Filed 6/30/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

KRISTINE RENEE H.,

Plaintiff and Appellant,

v.

LISA ANN R.,

Defendant and Respondent.

KRISTINE RENEE H.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

LISA ANN R.,

Real Party in Interest.

B167799

(Los Angeles County
Super. Ct. No. PF001550)

Appeal from an order of the Superior Court of Los Angeles County. Richard Curtis, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded with directions.

Honey Kessler Amado for Plaintiff, Petitioner, and Appellant.

Leslie Ellen Shear and Diane M. Goodman for Defendant, Respondent.

Shannon Minter and Courtney Joslin, National Center for Lesbian Rights; Jennifer C. Pizer, Lambda Legal Defense and Educational Fund; Martha Matthews, ACLU Foundation of Southern California, Romana Mancini, ACLU Foundation, Inc., Lesbian & Gay Rights Project; Tamara Lange, ACLU Foundation of Northern California; Vanessa H. Eisemann, Lesbian and Gay Lawyers Association of Los Angeles; Maxie Rheinheimer Stephens & Vrevich and Darin L. Wessel; Shannan Wilber, Legal Services for Children; Katina Ancar, National Center for Youth Law; Donna Furth, Northern California Association of Counsel for Children; Alice Bussiere, Youth Law Center; Willard K. Halm, Southern California Assisted Reproduction Attorneys, Family Pride Coalition, and the Los Angeles Gay and Lesbian Center, as Amici Curiae on behalf of Defendant, Respondent and Real Party in Interest Lisa Ann R.

Two women in a long-term relationship decided to have a child. They arranged for one of them to conceive a child through artificial insemination. One month before the child's birth, the women obtained a prebirth judgment (judgment) based on their stipulation in which they declared themselves to be the "joint intended legal parents" of the unborn child. Following the child's birth, they raised her together for almost two years. Thereafter, the women separated and the natural mother[1] brought a motion to vacate the judgment on the ground that the family court lacked jurisdiction under California's version of the Uniform Parentage Act (the Act) (Fam. Code, § 7600, et seq.)[2] to determine that her partner was the child's second parent. The family court denied the motion, and the natural mother appealed.[3] Under these circumstances, we must first

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[1] Family Code section 7610, subdivision (a), refers to a natural mother as one who has given birth to the child.

[2] Unless otherwise indicated, all further statutory references are to the Family Code.

The Act is a statutory process for determining that a parent-child relationship does or does not exist. Some version of the Uniform Parentage Act has been adopted in 18 states, including California. California's adoption of the Act "was part of a package of legislation introduced in 1975 as Senate Bill No. 347. The legislation's purpose was to eliminate the legal distinction between legitimate and illegitimate children. . . . A press release issued on October 2, 1975, described Senate Bill No. 347 this way: 'The bill, as amended, would revise or repeal various laws which now provide for labeling children as legitimate or illegitimate and defining their legal rights and those of their parents accordingly. In place of these cruel and outmoded provisions, SB 347 would enact the Uniform Parentage Act which bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents.' " (*Johnson v. Calvert* (1993) 5 Cal.4th 84, 88-89, cert. den. (1993) 510 U.S. 874 (*Johnson*).)

[3] Following a ruling on the motion, the former partner filed an order to show cause to modify custody and visitation, and the family court set a hearing to address those issues. The natural mother then filed a petition for writ of supersedeas, or in the alternative, writ of mandate, to stay the proceedings pending the outcome of the appeal.

determine whether the judgment entered before the child was born is void. If so, we must then consider whether the natural mother's former partner can establish parentage under the Act. The first question has not been previously considered. The second question was recently addressed in *Elisa B. v. Superior Court* (2004) 118 Cal.App.4th 966 (*Elisa B.*).[4]

As we will explain, we first conclude that the judgment is void. The family court could not accept the parties' stipulation as a basis for entering the judgment of parentage. A determination of parentage cannot rest simply on the parties' agreement. Rather, because the partner did not adopt the child, the sole basis upon which the family court could determine parentage is under the Act. Therefore, the judgment based on the parties' stipulation was in excess of the family court's jurisdiction and of no legal effect.

We answer the second question in the affirmative, concluding that the partner may be able to establish parentage under the Act. Our conclusion on this question differs from the one reached by the *Elisa B.* court. We conclude that the Act does provide a basis upon which the former partner can establish parentage. While such a conclusion under the Act may not be a result that the Legislature *expressly* contemplated,[5] the Act does

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We initially granted a stay and then lifted it (and thus effectively denied the petition for writ of supersedeas), and directed the family court to make temporary custody and visitation orders pending the outcome of these appellate proceedings.

[4] Although this decision is not yet final, we cite it because its interpretation of the Act is based on similar facts.

[5] Last year, the Legislature addressed this issue and enacted "The California Domestic Partner Rights and Responsibilities Act of 2003." Effective January 1, 2005, section 297.5 (Stats. 2003, ch. 421 (Assem. Bill No. 205) § 4) will provide in pertinent part: "(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under

mandate that we read the provisions in a gender-neutral manner and that mandate compels our conclusion. The Act states that insofar *as practicable, the provisions that are applicable to establishing a father and child relationship apply to determine the existence of a mother and child relationship*. (§ 7650 [emphasis added].)[6] Because the former partner is neither a natural mother nor an adoptive mother, we may look to the provisions of the Act establishing the father-child relationship to determine whether the former partner can establish parentage.

Section 7611, subdivision (d), commonly referred to as the *presumed father* statute, provides a basis upon which the partner can establish parentage. That statute, *when read in a gender-neutral manner*, provides that a woman is presumed to be a parent of a child if "[s]he receives the child into [her] home and openly holds out the child as h[er] natural child." We see no prohibition in the Act that prevents us from concluding that a child has two parents of the same sex, especially here when no one other than the partner is vying to become the child's *second parent*. We, therefore, reverse the order

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law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses. [¶] . . . [¶] (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." Although this new statutory provision cannot be applied here, the conclusion we reach in this case is consistent with the intent of the Legislature in enacting what will become Family Code section 297.5.

[6] Section 7650 states in its entirety: "Any interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship

denying the motion to vacate and remand to the family court to make the predicate determination of parentage before addressing the permanent custody and visitation issues presently before that court.[7]

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apply."

[7] As will be discussed, in light of our decision to reverse the order denying the motion to vacate the judgment, on remand, the former partner's right to custody and visitation turns on whether she has established facts upon which the family court can determine that she is the child's parent. Based on our gender-neutral interpretation of the Act, the former partner has standing to bring an action establishing her rights as a presumed parent. Subdivision (b) of section 7630 provides that "[a]ny interested party" may bring an action to determine the parental relationship between a child and a man presumed to be the father under subdivision (d) of section 7611. When read in a gender-neutral manner, this section permits the former partner to amend her pleadings to assert her right as a presumed parent. (Cf. *Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1219-1221.) Accordingly, those cases holding that a lesbian partner is not an "interested party" (*West v. Superior Court* (1997) 59 Cal.App.4th 302, 306 (*West*); *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597, 1599-1600 (*Curiale*)), and those cases holding that a wife biologically unrelated to the child is not an "interested party" (*Robert B. v. Susan B*. (2003) 109 Cal.App.4th 1109, 1115-1117; *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222, 229-230), 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.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Events Leading up to the Judgment*[8]

In 1992, Kristine,[9] the natural mother, and Lisa, her former partner, began a relationship that lasted for a decade. Shortly after meeting each other, Kristine quit her job, relocated to Southern California, and moved into Lisa's house. Later, the couple purchased a home together. While living together, the couple paid for expenses through a joint checking account. They also prepared durable powers of attorney for healthcare decisions in which they named each other as their healthcare agent.

