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Women Be Warned, Egg Donation Isn't All It's Cracked up to Be: The Copulation of Science and the Courts Makes Multiple Mommies

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WOMEN BE WARNED, EGG DONATION ISN'T ALL IT'S CRACKED UP TO BE: THE COPULATION OF SCIENCE AND THE COURTS MAKES MULTIPLE MOMMIES

Heather A. Crews[1]

This Recent Development proposes that California's new precedent for deciding maternity disputes arising pursuant to gestational surrogacy arrangements weakens legal protections afforded to the following populations: women who choose to donate eggs without becoming mothers, women who serve as gestational surrogates to friends or family members, and women who accept egg donations without also accepting the donor as a co-parent. The rule of law previously applied to surrogacy disputes as articulated in Johnson v. Calvert protects the interests of parties creating families through surrogacy while preserving one of the few procreative methods available to lesbian couples. The Johnson intent standard should not be limited by the Supreme Court of California's holding in K.M. v. E.G.

I. INTRODUCTION

Advances in Artificial Reproductive Technologies ("ART") are revolutionizing the ways in which parents create families.[2] The increasing use of in vitro fertilization, embryo and gamete freezing and storage, gamete intra-fallopian transfer, and embryo transplantation now make it possible for a child to have at least five different parents.[3] Gestational surrogacy, in particular, is

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[2] MARY SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 1 (2001).

[3] *See* John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991).

rapidly gaining both popularity and societal acceptance as a method of assisted reproduction.[4] Gestational surrogacy involves two types of ART: in vitro fertilization and embryo transplantation.[5] In a typical arrangement, a female donor's egg is harvested and inseminated outside of her body.[6] The fertilized egg is then implanted in a second woman, who carries the child to term and gives birth.[7] The division of the reproductive functions in such arrangements separates the female procreative role into two distinct elements: genetic and gestational.[8] The woman who contributes the egg is referred to as the "genetic mother" and the woman who carries the pregnancy and gives birth is the "gestational mother."[9] In many gestational surrogacy

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The potential parents might include the genetic parents (sperm and egg donors), the gestational mother (woman who carries the pregnancy and gives birth), and the functional parents (people who will raise the child). *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (1998) (describing a situation in which a child had six potential parents).

[4] Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 606 (2003).

[5] MARTHA A. FIELD, SURROGATE MOTHERHOOD 35 (Harvard University Press 1998). In vitro fertilization refers to the process by which a physician stimulates a woman's ovaries to produce eggs, removes the eggs in a procedure called laparoscopy, and fertilizes them with donor sperm in a Petri dish. Embryo transplantation is the process by which the fertilized egg is implanted in the uterus of a woman who will carry the child to term.

[6] *See* SHANLEY, *supra* note 2, at 103–04.

[7] *Id.*

[8] *See, e.g.*, Michelle Pierce–Gealy, *"Are You My Mother?": Ohio's Crazy—Making Baby—Making Produces a New Definition of "Mother,"* 28 AKRON L. REV. 535, 545 (1995).

[9] *See, e.g., id.* at 545. *See also* Adam P. Plant, *With a Little Help from my Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement,* 54 ALA. L. REV. 639, 664 n.6 (2003) (noting the inconsistency of nomenclature used in discussing gestational surrogacy agreements).

The terms "surrogacy" and "surrogate" have been applied to a variety of situations involving contracting parties producing a child through ART. *See, e.g., In re* Baby M., 527 A.2d 1227 (N.J. 1988) (involving an arrangement in which the surrogate gave birth to a child formed with her own egg that she intended to relinquish at birth). *Cf.* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (involving a surrogate who agreed to be impregnated with an embryo formed from another woman's fertilized egg). The term 'gestational surrogacy'

arrangements, one woman relinquishes her parental rights as part of a contractual agreement with the woman who intends to parent the child after birth.[10] However, if either of the two women have a change of heart during or after the pregnancy, the courts must determine which woman is the mother under law.

