S126945
S125643
S125912

IN THE SUPREME COURT OF CALIFORNIA

Kristine Renee H., Plaintiff and Appellant, *v.* ***Lisa Ann R.,*** Defendant and Respondent.	)	Supreme Court No. S126945 Court of Appeal No. 2d Civ. B-167799 Los Angeles Superior Court No. PF-001550
K.M., Plaintiff and Appellant, *v.* ***E.G.,*** Defendant and Respondent.	)	Supreme Court No. S125643 Court of Appeal No. A101754 Marin County Superior Court No. CV020777
Elisa Maria B., Petitioner, *v.* ***El Dorado County Superior Court (Emily B.)*** Respondent.	)	Supreme Court No. S125912 Court of Appeal No. CO42077 El Dorado County Superior Court No. PFS20010244

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT LISA R. (*Kristine H. v. Lisa R.*), APPELLANT K.M. (*K.M. v. E.G.*) and REAL PARTY EMILY B. (*Elisa B. v. Superior Court*),
and
BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT LISA R. (*Kristine H. v. Lisa R.*), APPELLANT K.M. (*K.M. v. E.G.*), and REAL PARTY EMILY B. (*Elisa B. v. Superior Court*)

CHILDREN'S ADVOCACY INSTITUTE
Debra Back Marley (State Bar No. 204842)
Robert C. Fellmeth (State Bar No. 49897)
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4807 / Fax: (619) 260-4753

S126945
S125643
S125912

IN THE SUPREME COURT OF CALIFORNIA

Kristine Renee H., Plaintiff and Appellant, *v.* ***Lisa Ann R.***, Defendant and Respondent.	)	Supreme Court No. S126945 Court of Appeal No. 2d Civ. B-167799 Los Angeles Superior Court No. PF-001550
K.M., Plaintiff and Appellant, *v.* ***E.G.***, Defendant and Respondent.	)	Supreme Court No. S125643 Court of Appeal No. A101754 Marin County Superior Court No. CV020777
Elisa Maria B., Petitioner, *v.* ***El Dorado County Superior Court (Emily B.)*** Respondent.	)	Supreme Court No. S125912 Court of Appeal No. CO42077 El Dorado County Superior Court No. PFS20010244

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT LISA R. (*Kristine H. v. Lisa R.*), APPELLANT K.M. (*K.M. v. E.G.*) and REAL PARTY EMILY B. (*Elisa B. v. Superior Court*),

CHILDREN'S ADVOCACY INSTITUTE
Debra Back Marley (State Bar No. 204842)
Robert C. Fellmeth (State Bar No. 49897)
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4807 / Fax: (619) 260-4753

On December 23, 2004, this Court granted permission to the American Civil Liberties Union Foundation of Southern California and other named *amici*, including the Children's Advocacy Institute, to file a single *amicus curiae* application and brief to be considered in the above-referenced cases. The Court also ordered that such application and brief be filed within 30 days "after the final brief on the merits is filed in the last of the three cases." The reply brief in the last of the three cases, *Kristine H.*, was filed on March 9, 2005.

Pursuant to Rule 29.1(f) of the California Rules of Court, the Children's Advocacy Institute hereby requests leave of this Court to file the attached brief amicus curiae in the above-captioned proceedings. The Children's Advocacy Institute submits this brief in support of Real Party in Interest Emily B. in *Elisa Maria B. v. Superior Court of El Dorado County* (2004)118 Cal.App.4th 966; in support of Appellant K.M. in *K.M. v. E.G.* (2004) 118 Cal.App.4th 477 (as modified in 13 Cal.Rptr.3d 136 (2004)); and in support of Respondent Lisa R. in *Kristine H. v. Lisa R.* (2004) 120 Cal.App.4th 143. This brief has been drafted by the Children's Advocacy Institute, without compensation from any party, and has been served on all parties (proof of service attached). The Children's Advocacy Institute contends that most of the discussion, citations, and points made in the attached proposed brief will not be presented by the parties in the three related cases before this Honorable Court.

The Children's Advocacy Institute (CAI), founded in 1989 as part of the University of San Diego School of Law, is a nonprofit academic and advocacy center dedicated to improving the health, safety, and well-being of California's children. CAI operates legal clinics representing abused and neglected children in juvenile dependency court; operates advocacy offices in Sacramento and San Diego; and engages in legal and budget research relevant to children, which is published in several sources, including *Child Rights &*

Remedies (a law school text), the annual *California Children's Budget*, the *Children's Regulatory Law Reporter*, and the *Children's Legislative Report Card*. CAI's goal is to educate policymakers about children's needs for economic security, adequate nutrition, health care, education, quality child care, and protection from abuse, neglect, and injury.

CAI advocates that children deserve to be intended by two parents. Legal parent-child relationships are crucial to the well-being of a child, and those existing relationships are in jeopardy after the Appellate Court decisions in these three matters. Without clarification, these decisions will leave hundreds of California children without a clear legal relationship to adults they recognize as parents and rely on for their basic needs. From a child's perspective, a parent—no matter what race, age, or gender—who willingly and knowingly brings a child into this world, should be held accountable for the attendant duties, including financial responsibilities, he or she owes to that child, and should also be granted parental status in order to enjoy the benefits of continuing that parent-child relationship.

