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“What is Sauce for the Gander is Sauce for the Goose:” Enforcing Child Support on Former Same-Sex Partners Who Create a Child Through Artificial Insemination

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**“WHAT IS SAUCE FOR THE GANDER IS SAUCE FOR THE
GOOSE:” ENFORCING CHILD SUPPORT ON FORMER SAME-SEX
PARTNERS WHO CREATE A CHILD THROUGH ARTIFICIAL
INSEMINATION**

I. INTRODUCTION

Whether or not marriage of gay couples is legally recognized by individual states, same-sex couples are forming unions and creating families. Adoption and new reproductive technologies have facilitated same-sex couples in their efforts,¹ and the formation of these “nontraditional” families is dramatically on the rise.² Unfortunately, as American society has clearly demonstrated, marriages sometimes end with divorce, and legal battles over parental rights and obligations involving the children of the marriage follow close behind.³ Similarly, as ill-prepared courts are finding out all too quickly, unions sometimes end with separation, bringing similar legal battles over parental rights and obligations involving the children of the union.⁴

The number of family law cases involving same-sex partners has risen steadily over the last generation, with the majority of cases involving lesbian and gay litigants seeking child custody and visitation.⁵ These cases have led the struggle in redefining the legal notion of parenthood. Many courts have recognized the positive benefits of permitting a relationship between a child and a non-biological parent to continue after the separation of the partners, and have granted non-biological parents custody and visitation rights.⁶ By

1. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 465-66 (1990).

2. THE URBAN INSTITUTE, GAY AND LESBIAN FAMILIES IN THE CENSUS: COUPLES WITH CHILDREN (2003), available at http://www.urban.org/UploadedPDF/900626_Checkpoints_Couples.pdf (“Ninety-six percent of all U.S. counties have at least one same-sex couple with children under 18 in the household . . .”).

3. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, NO. HS-11 (2003) (charting 21,500,000 divorced men and women in the United States in 2000 compared to 16,584,000 just 10 years earlier).

4. Nicole Berner, *Child Custody Disputes Between Lesbians: Legal Strategies and Their Limitations*, 10 BERKELEY WOMEN’S L.J. 31, 32 (1995).

5. *Id.* at 32.

6. See Barbara Bennett Woodhouse, *Children’s Rights in Gay and Lesbian Families: a Child-Centered Perspective*, in CHILD, FAMILY, AND STATE 273, 285-86 (N.Y.U. Press 2003)

contrast, courts have been unwilling to enforce corresponding obligations to same-sex parents. Although for years society has recognized the importance of enforcing child support obligations to provide a child with the financial support of two adults, courts have been reluctant to enforce these obligations on former same-sex partners to assist a child that has been created by artificial insemination. Granting rights without enforcing obligations establishes contradicting messages regarding a legal recognition of same-sex parents.

When a child is conceived through the process of artificial insemination into a union of two women, “the decision to create the child is even more conscious and deliberate than the decision that is made by some couples who are both biological parents and conceive a child by direct sexual intercourse.”⁷ While the latter could occur in a time span of about ten minutes in an act of lust, the former could take weeks if not months to obtain the necessary reproductive assistance.

Child support actions by lesbian mothers represent a unique stage in lesbian, gay, bisexual and transgender (“LGBT”) jurisprudential development because these cases are diametrically opposed to child custody and visitation cases.⁸ In child custody and visitation legal battles, the legal parent invokes the “traditional” laws of legal parenthood and asks the court to continue recognizing differences between same-sex parents and opposite-sex parents so their former partner is not awarded any parental rights.⁹ When a suit is brought to enforce child support on a former partner, the roles of the parties swap, and it is the non-legal parent who is arguing for the court to apply those traditional laws, in order to avoid the legal responsibility of financially supporting the child.¹⁰

The California Supreme Court broke new legal ground in the area of enforcing child support on same-sex parents in August of 2005. In opposition to the trend to deny enforcement of child support on former partners in a homosexual relationship, the court ruled in two cases that lesbian and gay partners who plan a family and raise a child together should be considered legal parents after a breakup, with the same rights *and responsibilities* as heterosexual parents.¹¹ In coming to this conclusion, the judges took another step toward providing for the best interest of all children, regardless of the marital status of their parents.

(arguing that “[a] child who has formed a parent-child relationship with a nonbiological co-parent or de facto parent has a right to legal recognition and protection of this relationship . . .”).

7. T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (Greaney, J., dissenting).

8. Kyle C. Velte, *Toward Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 264 (2001).

9. *Id.*

10. *Id.* at 264-65.

11. See *Elisa B. v. Superior Court of El Dorado County*, 117 P.3d 660, 670 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690, 692-93 (Cal. 2005).

This Note will begin by providing some background information on parenthood by artificial insemination. Part III will review the development of existing child-support laws in the United States and how these laws fail to address enforcement of child support on former same-sex partners. Part IV will discuss the roadblock to enforcing child support posed by the Uniform Parentage Act and will introduce the two cases recently decided by the California Supreme Court that demonstrate how courts can overcome this roadblock. The author will analyze the court's reasoning as well as the legal basis for the decisions. Part V will demonstrate how some courts have used the estoppel theory to enforce child support obligations. It will also discuss how courts have turned to arguments of public policy to support both sides of the debate. Part VI will introduce some precautionary measures same-sex parents can take to establish parental rights and responsibilities.

