"Sisters Are Doin' It for Themselves!" Why the Parental Rights of Registered Domestic Partners Must Trump the Parental Rights of Their Known Sperm Donors in California

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CALIFORNIA MADE HISTORIC PROGRESS in advancing the rights of gay and lesbian couples on January 1, 2005 when the California Legislature enacted California Family Code section 297.5, the Domestic Partnership Rights and Responsibilities Act of 2003 ("the Act").[1] Arguably, the biggest strides made by the Act were in the area of parenting between same-sex domestic partners.[2] Before the Act, when two women in a registered domestic partnership brought a child into the world using artificial insemination, only the birth mother was the legal parent unless the non-birth mother took affirmative steps to adopt the child.[3] After January 1, 2005, however, domestic partners

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1. CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2006). This law was enacted by Assembly Bill 205 ("A.B. 205") on January 1, 2005. Assemb. B. 205, 2003–04 Leg., Reg. Sess. (Cal. 2003).

2. Use of the term "domestic partners" will be used interchangeably with "registered domestic partners" assuming that, for the purposes of this Comment, domestic partners are legally registered in the State of California and therefore entitled to the protections of section 297.5.

3. *See* Sharon S. v. Superior Court, 73 P.3d 554, 571 (Cal. 2003) (establishing the "second-parent" adoption procedure whereby a person can adopt his or her same-sex partner's child without terminating the parental rights of the biological parent). However, this procedure does not allow parents to adopt their children before they are born. The form that a person must fill out to adopt a child asks for the child's name, date of birth, and location of birth—thus indicating that a child must be born in order to be adopted. Adopt-200, Adoption Request (revised Jan. 1, 2007), *available at* http://www.courtinfo.ca.gov/forms/fillable/adopt200.pdf. Therefore, non-biological parents do not have substantive

obtained the same legal rights and obligations as legally-married spouses.[4] Specifically in the area of parenting, "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."[5] This language creates parental rights in both domestic partners who conceive a child through artificial insemination because heterosexual married couples have parental rights when a child is born during their marriage—even if one parent is not biologically related to the child.[6]

I. Background

A. Why the Act Creates Three Legal Parents in Certain Cases

This Comment addresses a potential conflict created by the Act: when lesbian domestic partners conceive using sperm from a male acquaintance ("known donor") without physician assistance, the law, by default, creates parental rights in the known donor *and* both domestic partners. This situation occurs because the Act fails to address the "sperm donor statute," which does not allow for the termination of the donor's parental rights unless the couple inseminates using sperm from an anonymous donor or from a known donor with the help of a physician.[7] Therefore, because the Act creates substantive parental rights in both domestic partners and does not address the rights of the sperm donor in some situations, three parties potentially have full parental rights to a child conceived by artificial insemination—the biological mother, her domestic partner, and the known

rights to their children until they are born and the adoption proceedings are final. While this is a valuable tool in creating parenting rights for same-sex couples, it puts the burden on the non-biological domestic partner to affirmatively establish parentage. This Comment addresses why, with the provisions of the Act, parental rights are established in lesbian domestic partners before the child is born the same way parental rights are created in a married couple before a child is born into their marriage.

4. CAL. FAM. CODE § 297.5(a).

5. *Id.* § 297.5(d).

6. The Uniform Parentage Act ("UPA") states that when a woman gives birth to a child while she is married, her husband is the presumed father of the child. CAL. FAM. CODE §§ 7540, 7612 (West 2004). The California courts have a self-help site to answer parentage questions. Information contained on the site states, "[a]fter January 1, 2005, if parents are registered domestic partners when a child is born, the law assumes that the domestic partners are parents." California Courts Self-Help Center, http://www.courtinfo.ca.gov/selfhelp/family/parentage/intro.htm (last visited Nov. 11, 2006).

7. CAL. FAM. CODE § 7613 (West 2004). *See also* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 537–38 (Ct. App. 1986); Rainbow Flag Health Services, http://www.gayspermbank.com (last visited Nov. 14, 2006) (explaining that the sperm bank operates under California Family Code section 7613(b) which "legally separates Donor and Mother," implying that the donor has no legal parental rights when donating to a sperm bank).

donor.[8] The California Supreme Court, however, has never allowed three parties to have full parental rights to one child.[9] Therefore, when the court is confronted with three people claiming full parental rights—the two domestic partners and the known donor—the California Supreme Court must protect same-sex families in the same way it protects heterosexual families. The court must terminate the parental rights of the known donor in favor of the domestic partners.[10]

This parental conflict between the registered domestic partners and the known donor exists because the Act creates substantive parental rights in both registered domestic partners who bring a child into the world together using assisted reproductive technology while also retaining the rights of the known donor.[11] The Act attempts to remedy legal and societal inequities between homosexual and heterosexual families.[12] In doing so, the Act provides the same level of protection to the non-biological mother of a child born into a domestic partnership as provided to the husband of a heterosexual married

8. CAL. FAM. CODE § 297.5; CAL. FAM. CODE § 7613.

9. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (holding that when a wife's egg fertilized by the husband's sperm is implanted into a surrogate, all three parties had a biological connection to the child, but only two parties could be the legal parents).

10. This Comment only addresses the situation of lesbian domestic partners conceiving using the sperm of a known donor without physician assistance. Although there is no question that the Act creates substantive parental rights in all registered domestic partners, not just lesbians, this particular problem is unique to lesbians. Note also that heterosexual couples cannot be registered domestic partners until they are over the age of sixty-two. CAL. FAM. CODE § 297 (West 2004). Gay male domestic partners cannot biologically conceive a child using artificial insemination although they can inseminate a third party surrogate. The protections afforded male same-sex domestic partners under the Act is a critical issue, but is beyond the scope of this paper.

11. *See* CAL. FAM. CODE §§ 7540, 7612.

12. Some of these legal and social inequities that existed before the Act, and still exist under federal law, are evident in the fact that same-sex couples cannot marry and, therefore, cannot file joint tax returns, are not eligible for certain property tax credits, and are denied parental rights to their partner's children. Human Rights Campaign, Federal Benefits of Marriage, http://hrc.org/Template.cfm?Section=partners&CONTENTID=14362&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Nov. 20, 2006). See Freedom to Marry: FAQ, http://www.freedomtomarry.org/node.asp?id=3627 (last visited Nov. 20, 2006) for an explanation about why gay and lesbian couples need the right to marry. Under federal law, gay and lesbian people can be lawfully fired from their jobs on the basis of sexual orientation while it is illegal to fire an employee on the basis of race, color, gender, national origin, or religion. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e-17 (2000). *See* Christopher Lee, *Official Says Law Doesn't Cover Gays*, WASH. POST, May 25, 2005, at A25. Another inequity between homosexual and heterosexual couples is the fact that gay and lesbian people are often the victims of hate crimes. Christopher Heredia, *Hate Crimes Against Gays on Rise Across U.S.*, S.F. CHRON., Apr. 13, 2001, at A25.

couple.[13] Many states, including California, have the UPA, which creates the presumption that a husband is the legal father of his wife's child if that child is born into their marriage—regardless of whether he is the child's biological father.[14] The United States Supreme Court affirmed that presumption of fatherhood as constitutional in *Michael H. v. Gerald D.*[15] In *Michael H.*, the Court upheld a California statute that granted paternity to a woman's husband over her lover, notwithstanding the results of a blood test proving that the lover was the child's biological father.[16] The Act articulates the presumption that when two people in a domestic partnership have a child together, each partner is the presumed legal parent of that child.[17] The conflict arises, however, because the Acts fails to terminate the parental rights of known donors when they donate sperm to lesbians in a registered domestic partnership who do not use the assistance of a physician to inseminate.

The remainder of Part I explains when known donors obtain parental rights and why. This section also discusses why lesbian couples may choose to use a known donor without the assistance of physicians and how the Act fails to address the parental rights of lesbian couples in this situation.