The courts' struggle to apply existing legal frameworks to the complex familial arrangements made possible through ART has been well documented.[11] In light of technological advances, however, it is important to consider not only how the law adapts to changes in technology, but also how the courts respond to new trends in the groups who utilize these technologies. This Recent Development focuses on a rapidly emerging legal trend in the use of ART: disputes in which the parties to a gestational surrogacy arrangement were formerly part of a committed lesbian relationship. Advances in egg harvesting and implantation techniques (coupled with greater social acceptance of nontraditional families) have led to a growing trend of lesbian couples using this technique to create children.[12] Gestational surrogacy arrangements appeal to lesbian couples because any children born as a result will have a connection to both partners through either genetics or gestation. Indeed, this technique may provide the only method for same-sex couples to have a child with a biological connection to both women.[13]

K.M. v. E.G.[14] is the first custody dispute between an egg donor and a gestational mother who were part of a lesbian relationship to

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as used in this Recent Development refers to the former situation, where the surrogate is impregnated with an egg donated by another woman. *But cf.* Emily Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1, 2 (1999) (referring to this arrangement as "ovum donation").

[10] Larkey, *supra* note 4, at 610.

[11] Plant, *supra* note 9, at 664 n.19.

[12] Doskow, *supra* note 9, at 2 (noting that surrogacy arrangements are one of the few methods available for same-sex couples to have a child). *See generally* SHANLEY, *supra* note 2, at 124.

[13] Doskow, *supra* note 9, at 2.

[14] 117 P.3d 673 (Cal. 2005).

reach the highest court of any state.[15] On August 22, 2005, the Supreme Court of California held that both the genetic mother and the gestational mother who agree to bring children into the world through ART can be full legal parents.[16] In so doing, the court diverged significantly from a standard formerly applied in gestational surrogacy disputes between heterosexual couples and gestational surrogates.[17] This Recent Development proposes that California's new precedent applied to gestational surrogacy arrangements weakens legal protections afforded to the following populations: women who choose to donate eggs without becoming mothers, women who serve as gestational surrogates to friends or family members, and women who accept egg donations without also accepting the donor as a co-parent. The rule of law previously applied to surrogacy disputes as articulated in *Johnson v. Calvert*[18] protects the interests of parties creating families through surrogacy while preserving one of the few procreative methods available to lesbian couples. This rule should not be limited by the Supreme Court of California's holding in *K.M. v. E.G.*

II. THE JOHNSON INTENT STANDARD: HARD BOILED

In *Johnson v. Calvert*, the Supreme Court of California articulated a well-received standard for resolving parentage disputes between genetic and gestational mothers arising pursuant to a surrogacy agreement.[19] The Calverts, an infertile married couple, contracted with a gestational surrogate (Johnson) to give birth to a baby created by in vitro fertilization with the Calverts' donated gametes (eggs and sperm).[20] During the course of the pregnancy Johnson decided to keep the unborn child, and both

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[15] Sanja Zgonjanin, *What does it take to be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN'S L.J. 251, 251–52 (2005).

[16] *K.M.*, 117 P.3d at 675.

[17] *See, e.g.*, Johnson v. Calvert 851 P.2d 776 (Cal. 1993).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 778. The term *gametes* refers to the components of human reproductive material (eggs and sperm). In *Johnson*, Mrs. Calvert's egg was fertilized with Mr. Calvert's sperm.

