1-1-2004

Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents

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INTRODUCTION

Two women meet, fall in love, and decide to start a family. Perhaps one partner is artificially inseminated and is both the genetic and gestational mother of the child. Or, perhaps one partner donates her eggs and is the genetic mother while the other partner is the gestational and birth mother. Who is a legal mother in these scenarios? May both women establish legal parentage or can there be only one mother? With increasing frequency, courts are being asked to determine the parental rights of lesbian partners; some of these partners have no biological connection to their child(ren), while others have donated genetic material.[1] Existing parentage laws, predicated on a one mother/one father paradigm, are often inadequate to resolve these disputes.[2] The law has not yet caught up with the realities of reproductive technology and changing family forms. Even when current parentage laws can be used to legalize nontraditional parent-child relationships, courts are often reluctant to do so, in large part because they are re-

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1. *E.g.*, Kristine Renee H. v. Lisa Ann R., 16 Cal. Ct. App. 3d 123 (2004) (lesbian couple agreed that one partner would be artificially inseminated but both would coparent; the biological mother later sought a court judgment that the non-biological mother had no legal parent child relationship); K.M. v. E.G., 13 Cal. Ct. App. 3d 136 (2004), *cert. granted*, M.K. v. E.G., 97 P.3d 72 (2004). K.M. donated eggs and E.G. was the gestational mother; K.M. later sought to, and was denied, the right to establish legal parentage. *Id.*

2. *See, e.g.*, Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002) (discussing and critiquing the application of traditional family law principles to nonmarital families).

luctant to depart from the traditional family paradigm of one mother/one father.[3]

Parentage has long been established through biology or adoption.[4] In the maternity context, motherhood has been ascribed, in a relatively straightforward manner, to the woman who gave birth to the child. Paternity has traditionally been established through either biological connection or the marital presumption of paternity.[5] The advent of reproductive technologies, however, has made these traditional means of establishing parentage inadequate for some situations. Moreover, paternity and divorce laws protect the rights of parents to maintain custodial and visitation relationships with their children; in the absence of legal parentage, it is hard to overcome the presumptions of parental autonomy to establish a custody or visitation order.[6] For nonlegal[7] lesbian coparents, the lack of biological or birth connection has often been an impediment to establishing a legal parent child relationship and thus an insurmountable obstacle in maintaining a custodial or visitation relationship with their child(ren).[8] Therefore, courts have attempted to fashion additional means by which parentage can be established.

Scholars, and more recently courts, have started to embrace the notion of functional parenthood as an alternative means of establishing parent-

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3. *See, e.g.*, Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1391-92 (1994). "The lesbian non-legal mother . . . challenges the heterosexual matrix of third party custody by being the 'other' mother in an ideology that acknowledges only one mother, the third party in an ideology that admits of only two parents, one of each gender." *Id.*

4. Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLIAMETTE L. REV. 769, 771 (1999).

5. To preserve the extant, nuclear family, courts have long embraced the marital presumption of paternity, perhaps best illustrated in the case of Michael H. v. Gerald D., 491 U.S. 110 (1989), in which the Supreme Court rejected the petition of a biological father to establish a custodial, hence legal, relationship with his daughter in favor of preserving the intact marital unit. *See also*, Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000) (providing a historical analysis of the marital presumption and critique of its ongoing utility).

6. *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 348-49 (2002).

7. By using the term "nonlegal" I wish to include both lesbian coparents who have no genetic nor birth connection to the child as well as those women who have donated eggs to their partner but under the traditional means of parentage establishment, are not the mother because they did not give birth to the child. In a previous writing, I referred only to "non-biological" lesbian coparents, but wish to expand the analysis in this article to include the second scenario just identified. *See* Jacobs, *supra* note 6.

8. *E.g.*, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991). The court refused to enter a visitation order for a non-biological lesbian coparent because she could not prove biological or adoptive parenthood under statute. *Id.*

hood.[9] Additionally, both the American Law Institute (ALI) and the 2002 revised version of the Uniform Parentage Act (UPA) recognize that parental status and legal parenthood may be established without regard to biological connection.[10] The general premise of functional parenthood is to recognize someone who has, in a meaningful and regular way, acted as a parent and held herself out as a parent to the child.[11] In the past decade, several courts

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9. *See generally* Melanie B. Jacobs, *When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims,* 16 YALE J.L. & FEMINISM 193, 208-13 (2004) (providing an overview of the growing recognition of functional parenthood doctrine).

