**Case. No. B175367**

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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A.G.,

Appellant,

vs.

D.W.,

Appellee.

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From the Superior Court for Los Angeles County
Case Number BD 399555
The Honorable Roy Paul, Judge

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**APPELLANT'S OPENING BRIEF**

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## SUMMARY OF ARGUMENT

A.G. and D.W. were a lesbian couple who had a child together using artificial insemination. Prior to the birth of their son, C., A.G. and D.W. jointly arranged for D.W.'s insemination and jointly prepared for the birth. A.G. was present when C. was born and the couple gave C. A.G.'s last name. From the moment of his birth, A.G. has been a parent to C. in all respects. She cared for him, fed him, bought him clothing, brought him to medical appointments, and provided him with health insurance.

After A.G. and D.W. ended their relationship in September of 2000, A.G. continued to act as a parent to C.. A.G. continued to provide C.'s health insurance, take him to medical appointments, and purchase clothes for him. In addition, A.G. continued to see C. pursuant to a mutually determined visitation schedule and continued to provide D.W. with regular child support payments.

In January of 2003, a dependency petition was filed against D.W.. During the course of the dependency proceedings, the dependency court found that A.G. was a *de facto* parent and granted her unmonitored visitation. After the dependency action was closed, A.G. filed this family court action seeking visitation with C..

The trial court dismissed the action, holding that A.G. lacked standing to bring an action for custody or visitation of C.. In reaching that conclusion, the trial court felt it was bound by prior decisions holding that a

person who is not a biological or adoptive parent or who is not married to a biological parent has no standing to seek custody or visitation under the Uniform Parentage Act ("UPA"). (Family Code §§ 7600 et seq.) Since those cases were decided, however, the California Supreme Court expressly has rejected the notion that legal parentage under the UPA is based exclusively on biology or marriage. Instead, the Supreme Court has held that a person who is neither a biological parent nor married to a biological parent is a legal parent under some circumstances.

First, a person may be determined to be a child's presumed parent if he takes the child into his home and holds the child out as his own, even if he knows from the outset that he has no biological connection to the child. (See, e.g., *In re Nicholas H.* (2002) 28 Cal.4th 56 [holding that a man who is neither biologically related to a child nor married to the child's mother may be a presumed parent under § 7611(d) based on his conduct of receiving the child into his home and holding the child out as his own].) Moreover, and more specific to the question raised by this case, two appellate districts of the California Court of Appeal, including the Second Appellate District, have held that this rule must be applied equally to women. (See, e.g., *In re Salvador M.* (2003) 111 Cal.App.4th 1353 [holding that a woman with no biological connection to a child can be a presumed parent under § 7611(d)]; *In re Karen C.* (2002) 101 Cal.App.4th 932 [same].)

In this case, A.G. clearly is entitled to the presumption of parentage

under Family Code section 7611(d).[1] From the moment of C.'s birth, A.G. took C. into the home she shared with D.W. and held him out as her own child, including putting him on her health insurance, declaring him as a dependent on her taxes, feeding him, providing clothing for him, and taking him to medical appointments.

Second, California courts have held that two people who agree to have a child together through assisted reproduction and who then raise the child together are both legal parents, regardless of whether they are biologically related to the child. (*Johnson v. Calvert* (1993) 5 Cal.4th 84 [holding that the legal parents of a child born through a medical procedure are the two people who initiated the medical procedure with the intention of parenting the resulting child]; *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410 [holding that the rule established in *Johnson* applies even where the intended parents lack a biological connection to the child]; see also *People v. Sorensen* (1968) 68 Cal.2d 280 [holding that a man who consents to his wife's insemination is the child's legal parent under common law principles, despite his lack of biological connection to the child].)

In this case, A.G. actively participated in the decision and procedure to have a child with D.W. through artificial insemination. She paid for the

[1] Unless otherwise noted, all citations are to provisions of the California Family Code.

procedure and helped prepare for C.'s birth. A.G. was present at C.'s birth, and the couple gave C. A.G.'s last name. After C.'s birth, A.G. and D.W. issued a birth announcement to friends and family, to let them know that they were proud new parents. And for the next two years, A.G. and D.W. raised C. together in a two-parent family in which A.G. fulfilled all of the duties and obligations of a parent and developed a strong parent-child relationship with C..

In sum, the cases relied upon by the trial court in concluding that A.G. lacks standing are no longer good law. Based on the California Supreme Court decisions in *Nicholas H.* and *Johnson v. Calvert*, A.G. has two independent legal bases on which to establish her parentage under the UPA: (1) as a presumed parent under section 7611(d); and (2) as an intended parent under section 7613(a) and the common law rule established in *Sorensen*. In either case, A.G. is clearly an "interested person" with standing to bring an action to determine her parentage and for custody or visitation of C.. Appellant respectfully requests that this Court reverse and remand for further proceedings consistent with the Court's opinion.

## RELATED CASES PENDING BEFORE THE CALIFORNIA SUPREME COURT

Appellant also wishes to inform the Court that both of the legal issues presented in this case – the application of section 7611(d) and the application of *Sorensen*, *Johnson*, and section 7613(a) to determine the

legal parentage of children born to lesbian couples – are currently pending before the California Supreme Court in three separate cases, including one case that was originally decided by this Court. The three cases are: *Kristine H. v. Lisa R.* (2004) 16 Cal.Rptr.3d 123; *Elisa B. v. Superior Court* (2004) 118 Cal.App.4th 966; and *K.M. v. E.G.* (2004) 118 Cal.App.4th 447.[2] Specifically, on the Court's website, the Court describes two of the issues[3] presented by the three cases as follows:[4]

> The case includes one or more of the following issues: (1) May the presumption in Family Code section 7611, subdivision (d) - that a man is a presumed father if he "receives the child into his home and openly holds the child out as his natural child" - be applied to a birth mother's same sex partner when both women made the decision to have a child, received the child into their home and held the child out as their own, and agreed to support the child? (2) Under *Johnson v. Calvert* (1993) 5 Cal.4th 84, can both same sex partners be considered the legal parents of children conceived as a result of artificial insemination and born during their domestic partnership?