In approximately 1998, Lisa and Kristine began to take the necessary steps to have and raise a child together. Kristine wanted to have a child of her own, and the couple decided to conceive the child through artificial insemination. The couple obtained sperm from a sperm bank and jointly selected the donor. For one year, Kristine went through several insemination procedures, became pregnant once, but suffered a miscarriage.

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[8] The family court did not make any evidentiary findings when it entered the judgment. The facts upon which we rely are obtained solely from the parties' declarations in support of, and in opposition to, the motion to vacate the judgment. Because the natural mother brought her motion on the legal ground that the family court was without jurisdiction to enter the judgment before birth, the majority of the facts we recite are from the former partner's declaration. We assume for the purpose of determining the legal issues raised in this appeal that these facts are not disputed. Such factual assumptions by us, however, are not binding on the family court upon remand if the parties, or either of them, present different or additional facts not present in the record on the motion to vacate or successfully controvert any facts upon which we have relied.

[9] We intend no disrespect by such familiarity but identify the parties only by their given names to protect the identity of the minor child.

Because the couple could not afford to continue using the sperm bank, Kristine and Lisa turned to a friend who agreed to donate sperm. Kristine and Lisa prepared a donor agreement, which Kristine and the donor signed. Lisa worked with the donor to arrange the time and place to pick up the sperm. Kristine was inseminated at home and after one failed pregnancy, became pregnant with Lauren in February 2000. During Kristine's pregnancy, Lisa went with Kristine to every doctor visit and attended parenting classes.

2. *Entry of Judgment Establishing Lisa as a Second Parent*

When Kristine was eight months pregnant, Kristine and Lisa commenced an action in Los Angeles Superior Court to obtain a judgment establishing their parental rights to the unborn child. In a verified complaint to establish parental rights, filed on or about September 1, 2000, Kristine, as plaintiff, and Lisa, as defendant, alleged that Kristine is the legal mother of the unborn child and that Lisa is the "legal second mother/parent" of the unborn child. The parties based their complaint to establish their rights as legal parents on *Johnson, supra,* 5 Cal.4th 84, and *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410 (*Buzzanca*). They sought a judgment stating that they would be the parents of the unborn child, that they would be awarded joint custody after birth, that they would both be responsible for the payment of postnatal care, and that the hospital would be instructed to list Kristine as "mother" and Lisa as "father" on the original birth certificate.

Thereafter, Kristine and Lisa entered into a "stipulation for entry of judgment" establishing parentage in which they agreed to be the "joint intended legal parents" of the

unborn child. On September 8, 2000, the family court entered the judgment establishing parental rights in both Kristine and Lisa. The judgment provides that Kristine is the "biological, genetic and legal mother/parent" of the unborn child and shall have joint custody with Lisa, who "is the legal second mother/parent" of the unborn child; that on the original birth certificate Kristine "shall be listed as mother"; and Lisa "shall be listed in the space provided for 'father' "; and that Kristine and Lisa are "the only legally recognized parents" of the unborn child and "take full and complete legal, custodial and financial responsibility of said child."

3. *The Parties Raised the Child Together for Almost Two Years*

On October 3, 2000, the child was born. Lisa was present during delivery and took one month off work to bond with the child. Kristine and Lisa named the child Lauren. Lauren's middle name is a combination of Kristine's and Lisa's middle names, and Lauren's surname combines their last names. Lisa was named as Lauren's "father" on her birth certificate. After Lauren's birth, she became a dependent on Lisa's medical insurance. Both Kristine and Lisa provide financial support for Lauren and share in childcare responsibilities. For almost two years, Kristine, Lisa, and Lauren lived together as a family in the home they shared. Lauren refers to Lisa as "momma," and Kristine as "mommy."

Before Lauren's birth, statutory provisions authorizing domestic partnership registration and its attendant rights became effective.[10] Kristine and Lisa registered as

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[10] Section 297 provides that "two adults who have chosen to share one another's

domestic partners about a year after Lauren's birth. In January 2002, statutory provisions authorizing stepparent adoption for domestic partners became effective. (§ 9000, subds. (b), (f).)[11] Lisa, however, never took the steps to adopt Lauren, presumably under the belief that the previously obtained judgment was sufficient to establish her parental rights.[12] In September 2002, the couple's relationship ended, and Lisa moved out of the family home. Lauren was 23 months old.

4. *Kristine Unsuccessfully Moves to Vacate the Judgment and Lisa Seeks Custody and Visitation*

After their separation and termination of their domestic partnership, Kristine sought to sever Lisa's status as a legal parent by filing a motion to vacate the judgment.

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lives in an intimate and committed relationship of mutual caring" may, subject to certain requirements, register as domestic partners with the State of California, which entitles them to certain benefits and imposes certain obligations to each other.

[11] Section 9000, subdivision (b), provides: "A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides."

Section 9000, subdivision (f), provides that "stepparent adoption includes adoption by a domestic partner, as defined in Section 297." In *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 422, fn. 2, 426, 430-437, cert. den. (2004) 124 S.Ct. 1510, our Supreme Court confirmed that even before these amendments to the Family Code, same-sex partners could adopt their partner's child in a "second parent" adoption.

[12] Kristine argues that this explanation has been improperly raised for the first time on appeal. Kristine further argues that based on the parties' retainer agreement with their counsel, the parties knew that the judgment was precarious, and Lisa's reliance on the judgment was unreasonable. This is not an issue that we need address. The undisputed fact is that Lisa, for whatever reason, did not adopt Lauren. Because the parties terminated their relationship, Lisa is no longer eligible to do so.

Kristine originally contended (but has since abandoned this theory) that the family court could not determine their respective legal parental rights before Lauren's birth.

On April 28, 2003, the family court denied the motion. In doing so, it concluded that an action to determine parentage could be brought before birth. It reasoned that there was no "limiting provision" in the Act that prevented the entry of the judgment before birth. Thus, the judgment was not void and could not be vacated.[13] Kristine timely appealed.

On May 5, 2003, Lisa filed an order to show cause for modification of child custody and visitation. The hearing was originally set for June 16, 2003.

Kristine then filed a writ of supersedeas, or in the alternative, a petition for writ of mandate (1) challenging the family court's order denying her motion to vacate the judgment, and (2) seeking to stay the custody and visitation proceedings. This court granted a stay in the custody and visitation proceedings. On June 19, 2003, however, we lifted the stay (and thus effectively denied the petition for a writ of supersedeas) and directed the family court to make appropriate temporary custody and visitation orders pending the resolution of this appeal. We have consolidated the appellate proceedings to be decided in a single opinion.

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[13] On December 20, 2002, while the motion to vacate the judgment was pending, Lisa attempted to obtain custody and visitation and filed a petition for custody and visitation in the Superior Court of Riverside County (Riverside action). The Riverside action was continued and then ultimately dismissed because of the custody and visitation proceeding in Los Angeles Superior Court as a part of the family court proceedings now before us.

THE PARTIES' CONTENTIONS

Kristine collaterally attacks the judgment on the ground that it is void. Kristine contends that the family court could not enter the judgment establishing Lisa as a second parent based on the parties' stipulation because the Act is the sole means upon which to determine parentage, and Lisa is not a parent under any provision of the Act. According to Kristine, the only *lawful* way Lisa could become a second parent was through adoption.