In Part II, this Comment demonstrates that California has a clear preference for children to be raised in a two-parent family where both parents are in a legally cognizable relationship. This preference for the two-parent family model exists both in the context of heterosexual and homosexual relationships. This section reviews cases where the courts had the opportunity to find parenthood in three-parent situations but expressly declined to do so. The clear preference for a two-parent family model supports the grant of parental rights to the domestic partner over the known donor because the domestic partners are in a legally recognized relationship. By granting rights to the

13. CAL. FAM. CODE § 297.5.

14. CAL. FAM. CODE §§ 7540, 7612. The United States Department of Health and Human Services, Administration for Children & Families stated in a letter dated August 25, 2000 that nineteen states have adopted the UPA in full. U.S. Department of Health and Human Services Administration for Children & Families, http://www.acf.hhs.gov/programs/cse/pol/DCL/2000/dcl-00-93.htm (last visited Nov. 15, 2006). These states include Alabama, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Rhode Island, Ohio, Texas, Washington, and Wyoming. Cornell Law School, Legal Information Institute, http://www.law.cornell.edu/uniform/vol9.html#paren (last visited Nov. 15, 2006).

15. 491 U.S. 110 (1989).

16. *Id.* at 113.

17. CAL. FAM. CODE § 297.5.

known donor over the domestic partner, the court would fracture the stability of the lesbian two-parent family.

Part III of this Comment lays out a detailed explanation of the presumptions of parentage by reviewing cases that have found fatherhood (and motherhood) to exist based on the UPA presumptions even when it occasionally meant finding against the biological parent. Thus, in lesbian domestic partnerships, the court can, and must, find against the biological parent (the known donor) in favor of the non-biological mother.

Part IV argues that the presumptions of parentage must apply with equal force to domestic partners as to heterosexual spouses. This uniform application is logical considering the fact that the domestic partners are raising their children in legally cognizable two-parent families—the kind of family the State of California reveres. Furthermore, the known donor cannot assert paternity over the non-biological mother because he is not one of the three parties granted standing under the UPA to challenge paternity—the mother, the spouse living with the biological mother (the non-biological mother, i.e., the presumed parent), or the child.

Part IV also demonstrates that irrefutable evidence of biological ties does not foreclose parental presumptions. Accordingly, the knowledge that one domestic partner is not biologically related to the child does not prevent the parental presumptions from applying to that mother. Finally, the California Supreme Court has already applied the presumptions of parentage to women in same-sex domestic partnerships[18] and, based on the rationale laid out in this Comment, will necessarily do so again as equity and justice dictate.

B. Legal Rights of Sperm Donors

California statutory law helps same-sex couples become parents by automatically terminating the parental rights of a sperm donor when he donates sperm to a clinic or physician for insemination of a woman who is not his wife.[19] The reasoning behind this law is that men will more likely donate sperm when they are free from the fear of

18. *See* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (discussed *infra* note 60 and Section IV(C)(3)).

19. CAL. FAM. CODE § 7613(b) (West 2004). If a man donates sperm for the purpose of inseminating his wife, as in the case of in-vitro fertilization (where the wife's egg is fertilized by the husband's sperm and the resulting zygote is implanted into the wife's uterus), the parental rights of the sperm-donating husband are not terminated. *Id.*

being called upon to parent the child or pay child support.[20] Also, women will more likely use donated sperm when they feel assured that the donor will not try to take custody of the resulting child.[21]

The sperm donor's parental rights (and obligations) are not automatically terminated, however, when a lesbian couple uses the sperm of a known donor without the assistance of a physician.[22] Ostensibly, the laws attempt to prevent a situation where an unmarried woman has sex with a man, gets pregnant, and refuses to acknowledge the parental rights of the father. Another possible rationale for these laws is that the legislature wants to prevent a situation where a man can avoid the responsibilities of fatherhood. It appears that the law will only terminate the parental rights of the biological father when there is some clear indication that he did not intend to be the father of the child prior to impregnation.[23] Such intent is most obvious when a man anonymously donates sperm to a sperm bank; in other words, the mother and child will never know the identity of the donor, and it is clear that the sperm donor did not intend to be involved in the child's life. The law also appears to infer the intent to avoid fatherhood when a man donates sperm to a physician for insemination of a woman who is not his wife.[24] However, if a lesbian couple uses the sperm of a known donor and inseminates without the help of a physician, there is no statutory or common law terminating the parental rights of the known donor. Regardless, many lesbian couples still make the informed choice to inseminate using a known donor without the use of a physician.[25]

20. See Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 534–35 (Ct. App. 1986), for a discussion of the rationale behind California Family Code section 7005, which was amended in 1993 to become section 7613. CAL. FAM. CODE § 7613. In *Jhordan C.*, the court discussed how the presence of a professional third party, such as a physician, serves to formalize the donor/donee relationship and thus can help prevent confusion or disagreement about the role of the parties in the child's life. *Jhordan C.*, 224 Cal. Rptr. at 535.

21. *Jhordan C.*, 224 Cal. Rptr. at 534 ("[T]he California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity, and has likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support.").

22. CAL. FAM. CODE § 7613(b).

23. Therefore, a man who testifies that he had no intention of getting a woman pregnant cannot escape parental responsibilities if he did, in fact, impregnate a woman.

24. CAL. FAM. CODE § 7613(b).

25. In a Dutch study of 105 couples, forty one of whom were lesbian, ninety-eight percent of lesbian couples chose to use a known donor over an anonymous donor. *Parents' Attitudes to Sperm Donation—Still Some Concerns About Being Open*, MED. NEWS TODAY, Jan. 26, 2005, http://www.medicalnewstoday.com/medicalnews.php?newsid=19254. *See also* eHow: How to Find a Sperm Donor as a Lesbian Couple, http://www.ehow.com/how_17537_

C. Why Lesbian Couples Use Known Donors Without the Assistance of Physicians

There are several ways a lesbian couple may choose to inseminate: a couple may obtain sperm from an anonymous donor at a sperm bank and take it to a physician for assistance in insemination; the couple may also obtain the sperm from the sperm bank and inseminate in the privacy of their own home;[26] or a couple may take sperm from a known donor and bring it to a physician for insemination. The sperm donor does not have parental rights over the resulting child in any of the described situations.[27] Furthermore, if the couple is heterosexual and the couple brings the sperm of the husband to a physician for insemination, the husband's parental rights are not terminated.[28] However, if the lesbian couple chooses to inseminate with the sperm from a known donor *without* the assistance of a physician, the known donor retains parental rights.

Notwithstanding the legal predicament they may encounter, many lesbian couples still choose to use known donors because of the practical advantages.[29] As many married couples can attest, people often desire to have a child bearing the genetic material of someone the couple loves and respects. For a heterosexual couple, that desire is usually fulfilled by being able to have a child that has the genetic material of both partners.[30] The desire is no less for a lesbian couple, and

find-sperm-donor.html (last visited Nov. 15, 2006) (recommending women contact "suitable" friends or acquaintances to use their sperm, while warning women that in some cases the donor may retain parental rights).

26. Many couples inseminate at home using the "turkey baster" method (sperm is deposited by the man, collected into a syringe-like apparatus, and inserted into the woman). *TimeCapsule*, Ms. MAG., Dec. 1999/Jan. 2000, at 74.

27. CAL. FAM. CODE § 7613(b).

28. *Id.* Many heterosexual couples who struggle to conceive use the process of in-vitro fertilization. There are several other types of artificial reproduction that use the wife's egg and the husband's sperm to conceive with the help of a physician. For a more detailed explanation of assisted reproductive technologies, see the website of the University of California, San Francisco Medical Center Women's Health, http://www.ucsfivf.org/ucsf-ivf.htm (last visited Oct. 28, 2006).