## STATEMENT OF FACTS

The child in this case, C., was born to D.W. and A.G., a lesbian couple. (Clerk's Transcript ("CT") p. 96 (Declaration of A.G. ("A.G.

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[2] Because review has been granted in all three cases, the Court of Appeal decisions have been depublished.

[3] The third question is only relevant to one of the three cases pending before the Supreme Court and is not relevant to the instant case. That issue is described as: "(3) Must a woman who donates ova which are fertilized in vitro and implanted in her domestic partner's womb, resulting in the birth of a child, file an adoption petition in order to be a parent of the child under *Johnson v. Calvert*?"

[4] Replies briefs in the three cases are currently scheduled to be filed by the end of February, 2005.

Decl.")).[5] A.G. and D.W. began their relationship in 1995.[6] (*Id.* at p. 100 (A.G. Decl.); see also *id.* at p. 155 (Declaration of D.W. ("D.W. Decl."))) Two years later, in 1997, A.G. and D.W. decided to have a child together using assisted reproduction. (*Id.* at p. 100 (A.G. Decl.); see also *id.* at p. 120 (Declaration of A.T.).) A.G. paid for the intra-uterine insemination procedure that resulted in D.W. becoming pregnant with their child, C.. (*Ibid.* (A.G. Decl.); see also *id.* at p. 96 (A.G. Decl.); see also *id.* at p. 155 (D.W. Decl.).)

When D.W. became pregnant, the couple was excited and shared their happy news with family and friends, including A.G.'s mother, father, sisters, brothers, cousins, and grandparents and D.W.'s grandmother. (*Id.* at p. 101 (A.G. Decl.).) A.G. helped prepare for C.'s birth by decorating his nursery in the couple's shared home. (*Ibid.*; see also *id.* at p. 155 (D.W. Decl.).) The couple had a baby shower together and invited members of the G. family to participate. (*Id.* at p. 157 (D.W. Decl.); see also *id.* at p. 121 (Declaration of Al. G. ("Al. G. Decl.").) When D.W. gave birth, A.G. was

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[5] To the extent that there are any factual disputes relevant to the presumed parent determination, this Court must remand the case to the trial court. The trial court's conclusion that A.G. lacked standing was based on the court's legal conclusion that "the non-biological lesbian parent [is] not an interested person" within the meaning of the UPA. The trial court's conclusion that A.G. lacked standing was not based on the trial court's resolution of any disputed facts.

[6] D.W. was 26 years old when the relationship began – not 16, as implied in the trial court opinion.

by her side, videotaping the special event. (*Id.* at p. 101 (A.G. Decl.); see also *id.* at p. 121 (Al. G.. Decl.).)

C. was born on May 4, 1998. The couple gave C. A.G.'s last name (*id.* at p.101 (A.G. Decl.); see also *id.* at p. 155 (D.W. Decl.)), and sent out birth announcements to inform their friends and family that their son had arrived (*Id.* at p. 101 (A.G. Decl.); *id.* at p. 155 (D.W. Decl.).) A.G. also claimed C. on her tax returns. (*Id.* at p. 101 (GA.G. Decl.); *id.* at p. 155 (MD.W. Decl.).) A.G. and D.W. took C. into their home and held him out to the world as their son, living together as a family for the first two years of C.'s life. (*Id.* at p. 96 (A.G. Decl.).) A.G. and D.W. shared the responsibilities of parenting. From C.'s birth, A.G. maintained him under her health insurance coverage as her dependent. (*Id.* at p. 96 (A.G. Decl.); *id.* at p. 101 (A.G.Decl.); *id.* at p. 155 (D.W. Decl.).) Since the moment of C.'s birth, A.G. has been a parent to C. in every respect; she fed him, clothed him (*id.* at p. 155 (A.G. Decl.)), bathed him, played with him, read to him, cared for him when he was sick (*ibid.*), contributed to the costs of his daycare, took him to medical appointments (*id.* at p. 155), and provided him with the necessities of life. A.G. also provided C. with parental love and support.

In September of 2000, A.G. and D.W. separated. (*Id.* at p. 101 (A.G. Decl.).) After their separation, A.G. continued to maintain C. on her health insurance. (*Ibid.*) A.G. also continued to purchase clothing for C. and to

take C. to his medical appointments. (*Ibid.*) They agreed that C. would continue to reside with D.W. and his step-siblings and that A.G. would have visitation on alternating weekends and holidays. A.G. continued to provide health insurance coverage for C. and made child support payments to D.W. through the year 2002.

When A.G. learned that C. was involved in a dependency proceeding, she appeared in court and was granted "de facto" parent status with unmonitored visitation. (*Id.* at p. 149 ("The court grants Ms. A.G. de facto parent status over the child, C., and orders that she is entitled to unmonitored visitation while this dependency case is open."); see also May 17, 2004 order at p. 4.)

D.W. terminated C.'s visits with A.G. in November of 2003. On December 23, 2003, A.G. filed a Petition for Custody and Support of Minor Children to request unmonitored visitation with C..

On May 17, 2004, the trial court entered an order after hearing, holding that A.G. "lacked standing to bring this Petition." (*Id.* at p. 198.)

