**Case No. B175367**

COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

---

A.G.,

Appellant,

vs.

D.W.,

Appellee.

---

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

---

# APPELLANT'S REPLY BRIEF

---

Shannon Minter (168907)
Courtney Joslin (202103)
National Center for Lesbian Rights
870 Market St., Ste. 370
San Francisco, CA 94102
(415) 392-6257
(415) 392-8442 FAX

Attorneys for Appellant A.G.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***CASES***

***STATUTES AND COURT RULES***



***SECONDARY SOURCES***

## SUMMARY OF ARGUMENT

In her opening Brief, A.G. explained that the cases relied on by the trial court to hold that A.G. lacked standing are no longer good law in light of intervening decisions from the California Supreme Court.

In her opposition, D.W. presents little substantive response to the arguments made in A.G.'s Opening Brief. She fails to analyze or even to cite most of the cases discussed in the Opening Brief. Rather, the bulk of D.W.'s brief consists of reiterating her improper reliance on the same outmoded precedent relied on by the trial court.

As explained in A.G.'s Opening Brief, both of the legal issues presented in this case – the application of Family Code § 7611(d)[1] and the application of *People v. Sorensen* (1968) 68 Cal.2d 280, *Johnson v. Calvert* (1993) 5 Cal.4th 84, and § 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, S126945; *Elisa B. v. Superior Court* (2004) 118 Cal.App.4th 966, S125912; and *K.M. v. E.G.* (2004) 118 Cal.App.4th 447, S125643. Briefing on the merits in all three cases is now

[1] Unless otherwise denoted, all references are to the California Family Code.

complete, and the California Supreme Court has ordered that all three cases have calendar preference for oral argument.

Although D.W. also makes a number of factual claims, any factual disputes are irrelevant to this proceeding, since the trial court's dismissal was based 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 a 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"].) If this Court reverses and remands, it will be for the trial court to resolve any disputed issues of fact regarding the parties' intentions and post-birth conduct.

## ARGUMENT

### I. A.G. Is Not Precluded From Seeking Review of the Trial Court's Decision.

In her Answer Brief, D.W. argues for the first time that A.G. is precluded from arguing that she is a legal parent because, according to

D.W., A.G. "did not seek that status below." (Answer Brief ("AB" at p. 3.) This argument is unavailing.

First, D.W. is wrong in asserting that A.G. "did not seek" a determination that she was a parent below. To the contrary, A.G.'s Memorandum of Points and Authorities filed below was devoted solely to the issue of why A.G. is a parent under the Uniform Parentage Act ("UPA"). (RT pp. 107 – 119 [Memorandum of Points and Authorities].) Specifically, pages 8 - 13 of the Memorandum argued why A.G. must be found to be a legal parent under the California Supreme Court's decision in *Johnson v. Calvert* and Family Code section 7613(a). (RT pp. 107 – 112). As explained in her Memorandum below, "Petitioner, A.G., is a legal parent because she consented to [the] insemination 'to bring about the birth of a child that she intended to raise as her own.'" (RT at p. 107.) Pages 14 - 16 of A.G.'s trial court Memorandum argued why, independently, A.G. must be found to be a parent under an equal application of section 7611(d) and the California Supreme Court's decision in *In re Nicholas H.* (2002) 28 Cal.4$^{th}$ 56. (RT at pp. 113 – 115). As A.G. explained in her trial court Memorandum, "[h]ere the evidence showed without dispute that A.G. received C. into her home and openly held him out as her child and acted in all respects as a parent by financially providing for C., by taking C. to his medical appointments and to his day care and placing him on her insurance as her son. It follows that C. enjoys the presumption of § 7611(d) that A.G.,

Petitioner herein, is his legal parent entitled to visitation with him." (CT at p. 115). Thus, a review of the pleadings filed below makes clear that A.G. is making the same claims and the same arguments on appeal that she made below – that she is a legal parent under an equal application of section 7611(d) and, independently, under an equal application of section 7613(a) and the Supreme Court's opinion in *Johnson*.