Scholars have been addressing the need for expanded definitions of parenthood (i.e., beyond biology) for two decades. In a seminal article in 1984, Katharine Bartlett argued that courts must look beyond the traditional exclusivity model of parentage, in light of the decline of the nuclear family. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70. VA. L. REV. 879 (1984). Nancy Polikoff has also argued that legal parenthood premised only upon biology leaves many children with nontraditional parents out in the cold. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990). *See also* Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights,* 40 WAYNE L. REV. 1227 (1994) (recognizing the need to include nonbiological caretakers within the legal definition of parent based upon the best interests of the child).

10. The ALI Principles include establishment of a legal parent child relationship without regard to genetic connection in a variety of circumstances. The ALI defines "parent" as a legal parent, parent by estoppel, or a de facto parent. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION § 2.03 (1) (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES]. A parent by estoppel is defined, in part, as an individual who has either lived with the child since the child's birth or has lived with the child for at least two years, "holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent," when the court finds that recognition as a parent is in the child's best interests. ALI PRINCIPLES § 2.03(1)(b). A de facto parent is defined, in part, as someone "who regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived." ALI PRINCIPLES § 2.03(1)(c).

Moreover, the UPA also includes presumptions of legal parenthood that are not predicated on biology. For example, the UPA presumes a man's legal fatherhood if "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own." UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002), 9B U.L.A. 311 (Supp. 2004).

11. For example, stepparents, grandparents, and foster parents, have increasingly been recognized as functional parents entitled to maintain custodial or visitation relationships with children they helped raise. *See, e.g.*, Smith v. O.F.F.E.R., 431 U.S. 816 (1977) (Supreme Court recognizing liberty interest in foster families in preserving relationships with children in their care); Nunn v. Nunn, 791 N.E.2d 779 (Ind. Ct. App. 2003) (discussing Indiana statute which permits de facto custodians to establish custodial and/or visitation rights; in this case, a stepfather); Rideout v. Riendeau, 761 A.2d 291 (Me. 2000) (finding where grandparents had functioned as children's parents for significant periods of time, visitation pursuant to state Grandparents Visitation Act was appropriate and constitutional).

have used functional parenthood principles and equitable doctrines to award visitation rights to a nonlegal lesbian coparent.[12] While these cases represent positive progress for nonlegal mothers and their children, the results are not fully satisfying. The courts have not applied functional parenthood to legalize the parent-child relationship. Rather, the courts have used functional parenthood doctrine merely as a means of preserving a visitation relationship.[13]

In response to these lesbian coparent cases in which the functional parenthood doctrine was applied only to preserve visitation but not to recognize a legal parent child relationship, I have previously advocated using the UPA as a preferred method by which nonlegal lesbian coparents may be adjudicated a legal parent.[14] More specifically, I argued that applying the principles of functional parenthood, a nonlegal mother could be adjudicated a legal mother under the UPA, thus providing her with full parental status. I argue that such application is consistent with the policies of the UPA. In 1973, the UPA was promulgated to provide substantial legal equality for children born out of wedlock;[15] it was substantially revised in 2000, with additional modifications in 2002.[16] Both the 1973 and 2002 versions of the UPA recognize that parentage may be established by something other than biology or adoption. For instance, under the UPA, the mother and child relationship is established either by the woman's having given birth to the child, adoption of the child by the woman, or an adjudication of the woman's maternity.[17]

By recognizing that maternity may be established *other* than by birth or adoption, the Act opens the door to other methods of maternity adjudication. One method may be proof of genetic motherhood;[18] another may be

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12. *E.g.*, E.N.O. v. L.M.N., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); *In Re* Custody of H.S.H.-K., 533 N.W. 2d 419, 421 (Wis. 1995).

13. *In re Custody of* H.S.H.-K., 533 N.W.2d at 436 (stating that an invocation of general equitable principles to preserve the rights of a lesbian coparent must be exercised in a manner that protects a biological parent's autonomy and constitutional rights).

14. Jacobs, *supra* note 6. I specifically recommended maternity adjudication under the UPA as an alternative to same-sex second parent adoption. *Id.* at 353-54 (articulating the advantages of adjudication under the UPA over an adoption proceeding with its potential time delay, expense, and adversarial nature).

15. UNIF. PARENTAGE ACT, Prefatory Note (1973) (amended 2002), 9B U.L.A. 296.

16. UNIF. PARENTAGE ACT, 9B U.L.A. (amended 2002).

17. *Id.* § 201(a).