Lisa contends that the judgment establishing her status as a second parent cannot be collaterally attacked by Kristine as void for lack of jurisdiction because the parties could stipulate to parentage, and even if they could not, Lisa is a legal parent based on a gender-neutral application of two provisions of the Act -- the presumed father statute (section 7611, subdivision (d)), and/or the artificial insemination statute (section 7613, subdivision (a)). [14]

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[14] We summarily reject Lisa's argument that she can establish parentage based on a gender-neutral application of section 7613, subdivision (a). That subdivision determines the natural father of a child conceived through artificial insemination. Section 7613 provides, in pertinent part: "(a) 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. The husband's consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown."

DISCUSSION

1. *Standard of Review*

Although the issues raised in this appeal arise from a motion to vacate the judgment and a request to stay custody and visitation proceedings, we must address a legal question, that is, whether the family court had authority under the Act to determine that Lisa is Lauren's second parent. The resolution of this legal question is subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

2. *Collateral Attack on the Judgment*

Kristine contends that the judgment is void because the family court did not have jurisdiction under the Act to declare that Lisa is Lauren's second parent. Because we are dealing with a final judgment, Kristine's success on appeal depends on whether the judgment can be collaterally attacked. As Lisa and amici[15] argue, collateral attacks on

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Section 7613, subdivision (a), does not apply here for the following reasons: (1) Lisa and Kristine were not married; (2) Kristine was not inseminated under the supervision of a licensed physician; and (3) Lisa did not consent in writing to the procedure. Because of her noncompliance with these statutory requirements, Lisa's attempt to establish her parental rights under section 7613, subdivision (a), goes beyond a gender-neutral application of the statute and requires that we rewrite the statute. We cannot do so. That is a task that must be left to the Legislature. Moreover, the "insofar as practicable" standard set out in section 7650 could not be met with respect to this statutory provision.

15 Amici curiae who have submitted briefs include: (1) the National Center for Lesbian Rights and Lambda Legal Defense and Education Fund; (2) the ACLU Foundation of Southern California, ACLU Foundation, Inc., Lesbian and Gay Rights Project, ACLU Foundation of Northern California; (3) Legal Services for Children, National Center for Youth Law, Northern California Association of Counsel for Children,

judgments are disfavored. (See, e.g., *Robert J. v. Leslie M.* (1997) 51 Cal.App.4th 1642, 1647-1648.) Nevertheless, in some cases, if the court has made a grant of relief to one of the parties that the law declares shall not be granted, as Kristine contends here, such judgment may be collaterally attacked as void for lack of jurisdiction.

Lack of jurisdiction in the "most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citation.]" (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) In a broader sense, lack of subject matter jurisdiction also exists when a court "makes orders which are not authorized by statute." (*Polin v. Cosio* (1993) 16 Cal.App.4th 1451, 1454-1455.) " '[I]t seems well settled . . . that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction . . . .' " (*Abelleira*, *supra*, at p. 290.) (See, e.g., *Polin*, *supra*, at pp. 1455-1457 [judgment awarding custody exceeded statutory authority]; *In re Marriage of Goodarzirad* (1986) 185 Cal.App.3d 1020, 1024-1027 [stipulated judgment to terminate paternity was void and subject to collateral attack].) As we discuss below, we hold that the judgment is void and of no legal effect as it was not authorized under the Act. Therefore, Kristine's collateral attack is not precluded. That conclusion, however, does not mean that Lisa cannot establish parentage under the Act.

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and Youth Law Center; and (4) the Southern California Assisted Reproduction Attorneys (SCARA), the Family Pride Coalition, and the Los Angeles Gay and Lesbian Center. All the amici support Lisa's position.

3. *The Act Provides a Comprehensive Scheme for Determining Issues Relating to the Existence of a Parent-Child Relationship*

The jurisdiction of the family court in a parentage proceeding is derived from the Act. As stated, the Act provides a means of establishing the "parent and child relationship," which is defined as "the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." (§ 7601; *Johnson*, *supra*, 5 Cal.4th at p. 89.)

a. *The Family Court Had Jurisdiction to Determine Parentage*

The family court had fundamental subject matter jurisdiction to determine whether or not Lisa was Lauren's legal parent. Section 7650 provides that "any interested person" can bring an action. (See fn. 6, *ante*.) Kristine, as the child's natural mother and the plaintiff in the parentage action, was an interested person under the statute.[16] (*Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831, 835, fn. 2 (*Nancy S.*).) Thus, the determination of parentage was properly before the family court.

b. *The Family Court Did Not Have Statutory Authority to Enter the Judgment of Parentage Based on the Parties' Stipulation*

Though the family court had subject matter jurisdiction to determine the existence or nonexistence of a parent-child relationship (§ 7650), it lacked the authority under the

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16 An action to determine the existence of the father and child relationship may also be brought by a child, the child's natural mother, or a man statutorily presumed to be the child's father under subdivisions (a), (b), or (c) of section 7611. (§ 7630, subd. (a) (1).) As discussed, "[a]ny interested party" may bring an action to determine the parental relationship between a child and a man presumed to be the father under subdivision (d) of section 7611. (§ 7630, subd. (b).)

Act to enter a judgment of parentage based on nothing more than the parties' stipulation. The determination of parentage cannot rest on an agreement between the parties. (Cf. *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 178-179, 182, 190.) Because the parties could not by agreement establish their parental rights, and Lisa did not adopt the child, the determination of her legal status as a parent must be based on provisions in the Act. (§ 7610; see also *Johnson*, *supra*, 5 Cal.4th at pp. 88-89.) The Act provides the basis upon which the family court is authorized to make a judicial determination of parentage. The Act is a comprehensive scheme to determine a parent-child relationship and was enacted to " 'rationalize procedure, to eliminate constitutional infirmities in then existing state law, and to improve state systems of support enforcement.' [Citations.]" (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1050.) An agreement that attempts to establish parentage without regard to the provisions of the Act contravenes this strong public policy and cannot be supported.

c. *Buzzanca Did Not Endorse an Alternative Means to Establish Parentage Based on the Parties' Intent Without Regard to Provisions of the Act*

The parties (and the family court) mistakenly believed that based on *Buzzanca*, *supra*, 61 Cal.App.4th 1410, the parties' intention to become the legal parents of the unborn child was sufficient to establish their parental rights. This judgment is apparently not the only one entered based on what we believe is a misreading of *Buzzanca*.[17] To our

[17] As noted in Doskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World* (1999) 20 J. Juv. L. 1, 21 & fn. 117, based on the intended-parent doctrine relied on in *Buzzanca*, "courts in Los Angeles, San Luis Obispo and San

knowledge, this case presents the first appellate challenge to such a judgment.[18] We therefore must dispel any notion that *Buzzanca* can be read to support a prebirth parentage judgment based on a mere contractual expression of the parties' intentions.

In *Buzzanca*, *supra*, 61 Cal.App.4th 1410, a married couple agreed to have a fertilized embryo – genetically unrelated to either one of them – implanted in a surrogate. (*Id*. at p. 1412.) The court held that the husband and wife were the child's mother and father by construing the artificial insemination statute in the Act (§ 7613, subd. (a)), in a gender-neutral manner, to apply to both the husband and to the wife, and by looking to the parties' intent to create a child. (*Id*. at pp. 1421-1428.) Had the court not done so, the child would have been a legal orphan.

Francisco counties have granted UPA petitions, thereby establishing legal relationships between non-biological second parents and the genetic children of those parents' partners." (See also Mak, *Partners in Law*, Los Angeles Lawyer (July-August 2001) 35, 40 ["Second-parent adoption is no longer the only option for nonbiological parents, however. Under the doctrine of 'intended parentage,' nongestational coparents have obtained prebirth declarations of parentage."].)