Johnson and Mrs. Calvert petitioned the court for a declaration of maternity.[21] California's controlling statute, the Uniform Parentage Act ("UPA"), recognizes both giving birth and genetic consanguinity as grounds for maternity.[22] As a result, both women qualified as mothers under the UPA, and the court was forced to create a new standard to address the issue of which mother (genetic or gestational) had the superseding right to be declared the legal parent.[23]

After discussing the complex biological, personal, legal and social policy considerations surrounding surrogacy agreements, the court held that the intent of the parties when entering into the agreement was the best standard by which to determine competing claims of maternity.[24] The *Johnson* court ruled that in a "tie breaker" between a genetic and a gestational mother, the woman 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."[25] Although the court recognized that Johnson's "gestative function" (i.e. pregnancy) was necessary to bring about the child's birth, the court did not concede that her later change of heart should eliminate the original agreement between the parties.[26] By promulgating this rule, the court protected the interests of the intended parents (in this case, the genetic parents) because "but for their acted on intention, the child would not exist."[27]

The intent standard as articulated in *Johnson* is highly regarded for several reasons. This standard unambiguously allows individuals and couples to enter into surrogate arrangements with confidence that their agreement will be upheld and the child they arranged to conceive will be given into their care.[28] Furthermore,

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[21] *Id.* at 778.
[22] *Id.* at 781 (citing CAL. CIV. CODE § 7003(1) (West 1993)).
[23] Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).
[24] *Id.* at 782-85.
[25] *Id.* at 782.
[26] *Id.*
[27] *Id.*
[28] Illana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 143 (2000) (noting that the intent

the standard is sufficiently flexible to apply to a variety of surrogacy agreements and allows the court to award legal parentage without giving priority to gestation or genetics.[29] In essence, courts may award maternity to whichever mother intended to become a parent at the time of the agreement regardless of whether the woman donated the egg or gave birth.

Finally, the *Johnson* standard provides a basis for courts to decide surrogacy disputes without weakening existing statutory protections for gamete donors who do not intend to parent. Many states have enacted regulations providing that when a person donates gametes to a physician for use in insemination, the genetic donor has no parental claim to a resulting child.[30] For example, pursuant to California Family Code § 7613(b), the "donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[31] Such statutes, enacted as a legislative response to the growing number of families created through ART, recognize that few people would donate genetic material if there was a possibility that they could be responsible for children produced with it.[32] Likewise, using donated gametes to conceive would be a risky process for potential parents if the donor were able to assert parental rights over the child. In *Johnson*, the court held that donor protection statutes were inapplicable to individuals (like the Calverts) who enter into a surrogacy arrangement with the intent to become parents.[33] In so doing, the court distinguished the intent to donate genetic material from the intention to procreate a child through a surrogate. As Justice Pannelli states in *Johnson*, the

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standard "secures the commissioning couple's emotional and financial investment in the procreative process, thereby making collaborative reproduction a more attractive option for infertile couples").

[29] Hill, *supra* note 3, at 414–15 (noting that application of the intent test requires placing a "mental element" over biological ties to the child).

[30] Genetics and Public Policy Center Legal Brief, http://www.dnapolicy.org/downloads/pdfs/ART_Legal_Overview.pdf (last visited Nov. 17, 2005) (on file with the North Carolina Journal of Law & Technology).

[31] CAL. FAM. CODE § 7613(b) (2005).

[32] Genetics and Public Policy Center, *supra* note 30.

[33] Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993).

Calverts "never intended to 'donate' genetic material to anyone. Rather, they intended to procreate a child genetically related to them by the only available means."[34]

The intent standard is not without critics, however.[35] Some analysts point out that this standard ignores the best interests of the child and does not take into account the ability of the intended parties to care for the child.[36] The *Johnson* court addresses this issue by noting that the intent analysis and the child's best interest are not mutually exclusive, and that "the interests of the children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.'"[37] Furthermore, under a best interest analysis, a surrogate could be held to parental responsibilities contrary to her expectations if the intending mother refused to accept responsibility for the child after its birth.[38] Other criticisms of the intent approach include the lack of credence that the standard gives to the role of gestation involved in conception.[39] However, this criticism highlights one of the advantages of the standard. By focusing on the intent of the parties, the court avoids having to make a judicial determination giving greater weight to the gestational or genetic maternal role (an argument better suited for philosophy than the courtroom). For example, if parentage disputes were decided solely in favor of the gestator, surrogacy arrangements would essentially be eliminated as a procreative choice for women unable to give birth.