18. Through gender-neutral application of the Act, courts look to provisions applicable to paternity establishment for maternity establishment. *E.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (discussed below). Section 505 of the UPA provides that "a man is rebuttably identified as the father of a child if the genetic testing . . . results disclose that . . . the man has at least a 99 percent probability of paternity . . . ." UNIF. PARENTAGE ACT § 505 (amended 2002). Thus, in cases like *Johnson*, the court was able to identify two potential

proof of functional parenthood, specifically holding oneself out as the child's parent. The UPA presumes a man to be the father of a child if, "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."[19] By analogy, then, a woman who resides with the child, functions as a mother, and holds herself out as a mother to the children, should be able to establish maternity under the Act. Using the UPA to establish maternity, the nonlegal lesbian coparent becomes a legal parent with all the rights and responsibilities of parenthood.[20] No longer is she merely a third party attempting to maintain a visitation relationship with her child; rather, she is a legal parent whose interests will be evaluated in a traditional parental framework and entitled to the benefits and protections accorded other legal parents in the context of custody and visitation.[21] As courts attempt to recognize means of establishing parentage other than through biology and adoption, several have embraced the concept of intent-based parenthood, meaning that the party who intended to bring about the birth of the child should be declared the legal parent.[22] As Professor Richard Storrow has observed, however, parenthood by intention has been largely used to resolve parentage issues that arise in assisted reproduction cases involving married couples.[23] He argues that intentional parenthood should be recognized as an alternative means of establishing parentage—like genetic, gestational, or marital presumption parenthood—and should not be reserved for use only in cases involving married couples.[24] I agree with Professor Storrow that parenthood by intention should not be reserved for married couples only and should be applied to nonlegal lesbian coparents, too. To date, however, courts have demonstrated greater reluctance to use intention to establish legal parentage for nonlegal lesbian coparents.

A second difficulty of the intent doctrine as currently applied is that it focuses purely on pre-birth parenting intention; it does not encompass the intent to parent that may accompany functional parenting that begins after the child's birth. Thus, when courts are required to make initial parentage determinations among multiple potential parents, intent is often useful to choose between them. When only two parties are involved, however, intent

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mothers under the Act: the birth mother and the genetic mother. *See infra* notes 26-36 and accompanying text.

19. UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002), 9B U.L.A. 311 (Supp. 2002).

20. For a brief discussion of the many rights and responsibilities that attach to legal parenthood, *see* Jacobs, *supra* note 6, at 347-48.

21. *Id.* at 351.

22. *See infra* Part A.

23. *See* Storrow, *supra* note 2, at 639-40.

24. *Id.* at 677-78.

should be considered either to establish parentage in the first instance, or later, as a component of a functional parenthood analysis. If the parties did not intend to coparent pre-birth, but actively coparented the child for a period of time thereafter, I suggest that the initial intent should not be used to preclude parentage determination and the current intent to coparent should be considered as an element of functional parenthood.[25]

Finally, while intention is a good alternative to parental determinations predicated on biology or the marital presumption, the intent principle should not preclude other methods of parental establishment. As discussed below, some courts are concluding that if initial intent to parent is not present, functional parenthood is irrelevant. Analysis of the two leading cases in which the intent principle has been developed demonstrates some of its current limitations.

A. INTENT-BASED PARENTHOOD

The leading case to embrace intent-based parentage is that of *Johnson v. Calvert*.[26] Mark and Crispina Calvert had contracted with Anna Johnson to serve as a gestational surrogate for them.[27] Although Crispina had had a hysterectomy and could not gestate a pregnancy, she was able to produce eggs and Anna became the gestational surrogate for an embryo created from Mark's sperm and Crispina's egg.[28] During the pregnancy, Anna became reluctant to give the child to the Calverts and ultimately sought to establish her maternity and keep the baby.[29] The Court was required to determine who was the legal mother under California's version of the UPA: the birth mother or the genetic mother?

Under the California parentage statute, any interested party may bring an action to determine the existence of the mother and child relationship.[30] The mother and child relationship may be established by proof of her having given birth or *under the Act*.[31] As with the UPA, California's version includes language that states that insofar as practicable, provisions applicable to the father and child relationship may be applied to the mother and child relationship.[32] One of the means by which paternity can be estab-

25. I have argued elsewhere that functioning as a parent demonstrates "intent to parent" even if the person did not intend to bring about the birth of the child. *See* Jacobs, *supra* note 9.

26. 851 P.2d 776 (Cal. 1993).

27. *Id.* at 778.

28. *Id.*

29. *Id.*

30. *Id.* at 780 (citing CAL. CIV. CODE § 7015 (West 1997)).