[18] Amicus curiae the Southern California Assisted Reproduction Attorneys (SCARA), the Family Pride Coalition and the Los Angeles Gay and Lesbian Center (collectively, SCARA) represent that prebirth judgments have been issued for "roughly five years," resulting in reasonable and settled familial expectations "very much like those recognized in *Sharon S.* [*v. Superior Court*, *supra*, 31 Cal.4th 417]." SCARA represents to the court in its letter brief that "hundreds of families have come to rely on these judgments in the years since *Buzzanca*." According to SCARA, it "quickly polled six of its members who report that an adverse ruling in this case will potentially affect some 750 births." From there, SCARA concludes that "thousands of cases in California" are potentially affected by a decision voiding either prebirth agreements and/or the declaration of parentage. SCARA, however, provides no corroborating documents or data to support this conclusion. Moreover, even if it were an accurate estimate, it would be a problem more properly directed to the attention of the Legislature inasmuch as our decision is firmly based on the express language of the Family Code.

Buzzanca presented unique facts. While awaiting the birth of their child by way of a surrogate mother, the husband filed a petition for dissolution of marriage, asserting that there were no children of the marriage. (61 Cal.App.4th at p. 1413.) The wife responded that they were expecting a child, who was born six days later. (*Ibid*.) The trial court determined that the wife was not the legal mother because she did not give birth and was not biologically related to the child. It further concluded that the husband was not the father because he also had no biological connection to the child. (*Id*. at p. 1412, 1413-1414.)

Relying on section 7613, subdivision (a), the *Buzzanca* court disagreed and held that even though the husband and wife were not biologically related to the child, they were her legal parents. (61 Cal.App.4th at pp. 1421-1428.) Although section 7613, subdivision (a), determines paternity, the court construed the statute to determine both paternity and maternity because the husband and the wife had consented to the surrogacy. (*Id*. at pp. 1415-1421.)

The *Buzzanca* court supported its construction of section 7613, subdivision (a), by also relying on the parties' intent to become parents, their consent to a medical procedure that resulted in the birth of the child, and their initiation of the surrogacy agreement in order to cause the birth of a child. (*Id*. at pp. 1412-1413, 1418, 1421-1422, 1425-1426, 1428.) The focus on the parties' intent was based on *Johnson*, *supra,* 5 Cal.4th 84. In that case, our Supreme Court had to resolve a parentage dispute between two mothers, a

genetic mother and surrogate mother.[19] Because two women qualified as a natural mother under the Act, the court looked at the parties' intention as manifested in the surrogacy agreement. (*Id*. at pp. 93-95.) The "tie" was broken in favor of the genetic mother because "she who intended to bring about the birth of a child that she intended to raise as her own – is the natural mother under California law." (*Id*. at p. 93 [fn. omitted].) The *Buzzanca* court concluded that this intent-based analysis "was not limited to just *Johnson*-style contests between a woman who gave birth and a woman who contributed ova, but to any situation where a child would not have been born ' "but for the efforts of the intended parents." ' [Citation omitted.]" (61 Cal.App.4th at p. 1425.)

Neither *Buzzanca* nor *Johnson*, however, endorse contractual stipulations of parentage based on the parties' intentions without regard to the Act. In those cases the court looked at the parties' intent as a part of the interpretation and application of the Act. Only when the Act was unclear or yielded an ambiguous result did the courts consider intent to determine parentage. (*In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1231.)

We therefore conclude that the judgment based on the parties' intent to become parents exceeded the family court's jurisdiction and is void and of no legal effect.[20]

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[19] The Johnsons had a gestational surrogate in which the husband's sperm was artificially united with the wife's ovum, and the resulting embryo implanted in another woman's womb. (*Johnson*, *supra*, 5 Cal.4th at p. 87.)

[20] Despite this conclusion, the judgment, and the stipulation on which it was based, may have an *evidentiary* impact on Lisa's claim of parentage, which, as we explain may be established under the Act.

Nevertheless, for reasons discussed below, this does not mean that the Lisa cannot successfully assert a claim of parentage.

4. *Lisa is Entitled to Assert Parentage under a Gender-Neutral Interpretation of the Act*

Though we have concluded that the family court could not enter the judgment establishing Lisa as a second parent based on the parties' stipulation, we must now address the second question, that is, whether Lisa can establish her parental rights under the Act.

As section 7610 states: "The parent and child relationship may be established as follows: [¶] (a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part. [¶] (b) Between a child and the natural father, it may be established under this part. [¶] (c) Between a child and an adoptive parent, it may be established by proof of adoption." Because Lisa is not the natural mother and did not adopt Lauren, Lisa must rely on a gender-neutral application of the provisions that apply to establish a father-child relationship.

a. *The Act Permits Establishing a Parent-Child Relationship in Two Unmarried Parents of the Same Sex*

As a starting point, under the Act, the parent-child relationship extends equally to every child and to every parent regardless of the marital status of the parent.[21] (§ 7602;

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[21] Sections 7601 and 7602 provide in pertinent part:

" 'Parent and child relationship' as used in this part means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the

Johnson, *supra*, 5 Cal.4th at p. 89.) Therefore, the marital status of Kristine and Lisa is irrelevant for purposes of determining whether Lisa is Lauren's second parent.

Moreover, though the Act is predicated on determining legal "motherhood" and "fatherhood," contrary to Kristine's position, the statutory language does *not* restrict the parent-child relationship based on gender to a mother and father.[22] The Act requires that we read it in a gender-neutral manner and declares that "insofar as practicable," provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship. (§7650.)

Courts have relied on section 7650 to apply provisions of the Act used to establish paternity as a basis for determining maternity. In *Johnson*, *supra*, 5 Cal.4th 84, for example, the court concluded that by parity of reasoning blood testing provisions to determine paternity may also be used to resolve the question of maternity. (*Id*. at pp. 90-92.) Likewise, in *Buzzanca*, *supra*, 61 Cal.App.4th at p. 1421, the court concluded that the wife, who had no biological connection to the child and did not give birth to the child, was "situated like a husband in an artificial insemination case." The *Buzzanca* court then

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mother and child relationship and the father and child relationship." (§ 7601.)

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (§ 7602.)

[22] Kristine concedes that California recognizes two-parent families consisting of a mother and father in a heterosexual relationship, and two mothers or two fathers in a homosexual relationship. Kristine, however, concludes that the Act does not permit a determination of parentage in a homosexual partner not biologically related to their partner's child. As discussed, we do not read the Act to preclude a finding of two parents of the same sex.

applied section 7613, subdivision (a), the statute that determines the natural father of a child conceived through artificial insemination, to determine maternity. More recently, and pertinent to our discussion here, *In re Karen C.* (2002) 101 Cal.App.4th 932, 938-939, and *In re Salvador M.* (2003) 111 Cal.App.4th 1353, 1357-1358, applied section 7611, subdivision (d), the presumed father statute, to determine maternity.

Although these cases do not address the possibility of establishing parentage in a second parent of the same sex, we find no statutory prohibition against such a finding, provided the second parent can establish parentage under the Act. *The Act contemplates two legal parents irrespective of their gender*. As a general proposition, it benefits both the child and the parents to identify as early as possible who is responsible for the child's protection, guidance, and care.[23] Establishing parentage offers the possibility of security and the advantages of two parents, which is beneficial to the child. (See, e.g., § 7570, subd. (a).)[24] Moreover, the state has a compelling interest in establishing parentage, and

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[23] We do not, however, mean to pre-judge the still unresolved issue before the family court related to the custody and visitation proceedings, which necessarily involves the best-interests standard. As the *Johnson* court instructs, a determination of parentage is not based on that standard. (*Johnson*, *supra*, 5 Cal.4th at p. 93, fn. 10.)