**STANDARD OF REVIEW**

On May 17, 2004, the trial court granted D.W.'s motion to dismiss the complaint, concluding that, as a matter of law, A.G. lacked standing to seek custody or visitation of C.. On an appeal of a dismissal for lack of standing, if there is no material disputed factual issue, the court reviews the

decision de novo as a question of law. *People ex rel. Dept. of Corrections v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144.

In this case, the dismissal was not based on resolution of any factual disputes. Rather, the trial court based its dismissal solely on its conclusion, as a matter of law, that a lesbian partner who is not related to a child by blood or adoption always lacks standing to seek custody or visitation with the child, regardless of the facts of the case. (See Reporter's Transcript ("RT") at p. 22 ["In those cases [*Nancy S. v. Michelle G.* (1991) 228 Cal.App.3d 831 and *Curiale v. Reagan* (1990) 222 Cal.App.3d 159], the court determined that the non-biological lesbian partner was not an interested person. . . . This Court believes that I'm bound by the previous decisions that are strikingly on point."]; see also May 17, 2004 Order at p. 4 [holding that "based on the authority of" *West v. Superior Court* (1997) 59 Cal.App.4th 302, *Curiale*, and *Nancy S.*, "the Court finds that Petitioner lacks standing"].) Because the Court's conclusion turned solely on a question of law, not on the Court's resolution of any disputed facts, the standard of review is de novo.

## ARGUMENT

### I. A.G. Is a Legal Parent Under the UPA.

#### A. A.G. Is An Interested Person Within the Meaning of the UPA

The UPA provides that "any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship." (Cal. Fam. Code § 7650.) The trial court in this case held that A.G. was not an interested person and therefore lacked standing even to bring an action to have her parentage adjudicated. In reaching that conclusion, the trial court relied on three cases in which appellate courts held that a lesbian partner was not entitled to maintain an action for custody or visitation. (See Reporter's Transcript ("RT") at p. 22 [citing *Curiale v. Reagan* (1990) 222 Cal.App.3d 159; *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831; and *West v. Superior Court* (1997) 59 Cal.App.4th 302].)

In those cases, the oldest of which was decided almost fifteen years ago, the courts held that a person who is not a biological or adoptive parent or who is not married to a biological or adoptive parent cannot be a legal parent under the UPA. (See, e.g., *Nancy S.*, *supra*, 228 Cal.App.3d at p. 836 ["It is undisputed that appellant is not the natural mother of K. and S., and that she has not adopted either child. She does not contend that she and respondent had a legally recognized marriage when the children were born. Based on these undisputed facts, the court correctly determined that appellant could not establish the existence of a parent-child relationship under the Uniform Parentage Act."]; *West*, *supra*, 59 Cal.App.4th at p. 306 ["As a person unrelated to Cady, Lockrem is not an 'interested person' and,

therefore, may not drag West into the courts, under the Uniform Parentage Act, on the issue of visitation with West's daughter."]; *Curiale*, *supra*, 222 Cal.App.3d at p. 1600 ["While [what is now Family Code section 7650] confers standing upon any interested person to bring an action to determine the existence or not of a parent-child relationship, it has no application where, as here, it is undisputed [that] defendant is the natural mother of the child."].)

Those cases are no longer good law. The premise of those cases – that a person cannot be an interested person under the UPA unless she is a biological parent or is married to a biological parent – has been rejected expressly by the California Supreme Court.

First, the Supreme Court has held that an unmarried person may be adjudicated to be a child's presumed parent if he takes the child into his home and holds the child out as his own, even if he knows from the outset that he has no biological connection to the child. (See, e.g., *In re Nicholas H.* (2002) 28 Cal.4th 56 [holding that a man who is neither biologically related to a child nor married to the child's mother may be a presumed parent under § 7611(d) based on his conduct of receiving the child into his home and holding the child out as his own]; *In re Jesusa V.* (2004) 32 Cal.4th 588 [holding that biological paternity does not necessarily rebut another man's presumption of paternity under § 7611(d)]; see also *In re Salvador M.* (2003) 111 Cal.App.4th 1353 [holding that a woman with no

biological connection to a child can be a presumed parent under § 7611(d)]; *In re Karen C.* (2002) 101 Cal.App.4th 932 [same].)

Based on those decisions, this Court recently held that *Curiale*, *Nancy S.*, and *West* are no longer good law and that a person in A.G.'s situation does have standing to maintain an action for custody and visitation. (*Kristine H. v. Lisa R.* (2004) 16 Cal.Rptr.3d 123, 127 n. 7 ["Accordingly, those cases holding that a lesbian partner is not an 'interested party' [citing *West* and *Curiale*] . . . and has no standing to bring a parentage action, are not controlling here because, in our view, they are not based on a gender-neutral interpretation of the Act."]; see also *id.* at 136 [rejecting the biological mother's reliance on the holdings of *West*, *Nancy S.*, and *Curiale*].)

In this case, A.G. clearly has standing to assert that she is a presumed parent under section 7611(d). From the moment of C.'s birth, A.G. took C. into the home she shared with D.W. and held him out as her own child. D.W. and A.G. decided that C. would take A.G.'s last name; since the his birth, A.G. included C. on her health insurance as her son; A.G. has declared C. as a dependent on her tax returns; A.G. fed him, provided him with clothing, cared for his medical needs, as well as his emotional needs. Based on this conduct, the juvenile court found that A.G. is a *de facto* parent, and this conduct clearly is sufficient to conclude that she is a presumed parent under section 7611(d).

Second, the California Supreme Court has held that two people who agree to have a child together through assisted reproduction and who then raise the child together are both legal parents. (*Johnson, supra,* 5 Cal.4th 84 [holding that the legal parents of a child born through a medical procedure are the two people who initiated the medical procedure with the intention of parenting the resulting child]; see also *Buzzanca, supra,* 61 Cal.App.4th 1410 [holding that the rule established in *Johnson* applies even where both of the intended parents lack a biological connection to the child].)