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[34] *Id.*

[35] Larkey, *supra* note 4, at 623–24.

[36] *Id.* at 624.

[37] *Johnson*, 851 P.2d at 783 (quoting Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990)).

[38] The court in *Johnson* describes this kind of situation as "extremely rare." *Johnson*, 851 P.2d 776 at 783. However, the California Court of Appeals faced a similar dispute five years later in *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (1998) (holding that the intending parents were responsible for the child).

[39] *See, e.g.*, Johnson, 851 P.2d at 797–98 (Kennard, J. dissenting) (noting that "[a] pregnant woman intending to bring a child into the world is more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued.").

Despite criticism, the intent standard articulated in *Johnson* has become a cornerstone by which many courts and legal scholars analyze parentage disputes between gestational and genetic mothers.[40] Even in states that do not expressly endorse the intent test, many courts consider the original intent of the parties a major factor in determining legal parentage in surrogacy disputes.[41] For the last twelve years, families built through surrogacy arrangements in states upholding the intent standard have safely made procreative choices based on the premise that any dispute would be resolved in view of the parties' original intentions when entering into the agreement.[42]

III. K.M. v. E.G.

K.M. and E.G. entered into a committed lesbian relationship in 1993.[43] Long before this relationship, E.G. planned to become a mother and had explored available options including artificial insemination and adoption.[44] K.M. knew of E.G.'s desire to become a single parent and was "encouraging and supportive" of

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[40] *See* Larkey, *supra* note 4, at 622–23. *See also* ARK. CODE ANN. § 9-10-201 (2002) (providing that a child born to a surrogate mother is presumed to be the child of the intended mother); NEV. REV. STAT. § 126.045 (2001) (stating that "a person identified as an intended parent in a [surrogacy] contract . . . must be treated in law as a natural parent under all circumstances"). *But see* Belsito v. Clark, 644 N.E.2d 760 (1994) (rejecting the intent standard as articulated in *Johnson* primarily due to the test's difficulty of proof and failure to emphasize the gestator's role in the arrangement).

[41] Ardis L. Campbell, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567, § 3b (2000).

[42] *See, e.g.*, Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (considering a lesbian couple who obtained a pre-birth judgment declaring them to be the "joint intended legal parents" of the child presumably to bring themselves within the *Johnson* standard and recognizing that preconception intent to be a parent is the determinative inquiry in California). *See also* K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005) (Kennard, J. dissenting) (noting that "since this court's decision in *Johnson* . . . an unknown number of Californians have made procreative choices in reliance on it.").

[43] K.M. v. E.G., 118 Cal. App. 4th 477, 482 (2004) *rev'd*, 117 P.3d 673 (Cal. 2005).

[44] *Id.*

her efforts.[45] Although K.M. and E.G. were in a committed relationship, they discussed and agreed that E.G.'s intention was to have a child of her own.[46] In 1994, E.G. learned that her repeated attempts at artificial insemination were unsuccessful due to her inability to produce sufficient eggs.[47] At the suggestion of a fertility doctor, E.G. considered the possibility of using K.M.'s eggs to become pregnant through a surrogacy arrangement.[48] E.G. was hesitant because her relationship with K.M. was new, and she feared a custody battle in the future with K.M.[49] However, after the twelfth failed insemination, E.G. agreed to enter into a surrogacy agreement, provided that K.M. would only serve as a "real [egg] donor" and E.G. would be the only mother.[50]

In order to enter into the surrogacy arrangement, K.M. signed a waiver and consent form provided by the fertility clinic.[51] The contents of the form (entitled Consent Form for Ovum Donor (Known)) included the following language:

> I will agree to have eggs taken from my ovaries, in order that they may be donated to another woman . . . . The recipient will have control over the disposition of all retrieved eggs and resulting embryos . . . . It is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them. I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children . . . . I specifically disclaim and waive any rights in or [to] any child that may be conceived as a result of the use of any ovum or egg of mine, ... I waive the right of relationship or inheritance with respect to any child born of this procedure.[52]

