[; or] (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].

UNIF. PARENTAGE ACT (2000) § 201, 9B U.L.A. 299, 309 (2001).

21. *Id.* § 4(a)(1)–(4), 9B U.L.A. 394–94.

22. Omissions in the Act, or its derivative statutes, have led to courts in different states arriving at very different conclusions when faced with cases containing similar facts. The courts in California, for example, have held that an unmarried man lacks standing to sue an intact family in order to establish parental rights. Courts in Texas and Colorado, however, arrived at the opposite conclusion. *Id.* at prefatory note, 9B U.L.A. 297.

23. An additional problem requiring legal address was the widespread adoption in the 1990s of assisted reproduction and “gestational agreements” in association with the advent of surrogate childbirth, neither of which was addressed by the Act. Revision of the Act of 1973 was undoubtedly necessary to keep up with a society that was becoming increasingly sophisticated with respect to reproductive technology. *Id.*

tific advances, principally DNA technology, to identify parents in cases where such identification is circumstantially in doubt.<sup>24</sup> Similarly, the Act no longer recognizes "natural parents"; instead, the Act adopts the term "genetic parent" as being less ambiguous.<sup>25</sup> The Act's authors also expanded it to employ new sections recognizing voluntary acknowledgements of paternity, registry of paternity, genetic testing as a means of establishing paternity, the status of children of assisted reproduction, and gestational agreements.<sup>26</sup> As such, the 2000 revision represented a significant and much needed expansion of the Act of 1973.<sup>27</sup> However, most of those states that have adopted a version of the Uniform Parentage Act are still employing the Act of 1973. As a result, many states not only adhere to the older, traditional criteria of establishing paternity under the various rebuttable presumptions, but these states are also ill-equipped to address questions posed by emerging reproductive technologies and changing societal attitudes about families.

One pressing need unfulfilled by any version of the Uniform Parentage Act is the further development of the legal definition of the term "parent" to comprehensively encompass the caregivers in same-sex relationships, both male and female. Although the prospect of gay marriage was given a serious, though not necessarily fatal, setback in the elections of November 2004 (in which the electorate of eleven states approved state constitutional amendments prescribing marriage as an exclusively heterosexual institution)<sup>28</sup>, the increasing use of reproductive technologies and relaxed adoption laws have resulted in rapidly increasing numbers of families with same-sex parents.<sup>29</sup> As with traditional, heterosexual families, many homosexual relationships are likely to fail, leaving the questions of parenthood, custody, and duties of support in a legal vacuum that courts must struggle to fill.

The states have been slow to accept the Act of 2000; so far only four states have adopted it.<sup>30</sup> At the same time, new developments in reproduc-

24. *See, e.g., id.* § 501, 9B U.L.A. 329.

25. *See, e.g., id.* § 102(3), 9B U.L.A. 303 (referring to a "genetic father").

26. *See generally id.* §§ 301, 401, 501, 701, 801, 901, 9B U.L.A. 313, 321, 329, 354, 362, 371.

27. However, the Act of 2000 has been adopted, with variations, by only four states including Delaware, which repealed its adoption of the Act of 1973 and adopted the amended Act of 2000 in its stead in 2004. *Id.* at 9B U.L.A. 4 tbl. (Supp. 2005).

28. Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah, and Oregon all adopted state constitutional amendments defining marriage as exclusively being between one man and one woman. *See* Stevenson Swanson, *Amendments to Ban Practice Pass Handily in All 11 States*, CHI. TRIB. Nov. 3, 2004, at 8.

29. *See* U.S. CENSUS BUREAU, *supra* note 2, at 2 tbl.1 (comparing numbers of household types and sex of householder).

30. UNIF. PARENTAGE ACT (2000), 9B U.L.A. 4 tbl. (Supp. 2005).

tive technologies and social arrangements, including *in vitro* fertilization and surrogate parenthood, have posed serious problems for the state courts in the determination of parentage.<sup>31</sup> The result has been a welter of confusion and inconsistency. At one end of the spectrum, some state courts have held that the mother is the woman who gives birth to a child (the gestational mother), and that no other person can possess that legal status at the same time.<sup>32</sup> A number of surrogacy cases, however, have established that the genetic mother (the woman from whose ovum the child is conceived) is the true “mother” and has superior rights over the gestational mother.<sup>33</sup> At the same time, some states have acknowledged that individuals who have collaborated in bringing a child into the world and who have acted in a parental role through the child’s early life are “de facto parents” and assume full parental rights and obligations.<sup>34</sup> Other courts have flatly rejected that concept and rely strictly on biological and statutory definitions.<sup>35</sup> In some states, such as California, attempts to take a middle ground, such as applying the Uniform Parentage Act in a gender-blind manner, have resulted in contradictory results in highly similar cases.<sup>36</sup> Part II of this Note presents some of these disparate approaches to the definition of parenthood.

## II. PARENTHOOD IN CALIFORNIA: GENETICS, INTENTIONALITY AND THE “GENDER-NEUTRAL” APPROACH TO THE UNIFORM PARENTAGE ACT.

### A. *Identifying the Tension: Two Inconsistent Results*

Two cases currently before the California Supreme Court, *K.M. v. E.G.* and *Kristine Renee H. v. Lisa Ann R.*, directly confront the challenges posed by emergent reproductive technologies and changing societal attitudes.<sup>37</sup> At the heart of both of these cases are two questions that the courts must resolve: First, can a same-sex partner who has filled a parental role in the child’s life be a legal parent if she is genetically unrelated to the child? Second, are the demonstrated intentions of the mother and the same-sex partner to act as parents, both before and after birth, sufficient criteria to support a legal definition of parentage?

31. See, e.g., *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (2004).

32. See, e.g., *In re Thompson*, 11 S.W.3d 913, 918 (Tenn. 1999).

33. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

34. See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892–93 (Mass. 1999).

35. See, e.g., *Thompson*, 11 S.W.3d at 919.

36. Compare *K.M.*, 13 Cal. Rptr. 3d at 153, with *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123, 145–46 (Ct. App. 2004).

37. *K.M.*, 13 Cal. Rptr. 3d 136; *Kristine Renee H.*, 16 Cal. Rptr. 3d 123.

*K.M. v. E.G.* illustrates one approach to addressing these challenges. K.M. and E.G. were lesbian registered partners living in California.<sup>38</sup> K.M. donated her ova, fertilized by sperm from an anonymous donor, to E.G. so that E.G. could conceive a child.<sup>39</sup> Prior to the *in vitro* procedure, K.M. was required to sign a standardized, complex donor release form of the sort generally required of sperm donors and without which the procedure could not proceed; in signing the form, K.M. waived her parental rights to the products of the *in vitro* fertilization.<sup>40</sup> In due course, E.G. gave birth to twins, who were genetically unrelated to her even though she had carried them to term.<sup>41</sup> The twins *were* the genetic children of K.M.<sup>42</sup> The couple raised the children as co-parents for five years, although for a portion of that time K.M.'s identity as their genetic mother was concealed from the twins and the community.<sup>43</sup> When the twins went to school, both K.M. and E.G. were listed as parents, and K.M. represented herself to the twins as a parent.<sup>44</sup> When the children asked the partners why they did not have a father, K.M. and E.G. told them, "Aren't you lucky you have two mamas?"<sup>45</sup> Eventually, the relationship between K.M. and E.G. came to an end, and E.G. moved to Massachusetts, taking the children with her and denying K.M.'s requests for joint custody and visitation rights.<sup>46</sup> K.M. filed a Petition to Establish Parental Rights in the California courts to establish her identity as parent and to obtain visitation rights.<sup>47</sup> The trial court concluded that K.M. was not a legal parent because she relinquished any rights she might have had by signing the consent form.<sup>48</sup>

On appeal, the Appellate Court for the First District of California found that K.M. did have standing to bring action under the California Family Code; but the court agreed that K.M.'s alleged oral agreement with E.G. and her signing of the consent form indicated that the K.M. did not

38. *K.M.*, 13 Cal. Rptr. 3d at 139.

39. *Id.* at 141.

40. *Id.* at 140. The California Business and Professions Code requires that "[a] physician and surgeon who removes sperm or ova from a patient shall, before the sperm or ova are used for a purpose other than reimplantation *in the same patient or implantation in the spouse of the patient*, obtain the written consent of the patient as provided in [a different subdivision]." CAL. BUS. & PROF. CODE § 2260(a) (West 2003) (emphasis added).

41. *K.M.*, 13 Cal. Rptr. 3d at 141.

42. *Id.*

43. *Id.*

44. *Id.*

45. Appellant's Petition for Review, *K.M.* 13 Cal. Rptr. 3d 136 (No. S125643), 2004 WL 2108127, at \*12 (June 18, 2004).

46. *K.M.*, 13 Cal. Rptr. 3d at 142.

47. *Id.* E.G. responded to the petition by filing a motion to quash K.M.'s petition. The trial court determined that K.M. lacked standing to bring an action to determine parentage. *Id.* at 143.