Based on those decisions, A.G. also has standing to assert that she is a legal parent based on her active participation in the decision and procedure to have a child with D.W. through artificial insemination. A.G. and D.W. made the decision to have a child together. A.G. paid for the procedure. She attended medical appointments and helped make all the arrangements and preparations for C.'s birth. She was present at his birth and has functioned as one of his two parents, in every respect, from the moment he was born.

Accordingly, under both of the legal bases described above, A.G. is C.'s legal parent and has standing to maintain an action to determine her parentage and for custody or visitation as an "interested person" under Family Code section 7650.

### B. A.G. Is a Presumed Parent Under Family Code Section 7611.

A.G. is a presumed parent under Family Code section 7611(d) because she received C. into her home and held him out as her own. Section 7611(d) provides a rebuttable presumption of parentage where a man "receives a child into his home and openly holds out the child as his natural child." (Fam. Code § 7611(d).) The presumption of parentage under section 7611(d) arises solely out of a person's conduct; it is not related to the person's marital status or biological connection to the child. (See, e.g., *In re Jesusa V.*, *supra*, 32 Cal. 4th 588, 604 [holding that "biological paternity by a competing presumed father does not necessary defeat a nonbiological father's presumption of paternity" under § 7611(d)]; *Nicholas H.*, *supra*, 28 Cal.4th 56 [holding that a man who is neither biologically related to a child nor married to the child's mother may be a presumed parent under § 7611(d) based on his conduct of receiving the child into his home and holding child out as his own]; *In re Raphael P.* (2002) 97 Cal.App.4th 716 [same]; *In re Jerry P*. (2002) 95 Cal.App.4th 793 [same]; *In re Kiana A*. (2001) 93 Cal.App.4th 1109 [same]; *In re Karen C.* (2002) 101 Cal.App.4th 932 [holding that a woman with no biological relationship to a child can be a presumed parent under 7611(d)]; *In re Salvador M.* (2003) 111 Cal.App.4th 1353 [same]; *Steven W. v. Matthew W.* (1995) 33 Cal.App.4th 1108 [upholding a finding of presumed fatherhood in favor of a man who had held out the child as his own, even though the competing presumed father was the child's biological father and was married to the child's

mother].)

To the extent that earlier cases, including *Nancy S.*, *Curiale*, and *West*, had held that a person could not be a legal parent or an "interested person" within the meaning of the UPA if he or she lacked a biological connection to the child, those decisions are no longer good law. As was true for the unmarried men in *Nicholas H.*, *Raphael P.*, and other similar cases, the fact that A.G. is not biologically related to the child or married to the child's mother does not preclude her from being a presumed parent under section 7611(d). Whether the presumption applies is determined by whether the person engaged in the conduct required by the statute. That is certainly the case here.

The trial court in this case ignored these decisions, including the California Supreme Court's recent decision in *Nicholas H.* In that decision, the Court made clear that a presumed parent under section 7611(d) need not be a biological parent. Despite the manifest relevance of that holding to this case, the trial court held that it was bound to follow other, older decisions in which courts held that a lesbian partner never can be an "interested person" within the meaning of the UPA. (RT at pp. 22-23 ["The Court's indication is that the Court does not believe in reading the law and the facts in this case that I can simply overrule the established precedent in those cases. This Court believes that I'm bound by the previous decisions that are strikingly on point."). Reliance on these older cases, despite their

inconsistency with more recent case law from the California Supreme Court was erroneous. The holdings in *Nancy S.*, *West*, and *Curiale* expressly depended on the premise that a person who is neither a biological parent nor married to one can never be a legal parent under the UPA. That premise is not longer consistent with California law.

Moreover, the fact that A.G. is a woman does not change this analysis. The UPA itself requires that the Act be read in a gender-neutral manner and declares that "insofar as practicable," provisions applicable to the father and child relationship apply to an action to determine the existence or nonexistence of a mother and child relationship. (Fam. Code § 7650.) The California Supreme Court has made clear that this mandate applies even when the relevant statutory provisions are gender-specific. (See *Johnson*, *supra*, 5 Cal.4th at p. 90 [holding that, by parity of reasoning, the blood testing provisions of the UPA may also be used to resolve the question of maternity]; see also *Buzzanca*, *supra*, 61 Cal.App.4th 1410 [applying § 7613(a) to a woman].)

In addition, and even more relevant to the instant case, two appellate districts of the California Court of Appeal, including the Second Appellate District, already have concluded that this mandate means that section 7611(d) and the Supreme Court's holding in *Nicholas H.* must be applied equally to women. (*In re Karen C.* (2002) 101 Cal.App.4th 932, 938 [*Nicholas H.* applies equally to women]; *In re Salvador M.* (2003) 111

Cal.App.4th 1353, 1357 [same].)] Thus, the fact that A.G. is a woman also is not relevant to whether she is entitled to the section 7611(d) presumption of parentage.

There also is no reason to disqualify A.G. from presumed parent status merely because C.'s other legal parent is also a woman. The purpose of section 7611(d) is to protect existing family relationships by legally recognizing parentage in a person with whom the child has developed an actual parent-child bond. (*Salvador M.*, *supra*, 111 Cal.App.4th at p. 1358; see also *Nicholas H.*, *supra*, 28 Cal.4th at p. 65 ["The paternity presumptions are driven, not by biological paternity, but the state's interest in the welfare of the child and the integrity of the family."] [citations omitted].)

