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**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| **K.M.,**<br>**Plaintiff and Appellant,**<br>**v.**<br>**E.G.,**<br>**Defendant and Respondent.** | **A101754**<br><br>**(Marin County Super. Ct. No. CV 020777)** |

Appellant K.M. donated her eggs so that her lesbian partner, E.G., could bear a child through in vitro fertilization. The couple orally agreed that only E.G. would be the legal parent unless and until there was a formal adoption. E.G. gave birth to twins, and both women took on parental responsibilities; adoption proceedings, however, were never initiated. While K.M. does not dispute that E.G., the birth mother, qualifies as the children's parent, she argues that as the genetic mother, she, too, qualifies as a parent entitled to custody and visitation. Because we believe that the "intention" test set out in *Johnson v. Calvert* (1993) 5 Cal.4th 84, 93 (*Johnson*) governs and because substantial evidence supports the trial court's factual finding that *only* E.G. intended to bring about the birth of a child whom she intended to raise as her own, we conclude that K.M. does not qualify as a parent under the Uniform Parentage Act (Fam. Code, § 7600 et seq.).

## FACTUAL AND PROCEDURAL HISTORY

In accordance with established principles of appellate review, we construe the evidence in the light most favorable to the trial court's judgment, resolving all conflicts and drawing all inferences in favor of the judgment. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

K.M. and E.G. entered into an intimate relationship in June 1993 and began living together in March 1994. They registered as domestic partners in San Francisco in October 1994. Well before her relationship with K.M., E.G. had explored ways of having a child on her own, including artificial insemination and adoption. E.G. told K.M. of her efforts to become a single parent, and K.M. was "encouraging and supportive." The parties discussed and agreed that E.G.'s intention was to have a child of her own. A mutual friend of theirs was then involved in a child custody dispute with her lesbian partner, and E.G. wanted to avoid any such battle.

During the period from July 1993 to November 1994, E.G. was unsuccessfully artificially inseminated at fertility clinics 12 times. K.M. accompanied E.G. to all the appointments and reviewed the potential sperm donors with E.G. In December 1994, E.G. was referred to a fertility practice at U.C.S.F. Medical Center ("U.C.S.F."). Attempts at in vitro fertilization using E.G.'s eggs and sperm from a donor failed, because E.G. was unable to produce enough eggs to achieve pregnancy. At this same time, K.M. was having problems with fibroids in her uterus and was seen by the same medical group at U.C.S.F. E.G.'s doctor suggested that E.G. might want to attempt in vitro fertilization with K.M.'s eggs. E.G. was reluctant to do so because the couple's relationship was still new, and she did not want a custody battle in the future with K.M. Eventually, however, E.G. asked K.M. to donate her eggs, provided that K.M. would be a "real donor" and E.G. would be the only legal mother. The parties discussed the possibility of a future adoption by K.M. E.G. said she would consider adoption by K.M. but not for at least five years, when she felt the relationship was stable and permanent. K.M. agreed to E.G.'s terms and made no request to be a legal parent.

In February 1995, E.G. received in the mail from U.C.S.F. consent forms for both an ovum donor and an ovum recipient. The introductory paragraph of the four-page Consent Form for Ovum Donor (Known) provides: "I will agree to have eggs taken from my ovaries, in order that they may be donated to another woman." Under the heading "What will happen to me?," a detailed description of the egg retrieval process concludes with the sentence, "The recipient will have control over the disposition of all retrieved eggs and resulting embryos." On page 3, the same page where the donor is required to fill in blanks about the donor's medical history, the form states: "It is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them. I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children." On page 4, the signature page, the form states: "I specifically disclaim and waive any rights in or [to] any child that may be conceived as a result of the use of any ovum or egg of mine, and I agree not to attempt to discover the identity of the recipient thereof. [¶] I waive the right of relationship or inheritance with respect to any child born of this procedure . . . ."

K.M. and E.G. reviewed the forms with each other in the weeks prior to signing. E.G. told K.M. she was relying on the provision concerning relinquishment of parental rights. The standard procedure for egg donation at U.C.S.F. called for the egg donor to meet with a psychologist for counseling. K.M. and E.G. attended the counseling session together on February 14, 1995. After meeting with the counselor, K.M. and E.G. talked about what they would disclose publicly about the parentage of a child formed from K.M.'s donated eggs. They agreed to tell the child eventually that K.M. was the genetic mother, but they agreed that E.G. would decide when it was appropriate to do so. They also agreed not to tell other people that K.M. was the egg donor and to reveal only that E.G. was the mother.

On March 8, 1995, the parties went to U.C.S.F. to begin the procedure for retrieval of K.M.'s eggs. At the hospital, K.M. was given a copy of the ovum donor consent form to review and sign. K.M. signed the form and then had blood drawn, the first step in the egg retrieval procedure.

In April 1995, about a month after signing the ovum donor consent form, K.M. underwent the egg retrieval procedure at U.C.S.F. Three days after that procedure, K.M. gave E.G. an Easter card with a picture of eggs on the front and with a handwritten note inside: "To my Boss[, a] most memorable Easter that we share together[,] a gift of unconditional love and of life." K.M.'s eggs were fertilized in vitro with sperm from an anonymous donor, and four of the resulting embryos were implanted in E.G.'s uterus. The procedure was successful, and E.G. became pregnant with twin girls. In September 1995, K.M. gave E.G. a card stating "I look so forward to the day that I meet your two daughters." (Underscoring in original.)