48. *Id.* at 143.

intend to become a parent at the time of conception.<sup>49</sup> In so holding, the court relied on a decision of the California Supreme Court in a childbirth surrogacy case, *Johnson v. Calvert*, which established an “intentionality” test, looking to the putative parent’s stated intent to act as a parent at the time of fertilization.<sup>50</sup> However, the facts in *Johnson* were dissimilar to those in *K.M.* The Calverts, a husband and wife, contracted with a woman, Anna Johnson, to act as a surrogate.<sup>51</sup> Johnson was impregnated with an ovum from the wife that had been fertilized *in vitro* by sperm from the husband, and Johnson successfully carried the child to term.<sup>52</sup> Relations between the Calverts and Johnson deteriorated, however, and both sides filed actions seeking a declaration that they were the natural parents of the child.<sup>53</sup> The trial court ruled that the Calverts were the child’s “genetic, biological and natural” parents and that Johnson had no parental rights; the surrogacy contract was thus enforceable against her claims.<sup>54</sup> The Court of Appeal for the Fourth District affirmed, and Johnson appealed to the California Supreme Court, which ruled for the Calverts and established the intentionality test as determinative of parentage in cases with competing maternal claims.<sup>55</sup>

The intentionality test looks to the behavior and expressed intentions of the parties at the time of the child’s conception.<sup>56</sup> The *Johnson* court observed that “[w]ithin the context of artificial reproductive techniques . . . intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.”<sup>57</sup> Notably, the intentionality test looks only to the party’s intentions prior to and at the time of conception and not thereafter.<sup>58</sup> According to the court in *K.M. v. E.G.*, K.M.’s alleged oral agreement with E.G. prior to the twins’ conception, in which K.M. and E.G. agreed that E.G. would be the parent of any child conceived until the parties undertook formal adoption proceedings, and K.M.’s signing of the donor form were determinative that K.M. did not intend to be a parent of the child.<sup>59</sup> Although the court acknowledged that

49. *Id.* at 144, 147. The California Family Code is an adoption of the Uniform Parentage Act of 1973. UNIF. PARENTAGE ACT (1973) prefatory note (amended 2000), 9B U.L.A. 377 tbl. (2001).

50. *K.M.*, 13 Cal. Rptr. 3d at 150 (citing *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993)).

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

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 782.

56. *See id.*

57. *Id.* at 783 (quoting Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (1990)).

58. *See id.* at 782–83.

59. *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 149–50 (Ct. App. 2004).

K.M.'s genetic relatedness to the twins gave her a claim to parenthood under one definition contained in the statute, her claim to a maternal link was necessarily competitive with that of E.G.<sup>60</sup> The court quoted *Johnson* in asserting that "California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible."<sup>61</sup> Thus, although the California code includes more than one legal definition of motherhood, the court held that when such claims compete, the *Johnson* intentionality test is applied.<sup>62</sup> Ironically, the application of the intentionality test in *Johnson* favored the genetic mother over the gestational mother, whereas in applying the same test in *K.M.* the court favored the gestational over the genetic mother.<sup>63</sup>

The court finally declined to base its analysis on the best interests of the children, although it acknowledged the harsh results of its ruling for the twins.<sup>64</sup> Review of this case has been granted by the California Supreme Court.<sup>65</sup>

In a contemporaneous case that parallels *K.M.*, the lesbian partner of a gestational mother (both were genetically unrelated to the child) was found to have standing to establish parentage under the presumed father provision of the California Family Code.<sup>66</sup> To reach this conclusion, the Appellate Court of the Second District in *Kristine Renee H.* interpreted the statute in a gender-neutral manner, as mandated by section 7650 of the California Family Code.<sup>67</sup> Under section 7611(d), parentage can be established if (in language reverting to the ancient common law) Lisa (the nongestational partner) had (1) received the child into her own home, and (2) held out the child as her own.<sup>68</sup> The *Kristine Renee H.* court, unlike the court in *K.M.*, expressly declined to apply the "intentionality" standard from *Johnson*, although it found that the intentionality standard buttressed its result.<sup>69</sup> The

60. *Id.* at 151–52.

61. *Id.* at 144.

62. *Id.* at 152. *See also* CAL. FAM. CODE § 7610(a) (West 2003) (establishing that parenthood may be established by a mother giving birth to a child); *id.* § 8512 (defining "birth parent" as including the "biological parent" but not differentiating between genetic or gestational relationships). Furthermore, section 7650 states that definitions establishing the existence of a parental relationship must be applied in a gender-neutral manner, indicating that definitions used to establish paternity can also be used to establish maternity. *Id.* § 7650 ("Insofar as practicable, the provisions of this part applicable to the father and child relationship apply.")

63. *See K.M.*, 13 Cal. Rptr. 3d at 151–52; *Johnson*, 851 P.2d at 782.

64. *K.M.*, 13 Cal. Rptr. 3d at 154.

65. *M.K. v. E.G.*, 97 P.3d 72 (2004).

66. *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123, 144 (Ct. App. 2004).

67. *Id.* at 134–35.

68. *Id.* at 143 (citing CAL. FAM. CODE § 7611(d) (West 2003)).

69. *Id.* at 144–45.

*Kristine Renee H.* court's gender-neutral reading of the California Family Code, however, might have led to a considerably different outcome in *K.M.* The genetic identity of *K.M.* as a parent was not in dispute, thus establishing her as a "biological parent."<sup>70</sup> Furthermore, like Lisa, *K.M.* had arguably met the standard of paternity by taking the child into her home and holding it out to the world as her own.<sup>71</sup>

The Appellate Courts of the Second and Fourth Districts have thus arrived at opposite conclusions in *Kristine Renee H.* and *K.M.* by applying two different tests: "holding out the child" versus "intentionality." At the heart of both of these cases are two fundamental issues with which the California courts are attempting to come to terms: First, can a nonadoptive domestic partner of a birth mother be a legal parent if she is biologically unrelated (or even if she is genetically related) to the child? Second, is the intentionality test developed in *Johnson v. Calvert* a workable approach in resolving issues of parenthood?

Over time, the answer to the first question has perceptibly changed in California. The landmark case upholding a negative answer is *Curiale v. Reagan*.<sup>72</sup> In this case, a lesbian couple, Angela Curiale and Robin Reagan, agreed to have a child via artificial insemination and to raise the child together.<sup>73</sup> The child was born to Reagan in June 1985, and the couple raised child together for over two years, during which Curiale not only acted as parent but was also the sole financial provider for the family.<sup>74</sup> The relationship ended in 1987, and in June 1988 Reagan informed Curiale that she would no longer share custody or allow visitation.<sup>75</sup> The trial court refused to give effect to the prior agreement between Curiale and Reagan, stating that Curiale had no statutory basis on which to claim parental status.<sup>76</sup> The court found that "[t]he Legislature has not conferred upon one in plaintiff's position, a nonparent in a same-sex bilateral relationship, any right of custody or visitation upon the termination of the relationship," and the court declined to act further.<sup>77</sup> This finding has acted as precedent for a number of cases in the California courts, including *K.M.*<sup>78</sup>

70. *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 144 (Ct. App. 2004).

71. *Id.* at 141.

72. 272 Cal. Rptr. 520 (Ct. App. 1990).

73. *Id.* at 521.

74. *Id.*

75. *Id.*

76. *Id.* at 522.

77. *Id.*

78. The court in *K.M.* stated that "[t]he appellate courts have consistently held that the domestic partner of a child's natural parent does not qualify as a parent under the UPA despite the parental role the partner played in the life of the child." *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 152 (Ct. App. 2004).

The *Curiale* decision and its progeny stand in marked contrast to the reasoning of the California Supreme Court's decision in *In re Nicholas H.*<sup>79</sup> In *Nicholas H.*, a man acted as a parent (and was listed as father on the child's birth certificate) of a child born to a woman the man lived with, even though the man knowingly was not the child's biological parent.<sup>80</sup> The court held that the man had established parental rights under the California Family Code.<sup>81</sup> The court reasoned that the father's taking of the child into his own home and openly holding out the child as his own were sufficient to meet the presumptive definition of parenthood under section 7611(d).<sup>82</sup> Although the court emphasized that in this case rebutting the presumption of paternity would leave the boy effectively fatherless (the identity of the biological father had never been judicially established), the decision clearly established a legal definition of parenthood for non-biologically related individuals who act as parents to a child in a family setting.<sup>83</sup>

These California decisions have resulted in conflicting approaches to determining the rights of domestic partners to claim parenthood arising from historically parallel sets of decisions. One set of decisions, including *Curiale* and *K.M.*, states that a non-biologically related individual who acts as a parent to a child in a family unit cannot be a parent regardless of the pre- and postpartum role played by that individual. The other approach, originating in *Nicholas H.* and extended to *Kristine Renee H.*, states that the actions played in raising the child, specifically, taking the child into the home and holding the child out to the world as that individual's own, are sufficient to establish, and are determinative of, parenthood. It may be significant that the families involved in both *Nicholas H.* and *Karen C.* were a heterosexual couple and a single parent (presumably also heterosexual), respectively.<sup>84</sup> Both situations might well be considered more "traditional" forms of families, with which the courts might be more comfortable in establishing and defining parental roles. However in *Kristine Renee H.*, the court extended the reasoning of *Nicholas H.* and *Karen C.* to determinations of parenthood involving lesbian couples.<sup>85</sup> There, the court rejected the *Curiale* court's reasoning because the *Curiale* court failed to interpret

79. 46 P.3d 932 (Cal. 2002).