It is imperative that this Court provide a legal framework for awarding child support and resolving custody and visitation disputes when same-sex parents separate. As the California Legislature explained:

> There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights.

California Family Code section 7570(a).

Children born to same-sex couples have all the same needs for financial and emotional protection as other children. These children should not be penalized for the sexual preferences of their parents. The primary purpose of

the Uniform Parentage Act is to provide substantive equality for children without reference to the marital status of the parents, and without regard to gender. *See Griffith v. Gibson* (1977) 73 Cal.App.3d 465, 470; *see also* Family Code section 7602 (stating "the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents"). In *Johnson v. Calvert*, this Court looked first to the provisions of the UPA for determining parentage under California law. (1993) 5 Cal.4th 84, 88-97. Then, having found no guidance as to how the provisions of the UPA could be applied in a gender-neutral manner, this Court applied an "intent of the parties to procreate" standard to determine legal parentage. *Id.* Applying a gender-neutral application of Family Code section 7611(d), as the Second Appellate District did in *Kristine H. v. Lisa R.*, CAI contends the existing parent-child relationships would correctly be protected.

CAI submits this brief on behalf of the interests of children in having the law recognize and protect their significant relationships to the adults they have come to regard as members of their family. While this entails protecting the rights of parents to love, nurture, and raise their children free from unwarranted state interference, it may occasionally call for state action to protect children's significant relationships to others, including both related and unrelated parents. Accordingly, CAI requests leave to file the attached brief *amicus curiae*.

Dated: April 4, 2005 Respectfully submitted,

____

DEBRA B. MARLEY
State Bar No. 204842
Staff Attorney
Children's Advocacy Institute

S126945
S125643
S125912

IN THE SUPREME COURT OF CALIFORNIA

Kristine Renee H.,	)	Supreme Court No. S126945
Plaintiff and Appellant,	)	Court of Appeal No. 2d Civ. B-167799
v.	)	Los Angeles Superior Court
Lisa Ann R.,	)	No. PF-001550
Defendant and Respondent.	)	
	)	
K.M.,	)	Supreme Court No. S125643
Plaintiff and Appellant,	)	Court of Appeal No. A101754
v.	)	Marin County Superior Court
E.G.,	)	No. CV020777
Defendant and Respondent.	)	
	)	
Elisa Maria B.,	)	Supreme Court No. S125912
Petitioner,	)	Court of Appeal No. CO42077
v.	)	El Dorado County Superior Court
El Dorado County Superior Court	)	No. PFS20010244
(Emily B.)	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT LISA R. (*Kristine H. v. Lisa R.*), APPELLANT K.M. (*K.M. v. E.G.*), and REAL PARTY EMILY B. (*Elisa B. v. Superior Court*)

CHILDREN'S ADVOCACY INSTITUTE
Debra Back Marley (State Bar No. 204842)
Robert C. Fellmeth (State Bar No. 49897)
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4807 / Fax: (619) 260-4753

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

Summary of the Argument 1

Argument 5

I. A Child's Fundamental Right to Family Integrity Is Protected by the U.S. and California Constitutions 5

II. The UPA Should Be Applied in a Gender-Neutral Fashion to Determine Whether a Parent-Child Relationship Exists Between an Adult and a Child Sufficient to Compel Financial Support and to Establish Custody and/or Visitation 10

III. When the UPA (Interpreted in a Gender-Neutral Manner) Provides No Answer, the Court Can Look to the Procreative Conduct of the Purported Parents and the Child's Interests 14

IV. The Children in All Three Cases Have Actionable Estoppel Claims to Maintain Their Existing Relationships with Women Who They Believe to Be Parents in an Emotional and Social Context 17

V. Family Code Section 297.5 Codifies Existing Law Applied in a Gender-Neutral Fashion for Same-Sex Couples to Determine Their Relationships with Children They Bring into the World and Raise as Their Own 19