[24] Section 7570, subdivision (a), provides: "The Legislature hereby finds and declares as follows: [¶] . . . 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. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development." This statute necessarily expresses a legislative policy applicable to establishing maternity. (*Buzzanca*, *supra*, 61 Cal.App.4th at pp. 1423-1424.)

holding parents, rather than the state, responsible for their children's care. (*Buzzanca*, *supra*, 61 Cal.App.4th at p. 1423.) As the *Buzzanca* court noted: "Very plainly, the Legislature has declared its preference for assigning *individual* responsibility for the care and maintenance of children; not leaving the task to the taxpayers." (*Id*. at p. 1424.) We agree with these stated policy reasons and note that, for example, here Lauren benefited from her relationship with Lisa in many ways, such as Lisa's commitment to provide her access to benefits, which included medical insurance.

Kristine's position that a child may have only one mother is based on *Johnson*, *supra*, in which our Supreme Court stated that "California law recognizes only one natural mother." (5 Cal.4th at p. 92.) That statement, however, was made in a case involving competing claims for motherhood, one asserted by the surrogate mother and the other by the genetic mother. (*Id.* at pp. 89-93.) In that case, amicus curiae, the American Civil Liberties Union (ACLU), encouraged the Supreme Court to find the child had two mothers. The *Johnson* court, however, refused and found that "[t]o recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's [the genetic mother's] role as mother." (*Id.* at p. 92, fn. 8.) The court's comment, however, was based on its belief that interjecting a third party would upset the child's stable, intact, and nurturing home. The *Johnson* court did not foreclose the possibility, in an appropriate case, of finding two parents of the same sex where only two parties are attempting to establish legal parentage.

Kristine also cites prior decisions in which the courts of appeal have determined that a lesbian partner who is not a biological or adoptive parent is not entitled to custody or visitation of children conceived during the relationship. (See *West*, *supra*, 59 Cal.App.4th at pp. 305-306, 309; *Nancy S.*, *supra*, 228 Cal.App.3d at pp. 835-836; *Curiale, supra,* 222 Cal.App.3d at pp. 1599-1600.)[25] None of these cases, however, analyzed the Act in a gender-neutral manner to determine whether a second parent of the same sex could establish parentage under the provisions of the Act that applied to establishing a father-child relationship. Moreover, these cases were decided before our Supreme Court and Legislature recognized that a child may have two legal parents of the same sex, with equal status in terms of their relationship with the child. (*Sharon S. v. Superior Court, supra*, 31 Cal.4th at pp. 430- 435; § 9000, subds. (b), (f).)

Recently, in a case similar to the facts presented here, the Third District Court of Appeal in *Elisa B.*, *supra*, 118 Cal.App.4th 966, concluded that a child may not have two parents of the same sex, and held that the former partner who had no biological connection to her partner's children, and who did not adopt the children, was not a parent under the Act. (*Id*. at pp. 974-975.) In that case, the natural mother, Emily, gave birth to twins with no biological connection to her partner, Elisa. Nevertheless, the children had the couple's combined surnames. (*Id*. at p. 971.) After the twins were born, Emily did

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[25] These cases concluded that the Legislature was in a better position to consider expanding California law to afford parental rights to a nonbiological parent in a same-sex relationship. As discussed, the Legislature has now amended the Family Code to address this issue. (See fn. 5, *ante*.)

not return to work. Elisa provided the financial support for their family, which also included Elisa's biological son, who was conceived by artificial insemination with sperm from the same donor Emily had used to conceive the twins. In November 1999, the couple separated. (*Id.* at p. 972.) Emily and the twins remained in the house, and Elisa paid Emily support. After the house was sold in November 2000, Emily and the twins moved to an apartment, and Elisa continued to support them. In May 2001, Elisa's employment circumstances changed, and she discontinued support. (*Ibid*.) In June 2001, the county filed a complaint to establish Elisa's parentage of the twins and to impose a child support obligation. The trial court found that Elisa was a de facto legal parent and should be held to the same duty and responsibility as a presumed father under the Act. The trial court also found that because Elisa had intended to create the children, she should be accountable for supporting them. (*Ibid*.)

The Court of Appeal disagreed and concluded that Elisa was not the twins' parent. It reasoned that " [s]ince Elisa is not the twins' natural mother and, for obvious reasons, she is not their father, and because she did not adopt the twins, Elisa does not have any of the rights, privileges, duties, or obligations of a parent under the UPA." (*Elisa B.*, *supra*, 118 Cal.App.4th at pp. 974-975.) In so ruling, the *Elisa B.* court followed *Curiale*, *Nancy S.*, and *West*, which as stated, did not read the Act in a gender-neutral manner to determine whether the nonbiological partner could establish parentage under any other provisions of the Act. As we now discuss, the presumed father statute, when read in a gender-neutral manner, enables Lisa to assert her parental rights as a second parent.

b. *Section 7611, Subdivision (d), the Presumed Father Statute*

As stated, it is undisputed that Lisa is neither a natural mother nor an adoptive mother. (§ 7610, subds. (a), (c).) Under a gender-neutral application of the Act, however, we may consider the provisions applicable to the father and child relationship to determine whether Lisa can establish parentage. (§ 7650.)

The Act sets forth the methods for a father to establish a parent-child relationship. Although there are a number of provisions to establish paternity, we are concerned here with section 7611.[26] Because Lisa and Kristine are not married, the only provision of

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[26] Section 7611 establishes the legal status of a natural father and provides: "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540 [the conclusive presumptions]) or Chapter 3 (commencing with Section 7570 [which provides for a system of voluntary paternity in the case of unwed mothers]) of Part 2 or in any of the following subdivisions:

"(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court.

"(b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [¶] (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

"(c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) With his consent, he is named as the child's father on the child's birth certificate. [¶] (2) He is obligated to support the child under a written voluntary promise or by court order.

section 7611 that could apply here is subdivision (d). Subdivision (d) provides that a man may be a presumed father if he receives the child into his home and openly holds out the child as his natural child. The proponent has the burden of proving the foundational facts by a preponderance of the evidence, that is, that he received the child into his home and openly and publicly acknowledged the child as his own. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1653.) This presumption, however is rebuttable.

Section 7612 deals with rebutting the section 7611 presumption. It may be rebutted by a court judgment of paternity of a different man. (§ 7612, subd. (c).) Absent a judgment, any presumption arising under section 7611 is a "rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence." (§ 7612, subd. (a).) For example, if the section 7611 presumptions point to two men, the conflict is resolved in favor of the presumption that "on the facts is founded on the weightier considerations of policy and logic controls." (§ 7612, subd. (b).)

The Act distinguishes between a presumed father and one who is a natural father, evidencing the Legislature's clear intent "to provide natural fathers with far less rights than . . . presumed fathers . . . ." (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 844.) Only a presumed father is entitled to custody of a child and, in a dependency proceeding, only

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"(d) *He receives the child into his home and openly holds out the child as his natural child*. (Italics added.)

"(e) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he

a presumed father is entitled to reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451; *In re Jerry P.* (2002) 95 Cal.App.4th 793, 801 (*Jerry P.*).) "A 'natural father' can be, but is not necessarily, a 'presumed father' and a 'presumed father' can be, but is not necessarily, a 'natural father.' " (*Jerry P.*, *supra*, at p. 801 [fn. omitted].)

c. *The Presumed Father Statute has been Applied in a Gender-Neutral Manner to Establish Parentage in an Adult not Biologically Related to the Child*

Under the Act, by receiving a child into his or her home and holding the child out as his own or her own, a man or woman can achieve presumed parent[27] status without a biological connection to the child. (*In re Nicholas H.* (2002) 28 Cal.4th 56, 70 (*Nicholas H.*); *Karen C.*, *supra*, 101 Cal.App.4th 932, 936-939.) Moreover, when there are competing presumptions under section 7611, subdivision (d), biology is not dispositive. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 604-607 (*Jesusa V.*).)