80. *Id.* at 935.

81. *Id.* at 937.

82. *Id.* at 938.

83. *Id.* at 933–34. Notably, in *In re Karen C.*, the Court of Appeal for the Second District held that the "holding out the child as his own" presumptive test for parenthood employed in *Nicholas H.* must be applied equally to women and to men. 124 Cal. Rptr. 2d 677, 681 (Ct. App. 2002).

84. *Karen C.*, 124 Cal. Rptr. 2d at 678; *Nicholas H.*, 46 P.3d at 935.

85. *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123, 142–43 (Ct. App. 2004).

the California Family Code's language in the gender-neutral manner required by California Family Code section 7650 when establishing a parent-child relationship.<sup>86</sup>

The extension of the presumption of paternity established by "holding out the child" in *Kristine Renee H.* was a bold step, and it remains to be seen whether this extension will be sustainable on appeal to the California Supreme Court.<sup>87</sup> This extension takes a test that was intended originally only to determine paternity by means other than genetic testing or cohabitation at the time of conception and birth, and applies that test in order to grant parental rights to partners who filled parental roles in the family but were otherwise unrelated to the child, and in order to sustain those roles after the family unit had disintegrated. Furthermore, this extension grants presumptive parental rights to individuals who, like the plaintiff in *Kristine Renee H.*, are not only genetically unrelated to the child, but who could not be related under any circumstances.<sup>88</sup>

Given this line of reasoning, the decision reached in *K.M.* is surprising and appears to represent a step backwards toward the decision reached in *Curiale*. In *K.M.*, the genetically related party was not the woman who gave birth to the twins, but rather the donor of the ova; thus, the donor more closely related genetically to the twins than was E.G., who gave birth to the twins and was determined to be the children's only parent.<sup>89</sup> Under the tests described in California Family Code section 7611, the genetic relatedness of K.M., which neither party contested, should be sufficient in itself to establish a presumption of parenthood.<sup>90</sup> If the courts of California are going to interpret paternity as a gender-neutral concept, as they did in *Kristine Renee H.*,<sup>91</sup> consistency demands that they likewise define maternity in a gender-neutral manner. Although the court placed considerable emphasis on the fact that K.M. signed a complex, three page consent form waiving parental rights prior to the harvesting of her ova, signing such a form was mandatory before the procedure could begin.<sup>92</sup> Furthermore, her

86. *Id.* at 137.

87. In August 2005, the Supreme Court reversed the holding of the California Court of Appeals and held that the gestational mother was estopped from challenging the agreement assigning parental rights to both partners to which she had earlier stipulated. *Kristine Renee H. v. Lisa Ann R.*, 117 P.3d 690 (Cal. 2004).

88. Lisa had not donated the ovum that resulted in the child and, of course, was incapable of donating the required sperm. Even with current technology, it remains practically impossible for two women to be equally genetically related to an offspring; that still requires one sperm and one ovum.

89. *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 150 (Ct. App. 2004).

90. *Id.* at 144.

91. *Kristine Renee H.*, 16 Cal. Rptr. 3d at 137.

92. Appellant's Petition for Review, *K.M.* 13 Cal. Rptr. 3d 136 (No. S125643), 2004 WL 2108127, at \*8-\*9 (Cal. June 18, 2004).

active participation in the pregnancy and birth and her behavior in acting as parent for over five years after the children were born would certainly seem to satisfy the requirements for "taking into the home" and "holding out to the world"<sup>93</sup> that are the essence of section 7611(d). However, the *K.M.* court based its decision mainly on *Johnson v. Calvert* and its "intentionality" test.<sup>94</sup>

### B. Massachusetts: The "De Facto Parent"

When confronted with the complex issue of defining "parent" in such cases, not all states employ the same analytical approach as the California court in *K.M.* Massachusetts, for example, employs a broader standard in defining "parent" by examining the role played by the adult partner in the life of the child, both before and after birth. A case with similar factual circumstances to California's *K.M.* and *Kristine Renee H. v. E.N.O. v. L.M.M.*, which was tried before the Supreme Judicial Court in 1999.<sup>95</sup> The parties (individually "E" and "L") shared a committed, monogamous, lesbian relationship for thirteen years, during which they availed themselves of every legal mechanism available to signify the permanence of their relationship as life partners.<sup>96</sup> Throughout the course of their relationship, both parties intended to become parents of a child together, and in 1994 L became pregnant via artificial insemination with sperm provided by an anonymous donor.<sup>97</sup> Before the birth of the child, L and E executed a co-parenting agreement in which they agreed to share responsibilities for raising the child.<sup>98</sup> The agreement further specified that both parties would retain parental status in the event that the relationship ultimately dissolved.<sup>99</sup> After the birth of the child, E was the principal source of income for the family and acted as primary caregiver to the child for seven months

93. *K.M.*, 13 Cal. Rptr. 3d at 141.

94. *Id.* at 153.

95. 711 N.E.2d 886 (1999). Massachusetts has not adopted either the 1973 or 2000 versions of the Uniform Parentage Act. See UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 tbl. (2001); UNIF. PARENTAGE ACT (2000), 9B U.L.A. 4 tbl. (supp. 2005).

96. *E.N.O.*, 711 N.E. 2d at 888.

97. *Id.* Both individuals were party to the decision and process by which L became pregnant, and E cared for her partner throughout a difficult pregnancy, accompanying her to every doctor's appointment. When the child was born in 1995, E was present at the delivery and cut the child's umbilical cord. The parties sent out birth announcements identifying both L and E as the child's parents and the child's family name was a conjunction of both partner's surnames. *Id.* at 888-89.

98. *Id.* at 889.

99. *Id.*

when L experienced medical complications.<sup>100</sup> The child referred to both E and L as his parents.<sup>101</sup>

In 1998 E consulted an attorney about initiating adoption proceedings, but shortly thereafter the relationship between the two women began to crumble.<sup>102</sup> The couple separated in May of 1998, and L refused to allow E to have any access to the child.<sup>103</sup> In June 1998, E filed a complaint seeking specific performance of the couple's earlier coparenting agreement, permitting E to adopt the three-year-old child and establishing joint legal custody.<sup>104</sup> E further sought to establish a visitation schedule with the child and to diminish her obligations as primary source of income to L and the child.<sup>105</sup>

Following a hearing in probate court, the judge ordered temporary visitation rights for E pending trial.<sup>106</sup> L appealed the decision to Supreme Judicial Court, arguing that the probate court lacked jurisdiction to award temporary visitation rights to E.<sup>107</sup> L further argued that there was no statutory authority permitting visitation to one who, though standing in the position of a parent, is not a natural parent of a child.<sup>108</sup> The court, however, held that the probate court did indeed have jurisdiction, and then the court determined whether such visitation was in the best interests of the child.<sup>109</sup>

The court began its analysis by declaring that "[a] child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent."<sup>110</sup> The court defined a "de facto parent" as

one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal par-

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* In doing so, the judge applied the "best interests of the child" standard. Although somewhat amorphous, in this particular case the judge looked specifically to the fact that the decision to conceive and raise the child was mutual between the parties, that after birth E had acted daily in the capacity of a parent in all aspects of the child's life, that both parties had at all times referred to each other as the child's parent in the child's presence and that both were listed as parents on all school and health records of the child. The judge further relied on the report of the child's guardian ad litem, who reported that E "was an active parent and appreciative of the child's needs" and that "both mothers were clearly involved in the child's upbringing." *Id.* at 889-90.

107. *Id.* at 888.

108. *Id.* at 889.

109. *Id.* at 890, 893.