II. PARENTHOOD BY ARTIFICIAL INSEMINATION

Medical technologies directed toward human reproduction have advanced rapidly during the past decades, but state and federal legislatures have responded inadequately to the legal consequences of these new birth technologies.¹² This has left many courts with the decision of how to define parenthood and identify parents in families created by these technologies. The first step to defining parenthood is understanding the process of conception.

There are two types of fertilization that can cause the initiation of pregnancy.¹³ *In vivo* fertilization takes place within the body of a woman. Artificial insemination is a form of *in vivo* fertilization similar to natural reproduction except that the fertilization is not the direct result of sexual intercourse.¹⁴ During artificial insemination, sperm is deposited by a plastic syringe into the opening of a woman's uterus shortly after she has ovulated.¹⁵ By contrast, *in vitro* fertilization takes place outside of the body, where one or more ova are removed from the woman by a surgical technique and are placed in a dish where processed sperm are mixed with the ova.¹⁶ If fertilization occurs, the ovum undergoes division, and then within two to three days is placed in a woman's uterine cavity.¹⁷

Recognizing the importance to a child of financial support from two adults, many states have enacted laws to provide support for children that are created

12. Hutton Brown et al., *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597, 602 (1986) ("The resulting lag between technology and the law has forced courts to confront new situations that do not fit neatly into the statutory framework created to deal with past fact situations.").

13. *Id.* at 607- 608.

14. *Id.*

15. *Id.* at 608.

16. *Id.* at 608-09.

17. *Id.* at 609.

through artificial insemination to heterosexual couples.¹⁸ These statutes recognize the woman's consenting husband, rather than the sperm donor, as the child's father and are often based on the Uniform Parentage Act, which provides that if the husband has consented to artificial insemination, the resulting child is the legitimate child of the husband and wife, and that the sperm donor has no legally recognized relationship with the child.¹⁹ The developing statutes and case law enforcing child support on parents from artificial insemination, however, generally do not address the issue of parental responsibility for same-sex couples who mutually agree to create a child through artificial insemination.

III. TRADITIONAL CHILD SUPPORT OBLIGATIONS

Our current laws on child support enforcement demonstrate that ensuring financial support of children, whether from married or unmarried parents, is a high priority in our country's social policy.²⁰ Non-payment of child support has been referred to as the nation's greatest source of financial insecurity and is a leading cause of child poverty.²¹ Children who receive child support perform better academically, and are more likely to finish high school and attend college. Studies of the process of child support receipt has shown preexisting differences between children who receive support from both parents, and those who are supported by the income of only one parent.²²

Child support has historically been left to the states, but in 1950, the federal government stepped in by requiring states to notify local law enforcement when public assistance was paid out due to the desertion of a child by a parent.²³ Since the 1950s, the federal government has introduced several enforcement mechanisms and required more child support enforcement from the states, but state family law statutes still direct the enforcement process.²⁴ State courts must interpret and apply state family law statutes. Because most family law statutes are drafted as general guidelines, state court judges normally have broad discretion in resolving many family law disputes,

18. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 1325 (2004) (noting that the statutes, many of which are based upon the Uniform Parentage Act, usually require the husband's written consent to trigger the automatic recognition of his paternal status).

19. *Id.* at 1325; *see, e.g.* CAL. FAM. CODE § 7613 (West 2004); UNIF. PARENTAGE ACT § 703 (amended 2002), 9B U.L.A. 8 (Supp. 2005).

20. *See* Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. DCL L. REV. 357, 363-65 (2003) (discussing a brief history of child support enforcement).

21. *Id.* at 360 ("The possibility of a child escaping poverty often depends on whether or not the owed child support is being paid.").

22. *Id.* at 362.

23. *Id.* at 363.

24. *Id.* at 365.

including child support litigation.²⁵ This allows many state court judges the opportunity to use their position in order to provide for a child whose situation is not covered by state statutes, such as those created through artificial insemination by same-sex partners.

Blood ties are and always have been a principal determinant of personal relationships and resulting legal rights. Stemming from this notion, the concept of legitimacy and a preference for the child of legitimate birth emerged in early law.²⁶ Under English and American common law, children born out of wedlock were subject to different laws and different rights than "legitimate children," (those born to married parents).²⁷ In the United States, the historical treatment of non-marital children paid no regard to the needs of the child. Rather, the laws resulted in the punishment of the child under the rationale of protecting the exclusivity of the marital unit and punishing a woman who engaged in sex outside of marriage.²⁸ A series of U.S. Supreme Court decisions between 1968 and 1983 and the enactment of the Uniform Parentage Act have all but eliminated legal discrimination based on the "legitimacy" of a child.²⁹

One reason for the negative social attitude toward children born out of wedlock is the fact that illegitimacy is often accompanied by poverty.³⁰ Two married parents in a family setting are likely to provide a better economic

25. ELLMAN ET AL., *supra* note 18, at 459 (2004).

26. Paula A. Monopoli, *Deadbeat Dads: Should Support and Inheritance be Linked?*, 49 U. MIAMI L. REV. 257, 262-63 (1994).