In *Nicholas H.*, *supra*, 28 Cal.4th 56, the man seeking to establish paternity under section 7611, subdivision (d), admitted that he was not the biological father. (*Id.* at pp. 58-59.) The *Nicholas H.* court considered whether a presumption of fatherhood arising under section 7611 is necessarily rebutted under section 7612, subdivision (a), when the presumed father admitted that he is not the biological father of the child. The Supreme Court concluded that a presumption arising under section 7611, subdivision (d), is not,

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is the child's father in a declaration under penalty of perjury . . . ."

[27] Because we read section 7611, subdivision (d), in a gender-neutral manner, we refer to a woman in Lisa's situation as a presumed parent.

under section 7612, subdivision (a), necessarily rebutted by clear and convincing evidence that the presumed father is not the biological father of the child. (*Id.* at p. 70.)

The *Nicholas H.* court examined the text of section 7612, criticizing the appellate court for misreading portions of that statute. According to the Supreme Court, subdivision (a) of section 7612 provides that a presumption under section 7611 " '*may* be rebutted *in an appropriate action* only by clear and convincing evidence.' " (28 Cal.4th at p. 63 [italics in original].) Thus, the statute did not state that biological paternity would rebut the section 7611 presumption in all cases, without considering whether rebuttal was appropriate in the factual context before the court. The court found additional support for its interpretation in subdivision (b) of section 7612, which directs the court confronted with conflicting presumptions under section 7611 that the " 'presumption which on the facts is founded on the weightier considerations of policy and logic controls. ' " (*Ibid*.) As the *Nicholas H.* court reasoned, "[a]s a matter of statutory construction, if the Legislature had intended that a man who is not a biological father cannot be a presumed father under section 7611, it would not have provided for such weighing, for among two competing claims for presumed father status under section 7611, there can be only one biological father." (*Ibid*.)

While *Nicholas H.*, did not involve competing presumptive father claims, it relied on two Court of Appeal cases that addressed competing paternity claims. (28 Cal.4th at pp. 64-66.) Those cases upheld the finding that the nonbiological father was the presumed father under the Act. (*In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1118-1121

(*Kiana A.*); *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, 1116-1117 (*Steven W.*).)[28]

Following the Supreme Court's decision in *Nicholas H.*, *supra*, 28 Cal.4th 56, the Court of Appeal in *Karen C.*, *supra*, 101 Cal.App.4th 932, expanded that decision to apply with "equal force to a woman, as a presumed mother." (*Id*. at p. 934.) In *Karen C.*, the court held that a woman who was not the biological mother but had raised Karen C. as though she were her natural child could attempt to establish her legal rights as a parent based on a gender-neutral application of the presumed father statute. (*Id*. at pp. 938-939.)

The *Karen C*. court noted that "one of the key holdings of *Nicholas H*. is 'that a man does not lose his status as a presumed father by admitting he is not the biological father.' [Citation omitted.]" (*Karen C.*, *supra*, at p. 938.) The court reasoned the same analysis would apply to a woman based on a gender-neutral application of the statute. (*Id*. at p. 939; see also *In re Salvador M.*, *supra*, 111 Cal.App.4th at pp. 1357-1359.) In reaching this conclusion, the *Karen C.* court rejected the argument, advanced by Kristine here, that section 7611, subdivision (d), does not apply to women because the statutory

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28 Recently, the Supreme Court in *Jesusa V.*, *supra*, 32 Cal.4th 588, settled the question of whether biology is dispositive and approved the holdings in *In re Kiana A.*, *supra*, 93 Cal.App.4th 1009, and *Steven W.*, *supra*, 33 Cal.App.4th 1108, that biological paternity by a competing presumed father does not necessarily rebut another man's presumption of paternity under section 7612, subdivision (a). (*Jesusa V*. at pp. 604-606.) The court concluded that consistent with the rule and reasoning in *Nicholas H.*, and the cases upon which the court relied, "[a] juvenile court confronted with such a claim must instead consider whether rebuttal of the presumption would be appropriate in the circumstances of the case. [Citation.]" (*Id.* at p. 606.) According to the *Jesusa V.* court, this determination is a matter entrusted to the juvenile court's discretion. (*Ibid.*)

presumption was intended to erase the stigma of illegitimacy. (101 Cal.App.4th at p. 939.)

Kristine argues that *Nicholas H.* and *Karen C.* are inapposite because in those cases there was no biologically related adult who wanted to assume the role of parent. That argument, however, actually supports the application here of section 7611, subdivision (d), because there are no other competing claims to become Lauren's second parent. Moreover, Kristine's argument incorrectly assumes that Lauren may not have two parents of the same sex absent adoption.

We also reject Kristine's argument that by applying section 7611, subdivision (d), to determine whether Lisa is a parent, we are endorsing a rule of law pursuant to which a third, or fourth person not biologically related to a child might also establish legal parentage. That argument appears to assume, however, that Lauren's second legal parent must be the sperm donor. This argument is disingenuous since the sperm donor has not asserted any claim of parental rights.[29] More to the point, this case only involves a person seeking to become a *second* parent, so we have no occasion to address this issue. Our focus here is not on competing interests by several persons but on whether Lisa is a second parent. Just like in *Karen C.* and *Nicholas H.*, no one else but Lisa is attempting to fill that position.

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29 We have no need to reach, and do not address, the validity of the sperm donor agreement in which the donor acknowledged that he would have "no parental rights."

Finally, Kristine's assertion that the holdings in *Nicholas H.* and *Karen C.*, establishing parentage in a nonbiologically related adult are limited to dependency proceedings, has no merit. In support of this argument, Kristine principally relies on *Jerry P.*, *supra*, 95 Cal.App.4th 793. In that case, the court stated that in dependency proceedings, the purpose of section 7611, subdivision (d), is not to establish paternity but "to determine whether the alleged father has demonstrated a sufficient commitment to his parental responsibilities to be afforded rights *not* afforded to natural fathers -- the rights to reunification services and custody of the child." (*Id*. at p. 804 [italics in original].) Therefore, according to the *Jerry P.* court, in dependency proceedings the term " 'presumed father' does not denote a presumption of fatherhood in the evidentiary sense and presumed father status is not rebutted by evidence someone else is the natural father." (*Ibid.*)

We read nothing in the cited language of *Jerry P.*, *supra*, 95 Cal.App.4th at p. 804, that requires us to interpret the Act differently depending upon the type of proceedings in which it is raised. While it is true that in a dependency context the establishment of presumed father status entitles one who has attained that status to services not available to a biological father, it does not follow that the analysis of whether one attains presumed parent status depends on the nature of the proceeding. The purpose served by determining parentage under the Act might result in different consequences depending upon the proceeding, but the Act itself is subject to only one interpretation. The court has the discretion to weigh the section 7611 presumptions to determine parentage irrespective of the nature of the proceeding.

d. *Courts Have Previously Limited the Application of Section 7611, Subdivision (d), to Determine Parentage*

Up until now, no appellate decision has applied section 7611, subdivision (d), to determine parental rights in a same-sex partner with no biological connection to the child.