Conclusion 20

TABLE OF AUTHORITIES

Page

Federal Decisions

Gomez v. Perez (1973) 409 U.S. 535 5

Goss v. Lopez (1975) 419 U.S. 565 6

In re Gault (1967) 387 U.S. 1 6

Kenny A. v. Sonny Perdue

(2005) 2005 U.S. Dist. LEXIS 1891 . . . . 6, 9

Parham v. J.R. (1979) 442 U.S. 584 5

Planned Parenthood of Central Mo. v. Danforth

(1976) 428 U.S. 52 5

Prince v. Massachusetts (1944) 321 U.S. 158 9

Roberts v. United States Jaycees (1984) 468 U.S. 609 10

Tinker v. Des Moines Independent Comm'y School District

(1969) 393 U.S. 503 6

Troxel v. Granville (2000) 530 U.S. 57 8

State Decisions

Adoption of Danielle G. (2001) 87 Cal.App.4th 1392 7

Adoption of Matthew B. (1991) 232 Cal.App.3d 1239 4

American Academy of Pediatrics v. Lungren

(1997) 16 Cal.4th 307 7

Burchard v. Garay (1986) 42 Cal.3d 531 15

Elisa Maria B. v. Superior Court of El Dorado Cty

(2004) 118 Cal.App.4th 966 . . . . passim

In re Angelia P. (1981) 28 Cal.3d 908 9

In re Bridget R. (1996) 41 Cal.App.4th 1483 . . . . 1, 6, 7, 8

In re Jasmon O. (1994) 8 Cal.4th 398 . . . . 6, 8

In re Marriage of Buzzanca (1998) 61 Cal.App.4th 1410 . . 7, 15, 17

In re Marriage of Freeman (1996) 45 Cal.App.4th 1437 18

In re Marriage of Goodarzirad (1986) 185 Cal.App.3d 1020 . . 4, 15

In re Marriage of Pedregon (2003) 107 Cal.App.4th 1284 17

In re Nicholas H. (2002) 28 Cal.4th 56 11

In re Salvador M. (2003) 111 Cal.App.4th 1353 . . . . 11, 12

Johnson v. Calvert (1993) 5 Cal.4th 84 . . . . passim

K.M. v. E.G. (2004) 118 Cal.App.4th. 477 . . . . passim

Kristine H. v. Lisa A. (2004) 120 Cal.App.4th 143 . . . . passim

People v. Sorensen (1968) 68 Cal.2d 280 15

Ruddock v. Ohls (1979) 91 Cal.App.3d 271 7

Sharon S. v. Superior Court (2003) 31 Cal.4th 417 11

Susan H. v. Jack S. (1994) 30 Cal.App.4th 1435 7

State Statutes

Evidence Code section 623 17

Family Code section 297.5 19

Family Code section 7570(a) 2, 7

Family Code section 7601 16

Family Code section 7602 16

Family Code section 7611(d) . . . . passim

Welfare & Institutions Code section 11477(a) 18

AB 205 (Chapter 421, Statutes of 2004) 19, 20

Other Authorities

Krause, Elrod, Garrison & Oldham, *Family Law: Cases, Comments and Questions* (4th ed. 1998) at 10-15 . . 16

STATEMENT OF THE CASE

Amicus curiae Children's Advocacy Institute (CAI) adopts the statements of the three separate cases as articulated in the briefs of Real Party in Interest Emily B. (*Elisa B. v. Superior Court*), Appellant K.M. (*K.M. v. E.G.*), and Respondent Lisa R. (*Kristine H. v. Lisa R.*).

SUMMARY OF THE ARGUMENT

Amicus CAI urges this Court to recognize the existing relationships between the non-gestational parents and the children they have raised, with the attendant obligations and benefits, in all three of these cases. Compared to this Court's determination of surrogacy law in *Johnson v. Calvert*, and the involvement of three competing parents, the issues raised here are straight forward. This Court need not resort to new standards or legal tests. All three cases involve existing and lengthy parent-child relationships that can be upheld through proper interpretation of the Uniform Parentage Act (UPA).

In *Johnson v. Calvert* (1993) 5 Cal.4th 84, 88-97, this Court looked first to the provisions of the UPA for determining parentage under California law. Then, having found no guidance as to how the provisions of the UPA could be applied in a gender-neutral manner, this court applied an "intent of the parties to procreate" standard to determine legal parentage. *Id.* *Amicus* CAI encourages the same analysis in these cases, and believes the outcomes will protect the children's relationships with adults in their lives who they believe to be and rely on as parents.

Children have a fundamental liberty interest to maintain their respective family units, including a right to continue a relationship with a person who has functioned as a parent. *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1503-1504, *rev. denied*, 1996 Cal. LEXIS 2647 (Cal. May 15, 1996), *cert. denied*, 519 U.S. 1060 (1997). In order to protect the "real" parties in interest,

the children who are not separately represented and cannot advocate for themselves, this Court should also consider equitable arguments, such as estoppel, to prevent self-interested parents from picking and choosing which laws should apply to them. These cases have nothing to do with gay rights, gay marriage, or any of the politics surrounding same-sex issues. When one views these three cases through a child's perspective, the outcomes are self-evident. Elisa B.'s children must receive child support from her to assist with their special needs. The twin children, raised jointly by K.M. and E.G., must be afforded some method to continue their relationships with K.M. And Lauren must also continue her relationship with her second parent, Lisa R.

There are no third party interveners involved in these cases; there is only the potential for two parents, as supported and encouraged by the UPA. *See, e.g.*, Family Code section 7570(a). Some children have only one parent, while other children have none and are institutionally raised. The children here are fortunate enough to have two individuals who both intended their creation, took on a parental role in their lives, and expressed an interest in their welfare. To deny these children their right to continue two parental relationships would also violate equal protection laws by treating children from same-sex couples differently than children from male-female relationships.