E.G. gave birth to the twins on December 7, 1995. Soon afterward, E.G. asked K.M. to marry her, and on Christmas Day the couple exchanged rings.

The hospital records from the time of the delivery refer to the "parents" in the plural, e.g., "Both moms in to visit." However, E.G. listed only herself on the birth certificates as the mother, and the children were given E.G.'s surname. E.G. was also listed as the only parent on the children's baptismal certificates. K.M. was not mentioned during the baptism ceremony. Within a month of their birth, E.G. added the children as beneficiaries to her health care, dental, vision, and life insurance plans and to her retirement plan. K.M. had a life insurance policy and small retirement plan, but she never changed the beneficiaries to name the children.[1]

Before the twins were born, some friends held a baby shower honoring both E.G. and K.M. After the birth, E.G. and K.M., as a couple, received other congratulatory cards and gifts. But E.G. never revealed to her friends or family that K.M. was the egg donor. Nor did K.M. disclose that she was genetically related to the children, even though the children came to refer to K.M.'s parents as "Granny" and "Papa."

For the next five years, E.G. and K.M. and the twins continued to live together as a family unit. There is no dispute that K.M. acted as an affectionate mother to the girls,

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[1] K.M. had health coverage through E.G. and could not get additional life insurance because of her medical history.

and that the girls are emotionally attached to her. The couple agreed to refer to E.G. as "Muma" and to K.M. as "Boss" or her first name, and those are the terms the girls came to use.[2] E.G. and K.M. purchased a house together in Marin County and enrolled the children in preschool there. E.G. listed K.M. as a "co-parent" on the school enrollment forms. However, it was E.G. who signed the enrollment forms and paid the preschool tuition. Both E.G. and K.M. took the children to pediatric appointments. However, they never revealed to the children's pediatrician that K.M. was genetically related to the girls.

In 1998 the parties argued about whether or how to tell the girls that they were genetically related to K.M. E.G. asserted she would never tell them and insisted she was their only legal mother. E.G. referred to the waiver of rights on the ovum donor consent form and told K.M. she had no legal rights without adoption. In 2000, as the girls' fifth birthday approached, K.M. became insistent that she wanted to adopt, but E.G. had misgivings. The couple also disagreed about relocating to Massachusetts. By March 2001, the couple had separated, and E.G. filed a notice of termination of the domestic partnership. K.M. filed a petition to establish a parental relationship with the girls, seeking, among other things, to prevent E.G. from taking the children to Massachusetts. She voluntarily dismissed that petition in July 2001, when she and E.G. resumed living together and tried to resolve their differences. K.M. and E.G. then continued to live together until August 2001, when E.G. moved with the girls to Massachusetts. E.G. listed K.M. as a parent on the Massachusetts school forms. K.M. and E.G. each paid half the tuition for the Massachusetts school.

In February 2002, K.M. filed a new petition to establish a parental relationship. She also sought joint custody. In response, E.G. filed a motion to quash and dismiss the petition on the ground that K.M. lacked standing to assert parentage. Pending trial, the parties stipulated to orders for visitation by K.M. in Massachusetts.

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[2] Only after the litigation commenced did K.M. start referring to herself as "Mama Boss."

K.M.'s testimony at trial created a sharp conflict in the evidence. K.M. testified that from the beginning of their relationship she and E.G. planned to have children together. E.G. was to bear the child, because K.M. was not able to carry a child. K.M. denied any discussion with E.G. that E.G. would be the sole parent. However, K.M. conceded that when they met, E.G. was actively trying to get pregnant and E.G.'s then-pending adoption application did not involve her. She also conceded that E.G. was reluctant at first to have children with K.M. because their relationship was too new. K.M. testified that E.G.'s reluctance to use K.M.'s eggs was based on a concern that the child would resemble K.M. and then E.G. would have to reveal to her own mother that she is a lesbian.

K.M. acknowledged that before the egg retrieval procedure the parties had many conversations about egg donation and about adoption. K.M. testified that both she and E.G. intended to be the parents of any child formed from K.M.'s eggs. K.M. also testified, on the one hand, that the parties discussed the need for adoption to make K.M. a legal parent, and, on the other hand, that she believed adoption was unnecessary because of her genetic connection to the children. K.M. denied any agreement that the children would be E.G.'s alone.

K.M. denied going over the ovum donor consent form with E.G. in advance of signing. She testified that she first received the form at the hospital and signed it within minutes, believing it was a pro forma matter that was necessary to proceed with the egg retrieval. K.M. has a master's degree and conceded that she understood the language of the donor consent form. She was aware of the language concerning relinquishment of parental rights and understood that her legal rights were affected by the form. However, she did not intend to relinquish her parental rights; she thought the language of the donor form would not apply to her because she knew the recipient. She made no request to E.G. or to U.C.S.F. to change the form. She did understand and agree that E.G. would have control of any embryos formed through in vitro fertilization.

K.M. denied that the parties had an agreement about disclosing K.M.'s genetic connection to the children. However, she acknowledged that, with one exception, she did

not tell anyone, even her own family, that she was the egg donor until her relationship with E.G. ended. In 1998, when she and E.G. began having disagreements about telling the children, K.M. told one friend that E.G. could not have become pregnant without her, but K.M. did not directly say she was the egg donor. In 1999, K.M. told her therapist and the friend that she was the egg donor. And in 2001, as her relationship with E.G. was ending and after the couple had attended counseling sessions, K.M. told the children, over E.G.'s objection, that she was their genetic mother.