110. *Id.* at 891.

ent, performs a share of caretaking functions at least as great as the legal parent.<sup>111</sup>

Additionally, the de facto parent "shapes the child's daily routine, addresses developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide."<sup>112</sup>

The court recognized that nontraditional families are becoming an increasingly common part of the American familial landscape; same-sex couples are deciding to have children in increasing numbers, and the children of these relationships naturally form parental relationships with both partners, regardless of whether the parents are legal or de facto.<sup>113</sup> In cases where such nontraditional families dissolve, according to the court, the best interests of the child must be determined by examining the nature of the relationships between the child and both parental figures.<sup>114</sup>

A mere assertion of devotion to the child by the putative de facto parent is not sufficient to determine parental status.<sup>115</sup> The court used the facts from a previous case, *C.C. v. A.B.*, to outline the factual elements sufficient to establish de facto parental status.<sup>116</sup> In *C.C.*, a man who had lived in an unmarried state with a woman was granted standing to maintain a paternity action after the relationship dissolved because he had demonstrated a substantial parent-child relationship, despite the fact that at the time of conception and birth the woman was married to another man.<sup>117</sup> The mother admitted that the plaintiff might be the father of the child.<sup>118</sup> The plaintiff's name was listed as parent on the child's birth and baptismal certificates.<sup>119</sup> After the child was born, they all lived together as a family, and the plaintiff demonstrated an interest in continuing his relationship with the child.<sup>120</sup> In contradistinction, the court held in *C.M. v. P.R.* that a man who had lived with a woman during her pregnancy for several months before the child was born could not maintain a paternity action because he had not been part of the decision to bring the child into the world.<sup>121</sup>

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (citing *C.C. v. A.B.*, 550 N.E.2d 365 (Mass. 1990)).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (citing *C.M. v. P.R.*, 649 N.E.2d 154 (Mass. 1995)).

In *E.N.O.*, the court found that all of the facts of the case supported the conclusion that E was a de facto parent of the child.<sup>122</sup> E had been a part of the decision to conceive the child, had attended doctor's appointments and workshops together with L, and had participated in the birth of the child as a father would.<sup>123</sup> E was listed on the birth announcements as a parent and contributed her last name as part of the child's last name.<sup>124</sup> All of these facts manifested the intent of E and L to have a child and form a family together.<sup>125</sup> The parties further reinforced their commitment to parent the child together by executing and re-executing the coparenting agreement, in which they indicated their belief that the child would continue his relationship with E should the relationship between E and L come to an end.<sup>126</sup> E had resided with the child and L as a family, and E participated in the raising of the child in all respects as a de facto parent.<sup>127</sup> Furthermore, E provided financial support for the child and assumed primary care for the child during the course of L's illness.<sup>128</sup> The child was manifestly attached to E, calling her "Mommy" and telling people that he had two mothers.<sup>129</sup> In view of the established relationship between E and the child, the court held that the probate court judge had not erred in determining that temporary visitation rights with his de facto parent, E, would be in the child's best interests.<sup>130</sup>

The contrast between the Massachusetts and California cases is strong, but some philosophical lines link the two. The more conservative strain of California law, as illustrated in *K.M.*, emphasizes the parties' intentions at the beginning of the pregnancy alone and refuses to adopt the "best interests of the child" standard that Massachusetts uses as a baseline for its "de facto parent" determination.<sup>131</sup> In *K.M.*, the relationship of the non-gestational mother and child after birth is immaterial; the approach relies solely on the demonstrated intentionality at the commencement of the pregnancy.<sup>132</sup> The other approach, employed by the California court in *Kristine Renee H.*, of "taking the child into [her] home and holding it out to the world as [her] own," is closer to that of Massachusetts—although the

122. *Id.* at 892–93.

123. *Id.* at 892.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 892–93.

130. *Id.* at 894.

131. *See K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 154 (Ct. App. 2004).

132. *Id.* at 151.

court in *Kristine Renee H.* did not directly address the best interests of the child, it did so indirectly by examining the non-biological partner's behavior.<sup>133</sup> Both the Massachusetts approach and the California approach employed in *Kristine Renee H.* have the advantage of protecting children living in de facto families with same-sex adult partners from being summarily deprived of a relationship with someone whom they have known and depended on, from their earliest moments, as a parent.

### C. Delaware: Parental Relationships and Obligations

Parenthood, of course, establishes not only legal rights, but legal obligations as well. Can the legal obligations of parenthood traditionally imposed on biological parents also be imposed on the person who acts as a de facto parent but who has no biological or adoptive relationship to the child? The cases described above have revolved principally around definitions of parenthood designed to establish or deny rights of visitation to estranged, same-sex partners who have acted as parental figures. Delaware, however, has established that participation by a non-biologically related same-sex partner in conception and birth not only establishes rights to visitation but also may compel an obligation of financial support from the non-biologically related partner.<sup>134</sup>

In *Chambers v. Chambers*, a lesbian couple, Carol and Karen Chambers, maintained a committed relationship for three years.<sup>135</sup> A son, David, was born in August 1996 following an *in vitro* fertilization, but Carol and Karen separated nine months later.<sup>136</sup> In August 1999, Carol filed a Petition for Visitation in the Family Court of Delaware, in which she referred to David as her "son from infetro [sic]," and in a contemporaneous Motion for Temporary Visitation she stated that "David knows me as his other mother."<sup>137</sup> The following February the court approved a permanent visitation schedule between Carol and David.<sup>138</sup>

133. *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123, 144 (Ct. App. 2004). The advantage of "intentionality" as evidenced by behavior as a standard over "best interests of the child" is the unpredictability of the latter standard. In cases where there is no clear-cut choice (as, for instance, between an abusive and non-abusive partner) the decision may rely on stereotyped notions or prejudices, financial considerations, or other criteria not strictly related to the child's emotional welfare.

134. See *Chambers v. Chambers*, No. CN00-09493, 2002 WL 1940145 (Del. Fam. Ct. Feb. 5, 2002). All of the names in the case are pseudonymous. *Id.* at \*1 n.1.

135. *Id.* at \*1. The couple held a commitment ceremony and Karen legally changed her surname to that of Carol's. Some months after deciding to live together, Karen underwent an *in vitro* fertilization procedure with sperm provided by an anonymous donor. Carol helped to finance the fertilization procedure and signed her name on the embryo form on the line designated "partner." *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

Although she had been granted visitation rights by the court, Carol refused to pay child support to Karen.<sup>139</sup> In March of 2000, Karen filed a petition with the Family Court of Delaware seeking financial support for David.<sup>140</sup> Attempts to mediate a settlement failed, and the court determined that it had subject matter jurisdiction as a case of first impression.<sup>141</sup>

In ruling on Karen's motion for summary judgment, the court first looked to the Delaware child support statute and the Delaware Parentage Act for a definition of "parent."<sup>142</sup> Although the child support statute is specific regarding the obligations of parents, wed or unwed, to provide financial support for their minor children, it does not provide a precise definition of the term "parent."<sup>143</sup> Because the legislature failed to provide a definition of "parent," the court was left to provide its own definition.<sup>144</sup> Carol argued that because she was not biologically related to David and had not adopted him, it would be "absurd" for the court to find that the parent of a child is anything other than "a child's mother or father."<sup>145</sup> Karen, on the other hand, urged the court to adopt a broader definition of parent that was more liberal and less traditional than that advanced by Carol, which recognized parenthood only as established by biological or adoptive ties.<sup>146</sup>

The court rejected Carol's contention that the tests established by the Delaware Parentage Act were the exclusive means by which paternity might be established.<sup>147</sup> According to the court, the Act is not the exclusive means of determining paternity, and thus, by extension, neither can it be the exclusive means by which maternity is determined.<sup>148</sup> Furthermore, the language of the statute, which does not explicitly restrict the parent and child relationship to one mother and one father, does not necessarily preclude an interpretation of "parent and child relationship" from including two mothers.<sup>149</sup> Thus, according to the court, "parent and child" could

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at \*2. The Delaware Parentage Act is Delaware's adopted version of the Uniform Parentage Act of 2000. See UNIF. PARENTAGE ACT (2000), 9B U.L.A. 4 tbl. (supp. 2005).

144. *Chambers*, 2002 WL 1940145, at \*2.

145. *Id.*

146. *Id.*

147. *Id.* at \*4.

148. *Id.* at \*6.

149. *Id.* at \*5. The Delaware Code defines "parent-and-child relationship" to mean, "the legal relationship existing between a child and his or her natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother-and-child relationship and the father-and-child relationship." DEL. CODE ANN. tit. 13, § 801 (1999). Furthermore, the

equally reasonably include two "mother and child" relationships in the same family.<sup>150</sup>

In the absence of a legislative definition of "parent," the court initially looked to the definition provided by the dictionary, which, among other definitions, defines "parent" as "one who procreates, begets or brings forth offspring."<sup>151</sup> The court then looked to Carol's behavior as an indicator of her intentions. In her actions to obtain visitation rights, Carol had identified herself as the child's "mother," despite the fact that she was neither the gestational mother of nor genetically related to David.<sup>152</sup> Her financial contribution to the *in vitro* procedure further established her critical role in bringing the child into the world.<sup>153</sup> The court recognized that societal changes, including the increasing numbers of children living in non-traditional families, allowed for expanding traditional definitions of what is meant by "parent" in the absence of either a statutory definition or clear indication of legislative intent.<sup>154</sup> Having weighed what little authority it could find on the matter, the court rejected Carol's narrow definition of "parent," which rested solely on biological or adoptive grounds.<sup>155</sup> Rather, the court held that one whose acts had "certainly brought forth these offspring as if done biologically" is one "to whom responsibility attaches."<sup>156</sup> The court determined that Carol's actions in helping to bring David into the world and her arguing that she was his mother in obtaining visitation rights were compelling facts and circumstances demanding a "conclusion that she be considered David's mother for child support purposes."<sup>157</sup>

Finally, the court also looked to the public policy implications of its decision. Had the court adopted the more narrow definition of parenthood espoused by Carol, David might well have been thrown into poverty.<sup>158</sup> Given the rapid rise in the numbers of nontraditional families headed by gay and lesbian partners, the court argued that it could never have been the intent of the Delaware General Assembly to allow a child to be forced into

Code also states, "The parent-and-child relationship between a child and: (1) The natural mother may be established by proof of her having given birth to the child, or in accordance with this title." *Id.* § 801.