Second, to the extent that D.W. argues that A.G. is precluded from arguing that she is a legal parent under the UPA because she filed the wrong Judicial Council Form in the trial court (CT at p. 4), it is D.W. who is precluded from raising this procedural defense at this point. As explained above, there is no question that A.G. argued below that she should be determined to be one of C.'s two legal parents. In the trial court, D.W. argued that A.G. was not a legal parent and that she did not have standing to seek custody and visitation of C.; D.W. did not object that A.G. had filed the wrong Judicial Council Form or raise this procedural issue in any way. Having failed to raise this procedural defense below, D.W. is precluded from doing so now. "An appellate court will ordinarily not consider procedural defects or erroneous rulings in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method. [Citations]." (9 Witkin, Cal. Proc. 4th (1997) Appeal, § 394, p. 444; see also *Vikco Ins. Services, Inc. v. Ohio Indemnity Co.* (1999) 70 Cal.App.4th 55, 66-67 ["As a

general rule, issues or theories not properly raised or presented before the trial court will not be considered on appeal."].) It simply would be "unfair to the trial judge and the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial." (9 Witkin, Cal. Proc. 4th (1997) Appeal, § 394, p. 445.) "If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." (*Sommer v. Martin* (1921) 55 Cal.App. 603, 610.)

Had D.W. raised this issue below, the UPA itself specifically provides that the trial court may include in its judgment or order "any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges of the child, the furnishing of a bond or other security for the payment of the child, or any other matter in the best interest of the child." (Fam. Code § 7637.) Thus, the UPA makes clear that pleading defects do not preclude the trial court from making the necessary orders and findings regarding a child. Moreover, even if the trial court determined that the form A.G. used to initiate the action was not the correct Judicial Council form, such a defect would be easily correctable; A.G. merely would have filed an amended Petition, using the form as directed by the trial court.

Finally, even if the procedural argument raised by D.W. had any merit, which it does not, it would not preclude this Court from addressing the legal argument presented on this appeal, which is whether older case law holding that a same-sex partner can never maintain an action for custody or visitation as an "interested person" under Family Code § 7650 is still good law in light of intervening precedent to the contrary from the California Supreme Court. If this Court holds that A.G. is an interested person entitled to maintain an action for custody and child support, then the trial court on remand can direct A.G. to amend her pleadings if the trial court determines any amendment to be required. But without review of the trial court's holding that A.G. has no standing to seek custody or visitation with C., any amendment to the pleading would be futile. Thus, it is appropriate and necessary for this Court to review the trial court's opinion and to permit the trial court on remand to determine whether any amendment of the pleadings is required.

## II. The Court of Appeal Decisions Cited By D.W. Are Not Binding On This Court; They Either Are Irrelevant Or Have Been Overruled Implicitly.

D.W. asserts that "California law does not recognize a biologically unrelated woman as an 'interested person' that can bring an action to establish the status of parent." (AB at p. 4.) That assertion, however, begs the question before this Court – namely, how to determine the legal parentage of children born to unmarried/unregistered couples through artificial insemination under the UPA. Rather than presenting substantive arguments on that question, D.W. simply includes long block quotes from outdated case law. (AB at pp. 5 - 9 [citing *Curiale*; *Nancy S.*; and *West*].)

D.W.'s reliance on these decisions is unavailing. First, as the California Supreme Court noted in *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, these cases primarily "address the jurisdiction of California courts to award visitation to a 'de facto' parent." (*Id.* at p. 443 [discussing *Curiale*, *West*, and *Nancy S.*].) Here, by contrast, A.G. contends that she is a legal parent under the UPA and the common law, not a de facto parent. Thus, to the extent these cases rely on de facto parentage or other equitable theories, they are not apposite.