29. See Berkeley Parents Network, Sperm Donation, Known Sperm Donor and Legal Issues, http://parents.berkeley.edu/advice/parents/spermdonation.html#known (last visited Jan. 8, 2007) for a March 2004 discussion between women about the issues surrounding the use of known donors. "We have been given this wonderful gift by this amazing man and it seems there are all these legal barriers to conceving [sic] this child. We know that we will have to get a lawyer to assist us with the adoption, but why before to conception? [sic]" *Id.*

30. Rainbow Flag Health Services, http://www.gayspermbank.com (last visited Oct. 6, 2006) (discussing a sperm bank for lesbians to find gay male donors who want to be known to the couple and listing the benefits of using a known donor).

that desire can be fulfilled by looking to a friend or family member for donated sperm.

Other benefits of using a known donor to inseminate at home are: the prohibitive financial and privacy costs of using a sperm bank or physician,[31] effectiveness, and efficiency.[32] Another advantage of using a known donor is the possibility of having the donor participate in the child's life.[33] However, while some couples want donor participation, they do not want the donor to have legal parental rights over the resulting child.

D. The Act Fails to Address the Rights of a Couple in a Registered Domestic Partnership Using a Known Donor

When drafting the Act, the California Legislature did not explicitly address the rights of registered domestic partners when they conceive using a known donor without the aid of a physician.[34] Although

31. In *Jhordan C.*, the court stated:

> A requirement of physician involvement, as Mary argues, might offend a woman's sense of privacy and reproductive autonomy, might result in burdensome costs to some women, and might interfere with a woman's desire to conduct the procedure in a comfortable environment such as her own home or to choose the donor herself.

Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535 (Ct. App. 1986) (footnote omitted). The court expanded on this in the following footnote, stating, "[o]ne article on the subject of artificial insemination notes that many women prefer to choose a known donor because this 'eliminates potential difficulties in gaining access to medical information, permits the prospective mother to make the choice of donor herself, and allows the child access to paternal roots.'" *Id.* at 535 n.7.

32. "Insemination with a known donor is cost effective." LGBT Health Channel—Alternative Insemination, http://www.lgbthealthchannel.com/AI/ (last visited Nov. 15, 2006). *See also* Dr. Donnica, The First Name in Woman's Health, Tips for Enhancing Your Fertility, http://www.drdonnica.com/toptips/00000739.htm (last visited Nov. 15, 2006) (suggesting that a satisfying sexual experience can help to facilitate conception).

33. *See* Rainbow Flag Health Services, *supra* note 30.

> My two kids were conceived this way. The donor and his partner were old friends of mine. But to insure everyone [sic] rights and responsibilities we took all the legal precautions. We even did home insemination but paid them a nominal fee each time. They have no rights or responsibilities. But they attended the births by my invitation and have had their lives completely changed by having children in their lives for the first time who they care about—very much to their surprise. They are very involved in the children's lives and are considered a part of our extended family.

Berkeley Parents Network, Sperm Donation, http://parents.berkeley.edu/advice/parents/spermdonation.html (last visited Apr. 6, 2006).

34. Nothing in the full text of the Act mentions sperm donors or artificial insemination. Specifically, the only section in the Act that discusses the legal relationships of domestic partners and other persons neglects to mention sperm donors.

> This act is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or

the Act appears to make the domestic partners legal parents,[35] the statute does not terminate the rights of the known donor. The result is a potential parental conflict between the non-birth mother and the known donor. Allowing the known donor to have substantive parental rights instead of the non-biological domestic partner disregards the intentions behind the Act and withholds protections to same-sex couples that married heterosexual couples enjoy. Allowing such an inconsistency in parental rights to stand could be construed as a denial of equal protection to domestic partners.[36]

Arguably, it is unnecessary for the Act to specifically address the known donor scenario because the language and legislative history of the Act demonstrate that domestic partners are entitled to the same presumptions of parentage afforded to married spouses.[37] However, absent clear language in the statute terminating the parental rights of known donors upon donation to a couple in a registered domestic partnership, it is unclear how the California courts will decide this issue. Moreover, the California Legislature has not taken further steps to address the ambiguities created by the Act. Therefore, the question remains: Will the Act be interpreted by California courts to apply the parental presumption created by the UPA to lesbian domestic partners over the rights of known donors?[38]

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the legal consequences of those relationships, including, among other things, civil marriage, enforcement of palimony agreements, enforcement of powers of attorney, appointment of conservators or guardians, and petitions for second parent or limited consent adoption.

Assemb. B. 205, 2003–04 Leg., Reg. Sess. § 1(c) (Cal. 2003).

35. CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2006).

36. The constitutional debate of whether registered domestic partners are similarly situated to married couples is beyond the scope of this paper. Therefore, the denial of equal protection of California's family law to same-sex registered partners will not be addressed in this Comment.

37. The full text of the Act says that all state agencies will be required to "revis[e] all public-use forms that refer to or use the terms spouse, husband, wife, father, mother, marriage, or marital status, [and] that appropriate references to domestic partner, parent, or domestic partnership are to be included." Assemb. B. 205, 2003–04 Leg., Reg. Sess. § 12(a)(14) (Cal. 2003). *See* Frederick Hertz, *The New Realities of California's Domestic Partnership Law, Discerning the Uncertain Impacts of A.B. 205*, SAME SEX PARTNERSHIP L. REP., Apr. 2005, at 4 ("[A] step-parent adoption of a partner's child to establish both parents as legal parents may not be necessary, because by law any child born or adopted by one of the partners during a domestic partnership is presumed to be the legal child of both partners."). This quote demonstrates that the perceived impact of the Act is to apply parentage presumptions to registered domestic partners.

38. Grace Blumberg, *California's Adoption of Strong Domestic Partnership Legislation for Same-Sex Couples*, UCLA SCH. PUB. AFF. CAL. POL'Y OPTIONS 130 (2006), *available at* http://www.spa.ucla.edu/calpolicy/files06/blumbergrevrevII.pdf ("While [the Act] would appear to provide equality of treatment [to registered domestic partners as spouses], the means of

Indeed, there are many areas of California law, including the UPA, where application to domestic partners may be confusing. The sections of the UPA discussing parentage contain heavily gendered terms. This terminology may create confusion in the courts as to how to apply these laws to same-sex couples.[39] For example, California Family Code section 7540 states: "[T]he child of a wife cohabiting with her husband, who is not *impotent or sterile*, is conclusively presumed to be a child of the marriage."[40] Even if "domestic partner" is substituted for "husband," the use of the terms "impotent or sterile" may prohibit the courts applying this statute to a woman. Because two women can never create a child without artificial insemination, the sterility of the non-biological partner is irrelevant. Therefore, the courts may feel that the use of the term "sterility," for the purposes of determining parentage, is only relevant when applied to a heterosexual couple.

Of course the courts can simply ignore the gender-specific statutory language when applying the parental presumption to domestic partners, but the courts must still address a perceived legislative intent in that statute for biology to overcome the presumption.[41] Although the Act states, "[w]here necessary to implement the rights of registered domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners,"[42] it is still uncertain how the courts will interpret this provision when applying the UPA.[43] This problem is pressing given the fact that courts will not easily ignore language in a statute in order to arrive at a decision that

reproduction used by same-sex couples are usually different than those of opposite-sex couples. . . . The law regulating parenthood in opposite-sex couples, married or unmarried, applies a series of presumptions based upon the likelihood that both partners are the biological parents of a child. However, application of the presumptions of parenthood is inapt when we know, as a biological fact, that a child does not have two biological mothers or two biological fathers."). *See* Deborah Wald, The Wald Law Group, *The Shape of Things to Come, Pending and Soon-to-Be-Pending Parentage Litigation* 3 (2006), http://waldlaw.net/shape_of_things.pdf (discussing the uncertainty of how the Act will be applied when a couple inseminates using a known donor without physician involvement).

39. CAL. FAM. CODE § 7540 (West 2004).

40. *Id.* (emphasis added).