The Legislature has made clear that provisions of the UPA will be applied in a gender-neutral manner and without consideration of marital status. *See Johnson v. Calvert* (1993) 5 Cal.4th 84, 90. Hence, applying a gender-neutral interpretation of Family Code section 7611(d) (as the Second Appellate District did in *Kristine H. v. Lisa R.*), K.M. should be able to assert parental status because she helped raise and support the twin children for at least six years, and the children believed K.M. to be a "parent" in an emotional

and social context. K.M. also maintains a biological connection to the twins, since her ovum were implanted in E.G. The mere fact that K.M. signed a standard donor consent form provided by the hospital where the procedure to create the twins was performed should not be determinative of K.M.'s parental status. Further, E.G.'s attempt to waive the children's future rights to a continuing relationship with a person they consider to be a parent should be estopped as against public policy. One parent should not be able to force another parent to waive his/her right to pursue a continuing relationship before conception under these circumstances. For all of these reasons, *amicus* CAI requests that this Court reverse the First District Court of Appeal in *K.M. v. E.G.*

Amicus CAI respectfully requests that this Court also reverse the decision of the Third District Court of Appeal in *Elisa B. v. Superior Court of El Dorado County* (2004) 118 Cal.App.4th 966, based upon a gender-neutral reading of the UPA. Without reversal, the decision will leave many California children without a clear legal relationship to adults they recognize as a parent and rely on for their basic needs. From a child's perspective, a parent—no matter what race, age, or gender—who willingly and knowingly brings a child into this world, should be held accountable for the attendant duties, including financial responsibilities, he or she owes to that child.

Amicus CAI agrees with the Second Appellate District Court's gender-neutral analysis and application of Family Code section 7611(d), and the court's consideration of both the intent of the parties pre-birth, and the subsequent actions of the parties in raising and supporting the child to determine parentage in *Kristine H. v. Lisa R.* (2004) 120 Cal.App.4th 143. The Second Appellate District found that the stipulated judgment provided "an undisputed evidentiary basis from which the family court might be able to

assess Lisa's conduct in holding out the child as her own." 120 Cal.App.4th 143, 171. To the extent the court relied upon evidence surrounding the actions of Kristine and Lisa in executing the stipulated judgment, CAI urges this Court to affirm the Second Appellate District opinion.

Amicus CAI takes no position on the legality of the stipulated judgment, although many child advocates would support stipulations or other judgments **establishing** parental rights and duties as a matter of public policy, and oppose waivers of future liability for or responsibility to the children who the adult intended to create as contrary to public policy.[1] However, as raised by Respondent Lisa, Kristine should be estopped from challenging the stipulated parentage judgment since she was the plaintiff in the action and executed the stipulation. Further, Kristine did not challenge that judgment during the time Lisa raised and supported the child, instead bringing this challenge when the arrangement no longer suited her needs.

What is particularly troubling to child advocates is the way parents use children as a weapon in disputes such as those presented here. The children are often subjected to outcomes that are not based in the law, nor on their best interests, but upon the fickle and self-serving desires of their parents. Originally, Kristine wanted Lisa to be a mother to the child she gave birth to, and in fact they raised the child together for several years until the relationship ended and Kristine decided she wanted sole control over the child. Likewise,

---

[1] *See, e.g., Adoption of Matthew B*. (1991) 232 Cal.App.3d 1239, 1269 n. 21 (stating the doctrine that parentage judgments should only be voided when they do not serve public policy and the child's best interests, citing *In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020 as an example); *Johnson v. Calvert*, 5 Cal.4th 84, 95 (stating that "[i]n deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy").

in *K.M. v. E.G.*, E.G. wanted to have a child and accepted the help of her partner to raise the child for eight years until it no longer suited her needs. And finally, in *Elisa B.*, Elisa and Emily jointly determined they would bring children into the world and raise them as their own, then after the break-up of their relationship, Elisa decided she was no longer willing to support the children to whom she was committed.

There can be no assumption under these circumstances that the gestational mothers, Kristine and E.G., are acting in the best interests of the children involved. Applying the doctrine of *parens patriae*, the state must protect the interests of children who are too young to argue, too innocent to decide, and who will otherwise lose vital connections to parents who loved and cared for them. Under no circumstances should the children be penalized for the status or actions of their parents. *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).

ARGUMENT

I.
A CHILD'S FUNDAMENTAL RIGHT TO FAMILY INTEGRITY IS PROTECTED BY THE U.S. AND CALIFORNIA CONSTITUTIONS

A child is a person under the constitution, and courts have on many occasions acknowledged that children post-birth possess constitutionally protected rights and liberties. *See, e.g.*, *Parham v. J.R.* (1979) 442 U.S. 584, 600 (holding a child has a liberty interest in avoiding involuntary confinement); *Planned Parenthood of Central Mo. v. Danforth* (1976) 428 U.S. 52, 74 (stating "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as

well as adults, are protected by the Constitution and possess constitutional rights"); *Goss v. Lopez* (1975) 419 U.S. 565 (finding that lack of adequate procedures used by school in suspending students violated due process); *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503, 506-507 (finding children possess a First Amendment right to political speech); *In re Gault* (1967) 387 U.S. 1, 13 (holding children possess due process rights in criminal proceedings); *Kenny A. v. Sonny Perdue*[2] 2005 U.S. Dist. LEXIS 1891 (stating "[i]t is well settled that children are afforded protection under the Due Process Clause of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake," and affording children in deprivation hearings, including but not limited to proceedings to terminate parental rights, a right to counsel).

