MY TWO MOMS: CALIFORNIA'S SUPREME COURT DECISION IN *K.M. V. E.G.*[1] AND WHY GAY MARRIAGE OFFERS THE BEST PROTECTION FOR SAME-SEX FAMILIES

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I. INTRODUCTION

With growing regularity, our justice system must resolve child custody cases[2] by trying to decide what is in a child's best interest. This is complicated by the fact that families are not as simple as they once were. Remarriage, gay parenting[3] and reproductive technology all have changed society immensely. It is the responsibility of the courts to fashion the law to meet these new challenges where the legislature has failed. Currently, forty states have laws banning same-sex marriage.[4] After the recent passage of eleven constitutional amendments in the 2004 election,[5] as well as a constitutional amendment in both Texas and Kansas in 2005, eighteen of those states now have constitutional amendments prohibiting same-sex marriage.[6] The courts must regularly make child custody decisions when same-sex unions fail, with

1. Initials are used to protect the identity of the children involved in the case.

* J.D., University of Wisconsin Law School, 2006.

2. DivorceMagazine.com, U.S. Divorce Statistics, http://www.divorcemag.com/statistics/statsUS.shtml (last visited Feb. 28, 2006) (stating that as of 2002, ten percent of the population is divorced, up from eight percent in 1990 and six percent in 1980); *see also* Divorce Rates — Divorce Statistics Collection, http://www.divorcereform.org/rates.html (last visited Feb. 28, 2006) (claiming that 0.38% of the population, per capita, per year, gets divorced, and since divorce involves two people, the percentage is more meaningful if it is doubled).

3. Human Rights Campaign, a gay advocacy organization, approximates that there are currently between one and three million children in the United States that have gay parents. Jen Christensen, *Parent vs. Parent: Gay Dads and Lesbian Moms Are Winning New Recognition of Their Rights, but Many Still Lose Their Children*, THE ADVOCATE, Dec. 21, 2004, at 27, 29.

4. Lambda Legal, Background: State Laws and Proposed Amendments to State Constitutions to Deny Civil Rights to Same-Sex Couples, http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1530 (last visited Feb. 28, 2005).

5. National Conference on State Legislatures: Same-Sex Marriage Measures on the 2004 Ballot, http://www.ncsl.org/programs/legman/statevote/marriage-mea.htm (last visited Apr. 2, 2006); *see also*, Cheryl Wetzstein, *Gays Take Fight on Marriage to Court*, WASH. TIMES, Nov. 5, 2004, at A1.

6. Human Rights Campaign, Statewide Marriage Laws, http://www.hrc.org/ (follow "Marriage" hyperlink under "Get Informed"; then follow "Map: Statewide Marriage Laws" under "State-By-State Information") (last visited Apr. 2, 2006) [hereinafter Human Rights Campaign, Statewide Marriage Laws]

absolutely no guidance from the legislature because state law refuses to recognize these unions.

A recent development in California law, however, has greatly expanded the rights of gay couples. In a recent California case, the state appellate court held that a woman was not entitled to parental rights after she donated her eggs so that her lesbian partner could conceive, and then helped raise their twins.[7] The California Supreme Court reversed, holding that both women had legal parentage claims over the children.[8] This case highlights the struggle gay couples face when they create families. The law neither allows couples to marry[9] nor generally protects non-biological parents.

If a gay relationship comes to an end after the couple has a family, there is no single legal framework in place to protect parental rights. As one journalist aptly stated, "[G]ay parents who break up are still finding themselves in legal limbo, forced to sew together a patchwork of protections to ensure that both are shown due consideration as their children's legal parents."[10]

This Note will explore K. and E.'s unique story within the framework of same-sex marital and parental rights. Part II will describe relevant background information, including existing familial rights for homosexuals, and the development of California law regarding surrogacy contracts. Part III will explain the specifics of *K.M. v. E.G.*, both factually and legally, while Part IV will follow-up with alternative legal theories that the California Appellate Court could have used to render a different outcome in the case. Finally, this Note will show that marriage is a right that should be extended to same-sex couples, but until that time, every member of a couple should know his or her rights and responsibilities before deciding to create a family.

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

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

9. *But see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (amending Massachusetts law to allow gay marriage). In addition to Massachusetts same-sex marriage law, Vermont and Connecticut have civil union laws that "provide state-level spousal rights to same-sex couples within the state." Human Rights Campaign, Map of Relationship Recognition (Apr. 2005), http://www.hrc.org/ (follow "Marriage" hyperlink under "Get Informed"; then follow "map of relationship recognition" hyperlink under "Massachusetts Court Case" at the top of the page). Furthermore, California has enacted a domestic partnership law bestowing almost all marital benefits to same-sex couples. *Id.* Finally, Hawaii, Maine and New Jersey all have state laws that bestow some marital benefits on same-sex couples. *Id.*

10. Christensen, *supra* note 3, at 27.

II. BACKGROUND

A. *The Struggle for Constitutional Equality for Same-Sex Couples in the United States*

Many of the problems that arise when same-sex couples have families together and subsequently split up stem from the fact that they do not enjoy full constitutional rights, namely the right to marry.[11] Some states also do not allow same-sex couples to adopt children together,[12] which is not a constitutional right, but a very important one in the context of gay relationships.[13] A movement led by gay rights activists is currently underway to change state laws in order to guarantee that homosexuals can enjoy these rights.[14] Only the State of Massachusetts allows same-sex marriage, while other states have less comprehensive protections of gay unions.[15]

Currently, there are at least three major constitutional theories that advocates of same-sex marriage have put forth in order to win marital rights for homosexuals through the courts. In *Goodridge v. Department of Public Health*, Massachusetts granted homosexuals the right to marry on equal protection grounds, claiming that homosexuals as a class are denied equal protection of the law when, as individuals, they are not allowed to marry the person of their choosing.[16] Prior to the *Goodridge* decision, the Hawaii Supreme Court held in 1993 in *Baehr v. Lewin*[17] that the denial of marriage rights to homosexuals is presumed to be a violation of the Equal Protection Clause because it is discrimi-

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11. *See id.*

12. Currently, several states, including Colorado, Nebraska and Wisconsin do not allow co-adoptions or second- parent adoptions by same-sex couples. Joan Heifetz Hollinger, *Second Parent Adoptions Protect Children with Two Mothers or Two Fathers, in* FAMILIES BY LAW: AN ADOPTION READER 235, 238 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

13. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 1038 (4th ed. 2004).