Second, as explained in A.G.'s Opening Brief, to the extent these cases hold that a person who is neither a biological nor an adoptive parent

cannot be a legal parent under the UPA,[2] they have been overruled by the California Supreme Court's decision in *Nicholas H., supra*, 28 Cal.4th 56. In that case, the Court held that an unmarried man who was neither a biological nor an adoptive parent could be a legal parent under § 7611(d), based on his conduct of receiving the child into his home and holding the child out as his own. (*Id*.; see also *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)]; *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 addition, two of the cases cited by D.W. – *Curiale* and *Nancy S.* – predate *Johnson v. Calvert*. In *Johnson*, the California Supreme Court held that the parentage of a child born through assisted reproduction is determined by applying the intent-based rule set forth in § 7613(a), even under circumstances that are not expressly contemplated by that provision. (*Johnson*, *supra*, 5 Cal.4th at p. 89.) 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

[2] See, e.g., *Curiale*, *supra*, 222 Cal.App.3d at p. 1600; *Nancy S.*, *supra*, 228 Cal.App.3d at p. 836; *West*, *supra*, 59 Cal.App.4th at p. 306.

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*].)

D.W.'s brief not only fails to respond to the arguments about why the cases relied on by the trial court and in her brief are no longer good law, she completely fails to cite or discuss most of the cases discussed in A.G.'s brief, including *Nicholas H.*; *Jesusa V.*; *Salvador M.*; *Karen C.*; *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171 [holding that, if it had been presented on appeal, the court would have found that an unmarried man who consented to his female partner's insemination would be held to be a legal parent]; *People v. Sorensen* (1968) 68 Cal.2d 280 [holding that a husband who consents to his wife's insemination is the legal parent of the resulting child under common law principles]; and *In re A.B.* (Ind. Ct. App. 2004) 818 N.E.2d 126 [holding 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."].

## III. A Child Can Have Two Parents Of The Same Sex Under California Law.

In the only section of her brief providing any substantive response, D.W. argues that A.G. cannot be a legal parent under the UPA because "our courts have made clear that a child cannot have two mothers." (AB at p. 10.) As explained in A.G.'s opening brief, however, the fact that A.G. and D.W. are both women is not legally relevant to the determination of A.G.'s legal parentage.

D.W.'s only support for this argument is the California Supreme Court's passing remark in *Johnson* that a child cannot have two natural mothers. In *Johnson*, however, the Court was faced with the necessity of determining which two of three potential candidates should be held to be the child's legal parents. The Court did not consider the contingency before it today, where the only two candidates to be the children's legal parents are both women. Accordingly, the Court's dicta on this point does not resolve the very different legal question presented by this case.

Moreover, the California Supreme Court has clarified that the statutory term "natural parent" is a legal term of art that denotes a conclusion about a person's legal status – i.e., the term refers to a person who is a legal parent under the UPA; it does not refer exclusively to a biological parent. (See *Johnson, supra*, 5 Cal. 4th at p. 93 n.9 [holding that the term "natural" as used in the UPA is ultimately a legal, not a biological,

term and "simply refers to a mother who is not an adoptive mother"]; *Nicholas H., supra,* 28 Cal.4th at p. 64 [expressly rejecting the view that a "natural" father under the UPA must be a biological father]; *Jesusa V., supra,* 32 Cal.4th at 616 n. 9 [reiterating that a man may be a "natural" father under the UPA even if he is not a biological father]; see also *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410 [concluding that husband and wife – neither of whom had a biological connection to the child – were to be treated in law as if they were the child's "natural" parents]. In sum, as the UPA and the case law make clear, the term "natural parent" in the UPA simply means legal parent, regardless of that person's biological connection to the child. Accordingly, while it is clear that the UPA contemplates that a child may have only two natural parents, given that for purposes of the UPA "natural" does not necessarily mean biological, and given that the UPA itself mandates that the Act be applied in a gender-neutral manner whenever practicable, there simply is no basis for refusing to holding that a child may have two natural parents of the same sex, where appropriate under the circumstances of a particular case.[3]

---

[3] As explained in more detail in A.G.'s Opening Brief, the UPA mandates that it be applied in a gender-neutral manner whenever "practicable." (Fam. Code § 7650.) California courts already have concluded that it is practicable to apply both section 7613(a) and section 7611(d) to women. (*In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1420 [holding that § 7613(a) applied equally to a woman who consents to another woman's insemination]; *Salvador M., supra,* 111 Cal.App.4th 1353 [holding that § 7611(d) and the decision in *Nicholas H.* apply equally to women]; *Karen*