31. *Id.*

32. *Johnson*, 851 P.2d at 780. "[T]he Act sets forth no specific means by which a natural mother can establish a parent and child relationship. However, . . . insofar as practi-

lished is through evidence derived from genetic testing; another way is through application of the presumption of paternity based on a man's conduct toward the child, such as receiving the child into his home and openly holding the child out as his own.[33] Because genetic testing excluded Anna as the baby's mother and confirmed that Crispina was, in fact, the genetic mother, both women qualified as "mother" under the Act.[34]

In this case, three people were asserting parental rights: Mark, Crispina, and Anna. The court noted, however, that it was impossible to declare two legal mothers.[35] In order to establish one woman as the legal mother, the court looked to the parties' intent prior to the pregnancy and used intent as the "tie-breaker." Specifically, the court explained that when the two means to prove "natural" motherhood under the Act do not coincide in one woman, "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[36]

Thus, intent was not used as the sole means of establishing maternity; rather, as between two competing options, the court used intent as a tie-breaker to choose one mother. Notably, the court was choosing between two mothers so as not to create three legal parents; in essence, it was choosing between two women for the same parental role. Some scholars have argued that if the court had been confronted with a situation in which only one woman was seeking legal recognition of parentage—as a second, rather than third, parent—the court's intent analysis could apply in such a scenario.[37]

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cable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship." *Id.* at 781 n.8.

33. *Id.* (citing CAL. CIV. CODE § 7004 (West 1997)). *See also* UNIF. PARENTAGE ACT § 204(a)(5).

34. *Johnson*, 851 P.2d at 781.

35. *Id.* "Yet for any child California law recognizes only one natural mother . . . ." *Id.* The court further declined to "find the child has two mothers . . . . To 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 mother." *Id.* at fn.8.

36. *Id.* at 781.

37. *See, e.g.*, Shannon Minter and Kate Kendell, *Beyond Second-Parent Adoption: The Uniform Parentage Act and the "Intended Parents" - A Model Brief*, 29 GEO. J. GENDER & L. 29, 32 (2000). The authors argue that courts should employ the UPA to establish legal parentage for nonlegal lesbian coparents. They further contend that applying this intent-based standard is consistent with the holding in *Johnson*, that the terms of the UPA must be applied in a gender-neutral manner so that the standards used to determine the parentage of a child born to a different sex couple through assisted reproduction is similarly applied to determine the parentage of a child born to a same-sex couple through assisted reproduction. *Id. See also* Emily Doskow, *The Second-Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 18 (1999) (the author notes that the court left open the possibility that recognition of two mothers could be appropriate particularly because of the court's emphasis on intentions).

Several years later, a California court was again confronted with a difficult parentage case involving reproductive technology. In *Buzzanca*, five people were responsible for the birth of the child, and the court needed to determine the legal parents.[38] Luanne and John agreed to have an embryo genetically unrelated to either of them implanted in a surrogate.[39] After the pregnancy, John filed for divorce and a trial court was presented with the question of who are Jaycee's, the baby's, legal parents. The trial court "reached an extraordinary conclusion: Jaycee had *no* lawful parents."[40] The trial court reached this conclusion, in part, because the surrogate and her husband had agreed in writing that they were not the lawful parents, and the trial court further concluded that neither Luanne nor John were legal parents because they lacked any biological connection to Jaycee.[41]

The appellate disagreed and in beginning its analysis, clarified that legal motherhood could be established other than by giving birth or contributing an egg.[42] Analogizing to paternity law, the court recognized that fatherhood can be established by conduct, such as permitting a spouse to be artificially inseminated.[43] The court stated that parity of reasoning leads to the conclusion that both a husband *and* wife should be deemed lawful parents after a surrogate bears a biologically unrelated child.[44] Specifically, the court noted that Luanne's consent to the surrogacy situated her like a husband in an artificial insemination case and thus enabled her to establish maternity "under this part" because of her consent.[45]

Just as the *Johnson* court had to determine maternity under the Act and used intent as a tie-breaker, *Buzzanca* took intent a step farther and used pure intention to establish Luanne's parentage under the Act.[46] Because Luanne "caused" Jaycee's conception and birth by initiating the surrogacy arrangement, she intended the birth, intended to parent, and thus should have been declared the legal mother.[47] The court further noted that intention should also be used to establish John's paternity.[48]

I offer two observations concerning application of the intent-based standard as currently developed in *Johnson* and *Buzzanca*. First, intention has been employed when courts are confronted with determining legal parentage soon after the birth of a child and before a party has invested signifi-

38. Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).
39. *Id.* at 282.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Buzzanca*, 72 Cal. Rptr. 2d. at 282.
45. *Id.* at 288.
46. *Id.*
47. *Id.* at 291.
48. *Id.*

cant time functioning as a parent. Its utility, then, seems best applied when courts are making an initial determination of who should have the right to parent, before significant parenting is undertaken. By contrast, functional parenthood doctrine serves as a means of establishing legal parentage after someone has already assumed the responsibilities of parenthood and wishes to legalize the parent child relationship. Initial intent to parent often leads to functional parenthood, but there may be instances in which someone meets the criteria of a functional parent but did not intend to "bring about the birth of the child."[49]

Second, intent has served as a tie-breaker between two individuals seeking the same parental role. That is, in *Johnson*, two women were seeking to establish maternity within a two-parent paradigm and paternity had already been established.[50] Intent was used as a tie-breaker to choose one mother because the court was constrained to remain within the two-parent framework and did not wish to award legal parental status to three people. The *Johnson* court did not specifically restrict its analysis to this situation; although, as the discussion below demonstrates, many courts have viewed the doctrine in a restrictive manner. Intent should not be used as a means of precluding courts from making parental determinations when only two individuals seek parental status.[51] In the nonlegal lesbian coparent cases, courts are not being asked to choose one woman as the "natural mother," but rather to recognize two mothers as the *only* two legal parents. In this way, courts are not being asked to modify the one mother/one father paradigm to recognize a new paradigm of two mothers/one father.

B. APPLYING INTENT TO NONLEGAL LESBIAN COPARENTS

How then should courts use the intent test when making parentage determinations for lesbian coparents? In *K.M. v. E.G.*,[52] the court concluded that because K.M. had donated her eggs to E.G. without the intent of being a parent upon the children's birth, the intent doctrine precluded any subsequent determination of parentage, despite K.M.'s several years of active parenting. K.M. and E.G. entered into a committed, intimate relationship in

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49. Certainly, the intent doctrine could be expanded to apply to nonlegal lesbian coparents who seek a determination of parentage at birth, but the doctrine in its current application should not preclude other means of parentage establishment.

50. 851 P.2d at 776.

51. Whether courts should confer legal parental status on more than two individuals is beyond the scope of this article. There may, in fact, be appropriate instances in which to recognize the legal rights of more than two individuals. In this article, I have limited my argument and merely advocate that intent should not be used to preclude an alternative representation of the two-parent paradigm.

52. 13 Cal. Rptr. 3d at 136.

1993.[53] E.G. had considered artificial insemination prior to beginning the relationship and K.M. knew of E.G.'s plans to have a baby.[54] The parties, in fact, agreed that it was E.G.'s intention to have a child alone.[55] E.G. had difficulty with the insemination process, and it was determined that she was unable to produce enough eggs.[56] Ultimately, the parties agreed that K.M. would donate her eggs, that E.G. would be the sole legal parent, and that E.G. would consider adoption by K.M. after a period of five years.[57]

E.G. gave birth to twins in December 1995 and the couple soon after "married."[58] While only E.G. was listed on the children's birth certificates and provided health insurance for the children, it was undisputed that E.G., K.M., and the twins lived together as a family unit for the next five years.[59] Although K.M. actively coparented the children, she did not reveal to anyone, including her own family, that she was the children's genetic mother until her relationship with E.G. ended.[60] K.M. sought to establish her legal parentage when the parties' relationship ended, but the trial court found that she had relinquished her claims to parentage when she had signed an ovum donor form.[61]

The appellate court upheld the trial court's findings and determined that K.M. was not a legal parent, in large part, because of her intentions to waive her parental rights when she donated her eggs.[62] The court engaged in lengthy analysis of the UPA and *Johnson* test to conclude that only one mother can be declared under the UPA, and that they were required to make parentage determinations between two competing claimants.[63] Rather than analyze this case in a two-parent paradigm, the court instead determined that because the gestational mother intended to parent the children, no other woman could be declared the "natural mother."[64] The court noted that the *Johnson* test requires examination of the woman's intent "'from the outset' to bring about the birth of the child."[65] Moreover, the court stated that when two women have proof of maternity, the determination of legal parentage is made by examining the parties' intentions and that as between the

53. *Id.* at 139.
54. *Id.* at 139-40.
55. *Id.* at 140.
56. *Id.*
57. *K.M.*, 13 Cal. Rptr. 3d at 140.
58. *Id.* at 141.
59. *Id.* at 141.
60. *Id.* at 142.
61. *Id.* at 143.
62. *Id.* at 149-50, 153-54.
63. *K.M.*, 13 Cal. Rptr. 3d at 151-52 n.12. "[W]e must make the purely legal determination as between the two claimants." *Id.* (*quoting Johnson*, 851 P.2d at 791).
64. *See id.* at 152.
65. *K.M.*, 13 Cal. Rptr. 3d at 151 (*quoting Johnson*, 851 P.2d at 782).