14. *See* Lambda Legal, http://www.lambdalegal.org (last visited Feb. 28, 2006).

15. In a Vermont case, *Baker v. State*, the Supreme Court of Vermont held that same-sex couples must be afforded the same rights as other couples under the Vermont Constitution. 744 A.2d 864 (Vt. 1999). It deferred to the legislature, however, on how to address the issue. *Id.* at 867. The legislature then passed the act creating civil unions, which are not marriage, but afford the same rights as marriage. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002). Other states have followed suit, enacting laws that provide some or all marital benefits to same-sex couples. *See supra* note 9.

16. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

17. 852 P.2d 44 (Haw. 1993). The court held that the statute in question that denied marriage licenses to same-sex couples was "presumed to be unconstitutional unless . . . the State of Hawaii, c[ould] show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights." *Id.* at 67. This case was later rendered moot by a state constitutional amendment allowing the legislature to limit marriage to opposite-sex couples. HAW. CONST. art. I, § 23. The Hawaii legislature then amended the marriage statute to define marriage as "between a man and a woman." HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005).

nation on the basis of sex.[18] The third theory for allowing gay marriage is premised on the notion that marriage is a fundamental right. A recent California circuit court opinion held that homosexuals are denied a fundamental right when they are barred from marriage.[19] Interestingly, the United States Supreme Court found a fundamental right to marriage when it overturned anti-miscegenation laws.[20] Each theory has its merits and pitfalls; it remains to be seen which theory will prevail in the future.[21]

In general, gay rights are gaining recognition throughout the country. Recently, there has been a backlash against gay marriage with the passage of eleven new state constitutional amendments banning gay marriage.[22] Another blow to the gay rights movement and the cause of marriage equality for gays came when President Clinton signed the Defense of Marriage Act (DOMA) into law in 1996. Under DOMA, the federal government only recognizes marital unions between a man and a woman, and states are permitted to do the same.[23]

Although not directly affecting the legality of same-sex marriage, the U.S. Supreme Court has rendered a few decisions that are favorable towards homosexuals in recent years. One of the first landmark cases in the area of expanding legal protection for homosexuals was *Lawrence v. Texas*,[24] in which the Court overturned solid precedent and held antisodomy laws unconstitutional.[25] A particularly important aspect of the holding is that the Court did not use the Equal Protection Clause of the Fourteenth Amendment to overturn the law simply because it targeted homosexuals, but instead found that no law banning sodomy could ever be constitutional.[26] As stated by author Evan Gerstmann, this "represents a new recognition of, and

18. *Baehr*, 852 P.2d at 64.

19. Press Release, Lambda Legal, California State Court Says Same-Sex Couples Must Be Allowed to Marry; Lambda Legal Says Ruling Is "Powerful, Historic and Legally Solid," (Mar. 14, 2005), http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1664.

20. Loving v. Virginia, 388 U.S. 1, 12 (1967).

21. EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 39-40, 59-63, 67-69 (2004).

22. Lambda Legal, *supra* note 4.

23. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); and 28 U.S.C. § 1738C (2000)). Currently, thirty-nine states have laws that purport not to honor marriages of same-sex couples from other jurisdictions. Human Rights Campaign, Statewide Marriage Laws, *supra* note 6. Twenty-four of those states also have passed laws that define marriage between a man and a woman, and fifteen of those states also have amended their state constitutions to purport to prohibit marriage between same-sex couples. *Id.*

24. 539 U.S. 558 (2003).

25. GERSTMANN, *supra* note 21, at ix. The Court overturned *Bowers v. Hardwick*, which had upheld Georgia's broadly defined sodomy law. *Id.*

26. The Court concluded that it was a violation of substantive due process under the Fourteenth Amendment to proscribe private, sexual behavior between two consenting adults. *Lawrence*, 539 U.S. at 578.

respect for, the human dignity of gays and lesbians."[27] Furthermore, it destroyed one argument against same-sex marriage: the idea that these unions could never be legally consummated in states with antisodomy laws.[28]

Another important United States Supreme Court case in the area of gay rights, *Romer v. Evans*, struck down an amendment to the Colorado Constitution that prohibited any legislative, judicial, or executive action at any state or local level designed to protect homosexuals.[29] The Court ruled that the amendment did not even meet the most basic rational basis review because there was a poor fit between the means, banning any protection of homosexuals, and the ends, preventing those opposed to homosexuality from having to interact with homosexuals and preserving state resources for other equal protection claims.[30] Furthermore, the Court found that because of the poor fit between the means and the ends, there could be no other explanation for the law except for animus towards homosexuals.[31] While this case was an important development in the area of gay rights, it did not extend equal protection to homosexuals as a class. Instead, the Court analyzed the law under rational basis, the tier reserved for ordinary legislation that does not target a "suspect class."[32] The Court did not even discuss the possibility of homosexuals as a suspect class, ignoring the issue altogether. This reasoning does not bode well for the future of same-sex marriage under the Equal Protection Clause of the Fourteenth Amendment, on the basis that these laws discriminate against homosexuals as a suspect class.[33] A law banning same-sex marriage could survive a rational basis scrutiny for many reasons, such as the desire for a state to promote only dual-gender parenthood.[34]

The Court has not yet granted certiorari to hear any same-sex marriage case, signaling that it is not ready to protect same-sex marriage and is leaving the issue to the state courts to decide.[35] As mentioned above, problems arising from the dissolution of gay relationships, especially surrounding parental rights, are coming

27. GERSTMANN, *supra* note 21, at xi.

28. *Id.* at x.