150. *Chambers*, 2002 WL 1940145, at \*5.

151. *Id.* at \*2 (quoting BLACK'S LAW DICTIONARY 1269 (4th ed. 1968)).

152. *Id.* at \*10.

153. *Id.* at \*3.

154. *Id.* at \*5 (citing Carol Buell, *Legal Issues Affecting Alternative Families: A Therapist's Primer*, in *GAY AND LESBIAN PARENTING* 75 (Deborah F. Glazer & Jack Drescher eds., 2001)).

155. *Id.* at \*4.

156. *Id.*

157. *Id.* at \*4.

158. *Id.* at \*5. Karen had been unable to work since before David's birth due to a disability. *Id.*

poverty under the facts of the *Chambers* case.<sup>159</sup> The court instead stated that it was much more likely that the Assembly would have intended that one who had “acted in tandem with her committed life partner to bring an infant into this world, [would be expected] to support him as his ‘parent.’”<sup>160</sup>

The court’s definitions of parental obligations in this case, although not explicitly stated, are perhaps the most dramatically liberal of all considered in this Note so far. California’s intentionality test and the Massachusetts de facto parent definition both look to the intention of a putative parent to bring a child into the world, but they both also look to the activities of the individual in playing a role in the life of the growing child.<sup>161</sup> The *Kristine Renee H.* case in California emphasized the non-gestational partner’s role in taking the child into her home and holding it out to the world as her own.<sup>162</sup> *E.N.O.* in Massachusetts similarly emphasized the strong parental role played by the non-gestational partner in the life of the growing child.<sup>163</sup> In *Chambers*, the Delaware court paid very little attention to the emotional relationship of either adult partner to the child in defining Carol’s parental obligation to pay child support.<sup>164</sup> Indeed, the court was highly critical of Carol for disingenuously holding herself out as David’s “other mother” when attempting to establish rights to visitation, but then holding forth a much narrower definition of parent when attempting to avoid paying child support.<sup>165</sup> The critical factor on which the Delaware court focused was Carol’s participation, both financial and by signing the forms, in the *in vitro* procedure by which David was conceived.<sup>166</sup> The court effectually equated this with the natural method by which children are conceived, stating that without Carol’s participation, the child might never have been brought into the world.<sup>167</sup> According to the Delaware court, acts by an individual that intentionally and materially assist in the conception of a child may be sufficient to establish that individual as a parent.<sup>168</sup>

159. *Id.*

160. *Id.*

161. See *supra* text accompanying notes 132–34.

162. *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123, 143 (Ct. App. 2004).

163. *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892 (Mass. 1999).

164. See *Chambers*, 2002 WL 1940145, at \*10.

165. *Id.* at \*9.

166. *Id.* at \*10.

167. *Id.*

168. For example, the court stated that “Carol’s acts and directives predating conception, while biologically not providing the genetic material necessary to conceive the child, constituted a symbolic act of procreation.” *Id.* at \*10.

D. *Tennessee, New York, and Florida: Strict Statutory Interpretation of Parental Status*

Other states have taken a much more constrained attitude toward defining parenthood when faced with such situations. In sharp contradistinction to the decision reached in *E.N.O.* in Massachusetts and *Chambers* in Delaware, Tennessee, New York, and Florida have taken much more restrictive postures in defining what a parent is, limiting visitation rights to those who meet a strictly defined statutory definition of parent. Tennessee has not adopted either version of the Uniform Parentage Act as a basis for its family law.<sup>169</sup> In *In re Thompson*, the Court of Appeals for Tennessee dealt with two cases factually similar to the Massachusetts and California cases described above.<sup>170</sup> The resulting decision held that only individuals meeting the statutory definition of legal parent, which excludes non-gestational homosexual partners, can assert parental rights to custody or visitation regardless of intent, behavior, or the best interests of the child.<sup>171</sup>

169. See UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 tbl. (2001); UNIF. PARENTAGE ACT (2000), 9B U.L.A. 4 tbl. (supp. 2005).

170. *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

In the first case, *White v. Thompson*, a lesbian couple who had lived in a "committed intimate relationship," *id.* at 915, had discussed throughout the course of their relationship the possibility of having and raising a child together. After five years together, Thompson underwent a successful artificial insemination. White contributed to Thompson's support during and after the pregnancy, and when the child, J.T., was born. Its name was based on relatives of both White and Thompson. After J.T.'s birth, White continued to provide support and care to J.T. The relationship between White and Thompson ended approximately one year after the birth of J.T. White continued to provide care and support for J.T. for some time thereafter, until Thompson began refusing or interfering with White's visitation and denying White telephone access to the child. White petitioned the lower court for regular and frequent visitation rights predicated on the best interests of the child. Thompson argued that White lacked standing to assert visitation rights. The court agreed with Thompson that White lacked standing and explicitly declined to address White's best interests of the child argument. White appealed. *Id.* at 915-16.

The second case, *Coke (and Dooley) v. Looper*, tells a very similar story. Coke and Looper, a lesbian couple, had attempted for two years to conceive a child via artificial insemination. After their son, J.C., was born in 1992, Coke and Looper entered into a coparenting agreement, under which both parties would share in providing J.C. with food, clothing, and medical or remedial care until his eighteenth birthday, and that should the relationship end, both Coke and Looper would continue to provide care. In that case, J.C. would reside with Coke, and Looper would have visitation rights. Looper and Coke ceased to live together when J.C. was three years old, and they implemented a visitation schedule between them until Coke and Donald Dooley, who had begun a relationship with Coke, filed a complaint seeking a restraining order and damages against Looper. Looper filed an answer and counter-complaint seeking that Coke and Dooley "be permanently enjoined from interfering with [Looper's] relationship and visitation with the minor child and establish a visitation schedule." *Id.* at 917. Dooley filed individually for a motion for judgment on the pleadings, arguing (as was argued in *White*) that Looper lacked any standing to assert visitation rights. After a hearing, the court found that Looper, like White, lacked any claim or legal interest in the child and thus lacked standing to assert visitation rights. The court therefore dismissed her counter-complaint with prejudice and also granted an independent motion to dismiss filed by Coke. *Id.* at 916-17.

171. *Id.* at 919.

The consolidated cases were heard by the Tennessee Court of Appeals<sup>172</sup> with a single question of law for the court to decide:

Whether a petition for visitation may be brought by a woman who, in the context of a long-term relationship, planned for, participated in the conception and birth of, provided financial assistance for, and until foreclosed from doing so by the biological mother, acted as a parent to the child ultimately borne by her partner.<sup>173</sup>

The court began its analysis by looking to the manner by which “parent” is defined by Tennessee law.<sup>174</sup> Tennessee Code section 36-1-102 defines the terms “legal parent” and “parent.”<sup>175</sup> A legal parent is defined by that section as (1) the biological mother of a child; (2) a man who was married to, or attempted to marry, the woman who gave birth if the child was born during the marriage or within three hundred days after the marriage was terminated or a decree of separation issued by the court; (3) a man who had been adjudicated to be the legal father of the child; and (4) an adoptive parent of the child.<sup>176</sup> The term “parent” was defined somewhat more loosely by the statute to include biological, legal, adoptive, or (for certain limited purposes) stepparents.<sup>177</sup> The court remarked pointedly in a footnote that although neither of the appellants were married to their respective partners at the time the respective children were born, neither appellant could have been; Tennessee confines marriage to legal contracts “solemnizing the relationship of one (1) man and one (1) woman” in order “to provide the unique and exclusive rights and privileges to marriage.”<sup>178</sup>

In its ruling, the court found that neither appellant satisfied the statutory definition of parent as defined by the Tennessee Code.<sup>179</sup> The court acknowledged that in common usage the term “parent” may sometimes be defined more loosely as a person who shares mutual love and affection with the child and who supplies care and support.<sup>180</sup> It declined, however, to extend the definition of parent beyond the strict definition provided by the statute.<sup>181</sup> To do so, explained the court, would be an unacceptable exercise in judicial legislation.<sup>182</sup> Furthermore, the Tennessee Code grants

172. *Id.* at 913.

173. *Id.* at 917.

174. *Id.*

175. *Id.*; TENN. CODE ANN. § 36-1-102 (28) (West 2002).

176. *Thompson*, 11 S.W.3d at 918; TENN. CODE ANN. § 36-1-102 (28).

177. *Thompson*, 11 S.W.3d at 918; TENN. CODE ANN. § 36-1-102 (36).