27. *Id.* (noting that an illegitimate child could not inherit money from anyone, and common law did not impose upon the biological father any legal liability to support his offspring).

28. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1448 (1992).

29. Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L. J. 141, 154 (2004); Sanja Zgonjanin, *What Does It Take To Be a (Lesbian) Parent? On Intent and Genetics*, 16 HASTINGS WOMEN'S L.J. 251, 259 (2005); *see also* UNIF. PARENTAGE ACT, § 202, 9B U.L.A. 309 (2001); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (striking down a six-year Pennsylvania statute limiting the time to bring a support action for non-marital children, because the statute did not withstand the heightened scrutiny test under the Equal Protection Clause when compared to support rights of marital children); *Gomez v. Perez*, 409 U.S. 535, 539 (1973) (holding that there was a constitutional duty of *both* parents to support a non-marital child, once paternity had been proved); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 165 (1972) (holding that a non-marital child could also recover under state worker's compensation laws); *Levy v. Louisiana*, 391 U.S. 68, 70-72 (1968) (holding that non-marital children were clearly persons within the meaning of the Equal Protection Clause of the United States Constitution, and it would be "invidious to discriminate against them when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done [to their] mother").

30. Carole M. Hirsch, *When the War on Poverty Became the War on Poor, Pregnant Women: Political Rhetoric, the Unconstitutional Conditions of Doctrine, and the Family Cap Restriction*, 8 WM. & MARY J. WOMEN & LAW. 335, 341 (2002) (noting that this correlation has led to the stereotype that unwed mothers are lazy and undeserving).

climate for child rearing than an unmarried, all too often very young mother.³¹ The underlying causes for the sobering statistics of non-marital births and unplanned pregnancies are undoubtedly complex, but it remains up to the legislators and jurists to ensure that the non-marital child's best interests and welfare continue to be legally protected. This includes protection of those children who are created through artificial insemination, regardless of the sexual orientation of their parents.

Federal legislation concerning child support enforcement has provided a substantial boost in the fortunes of non-marital children. Congress has mandated that states enact child support guidelines in order to receive federal funds, in an attempt to make child support awards more uniform and to increase award levels and efficiency.³² As a condition to participation in the Federal program, the states are required to provide effective means for the establishment of paternity of non-marital children.³³ As a result, states established stricter means of enforcing child support.

The Uniform Parentage Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1973 and revised in 2000, contains guiding principles of full equality for all children in their legal relationship with both parents, whatever their parents' marital status.³⁴ By 2000, the UPA had been adopted in nineteen states and adapted in many more.³⁵ The Act provides that the parent-child relationship extends to every child and every parent.³⁶ It also delineates various methods for establishing a parent-child relationship.³⁷ It has been held, however, that the UPA has no application in a legal dispute between parties involved in a homosexual relationship.³⁸

Child support orders are issued upon a non-custodial parent based on the principle that parents have an obligation to support their children financially through childhood, even upon dissolution of the adult relationship.³⁹ Parenting rights and responsibilities typically go together: if you are a legal parent, you have both; if you are not a legal parent, you have neither. However, up to this point in legal history, homosexual parents have been treated differently. Courts have granted many non-biological partners in a homosexual

31. Swank, *supra* note 20, at 360.

32. ELLMAN ET AL., *supra* note 18, at 459-60.

33. 42 U.S.C. §§ 667, 668 (2005).

34. ELLMAN ET AL., *supra* note 18, at 955-56.

35. UNIF. PARENTAGE ACT, 9B U.L.A. 296 at Prefatory Note (2001).

36. UNIF. PARENTAGE ACT, § 103 (amended 2002), 9B U.L.A. 9 (Supp. 2005).

37. *Id.* at § 201.

38. *See, e.g., Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Cal. Ct. App. 1990) (noting that the Uniform Parentage Act, which deals with the rights of children and the determination of parentage, has no application where it was undisputed that a woman who had a homosexual relationship with the natural mother of the child who sought custody and visitation with the child, was not the natural mother).

39. Velte, *supra* note 8, at 263.

relationship rights of visitation and custody. Only a few, however, have enforced the coinciding parental responsibilities to non-biological partners from homosexual relationships.

The Equal Protection Clause of the Constitution requires states to enforce child support regardless of whether the parents of the child were ever married.⁴⁰ Although the law no longer discriminates against illegitimate children, there is a new category of children who are left without the support of the American legal system, and who are being discriminated against through no fault of their own – those created by same-sex couples through artificial insemination.