E.G. and K.M. reviewed the forms together and decided not to reveal to other people that K.M. was the egg donor.[53] Although

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] K.M. v. E.G., 118 Cal. App. 4th 477, 482 (2004) *rev'd*, 117 P.3d 673 (Cal. 2005).
[49] *Id.*
[50] *Id.*
[51] *Id.* at 483.
[52] *Id.*
[53] K.M. v. E.G., 118 Cal. App. 4th 477, 483 (2004) *rev'd*, 117 P.3d 673 (Cal. 2005).

E.G. would be identified as the only parent, she agreed to consider allowing K.M. to adopt the children if their relationship continued for several years.[54] In 1995, E.G. gave birth to twin girls using the donated genetic material of K.M and an anonymous sperm donor.[55] E.G. listed herself as the only parent on the birth certificates and the children received E.G.'s surname.[56]

For the next five years, the twins lived together with E.G. and K.M.[57] E.G.'s relationship with K.M. began to deteriorate in 2001 and the couple subsequently separated.[58] At that time K.M. petitioned the court seeking recognition as a legal parent.[59] E.G. argued that she never intended to share parental rights with K.M. and sought a declaratory judgment that she was the only mother of the twins.[60]

A. *The Lower Court Decisions in K.M. v. E.G.: Over Easy*

At trial, the court granted E.G.'s motion to dismiss, finding that K.M. was not a legal parent.[61] The court examined the intent of the parties and determined that K.M. and E.G. intended only E.G. to be the legal mother.[62] Although K.M. and E.G. were in a committed relationship, K.M.'s intent to become an egg donor did not qualify her for legal parent status.[63] The trial court applied the donor protection statute explaining that K.M.'s "position was analogous to that of a sperm donor, who is treated as a legal stranger to the child if he donates sperm through a physician . . .

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[54] *Id.*
[55] *Id.* at 484.
[56] *Id.*
[57] *Id.*
[58] K.M. v. E.G., 118 Cal. App. 4th 477, 485 (2004) *rev'd*, 117 P.3d 673 (Cal. 2005).
[59] *Id.*
[60] *Id.* at 486.
[61] *Id.* at 485 (summarizing the holding of the lower court).
[62] *Id.*
[63] K.M. v. E.G., 118 Cal. App. 4th 477, 485 (2004) *rev'd*, 117 P.3d 673 (Cal. 2005) (summarizing the holding of the lower court).

[there is] no reason to treat ovum donors as having greater claims to parentage than sperm donors."[64]

The Appellate Court upheld the lower court's decision not to recognize K.M. as a legal parent.[65] In so ruling, the court considered the parties' intention that E.G. would be the sole parent, the egg donor consent form containing the waiver of the K.M.'s parental rights, and the parties' relationship at the time of conception.[66] Although the court recognized that each of these factors, taken alone, would not necessarily be a determination of parentage, the cumulative effect was sufficient to suggest that E.G. and K.M. intended for E.G. to be the only parent.[67] The court concluded that if the parties changed their original intentions and wanted K.M. to be a parent, they had adoption as a means of recourse.[68] Quoting from *Johnson*, the court explained: "'Within the context of artificial reproductive techniques . . . intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.'" [69]

Because K.M. donated her eggs without the original intent to become a parent, her ability to gain parent status was precluded unless E.G. consented to adoption.[70] K.M. appealed to the Supreme Court of California.[71]

B. *The Supreme Court of California's New Rule: Scrambled*

On August 22, 2005, the Supreme Court of California overturned the appellate court in a 4-2 opinion, holding that K.M. qualified as a legal parent despite E.G.'s original intent to become a single parent and K.M.'s waiver of all parental rights to the children.[72] The majority applied a new rule, declaring that "a