178. *Thompson*, 11 S.W.3d at 918; TENN. CODE ANN. § 36-3-113.

179. *Thompson*, 11 S.W.3d at 918.

180. *Id.*

181. *Id.*

182. *Id.*

only parents, whether biological or adoptive, the legal right to custody and control of their children, and the court reasoned that that extending those rights to third parties would impair the parent's rights to custody and control.<sup>183</sup> The court flatly rejected the plaintiff's argument that they had acted as de facto parents or in loco parentis as being without precedent or support in Tennessee law, denying them any rights to visitation.<sup>184</sup> The court did not, in its analysis and conclusion, approach the question of the best interests of the children. Thus, Tennessee's strict adherence to the statutory definition of "parent" has the necessarily harsh effect of summarily depriving a child of a parental figure, regardless of how much and how long that parental figure had played a central role in the life of the child.

Similar findings were reached in cases in New York and Florida. In *Lynda A.H. v. Diane T.O.*, the Appellate Division of the New York Supreme Court held that a lesbian partner of a woman who had had a child via artificial insemination lacked standing to obtain either custody or visitation rights.<sup>185</sup> As in the cases described above, both partners had planned and participated in the conception and the raising of the child during the course of a long-term relationship that eventually failed. The trial court granted temporary visitation rights to the non-gestational partner.<sup>186</sup>

The appellate court ruled that the trial court erred in granting temporary visitation and that the petitioner was entitled to neither custody of, nor visitation with, the child.<sup>187</sup> The court held that under New York law the custodial right of a biological parent is always superior to that of someone without a biological relationship to the child unless the biological parent has relinquished the right.<sup>188</sup> In the absence of any evidence that the biological mother had relinquished her rights on these grounds "the inquiry ends."<sup>189</sup> The court held that because the petitioner in this case was neither the biological nor the adoptive parent in this case, she had no standing to seek visitation of the child, citing the strong policy considerations to the contrary in New York regarding custody and visitation.<sup>190</sup>

Likewise, in *Music v. Rachford*, the Florida District Court of Appeals rejected the contention that a party in a similar factual situation was a de

183. *Id.* at 919.

184. *Id.* at 923.

185. 673 N.Y.S.2d 989, 990 (App. Div. 1998).

186. *Id.* at 990.

187. *Id.*

188. *Id.* The parental right can be relinquished by "surrender, abandonment, persistent neglect, unfitness or other like extraordinary circumstances." *Id.*

189. *Id.* at 991.

190. *Id.*

facto parent entitled to visitation rights.<sup>191</sup> In a brief opinion, the court maintained that despite the petitioner's arguments that she was entitled to de facto parental status, the controlling authority indicated that visitation rights are established by Florida statutes and that "the courts have no authority to compel visitation between a child and one who is neither a parent, grandparent, nor great-grandparent."<sup>192</sup> Although the Florida courts in both the precedential case and *Music* declined to specifically define parenthood, these courts implied that only biological or adoptive parents can be considered parents when determining visitation rights.<sup>193</sup>

These cases in Tennessee, New York, and Florida all define parenthood narrowly and restrictively as arising from either a biological relationship with the child or through adoption.<sup>194</sup> The term "biological relationship" requires clarification, although the courts and statutes of these states are generally silent on the precise meaning. By "biological relationship," one might infer generally that either a genetic or a gestational relationship to the child exists. Claiming a genetic relationship, that is, that either sperm or an ovum (and thus, half the child's genome) was provided by the putative parent, would be the natural argument of men (who are incapable of pregnancy) attempting to establish parental status. Women claiming their genetic child carried by a surrogate mother would make the same argument. Conversely, a gestational relationship would be the claim of a woman who had carried to term a child conceived of another's fertilized ovum. But how are these alternative definitions of "biological relationship" to be resolved when, as in the California case of *K.M. v. E.G.*, one putative parent has a genetic relationship to the child (e.g., K.M., who donated the ova) and the other putative parent carried the child to term but has no genetic relationship to the child? Which form of "biological relationship," if either, trumps in determining who is parent? Although it seems unlikely that cases such as *K.M.* will ever be common in the state family courts, modern reproductive technology is continuously providing expanding choices to individuals, and it would seem equally unlikely that *K.M.* will long remain a unique case. To rely on a simple definition of "a biological relationship" as a determinant of parenthood may soon prove unsatisfactory in the determination of parental status.

191. 654 So. 2d 1234, 1235 (Fla. Dist. Ct. App. 1995).

192. *Id.* (citing *Meeks v. Garner*, 598 So. 2d 261 (Fla. Dist. Ct. App. 1992)).

193. *See id.*

194. *See supra* text accompanying notes 170–90.

E. *Closing the Door Altogether: Pennsylvania and the Blocking of Adoption*

One argument against determining parenthood by either the “intentionality” test or the “de facto parent” test is that the non-gestational partner of a same-sex couple could always adopt the child to whom her partner has given birth, establishing both adults as parents in the eyes of the law.<sup>195</sup> Leaving aside the fact that Florida, alone of all the states, has a statutory ban on adoption by homosexual individuals that would prevent this strategy, a recent case in Pennsylvania has established that attempting such an adoption might be problematic.<sup>196</sup>

In the case of *In re Adoption of R.B.F.*, a Pennsylvania court addressed the question of whether a lesbian could adopt the twin children of her long-time partner.<sup>197</sup> The children had been conceived through *in vitro* fertilization with the assistance and support of the partner seeking to adopt.<sup>198</sup> Writing for the majority, Judge Stevens held that, under the language of the state Adoption Act, the intended adoptive mother could not adopt the twins unless the gestational mother consented to giving up her rights as parent to the boys.<sup>199</sup> Judge Stevens emphasized that the court’s opinion was in no way based on the petitioner’s sexual orientation.<sup>200</sup> According to Judge Stevens, “the Adoption Act’s clear and unambiguous provisions do not permit a non-spouse to adopt a child where the natural parents have not relinquished their natural rights, and, therefore, the Act does not afford [the intended adoptive mother] a legally ascertainable interest, notwithstanding the equal protection clause.”<sup>201</sup> The court rejected the Appellants’ argument that a de facto parent may adopt, an argument based on the language of a section of the Adoption Act allowing “any individual” to become an adoptive parent.<sup>202</sup> Holding that the Adoption Act must be interpreted strictly and in light of all of its sections, the court found that the language

195. *See, e.g.*, *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 139 (Ct. App. 2004) (E.G. had explored adoption as a way to have a child of her own.).

196. *But see supra* note 5 (noting that in several states adoption by homosexuals is prohibited).

197. 762 A.2d 739, 740 (Pa. Super. Ct. 2000).

198. *Id.* B.A.F. and C.H.F. had maintained a committed lesbian relationship for over thirteen years before deciding to conceive and raise a family together. C.H.F. successfully underwent *in vitro* fertilization and, in March 1997, gave birth to twin boys. The couple subsequently filed a petition pursuant to the Adoption Act in the Court of Common Pleas, Lancaster County, which dismissed the petition with prejudice. The petitioners then appealed the case to the Superior Court. *Id.*

199. *Id.* at 743.

200. *Id.* at 741.

201. *Id.*

202. *Id.* The Pennsylvania statute states that “[a]ny individual may become an adopting parent.” 23 PA. CONS. STAT. ANN. § 2312 (2001).

of section 2711 was controlling.<sup>203</sup> Section 2711(d) requires that a parent waive all parental rights before a non-spouse may adopt.<sup>204</sup> Only a parent's spouse, the court continued, could adopt a child without the parent being required to waive all parental rights.<sup>205</sup> Because the Pennsylvania legislature had forbidden same-sex marriages, members of same-sex couples are prevented from adopting their partner's children unless their partner agrees to waive all parental rights.<sup>206</sup>

Judge Johnson, in a dissent joined by Judges Kelly and Todd, reasoned that the humane intentions behind the Adoption Act, motivated by "benevolent sentiments of the Legislature that passed it towards a dependent class of our population," demanded a liberal interpretation of the Act rather than the majority's strict interpretation.<sup>207</sup> Judge Johnson based his dissent on three reasons: (1) the majority's strict construction of the Adoption Act contravened the state's Statutory Construction Act and was contrary to legislative intent; (2) the majority failed to recognize the statutory discretion afforded a trial court when deciding to decree an adoption in spite of a parent's retention of parental rights; and (3) the majority's focus on the nature of the relationship between the petitioners and its failure to consider the interests of the children was inappropriate.<sup>208</sup> With respect to the third reason, the court quoted from a Superior Court case, *Blew v. Verta*:

Although courts have gone to great lengths to provide every child with precisely one mother and one father, the realities of family formation and parenting are considerably more complex. Lesbian-mother families are but one alternative to the presumed form. In resolving disputes about the custody of children, the court system should recognize the reality of children's lives, however unusual or complex. Courts should design rules to serve children's best interests. By failing to do so, they perpetuate the fiction of family homogeneity at the expense of the children whose reality does not fit this form.<sup>209</sup>

Judge Johnson stated his regret that the majority chose to turn a blind eye toward the effect of the petitioned-for adoption on the lives of the children.<sup>210</sup> He further noted the inconsistency of such a decision, given that a homosexual couple is completely at liberty, under Pennsylvania law, to

203. *R.B.F.*, 762 A.2d at 741.