IV. A ROADBLOCK TO ENFORCEMENT BY THE UNIFORM PARENTAGE ACT AND A DETOUR BY THE CALIFORNIA SUPREME COURT

A. *The Uniform Parentage Act: A Roadblock to Enforcing Child Support Obligations of Same-Sex Parents*

The current language of the Uniform Parentage Act provides a defense to actions for child support by former domestic partners.⁴¹ A former domestic partner is not a parent within the meaning of the UPA, and thus according to some courts, does not have any of the rights or obligations arising from the parent and child relationship.⁴² Designed to equalize the legal and social status of children born out of wedlock, the prefatory note of the UPA includes the declaration that all children should be treated equally without regard to marital status of the parents.⁴³ With this goal in mind, UPA section 703 states that if a woman is married to someone other than a semen donor, then her *husband's* consent to the assisted reproduction is sufficient to make him the father.⁴⁴ The Act, however, is silent on the impact of artificial insemination of a woman with a domestic partner. Due to the precise statutory language of the Act, some courts in states that have adopted the Act have relied on it in refusing to recognize any parental responsibilities on former-domestic partners who participated in an artificial insemination process.⁴⁵

40. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

41. *See* UNIF. PARENTAGE ACT, § 703 (amended 2002), 9B U.L.A. 40 (Supp. 2005).

42. *Id.* at §§ 102 (14), 201 (Establishment of Parent-Child Relationship).

43. *Id.* at Prefatory Note.

44. *See also, id.* at § 201 ("The father-child relationship is established between a man and a child by . . . the man's having consented to assisted reproduction by a woman . . . which resulted in the birth of the child."); Polikoff, *supra* note 1, at 540 n. 459 ("It was fifteen years after the Act's adoption, in 1988, that the National Conference of Commissioners on Uniform State Laws approved legislation acknowledging the practice of alternative insemination of unmarried women.").

45. *See Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 215-16 (Cal. Ct. App. 1991) (noting that a lesbian who was not the natural or adoptive mother of her former partner's two children could

In California, a state that has adopted the pertinent part of the UPA, lower courts initially relied on the statutory language of the UPA to deny actions to establish that a former same-sex partner was obliged to pay child support.⁴⁶ *Elisa Maria B. v. The Superior Court of El Dorado County*, recently decided by the California Supreme Court, is the first case in California to bypass the strict language of the UPA.⁴⁷

The trial court and appellate court decisions in *Elisa Maria B.* paved the way for the decision by the Supreme Court of California, by developing theories of equity to enforce child support on a former domestic partner. The case involved two female partners who each gave birth to children conceived by artificial insemination.⁴⁸ Elisa delivered a boy and Emily had twins. They selected the children's names together, hyphenated the women's last names as the children's surname, and considered them to be "children of both women."⁴⁹ Elisa provided financial support and medical insurance for the children and claimed all three children as dependants for income tax purposes.⁵⁰ Six years after they began living together, the women split up and separated their children.⁵¹ Elisa agreed to provide financial support for Emily's twins "when she could." Almost a year and a half later, Elisa stopped sending money and stopped seeing the twins.⁵²

Emily began receiving public assistance for the twins, and the County of El Dorado filed an action to establish that Elisa is a "parent" of the twins in order to impose a child support obligation.⁵³ Elisa argued that she is not a parent of the twins within the meaning of the UPA and, thus, does not have any of the rights or obligations arising from the parent and child relationship.⁵⁴

The trial court found that Elisa should be "held to the same legal duty and responsibilities of a man found to be a presumed father" under the UPA.⁵⁵

not establish the existence of a parent-child relationship under the UPA even if she helped facilitate the conception and birth and assumed parental responsibilities); *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Cal. Ct. App. 1990) (holding that although UPA "confers standing upon any interested person to bring an action to determine the existence of a parent-child relationship," this does not extend to a woman who did not have a biological or adoptive relationship with the child of her former partner in a same-sex relationship).

46. *Elisa Maria B. v. Superior Court of El Dorado County*, 117 P.3d 660, 662 (Cal. 2005).

47. *Elisa Maria B. v. Superior Court of El Dorado County*, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004).

48. *Id.* at 496.

49. *Id.*

50. *Id.*

51. *Id.* at 498.

52. *Id.* at 496 (The court noted that Elisa claimed this infraction was because she did not want to have to deal with Emily due to the tension between them.).

53. *Elisa Maria B.*, 13 Cal. Rptr. 3d at 497.

54. *Id.*

55. *Id.* at 499.

Recognizing the unfairness of an individual intentionally entering an agreement to become a parent and then abandoning the responsibilities that go along with that decision, the trial court used the doctrine of estoppel to enforce child support upon Elisa.⁵⁶ Because Elisa "consented to the creation of these children and encouraged their creation," she is precluded by principals of promissory or equitable estoppel from disclaiming financial responsibility for them, according to the court.⁵⁷

On appeal, Elisa argued for a strict reading of the Uniform Parentage Act by asserting that the court could not impose a parental obligation of support on her because she is not a parent under the Uniform Parentage Act.⁵⁸ The Court of Appeals agreed, read the language of the Uniform Parentage Act strictly, and issued a peremptory writ of mandate directing the trial court to vacate its order and enter judgment in favor of Elisa.⁵⁹

Emily's situation precluded the enactment of the Domestic Partnership Act by the California Legislature, a statutory recognition and response to the problem of defining legal parenthood and its coinciding rights and responsibilities. The new law gives domestic partners most of the same rights as opposite sex spouses, including parental rights. California law now allows domestic partners to register with the Secretary of State to receive these rights under the Domestic Partnership Act.⁶⁰ In 2003, the Legislature added section 297.5 to the Family Code that states in pertinent part:

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 those spouses registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.⁶¹

The Domestic Partnership Act will make parentage automatic for children born to registered domestic partners during their partnership. This means that children will be assured, at least in California, of knowing they have two legal parents, and the availability of child support will mean fewer former partners left financially dependent on the state because of dissolution of their relationship.⁶² The Domestic Partnership Act, however, did not apply to this

56. *Id.*

57. *Id.* at 497.