Despite the holding in *Karen C.*, applying section 7611, subdivision (d), in a gender-neutral manner to determine maternity, the *Elisa B.* court rejected the argument to extend section 7611, subdivision (d), as a basis to establish parentage in a nonbiological same-sex partner. The court reasoned, "[n]othing in *Nicholas H.* or *Karen C.* even remotely suggests section 7611(d) can be used to establish that a woman in a same-sex relationship is the presumed parent of her partner's biological children while the mother is still alive, has not abandoned her children, and has not relinquished her parental rights." (118 Cal.App.4th at p. 977.) In our view, *Elisa B.* erroneously concluded that the presumption could not be applied in a gender-neutral manner to determine parentage in a second, nonbiological parent of the same sex.

In any event, the *Elisa B.* court further concluded that if the presumption did apply, it had been rebutted. It reasoned that "because the trial court is attempting to impose the legal obligations of parenthood upon an unwilling candidate, this is an appropriate action for Elisa's lack of biological ties to be used to rebut the presumption in section 7611, subdivision (d) . . . ." (118 Cal.App.4th at p. 977.)

Other courts that have rejected the application of subdivision (d) of section 7611, have addressed the question of competing claims of maternity, which is not at issue in

this matter. Here, we are attempting to determine whether Lisa is entitled to legal *second* parent status based on a *gender-neutral* application of section 7611, subdivision (d).

In *Johnson*, *supra*, 5 Cal.4th at p. 91, for example, the court did not apply the presumptions of section 7611 because, in its view, there was no need to resort to an evidentiary presumption to ascertain the identity of the natural mother as the factual basis of each woman's claim was obvious. One woman was claiming maternity because she had given birth, the other woman because she was genetically related to the child. (*Ibid*; see also *K.M. v. E.G.* (2004) 118 Cal.App.4th 477, 496-497, mod. (June 9, 2004, A101754) __ Cal.App.4th __ [2004 WL 1257996] [rejecting application of presumptions and instead applying the *Johnson* test].)

In re Marriage of Moschetta, *supra*, 25 Cal.App.4th 1218, rejected the application of section 7611, subdivision (d), to determine maternity in a wife who had no biological connection to the child because, in the court's view, the presumption applied only to determine biological parentage. In that case, the child was biologically related to the husband but not the wife. (*Id*. at p. 1223.) In the dissolution proceeding, both the wife and the surrogate sought to establish parental rights. (*Ibid*.) The trial court declared the surrogate as the child's mother. (*Id*. at p. 1224.)

On appeal, the husband sought to enforce the surrogacy agreement, but the court declined to do so because it was incompatible with the Act and adoption laws.[30] (*In re*

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[30] On appeal, the wife filed a brief supporting the judgment establishing the surrogate as the child's mother. (*In re Marriage of Moschetta*, *supra*, 25 Cal.App.4th at p. 1224.)

Marriage of Moschetta, *supra*, 25 Cal.App.4th at pp. 1227-1231.) The court also rejected the husband's argument that his wife was a presumed mother under section 7611, subdivision (d), because it was indisputable that the surrogate was the biological mother. (*Id*. at p. 1226.) The court concluded that the wife could not hold the child out as her natural child because, "[t]here never was any doubt that [the child] has no biological, natural or genetic connection with [the wife]." (*Ibid*.) The court reasoned that section 7611, subdivision (d), has no application in surrogacy cases because it is rooted in the old law of illegitimacy and has been retained to settle questions of biological parenthood. It concluded, "the statutory presumption is inapplicable because of the absence of doubt as to the identity of the natural mother. There is no question of *biological* parenthood to settle. Unlike the context of illegitimacy from which the presumption arose, in surrogacy there is no need to resort to presumptions. All parties know who gave birth and who is genetically related to whom." (*Id*. at p. 1226 [italics in original]; see also *Dunkin v. Boskey*, *supra*, 82 Cal.App.4th at p. 186 [§ 7611, subd. (d), settles questions of biological parenthood].)

In *Robert B. v. Susan B.*, *supra*, 109 Cal.App.4th 1109, a husband and wife brought a parentage action against a single woman who had been mistakenly artificially inseminated with the couple's embryos and gave birth to a child who was the husband's biological child and genetically related to the couple's child. (*Id*. at pp. 1111-1112.) The court rejected, without analysis, the wife's attempt to establish herself as a presumed mother of the child. The court concluded that the wife had no status under section 7611, subdivision (d), because she had no biological connection to the child, and the single

woman was asserting a legally recognized claim as the natural mother because she had given birth to the child. (*Id*. at pp. 1116-1117.)

As stated, these cases are distinguishable. Here, we are not determining who is the natural mother. Kristine is the natural mother. Our inquiry is whether a presumption of parentage may apply to determine "second parent" status. For that inquiry, the lack of a biological connection to a child does not automatically defeat a presumption of parentage under subdivision (d) of section 7611. As previously discussed, section 7612, subdivision (a), states a presumption under section 7611 "may be rebutted in an appropriate action only by clear and convincing evidence." In recent cases, our Supreme Court has interpreted this language as giving the court discretion to decide whether proof that the presumed parent is not the biological parent is sufficient to rebut the presumption. (*Jesusa V.*, *supra*, 32 Cal.4th at pp. 606-607; *Nicholas H.*, *supra*, 28 Cal.4th at p. 70; *Karen C.*, *supra*, 101 Cal.App.4th at pp. 938-939.) These recent cases, in our view, suggest that earlier cases concluding biology is dispositive in all actions incorrectly applied the section 7611, subdivision (d), presumption.

In sum, we conclude that when read in a gender-neutral manner, section 7611, subdivision (d), may be applied to establish legal parentage in a partner of the same sex with no biological connection to the child. Our construction of this statute would not be any different if, instead of affirming her parental obligations, Lisa was seeking to deny her parental obligations of support. Our conclusion also is consistent with the recent amendments to the Family Code that, although not directly applicable here, recognize

that domestic partners who create children have the same rights and responsibilities as spouses for children conceived during the domestic partnership. (See fn. 5, *ante*.)

6. *Lisa May Be Able to Establish Legal Parental Status if She Can Satisfy the Requirements of Section 7611, Subdivision (d)*

To qualify as a presumed parent under section 7611, subdivision (d), Lisa must (1) receive the child into her home, and (2) hold out the child as her own.

a. *The "Holding Out" Requirement May Be Established by Lisa's Course of Conduct*

Addressing the latter point first, on the record before us, Lisa's declaration indicates that she might be able to prove that she satisfies the statutory requirement of holding Lauren out as her own. She has presented evidence of her course of conduct, which began with the child's conception, from which the family court might be able to conclude that she has fulfilled the role of a presumed parent.[31]

Though these facts must be established on remand by the family court, Lisa has stated that she and Kristine took the necessary steps to create Lauren, and both of them participated in the artificial insemination process. When Kristine became pregnant, Lisa and Kristine lived together in their shared home and prepared for Lauren's birth. Lisa economically and emotionally supported Kristine during the pregnancy, attended doctor's appointments and parenting classes, and was present during the child's delivery.

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31 The evidence tendered by Lisa, and reflected in the limited record before us, is relevant and may be considered by the family court upon remand.

One month before the child was born, Lisa and Kristine invoked the jurisdiction of the family court to declare Lisa as the child's parent. While the judgment is not itself enforceable, it provides 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. Lisa and Kristine signed and presented to the court a stipulation in which Lisa declared her intent to be "the joint intended legal parent[]" of the unborn child, sought joint custody as soon as the child was born, and agreed to financially support the unborn child. She further agreed to be listed in the space provided for "father" on the unborn child's birth certificate. Lisa, along with Kristine, asked the court to acknowledge that they "are the only legally recognized parents of the unborn child" and "take full and complete legal, custodial and financial responsibility for said child."