29. 517 U.S. 620 (1996).

30. *Id.* at 632-33.

31. *Id.* at 632.

32. *Id.* at 631.

33. *See* GERSTMANN, *supra* note 21, at 39.

34. *Id.*

35. *See* Littleton v. Prange, 531 U.S. 872 (2000) (United States Supreme Court denied the petition for writ of certiorari. In the case, a transsexual woman was denied a wrongful death cause of action when her husband died. The Texas Court of Appeals found that her marriage was void because she was a male-born person, and Texas law did not permit two males to marry. Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999)).

before the court system with growing regularity.[36] Often, the children produced in these relationships are not treated fairly because the courts deny them access to the nonbiological or nonadoptive parent.[37] For example, in Colorado, Elsey McLeod filed for custody rights to the daughter she helped raise with her former partner.[38] Her former partner became an evangelical Christian, and used money from an anti-gay marriage group to fund her quest to deny McLeod parental rights.[39] McCleod was not allowed to adopt her daughter, because neither China (her daughter's country of origin) nor Colorado recognize or allow adoptions by same-sex couples.[40] This is just one case of many that highlights the prevalence of this problem in the United States today.[41]

Another case that presented a challenge to the courts and addresses same-sex unions and the custody of children born from those unions is *Miller-Jenkins v. Miller-Jenkins*.[42] This case involved a lesbian couple who entered into a civil union in 2000.[43] Lisa gave birth to a child while the two women were joined in the union, and Janet acted as a second parent.[44] When the women sought to dissolve the union in 2003, the judge awarded visitation rights to Janet, even though she was not the biological mother.[45] However, Lisa then took their daughter to Virginia, where the child was born, and was granted sole legal custody by a district court judge.[46] Lisa's lawyer argued that when the civil union was dissolved, the Vermont court should not have determined parentage, but Janet has appealed.[47] The issue might come down to Virginia's Affirmation of Marriage Act,[48] which prohibits same-sex marriage versus the federal Parental Kidnapping Protection Act,[49] which was designed to prevent parents from leaving one state with a child.[50]

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36. *But see* ELLMAN, *supra* note 13, at 1039 (explaining there is very little empirical evidence on the presence of children among gay and lesbian couples).

37. GERSTMANN, *supra* note 21, at 32.

38. Christensen, *supra* note 3, at 27.

39. *Id.*

40. *Id.*

41. *See also* T.F. v. B.L., No. SJC-09104, 2004 Mass. LEXIS 566 (Mass. 2004). In that case, the Massachusetts Supreme Court ruled that a woman who consented to creating a family with her former partner was not required by law to pay child support upon the dissolution of the relationship because she did not become a de-facto parent simply because she helped to raise the child. *Id.*

42. No. 454-11-03RcDMd (Rutland Co., Vt., Fam. Ct.); No. CH04-280 (Frederick Co., Va., Cir. Ct.).

43. Mark Hamblett, *States Clash over Same-Sex Parental Rights, Civil Unions*, PALM BEACH DAILY BUS. REV., Sept. 23, 2004, at 10.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. VA. CODE ANN. § 20-45.3 (2004).

49. 28 U.S.C. § 1738A (2000).

50. *Id.*

The Supreme Court has issued a signal that it is not ready to fully protect same-sex families. It recently denied certiorari to a Florida case that upheld the ban on gay adoption in the state.[51] It appears that at this time, the Justices are not prepared to overturn bans on same-sex adoption under the Due Process Clause. This leaves gay couples and individuals in certain states with fewer options to have families and less protection when they do. As a result, some children of same-sex couples, such as the twins born to K. and E., may be denied contact with a loving parent when the relationship ends.

B. *California Law on Surrogacy Contracts*

The law in California determining legal parentage when reproductive technology is involved is fairly well developed. It is important to note that *K.M. v. E.G.* not only involved the rights of same-sex couples who create families, but also the issue of interpretation of surrogacy contracts. The landmark case in this area is *Johnson v. Calvert*, where the Supreme Court of California held that legal parentage should be determined by looking at the intent of the parties.[52] According to the court, the legal parents are those who intended to bring about the birth of the child.[53]

In *Johnson*, a married couple hired a surrogate to carry their child. Their own egg and sperm were used to create the zygote and impregnate the surrogate.[54] They had a surrogacy contract that stipulated that the surrogate, Anna Johnson, would relinquish all parental rights to the child and that it would be the Calverts' child upon birth.[55] In exchange, Johnson was compensated with $10,000 and a life insurance policy.[56]

The relationship between the two parties crumbled, and before the child was born, Johnson threatened to keep the baby.[57] The Calverts sued to be named the parents of the unborn baby, and Johnson filed a motion to be named the mother of the baby.[58] The Supreme Court of California looked to the Uniform Parentage Act (UPA)[59] to establish parentage.[60] The Act provides a means of establishing the "'parent and child relationship,'" which is defined as "'the legal relationship existing between a child and [the child's] natural or adoptive parents incident to which the law confers or imposes rights,