This Court has explicitly recognized that "children are not simply chattels belonging to their parent, but have fundamental interests of their own…" *In re Jasmon O.* (1994) 8 Cal.4th 398, 419. These fundamental interests are of constitutional dimensions. *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1490, *rev. denied*, 1996 Cal. LEXIS 2647 (Cal. May 15,

---

[2] A federal court in Georgia recently issued a decision stating that children have fundamental liberty interests, including a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit, including having a relationship with biological parents. *Kenny A. v. Sonny Perdue*, 2005 U.S. Dist. LEXIS 1891 at 14. In a class action filed by a national organization against Georgia's child welfare agency alleging the agency itself is neglectful of the foster children in its system, the federal court decided that abused and neglected children have a constitutional right to legal representation. The U.S. District Court went on to state that an erroneous decision that a child is abused or neglected or that parental rights should be terminated "can lead to the unnecessary destruction of the child's most important family relationships." *Id.*

1996), *cert. denied*, 519 U.S. 1060 (1997); *see also American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 (holding that a statute requiring a pregnant minor to obtain parental consent or judicial authorization for an abortion was properly determined to be unconstitutional because the law infringed upon a minor's fundamental right to privacy guaranteed by the California Constitution).

As referenced in the Attorney General's opening brief in *Elisa B. v. Superior Court*, several courts in California have found that children possess a fundamental right to establish parentage. *See Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 277-278 (stating "[t]he establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights"); *Susan H. v. Jack S.* (1994) 30 Cal.App.4th 1435, 1441 (quoting same); *see also In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 1423-1424 (discussing Family Code section 7570 and state's compelling interest in establishing parentage, which provides children with equal rights and promotes second policy of protecting the public fisc). And several California courts have found that a child has a constitutional right to a continuing relationship with a parent. *See In re Bridget R.*, *supra*, 41 Cal.App.4th at 1503-1504; *Adoption of Danielle G.* (2001) 87 Cal.App.4th 1392, 1403-1404.

As one state appellate court concluded:

> [A]s a matter of simple common sense, the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. If anything, children's familial rights are more compelling than adults', because children's interests in family relationships comprise more than the emotional and social interests which adults have in family life; children's interests also include the elementary and wholly practical needs of the small and helpless to be protected from

> harm and to have stable and permanent homes in which each child's mind and character can grow, unhampered by uncertainty and fear of what the next day or week or court appearance may bring.

In re Bridget R. (1996) 41 Cal.App.4th 1483, 1504 (citing *In re Jasmon O. supra*, 8 Cal.4th at 419).

State action which interferes with the enjoyment of a fundamental right is unreasonable under the due process clause and must be set aside or limited unless such legislation serves a compelling public purpose and is necessary to the accomplishment of that purpose. In other words, such state action would be subject to a strict scrutiny standard of review.[3] *In re Bridget R., supra*, 41 Cal.App.4th 1483, 1503 (citations omitted). If by state action, a parent (who a child relies on for care and support) is arbitrarily taken from a child, that child is being deprived of his/her constitutional right.[4]

We have an adult-centric bias in our society. A child is not a prize to be awarded to the meritorious, but a sentient human with the same rights to his/her parents as the courts readily grant parents to their children. A finding that children are entitled to a similar fundamental liberty interest in their

---

[3] However, even if a strict scrutiny analysis is not utilized, the law of the appellate case in *Elisa B*. must be reversed based upon the acknowledgment of the Attorney General that there is no legitimate governmental purpose in denying children of a same-sex couple child support that other children from a male-female relationship would clearly be entitled to. The Attorney General supports Emily's recovery of child support on behalf of her two intended children, leaving no doubt that a ruling to the contrary would be arbitrary and irrational.

[4] As Justice Stevens stated in his dissenting opinion in *Troxel v. Granville*, "[i]t seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child." (2000) 530 U.S. 57, 91.

familial relations does not mandate unworkable restrictions on the court. It merely places the interests of children on the constitutional table. They may be trumped by a competing constitutional right, including a parent's right. But such recognition balances both equitably, rather than automatically relegating one to dismissal.

Children are likewise entitled to procedural due process under the California and U.S. Constitutions because their liberty interests are at stake in these proceedings. This Court should afford the children affected in these cases with some measure of due process, like separate legal representation in cases where conflicts are evident,[5] or at the very least the consideration of the children's interests on an even playing field with the interests of the parents. The government's interest here, as dictated by the many provisions of the UPA, is to encourage the establishment of parent-child relationships.

The government has an interest in ensuring that a child's safety and well-being are protected under the doctrine of *parens patriae*, referring to the state in its capacity as provider of protection to those unable to care for themselves. Under normal circumstances, children's needs are met by helping parents achieve the children's interests, but when a parent's and a child's interests are in conflict, the legal system should protect the child's interest. *See, e.g.*, *Prince v. Massachusetts* (1944) 321 U.S. 158; *In re Angelia P.* (1981) 28 Cal.3d 908, 917–918 (stating "[n]ot only is the child a helpless party but the parents should suffer the consequences of their inadequacy rather than the child" (citations omitted)); *Kenny A.*, *supra*, 2005 U.S. Dist. LEXIS 1891 at 18. Under some circumstances, this requires giving legal protection to the child's ties to caregivers other than their gestational mothers.

The First Amendment's right of association is also a source of

[5] *See, e.g., Johnson v. Calvert*, 5 Cal.4th 84, 90.

constitutional protection for intimate personal relationships, family privacy, and family continuity because these relationships involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 619–620. Relationships that grow out of shared experience, nurturing and interdependence are "an intrinsic element of personal liberty." *Id.* at 620. The constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. *Id.* at 619. The "emotional enrichment" garnered by children from their families sustains them as they grow to maturity. This Court should ensure that the State protects children against the unwarranted loss of psychological and emotional ties to their established families.