Because the presumption arises solely out of the person's conduct, and is not related to the person's biological connection to the child, the person's marital status, or the person's gender, there is no rational basis for refusing to apply the presumption equally solely because the presumed parent is the same sex as the child's other legal parent. From the child's perspective, the need to protect an established parent-child relationship is no less great simply because the person is of the same sex as the child's other parent. Regardless of the person's gender, the child has come to rely upon the person as an emotional and physical caretaker.

In this case, it is clear that A.G. is entitled to the presumption of parentage under section 7611(d). When C. was born, A.G. took him into her home and held him out as her own. She lived with C. for more than two years, during which time she listed him as her "son" on her health and dental insurance plans, took him to medical appointments, paid for daycare, and claimed him as her son on her income tax returns. A.G. continued to treat C. as her son after her relationship with D.W. ended. A.G. had regular visitation with C., continued to provide C. with insurance coverage, purchased clothing for him, and made regular child support payments. A.G. has always held out C. as her son and acted as his parent. As a result of this conduct, the juvenile court granted A.G. *de facto* parent status with respect to C. and held that A.G. was entitled to unmonitored visitation during the pendency of the dependency case.

California Rule of Court, Rule 1401(a)(8) defines a "*de facto* parent" as "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period ..." While a determination that a person is a *de facto* parent does not necessarily mean that she is a presumed parent under section 7611(d), the finding that A.G. "assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs

for care and affection" is binding on the parties and this Court and certainly is relevant to the inquiry under section 7611(d).

Thus, here, as in *Nicholas H.*, "the evidence 'more than satisfied the requirements of section 7611(d),' [A.G.] has lived with [C.] for long periods of time, [she] has provided [him] with significant financial support over the years, and [she] has consistently referred to and treated [C.] as [her son]." (*Nicholas H.*, 28 Cal. 4th at p. 61.) Therefore, this Court must reverse the trial court's order and hold that A.G. is an interested person entitled to maintain an action for custody or visitation with C..

### C. A.G. Is a Legal Parent Under Equal Application of Family Code Section 7613(a) and *Johnson*.

In addition to being a presumed parent under section 7611(d), A.G. is one of C.'s legal parents based on her active participation and consent to D.W.'s artificial insemination, with the intention of assuming a permanent parental commitment to the resulting child. Any other conclusion is inconsistent with the UPA's primary goal of providing substantive equality for nonmarital children and with the equal protection guarantees of the California and federal constitutions.

#### 1. Couples who use artificial insemination to create children, with the intention of being parents, must be held responsible for their procreative conduct.

In California, both statutory and case law establish that when two people use artificial insemination to engage in intentional procreative

conduct, they both are legal parents, regardless of whether they both have a biological connection to the child. The relevant statutory provision, which is part of the UPA, states:

> If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.

(Fam. Code § 7613(a).)

Even prior to the enactment of section 7613(a), this Court held that a husband who actively participated in and consented to his wife's artificial insemination was a legal parent. In *People v. Sorensen* (1968) 68 Cal.2d 280, the California Supreme Court became the first in the country to hold that children born through artificial insemination must be placed on an equal legal footing with other children. In *Sorensen,* an infertile husband agreed to have a child through artificial insemination. After the child was born, the husband "presented to friends that he was the child's father and treated the boy as his son." (*Id.* at p. 282.) When the couple separated, however, the husband refused to provide child support. He was convicted under a statute that imposed a criminal penalty on fathers who willfully failed to support their children. On appeal, the husband argued that he was not the child's legal parent and thus had no obligation of support. The California Supreme Court rejected his argument.

In concluding that the husband was a legal parent, the Court stressed his role in causing the child's birth, even though he was not the child's biological progenitor. The Court explained that by actively participating in and consenting to his wife's insemination, Mr. Sorensen was responsible for bringing a child into the world. (*Id.* at p. 285.) The Court noted that it is reasonable to hold that such a person is a legal parent to the child, because "without [the person's] active participation and consent the child would not have been procreated." (*Ibid*.)[7]

The California Supreme Court applied the same intent-based rule in *Johnson v. Calvert* (1993) 5 Cal.4th 84, to hold that the legal parents of children born through gestational surrogacy were the two persons who initiated the procedure with the intention of parenting the resulting child. As the Court explained:

> Mark and Crispina [Calvert] are a couple who desired to have a child . . . but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of their child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.

(*Id.* at p. 93.) Accordingly, even though gestational surrogacy is not specifically addressed in the UPA, the Court held that the Calverts were the

[7] The common law rule established in *Sorensen* retains independent vitality, even though the Legislature has codified this principle. (See, e.g., *Buzzanca*, *supra*, 61 Cal.App.4th at p. 1420-1421 [noting that common law principles are still a basis for establishing parenthood].) In addition to her statutory claims, Appellant is also arguing that she is a legal parent under the common law rule established in *Sorensen*.

child's legal parents, based on their use of assisted reproduction to engage in intentional procreative conduct. In such cases, the Court explained, the intending parents' "mental concept of the child" is a "but for" condition of the child's birth and rightly "creates expectations in society for adequate performance on the part of the initiators as parents of the child." (*Id.* at p. 94.) The Court of Appeal has held that the analysis in *Johnson* applies even when neither of the intended parents has a genetic connection to the child. (*Buzzanca, supra,* 61 Cal.App.4th 1410.)

This rule must be applied equally to protect the child in this case. Like the Calverts, A.G. affirmatively intended to bring a child into the world. Also like the Calverts, A.G. participated actively in the preparation for the child's birth. Like Mr. Sorensen, A.G. and D.W. jointly decided to have a child together. From the moment of C.'s birth, A.G. held herself out to the child, other family members, and the broader community as a parent participating equally in C.'s upbringing. Since his birth, A.G. has been equally responsible, along with D.W., for C.'s support and welfare. Accordingly, based on *Sorensen* and *Johnson*, and an equal application of section 7613(a), A.G. is a legal parent, entitled, and in fact obligated, to maintain her rights and responsibilities with regard to C..