41. Blumberg, *supra* note 38, at 130. Additionally, in the registered domestic partner/known donor scenario, the non-birth mother will not have a direct biological link to the child. Although in other cases, the non-birth mother may have provided the egg for fertilization and implantation in the birth mother, that situation avoids the conflict addressed in this paper because the egg and sperm must have passed through a physician and therefore the sperm donors rights are terminated under section 7613(a) or (b). CAL. FAM. CODE §§ 7613(a)–(b) (West 2004).

42. CAL. FAM. CODE § 297.5(l) (West 2004).

43. Blumberg, *supra* note 38, at 131–32.

is otherwise supported.[44] If there is gender-specific terminology in a statute, the court may very well hold that legislative intent is reflected in the language that cannot be ignored.[45] However, this Comment demonstrates why California courts need not ignore the gender-specific language of section 7540 to uphold the rights of domestic partners over known donors.

As increasingly more women in registered domestic partnerships begin families with the necessary help of sperm donors, issues of parentage become inevitable.[46] Although domestic partners may enter into a contract with a known donor establishing that the donor forgoes all parental rights, these contracts are not enforceable and are only relevant to evidence intent. [47] Even if a donor demonstrates intent not to parent the child at the time he signs a contract, there are many conflicts that can arise when the child is born and the donor may still assert paternity. [48] For non-biological mothers, the possibility of having the parental rights to their children taken away from them and given to the known donor is devastating.[49] If the donor is awarded parental rights in addition to both mothers, the couple may be forced to parent with a third-party known donor against their wishes.[50] The necessary resolution of this issue, based upon California Supreme Court precedent and statutory law, is to grant parenthood to the non-biological mother and terminate the rights of the known donor.

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44. *See In re* Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994) (decided eleven years before the Act went into effect). In *Moschetta*, the court would not apply provisions of the UPA in a gender-neutral manner because gendered terms evidenced intent by legislature to distinguish people on the basis of their reproductive roles. *Id.* at 896.

45. *Id.* at 896.

46. *See* LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000); Katha Pollitt, *The Strange Case of Baby M*, NATION, May 23, 1987, at 667.

47. Deborah Wald, The Wald Law Group, *California Surrogacy—A Gay Primer* 1 (2006), http://www.waldlaw.net/gay_surrogacy.pdf ("It is an established principle of family law that you cannot either create or negate parentage via contract. . . . [A]dults cannot contract away a child's right to a parental relationship; nor can adults create such a relationship by contract alone. This is a fundamental concept of family law that California has refused to abandon . . . .").

48. *See* Pollitt, *supra* note 46, at 667. The most widely publicized case of a surrogacy agreement gone awry is the infamous *Baby M* case involving surrogate mother, Mary Beth Whitehead, and her fight to keep parental rights over a child carried for the Sterns, a married, infertile couple. *Id. See also* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986). In *Jhordan C.*, the mother alleged that she had an agreement with the known sperm donor that he would not participate in the child's life. *Id.* at 532. The sperm donor changed his mind after the baby was born. *Id.* at 532–33.

49. *See LaChapelle*, 607 N.W.2d 151. A woman in a lesbian relationship was inseminated using the sperm of a known donor. *Id.* at 157. After the donor initiated paternity proceedings, a court vacated the adoption by the non-biological mother. *Id.* at 157–58.

50. *See id.* at 160–61.

E. How California Can Protect the Rights of the Non-Biological Mother

Our society consistently favors families that have two parents in a legally cognizable relationship over families that have three parents.[51] These preferences support the parental presumptions of the UPA.[52] In furtherance of the goal of protecting children and families, the California Legislature enacted the Act in part to grant children of lesbian, gay, bisexual, and transgender ("LGBT") families the same protections afforded to children of heterosexual families.[53] Therefore, the California Supreme Court must apply the UPA presumptions of parentage to lesbian domestic partners, terminating the rights of the known donor. Biological differences between men and women, and between domestic partners and married couples, should not prevent equal application of the parentage presumptions to domestic partners. The California Supreme Court has already begun applying the UPA in a gender-neutral manner to disputes between lesbian mothers, and the court has no reason to depart from that approach when lesbian domestic partners conceive using a known donor without physician assistance.[54]

II. Public Policy Supports the Two-Parent Family Model

California clearly prefers that a child is raised by two parents as opposed to one. California lawmakers believe that the two-parent family model provides the ideal structure for the healthy development and optimal support of children. As the California Supreme Court

51. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998). In *Buzzanca*, a married couple bought an egg from an anonymous donor, had it fertilized with the sperm of an anonymous donor, and implanted it into a paid surrogate. *In re Buzzanca*, 72 Cal. Rptr. at 282. When the couple divorced, the trial court held that the child had no legal parents. *Id.* The Court of Appeal reversed and declared the husband and wife legal parents. *Id. See also Jhordan C.*, 224 Cal. Rptr. 530; discussion, *infra* Section II.

52. CAL. FAM. CODE §§ 7540, 7613 (West 2004); Michael H. v. Gerald D., 491 U.S. 110 (1989); Dawn D. v. Superior Court, 952 P.2d 1139 (Cal. 1998).

53. Assemb. B. 205, 2003–04 Leg., Reg. Sess. (Cal. 2003) (unenacted earlier version dated Jan. 28, 2003).

> Expanding the rights and responsibilities of registered domestic partners would further California's interest in encouraging close and caring families, promoting stable and lasting family relationships, and protecting family members from economic and social consequences of abandonment, separation, the death of loved ones, and other life crises; would protect these couples, the children they are raising, third parties, and the state against numerous harms and costs . . . .

Id. § 1(b)(3).

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

stated in 2005 when determining that two women were both legal parents of children they brought into the world using artificial insemination:

> By recognizing the value of determining paternity, [in making the UPA law in California] the [California] Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.[55]

This preference is particularly evident when looking at cases between single mothers and known donors. In *Jhordan C. v. Mary K.*,[56] Mary asked her friend Jhordan for his sperm so that she could bear a child.[57] Mary claimed that it was both parties's understanding that Jhordan would play no role in the child's life.[58] When Jhordan changed his mind and brought a paternity action, the court agreed that he deserved parental status despite Mary's opposition.[59] This is the approach taken by most courts when a refusal to grant parentage would leave a child with only one legal parent.[60]

The California Supreme Court has applied this two-parent policy to same-sex parental disputes as well. In a trilogy of cases decided in 2005, *Elisa B. v. Superior Court*,[61] *K.M. v. E.G.*,[62] and *Kristine H. v. Lisa*

55. *Id.* at 669.

56. 224 Cal. Rptr. 530 (Ct. App. 1986).

57. *Id.* at 532.

58. *Id.*

59. *Id.*

60. *See* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Ct. App. 2003). In *Robert B.*, a married couple contracted with an anonymous donor, through a fertility clinic, for an egg to be fertilized with the husband's sperm for implantation in the wife. *Id.* at 786. Separately, a single woman, Susan, used the same clinic to obtain a fertilized embryo from anonymous donors for her own insemination. *Id.* The clinic erred and inseminated Susan with the married couple's embryo. *Id.* The court, choosing to hold that a child has two parents instead of one, declared that the husband, Robert, was the legal father of Susan's child despite the fact that she had no relationship whatsoever to Robert. *Id.* at 786–87; *see also Elisa B.*, 117 P.3d 660. In *Elisa B.*, one partner agreed to insemination of the other partner using an anonymous donor. *Id.* at 663. The non-biological mother held the children out as her own, but then later claimed she was not their parent. *Id.* The California Supreme Court held that the woman was the other legal parent of the children. *Id.* at 670; *see also* K.M. v. E.G., 117 P.3d 673 (Cal. 2005). In *K.M.*, one woman donated her egg to her lesbian partner and agreed to relinquish her parental rights. *Id.* at 676. The California Supreme Court held that the woman did not relinquish her parental rights in this scenario. *Id.* at 678; *see also* Kristine H. v. Lisa R., 117 P.3d 690, 696 (Cal. 2005) (holding that when the biological mother consented to a judicial determination of parentage of the non-biological mother, she was estopped from later claiming that the non-biological mother was not a legal parent).