51. Maya Bell, *Justices Let Ban Stand on Gay Adoption: Top Court Won't Hear Challenge to Florida Law*, ORLANDO SENTINEL, Jan. 11, 2005, at A1.
52. 851 P.2d 776 (Cal. 1993).
53. *Id.* at 782-83.
54. *Id.* at 778.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Uniform Parentage Act, CAL. FAM. CODE § 7600 (West 2004).
60. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).

privileges, duties and obligations.'"[61] Parentage is thus defined as "natural or adoptive."[62] The Court found that fatherhood was not at issue in the case and focused on who was the "natural" mother.[63] Crispina Calvert presented a genetic test that proved that she was the baby's mother, and Johnson presented evidence of gestation.[64] Both genetic consanguinity[65] and gestation are proof of motherhood under the statute.[66] However, the court held that in California, a child may have only one legal mother who, in this case, was Crispina Calvert because she intended to create the child.[67] This holding affirmed that the Calverts were the legal parents and that Johnson had no rights to the child, including visitation.[68]

A California appellate court afffirmed this standard in *Buzzanca v. Buzzanca*.[69] In that case, John and Luanne Buzzanca hired a surrogate to carry a child who was conceived from a donor egg and donor sperm.[70] Shortly before the child was born, John petitioned for divorce, claiming that he was not the father of the child, and that he accepted no financial or emotional responsibility for the child.[71] Luanne, on the other hand, claimed that she and her husband were the parents.[72] The surrogate claimed no responsibility for the child.[73] The trial court bizarrely held that the child had no legal parents.[74] The court reasoned Luanne could not be the mother because she was neither the genetic parent, nor the birth mother, and John could not be the father because he was not the genetic parent.[75] The appellate court overturned the trial court.[76] First, the court explained that fatherhood can be established when a man is not the genetic parent of a child—for example when a man consents to impregnating his wife using donor sperm. Similarly, motherhood also could be established under this standard, even outside of adoption.[77] The court found that

61. *Id.*
62. *Id.*
63. *Id.* at 781.
64. *Id.*
65. Consanguinity is defined as "the quality or state of being consanguineous," and consanguineous is defined as "of the same blood or origin . . . descended from the same ancestor." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 264 (Frederick C. Mish et al. eds., 11th ed. 2003).
66. *Calvert*, 851 P.2d at 782.
67. *Id.*
68. *Id.* at 778.
69. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
70. *Id.* at 282.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 293.
77. *Id.* at 284.

John and Luanne were the legal parents.[78] The appellate court reaffirmed that the intent to create the child is key to establishing parenthood in reproductive technology cases.[79]

The California Supreme Court has squarely addressed the issue of who is the legal mother under California law when two women have equal claims of parentage under California's UPA. As a matter of public policy, both *Johnson v. Calvert*[80] and *Buzzanca v. Buzzanca*[81] were decided appropriately. These decisions support the use of reproductive technology and provide couples with the opportunity to conceive or carry a child, which is very important and now technologically feasible for anyone who can afford it. While these decisions both involve surrogacy cases, neither case addressed this issue in the context of a surrogacy contract made between lesbian partners, where both women contributed not only to the pregnancy, but to the rearing of the children as well. *K.M. v. E.G.* presented this unique situation to the court.

III. THE CASE OF *K.M. v. E.G.*

A. *The Story*

K.M. and E.G. met in 1992 at a dinner party in California, where they both lived.[82] The two women began a relationship in 1993, and six months later they registered as domestic partners in San Francisco.[83] Even before she met K., E. was interested in having children. She and K. discussed having children from the beginning of the relationship.[84] E. wanted to be a single parent; however, she had witnessed nasty custody battles and wanted to avoid going through one herself.[85]

Early in the relationship, E. decided to be artificially inseminated with anonymous donor sperm from a sperm bank.[86] She consulted numerous people, including K., about whom she should choose as the father, and ultimately selected an attractive, dark-haired man with Irish roots.[87] She was inseminated twelve times over the course of the next year but was never impregnated.[88] K. was with her every step of the way and cared for her after each insemination.[89]

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78. *Id.* at 288.
79. *Id.* at 289.
80. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
81. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
82. Peggy Orenstein, *The Other Mother*, N.Y. TIMES MAG., July 25, 2004, at 24, 26.
83. *Id.*
84. *Id.*
85. *Id.* at 27.
86. *Id.* at 26.
87. *Id.*
88. *Id.*
89. *Id.*

In 1994, E. tried in vitro fertilization,[90] but did not produce any viable eggs.[91] K. also considered becoming pregnant, but she suffered health problems, including fibroids in her uterus, that made it impossible.[92] In fact, K.'s uterus had to be removed because of her condition. Her eggs were fine, but she would never be able to carry a child.[93] The director of the clinic then suggested that E. and K. use K.'s eggs and E.'s womb to produce a child.[94]

E. later claimed that she was reluctant to use K.'s eggs and agreed to do so only if she were the sole legal mother.[95] She told K. that if their relationship remained solid, she would consider a second-parent adoption by K. in five years.[96] In contrast, K. later claimed that they planned to be domestic partners and raise the children together. She denied agreeing to E.'s terms.[97]

In the spring of 1995, K. began the in vitro process with a series of injections.[98] Before the first shot, she had to sign a generic consent form at the clinic, agreeing in three different places to waive her rights to the eggs or any children that might come of them.[99] E. and K.'s versions of the facts differ here as well. E. alleged that they were given the form weeks in advance, whereas K. claimed that she had never seen it before and had only a few minutes to read it before the injections began.[100]

The form may have been designed for anonymous donors given that it included the phrase: "I agree not to attempt to discover the identity of the recipient."[101] In fact, the clinic no longer requires lesbian couples to sign this form.[102] However, at the time K. donated her

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90. In vitro fertilization is defined as:
fertilization of an ovum outside the body, the resultant zygote being incubated to the blastocyst stage and then implanted in the uterus. The technique, pioneered in Britain, resulted in 1978 in the first *test-tube baby.* It is undertaken when a woman has blocked fallopian tubes or some other impediment to the union of sperm and ovum in the reproductive tract. The mother-to-be is given hormone therapy causing a number of ova to mature at the same time . . . . Several of them are then removed from the ovary through a laparascope. The ova are mixed with sperm from her partner and incubated in a culture medium until the blastocyst is formed. The blastocyst is then implanted in the mother's uterus and the pregnancy allowed to continue normally.
THE BANTAM MEDICAL DICTIONARY (5th ed. 2004).