**2. Children's parentage must be determined, even if they were born under circumstances not specifically contemplated by the legislature.**

In prior cases involving children born through assisted reproduction, the California Supreme Court has made clear that courts must determine the parentage of such children, even when they are born under circumstances not contemplated by the Legislature. In *Sorensen*, the Court was faced with the question of whether a man who used the then-new technology of artificial insemination was a legal parent under the Penal Code provision at issue in the case. As the Court explained, "It is doubtful that . . . the Legislature considered the plight of a child conceived through artificial insemination. However, the intent of the Legislature obviously was to include every child, legitimate or illegitimate, . . . and enforce the obligation of support against the person who could be determined to be the lawful parent." (*Sorensen*, *supra*, 68 Cal.2d at pp. 284-285.) Accordingly, the Court concluded that it was "reasonable" to construe the term "father" to include husbands who use artificial insemination to have children. (*Id.* at p. 286.)

In *Johnson*, this Court determined the legal parentage of a child born through a gestational surrogate, even though surrogacy is not explicitly addressed by the UPA. (*Johnson*, *supra*, 5 Cal.4th at p. 89 ["Passage of the Act clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975. Yet, it facially applies to *any* parentage determination, including the rare case in which a child's maternity is in issue."] [Emphasis in original].) As the Court explained,

"[n]ot uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature." (*Ibid.*)

The Court of Appeal also has applied the UPA to determine the parentage of children born under circumstances not contemplated in the statute. In *Buzzanca*, an infertile married couple used a donated egg and donated sperm and a gestational surrogate to carry their child to term. The couple divorced before the surrogate gave birth, and the husband sought to avoid his responsibility for the child. The husband argued that he should not be considered the child's legal parent on the ground that the case did not fall precisely within the language of section 7613(a). (*Buzzanca*, *supra*, 61 Cal.App.4$^{th}$ at p. 1421 [husband argued that section 7613(a) "should not be applied because …his wife did not give birth."].) In rejecting the husband's literalist argument, the court explained:

> [I]t is, of course, true that application of the artificial insemination statute to a gestational surrogacy case…may not have been contemplated by the Legislature. Even so, the two kinds of artificial reproduction are exactly analogous in this crucial respect: Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie.

(*Id.* at p. 1418.)

Similarly, with regard to the wife, even though section 7613(a) does not specifically address the situation in which a *woman* consents to another woman's insemination, the Court of Appeal concluded: "[t]he same rule which makes a husband the lawful father of a child born because of his

consent to artificial insemination should be applied here…to the wife." (*Id.* at pp. 1412-1413.)

The same rule must be applied here. Although the Legislature did not expressly contemplate the situation in which an unmarried couple uses artificial insemination to have children, the conduct is analogous to that contemplated in section 7613(a) "in this crucial respect: Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie." (*Id.* at p. 1418.)

### 3. Section 7613(a) must be applied equally to nonmarital children.

Although section 7613(a) speaks in terms of husbands and wives, this Court must do what California courts have done before and determine the legal parentage of these children, even though the circumstances of their birth are not specifically contemplated in the statute. As the Supreme Court recently reaffirmed, an individual provision must be interpreted in light of the statutory scheme as a whole. (*In re Marriage of Harris* (2004) 34 Cal.4$^{th}$ 210, 222.) "Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] . . . [W]e do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*Ibid.*)

The primary purpose of the UPA is to ensure that nonmarital children are treated equally to children whose parents are married. (See, e.g., *Johnson*, *supra*, 5 Cal.4th at p. 88 [noting that the UPA's purpose was to eliminate the distinction between marital and nonmarital children and to replace that outmoded system with one that "bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents."]; *Griffith v. Gibson* (1977) 73 Cal. App.3d 465, 472-473 [the UPA must be construed "in the light of the manifest legislative purpose to equalize the rights and obligations of parents in relationship to their children without regard to sex [or] marital status"].) This core principle is codified in section 7602, which provides: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (Fam. Code § 7602.)

Because the primary purpose of the UPA is to secure equality for nonmarital children, a refusal to apply section 7613(a) to nonmarital children subverts the Legislature's intent by discriminating against an entire class of children born through artificial insemination, solely because their parents are not married. Limiting section 7613(a) exclusively to married couples is invidious and serves no legitimate purpose.

Thus, section 7613(a) must be read in conjunction with section 7602, which mandates that the parent and child relationship extend equally regardless of the parent's marital status; with section 7650, which mandates

that the UPA must be applied in a gender-neutral manner; and with other provisions of the UPA providing for the prompt determination of a child's legal parentage. In light of the statutory scheme as a whole, it is clear that section 7613(a) must be applied equally to nonmarital children. Any other conclusion produces the anomalous result that children who are born as a result of intentional procreative conduct to unmarried parents are denied the rights and protections provided to children born to married couples who engaged in the very same conduct. (*Harris, supra,* 34 Cal.4th at p. 222 ["'[i]t is a fundamental rule of statutory construction that statutes should be construed to avoid anomalies.'"].)

The only published Court of Appeal decision addressing this question correctly reached this conclusion. In *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, an unmarried heterosexual couple had a child through artificial insemination. The trial court concluded that the male partner was not a legal parent because he was not married to the child's mother and had no biological connection to the child. Although the trial court's ruling on that issue was not appealed (and therefore not ruled upon by the appellate court), the Court of Appeal indicated that if it had reached the issue, it would have concluded that the man was a legal parent.