58. *Id.*

59. *Elisa Maria B.*, 13 Cal. Rptr. 3d at 497.

60. Diana Richmond, *Tax Pitfalls Under the California Domestic Partnership Act*, CAL. FAM. L. MONTHLY, Dec. 1, 2004, at 346 ("New Family Code section 297.5 declares that registered domestic partners shall have the same rights and responsibilities as are granted to and imposed upon spouses.").

61. See CAL. FAM. CODE § 297.5 (West 2004).

62. Richmond, *supra* note 60, at 347.

case because it did not become effective until January 1, 2005, and because there is no evidence that Elisa and Emily ever registered as domestic partners.

In overturning the trial court, the Court of Appeals began its opinion by distinguishing Emily's role as natural mother of the child from Elisa's unrecognized role, and held that Elisa had no legal maternal relationship with the children under the UPA. For any child, California law recognizes only one natural mother.⁶³ The court referred to the language used in the UPA, which states that the term "parent-child relationship" 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 mother and child relationship and the father and child relationship."⁶⁴ Since Elisa is not the twins' natural mother and because she did not adopt the twins, according to the court, Elisa does not have any rights, privileges, duties, or obligations of a parent under the UPA.⁶⁵

The Court of Appeals refused to consider public policy in making its decision, stating that such decisions should be left to the legislature.⁶⁶ The court should have recognized that the California Legislature had already considered this policy debate and in response passed the Domestic Partnership Act. The court's decision also failed to take into consideration that the drafters of the UPA identified as a "notable feature" of the Act: "the declaration of equality for all children without regard to marital status of the parents of a particular child."⁶⁷ The drafters of the UPA included section 202 that states that a child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.⁶⁸ Both of these inclusions in the UPA support a decision to provide for the best

63. For former California cases, see *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991); *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522-23 (Cal. Ct. App. 1990) (holding that, although the UPA confers standing upon any interested person to bring an action to establish the existence of a parent-child relationship, the Legislature has not conferred upon a former lesbian partner who did not have a biological or adoptive relationship with the child of her former partner in a same-sex relationship, any right of custody or visitation upon the termination of the relationship.). The Court held that a lesbian who was not the natural or adoptive mother of her former partner's two children "could not establish under the existence of a parent-child relationship under the [UPA]" even if "she helped facilitated the conception and birth of both children and immediately after the birth assumed all the responsibilities of a parent." *Nancy S.*, 279 Cal. Rptr. at 215-16.

64. *Elisa Maria B. v. Superior Court of El Dorado County*, 13 Cal. Rptr. 3d 494, 499 (Cal. Ct. App. 2004).

65. *Id.* at 500.

66. *Id.* at 507 ("Whether and in what circumstances a person in a same-sex relationship, who is not related to the children born during the relationship, should have the rights or obligations of a parent are matters plainly within the realm of legislative policy.").

67. UNIF. PARENTAGE ACT, 9B U.L.A. 296 at Prefatory Note (2001).

68. *Id.* at § 202 (No Discrimination Based on Marital Status).

interest of the child, and to force those individuals who actively participate in the conception of a child to be responsible for his or her actions. The Court of Appeals not only failed to recognize public policy that has been promoted by the California Legislature recognizing the relationships of domestic partners, but also applied the UPA too strictly rather than using the law to make decisions that provide for the best interest of the child.

While the Court of Appeals of the Third District of California accepted the argument in *Elisa B.* that child support could not be enforced upon a former domestic partner because of the definition of parent under the UPA, the Court of Appeals of the Second District came to a different conclusion regarding the parental rights and responsibilities of former same-sex partners. In *Kristine Renee H. v. Lisa Ann R.*, as in *Elisa B.*, two women in a long-term relationship decided to have children and arranged for one of them to conceive a child through artificial insemination.⁶⁹ Before the child was born, however, the women obtained a judgment from the court based on a stipulation in which they declared themselves to be the "joint intended legal parents" of the unborn child.⁷⁰ Following the child's birth, the couple raised the child together for almost two years. The women then separated and the natural mother brought a motion to vacate the judgment so that her former partner could not obtain any custody or visitation.⁷¹

Although this case does not discuss the issue of child support, the Second District found a way to read past the strict language of the UPA and recognize the parental status of a former domestic partner. Here, the natural parent attempted to use the UPA to argue that her former partner had no parental rights.⁷² She sought to have the judgment regarding their former parental agreement vacated on the ground that the family court lacked jurisdiction under California's version of the UPA. The family court denied the motion, and the biological mother appealed.⁷³

The Second District considered whether the biological mother's former partner could be considered a parent under the UPA.⁷⁴ Recognizing the court's conclusion differed from the one reached by the Third District in *Elisa B.*, the Second District found that the UPA does provide a basis upon which the former partner can establish parentage. The court referred to the recognition of

69. *Kristine H. v. Lisa R.*, 16 Cal. Rptr. 3d 123, 125 (Cal. Ct. App. 2004), *vacated*, 117 P.3d 690 (Cal. 2005).