After a seven-day trial, the trial court issued a lengthy and thoughtful opinion buttressed with numerous factual findings, resolving the disputed facts and concluding that K.M. was not a legal parent. The trial court found that K.M. relinquished her claim to parentage when she knowingly, voluntarily and intelligently signed the ovum donor consent form. Further, the court found that the parties agreed E.G. would be the sole legal parent and their agreement was not modified by their conduct. Accordingly, the court ruled that K.M. lacked standing, and the court granted E.G.'s motion to quash and dismiss the petition. K.M. appeals.

## DISCUSSION

### *Introduction*

The Uniform Parentage Act (UPA) was adopted by the Legislature in 1975 to eliminate the distinction between legitimate and illegitimate children. (See *Johnson, supra,* 5 Cal.4th at pp. 88-89.) 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." (Fam. Code, § 7601.) The UPA is not confined to a determination of paternity. Under the act, the "parent and child relationship" expressly includes the mother and child relationship. (Fam. Code, §§ 7601, 7610, subd. (a), 7650.) Although the act was not adopted to resolve issues that arise under modern reproductive technology, our Supreme Court has said that the act should be used even for the rare case such as the one before us in which, because of new biological possibilities, a child's maternity is in dispute. (*Johnson*, at p. 89.)

I. STANDING

Though we affirm the trial court, we disagree with its ruling that K.M. lacked standing to bring the action to determine parentage under the UPA. The UPA provides that "[a]ny interested person" may bring an action under the UPA to determine the existence of a mother and child relationship. (Fam. Code, § 7650.)[3] Two appellate courts have held that the lesbian partner of a child's natural mother, being genetically unrelated to the child, is not an "interested party" and has no standing to bring the mother into court under the UPA. (*West v. Superior Court* (1997) 59 Cal.App.4th 302, 306; *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597, 1600; but see *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831, 835, fn. 2 (*Nancy S.*).) Similarly, two other courts have held that the wife of a sperm provider, with no genetic relationship to the child, is not an interested party under the UPA. (*Robert B. v. Susan B.* (2003) 109 Cal.App.4th 1109, 1115-1116; *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222, 229.) In *Johnson,* however, the Supreme Court impliedly recognized that a woman with genetic consanguinity has a colorable claim to parentage and qualifies as an interested party in a parentage dispute with the birth mother. (*Johnson, supra,* 5 Cal.4th at pp. 90, 92-93.) Here, in light of K.M.'s genetic connection to the children, we conclude that K.M. qualified as an "interested party" for purposes of obtaining a judicial declaration of her status as a parent.

On the merits, however, as we explain, the trial court properly concluded after a full evidentiary hearing that E.G. was the only legal parent. Once the trial court made the substantive determination that K.M. was not a legal parent, the court lost jurisdiction to

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[3] An action to determine the existence of the *father* and child relationship may be brought by a child, the child's natural mother, or a man statutorily presumed to be the child's father. (Fam. Code, § 7630, subd. (a).) "Any interested party" may bring an action to determine the parental relationship between a child and a man who receives the child into his home and openly holds out the child as his natural child. (Fam. Code, § 7630, subd. (b).)

award custody or visitation to her and properly dismissed K.M.'s petition. (*West v. Superior Court, supra,* 59 Cal.App.4th at p. 305; *Curiale v. Reagan, supra,* 222 Cal.App.3d at p. 1600.)

II. THE NATURAL MOTHER: THE *JOHNSON* TEST

The UPA recognizes a legal parental relationship for two kinds of parents—"natural" and "adoptive." (Fam. Code, §§ 7601, 7610; *Johnson, supra,* 5 Cal.4th at p. 89; see also *Nancy S., supra,* 228 Cal.App.3d at pp. 835-836, 841.) The parent and child relationship for the "natural mother" may be established "by proof of her having given birth to the child, or under [the UPA]." (Fam. Code, § 7610, subd. (a).) The California Supreme Court has rejected the notion that only the woman who gives birth to a child qualifies as the "natural" mother: "The disjunctive 'or' indicates that blood test evidence [reflecting genetic consanguinity], as prescribed in the Act, constitutes an alternative to proof of having given birth." (*Johnson*, at p. 92.) The court explained as follows: "In our view, the term 'natural' as used in [subdivision (a) of Family Code section 7610] simply refers to a mother who is not an adoptive mother. [Section 7610] does not purport to answer the question . . . who is to be deemed the natural mother when the biological functions essential to bringing a child into the world have been allocated between two women." (*Johnson*, p. 92, fn. 9.)