genetic and birth mothers, "the law recognizes the woman who intended to bring about the birth of the child to raise as her own."[66]

The court did not look beyond K.M.'s initial intentions nor consider her years of functional parenting. Rather, it used a restrictive application of intention as a way of reinforcing E.G.'s legal motherhood and precluding any parentage determination for K.M. K.M. argued that her conduct subsequent to the birth of the twins mandated legal recognition of her parental status.[67] The court rejected her argument and found that "[f]unctioning as a parent does not bestow legal status as a parent."[68] The court approached intent and functionality backwards: the court saw functional parenthood as relevant to prove or refute intentional parenthood, instead of recognizing intention as a part of the functional parenthood analysis.[69]

I contend that the *K.M.* court misapplied the *Johnson* test in two respects. First, the court narrowed its analysis to determine only one legal mother and did not appreciate that K.M. sought a declaration of legal parentage as a second parent, not as the only legal mother. Second, the court used intention as a means of precluding a determination of legal parentage, rather than as a method of establishing parentage for a second parent. Regarding the first point, K.M. was not seeking a declaration of motherhood *in place of* E.G., in contrast to the facts of *Johnson*. Rather, K.M. sought recognition of her parental status as a second mother or a second legal parent.[70] She was not competing with E.G. for the position of "natural mother" under the UPA as were Crispina and Anna; she merely sought legal recognition of her five years of functional parenting.[71]

Relatedly, because she was not seeking to replace E.G. as the children's mother, but was seeking to be declared a mother, the intention test was misapplied to preclude a functional parenthood analysis. The *Johnson* and *Buzzanca* courts used intention to make an initial parentage determina-

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66. *Id.* at 151 (citing *Johnson*, 851 P.2d at 782).

67. *Id.* at 136.

68. *Id.* at 152.

69. *K.M.*, 13 Cal. Rptr. 3d. at n. 13.

> We do not mean to imply that the conduct of the parties after the birth of a child and the parental roles the parties played have no legal significance. Such evidence would be relevant to confirm or refute proof of the parties' parentage intentions at conception under the *Johnson* test.

Id. Furthermore, the court relied on previous California lesbian coparent cases, particularly *Nancy S. v. Michele G.*, in which a court refused to recognize the parental status of a non-biological lesbian coparent. *Id.* (citing 279 Cal. Rptr. 212 (Cal. Ct. App. 1991) (holding that non-biological lesbian coparent could not establish legal parentage under the California parentage act using theories of de facto parent or parent by estoppel and thus had no standing to pursue visitation or custody)). For an analysis of the *Nancy S.* opinion, *see* Jacobs, *supra* note 6, at Part III.B.1.

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

71. *Johnson*, 851 P.2d at 776.

tion, to decide who had the right to function as the children's parents. In contrast, K.M. had functioned as a parent for more than five years.[72] Clearly, she had "intent" to parent over that period, even if she did not manifest that intent prior to the twins' births. Her decision to relinquish her parental rights almost six years prior to this litigation when she donated her eggs should not have precluded other parentage analyses, especially because, with E.G.'s consent and permission, she actively coparented the children.[73]

The *Johnson* test was misapplied again in *Maria B. v. Emily B.*[74] Elisa (Elisa Maria) and Emily were in a committed relationship and wished to have children.[75] Both women wanted to experience childbirth, so each underwent the artificial insemination process using an anonymous donor.[76] Elisa gave birth to a boy in 1997 and Emily gave birth to twins in 1998.[77] The women jointly chose the children's names and gave them hyphenated surnames, breastfed the children together, and each woman considered herself mother to the other's child(ren).[78] In fact, since Elisa earned a higher salary, they agreed that Emily would remain a stay at home mom; Elisa supported the family, paid medical insurance for the children, and claimed the children as dependents on her taxes.[79]

The relationship soured and the couple separated in 1999.[80] Although initially Elisa supported Emily and the twins, she ceased doing so in May 2001, and one month later, the county filed a complaint against Elisa to establish her parentage and a child support order.[81] The trial court held that because Elisa intended to create children with Emily, and because she had functioned as a de facto parent, she should be declared a legal parent under the UPA.[82] The appellate court disagreed and determined that Elisa had no parental status with the children, and thus no parental obligation.[83] Quoting the *Johnson* opinion, the *Elisa B.* court stated that "California law recog-