This is particularly true now that California law explicitly provides that a child may have two "natural" parents of the same sex under the UPA. Specifically, as a result of A.B. 205 (2003), when registered domestic partners have a child through artificial insemination, both partners automatically are considered the "natural" parents of the child under the UPA.[4] (See Cal. Fam. Code § 297.5(d) ["The rights and obligations of

---

*C.*, *supra*, 101 Cal.App.4th 932 [same].) Moreover, failure to apply these rules equally to the child at issue in this case because of the gender or sexual orientation of his parents would violate the Equal Protection Clause of the California and federal constitutions.

[4] Of course A.B. 205 does not govern this case, since C. was born prior to the enactment of the statute, and in fact prior to the existence of the state domestic partnership registry. That does not mean, however, that C. must be left with only one legal parent. To the contrary, the underlying purpose of the UPA is to ensure substantive equality for children born to unmarried (and now unregistered) couples. (Fam. Code §7602 ["The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."].) In addition to this underlying purpose of the UPA, A.B. 205 also expressly provides that it "is not intended to repeal or adversely affect any other ways in which relationships between adults may be recognized or given effect in California, or the legal consequences of those relationships . . . ." (Stats. 2003, ch. 421, § 1(c)).

D.W. asks this Court to disregard that clear statement of legislative intent by construing A.B. 205 to deprive children with unregistered same-sex parents of the same protections given to other nonmarital children. There simply is no basis, however, for holding that registered domestic partnership must be the exclusive means of establishing parental rights and responsibilities for same-sex parents, any more than marriage is the exclusive means of establishing parental rights and responsibilities for heterosexual parents.

As the California courts and legislature have made clear, "the legal relationship between a child and his or her parents is not dependent upon the existence of a marriage [or a domestic partnership] between the parents." (*Macgregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal.3d 205, 212.) Rather, "established legislative policy bases parent and child rights on the existence of a parent and child relationship rather than on the

registered domestic partners with respect to a child of either of them shall be the same as those of spouses."]; see also All County Letter 04-14, available at http://www.avss.ucsb.edu/news/ACL04-14Attach.pdf [explaining that hospitals shall include the birth mother's registered domestic partner on a child's original birth certificate in the same manner as a husband].)

Moreover, even prior to the enactment of A.B. 205 (2003), California law clearly permitted a child to have two parents of the same sex. Family Code section 9000(b) provides that domestic partners may use the same streamlined adoption procedures available to stepparents. In addition, in 2003, the California Supreme Court affirmed the permissibility of second parent adoptions, a procedure which has been used by same-sex couples since the mid-1980s. (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 437 [noting that 10,000 to 20,000 second parent adoptions had been granted in California].) While these provisions do not determine C.'s legal parentage, since he was born before the domestic partnership registry even existed, they do confirm that California law permits a child to have two mothers or two fathers.

Moreover, D.W.'s assertion that the section 7611 presumptions "only come into play if there is some question concerning the identity of

---

marital status of the parents." (*Sharon S.*, *supra*, 31 Cal.4th at p. 439 [quoting *Johnson*, *supra*, 5 Cal.4th at p. 89].)

the natural parent or it is unclear who has the right to claim the maternal or paternal status," is simply erroneous. In *Nicholas H.*, there was no dispute that Kimberly was the child's biological mother. There also was no dispute that Thomas was not the child's biological father. The same is true in this case – there is no dispute that D.W. is C.'s biological parent; and there is no dispute that A.G. is not C.'s biological parent. But what the California Supreme Court held in *Nicholas H.* is that neither of those two facts necessarily rebuts a presumption that arises under section 7611(d). If a person engages in the conduct outlined by the statute -- taking the child into his home and holding the child out as his own – the presumption arises. It is then left to the court to determine if it is an "appropriate case" in which to find the presumption rebutted.