70. *Id.* The pre-birth judgment was later found to be void because a determination of parentage cannot rest simply on the parties' agreement. According to the court, the sole basis upon which the family court could determine parentage is under the Uniform Parentage Act. *Id.* at 126.

71. *Id.* at 125.

72. *Id.*

73. *Id.*

74. *Kristine H.*, 16 Cal. Rptr. 3d at 126.

“presumed fathers” by the UPA, finding that just as the UPA recognized “presumed fathers” it also can be read to recognize “presumed mothers.” The Court held as follows:

While such a conclusion under the Act may not be a result that the Legislature expressly contemplated, the Act does 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.⁷⁵

Because the former partner is neither a natural mother nor an adoptive mother, the Court concluded that it could look to the provisions of the Act establishing the father-child relationship to determine whether the former partner can establish parentage.⁷⁶

According to the Second District, Section 7611, subdivision (d) of the California adopted UPA establishes a presumption. The statute provides that a man is presumed to be a parent of a child if “he receives the child into his home and openly holds out the child as his natural child.” *When read in a gender-neutral manner*, the statute provides that a woman is presumed to be a parent of a child if “[she] receives the child into [her] home and openly holds out the child as h[er] natural child.”⁷⁷ The court found no prohibition in the Act that prevented them from concluding that a child has two parents of the same sex, especially where no one other than the partner is “vying to become the child’s second parent.”⁷⁸

To support its decision, the court reiterated the Act’s rule that the parent-child relationship extends equally to every child and to every parent regardless of the marital status of the parent.⁷⁹ Therefore, the marital status of the two women is irrelevant for purposes of determining whether there is a second parent. The Act contemplates two legal parents irrespective of their gender. Disregarding the fact that its decision may prove controversial, the Second District placed great weight on policy considerations, noting that the state has a compelling interest in establishing parentage, and holding parents, rather than the state, responsible for their children’s care.⁸⁰

75. *Id.* (referring to CAL. FAM. CODE § 7650 (West 2004)). This section is the same in substance as UNIFORM PARENTAGE ACT, § 4(a), 9B U.L.A. (1973).

76. In coming to this conclusion, the court referred to the Legislature’s passing of the California Domestic Partner Rights and Responsibilities Act of 2003, discussed *supra* note 7, to show legislature’s intent of recognizing former domestic partners as parents. *Id.* at 126 n.5.

77. CAL. FAM. CODE § 7611 (West 2004).

78. *Kristine H.*, 16 Cal. Rptr. 3d at 126.

79. UNIFORM PARENTAGE ACT, § 202, 9B U.L.A. 309 (2001) (No Discrimination Based on Marital Status).

80. *Kristine H.*, 16 Cal. Rptr. 3d at 135.

B. "What is Sauce for the Gander is Sauce for the Goose"

The California Supreme Court, in hearing *Elisa B.* and *Kristine*, sided with the Court of Appeals of the Second District and unanimously decided to recognize "presumed" parenthood for same-sex parents.⁸¹ In *Elisa B.* the court concluded that a woman who agrees to raise children with her lesbian partner, supports her partner's artificial insemination using an anonymous donor, and receives the resulting children into her home and holds them out as her own, is the child's presumed parent under the Uniform Parentage Act and has an obligation to support the child.⁸² In *Kristine*, the court invoked the doctrine of estoppel to hold that a biological mother could not attack the validity of a judgment to which she had stipulated to naming her former partner as a legal parent.⁸³

Both cases decided by the California Supreme Court involved couples that had made deliberate decisions to bring a child into the world through artificial insemination. The gender-specific statutory language presented in the Uniform Parentage Act posed a problem for the lower courts in finding the former partner to be a legal parent. The California Supreme Court, noting support from both public policy and equity rationales, accepted the detour introduced by the Second District, and paved the way for California lower courts as well as other states to begin enforcing child support obligations when it is necessary in untraditional families.

In overturning the Third District of California's decision in *Elisa B.*, the California Supreme Court referred to the discrimination that previously existed in the law with respect to children born to unmarried parents, and noted that the UPA was enacted, in part, to end such discrimination.⁸⁴ One purpose of the UPA was to eliminate distinctions based upon whether a child was born into a marriage, and thus was "legitimate," or was born to unmarried parents, and thus was "illegitimate." Regardless of the marital status of the parents, the UPA provides that the parent and child relationship extends equally to every child and to every parent.⁸⁵

The California Supreme Court found the facts of the case perhaps the most compelling reason for enforcing child support obligations.⁸⁶ It recognized that it was undisputed that Elisa actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting

81. See *Elisa B. v. Superior Court of El Dorado County*, 117 P.3d 660 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

82. *Elisa B.*, 117 P.3d at 670.

83. *Kristine H.*, 117 P.3d at 693.

84. *Elisa B.*, 117 P.3d at 664.