The court in *Dunkin* noted that even though the situation did not fall precisely within the literal language of the UPA, the appellant nonetheless

could be deemed a legal parent under the intent-based principles established in *Sorensen* and codified in the UPA:

> [W]e are persuaded that his status has the elements of those of a lawful father under the decision in *Sorensen* by virtue of his written consent to the artificial insemination of respondent and voluntary consequent assumption of fatherhood duties. . . . Indeed, the UPA expresses a legislative preference for the extension of parent and child relationships equally to married and unmarried parties….

(*Dunkin*, *supra*, 82 Cal.App.4th at p. 188 [internal citations omitted]; see also *In re Parentage of M.J.* (Ill. 2003) 203 Ill. 2d 526, 787 N.W.2d 144 [holding that an unmarried man who had a child with his female partner through artificial insemination is responsible as a parent under common law principles]; *In re C.K.G.*, 2004 WL 1402560, Slip Op. (Tenn. Ct. App. 2004) [holding that an unmarried woman who had children with her nonmarital male partner through use of a medical procedure was the legal parent of the triplets to whom she was genetically unrelated based on her intent to parent the resulting children, relying on *Johnson* and *Buzzanca*].)

This Court similarly must hold that an unmarried person who actively participates in and consents to his or her partner's insemination with the intention of parenting the resulting children is a legal parent. A "deliberate procreator" must be held to be as responsible "as a causal inseminator." (*Buzzanca*, *supra*, 61 Cal.App.4th at p. 1428.)

An increasing number of children are being born to unmarried couples. (See, e.g., Ann Laquer Estin (2001) *Unmarried Partners and the*

*Legacy of Marvin v. Marvin*, 76 Notre Dame L. Rev. 1381, 1389 n. 52 ["In 1970, just over ten percent of all births were nonmarital births. By 1995 almost one-third were nonmarital."]; see also *Holguin v. Flores* (2004) 122 Cal.App.4th 428, 440 ["In 2001 a California legislative committee estimated the number of 'unmarried cohabitants' in the state as approximately 600,000. Nationwide, the number is purported to be over 4 million."].) Regardless of what one thinks of this trend, as the United States Supreme Court has repeated many times, children cannot be penalized based on the circumstances of their birth. (See, e.g., *Gomez v. Perez* (1973) 409 U.S. 535, 538 [holding that it is "illogical and unjust" to deprive a child of important rights and benefits simply because the child's parents are not married].).

> No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), . . . courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who -- other than the taxpayers -- is obligated to provide maintenance and support for the child. These cases will not go away.

(*Buzzanca*, *supra*, 61 Cal.App.4th at pp. 1428-1429.)

Since going into effect on January 1, 2005, Assembly Bill 205 (2003) now ensures that *future* children born to registered domestic partners in California are provided with the same rights and protections as children

born to married couples under state law.[8] A.B. 205 does not, however, remove the need for this Court to hold that section 7613(a) must be applied equally to nonmarital children. As this case illustrates, there are many children in California who already have been born to unmarried and unregistered couples through the use of medical procedures and whose parentage remains unresolved. Moreover, even though A.B. 205 has gone into effect, children will continue to be born to same-sex couples who do not register as domestic partners as well as to heterosexual couples who do not marry. These children cannot be ignored.

#### 4. Section 7613(a) must be applied equally to children born to same-sex couples.

The fact that A.G. and D.W. are both women is not legally relevant to the determination of A.G.'s legal parentage under section 7613(a). In *Johnson*, this Court held that the UPA must be applied in a gender-neutral manner, even when the statutory provisions at issue are gender specific. (*Johnson*, *supra*, 5 Cal.4th at p. 89; see also *Kristine H. v. Lisa R.* (2004) 120 Cal.App.4th 143, 16 Cal.Rptr.3d 123, 134-135 ["The Act requires that we read it in a gender-neutral manner . . ."].) This directive is codified in the statute, which provides: "Insofar as practicable, provisions applicable to

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[8] See, e.g., Fam. Code § 297.5(d) ["The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses."].

the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship." (Cal. Fam. Code § 7650.)

Consistent with this directive, the Court of Appeal in *Buzzanca* held that, in the context of a gestational surrogacy arrangement, section 7613(a) must be applied equally to a woman (the wife, in that case) who consents to another woman's insemination with the intention of parenting the resulting child. As the court in *Buzzanca* explained, the wife was situated in the same position as a man "whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child." (*Buzzanca*, *supra*, 61 Cal.App.4th at p. 1421.) Men and women, the court continued, "are equally situated from the point of view of consenting to an act which brings a child into being." (*Id.* at p. 1426.)

In fact, an Indiana Court of Appeal recently decided a case with very similar facts to the instant case and reached this conclusion. In the case of *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. 2004), two women in a same-sex relationship had a child together using artificial insemination. The couple separated when the child was approximately 2 ½ years old. After their separation, the nonbiological parent continued to have regular visitation and pay monthly child support. At some point, the biological parent unilaterally terminated the visitation and began rejecting the child support payments. Thereafter, the nonbiological mother initiated an action to establish her

parentage. The trial court dismissed the complaint for lack of standing. The court of appeal reversed, reasoning that "no legitimate reason exists to provide children born to lesbian parents through the use of reproductive technology with less security and protection than that given to children born to heterosexual parents through artificial insemination." (*Id.* at p. 131.)

The rule established in *In re A.B.* is the same one that should be applied here based on an equal application of the existing California law: "when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child." (*Id.* at pp. 131-132.)

## II. Discriminating Against Children Born Through Artificial Insemination Based On Their Parents' Marital Status, Gender, Or Sexual Orientation Violates the Children's Constitutional Right To Equal Protection.