II.
THE UPA SHOULD BE APPLIED IN A GENDER-NEUTRAL FASHION TO DETERMINE WHETHER A PARENT-CHILD RELATIONSHIP EXISTS BETWEEN AN ADULT AND A CHILD SUFFICIENT TO COMPEL FINANCIAL SUPPORT AND TO ESTABLISH CUSTODY AND/OR VISITATION

In 1975, the UPA was created in part to address discrimination toward the "illegitimate" children produced by unmarried couples. *See Johnson v. Calvert*, *supra*, 5 Cal.4th 84, 88. At that time, procreation by unmarried opposite-sex couples was viewed in society much like the actions taken herein by same-sex couples is viewed today. In 1975, our nation broadly supported measures to ensure that all children were treated as legitimate members of society. Now, thirty years later, we must uphold the intent and spirit of the law

that claimed all children were legitimate—regardless of their parents' gender or marital status.

In 2003, this Court stated in *Sharon S. v. Superior Court*, that the UPA "bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents." 31 Cal.4th 417, 439 (quoting *Johnson v. Calvert*, 5 Cal.4th at 89). As is common with social phenomenon, the law takes time to catch up to society's progress and change. We have the capacity to understand the impact that failure to afford parental rights to children of same-sex couples will have. But the categorical refusal to grant parental status based upon the sexual preferences of the adult is blatantly unfair to the child and a violation of that child's right to the love and support of a parent.

In *Johnson v. Calvert*, this Court first looked to the provisions of the UPA for determining parentage under California law. 5 Cal.4th 84, 88-97. Then, having found no guidance applying the provisions of the UPA in a gender-neutral manner, this Court looked to the intent of the parties to procreate in order to determine legal parentage. *Id*. Applying a gender-neutral interpretation of Family Code section 7611(d) (as the Second Appellate District did in *Kristine H. v. Lisa R*.), the children in all three cases should be afforded the right to continue a relationship with their respective second parent.

As the court in *Salvador M.* stated, the presumption in section 7611(d) arises solely out of conduct, which is driven "not by biological paternity, but by the state's interest in the welfare of the child and the integrity of the family." *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1357-1358 (citing *In re Nicholas H.* (2002) 28 Cal.4th 56, 65). Therefore, an important consideration when applying the presumption is the child's own understanding

and belief that the person is the child's parent. *Id.* at 1358 (finding "respondent ignores the most compelling evidence that appellant held Salvador out as her own son—*i.e.*, the fact that eight-year-old Salvador believed appellant was his mother").

The factual record shows that the twin children believed that K.M. was a parent to them, just as the children in both *Elisa B.* and *Kristine H.* believed that Elisa and Lisa, respectively, were their parents. The purpose of the UPA, particularly section 7611(d), is to protect existing parent-child relationships. Therefore, this Court should not focus solely on the intent of the parties before birth, but should also take into consideration the lengthy parent-child relationships established and nurtured post-birth.

A gender-neutral interpretation of the law requires that the court consider all of the possible methods by which men can become fathers under existing law and to afford those same avenues of parentage to women. For instance, a man may become a father through the birth of a child in a marriage (whether through artificial insemination or natural means of fertilization), adoption of a child in a non-marital relationship, intent to procreate during a non-marital relationship, legal guardianship of a child with or without a partner, presumed parent status under the UPA, *et al.* (A more complete list of possible avenues to parental status can be found in Real Party in Interest County of El Dorado's opening brief in *Elisa B. v. Superior Court*, at 30-32.) All of these methods must also be available to a woman regardless of the gender of her partner.

The problem with the courts' analyses in *Elisa B.* and *K.M. v E.G.* is the assumption that children of same-sex couples can have only one parent—a mother in this case. But this logic is flawed. It does not assist same-sex couples or courts in determining parentage. For instance, what happens when

a male same-sex couple intends to create and raise children. Can there be only one father? Is the woman who gave birth to the child the mother and entitled to greater rights than the other male in the relationship? Can the court rely exclusively on section 7611(d) to find two presumed fathers? Does it all depend on which one has a biological link to the child?

As the Attorney General stated in his opening brief in *Elisa B.*, "[u]nder a gender-neutral interpretation of the UPA, a woman who intends to procreate or who holds herself out as a parent may be deemed a child's parent regardless of whether her partner is a man or a woman." Likewise, a man who intends to procreate or who holds himself out as a parent may be deemed a child's parent regardless of whether his partner is a man or woman. This is true gender neutrality and would ensure that every child born into a same-sex relationship would be treated in the exact same manner as a child born to a heterosexual couple.