91. Orenstein, *supra* note 82, at 26.
92. *Id.*
93. *Id.* at 26-27.
94. *Id.* at 27.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

eggs to E., K. had to sign the form waiving her legal rights to the eggs and subsequent children born from them.[103]

E. became pregnant with twin girls who were born in December of 1995.[104] At the hospital E. proposed to K., and the couple exchanged vows at their home on Christmas Day.[105] They bought a new house together and began living as a family.[106] K. contributed both financially and emotionally to the twins' upbringing.[107] K. took care of them when they were ill and spent every Friday with them.[108] She was listed as a co-parent on their school forms, although E. later said that this was only done so that K. would be allowed to pick them up from school.[109]

After three years, K. asked E. when she was going to tell the twins the truth about their parentage.[110] E. told her that she never would and that she was their only legal mother.[111] E. insisted that she was, and is, the only legal mother of the twins, both of whom have her surname.[112] At this point, the relationship began to collapse.[113] K. begged for a second-parent adoption, but E. refused.[114] When the twins were five years old, E. took them away for three days without telling K.[115] When they returned, K. told the girls the truth about their biological parentage.[116] The women tried counseling, but they were unable to resolve their problems.[117]

E. then decided to move to Massachusetts with her daughters, and K. filed a petition under the UPA in California to establish a parental relationship with the girls to prevent the move.[118] E. succeeded in taking the girls to Boston just before they turned six in 2001, and has gradually cut K. out of their lives.[119]

B. *The Battle*

The trial court initially held that K. did not have standing to bring a claim under the UPA because she was not a legal parent to the twins.[120] However, the appellate court reversed, citing from the stat-

103. *Id.*
104. *Id.* at 28.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 143 (Cal. Ct. App. 2004).

ute that any "interested person" may bring a motion under this act to determine a parental relationship.[121] The court determined K. was an interested party solely because of her genetic connection with the children rather than because of her emotional connection to them.[122] Previously, California appellate courts had denied a lesbian partner who was not the natural mother the right to bring an action under the UPA for determination of motherhood.[123] However, as discussed later, the California Supreme Court recently held that a woman must take responsibility for a child conceived during her relationship with a former partner, when the partner was the birth and genetic mother, and the father was a sperm donor.[124]

While the trial and appellate courts disagreed about whether K. had standing to bring the action, they both ultimately found against her claim of parentage.[125] The trial court held that both women agreed that E. would be the sole legal parent and that K. knew from the outset that she could become a legal parent only through a second-parent adoption.[126] The trial court further found that K. had orally agreed that E. would be the sole parent and that she expressly waived her rights to the eggs and any children born from them when she signed the donor consent form.[127] K. was capable of understanding the rights that she was relinquishing with the waiver and agreed to the relinquishment.[128]

The appellate court affirmed that K. had no right to custody of the girls.[129] It held that the intention of the parties was for E. to be the sole legal parent.[130] It was irrelevant that the parties raised the children together and that K. acted as a mother to the girls.[131] Furthermore, under *Johnson v. Calvert* and the UPA, a child can only have one natural mother.[132] Yet, E. and K. each had a valid claim of motherhood. K. had a claim because she donated her eggs and was genetically consanguineous with the twins, and E. had a claim because she gave birth to them.[133] Using the law surrounding surrogacy contracts, the appellate court looked to who intended to bring about the birth of the children and found that it was solely E.[134] Therefore, the court concluded the only mother in this case was E. It based this decision

121. *Id.*
122. *Id.* at 144.
123. *Id.* at 143.
124. Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005).
125. *K.M.*, 13 Cal. Rptr. 3d at 144.
126. *Id.* at 143.
127. *Id.*
128. *Id.* at 142.
129. *Id.* at 154.
130. *Id.* at 149.
131. *Id.* at 151.
132. *Id.* at 144.
133. *Id.*
134. *Id.* at 149.

on the testimony of both E. and K., and the fact that K. relinquished her rights when she signed the waiver. Finally, the appellate court acknowledged that the children were going to lose a loving parent, which would be damaging to them.[135] However, the court could not overlook the intentions of the parties, which were partially manifested in the waiver that K. signed[136] because doing so could undermine surrogacy contracts and surrogacy law in California.[137]

Here, the court faced a difficult dilemma—ultimately choosing to enforce a contract that K. signed over her personal relationship with the twins.[138] Courts often have to make painful decisions that hurt people, while at the same time reinforcing sound public policy. The court chose stability of surrogacy contracts in the long term over what was best for the twins in this case. One concern of the court could have been that by overlooking the surrogacy contract, it would be signaling to surrogate mothers or egg donors that they too have a legal claim to the children conceived, thus taking away guarantees people expect when they enter surrogacy agreements. However, the appellate court decision was legally sound. The appellate court took the trial court's accepted facts—that both K. and E. intended for E. to be the sole legal parent—and applied previous case law[139] to conclude that only E. was entitled to custody.[140]