In addition, Lisa has presented evidence of her conduct following Lauren's birth. In her declaration, Lisa stated that she is listed as a parent on Lauren's birth certificate, that Lauren's middle name and surname are a combination of Lisa's and Kristine's names, and that after Lauren was born she took time off work to bond with the child. Moreover, Lauren is a dependent on Lisa's medical insurance. Lisa further stated in her declaration that she and Kristine share childcare responsibilities, and Lauren calls Lisa "momma." The family court must look to this evidence, and the additional evidence presented by the parties on remand, to determine whether Lisa's course of conduct demonstrates a full commitment to Lauren's welfare – emotional, financial, and otherwise – to satisfy the holding out requirements of section 7611, subdivision (d).

b. *The "Receiving Into One's Home" Requirement May Be Established by Lisa's Conduct Following the Child's Birth*

Though these facts must be established by the family court on remand, Lisa has stated in her declaration that she, Kristine, and Lauren lived together as a family in their shared home until the break up of the adults' relationship. Lisa, however, did more than just live with Kristine and Lauren. One month before her birth, she agreed to become her joint legal parent, and to financially support Lauren. Upon birth, Lisa was listed on Lauren's birth certificate, gave Lauren her family name, and provided financial and emotional support for Lauren. According to Lisa, she acted in every way as Lauren's second parent and believes that she demonstrated the level of diligent commitment the law requires in order to satisfy the statutory requirement of receiving Lauren into her home.

We reject Kristine's argument that even if Lisa could establish the statutory requirements of a presumed parent, Lisa's claim to parentage has been rebutted as a matter of law by Kristine, the biological and gestational mother. Such a conclusion erroneously assumes that a child may not have a natural mother and another parent of the same sex unless that parent adopts the child. Moreover, we do not agree with Kristine's characterization that should the family court determine that Lisa is a legal parent, such a ruling would be an "imposition of a presumed mother on an intact family." The record before us indicates that when Lauren was conceived, born, and up until she was almost two-years old, the *family* consisted of Kristine, Lisa, and Lauren. Whether this is an

appropriate action to rebut the section 7611, subdivision (d), presumption is a factual determination left to the family court on remand.

We therefore will remand the case to the family court to determine whether Lisa has satisfied the statutory requirements to become a presumed parent under a gender-neutral application of section 7611, subdivision (d), and whether this would be an appropriate action in which to conclude that the presumption has been rebutted.[32] If Lisa is found to be Lauren's parent, then the family court must proceed to determine Lisa's rights, if any, to custody and visitation of Lauren. In making that determination, the family court should consider and apply all of the factors and criteria set out in the applicable provisions of the Family Code.

7. *Impact of the "Intended Parent Doctrine"*

Although it is clear that the issue of parentage must be established under provisions of the Act, the result we reach is also fully supported by an application of the so-called "intended-parent doctrine."

That doctrine has been applied in cases where couples have employed artificial reproductive means to create a child. In *People v. Sorensen* (1968) 68 Cal.2d 280, the

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[32] As we have noted, upon remand, the family court must make a determination of whether the statutory requirements of section 7611, subdivision (d), have been satisfied. Although the parties contend that such a hearing is unduly burdensome, we disagree. Such a hearing will assure that Lisa's status as a parent will be adjudicated under the applicable rules of law. Moreover, it will give both parties an opportunity to present evidence on the statutory requirements. Finally, the parties are presently before the court to determine custody and visitation, and because we have concluded that the judgment is void, the determination of parentage must be resolved before the court may determine those issues.

court concluded that a husband was liable for the support of a child created through artificial insemination, and emphasized the role of his consent in causing the birth of the child. (*Id*. at pp. 283-285.)

The intended-parent doctrine also has been applied in surrogacy cases, such as *Johnson*, *supra*, 5 Cal.4th at p. 93. The *Johnson* court found support for the application of that doctrine in the works of several legal scholars. Of particular relevance here, is the *Johnson* court's endorsement of a law review article[33] stating in the context of artificial reproduction that " 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.' [Citation omitted.]" (*Id*. at p. 94.) Relying on this citation and other references to legal articles in *Johnson*, the court in *Buzzanca*, *supra*, 61 Cal.App.4th 1410, also a surrogacy case, defined intentional parenthood in a much broader sense to apply "where a child would not have been born ' "but for the efforts of the intended parents." ' [Citation.]" (*Id*. at p. 1425.)

Recently, in an assisted-reproductive case involving a lesbian who had donated ova to her partner, Division Five of the First District applied the intended-parent doctrine and concluded that even though the donor partner was biologically related to her partner's twin daughters, she was not a legal parent because the parties did not intend to co-parent at the time of the donation. (*K.M. v. E.G., supra,* 118 Cal.App.4th at p. 487.) Relying on *Johnson*, *supra*, 5 Cal.4th 84, the court looked to the parties' intentions,

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33 Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality* (1990) Wis. L. Rev. 297, 323, fn. omitted.

which militated against a finding of the donor's parentage. The appellate court upheld the factual determinations that the donor was not a legal parent because she had orally agreed that the partner who became pregnant would be the sole parent of the children until formal adoption, and the donor partner signed a donor agreement that established she had not intended to parent the children. (*K.M. v. E.G., supra,* at pp. 489-493, 494-495.) The court reiterated that when considering the parties' intent, the focus of the *Johnson* test must be on their intentions at the time the child is conceived, which would include the relationship between the parties, the parties' statements on parentage, their plans for raising the child, and their subsequent conduct in carrying out those plans. (*Id*. at pp. 495-496.) As the court noted: "The law requires a fixed standard that gives prospective parents some measure of confidence in the legal ramifications of their procreative actions." (*Id*. at p. 496.)

This intent-based standard for recognizing parental rights clearly buttresses the conclusion that we reach. Keeping the focus of the *Johnson* test in mind, based on this record, at the time Lauren was conceived, Kristine and Lisa were in a committed relationship, and they *acted together to cause the birth of their child*. Their plans to raise the child together led them to enter into a stipulation to establish them as the legal parents of the unborn child and obtain a judgment establishing their parental rights. Upon Lauren's birth, Kristine and Lisa raised the child in the family home until they separated. Now, because Kristine no longer wants to be Lisa's partner, she disputes Lisa's claim to parental rights. As we have stated, the parties cannot make up the rules to establish a parental relationship, nor can they make up the rules to sever one. The same rules that

apply to all other parents should apply to Kristine and Lisa.[34] Determining that Kristine and Lisa are both Lauren's parents (assuming the family court so concludes), no matter what happens to their adult relationship, would be consistent with their own intentions when they took the steps to create Lauren and is based on an application of the Act – the same rules that apply to other parents in their situation who must deal with the legal consequences of their procreative actions long after they have separated.

In light of our decision, we need not, and do not, reach the additional arguments Lisa raises, or the constitutional issues Lisa and amici raise in their briefs.

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[34] It is clear that the Legislature agrees with this proposition. (See fn. 5, *ante*.)

DISPOSITION

The family court's order denying Kristine's motion to vacate the judgment of September 8, 2000, is reversed. Upon remand, the family court is directed to vacate that order and to enter a new order granting Kristine's motion to vacate. The family court is further directed, upon remand, to conduct, in accordance with the views expressed herein, such further proceedings and amendment of pleadings as are appropriate in order to resolve the issues of Lisa's parentage and her rights, if any, to visitation and/or custody. The parties shall bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.