The most unfortunate aspect of the appellate decision in *K.M. v. E.G.*[6] and the lower court decision in *Kristine H.* is that the children involved had two loving and supportive parents who wanted to be part of their lives. Some children receive love and support from only one parent, and there are many

---

[6] E.G. argues that K.M. could only attain legal parentage if she adopted the twins, but E.G.'s conduct made adoption impossible for K.M. E.G. maintained total control over the situation by refusing to allow K.M. to adopt when she had previously—before K.M. donated her eggs to E.G.—said that she would consider allowing K.M. to adopt when the twins turned five years of age. This Court must allow a method of effectuating the rights and interests of the other members of the family, namely K.M. and the children. The appellate court's decision allows one parent to manipulate the situation to her needs. E.G. willingly took advantage of K.M.'s assistance in raising, loving, and supporting the two children, knowing she had the upper hand in the situation because she could always deny K.M.'s request to allow her to adopt and claim she intended to be the sole parent.

other children who are raised in institutional settings with no parental guidance or support whatsoever. No societal purpose can be served by denying children this essential part of life. The First District Court of Appeal stated:

> We join the trial court in recognizing the harsh consequences of this decision for the children in this case who will ***suffer significantly*** from the inability of the parties to agree on sharing their parental roles. As the trial court found, ***the interests of the children will be disserved by the loss of a loving mother figure***.

K.M. v. E.G., 13 Cal.Rptr.3d 136, 153-154 (emphasis added).

Unfairness does not begin to define the impact these decisions will have on children created from same-sex relationships. This outcome does not promote societal interests in child well-being.

III.
WHEN THE UPA (INTERPRETED IN A GENDER-NEUTRAL MANNER) PROVIDES NO ANSWER, THE COURT CAN LOOK TO THE PROCREATIVE CONDUCT OF THE PURPORTED PARENTS AND THE CHILD'S INTERESTS

As Justice Kennard points out in her dissent in *Johnson v. Calvert*, factors pertinent to good parenting include the ability to nurture the child physically and psychologically, and to provide ethical and intellectual guidance. 5 Cal.4th 84, 120 (citations omitted). Moreover, a child has a well recognized right to stability and continuity. *Id.* (citing *Burchard v. Garay* (1986) 42 Cal.3d 531, 546 (conc. opn. of Mosk, J.)). These aspirational parental traits and conditions are undeniable.

Yet, the First Appellate District Court's analysis would hold one parent's intent before birth to be determinative, as compared to subsequent fulfillment of parental duties by a second parent toward a child. *Amicus* CAI

believes the outcome in *K.M. v. E.G.* is flawed and will lead to the detrimental treatment of children created from same-sex partnerships. Instead, CAI agrees with the Second Appellate District Court's gender-neutral analysis and application of Family Code section 7611(d), and also the court's consideration of both the intent of the parties pre-birth, as well as the subsequent actions of the parties in raising and supporting the child to determine parentage. *See Kristine H. v. Lisa R.*, *supra*, 120 Cal.App.4th 143. This analysis will preserve existing parent-child relationships to the benefit of the involved children in all three cases.

The First Appellate District Court's analysis, if upheld by this Court, would also allow one parent to waive the right of the child to any future parent-child relationship with a second parent, a practice that has been struck down by several courts. *See In re Marriage of Buzzanca*, *supra*, 61 Cal.App.4th at 1426 (stating "[i]t is well established that parents cannot, by agreement, limit or abrogate a child's right to support"); *In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, 1027, 1029 (finding a signed stipulation by a biological father waiving his future right to care, custody and control of the minor child in exchange for a waiver of all past due and future child support was invalid as an unlawful abridgement of the court's inherent power to oversee contracts involving children to assure that the children's welfare is protected).

In *People v. Sorensen*, this Court found that although the mother of the child told her husband upon separation that she wanted no child support, that fact was immaterial because "she had no authority or power by agreement or release to deprive her child of the legal right to be supported by his father or to relieve [the father] of the obligation imposed on him by law…" 68 Cal.2d 280, 287. In *Sorensen*, the father was not biologically related to the child, but

was adjudicated the lawful parent because he had consented to the artificial insemination of his wife and held the child out as his own for the first four years of the child's life. *Id.* at 289.

In *K.M. v. E.G.*, E.G. argues intent should dictate the outcome based upon two findings: (1) there was an oral agreement before K.M. donated her eggs that E.G. was to be the mother of any resulting children unless and until the parties underwent formal adoption proceedings, while K.M. denies such a conversation took place; and (2) that the ovum donor consent form signed by K.M. abolished any future parental rights based upon genetics, which K.M. testified was not her understanding of the form. This Court is being asked to ignore the subsequent eight years of parenting performed by K.M. on behalf of the twins and decide this case on a conversation that took place before the children were even born, or possibly never took place at all. Also, E.G.'s case is dependent upon a consent form routinely filled out in situations where a person donates eggs without any intent to become a caretaker to the child. It was not an appropriate form for the situation and the results violate the children's constitutional rights to maintain their relationships with K.M.

As K.M. argues in her opening brief, "[i]t is significant that the UPA bases legal parentage on the existence of the parent and child relationship instead of the relationship between the parents." *See* page 17 (citing Krause, Elrod, Garrison & Oldham, *Family Law: Cases, Comments and Questions* (4th ed. 1998) at 10-15; Family Code sections 7601, 7602). Furthermore, this Court in *Johnson v. Calvert* confirmed that as a practical matter it was not possible to waive any parental rights prior to conception and birth. 5 Cal.4th at 92, n.8. As a matter of public policy, we cannot allow a ruling condoning waiver by one parent of not only the other parent's parental rights, but the children's rights to their second parent who they have known for eight years

to be their provider and caretaker. Intent of the parties prior to birth of a child created out of that relationship cannot be the determinative factor for deciding parentage cases when there is ample, subsequent evidence of an established parent-child relationship that should be considered under a gender-neutral reading of the UPA.