On appeal, the California Supreme Court reversed the lower court.[141] The court carved out an exception to the *Johnson* rule allowing only one legal mother, and held that there can be two legal mothers when partners in a lesbian relationship have children through reproductive technology using one partner's egg and the other partner as the carrier.[142]

In a 4-2 decision, the supreme court focused on the appellate court's application of Family Code section 7613.[143] Under section 7613(b), "the donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[144] While the appellate court found that section 7613(b) applied to women who were egg donors as well as to men who were sperm donors,[145] the supreme court held it inapplicable to a woman who donates her eggs so her registered domestic partner can

135. *Id.* at 153-54.
136. *Id.* at 150.
137. *Id.*
138. *Id.* at 153.
139. *Id.* at 145.
140. *Id.* at 149-50.
141. K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
142. *Id.* at 681.
143. CAL. FAM. CODE § 7613 (West 2004).
144. *Id.*
145. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 148 (Cal. Ct. App. 2004). "In fact, the status of K.M. under the donor consent form and the parties' agreement is consistent

conceive.[146] The court was particularly wary of applying this section when both women raised the child or children in their shared home.[147] According to the court, "[b]oth the woman who provides her ova and her partner who bears the children are the children's parents."[148]

In a lengthy discussion of the California legislature's intent when it passed section 7613(b) and its predecessor, Civil Code section 7005, the supreme court found that the legislature intended for both married and unmarried women to be able to take advantage of sperm donation.[149] Therefore, the statute contained the broad language that a sperm donor was not considered a father unless he was married to the recipient.[150] The court went on to indicate that the legislature probably did not mean to exclude a man from having parental rights to a child conceived when he donated sperm to his unmarried partner.[151] Similarly, K. should not be excluded from having parental rights to her biological children conceived after she donated eggs to her unmarried partner.[152]

The court refused to give K. the same status as an anonymous sperm donor because, like the couple using a surrogate carrier in *Johnson*, K. and E. were a couple who intended to produce a child to raise as their own.[153] Just as the court had found in *Johnson* that the couple was not intending to donate the zygote created from their egg and sperm to the surrogate mother, the court found that K. was not intending to donate her eggs for E.'s sole use.[154] The court further stated that even if both E. and K. intended for E. to be the sole parent, their behavior suggested otherwise. They raised the children together, and therefore their situation was not a typical or "'true 'egg donation' situation.'"[155]

The court concluded that, contrary to *Johnson*, a child can have two mothers as long as those maternal claims are not mutually exclusive.[156] K. and E. both had claims as the children's mother under the UPA, and K. did not want to exercise her right to be the children's mother at the expense of E.'s right to do so.[157]

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with the status of a sperm donor under the UPA, i.e., 'treated in law as if he were not the natural father of a child thereby conceived.'" *Id.*

146. *K.M.*, 117 P.3d at 675.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 680.
152. *Id.* at 679.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 681.
157. *Id.*

Finally, the court considered the waiver that K. signed abrogating her rights to her eggs and any children that may come of them.[158] The majority emphasized that a waiver of parental rights does not affect the court's determination of parental rights under the Family Code.[159] Therefore, E. could not take away K.'s parental rights to the children; the two of them conceived the children together and raised them in a joint home.[160]

In a strong dissent, California Supreme Court Justice Werdegar agreed with the majority that it is possible for a child to have two legal mothers in certain situations, but argued that the court should have applied the existing *Johnson* intent test to this case.[161] Applying the *Johnson* test, Justice Werdegar found that there was strong evidence that E. intended to be the sole legal parent.[162] He pointed to the trial court's findings that K.'s intentions were not clear and therefore she did not intend to be a parent to the twins, and that E. was the only legal mother under the statute.[163] Second, Justice Werdegar criticized the court for creating an exception for lesbian couples, stating that the rule requires complicated judicial determination of who is a lesbian and may violate equal protection requirements.[164] Finally, in his strongest criticism, Justice Werdeger explained that the new law would destabilize ovum donation and surrogacy contracts, particularly because those wishing to take advantage of reproductive technology will not be able to rely on previous case law.[165]

IV. OTHER PARENTING THEORIES

Gay marriage is not the only avenue for protecting same-sex families. Other theories have been applied by a number of state courts to various types of nongenetic parents, particularly stepparents. Arguably, some of these theories could have resulted in a more favorable ruling for K. while still maintaining the stability of surrogacy law. As discussed below, California does not recognize some of the theories.

A. *Psychological Parent, In Loco Parentis and Equitable Parent Doctrine*

The psychological parent theory gives some rights to a second, nonbiological parent who helps raise the child.[166] This theory was

158. *Id.* at 682.

159. *Id.* "Regardless of its terms, an agreement between an alleged or presumed mother and the mother or child does not bar an action under this chapter." CAL. FAM. CODE § 7632 (West 2004).

160. *K.M.*, 117 P.3d at 682.

161. *Id.* at 685-86 (Werdeger, J., dissenting).

162. *Id.* at 686.

163. *Id.*

164. *Id.* at 687.

165. *Id.* at 688-89.

166. *Id.* (majority opinion).

first used to give foster parents rights in 1963.[167] This theory recognizes that nonbiological parents can be as important as biological parents to a child in terms of emotional and physical health. Therefore, it is important to give the second parent rights to continue the relationship with the child, even when the relationship with the other parent dissolves.[168]

California courts, however, have not recognized the rights of a psychological or de facto parent unlike other states such as New Jersey.[169] Using the psychological parent theory, a recent New Jersey Family Court case awarded physical custody of a child to a "psychological parent" who helped raise the child, even though he was not the child's biological father.[170] In contrast, a California court refused to grant any parental rights to a lesbian partner who was the nonbiological parent of the couple's two children.[171] Like K. and E., this couple raised the children together from birth and never initiated a second-parent adoption.[172]

Similarly, the California appellate court specifically rejected the idea that K. became a de facto parent by helping to raise the twins.[173] The court reiterated that the only means K. had of becoming a parent to the twins was in the form of a second-parent adoption—beyond that she has no other means of becoming a legal parent.[174] Had the court applied the psychological parent theory in *K.M. v. E.G.* it could have allowed E. to retain permanent custody of the children, while still preserving the relationship K. and the children shared.