85. *Id.*

86. *Id.* at 669.

child or children would be raised by Emily and her as co-parents, and they did act as co-parents for a substantial period of time.⁸⁷

According to the court, a declaration that Elisa was not a parent of the twins and, thus, had no obligation to support them because she is not biologically related to them would leave the children with the support of only one parent.⁸⁸ The financial burden would be borne by the country rather than Elisa because Emily is financially unable to support the twins on her own.⁸⁹ The Court quoted the California Legislature in stating:

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 rights⁹⁰

By recognizing the value of determining paternity, the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise be on the public.

The court's decision is rational and provides for the best interest of the child. Society for decades has found the financial abandonment of a child unacceptable and has imposed child support obligations when the child is conceived through natural reproduction. The court is simply recognizing the hypocrisy in not enforcing the same obligations in artificial insemination cases.

In his concurring opinion, Justice Kennard writes:

Had a man who, like Elisa, lacked any biological connection to the twins received them into his home and held them out as his natural children, this case would undoubtedly have resulted in determination that he met the statutory criteria for being the presumed father of the twins. These legal principles apply with equal force in this case, where Elisa, whom the county seeks to hold financially accountable for support of the twins, meets the statutory criteria of a presumed mother, a status that brings with it the benefits as well as the responsibilities of parenthood.⁹¹

Justice Kennard concludes his opinion with the "flip side" of an old adage, "What is sauce for the gander is sauce for the goose."⁹²

87. *Id.*

88. *Id.* at 669.

89. *Id.* at 664.

90. *Elisa B.*, 117 P.3d at 669.

91. *Id.* at 673 (Kennard, J., concurring).

92. *Id.*

C. "Presumed" Parents

The recognition of "presumed fathers" by the Uniform Parentage Act demonstrates the importance of preserving an intact family unit and existing parent-child relationships to the drafters of the Act. These presumptions are founded on the principles of stability for the child and ensuring that the child will continue to reap the benefits, especially financial benefits, of having two legal parents.⁹³ Applying these principles to preserve familial relationships demonstrates that having parents – socially, emotionally, and financially – is more important than a biological or adoptive connection to the child. These principles are equally applicable to lesbian co-parents. Thus, the issue of UPA application to lesbian co-parents is not so contrary to the language of the UPA.

Elisa became a "presumed parent" of the twins, according to the Supreme Court of California, when she both received the twins into her home and openly held them out as her own.⁹⁴ This legal presumption of motherhood can be rebutted only by clear and convincing evidence.⁹⁵ Justice Kennard, in his concurring opinion, opined that permitting a rebuttal in this case would be inappropriate because it would leave the children with the financial support of only one parent.⁹⁶

Following a similar rationale, the Supreme Court of California concluded in *Kristine*, that the biological mother was estopped from arguing that her former partner was not a legally recognized parent by the UPA.⁹⁷ Regardless of whether the stipulated judgment was enforceable, the UPA recognizes the former partner as a "presumed parent." Ultimately, however, the court relied upon the estoppel doctrine.⁹⁸ The court had subject matter jurisdiction to determine the parentage of the unborn child because *Kristine* invoked that jurisdiction, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment for nearly two years. Therefore, the court found it would be unfair both to Lisa and the child to permit *Kristine* to challenge the validity of that judgment.⁹⁹

V. USE OF THE ESTOPPEL THEORY TO ENFORCE CHILD SUPPORT OBLIGATIONS AND THE CHANGING ROLES OF "PUBLIC POLICY"

Kristine is not the only case to introduce the estoppel theory in determining parental rights and obligations for same-sex parents.¹⁰⁰ The use of the estoppel

93. ELLMAN ET AL., *supra* note 18, at 955, 968.

94. *Elisa B.*, 117 P.3d at 670.

95. *Id.* at 667.

96. *Id.* at 673 (Kennard, J., concurring).

97. *Kristine H. v. Lisa R.*, 117 P.3d 690, 693 (Cal. 2005).

98. *Id.*

99. *Id.* at 696.

100. *Id.* at 693.

theory to enforce child support is based on the reliance component that exists in many fact situations of same sex-partners who create a child through artificial insemination. When entering into the realm of parenthood, one partner relies on the promise of the other partner to share both the benefits and responsibilities of starting a family together.

Estoppel is a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation knew or should have known that the other would rely upon the conduct to his detriment.¹⁰¹ The argument is that when a former partner assists in the process of artificial insemination, invites the child into the home and holds the child out as their own, they should not later be able to walk out on that child. The contract theory of promissory estoppel enforces a promise that “the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance.”¹⁰² Such a promise is binding if injustice can be avoided only by enforcement of the promise.¹⁰³

According to the American Law Institute’s Principles of the Law of Family Dissolution, a parent by estoppel is one who, although not a biological or adoptive parent:

Lived with the child for at least two years, holding out and accepting full and permanent responsibility as a parent, as part of a prior co-parenting agreement with the child’s legal parent . . . to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child’s best interests.¹⁰⁴

The determination of whether to recognize parenthood through estoppel and whether to enforce child support obligations will depend largely on the facts of each individual case: How involved was the parent? How long had they assisted in raising the child? What conversations occurred before the artificial insemination process regarding the responsibilities of each partner? If the promisor knows or should have known that the promisee would rely on his promise, then enforcement of the contract is necessary to avoid injustice.¹⁰⁵

101. *L.S.K. v. H.A.N.*, 813 A.2d 827, 877 (Pa. Super. Ct. 2002).