72. *K.M.*, 13 Cal. Rptr. 3d at 141.
73. *Id.* at 140-41.
74. 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004).
75. *Id.* at 497.
76. *Id.* at 498.
77. *Id.*
78. *Id.*
79. *Maria B.*, 13 Cal. Rptr. 3d at 498. Although the women had consulted with an attorney prior to the children's births concerning adoption, they did not follow through. *Id.*
80. *Id.* at 498.
81. *Id.* Elisa contended that under the UPA, she was not a legal parent and therefore had no duty to support the children. *Id.* at 499.
82. *Id.* Using parity of reasoning, much like the *Buzzanca* court, the trial court held Elisa to the same legal responsibilities as a man under the UPA. I contend that the trial court correctly found Elisa to be a parent under the UPA and appropriately considered her years of parenting as well as her intent to parent the twins.
83. *Id.* at 508.

nizes only one mother" and further, that in making a determination of maternity, the law should recognize the woman who intended to bring about the birth of the child.[84] Because Emily is biologically related to the twins and intended their births, the court concluded that she alone is their legal mother and Elisa has no legal relationship with the children.[85]

The court used a myopic view of *Johnson* to reach this absurd result. Despite Elisa's intent to have the children and raise them as her own, coupled with several years of active parenting, the court restricted its application of the intent doctrine to determine *which* woman is the "natural mother" under the Act.[86] The court did not need to be so restrictive in this case. Both women intended to bring about the births of all three children; yet, the court relied on intent as a tie-breaker and did not see the greater applicability of using Elisa's intent and functional parenthood to establish her legal relationship (and responsibilities).

The county, on behalf of Emily, was not asking that Elisa be declared mother in place of Emily, but rather that her parenthood be established *in addition* to Emily's.[87] Just as in a paternity case, the court was requested to legalize a second parental relationship with the child; here Elisa could easily have been found a parent under the UPA if the court applied the paternity presumption of holding oneself out as a parent and considered her intent to parent. As discussed above, the *Johnson* court used intent as a tie-breaker between two individuals seeking to fill the same parental role; that was not the issue presented here, and the *Johnson* court did not specifically limit application of intent to that context.

The *Maria B.* court similarly applied a narrow reading of *Buzzanca*, stating that the *Buzzanca* ruling was limited to its facts and that the court did not address whether its reasoning would apply to an unmarried or same-sex couple.[88] Thus, the court determined that relying on *Buzzanca's* establishment of Luanne's parentage by pure intention was not applicable here. In addition, the court wrote, "[n]othing in *Buzzanca* or *Johnson* holds that a woman's intention to create and raise a child can be used to establish the child has two mothers."[89] Thus, the court concluded, Elisa's intent is irrelevant to her parentage determination. As Professor Storrow observed, parenthood by intention has been reserved for married couples and this case lends credence to his observation. There is no appreciable difference be-

84. *Id.*

85. *Maria B.*, 13 Cal. Rptr. 3d at 500.

86. *Id.* at 502. "Here, the twins have a natural, biological mother Emily, who is not disclaiming her maternal rights and obligations, and the children can have only one natural mother." *Id.*

87. *Id.* at 498.

88. *Id.* at 503.

89. *Id.* at 504.

tween Luanne and Elisa: both women intended to parent children with whom they would have no biological connection. "But for" their intent, the children may not have been born. Yet, the court refused to look beyond the traditional one mother/one father paradigm.

A third California appellate court confronted with the issue of determining parentage for a nonlegal lesbian coparent concluded that the UPA *could* be applied to establish her parentage and used the *Johnson* intent test to reinforce its decision. In *Kristine H. v. Lisa R.*,[90] the women, who had been in a long-term relationship, jointly agreed that one partner would be artificially inseminated.[91] A month before their daughter's birth, they obtained a pre-birth judgment based on a joint stipulation in which they declared their intention to be joint legal parents.[92] Following her birth, the women raised her together for about two years before they separated.[93] At that time, Kristine, the biological and birth mother, brought an action to vacate the judgment and have Lisa's parental rights voided.[94]

The court defined two legal issues: was the pre-birth judgment enforceable? And, if not, could Lisa establish parentage under California's UPA?[95] First, the court addressed the legality of the judgment. The parties filed their stipulation and sought a pre-birth judgment based on *Johnson* and *Buzzanca*, indicating that they both intended to parent the child.[96] Despite the parties' intentions, the appellate court found the judgment was void and not authorized under the UPA.[97] The court engaged in a thorough analysis of both *Johnson* and *Buzzanca* and reasoned that "[i]n those cases the court looked at the parties' intent as a part of the interpretation and application of the Act. Only when the Act was unclear or yielded an ambiguous result did the courts consider intent to determine parentage."[98] The court further concluded that neither *Johnson* nor *Buzzanca* permit contractual stipulations of parentage based on the parties' intentions alone.[99] Ques-