In *Johnson,* the court analyzed the concept of "natural mother" within the context of a surrogacy agreement. An embryo created by the gametes of a married couple was implanted in the uterus of another woman, who had agreed by written contract to bear the child but to relinquish all parental rights. When the surrogate changed her mind and refused to surrender the child, the married couple sought a declaration of parentage under the UPA. The Supreme Court acknowledged that both women had acceptable proof of maternity—one had given birth to the child and the other had genetic consanguinity. (*Johnson, supra,* 5 Cal.4th at pp. 92-93.) But the court expressly declined to find that a child can have two natural mothers. (*Id*. at p. 92, fn. 8.) The court said that "for any child California law recognizes only one natural mother, despite advances in reproductive

technology rendering a different outcome biologically possible." (*Id*. at p. 92; see also *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1224.)[4]

The *Johnson* court resolved the competing maternity claims of the genetic mother and the surrogate birth mother by examining the parties' intentions as manifested in the surrogacy agreement. The court emphasized that it was the married couple who affirmatively intended the birth of their child and took steps to effect in vitro fertilization, while the surrogate mother simply intended to facilitate the procreation of the couple's child. It was the genetic mother who "from the outset intended to be the child's mother." (*Johnson, supra,* 5 Cal.4th at p. 93.) Quoting from a law review article,[5] the *Johnson* court explained that, " 'Within the context of artificial reproductive techniques,'. . . intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood." (*Id.* at p. 94.) The *Johnson* court articulated the test of maternity as follows: the woman who intended to procreate the child—to bring about the birth of a child whom she intended to raise as her own—is the natural mother under California law. (*Id.* at p. 93.)[6] In subsequent cases, the appellate

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[4] *Johnson,* of course, dealt only with the concept of a child's "natural mother" and did not touch upon the concept of an adoptive parent. More recently, the Supreme Court has held that a child may have two adoptive mothers. (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 435.) The Legislature confirmed the point by expressly providing that a domestic partner may, with the consent of the birth parent, adopt the child of his or her domestic partner under the same procedure used for a stepparent adoption. (Fam. Code, §§ 9000, subds. (b) & (f), 9003, 9006, subd. (b).) The present case does not pertain to parentage by adoption.

[5] Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality* 1990 Wis. L. Rev. 297, 323.

[6] *Johnson* also quoted from Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* (1986) 96 Yale L.J. 187, 196 (*Note)*: "The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers." (*Johnson, supra,* 5 Cal. 4th at p. 94.) *Johnson* seemed to view this formulation as synonymous with the intention test. Certainly, the author of the *Note* so viewed it. (*Note*, at pp. 196-197.) Both *Johnson* and the *Note* focused on reproduction through use of a surrogate. (*Note,* at p. 188.) In that context, determining the originators of the mental concept of the child seems to work well. In a context like

courts have construed the *Johnson* test to mean that the intent to be the parent is the "tie-breaker" when two women have equal claims. (*Robert B. v. Susan B., supra,* 109 Cal.App.4th at pp. 1115-1116; see also *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410, 1421-1422.)

III. THE PARTIES' PARENTAGE INTENTIONS

A. *Expressions of Intention*

The trial court made two significant factual findings that defeat K.M.'s assertion that she intended to be the parent of a child produced from her egg. First, K.M. orally agreed before the children were conceived that E.G. would be the sole legal parent unless and until the parties underwent formal adoption proceedings. Second, K.M. signed a donor consent form in advance of the egg donation procedure in which she expressly waived any parental rights that might attach to her genetic connection to a child formed by her ovum.

1. The Oral Agreement

K.M. argues that the oral agreement between K.M. and E.G. concerning K.M.'s parental status is unenforceable for a number of reasons: lack of consideration, unconscionability, indefinite terms, and violation of the statute of frauds. The arguments are beside the point. The present action brought under the UPA is not an action to enforce a contract; the determination of parentage does not rest upon a binding agreement between the parties. (Cf. *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 190 [contractual father sought damages for breach by mother].) To the contrary, Family Code section 7632 states: "Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this chapter [on determining a parent and child relationship]." Although that provision refers to an agreement by the

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our own, where K.M. and E.G. had a committed relationship at the time of conception, employing this same determination in the analysis might prove unhelpful. *Johnson's* reference to the originator of the mental concept of the child should not be misinterpreted to mean that parentage will be conferred on the person in the relationship who *first suggested* that the couple have and raise a child of their own.

alleged father, we conclude that the statute should apply equally to an agreement by a woman alleged to be the child's second mother. (Fam. Code, § 7650; see *In re Karen C.* (2002) 101 Cal.App.4th 932, 938, 939.)[7] The clear purpose of Family Code section 7632 is to preclude parents from foreclosing a judicial determination of parentage. (*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1849 [mother's settlement with father did not preclude paternity determination and support award]; see also *In re Marriage of Buzzanca, supra,* 61 Cal.App.4th at pp. 1426-1428 [wife's promise to assume all responsibility for child born of surrogate did not abrogate husband's duty to support].)

The ultimate determination of natural motherhood depends not upon the existence of a binding contract but rather, as *Johnson* instructs, upon the woman's *intention* to bring about the birth of the child to raise as her own. (*Johnson, supra,* 5 Cal.4th at p. 93; see also *Robert B. v. Susan B., supra,* 109 Cal.App.4th at pp. 1115-1116; *In re Marriage of Buzzanca, supra,* 61 Cal.App.4th at pp. 1421-1422.) This distinction between an expression of intention and an enforceable contract is apparent in the Supreme Court's recent opinion on the doctrine of equitable adoption. (*Estate of Ford* (2004) 32 Cal.4th 160.) In holding that the doctrine applies only when the evidence establishes an intention to adopt, the court explained that the claimant need not prove all the elements of an enforceable contract: "This intent [to adopt] may be shown, of course, by proof of an unperformed express agreement or promise to adopt. But it may also be demonstrated by proof of other acts or statements directly showing that the decedent intended the child to be . . . a legally adopted child . . . ." (*Id.* at p. 171.)