61. 117 P.3d 660.

62. 117 P.3d 673.

R.,[63] the court held that both women in all three of the domestic partnerships were the legal parents of their partner's children.[64] The court held that only two parents had parental rights, irrespective of the parties's intentions, when the alternative would have been to grant parental rights to a sole parent.[65]

The California Supreme Court's affinity for the two-parent model is also evident in situations where a child may have more than two parents. For example, in *Johnson v. Calvert*,[66] the court was confronted with the unusual situation of having three parties with biological connections to the child.[67] Mark and Crispina, a married couple, each provided eggs and sperm to be fertilized by a physician and implanted in a surrogate mother, Anna.[68] Although the three parties were biologically connected to the child, the court said "[t]o recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as a mother."[69] Although it meant terminating Anna's parental rights, the court chose to adhere to the traditional two-parent family model rather than grant parental rights to three parties.[70] Also, in the case *In re Kiana A.*,[71] the court determined that Kiana's father could have been one of two men.[72] The court could have allowed Kiana to have three parents: her mother and the two presumed fathers.[73] Instead, the court chose to grant parental rights to only one of the two putative fathers, giving Kiana two parents instead of three.[74]

The decisions of the California Supreme Court reflect a general perception in our society that the two-parent model is in the best in-

63. 117 P.3d 690.

64. *Elisa B.*, 117 P.3d at 670; *K.M.*, 117 P.3d at 675; *Kristine H.*, 117 P.3d at 696.

65. *Elisa B.*, 117 P.3d at 670; *K.M.*, 117 P.3d at 675; *Kristine H.*, 117 P.3d at 696.

66. 851 P.2d 776 (Cal. 1993).

67. *Id.* at 782. The court said that under the UPA, both the gestational mother and the genetic mother could be the "natural" mothers. *Id.*

68. *Id.* at 778.

69. *Id.* at 782.

70. *Id.* Therefore Anna was a legal mother of the child. However, Crispina was also a legal mother of the child having provided the egg that became the child. *Id.* The California Supreme Court decided to choose between the three legal parents and declare Mark and Crispina to be the only legal parents. *Id. See also* CAL. FAM. CODE § 7610(a) (West 2004) (establishing maternity in the mother when she gives birth to the child).

71. 113 Cal. Rptr. 2d 669 (Ct. App. 2001).

72. *Id.* at 673–74.

73. *Id.* at 674.

74. *Id.* at 679–80.

terests of the child.[75] In the ideal scenario, the two parents are in a legally recognized partnership. The United States Supreme Court postulated this view in *Michael H. v. Gerald D.*,[76] a case where the mother's lover wanted parental rights to a child born during her marriage to another man.[77] Quoting from the California Court of Appeal, Justice Scalia wrote: "'"[It is] overriding social policy, that given a certain relationship between the husband and wife . . . the integrity of the family unit should not be impugned."'"[78] Scalia further elaborated on how courts have gone to great lengths to protect the traditional model of a married couple raising a child without interference from third parties: "The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family . . . ."[79]

In *Michael H.*, the United States Supreme Court upheld centuries of precedent,[80] acknowledging the societal importance of the conclusive presumption of parentage favoring the husband over the wife's lover:

> The primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate . . . . A secondary policy concern was the interest in promoting the "peace and tranquility of States and families," . . . a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are [not products of their marriage].[81]

Justice Scalia went on to note that the Court was not aware of a single case in which a state had awarded "substantive parental rights to the [non-husband] natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child."[82] It is evident that courts favor the two-parent marriage model in the interests of family harmony and stability.

This interest is no less important when applied to two-parent same-sex domestic partners raising children. As Justice Scalia ex-

75. *See* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Ct. App. 2003).

76. 491 U.S. 110 (1989) (*see* discussion *supra* Section I(A)).

77. *Michael H.*, 491 U.S. 110 at 113–14.

78. *Id.* at 119–20.

79. *Id.* at 123 n.3.

80. *Id.* at 124–25 (Scalia discusses the history behind the "presumption of legitimacy," citing material dating back to 1569).

81. *Id.* at 125.

82. *Id.* at 127.

plained,[83] the unitary family has been afforded centuries of respect in our society[84] because the stability of the union provides a better environment in which to raise children.[85] Therefore, it is clearly preferable for children to be raised in a stable and supportive two-parent same-sex domestic partnership than to be raised amid an acrimonious parental dispute where one mother is denied parental rights in favor of the known donor.[86]

III. Presumed Parentage and the UPA in California

In order to protect and further the two-parent family model, common law doctrine and state statutory law create presumptions of parentage that can only be rebutted in limited situations. Most of the legally created presumptions pertain to fatherhood on the assumption that it is usually unnecessary to create a presumption determining maternity. However, as discussed herein, there have been occasions when a court has applied the presumptions to mothers.

A. The Presumption of Fatherhood

In *Michael H.*, the United States Supreme Court asserted that it was not unconstitutional to deny parentage to a man who fathers a child, if that child is born to a woman in a legal marriage.[87] In fact, the biological father cannot challenge the husband's presumption of paternity even if the biological father has an ongoing relationship with the child and the child calls him "Daddy."[88] Although in disagreement about what role the biological father's relationship with the child played in the disposition of *Michael H.*, seven of the nine California Supreme Court Justices agreed in *Dawn D. v. Superior Court*[89] that a

83. *Id.*

84. *Id.*

85. *Id.* at 125.

86. Although Justice Scalia is widely considered a foe of gay and lesbian civil rights, his rationale that a two-parent family is the best environment to raise a child is applicable in this situation because California recognizes that gay and lesbian people can create healthy and stable families. *See* Richard A. Serrano & David G. Savage, *Scalia's Talk to Antigay Group Spurs Ethics Questions*, BOSTON GLOBE, Mar. 8, 2004, http://www.boston.com/news/nation/articles/2004/03/08/scalias_talk_to_antigay_group_spurs_ethics_questions/. Therefore, Justice Scalia's reasoning that healthy and stable two-parent families are in the best interests of children supports California's protection of gay and lesbian families.

87. *Michael H.*, 491 U.S. at 135–36.

88. *Id.* at 143–44 (Brennan, J., dissenting).

89. 952 P.2d 1139 (Cal. 1998).

biological link alone does not create due process rights in the biological father to overcome the husband's presumed fatherhood.[90]

In *Dawn D.*, the California Supreme Court dealt with the issue of presumed fatherhood.[91] Dawn was married to Frank but separated from him and began living with Jerry.[92] Dawn became pregnant by Jerry and returned to live with her husband Frank.[93] Jerry petitioned the court for a determination of parentage and visitation with the child.[94] The California Supreme Court, relying heavily on *Michael H.*, held that Jerry did not have a constitutionally protected interest in establishing a relationship with his biological child when that child was born to a woman married to another man.[95] In her concurrence, Justice Kennard laid out the long tradition of the marital presumption and went so far as to say that if Jerry had wanted a relationship with a child, he should have married and had a child of his own.[96]

The presumption of fatherhood and its application demonstrates that the stability and unity of the family is ultimately more important than biological certainty. Furthermore, the California Supreme Court appears inclined to use the parental presumptions to discourage extramarital relationships. Lesbian women, however, are not allowed to marry in the United States or the State of California.[97] Therefore, two women solemnize their relationship by registering as domestic partners in the state of California.[98] However, in order to conceive, women in domestic partnerships must go outside of their relationship in order to get the necessary biological material. In the interest of preventing discrimination and equally applying the laws of California, domestic partners must not be penalized for their inability to conceive solely within their relationship; domestic partners need the same presumption of parentage afforded to husbands in heterosexual marital relationships. The two-parent preference in *Dawn D.* must apply with equal force to lesbian domestic partners and therefore preserve the parental rights of the non-biological domestic partner over the known donor.