90. 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004).
91. *Id.* at 125.
92. *Id.* at 125.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Kristine H.*, 16 Cal. Rptr. 3d at 128.
97. *Id.* at 131.
98. *Id.* at 133-34.
99. *Id.* at 133. The court took notice that based on the intended-parent doctrine articulated in the cases, courts in several counties had granted pre-birth judgments. *Id.* at 132 n.17. This was apparently the first appellate challenge to the practice and it was resoundingly rejected by this court. *Id.* at 132. The court did not address the scenario of women obtaining a judgment post-birth, as many opposite-sex couples do in the paternity context. Given the court's gender-neutral application of other provisions of the UPA, it would be inapposite for the court not to recognize a post-birth judgment.

tioning the applicability of the UPA generally to determinations of parentage for nonlegal lesbian coparents, the court determined the Act should apply and explicitly rejected the reasoning espoused in *Maria B.*[100] By parity of reasoning and gender-neutral application of the provision related to establishment of the father and child relationship, the court declared its ability to establish a mother and child relationship.[101] Reviewing cases like *Johnson*, in which the court similarly used portions of the Act to establish maternity, the court noted that while previous cases had not specifically addressed the possibility of establishing legal parentage in a parent of the same sex, there is nothing in the statutory language which precludes such a result.[102]

The *Kristine* court further rejected arguments that the *Johnson* ruling precluded the establishment of a legal relationship for a second mother.[103] The court recognized that the *Johnson* language regarding the legal recognition of one mother only was contextual[104] and agreed that the *Johnson* court did not foreclose the possibility of finding two parents of the same sex as the child's legal parents where *only two* were attempting to establish legal parentage.[105] Thus, by applying the Act in a gender-neutral manner, the court looked to the provision of the Act that presumes paternity if a man receives a child into his home and openly holds the child out as his own.[106] While acknowledging that no other appellate division has applied section 7611(d) to determine parental rights for a same-sex partner, the court rejected the reasoning of other opinions and concluded that, indeed, the presumption could apply. Moreover, based on the factual history of the case, the court easily found that Lisa met the standard of the presumption.

Finally, the court noted that while parentage must be established under the Act, the intended parent doctrine reinforced its result. The court observed that the women "*acted together to cause the birth of their child.*"[107] The court determined that a finding that Lisa is also the child's mother is consistent with the women's intentions prior to the birth of their daughter and just as other parents must deal with the consequences of legal separa-

100. *Kristine H.*, 16 Cal. Rptr. 3d at 126.

101. *Id.* at 134.

102. *Id.* at 135. "*The Act contemplates two legal parents irrespective of their gender.*" *Id.*

103. *Id.* at 136.

104. *Kristine H.*, 16 Cal. Rptr. 3d at 136. Referring to the *Johnson* court's statement that "California law recognizes only one legal mother," the court noted that the comment was made in the context of two competing claims for motherhood and, further, that the court was reluctant to imbue a third party with parental rights. *Id.* (quoting *Johnson*, 851 P.2d at 781).

105. *Id.*

106. *Id.* at 138 (citing § 7611(d)).

107. *Id.* at 145 (emphasis in original).

tion, so too must these.[108] Intent was not the sole factor in establishing Lisa's parentage, but it assisted the court in making its determination.

Here, the court used intent as an element of the parentage decision. Although rejecting parenthood by pure intention, vacating the judgment, the court understood that intent is often part of the function and considered intent in application of the Act. Moreover, the court did not use intent as a means of precluding other determinations and did not severely restrict the application of the *Johnson* and *Buzzanca* decisions.

CONCLUSION

Parenthood by intention should be used as a means of establishing legal parentage for nonlegal lesbian coparents. It should either be used as a way to legalize the parental relationship immediately after the birth of a child or as part of a greater functional parenthood application. The intention doctrine should not continue to be narrowly applied; rather, courts should follow the example set by the *Kristine* court and recognize that the *Johnson* opinion did not restrict intention to married couples and tie-breaking scenarios. Interestingly, all three nonlegal lesbian coparent cases have been accepted for review by the California Supreme Court, which will hopefully broaden the scope and application of the intent doctrine and provide another avenue for parental recognition for lesbian coparents.

108. *Id.* at 146.