The fact that the Court in *Johnson* held that it did not need to resort to the 7611 presumptions under the particular facts of that case does not compel a contrary conclusion. In *Johnson*, both women who were seeking to be declared the child's mother had a biological basis for asserting parentage – the gestational surrogate gave birth to the child and the intended parent was genetically related to the child. In addition, the child's biological father also was known. Thus, since the identity of one parent already was known (the father), the issue before the Court in *Johnson* was how to identify which of the two persons vying to be the child's second legal parent had the stronger claim. Under those circumstances, and where

the action was brought shortly after the child's birth, before any party had developed a strong parent-child bond, the Court held it was unnecessary to resort to the evidentiary presumptions to resolve the question presented in that case. Under the very different circumstances presented here, there is only one person with a legal claim to be C.'s second parent, and the question properly before the trial court was whether A.G. met the criteria of a presumed parent under section 7611(d).

## IV. Because A.G. Is A Legal Parent, D.W.'s Argument About The Narrow Class Of Non-Parents Entitled To Seek Custody Or Visitation Is Not Relevant.

Family Code sections 3100 et seq. authorizes courts to award visitation to certain non-parents. Because this case involves a custody dispute between two legal parents, those provisions do not apply and have no relevance in this case. A.G. is not seeking custody or visitation as a non-parent. Rather, she is seeking an adjudication that she is C.'s second legal parent under a proper application of sections 7613(a) and 7611(d) and of the case law construing those sections.

## V. Failure To Apply the Existing Provisions and Rules For Determining a Child's Parentage Equally to C. Because of the Sex, Sexual Orientation, Or Marital Status of His Parents Would Violate the Due Process and Equal Protection Clauses of the California and U.S. Constitutions.

D.W.'s equal protection argument is premised on the erroneous presumption that A.G. is not a parent. That position avoids the question presented by this case, which is whether the rules that have been applied to

determine the legal parentage of children born to heterosexual couples must be applied equally to determine the parentage of children born to same-sex couples. If the Court applies those rules equally here, it must conclude that the trial court erred in concluding as a matter of law that a lesbian co-parent cannot be an interested party within the meaning of the UPA and, therefore, necessarily lacks standing to bring an action for custody.

Moreover, because this case involves a custody dispute between two legal parents, *Troxel v. Granville* (2000) 530 U.S. 57, is irrelevant. There is nothing in *Troxel*, or any other U.S. Supreme Court case, holding that a person must be a biological parent in order to be considered a legal parent, or in order to have a constitutionally protected relationship with a child. To the contrary, as the U.S. Supreme Court has made clear, it is the substance of the parent-child bond – not biology – that creates the constitutionally protected relationship. For example, in *Prince v. Massachusetts* (1944) 321 U.S. 158, 169, the Supreme Court treated the relationship between Sarah Prince and her aunt Betty Simmons as a constitutionally protected parent-child relationship. (See also *Smith v. OFFER* (1977) 431 U.S. 816, 843, n. 49 [citing *Prince* as example of a case in which the Supreme Court held that parental due process rights extend beyond biological parents].) As the Supreme Court has explained, the core of the family interest protected by the due process clause is the emotional bond that develops between family members as a result of shared daily life:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

(*Smith, supra*, 431 U.S. at 844; see also *Lehr v. Robertson* (1983) 463 U.S. 248, 261; *Moore v. City of East Cleveland* (1977) 431 U.S. 494, 504-506.) As explained in more detail in A.G.'s Opening Brief, failure to apply these principles, and established California law equally to C. because of the sex, sexual orientation, or marital status of his parents would violate both the Due Process and Equal Protection Clauses of the California and federal constitutions.

## CONCLUSION

Accordingly, this Court must reverse the decision of the trial court and hold that A.G. is an "interested person" within the meaning of the UPA. 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 Reply Brief of Appellant complies with the specifications of California Rules of Court 14(c) as follows:

1. The word count of the Brief is 4,393 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 March, 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 March 17, 2005, I served the attached documents, described as **APPELLANT'S REPLY 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
(5 copies)

Pat Murphy
Law Offices of Pat Murphy
1110 West Avenue, L-12, Suite 1-C
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: March __, 2005

Courtney Joslin