90. *Id.* at 1144 (discussing the fact that even the dissent in *Michael H.* rejected the possibility that a biological connection alone is sufficient to create a parental relationship with the child).

91. *Id.* at 1139–40.

92. *Id.* at 1140.

93. *Id.*

94. *Id.*

95. *Id.* at 1145.

96. *Id.* at 1148 (Kennard, J., concurring).

97. 1 U.S.C. § 7 (2001); CAL. FAM. CODE § 308.5 (West 2004).

98. CAL. FAM. CODE § 297 (West 2004).

B. California's UPA

1. Family Code Sections 7540 and 7611(a)

The statutory law of California reflects the deeply held belief that "'a mere biological connection is insufficient to establish a liberty interest on the part of an unwed father. . . .'"[99] California Family Code section 7540 creates a *conclusive* presumption that the husband and wife are the legal parents of a child born to them during their marriage if the husband is not impotent or sterile.[100] Under Family Code section 7611(a), a husband is presumed to be the father of a child if the child was born while the husband and wife were married, or within three-hundred days after the termination of the marriage.[101] Sections 7541 and 7630 clarify who may challenge the presumption of paternity created by sections 7540 and 7611(a).[102] Only a child, the child's natural mother, or a man who is already presumed to be the child's father may bring an action to challenge paternity, which is established under section 7611(a).[103] Therefore, if a husband and wife are married and have a child, the husband may bring an action to challenge his presumed paternity. For example, the presumed father may bring such an action upon his divorce from his wife because the husband does not want to pay child support due to his belief that he is not the natural father of the child.

2. Family Code Section 7611(d)

Another provision of the UPA, California Family Code section 7611(d), states that a man who openly holds a child out as his own is a presumed father in California. In *Nicholas H.*,[104] Thomas was not Nicholas's biological father and had admitted to that fact during dependency proceedings.[105] However, he received Nicholas into his home and held him out as his natural child.[106] He also provided financial support for Nicholas for most of the child's life.[107] The court,

99. *Dawn D.*, 952 P.2d at 1144 (citing Michael H. v. Gerald D., 491 U.S. 110, 143 n.2 (1989) (Brennan, J., dissenting)).

100. CAL. FAM. CODE § 7540 (West 2004).

101. CAL. FAM. CODE § 7611(a) (West 2004 & Supp. 2006).

102. CAL. FAM. CODE § 7541 (West 2004); CAL. FAM. CODE § 7630(a) (West 2004 & Supp. 2006).

103. CAL. FAM. CODE § 7541; CAL. FAM. CODE § 7630(a).

104. 46 P.3d 932 (Cal. 2002).

105. *Id.* at 935.

106. *Id.*

107. *Id.*

therefore, held Thomas to be Nicholas's presumed father.[108] In another case, a California Court of Appeal applied section 7611(d) to a mother.[109] In *Karen C.*, a woman gave birth to an unwanted child and immediately gave her to another woman, Leticia, whose name went on Karen's birth certificate.[110] Based on the fact that Leticia was the only mother Karen had ever known, and only a social worker was aware that Leticia was not Karen's biological mother, the court held that, under section 7611(d), Leticia established maternity.[111]

Such case law demonstrates the strong precedent in California to acknowledge presumptions of parentage absent a biological link with the child. Clearly, in the context of domestic partners, this assumption becomes critical as one mother will necessarily lack a biological connection to the child. However, as demonstrated, it is not the biological connection to the child, but rather the behavior of that parent with the child and the parent's relationship with that child's mother that creates a presumption of parentage. Therefore, the fact that the known donor is biologically related to a child is not enough to defeat the presumption of parentage in the non-biological mother.

IV. The Presumptions of the UPA Must Apply Equally to Domestic Partners as to Married Couples

A. The Two-Parent Family Model Rationale Applies to Same-Sex Families

The rationale for the parentage presumptions[112]—to protect the two-parent family model—is no less important in registered domestic partnerships than in heterosexual marriages. The potential destruction to the harmony of a partnership in addition to the traumatic repercussions for the child are equally as plausible when a known donor tries to assert parentage over the objections of the birth mother and her partner.

The only ostensible difference from an illicit lover asserting parentage over a child born into a marriage is that both domestic partners assent to the role of the known donor in the conception of their child. This difference is of limited significance, however. Presumably,

108. *Id.* at 934.

109. *In re* Karen C., 124 Cal. Rptr. 2d 677, 678 (Ct. App. 2002).

110. *Id.* at 678. The court did, however, express reluctance in granting maternity to someone who suffered from alcoholism and depression and attempted suicide several times. *Id.* at 678 n.1.

111. *Id.* at 682.

112. *See* discussion *supra* Part II.

the fact that both domestic partners know of the role of the sperm donor in conceiving their child prevents the kind of traumatic discovery faced in a marriage when the husband discovers that his wife has been having sex with another man. Therefore, the need to protect the husband's presumed paternity might seem more important to the stability of the marital union than in the domestic partnership.

However, by the time the presumption of paternity is needed to protect the husband's right to his child, this rationale falls apart. Clearly, if someone has tried to assert paternity over the husband's child, the traumatic event in the marriage has already occurred. However, taking the child away from the husband and forcing the wife to co-parent with the lover may further deteriorate whatever is left of the marriage.

The same is true in a domestic partnership. The stress, emotionally and financially, of a long and drawn-out legal battle on the partners and their child can be enormous. And, of ultimate significance, a grant of paternity to the known donor will destroy the unitary two-parent family that our legal institutions have gone to such great lengths to protect. To reiterate Justice Scalia's point in *Michael H.*, society does not favor a natural father over a marital family that embraces the child as its own.[113] Furthermore, to apply the same rationale used by the California Supreme Court when it terminated the rights of the surrogate in order to protect the two-parent unitary family in *Johnson v. Calvert*,[114] recognizing the sperm donor as having parental rights would diminish the non-biological mother's role as a parent.[115] Extending the traditional family model to three parents, or limiting it to one, is something the court was unwilling to do in the interest of family stability.[116] This rationale has no less force when applied to same-sex families using a known donor instead of a surrogate.[117]

B. The Act Provides Legal Protection to the Same-Sex Two-Parent Family Model

In recognition of the fact that same-sex couples were registering as domestic partners and creating families mirroring the marital fam-

113. Michael H. v. Gerald D., 491 U.S. 110, 127 (1989).
114. 851 P.2d 776 (Cal. 1993).
115. *Id.* at 781.
116. *Id.*
117. Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

ily, the legislature enacted the Act to offer the same protection to these relationships as provided to, and needed in, heterosexual marriages.[118] The language of the Act specifically provides for the presumed parentage statutes to apply to domestic partners.[119] The Act forbids the discriminatory application of laws based on the biological differences between a husband in a marriage and partner in a registered domestic partnership.[120]

The need for these protections is essential in order for a non-biological mother to retain rights to her children when her relationship with the biological mother ends. For example, in *K.M. v. E.G.* and *Kristine H.*, the biological mother tried to assert that her domestic partner had no rights to the children they conceived and raised together since birth.[121] The biological mother needs this protection as well to ensure that the non-biological mother will not shirk her parental responsibilities when it suits her. In *Elisa B.*, Emily and her partner, Elisa, simultaneously got pregnant using artificial insemination.[122] Emily had twins, one of which was severely disabled.[123] When the relationship deteriorated, Elisa tried to claim that she was not the mother of the twins precluding any obligation to pay for their care.[124] This left Emily in a precarious financial situation.[125]

The need for two people who bring a child into the world together to have their parentage legally protected is paramount for another reason as well. If the biological mother dies and her domestic partner is unable to get custody of the child because the partner is not

118. The intent behind the Act is clearly stated by the California Legislature:

> The Legislature hereby finds and declares that despite longstanding social and economic discrimination, many lesbian, gay, and bisexual Californians have formed lasting, committed, and caring relationships with persons of the same sex. These couples share lives together, participate in their communities together, and many raise children and care for other dependent family members together. Many of these couples have sought to protect each other and their family members by registering as domestic partners with the State of California and, as a result, have received certain basic legal rights. Expanding the rights and creating responsibilities of registered domestic partners would further California's interests in promoting family relationships and protecting family members during life crises, and would reduce discrimination on the bases of sex and sexual orientation in a manner consistent with the requirements of the California Constitution.