In *Johnson,* the court looked to the parties' written surrogacy agreement to determine the parties' intentions on parentage. In the present case, the trial court found in the parties' oral expressions an intention that E.G. would be the only legal parent unless and until an adoption by K.M. It makes no difference whether the parties' oral expressions would be an enforceable agreement under contract law. What is legally

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[7] Family Code section 7650 provides that "[i]nsofar as practicable, the provisions of [the UPA] applicable to the father and child relationship apply" to the mother and child relationship as well.

relevant is the finding by the trial court that the parties' understanding showed that *they intended* E.G. to be the one to bring about the birth of a child to raise as her own child.

2. The Ovum Donor Consent Form

K.M. makes several challenges to the validity of the ovum donor consent form. First, she contends the donor consent form did not give her adequate notice that she was waiving her parental rights. Further, she argues the donor form was a contract of adhesion and unconscionable. K.M. insists that by signing the form she was not indicating any intent to waive her parental rights. These arguments are curtailed on appeal. Despite K.M.'s testimony to the contrary, the trial court found the evidence to be clear and convincing that K.M. signed the donor consent form and waived her parental rights "knowingly, voluntarily and intelligently." The court found K.M.'s testimony on her execution of the donor form "contradictory and not always credible." Further, the court found the relinquishment of parental rights contained in the donor form "clear." We are bound to accept the trial court's resolution of conflicting evidence as long as the court's findings are supported by substantial evidence.

The record contains sufficient evidence to support the factual findings. E.G. testified that she and K.M. carefully reviewed in advance the ovum donor consent form and its provisions concerning relinquishment of parental rights. The parties stipulated that the customary practice at U.C.S.F. is to send the forms one month before the initial appointment. K.M. never objected to the terms of the donor consent form to E.G. or to the U.C.S.F. medical personnel, even though she participated in counseling two weeks before signing the form and did not undergo the egg retrieval procedure until a month afterward. K.M. admitted in her testimony that she understood the language of the donor consent form, and the trial court could reasonably disbelieve K.M.'s testimony that she did not understand the legal implications of that language. The evidence was undisputed that until 1999 neither party disclosed to others K.M.'s genetic connection to the children and K.M. never listed the children as beneficiaries of her life insurance policy or retirement plan. That evidence serves to show that K.M. understood her relinquishment of parental rights. Certainly, as K.M. emphasizes, there was evidence that family and

friends regarded K.M. and E.G. as a couple raising the children together. But evidence that K.M. was E.G.'s domestic partner and helped raise the children does not preclude a finding that K.M. understood and agreed that E.G. would be the only legal parent.

Next, K.M. challenges the trial court's ruling that the donor consent form was a valid contract made between K.M. and U.C.S.F. to which E.G. was a third party beneficiary. K.M. argues that the donor consent form is unenforceable as a third party beneficiary contract because it did not express an intent to benefit E.G. As we have already determined in connection with the oral agreement between K.M. and E.G., the effectiveness of the donor consent form as a binding contract is not the question here. The consent form clearly reflects that K.M. donated her eggs as a gift. (Cf. Health & Saf. Code, § 7150 et seq. [organ and tissue donations].) The consent form is a Consent Form for Ovum *Donor*. The opening paragraph of the donor consent form stated that K.M., as ovum donor, was "*helping* an infertile woman achieve a pregnancy" and agreeing to have her eggs taken and "*donated* to another woman." As between K.M. and E.G., the donor consent form is legally relevant as a written manifestation of the parties' intentions on parentage.[8] The donor consent form confirms that E.G. was intended to be the natural mother and sole legal parent, while K.M. was the ovum donor.

Finally, K.M. argues that insofar as the donor consent form constitutes a waiver of her rights to parental status, the document violates her constitutional right to procreate. The argument is not persuasive. Nothing in the donor consent form precluded K.M. from bringing about the birth of another child she intended to raise as her own child. The form simply reflects K.M.'s intention that she would not be the legal mother of any child formed from eggs donated to E.G.

In *Johnson,* the Supreme Court observed as follows: "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending

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[8] The ovum donor consent form may have other implications as between the ovum donor and U.C.S.F. The donor consent form provides the patient's informed consent to the egg retrieval procedure and allows the medical center to assure a prospective recipient that the donor has no legal claim of parentage.

parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. Certainly in the present case it cannot seriously be argued that Anna [the surrogate], a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract." (*Johnson, supra,* 5 Cal.4th at p. 97.)

There is no reason K.M. should be found incapable of making the informed choice to donate her eggs to another woman who intended to be the sole legal parent. In fact, the status of K.M. under the donor consent form and the parties' agreement is consistent with the status of a sperm donor under the UPA, i.e., "treated in law as if he were not the natural father of a child thereby conceived." (Fam. Code, § 7613, subd. (b); see discussion, *post*.) No public policy is violated by an agreement treating an egg donor in the same way. (Cf. *Dunkin v. Boskey, supra,* 82 Cal.App.4th at pp. 183-192 [contract by mother to grant paternal rights to male partner was not invalid].)

B. *The Parties' Relationship*

We recognize, as K.M. emphasizes, key factual differences between *Johnson* and the present case. In *Johnson,* the genetic mother was married to the genetic father, while the surrogate birth mother was a stranger to that established relationship. In contrast, K.M. and E.G. had a committed relationship with each other that antedated the conception of the children, and the parties planned to provide together a stable and nurturing home for the children.