IV.
THE CHILDREN IN ALL THREE CASES HAVE ACTIONABLE ESTOPPEL CLAIMS TO MAINTAIN THEIR EXISTING RELATIONSHIPS WITH WOMEN WHO THEY BELIEVE TO BE PARENTS IN AN EMOTIONAL AND SOCIAL CONTEXT

The doctrine of equitable estoppel, as stated in Evidence Code section 623, reads: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." The doctrine of estoppel springs from the law's distaste for inconsistent actions and positions, like consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility. *In re Marriage of Buzzanca*, *supra*, 61 Cal.App.4th at 1420.

In cases where individuals have allowed children to rely on their assumption of parental responsibilities, California courts have applied the equitable estoppel doctrine to treat them as legal parents. *See* Respondent Lisa R.'s answer brief at 44. For instance, in two recent appellate cases, the courts held that non-biological fathers who held children out as their own were financially responsible and had to pay child support under the doctrine of estoppel. *See In re Marriage of Pedregon* (2003) 107 Cal.App.4th 1284, 1291

(holding that the doctrine of estoppel required a man who was not the child's biological father, but had held himself out to the child and to others as the child's father, had to pay support after he divorced the child's mother); *In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1447-1448 (holding that a man may be estopped from contesting a support order for a child who is not biologically his if the man's conduct toward the child makes such an obligation equitable).

The child is the one who holds the right to support once parentage is established, and the parent is merely a conduit. *See* Opening Brief by County of El Dorado, at 45 (citing Welfare & Institutions Code section 11477(a)). Most support cases founded on parentage by estoppel observe that the estoppel runs to the child, not to the parent. *See* Opening Brief by County of El Dorado, at 44 (citation omitted).

Yet, in another example of our society's adult-centric bias, the Third Circuit Court of Appeal decision in *Elisa B. v. Superior Court* ignored the fact that the children were the ones who experienced a detriment due to the loss of their second parent. Instead, the court focused on the other parent, Emily B., and concluded that her reliance on a promise of support was unreasonable. No discussion ensued regarding what reliance the children placed on Elisa B. performing her parental duties. No attention was paid to the fact that a child's reliance on a parent figure is inherently reasonable and that no separate oral contract should or could be made between a child and parent regarding the "terms of parenthood." In fact, such a requirement would be unconscionable. Children can and should rely on their parents for love and support; biologically they must. These are principles supported in statute, as well as common law.

In *K.M. v. E.G.*, E.G. argues that estoppel should be used to disallow K.M. to assert any parentage claims because she signed a donor consent form

eight years earlier. E.G. apparently misses a related argument that she should be estopped from cutting off existing parent-child relationships after encouraging K.M. to raise and support the children created by K.M.'s eggs for eight years. There is ample distaste for E.G.'s actions in this case, and E.G. is most certainly not acting with the best interests of her children in mind.

In *Elisa B.* and *K.M. v. E.G.*, the children depended on a second parent to provide support in a financial, emotional and social context, so any parent who later claims that such a relationship should be terminated, should be estopped from taking such an inconsistent position in subsequent litigation.

V.
FAMILY CODE SECTION 297.5 CODIFIES EXISTING LAW APPLIED IN A GENDER-NEUTRAL FASHION FOR SAME-SEX COUPLES TO DETERMINE THEIR RELATIONSHIPS WITH CHILDREN THEY BRING INTO THE WORLD AND RAISE AS THEIR OWN

Effective January 1, 2005, Assembly Bill (AB) 205 (Chapter 421, Statutes of 2003), which creates Family Code section 297.5, codifies the gender-neutral interpretation of the UPA and other laws applicable to married persons under California law. However, AB 205 provides legal guidance to only those same-sex couples who properly register as domestic partners. AB 205 leaves out the population of children created by same-sex couples prior to the passage of the legislation who do not register, and those children created from couples who do not register in the future. Therefore, this Court should decide these cases to be consistent with AB 205 or else risk creating an additional equal protection dilemma for children of same-sex couples unaffected by AB 205.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Children's Advocacy Institute respectfully requests that this Court reverse the decision of the Third Appellate District in *Elisa Maria B. v. Superior Court of El Dorado County* (2004) 118 Cal.App.4th 966; reverse the decision of the First Appellate District in *K.M. v. E.G.* (2004) 118 Cal.App.4th 477 (as modified in (2004) 13 Cal.Rptr.3d 136); and affirm the portion of the Second Appellate District in *Kristine H. v. Lisa R.* (2004) 120 Cal.App.4th 143, allowing Lisa R. to assert a claim as a presumed parent.

Dated: April 4, 2005   Respectfully submitted,

____

DEBRA B. MARLEY[7]
State Bar No. 204842
Staff Attorney
Children's Advocacy Institute

[7] Pursuant to Rule of Court 14(c)(1), I hereby certify that this *Amicus Curiae* Brief, including footnotes, consists of 8,095 words. This determination was made using the word count of the computer program used to prepare this brief.