Assemb. B. 205, 2003–04 Leg., Reg. Sess. § 1(b) (Cal. 2003).

119. CAL. FAM. CODE § 297.5(a) (West 2004 & Supp. 2006).

120. *Id.* § 297.5(h).

121. *K.M.*, 117 P.3d at 675–76; *Kristine H.*, 117 P.3d at 692.

122. Elisa B. v. Superior Court, 117 P. 3d 660, 663 (Cal. 2005).

123. *Id.*

124. *Id.* at 663–64.

125. *Id.* at 663.

the child's legal parent, the child may be placed into the custody of a homophobic or hostile family who will prevent the non-biological parent from having a relationship with her child.[126]

The child, too, deserves several rights from a legal relationship with his or her non-biological parent, such as: rights to financial benefits, inheritance under intestacy laws, wrongful death and loss of consortium damages, Social Security benefits, child support, and health insurance benefits.[127] For these important reasons, the rights of the non-biological mother must be protected even if that means terminating the rights of the known donor.

C. The Presumptions of Parentage Must Apply to Same-Sex Families

1. Application of Section 7540 and Section 7611(a)

Both Family Code sections 7540 and 7611(a), which state that a child born into a marriage is presumed to be a child of that marriage, envision situations where a child is born to a woman who is legally married to a man.[128] Section 7540 creates a conclusive presumption that applies when the mother has been cohabitating with her husband and a child is born into their marriage.[129] Section 7611(a) creates a rebuttable presumption that applies when a child is born into a marriage during which at some point the husband and wife do not live together.[130]

a. The Known Donor Does Not Have Standing Under Section 7540 or Section 7611(a) to Challenge Paternity

In *Dawn D.*, the California Supreme Court not only recognized that the non-husband biological father does not have a constitutionally protected interest in asserting paternity, it also held that he did not have a statutorily protected interest under Family Code section 7611 because he was not "cohabitating" with the mother at the time of

126. See NATIONAL CENTER FOR LESBIAN RIGHTS, ADOPTION BY LESBIAN, GAY AND BISEXUAL PARENTS: AN OVERVIEW OF CURRENT LAW, http://www.nclrights.org/publications/adptn0204.htm (last visited Oct. 28, 2006) for a discussion of cases where the non-biological parent was forced to litigate against the biological mother's family for custody of the children after the death of the biological mother.

127. See *id.* for a discussion on the rights afforded to non-biological parents upon adoption.

128. CAL. FAM. CODE § 7540 (West 2004); CAL. FAM. CODE § 7611(a) (West 2004 & Supp. 2006).

129. CAL. FAM. CODE § 7540.

130. CAL. FAM. CODE § 7611(a).

conception.[131] The court also prevented the biological father from asserting paternity because he was not one of the three parties who had standing to challenge paternity—the child, the mother, or the *presumed* father.[132] The presumed father in *Dawn D.* was the husband of the mother, not her lover. [133]

The same interpretation of sections 7540 and 7611(a) must apply when a child is born into a domestic partnership using the sperm of a known donor. Whether the presumption is conclusive (section 7540) or rebuttable (section 7611(a)), the donor is not a party that has standing to challenge parentage. In the context of domestic partners, the known donor is neither the child, the mother, nor the presumed father (since the donor is not married to the mother at the time the child is born).[134] Therefore, under the provisions of the UPA, the donor lacks standing to challenge paternity in the same way the wife's lover lacked standing in *Dawn D.*[135]

Furthermore, although section 7541(a) states that "if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests . . . are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly," the only person that may order blood tests under section 7540 are the husband, child, or a man who qualifies as a presumed father under section 7611.[136] Because section 7611 only allows for presumed paternity if the man is either married to the child's mother or actively participates in the child's life and holds him or her out as his own, a sperm donor will never qualify as a presumed father under section 7611 before the child is born.[137] Therefore, a sperm donor will not have standing to order blood tests under section 7541.

If the donor lacks standing to challenge the presumptions created by the UPA (and affirmed in the Act), then it is irrelevant whether the sperm donor statute creates parental rights in the known donor because he will never have standing to challenge the parentage of the domestic partner. The sperm donor statute does not give the donor an affirmative right to establish paternity.[138] In fact, the only time someone other than the biological mother, putative father, or

131. Dawn D. v. Superior Court, 952 P.2d 1139, 1140 (Cal. 1998).
132. *Id. See* CAL. FAM. CODE § 7541 (West 2004).
133. *Dawn D.*, 952 P.2d at 1140.
134. CAL. FAM. CODE § 7611(a).
135. *See Dawn D.*, 952 P.2d at 1142.
136. CAL. FAM. CODE § 7541; CAL. FAM. CODE § 7540 (West 2004).
137. CAL. FAM. CODE § 7611.
138. CAL. FAM. CODE § 7613 (West 2004).

child can challenge parentage is when a presumption of parentage is established by the parent's affirmative action in holding the child out as one's own, as set forth in Family Code section 7611(d). Since this Comment discusses why full parental rights should exist in the non-biological parent before the child is born, this grant of standing to the known donor should not be available to the known donor to challenge paternity in this instance.

Since the enactment of the Act, the only parties that have standing to challenge parentage are the biological mother, the child, and the domestic partner.[139] The California Supreme Court has already prevented domestic partners from disavowing their parental responsibilities or trying to terminate their former partners's rights when the domestic partners take affirmative steps together to bring a child into the world using artificial insemination.[140] Although to date no child has brought a parentage action to terminate the rights of her non-biological mother in favor of the sperm donor, it is fair to assume that the courts would not allow the child to succeed on such grounds. Presumably, the reason a child can bring a paternity action is to enable him or her to discover the identity of her biological father. Because it is already known that the non-biological mother is not biologically related to the child, allowing the child to bring an action to terminate her non-biological mother's rights is exactly the sort of bootstrapping argument previously rejected by the courts.[141]

Whatever the rationale for allowing a child to bring a paternity action, just as in *Elisa B.*, *K.M.*, and *Kristine H.*,[142] the courts will not allow a malicious attempt by a domestic partner to deny her partner rights to a child that the partner helped conceive through artificial insemination.[143] Therefore, when two registered domestic partners bring a child into the world using artificial insemination, the non-biological mother will be a presumed parent, and a paternity action under 7611 or 7540 cannot defeat her parentage. This is because the

139. CAL. FAM. CODE § 7541.

140. *See* Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005) (disallowing a non-biological mother from abrogating her parental responsibilities by claiming that she was not biologically related to the child, and hence, not a parent); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005) (disallowing the biological mother to deny her partner's parental rights to their child on the basis that a same-sex partner cannot be a legal parent because both parents consented to the artificial insemination of one partner and that the biological mother's argument was essentially bootstrapping).

141. *See* discussion of cases, *supra* note 140.

142. *See* discussion of cases, *supra* note 60.

143. *See Elisa B.*, 117 P.3d 670; *K.M.*, 117 P.3d 678; *Kristine H.*, 117 P.3d 696.

known donor does not have standing to bring the action, and the biological mother and child cannot defeat the parentage of the non-biological mother. Therefore, the only parties that have standing to challenge parentage—the biological mother, the child and the domestic partner—under the statute would be precluded from doing so.

b. The Gendered Terms of Section 7540, "Impotent or Sterile," Cannot Be Used to Deny Parentage to the Non-Biological Mother

The fact that Family Code section 7540 allows a parental challenge if the husband is impotent or sterile does not affect the rights of the non-biological mother for two reasons. First, the Act explicitly forbids the application of laws containing gendered terms to prevent domestic partners from protection under those laws.[144] If a domestic partner could never establish parentage under section 7540 because she could not have biologically produced the child (i.e., she is impotent or sterile for the purposes of the statute), then she is being denied legal protection based on the gendered terms of a statute. Because such a consequence is illegal in California, the language "impotent or sterile" cannot bar a domestic partner from establishing parentage under section 7540.