A second theory the court in *K.M. v. E.G.* could have relied on to find that K. had parental rights is the *in loco parentis* doctrine.[175] The *in loco parentis* doctrine is applied when a person fulfills the duties of an already existing, but absent, parent, taking on custody of the child and the responsibilities of a parent.[176] The *in loco parentis* doctrine is generally used in cases of divorce, where a stepparent incurs standing through the marriage and seeks visitation rights after the marriage is terminated.[177]

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167. *Id.*

168. *Id.* at 910-11.

169. Orenstein, *supra* note 82, at 27.

170. V.C. v. M.J.B., 748 A.2d 539 (N.J.), *cert. denied*, 531 U.S. 926 (2000). The New Jersey Supreme Court adopted the Wisconsin test (discussed in *In re H.S.H.-K*, *infra* notes 193-200) for determining whether a parent-like relationship has been formed. *Id.*; *see also* Hoy v. Willis, 398 A.2d 109 (N.J. Super. Ct. App. Div. 1978) (awarding custody to maternal aunt who acted as a psychological parent to the child).

171. Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

172. *Id.* at 214.

173. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 152 (Cal. Ct. App. 2004).

174. *Id.*

175. Stacey A. Warman, *There's Nothing Psychological About It: Defining a New Role for the Other Mother in a State That Treats Her As Legally Invisible*, 24 NOVA L. REV. 907, 911 (2000).

176. *Id.*

177. *Id.*

Although K.'s situation was different in that she was not filling in for an absent parent, she was acting as a second parent where there was none.[178] K. did not use this specific theory in court, but made a very similar argument.[179] She claimed she "should be recognized as a co-parent because she played a joint parental role with E.G. in raising the children."[180] From the day the twins were conceived, K. acted as the second parent.[181] Despite the fact that K. and E. could not marry, they had a commitment ceremony, bought a house together, and acted as a married couple. It is impossible to know how the court would have responded to an *in loco parentis* argument. However, based on the court's decision that she could only achieve parental status through a second-parent adoption, it is doubtful that the theory would have been accepted.

The equitable parent doctrine,[182] which is based on the theory of equitable estoppel, is a third theory.[183] Equitable parenthood involves a situation in which a nonparent takes on the role of a parent, and then is precluded from claiming at a later date that he or she is not the parent.[184] Generally, this doctrine is invoked when a nonbiological or nonadoptive parent is willing to accept responsibility for the child in exchange for custody or visitation rights, and then tries later to deny child support to the child.[185] However, the relationship between the nonparent and the child has to be created with the consent of the legal parent.[186] This doctrine is one way to recognize a same-sex second parent who has failed to adopt the child and is not a biological parent.

K. tried a different use of the equitable estoppel doctrine, asking the courts to estop E. from denying K. rights on behalf of the children.[187] K argued it was unfair to the children that E. had led them to believe K. was their parent.[188] The appellate court rejected this argument based on a previous case, *Nancy S. v. Michele G.*[189] The *Nancy S.*

178. Orenstein, *supra* note 82.

179. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 152 (Cal. Ct. App. 2004).

180. *Id.*

181. *Id.* at 28.

182. Warman, *supra* note 175, at 912.

183. Equitable estoppel is defined as "[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." BLACK'S LAW DICTIONARY 590 (8th ed. 2004).

184. Warman, *supra* note 175, at 912.

185. *Id.*

186. *Id.*

187. K.M. v. E.G., 13 Cal. Rptr. 3d 136, 152-53 (Cal. Ct. App. 2004). This is separate from the equitable parent theory discussed above. Nancy S. v. Michele G., 279 Cal. Rptr. 212, 218 (Cal. Ct. App. 1991) (explaining the difference between equitable estoppel and the concept of an "equitable parent").

188. *K.M.*, 13 Cal. Rptr. 3d at 152-53.

189. 279 Cal. Rptr. at 218.

court expressed concerns over the various types of nonparents who could use this doctrine to sue legal parents for parental rights.[190] While the court recognized that the biological mother in *Nancy S.* had clearly intended for her partner to be the second parent, it did not grant her rights based on equitable estoppel because it anticipated the floodgates for this type of litigation would be opened—even when a natural parent did not intend to create a parental relationship between her child and another person.[191] Finally, the court recognized its own constitutional limitations and held that the definition of who could sue for parental rights was an issue better left to the legislature.[192]

B. *Wisconsin's Test*

In 1995 the Wisconsin Supreme Court used a novel test to award visitation of a child to the child's nonbiological and nonadoptive lesbian parent.[193] The case represents a fourth theory the California court could have used to protect the relationship between K. and the twins. Although K. did not argue for this test, it would have been one alternative, since the facts in both cases have striking similarities.