As we read *Johnson,* the nature of the relationship between the genetic parents and the birth mother in that case was relevant insofar as it cast light on the parties' parentage intentions. That is, the genetic mother was held to be the natural mother because under the surrogacy arrangement it was she who intended to bring about the birth of the child. (*Johnson, supra,* 5 Cal.4th at p. 93.) In a footnote, the court commented that "in a true

'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law." (*Id*. at p. 93, fn. 10.) K.M. does not dispute that E.G., who gestated and delivered the twins, is the natural mother of the children. K.M. argues, however, that the circumstances here do not present a "true 'egg donation' situation" and that because of her existing and ongoing relationship with E.G. she cannot be characterized as a mere egg donor.

We agree that a legal distinction exists between an intending parent and a mere "donor" of genetic material. The Legislature and the courts have already drawn that distinction with respect to a sperm donor. The UPA specifies that the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife "is treated in law as if he were not the natural father of a child thereby conceived." (Fam. Code, § 7613, subd. (b).) The courts have held that the statute does not apply, however, when the sperm provider intended to be a parent, not a mere donor. (*Robert B. v. Susan B., supra,* 109 Cal.App.4th at p. 1113 [man whose sperm was intended to impregnate wife was not "donor" to mistaken recipient]; *Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1273 [man whose sperm impregnated surrogate pursuant to agreement was not a sperm "donor"]; see also *Jhordan C. v. Mary K.* (1986) 179 Cal.App.3d 386, 393-394 [sperm donor statute does not apply to man whose sperm was not provided through physician].) In *Johnson*, the Supreme Court similarly concluded that the married couple were not merely donors of genetic material; they intended to procreate a child genetically related to them. (*Johnson, supra,* 5 Cal.4th at p. 100.)

In the present case, the trial court found that K.M. was an ovum donor and not an intending parent. The trial court had evidence of the relationship between K.M. and E.G. as it existed at the time of the egg donation and the conception of the children. That evidence showed that the parties intended to maintain their relationship into the future and, at least implicitly, planned to raise together any child formed from K.M.'s donated eggs. The evidence was conflicting, however, on whether the parties intended joint parenthood or whether the parties intended to raise the child as E.G.'s child. Although

the trial court did not analyze the case in exactly the way we do under *Johnson,*[9] the court's factual findings nevertheless indicate it was only E.G. who affirmatively intended to be the mother of a child, while K.M.'s intention was to donate ova to E.G. to facilitate the procreation of a child *for E.G.*[10]

Again, substantial evidence supports the trial court's factual findings. E.G. testified that her intention all along was to be the only mother. Even before her relationship began with K.M., she had tried to conceive a child to raise as her own. E.G. was initially reluctant to use K.M.'s eggs because she believed the relationship was too new and she feared a future legal dispute over parentage. E.G.'s testimony that K.M. orally agreed to E.G.'s sole parenthood was confirmed by the conduct of both parties after the birth of the children in keeping K.M.'s genetic connection secret for years.

In *Johnson,* which arose in a very different factual context, the Supreme Court concluded that only one woman could be the child's natural mother to the exclusion of the other: "Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. To 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 role as mother." (*Johnson, supra,* 5 Cal.4th at p. 92, fn. 8.)

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**9** The trial court assumed that a child can have two "legal mothers" and then focused on K.M.'s contractual relinquishment of her parental rights. As we understand *Johnson,* although genetic consanguinity gives a woman a colorable claim of maternity, the biological connection does not ripen into parentage unless the evidence establishes that the genetic mother intended to raise the child as her own.

**10** We can envision that, in many cases, the clearest indicator of the parties' intentions on parentage will be their relationship at the time of conception and their plans, if any, to remain together and jointly raise the children. Under the particular facts of this case, the trial court found, based on substantial evidence, that, despite their relationship at conception and their plans to remain a couple after E.G. gave birth, the parties did *not* intend that K.M. would be a legal parent.

Here, the trial court's factual findings establish E.G. as the only natural mother because only E.G. intended to procreate a child of her own. We simply do not have before us the case that K.M. would like it to be—where both the birth mother and the genetic mother mutually intend joint parenthood. Accordingly, we need not and do not decide here whether the determination of natural motherhood in a dispute between the genetic mother and the birth mother always compels the selection of one woman to the exclusion of the other or whether a child can, in an appropriate case, have two natural mothers.

C. *Revision of Intentions*

K.M. asserts that E.G.'s conduct after the birth of the children in accepting K.M. as a co-parent should be seen as a rescission of the parties' oral agreement to give parental status only to E.G. The trial court found to the contrary that E.G. did not intend by her conduct to confer legal parental status on K.M. and that the parties did not modify their agreement that E.G. was to be the sole legal parent. We discern no error in that ruling. We emphasize again that contract law is not controlling; our focus is on the parties' intentions. The parties' pre-conception intention that E.G. would be the sole legal parent until adoption impliedly contemplated that the parties would remain together as a couple and that the children and others might regard K.M. as a second parent. E.G.'s acceptance of K.M. as a joint parental figure in the children's lives was consistent with the parties' initial intentions and provides no basis for a finding of repudiation of those intentions.