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[64] *Id.* at 485.
[65] *Id.* at 477.
[66] *See generally id.* at 489–500.
[67] *Id.* at 499.
[68] K.M. v. E.G., 118 Cal. App. 4th 477, 496 (2004) *rev'd*, 117 P.3d 673 (Cal. 2005).
[69] *Id.*
[70] *Id.*
[71] K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).
[72] *Id.*

woman who has supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home" is a mother of the resulting children.[73] In order to reach this rule, the court altered the intent test and declared the donor protection statute inapplicable to situations in which children are raised by lesbian partners in a joint home.

IV. ANALYSIS

A. *K.M. v. E.G. Weakens the Stability of Surrogacy Arrangements*

Through application of the *Johnson* standard, the *K.M.* appellate court examined the intentions of K.M. and E.G. at the time of the surrogacy arrangement, finding that E.G. intended to be the sole parent of the children.[74] However, the Supreme Court of California held that this finding was superseded by another consideration: E.G. and K.M.'s intent to live together with the children. The Supreme Court notes that "[t]he circumstances of the present case are similar [to *Johnson*] in a crucial respect; both the couple in *Johnson* and the couple in the present case intended to produce a child that would be raised in their own home."[75] The majority notes that establishing intent after time has passed is a difficult task and determines that the only indisputable manifestation of intent is the fact that the couple lived together with the children.[76] This modified application of the intent test presents a multitude of problems.

First, the court's reluctance to give credence to E.G.'s intent to become a single parent undermines a fundamental premise of the court system. Justice Moreno declined to focus on the couple's original intent because it would require the court to base "the determination of parentage upon a later judicial determination of intent made years after the birth of the child."[77] Although courts

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[73] K.M. v. E.G., 118 Cal. App. 4th 477, 482 (2004), *rev'd*, 117 P.3d 673 (Cal. 2005).

[74] *Id.* at 489.

[75] *K.M.*, 117 P.3d at 679.

[76] *Id.*

[77] *Id.* at 682.

may struggle to determine intent in ambiguous situations, the judiciary's primary function in such cases is to make an accurate determination of factual issues such as intent through evidentiary analysis.[78] Under the *K.M.* holding, even if parties to a surrogacy agreement establish their intentions through discussion, contract, and subsequent actions, the legal rights of each party could be successfully challenged years later.

Furthermore, despite Justice Moreno's reluctance to make a parentage determination based on intent, the court's decision ultimately rests on such a determination: the intent of the parties to raise the children in a joint home.[79] The *Johnson* court clearly established that the intent inquiry focuses on the time of conception: the legal mother is the woman who "*from the outset* intended to be the child's mother."[80] The *K.M.* majority's focus on the subsequent living arrangement of the parties is an unprecedented jump from the established standard, one that could not have been predicted and which undermines an unknown number of surrogacy arrangements between co-habiting parties.[81] Although the percentage of surrogacy arrangements established between parties that live together is undocumented, the enforcement of their original agreements with respect to parentage should not be precluded because of a living arrangement unrelated to procreative actions.

B. The K.M. Decision Weakens Statutory Protections for Donors

As mentioned earlier, the *Johnson* court declined to apply the California donor protection statute to individuals who donate gametes with the intention of becoming parents.[82] According to *Johnson*, individuals in a surrogacy arrangement who intend to

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[78] *Id.* at 686 (Werdegar, J., dissenting) (noting that "the task of determining intent of persons who have undertaken assisted reproduction is not fundamentally different than the task of determining intent in the context of disputes involving contract, tort, or criminal law, something courts have done satisfactorily for centuries.").

[79] *Id.* at 686 (Werdegar, J., dissenting).

[80] Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (emphasis added).

[81] *K.M.*, 117 P.3d 673 at 688–89.