Sandra Holtzman and Elsbeth Knott were in a relationship for more than ten years.[194] The two women decided to have a child together; Knott was impregnated with donor sperm and had a child in 1988.[195] For five years following the birth of the child, Holtzman provided primary financial support for the family, and both women shared in the childrearing.[196] When the relationship ended, Knott took the child and refused Holtzman custody or visitation rights.[197] Holtzman sued for custody or visitation.[198] The Wisconsin courts denied Holtzman custody, but the supreme court established that a parentlike figure could receive visitation rights if four elements were proven: 1) the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parentlike relationship; 2) the petitioner and the child lived together in the same household; 3) the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation; and 4) the petitioner was in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in na-

190. *Id.* at 219.
191. *Id.*
192. *Id.*
193. *In re H.S.H-K.*, 193 Wis. 2d 649, 533 N.W.2d 419 (Wis. 1995).
194. *Id.* at 659, 533 N.W.2d at 421.
195. *Id.* at 660, 533 N.W.2d at 421.
196. *Id.* at 660, 533 N.W.2d at 422.
197. *Id.* at 661, 533 N.W.2d at 422.
198. *Id.*

ture.[199] The Wisconsin Supreme Court then remanded the visitation issue to the circuit court to determine whether Holtzman met these criteria.[200]

These various doctrines employed to find parental rights for nonbiological and nonadoptive parents are used in very limited ways by courts. The California courts have not been receptive to using these doctrines, as in the cases of *K.M.* and *Nancy S.* In *K.M.*, none of the courts chose to apply the equitable estoppel doctrine or psychological parent doctrine K. proposed.[201] The circuit court reaffirmed that the surrogacy contract trumped any other evidence of either the intention of the parties or the relationship between K. and the twins.[202] The appellate court was not willing to go out on a limb to support parental rights for lesbian partners who help raise children because of the fear of the litigation that would follow.[203] The California Supreme Court, while ruling in K.'s favor, made the ruling based on the surrogacy contract and existing law, and did not consider the impact of any alternative theories on K.'s parental rights or visitation.[204]

VI. CONCLUSION

While the story of K. and E. is unusual, it serves as a reminder that same-sex couples do not enjoy the same protections as dual-sex couples. The California Supreme Court in *K.M. v. E.G.* made a legally shaky decision which may undermine contract law in relation to sperm and egg donation and surrogacy contracts. Nonetheless, the court reached the decision that best protects the children of gay couples. California is, unsurprisingly, moving in the right direction in terms of protecting these modern families. Many other states are lagging behind or are resistant to establishing measures that allow same-sex couples and their children to enjoy the same legal status as other families do.[205]

Establishing nationwide same-sex marriage is one way of protecting gay couples and their children when their unions dissolve. Presumably, if gay couples were allowed to marry, they would have the same protections as all other married couples, and children of these unions would be protected in the same way that children of heterosexual marriages are protected. In most states, when heterosexual

199. *Id.* at 694-95, 533 N.W.2d at 435-36.

200. *Id.* at 699, 533 N.W.2d at 437.

201. *See* K.M. v. E.G., 117 P.3d 673, 681-82 (Cal. 2005) (rejecting the intent test and basing its decision on existing law); K.M. v. E.G., 13 Cal. Rptr. 3d 136, 152-53 (Cal. Ct. App. 2004) (citing trial court's rejection of the functioning parent and estoppel arguments).

202. *K.M.*, 13 Cal. Rptr. 3d at 143, 149.

203. *Id.* at 154.

204. *K.M.*, 117 P.3d at 681-82.

205. *See* Human Rights Campaign, Statewide Marriage Laws, *supra* note 6.

couples divorce, child custody and placement orders are determined according to what is in the best interest of the child.[206] For heterosexual couples, custody and child support determinations are made even when the child is nonmarital; the law generally imposes rights and obligations on genetic parents.[207] Therefore, same-sex marriage is especially important because of biology: two people of the same sex cannot both be the biological parent of one child.

Marriage and civil unions give same-sex couples legal protection where they would otherwise be excluded, but they are not the only mechanisms for protecting the parent-child relationship when these unions fail. Some states recognize the psychological parent doctrine, which gives visitation rights to a person who has acted in a parental role and has a strong emotional bond with the child.[208] However, same-sex marriage is the only mechanism that would guarantee homosexuals equal protection under the law.[209] Marriage brings with it countless rights on both the federal and state level, including hospital visitation, control over funeral arrangements for a spouse, and access to family health insurance plans that same-sex couples in most states do not enjoy.[210]

Until the time when same-sex couples are allowed to marry, they should be informed of their rights and responsibilities when they decide to start a family. It is no secret that when any relationship, gay or straight, ends, people do and say things to hurt the other person—often using their children as weapons. Without the legal protection afforded by marriage, same-sex couples should communicate clearly about their intentions before they decide to start a family. It is important for each partner to feel comfortable with the arrangement and understand what his or her rights will be. Furthermore, same-sex couples should seek second-parent adoptions whenever possible to protect the rights of the nonbiological or nonadoptive second parent. Otherwise, they may fall through the legal cracks, as in *K.M. v. E.G.* Although ultimately the California Supreme Court remedied the situation in K.'s favor,[211] a woman in another state may not be as fortunate.

Same-sex marriage is an important milestone for guaranteeing that homosexuals enjoy the same freedoms as heterosexuals. If nationwide same-sex marriage were available, married same-sex parents would be guaranteed custody rights and child support responsibilities that are designed to better the lives of all parties involved. With or

206. ELLMAN, *supra* note 13, at 564.

207. *Id.* at 447, 966. *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (United States Supreme Court upheld lower court's denial of genetic father's rights in favor of genetic mother's husband).

208. Warman, *supra* note 175, at 910-11.

209. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

210. GERSTMANN, *supra* note 21, at 19.

211. *Id.* at 682.

without the protection that marriage offers, more and more same-sex couples are raising families together. If these relationships dissolve, it is the children who are hurt when they are denied a relationship with one parent.

California has reached major milestones recently by creating new law that protects gay couples and their families. However, the battle for equal rights for homosexuals is ongoing and has a long way to go. Until the time when same-sex couples are afforded the right to marry throughout the country, there will be children and families falling through the cracks of the legal system and suffering the consequences.