Refusing to apply the parentage rules equally to the child at issue in this case simply because C.'s parents were an unmarried lesbian couple would violate C.'s constitutional right to equal protection. Whenever possible, statutes must be construed to avoid constitutional problems. (See *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 237-38 [quoting *United States v. Jin Fuey Moy* (1916) 241 U.S. 394, 401].) For this reason as well, this Court should reverse the holding of the trial court and conclude

that A.G. is a legal parent under the UPA and has standing to maintain the instant action.

The United States Supreme Court consistently has struck down as unconstitutional state laws that burdened or disadvantaged children born out of wedlock. (See, e.g., *Trimble v. Gordon* (1977) 430 U.S. 762 [striking down statute that prohibited illegitimate children from inheriting from their father unless their parents had married]; *Jimenez v. Weinberger* (1974) 417 U.S. 628 [striking down section of the Social Security Act that denied benefits to illegitimate children of a recipient of disability insurance]; *New Jersey Welfare Rights Org. v. Cahill* (173) 411 U.S. 619 [striking down statute that denied benefits to illegitimate children]; *Weber v. Aetna Casualty & Surety Co.* (1972) 406 U.S. 164 [striking down workman's compensation statute that denied benefits to unacknowledged illegitimate children]; *Levy v. Louisiana* (1968) 391 U.S. 68 [striking down statute that prevented illegitimate children from bringing a wrongful death tort action].) This Court also has held that children must not be penalized for circumstances beyond their control. (See, e.g., *Darces v. Woods* (1984) 35 Cal.3d 871 [striking state law that provided reduced benefits to families that included undocumented alien children].)

In addition, gender classifications are subject to heightened scrutiny under both the state and federal constitutions. (*Catholic Charities of Sacramento v. Superior Court of Sacramento County* (2004) 32 Cal. 4th

527, 564 [“We long ago concluded that discrimination based on gender violates the equal protection clause of the California Constitution . . . and triggers the highest level of scrutiny”]); *United States v. Virginia* (1996) 518 U.S. 515, 524 [since gender generally provides no reasonable basis for differential treatment, classifications based on sex must be based upon “an exceedingly persuasive justification”].) Classifications that discriminate on the basis of sexual orientation also generally are considered invidious by state and federal courts and have been struck down on that basis. (See, e.g., *Gay Law Students Association v. Pacific Telephone & Telegraph Co.* (1979) 24 Cal.3d 458 [discrimination in state employment]; *Holmes v. California National Guard* (2001) 90 Cal.App.4th 297 [discrimination in state military positions]; *People v. Garcia* (2000) 77 Cal.App.4th 1269 [exclusion from juries]; *Lawrence v. Texas* (2004) 539 U.S. 558 [striking Texas statute that discriminated on the basis of sexual orientation]; *Romer v. Evans* (1996) 517 U.S. 620 [laws that exclude lesbian and gay people from otherwise generally applicable rights and protections violate the federal equal protection clause].)

Regardless of what level of scrutiny applies, under any form of equal protection analysis, an interpretation of California’s parentage laws that denies legal recognition of A.G.’s and C.’s parent-child relationships would be unconstitutional. It is patently irrational to recognize as legal parents: (1) a wife who consents to the insemination of a gestational surrogate by her

husband, as in *Johnson*; (2) a wife and a husband who consent to the insemination of a gestational surrogate using a donated egg and donated sperm, as in *Buzzanca*; (3) a man who holds himself out as a child's father, but is neither married to the child's mother nor biologically related to child, as in *Nicholas H.*; and (4) a woman who holds herself out as a child's mother, but is neither married to the child's father nor biologically related to the child, as in *Karen C.*, but to deny legal parentage to a lesbian who consented to her partner's artificial insemination with the intention of parenting the resulting children and who subsequently assumed parental responsibility for the children and held herself out as their parent to the world.

## CONCLUSION

A.G. and D.W. deliberately chose to have a child together. A.G. actively participated in and consented to D.W.'s artificial insemination by an anonymous donor, with the intention of being a parent. After C. was born, A.G. raised him and held him out as her own child. A.G. and C. have developed a strong parent-child bond. This Court must protect C. by holding that sections 7613(a) and 7611(d) must be applied equally to children born to unmarried same-sex parents. To hold otherwise would eviscerate the core purpose of the UPA, which is to secure substantive equality for nonmarital children, and would serve no purpose other than the unconstitutional one of punishing children for circumstances over which

they have no control.

DATE: Respectfully submitted,

BY: _______________________
Courtney Joslin
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

The accompanying Opening Brief of Appellant complies with the specifications of California Rules of Court 14(c) as follows:

1. The word count of the Brief is 8,471 words, based on the count of the word processing system used to prepare the brief.

I certify that the foregoing is true and correct. Dated this __ day of January, 2005, at San Francisco, California.

______________________________
Courtney Joslin

## SERVICE LIST

I am over eighteen (18) years of age and reside in the County of San Francisco. I am not a party to this action. I am employed in the County of San Francisco and my office address is 870 Market St., Ste. 370, San Francisco, CA 94102.

On January 27, 2005, I served the attached documents, described as **APPELLANT'S OPENING BRIEF**, on the parties of record in this case by placing true and correct copies thereof enclosed in sealed envelopes, with first class postage thereon prepaid, addressed as follows:

Superior Court of California, County of Los Angeles
111 N. Hill St.
Los Angeles, CA 90012

California Supreme Court
350 McAllister St.
San Francisco, CA 94102-4783
(4 copies)

Pat Murphy
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Lancaster, CA 93534

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January __, 2005 ______________________________
Courtney Joslin