Second, the "impotent or sterile" language of section 7540 cannot prevent a domestic partner from establishing parentage because the only parties who could raise a parental challenge and, therefore, assert that the domestic partner is impotent or sterile, have no practical basis for doing so. This would require the biological mother to go to court and essentially claim that her domestic partner could not be the other parent of her child because the partner is impotent or sterile. Although domestic partners have tried to deny their former partner's parental rights, the California Supreme Court has rejected those attempts when both partners actively bring a child into the world together using artificial insemination.[145] Even though the child also has legal standing to challenge parentage under section 7540, it is inconceivable that the court would reject the mother's ability to challenge the parentage of her partner yet allow the child to do so. If the child were able to challenge paternity, it would have to be on some ground other than the fact that the partner is "impotent or sterile."

144. CAL. FAM. CODE § 297.5(l) (West 2004 & Supp. 2006).

145. *See Elisa B.*, 117 P.3d 670; *K.M.*, 117 P.3d 678; *Kristine H.*, 117 P.3d 696.

2. Biology Will Not Trump the Presumption of Parentage in the Case of the Known Donor

Even if the donor did have standing to challenge the presumption of parentage, he would be unlikely to prevail if he has nothing more than a biological connection with the child. As previously noted, both the United States Supreme Court and the California Supreme Court have rejected the notion that biology alone creates substantive legal parental rights.[146]

Not only is biology inconclusive in parental presumptions, but once a presumption is created, the court has discretion whether to allow a paternity test to override the presumptions in the best interest of the child.[147] In the case *In re Kiana A.*, two men had competing claims of paternity to Kiana.[148] The court held, however, that a paternity test establishing one of the men as the biological father would not have resolved the competing claims.[149] Both men had established themselves as fathers under the presumptions of paternity.[150] One man, Mario A., had married Kiana's mother and his name was on Kiana's birth certificate.[151] The court recognized him as a presumptive father under section 7611(c)(1), which allows a man to be a presumptive father in exactly that situation.[152] The other man, Kevin W., had received Kiana into his home and held her out as his child.[153] Kevin W. was therefore entitled to a presumption of paternity under 7611(d).[154] The court looked to the best interest of the child to determine which "father" should get parental rights.[155] Determining that the child had a strong and developed relationship with Kevin W., the court held that he was Kiana's legal father.[156] This case suggests that genetic proof of parentage will not necessarily trump a parental presumption, leaving ample room for grants of parentage to non-biological parents over biological parents. The California Supreme Court affirmed this approach in a more recent case, *In re Jesusa V.*,[157] by

146. *See* Michael H. v. Gerald D., 491 U.S. 110, 126 (1989); Dawn D. v. Superior Court, 952 P.2d 1139, 1144 (Cal. 1998).
147. *In re* Kiana A., 113 Cal. Rptr. 2d 669, 678 (Ct. App. 2001).
148. *Id.* at 673–74.
149. *Id.* at 678.
150. *Id.*
151. *Id.* at 676.
152. *Id.*
153. *Id.*
154. *Id.* at 677.
155. *Id.* at 679–80.
156. *Id.*
157. 85 P.3d 2 (Cal. 2004).

awarding substantive parental rights to the mother's husband over the biological father.[158]

The fact that biology does not conclusively defeat presumptions of parentage means that in spite of a lack of genetic link between the domestic partner and the child, the non-biological domestic partner can nonetheless be the legal parent of the child. As demonstrated in *Kiana A.* and *Jesusa V.*, it is the best interests of the child that should ultimately govern grants of parentage, second to the demonstration of parentage. The California Legislature enacted the Act, and in particular subsection (d), to protect the best interests of children born into domestic partnerships. Upholding the legislative intent of the Act and the precedent set by California case law means keeping intact families together rather than granting parental rights simply on biological factors alone.

3. The California Supreme Court Has Already Applied a Presumption of Parentage to Same-Sex Parental Disputes

The California Supreme Court has already applied the UPA presumptions of parentage to same-sex couples in a different factual context. In *Elisa B.*, two women in a committed relationship decided to each get pregnant using sperm from the same anonymous donor.[159] Elisa gave birth to one child and her partner, Emily, gave birth to twins, one of whom was significantly disabled.[160] The relationship deteriorated and Elisa tried to claim that she was not financially responsible for Emily's twins.[161] The court held that Elisa was a presumed parent under California Family Code section 7611(d) and the law created in *Nicholas H.*:

> [S]he received the children into her home and openly held them out as her natural children, . . . this is not an appropriate action in which to rebut the presumption that Elisa is the twins' parent with proof that she is not the children's biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children's second parent.[162]

158. *Id.* at 13–14.
159. *Elisa B. v. Superior Court*, 117 P.3d 660, 663–64 (Cal. 2005).
160. *Id.* at 663.
161. *Id.* at 663–64.
162. *Id.* at 670.

Although *Elisa B.* is factually distinct from the situation envisioned by this Comment, Elisa was trying to avoid parental responsibilities and leave her child with only one parent. The holding demonstrates that the California Supreme Court will apply the presumption of parental provisions of the UPA to same-sex couples, at least to uphold the two-parent family model. In *Elisa B.*, however, the court was not terminating anyone's statutory parental rights.[163] As discussed earlier, the California Supreme Court prefers that children are raised in a two-parent family. Therefore, when determining which of three parties should have full parental rights, the biological mother, her partner, or the known donor, the court should likewise have no trouble applying sections 7540 and 7611(a) to conclude that the domestic partners are the legal parents.

V. Conclusion

To prevent discriminatory application of the laws and uphold the protections afforded to domestic partnerships granted by the Act, the California Supreme Court must say to the known donor—as Justice Kennard said to Jerry in *Dawn D.*—if you donate sperm, you take the risk that the child will be raised within that domestic partnership and that you will be excluded from participation in the child's life.[164] Terminating the rights of the known donor in favor of the non-biological mother might have painful consequences. For example, it is not difficult to envision a situation where the couple and donor agree prior to the birth of the child that the donor will play an active role in the life of the child, and the couple later takes unilateral steps to dissolve that relationship. However, it is equally unfortunate to terminate the rights of the non-biological partners who participated in the planning and conception of her child simply because she may not enter into a legal marriage. It would be inimical to uphold cases like *Michael H.* and *Dawn D.*, where the male lover of a married woman is denied legal rights to the child he fathered because the woman he impregnated is legally married to another man, while allowing a known donor, who donated sperm to two women in a registered domestic partnership, to have parental rights over the non-biological partner. Such action would be absurd and undermine the clear legislative intent to provide protections for gay and lesbian families. Therefore, California must

163. *Id.*

164. Dawn D. v. Superior Court, 952 P.2d 1139, 1148 (Cal. 1998) (Kennard, J., concurring).

protect the non-biological mother's right to be a legal parent as the legislature intended with the Act.[165]

This means finding that a child born into a registered domestic partnership is the child of that union and rejecting the standing of a known donor who challenges such parentage. As the California Supreme Court has been willing to apply parental presumptions to domestic partners for the purpose of upholding the two-parent family model, the court must apply the presumption of parentage to domestic partners over the known donor. It is critical that the court is steadfast in the application of these provisions in order to affect the intent of the Act and protect the children of gay and lesbian families just as they do the children of heterosexual families.

165. CAL. FAM. CODE § 297.5 (West 2004 & Supp. 2006).