204. Section 2711(d)(1) specifies with particularity the terms by which a valid waiver of parental rights can be made. 23 PA. CONS. STAT. ANN. § 2711(d)(1).

205. *R.B.F.*, 762 A.2d at 742-43.

206. *Id.*

207. *Id.* at 745 (quoting *In re McQuiston's Adoption*, 86 A. 205, 206 (Pa. 1913)).

208. *Id.* at 745-51.

209. *Id.* at 748 (quoting *Blew v. Verta*, 617 A.2d 31, 36 (1992)).

210. *Id.* at 748-49.

adopt children and form a family unit as long as neither adult was related, genetically or gestationally, to the children.<sup>211</sup>

The majority's formalist approach represents, in their view, a proper deference both to the legislature's role as the decision maker in matters of public policy, and to the legislature's refusal to sanction same-sex marriages.<sup>212</sup> Yet the legislature's decision not to forbid gay couples from adopting (as long as neither partner is related to the children) reflects neither policy nor bias against families headed by same-sex couples. Indeed, as Judge Johnson noted in his dissent, the majority's rule inconsistently and unreasonably penalizes one type of family headed by same-sex partners (those in which one partner is a biological parent) and promotes other families headed by same-sex couples (those in which neither party is biologically related to the adoptive children).<sup>213</sup> To extend this reasoning to its logical conclusion, a partner in a same-sex couple could not adopt her partner's biological child, but if the two decided to adopt another child from an outside source, then she would be legally entitled to do so. The result would be a family in which both partners were the parents of the child adopted from outside the original family unit; but a biological child could only call one of the partners (her biological mother or father) her parent, in the legal sense of the word.<sup>214</sup>

*R.B.F.* demonstrates some of the difficulties facing same-sex couples hoping to adopt their mutually conceived children. The "adoptive alternative," which promotes a strict statutory definition of parenthood as either biological or adoptive, can be frustrated where, as in Pennsylvania, adoption laws insist that a non-biological parent can only achieve parental status at the expense of the biological parent, who must give up her parental rights.<sup>215</sup> These laws are designed to protect the inviolate status of a biological parent over that of a stranger, unless parental rights have been terminated for cause;<sup>216</sup> however, these laws can also function to deny

211. *Id.* at 749.

212. *Id.* at 742.

213. *Id.* at 749.

214. In 2002, the Supreme Court of Pennsylvania vacated the order of the Superior Court and remanded the case for evidentiary hearings in the trial court. The court held that the Adoption Act provides nonmarried prospective adoptive parents an opportunity to establish cause why the legal parent need not relinquish parental rights, and that the opportunity to show cause had been denied by the lower court's interpretation of the statute. The court cautioned that granting of such cause was within the trial court's discretion and that their holding did not simply open the doors to all adoptions by unmarried couples. The court did not address the appellant's contention that the Adoption Act denies equal protection of the law guaranteed by the Pennsylvania Constitution as well as the Fourteenth Amendment to the United States Constitution. *In re Adoption of R.B.F.*, 803 A.2d 1195, 1202 (Pa. 2002).

215. *See R.B.F.*, 762 A.2d at 742-43.

216. *Id.* at 743.

parental status to an individual who has acted in the role of de facto parent since conception. In the case of a de facto parent, no threat to the biological parent is implied by granting to the de facto parent additional parent status. Indeed, granting parental status in such a case would strengthen the cohesive bonds of the family, legally and emotionally, surely a desirable object in all cases.

### III. CONSTRUCTING A MODEL FOR NEW DEFINITIONS OF PARENTAGE

Scenarios such as those described in this article in which non-gestational, same-sex partners attempt to achieve status as parents after a relationship fails, will inevitably become more common in the state courts. The most recent federal census revealed that approximately one-third of all lesbian households and one-fifth of all homosexual male households have children.<sup>217</sup> Furthermore, although there are no strong data concerning rates of divorce or separation among gay and lesbian couples in the United States (where homosexual marriages are generally illegal), recent studies suggest that the rate of separation for committed homosexual couples is comparable to that of heterosexual couples.<sup>218</sup> With increasing numbers of families headed by same-sex parents, and with separation rates comparable to divorce rates of heterosexual couples, custody and visitation disputes appear to have become a permanent fixture in the family law landscape. Furthermore, the reproductive rights of lesbians are constitutionally protected, as with all individuals in the United States; one cannot prevent an individual from reproducing merely because of that person's sexual orientation.<sup>219</sup> So families headed by lesbian partners will continue to be generated, even in the presence of laws preventing homosexual marriage or adoption. As this Note has illustrated, different states have approached the question of defining parenthood in same-sex families in very different manners. But with the advent of more efficient reproductive technologies and greater numbers of families headed by same-sex couples, American courts need a legal definition of "parent" that can be consistently and evenly applied to cases such as those described in this Note.

217. U.S. CENSUS BUREAU, *supra* note 2, at 9 tbl.4.

218. See generally Margaret Nichols, *Lesbian Relationships: Implications for the Study of Sexuality and Gender*, in *HOMOSEXUALITY/HETEROSEXUALITY* 350 (D.P. McWhirter et al. eds., 1990). Although relatively little data exists on the longevity of lesbian relationships, a single eighteen-month study reported by Blumstein and Schwartz in 1983 found that lesbian couples had higher dissolution rates than any other types of couples. Although social factors may complicate this, Nichols assumes that there is little reason to believe that lesbian relationships are significantly longer-lived than gay male or heterosexual relationships. *Id.* at 358.

219. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that procreation is a basic liberty).

First of all, the definition of “biological parent” needs to be more precisely defined. A “genetic parent” is one who contributes one-half of the child’s nuclear genetic material in the form of chromosomal deoxyribonucleic acid (D.N.A.).<sup>220</sup> A “gestational parent” is one in whom a fertilized ovum (fertilized naturally via intercourse or following *in vitro* fertilization) implants itself into the lining of the uterus; the fertilized ovum forms a placental connection with the mother and is eventually born. Historically, for women, being both genetic and gestational parent were one and the same. However, as this Note has demonstrated, it is currently possible for one woman to be the gestational mother of a child to whom she has no genetic relationship, and for her partner to be the genetic mother in spite of the fact that she neither carried nor gave birth to the child.<sup>221</sup> Alternatively, one partner could be the gestational mother while neither is the genetic mother if sperm and ova are donated by a third party (as can also happen). Given these possibilities, it seems that to arbitrarily prefer or give superiority to either definition over the other is an unsatisfactory solution. Cases arising over disputes concerning surrogate motherhood agreements typically also involve a struggle to establish parental rights between genetic parents on the one hand and gestational mothers on the other. Attempting to ascertain who the “real mother” is in cases involving surrogate childbirth has been controversial, and many have viewed the decisions with skepticism.<sup>222</sup> However, in most of the surrogacy cases, the parties believed they had an understanding that the genetic parents would have custody of the child following birth: the surrogate mother typically would only carry the fetus to term and deliver it.<sup>223</sup> But even these seemingly straightforward contractual arrangements seem to break down frequently amidst emotional upheaval for all parties. Given the difficulty in asserting whether a parental right determined by a genetic claim is superior to a right determined by a gestational claim, state legislatures and courts might wish to view the idea of genetic versus gestational claims to “biological parenthood” with mistrust and adopt a broader, more informed definition of motherhood that embraces both.

220. Nuclear DNA is found in the nucleus of cells in the body and is the source of expression of heritable characters. Mitochondrial DNA, found in cellular organelles called mitochondria, is inherited strictly from the mother’s ovum.