In any event, we reject the notion that the intent to be a parent should be assessed and reassessed over time. As we understand the *Johnson* test, the focus of inquiry must be on the intentions at the time the child was conceived: the natural mother is the woman who "*from the outset* intended to be the child's mother." (*Johnson, supra,* 5 Cal.4th at p. 93; emphasis added.)[11] Of course, the trial court may properly consider, as it did here, various factors bearing upon the parties' subjective intentions at the time of the child's

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[11] For purposes of deciding the case before us, we construe "from the outset" to mean

conception, including the relationship between the birth mother and the genetic mother, the parties' statements on parentage, their plans for raising the child, and their subsequent conduct in carrying out those plans. But we cannot countenance extending the inquiry beyond that initial time frame to encompass whether or how the parties' intentions were modified through the years, perhaps as the adults' relationship waxed or waned. The law requires a fixed standard that gives prospective parents some measure of confidence in the legal ramifications of their procreative actions.

Had E.G. changed her mind after the children were born and agreed with K.M. that K.M. should be a second legal parent, the couple could have proceeded to adoption. (See fn. 4, *ante*.) An adoption decree would provide objective, formalized proof of the parties' parentage intentions. Here, in the absence of an adoption decree, any post-conception revision of the natural mother's intentions is legally irrelevant.

## IV. EFFECT OF THE PARTIES' SUBSEQUENT CONDUCT

The *Johnson* "intention" test calls for a determination of the woman's intent "from the outset" to bring about the birth of the child. (*Johnson, supra,* 5 Cal.4th at p. 93.) K.M. has suggested that we should alternatively consider circumstances occurring after birth of the child, namely, the parties "social, psychological and functional parental relationships" with the child and the best interests of the child. We cannot agree.

### A. *Presumption of Parentage*

K.M. relies on Family Code section 7611, subdivision (d), which creates an evidentiary presumption of paternity for a man who receives the child into his home and openly holds out the child as his natural child. The UPA provides that, "[i]nsofar as practicable, the provisions of [the UPA] applicable to the father and child relationship apply" to the mother and child relationship as well. (Fam. Code, § 7650.) Thus, for determining maternity, it is appropriate to examine the statutory presumptions that apply

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at the time of conception. Neither party claims that prior to conception there was a change in intention. Therefore, we need not decide whether the "outset" includes a time prior to conception.

to the determination of paternity. (*Johnson, supra,* 5 Cal.4th at p. 90; see *In re Karen C., supra,* 101 Cal.App.4th at pp. 938, 939.)

The Supreme Court in *Johnson* has held, however, that the statutory presumptions do not apply when, as here, the identity of the natural mother is not an evidentiary question: "[The presumptions of paternity in Family Code section 7611] describe situations in which substantial evidence points to a particular man as the natural father of the child. (9B West's U.Laws Ann. (1987) Unif. Parentage Act, com. foll. § 4, p. 299.) In this case, there is no question as to who is claiming the mother and child relationship, and the factual basis of each woman's claim is obvious. Thus, there is no need to resort to an evidentiary presumption to ascertain the identity of the natural mother. Instead, we must make the purely legal determination as between the two claimants." (*Johnson, supra*, 5 Cal.4th at p. 91.) Here, as in *Johnson*, the factual basis of each woman's claim is obvious. K.M. has undisputed genetic consanguinity while E.G. gestated and gave birth to the twins. We resolve maternity under the *Johnson* intention test. The presumption of parentage that arises from Family Code section 7611, subdivision (d), is unnecessary to determine who is the natural mother.[12]

B. *Co-parenting*

K.M. argues that she should be recognized as a legal co-parent because she played a joint parental role with E.G. in raising the children. The argument must be rejected. Functioning as a parent does not bestow legal status as a parent. The appellate courts have consistently held that the domestic partner of a child's natural mother does not qualify as a parent under the UPA despite the parental role the partner played in the life of the child. (*West v. Superior Court, supra,* 59 Cal.App.4th 302; *Nancy S., supra,* 228 Cal.App.3d 831; *Curiale v. Reagan, supra,* 222 Cal.App.3d 1597.

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**12** In any event, the concept of receiving a child into one's home as one's *own child* must be distinguished from cohabiting with the child's mother and welcoming the *mother's child*. (*Miller v. Miller* (1998) 64 Cal.App.4th 111, 118.) The trial court found from the conflicting evidence that K.M. received the twins as E.G.'s children, agreeing not to disclose her own genetic connection to the children or to attain legal parental status until adoption. The presumption does not arise from these facts.

In *Nancy S.*, two women in a long-term lesbian relationship jointly decided to have children by artificial insemination. Nancy then gave birth to two children four years apart. Both women assumed the responsibilities of a parent, and the children referred to both women as "Mom." After the couple's relationship ended, the two shared custody and visitation for three years, but eventually a dispute arose over the custody arrangements. Nancy then obtained a judicial declaration that she was solely entitled to custody and that her former domestic partner, Michele, was entitled to visitation only with Nancy's consent. This court affirmed the trial court's determination that because Michele was neither a natural nor an adoptive parent she did not qualify as a parent. (*Nancy S., supra,* 228 Cal.App.3d at p. 836.)

The *Nancy S.* court recognized that Michele's role as a loving mother to the children would entitle her to the status of a "de facto parent" so as to allow her to intervene in a guardianship or dependency proceeding. (*Nancy S., supra,* 228 Cal.App.3d at pp. 836-837; see also *In re Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1158-1159.) But the court held that Michele's status as a de facto parent did not make her a natural parent under the UPA and consequently did not entitle her to custody or visitation without the consent of the natural parent. (*Nancy S.*, at pp. 837-838.)