[82] *Johnson*, 851 P.2d at 787.

parent genetically related children are not donating their gametes and cannot be denied parentage by statutes precluding the parental rights of gamete donors.[83] The *K.M.* majority makes a similar (although much more questionable) distinction between women who "donate" eggs and women like K.M., who (according to the Supreme Court) "*provide* . . . ova to her lesbian partner with whom she [i]s living so that [the partner] can give birth."[84] Essentially, women who "donate" eggs are not entitled to declarations of parentage, while "lesbian" women who "provide" ova can be legal parents, even against the wishes of the gestational mother.

This distinction is arbitrary and weakens the protections given to egg donors and recipients through legislation. The *K.M.* opinion offers no standard by which to distinguish egg "donors" and "providers," and the court's unwillingness to consider the surrogacy agreement between the parties and K.M.'s donor consent form as indicators of her status leaves no discernable guidance. In addition, the majority's distinction expressly applies only to "lesbian partner[s]" which creates a classification yet to be defined by law.[85] Finally, the court neglects to indicate how long partners would have to live together to fall under this provision. Under the *K.M.* rule, if a surrogacy dispute arises between cohabiting lesbians, legal maternity will turn on whether or not the genetic mother donated or provided the eggs to her partner, regardless of how the parties intended or agreed to determine parentage.

The distinction between donors and providers allows not only the opportunity for future donors to assert parental rights over children created with their eggs, but also allows individuals who conceive with donated eggs to impart maternal responsibilities to the donor above and beyond those agreed on at the time of conception. Based on the *K.M.* rule, if the genetic and gestational mothers reside together for an unspecified period of time, the act of co-habitation could serve as the basis for parentage liability of the

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[83] *Id.*

[84] K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005) (emphasis added).

[85] *Id.* at 678.

partner who did not intend to assume parental responsibilities.[86] By disregarding donor protection statutes precluding K.M.'s right to be recognized as a legal parent to children created with her donated eggs, the court's decision eliminates protections for both donors and recipients of genetic material. Essentially, the majority has rewritten the donor protection statute to state that a gamete donor is the legal parent of a child born through ART whenever the donor and birth mother "intended that the resulting child would be raised in their joint home," even though both the donor and the birth mother did not originally intend to be joint parents.[87]

V. THE HARD BOILED CONCLUSION

Upon consideration of the facts of the *K.M.* case, the Supreme Court of California's desire to award parental rights to both women is understandable. The fact that K.M. helped E.G. raise the twins for the first five years of their lives and, for all intents and purposes, served in a maternal role, undoubtedly influenced the court's decision.[88] By awarding maternity to both K.M. and E.G. the court provided the twins with two parents as opposed to just one, a goal supported by historical family law precedent.[89] However, to obtain this result the court sacrificed the reliability of surrogacy agreements and limited the application of statutory protections for gamete donors.

When courts are faced with newly emerging trends in the use of modern technologies, the need for stability in the law is critical. For many courts, the *Johnson* intent standard serves as a clear and established rule which can be applied to disputed claims of motherhood when two women each have a legal claim.[90] The

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[86] *See id.* at 679 (noting the importance of the fact that the children were "raised in their own home" but failing to delineate how long a couple would have to live together with children to meet this standard).

[87] *Id.* at 685 (Kennard, J. dissenting).

[88] *Id.*

[89] *See* Linda Kelly, *Family Planning, American Style*, 52 ALA. L. REV. 943, 945 (noting that the concept of the traditional nuclear family is "breaking down").

[90] Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

intent test is sufficiently flexible to protect both gestators and genetic mothers depending on how the parties initially intended to structure their agreement. Preservation of the intent standard is critical for maintaining gestational surrogacy as an option for couples unable to conceive on their own. In light of the K.M. majority's abrogation of *Johnson* and apparent willingness to ignore preconception manifestations of intent, at least in some cases, women who wish to donate eggs, serve as gestational surrogates without becoming mothers, or accept egg donations without accepting the donor as a co-parent should be forewarned: surrogacy agreements may result in more than originally bargained for.