221. See, e.g., *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 141 (Ct. App. 2004).

222. See Ardiss L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567, 575 (1993).

223. See *id.* (“[S]ome courts have looked to genetics as the primary basis to determine who is the parent.”).

Given the difficulties in ascertaining claims of biological parenthood and in determining whether genetic, gestational, or neither claim should be superior, courts should employ the more reliable “intentionality test” as employed in California in the case of *Kristine Renee H.* Courts can use this test to establish de facto parental status, as has been done in both Massachusetts and Delaware. If both partners act together, in concert, and by agreement, to bring a life into the world, and if both parents act in a parental role during the early life of the child, providing emotional, physical and financial support, courts should consider such activities as determinative of parental status. As the court in the Delaware case of *Chambers v. Chambers* declared, if both partners had not agreed to act together, the child would not have been born.<sup>224</sup> The acts of creating a new life together with the understanding that the pair would be forming a family unit with the child and continuing to act as parents following birth should be sufficient to establish both individuals as parents. This proposed standard is more inclusive than the one employed by the California court in *K.M. v. E.G.* (which looked only to intentional behavior prior to and at conception), and is similar to that employed both in *Kristine Renee H.* and in Massachusetts’s “de facto parent” decision in *E.N.O.*<sup>225</sup> The criteria employed in *Kristine Renee H.* and *E.N.O.* can be employed to distinguish cases such as those described in this Note from surrogacy cases in which the original intent (barring fraudulent misrepresentation) is that the gestational mother would give up the child and the genetic parents and the child would form the subsequent family unit. The intentions and behavior of both partners, before and after birth, should be a determining criterion to be employed by the courts in assessing parental status for the purposes of custody and visitation rights.<sup>226</sup>

Considering intentionality in determining parental status has an additional benefit. In discerning the intentions of both partners, both before and after birth, towards conceiving and raising the child, the welfare and interests of the child also become an implicit and important factor in determining who is a parent. Although a few courts have acknowledged the harsh consequences that their decisions have caused for children denied visitation

224. No. CN00-09493, 2002 WL 1940145, at \*10 (Del. Fam. Ct. Feb. 5, 2002).

225. See *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 892 (Mass. 1999).

226. Although the subject of same-sex marriage is currently unpopular in most of the U.S., introduction of such marriages would substantially ameliorate the problems described in this Note. If a married couple participates in the conception and rearing of a child there is a typically a presumption of parentage for both members. This is certainly the case with *in vitro* fertilization in married couples. Although adoption of same-sex marriage would necessarily mean applying the term “paternity” in a gender-neutral manner, that would not be inconsistent with a gender-neutral definition of marriage rather than a definition defining it as a union between one (1) man and one (1) woman.

with one whom they perceived as a "mother," more often the courts are silent on the matter, preferring to engage in formalistic statutory and common law analyses.<sup>227</sup> Small children, however, tend to love their parents uncritically. The intense emotional bonding between a child and an adult acting in a parental role is a commonplace miracle of human existence. It is dependent neither on genetics nor gestation, as is routinely seen in individuals who adopt unrelated infants as their own. The courts do a serious injustice in deciding to instantly remove one person from her status of "parent," sometimes after years of caregiving, on making a decision that that such an individual has no legal standing to ever again see the child she treated as her own. As such, the use of the intentionality test represents an important positive consideration of social policy in that it protects the interests of children of legally and socially sanctioned family units. Social policy concerns should dictate that children, who are vulnerable and generally incapable of fending for themselves, should be able to depend on the presence and support of those whom they have always considered parents. This is particularly so when those who have acted in a parental role ardently desire to continue to do so. Given the new reproductive methodologies and the changing social attitudes that have made the opportunity to generate a family both feasible and societally acceptable for a greater variety of couples, the American legal system must ensure that the interests of all members of the families so generated, particularly the interests of children, are duly considered.

#### CONCLUSION

Emerging reproductive technologies and changing societal attitudes concerning the makeup of a family have resulted in numerous cases where former members of same-sex couples have been denied legal status as a parent despite playing active roles in conception, birth, and childrearing. Despite the current admixture of the states' political viewpoints on same-sex marriage or families, such family units are now a fixture of the American social landscape, and the situations described in this Note are not simply going to go away. The states' legal systems thus require a consistent and just set of definitions of parentage by which these disputes can be resolved. State courts need to adopt a definition of parentage that is broader and more inclusive than traditional definitions. The biological definition of parent needs to be expanded to embrace both genetic and gestational forms of parentage, and neither definition should categorically exclude the other.

227. See, e.g., *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 143–54 (Ct. App. 2004).

Furthermore, a new definition of “parent” should be added to the list of legal definitions of parentage, a definition based on participation by the nongestational partner in conceiving, giving birth, and acting in a parental role to a child; such definitions should not be excluded by either biological definition.

EPILOGUE: *K.M. v. E.G.*

As this Note was preparing to go to press, the California Supreme Court heard and decided *K.M.*’s appeal.<sup>228</sup> The court reversed the decision of the appellate court and held that both *K.M.* and *E.G.* were parents of the twins.<sup>229</sup> Furthermore, the court held that the statute treating sperm donors as if they are not natural fathers of children conceived with their sperm was not applicable to the case.<sup>230</sup>

In its analysis, the court noted an important similarity between this case and that of *Johnson v. Calvert*, namely that the couples in both cases intended to produce a child that would be raised in their own home.<sup>231</sup> Although *E.G.* disputed *K.M.*’s claim that she was a parent and not a donor, the court found that the undisputed fact that the couple lived together and intended to raise the conceived children in their home was controlling in the determination that section 7613(b) did not apply.<sup>232</sup> That statute has its origins in the Uniform Parentage Act of 1973, which states that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”<sup>233</sup> In its initial adoption of the Uniform Parentage Act, the California legislature made a single critical change and expanded the reach of the provision to extend to both married and unmarried women.<sup>234</sup> Thus, as the court explained, California’s adoption of the modified Act afforded both married and unmarried women protection from paternity claims made by a semen donor, and it protected the donors from possible paternity claims asserted by married and unmarried women.<sup>235</sup>

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

229. *Id.* at 675.

230. *Id.*

231. *Id.* at 679 (citing *Johnson v. Calvert*, 851 P.2d 776, 782 n.10 (Cal. 1993)).

232. *Id.* at 680.

233. *Id.* at 679 (UNIF. PARENTAGE ACT (1973) § 5(b) (amended 2000), 9B U.L.A. 369, 408 (2001)).

234. *Id.*

235. *Id.*

According to the court, the California legislature had intended this change to make artificial insemination available to single women.<sup>236</sup> But the court found that there was no reason to believe that the legislature had intended to expand the reach of the statute to apply where an unmarried man donated semen to impregnate his unmarried partner in order to conceive a child that would be raised in the couple's joint home.<sup>237</sup> Because K.M. and E.G. were living together and intended to raise the children in their joint home, the court found that the lower courts' reliance on section 7613(b) was misplaced and that the statute was inapplicable.<sup>238</sup>

The court found that K.M.'s genetic relationship to the twins established a maternal relationship, as did E.G.'s giving birth to the children.<sup>239</sup> The court noted that although it had stated in *Johnson* that a child may have only one natural mother, *Johnson* did not preclude "a child from having two parents both of whom are women."<sup>240</sup>

The court held that because the Uniform Parentage Act determined parentage of the twins, both K.M. and E.G. were parents—K.M. genetically and E.G. gestationally.<sup>241</sup> Furthermore, because both were parents, the "intentionality" was inapplicable—K.M. did not dispute the fact that E.G. was the twins' mother, but she asserted that she was the twins' mother in addition to, rather than instead of, E.G.<sup>242</sup> Thus, because there was no "tie to break," the intentionality test applied in *Johnson* was inappropriate for this case.<sup>243</sup>

The court expressly declined to expand the intentionality test to cover cases such as K.M.'s, noting that the Uniform Parentage Act did not explicitly use intent to conceive in outlining the determination of parental status.<sup>244</sup> As the court explained, if a man engaged a sexual intercourse with a woman who falsely assured him that she was incapable of becoming pregnant, the man would still be the natural parent of any resulting child despite his lack of intent to become a father.<sup>245</sup>

Finally, the court found that the consent form signed by K.M. did not bar her from asserting parental rights, despite the form's claims to the con-

236. *Id.* at 679–80.

237. *Id.* at 680.

238. *Id.*

239. *Id.*

240. *Id.* at 681.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

trary.<sup>246</sup> According to California Family Code section 7632, “[r]egardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this chapter.”<sup>247</sup> The court held that a woman who supplied ova for impregnating her lesbian partner with the understanding that the resulting child will be raised in their joint home cannot waive her responsibility to support that child.<sup>248</sup> Also, such a waiver cannot “effectively cause that woman to relinquish her parental rights.”<sup>249</sup>

The California Supreme Court’s decision represents a vindication of the Uniform Parentage Act, but it is a narrow application of that Act. In rejecting the intentionality test of *Johnson, K.M.* potentially narrows the scope of that test. *K.M.* is an unusual case in that both partners qualified as “parents” under the code; such was not the case in *Kristine Renee H. v. Lisa Ann R.*, in which only one parent satisfied the code’s biological definitions of parent and in which the intentionality test was invoked.<sup>250</sup> However, the court left open the California Family Code’s alternative definition of “parent” as “one who takes a child into his home and holds it out to the world as his own” that was employed in *Kristine Renee H.*<sup>251</sup> Thus, the court left this as a possible alternative approach in expanding the role of parentage to fit the evolving face of the family unit in America. The Uniform Parentage Act of 2000 deleted this definition,<sup>252</sup> but perhaps future versions of the Act should consider its reinclusion in order to provide the flexibility and protections provided to non-gestational partners in same-sex relationships who wish to attain the legal status of parent.

246. *Id.* at 682.

247. *Id.*

248. *Id.*

249. *Id.*

250. 16 Cal. Rptr. 3d 123, 127 (Ct. App. 2004).

251. *See K.M.*, 117 P.3d at 682.

252. *See* UNIF. PARENTAGE ACT (2000) § 204, 9B U.L.A. 311 (2001).