In the present case, the trial court rejected K.M.'s claim of an agreement for joint parenthood and found that from the outset only E.G. was the intending parent. We must conclude in accordance with *Nancy S.* that K.M. could not acquire the status of a natural parent by thereafter functioning in a parental role.[13] The method available to K.M. for acquiring parental rights was adoption. Without an adoption decree formalizing her parental rights, K.M. is not legally recognized as the children's parent.

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[13] We do not mean to imply that the conduct of the parties after the birth of a child and the parental roles the parties played have no legal significance. Such evidence would be relevant to confirm or refute proof of the parties' parentage intentions at conception under the *Johnson* test.

C. *Estoppel to Deny Rights of Children*

K.M. argues that E.G. should be estopped by her conduct from denying K.M.'s parentage. The trial court rejected the argument below, finding that K.M. was not misled by E.G.: "she knew that [E.G.] did not intend [by her conduct] to confer parental rights upon [K.M.]; and she understood that [E.G.] would confer such rights only via formal adoption proceedings." K.M. now contends that the estoppel must be analyzed from the point of view of the children and that E.G. should be estopped because E.G. misled the children into believing that K.M., too, was their mother.

The application of estoppel in these circumstances has been rejected. In *Nancy S., supra,* 228 Cal.App.3d 831, the birth mother's lesbian partner argued that the doctrine of equitable estoppel should be applied because the mother had encouraged and supported a parent-child relationship for many years. The appellate court held that estoppel could not be invoked against the natural mother to establish parentage in a nonparent. (*Id*. at pp. 839-840.)[14] In *Nancy S.,* moreover, the court rejected the formulation advanced by the domestic partner that a nonparent may acquire parental status when the legal parent created the relationship between the nonparent and child with the intent that the relationship be parental in nature. (*Id*. at pp. 840-841.) The *Nancy S.* court explained as follows: "Although the facts in this case are relatively straightforward regarding the intent of the natural mother to create a parental relationship between appellant and her children, expanding the definition of a 'parent' in the manner advocated by appellant would expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the

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[14] Likewise, in applying the doctrine of equitable adoption in a case of intestate succession, the Supreme Court rejected the application of estoppel based merely on the existence of a familial relationship between the decedent and the claimant. "The existence of a mutually affectionate relationship, without any direct expression by the decedent of an intent to adopt the child or to have him or her treated as a legally adopted child, sheds little light on the decedent's likely intent regarding distribution of property." (*Estate of Ford, supra,* 32 Cal.4th at p. 170.)

status of individuals claiming to be parents would have to be litigated and resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status. By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue." (*Nancy S.,* at p. 841.)

Because there is substantial evidence supporting the trial court's finding that K.M. intended any child born of E.G. to be E.G.'s own child, K.M. does not qualify as a natural mother under the *Johnson* test. Pursuant to *Nancy S.,* K.M. cannot subsequently acquire parental status by equitable estoppel based upon E.G.'s conduct or the perceptions of the children.

D. *Best Interests of the Children*

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. invites us to decide this case based on the children's best interests and reverse. This we may not do. In *Johnson*, the Supreme Court expressly rejected the assertion that *parentage* can be based on the best interests of the child: "Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions." (*Johnson, supra,* 5 Cal.4th at p. 93, fn. 10.) Basing parentage on a best interests standard would put at risk the rights of any natural parent who entered into a relationship and encouraged the formation of parental bonds between the children and the new partner. (Cf. *Nancy S., supra,* 228 Cal.App.3d at pp. 840-841.) Moreover, the best interests standard would foster litigation and promote instability in the children's lives. (*Johnson,*

at pp. 93-94, fn. 10.) Thus, the best interests standard is limited to issues of custody and visitation and we may not apply it to decide the parentage question at issue here.[15]

DISPOSITION

The judgment is affirmed.

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Simons, J.

We concur:

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Jones, P.J.

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Gemello, J.

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[15] K.M. argues that the dismissal of her petition deprived her of her constitutional rights as a parent and likewise deprived the children of their constitutional rights to preservation of the parent-child relationship. These arguments presuppose that K.M. is the natural parent. (See *Johnson, supra,* 5 Cal.4th at pp. 98-100.) Because she is not a parent, the arguments fail. Amicus curiae, the National Association of Counsel for Children, argues that independent counsel should have been appointed to represent the interests of the children. Under the UPA, the trial court has discretion to appoint counsel for the children when custody or visitation is in issue. (Fam. Code, § 7635, subd. (d).) The trial court could reasonably have concluded that the interests of the children in preserving their relationship with K.M. were adequately advanced through the advocacy of K.M. and her counsel. Once the trial court determined that K.M. was not a legal parent, custody and visitation were no longer in issue.

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| Trial court: | Marin County Superior Court |
| Trial judge: | Hon. Randolph E. Heubach |

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| Counsel for Plaintiff and Appellant: | Hersh Family Law Practice,<br>Jill Hersh, Stephanie Wald |
| Counsel for Defendant and Respondent: | Sideman & Bancroft LLP,<br>Diana E. Richmond |

Shannon Minter and Courtney Joslin for National Center for Lesbian Rights on behalf of Plaintiff and Appellant

Marvin R. Ventrell for National Association of Counsel for Children and Donna Wickham Furth for Northern California Association of Counsel for Children as Amici Curiae on behalf of the minors