102. RESTATEMENT (SECOND) OF CONTRACTS § 90 (2003).

103. *Id.*

104. PRINCIPLES OF FAMILY DISSOLUTION § 2.03(1)(b) (2002). This source is published by the American Law Institute to offer “a legal framework that can accommodate the different choices people make and the different expectations they bring to their family relationships.” *Id.* at Director’s Foreword at xv. See also, Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-parents*, 49 VILL. L. REV. 363, 389 (2004).

105. Osborne, *supra* note 104, at 389.

A. "You Promised!" Application of Estoppel Doctrine to Enforce Child Support on Same-Sex Parents: *L.S.K. v. H.A.N.*

When the Pennsylvania Superior Court handed down its decision in *L.S.K. v. H.A.N.* on Dec. 17, 2002, it became the first appellate court in the nation to apply the estoppel doctrine to preclude a former domestic partner from defending against paying child support by arguing that she or he was not the biological parent of the child in question.¹⁰⁶ The court considered a question of first impression: whether a woman owes a duty of support to the children of her former lesbian partner.¹⁰⁷ The two women, L.S.K. (biological mother) and H.A.N., were involved in a relationship for more than a decade when they decided to have children together.¹⁰⁸ From two pregnancies created by artificial insemination, L.S.K. gave birth to five children.¹⁰⁹ Because H.A.N. was laid off from her job when the first child was born, L.S.K. returned to work while H.A.N. cared for the child. During the second pregnancy, L.S.K. became incapacitated and H.A.N. took care of her.¹¹⁰ After the second birth, L.S.K. again returned to work while H.A.N. stayed home and cared for the children. The parties separated in the fall of 1997, when the oldest child was six, and the other four children were four years old.¹¹¹

In February of 1998, H.A.N. filed a complaint requesting an order granting her custody of the children.¹¹² This action provided the stepping-stone for the court to enforce a child support obligation upon a same-sex partner by using the estoppel theory.¹¹³ In response, L.S.K. filed an action seeking child support for the five children. H.A.N. alleged that there was no legal cause of action against her for child support in the absence of an order granting her legal custody or *in loco parentis*¹¹⁴ status.¹¹⁵ The trial court found that H.A.N.'s

106. Lawrence W. Abel, *Can a Woman Father a Child? Recent Rulings in Pennsylvania Point to the Affirmative. Is Your State Far Behind?*, THE MATRIMONIAL STRATEGIST, June 10, 2003, at 1.

107. *L.S.K. v. H.A.N.*, 813 A.2d 827, 876 n.4 (Pa. Super. Ct. 2002).

108. *Id.* at 874-75 (noting that although they originally planned on taking turns getting pregnant, due to a medical condition, H.A.N. could not bear children).

109. *Id.* (noting that one child was conceived from the first artificial insemination, and four children were conceived at the second insemination).

110. *Id.*

111. *Id.* at 875 (noting that the mother was transferred and moved with the children to San Diego, California and the former partner remained in Pennsylvania).

112. *Id.* at 876.

113. *L.S.K.*, 813 A.2d at 876 ("[E]quity mandates that H.A.N. cannot maintain the status of *in loco parentis* to pursue [a custody] action as to the children, alleging she has acquired rights to them, and at the same time deny any obligation for support merely because there was no agreement to do so.").

114. *Id.* ("The phrase *in loco parentis* refers to someone who is not a lawful party but puts oneself in the situation by assuming the obligations incident to the parental relationships without going through the formality of a legal adoption.").

conduct in seeking custody of the children demonstrated her previous intent to be a parent and estopped her from claiming that she was not liable for support.¹¹⁶

Upon review, the Superior Court noted that during the custody litigation, H.A.N. had established her *in loco parentis* status, which allowed her standing in the custody litigation, and through which she gained legal, as well as physical, custody.¹¹⁷ Recognizing the hypocrisy in H.A.N.'s refusal to pay child support after succeeding in gaining child custody, the court affirmed the trial court's decision to enforce child support on the former domestic partner.¹¹⁸ The Superior Court's decision to affirm relied in part on equitable considerations brought on by H.A.N.'s seeking and receiving custody rights,¹¹⁹ and was supported by public policy arguments to provide for the best interests of the children.¹²⁰

This case presents a set of facts where one partner's conduct evinces a powerful case of actual consent to the creation of the child. The allegations demonstrate a deliberate course of conduct with the precise goal of causing the birth of these children. In *L.S.K.*, the Superior Court took into consideration that H.A.N. "acted as a 'co-parent' with Mother in all areas concerning the children's conception, care and support."¹²¹ For example, besides agreeing to have children through artificial insemination, H.A.N. was the mother's partner in childbirth classes and active in the delivery room, assisted in selecting the names of the children, had her family members serve as godparents, and stayed home and cared for the children while L.S.K. continued her career.¹²²

In response to H.A.N.'s argument that an absence of legislation on the matter prevents any enforcement, the court held that equitable considerations "can be applied in weighing what is *just and necessary to protect the rights, interests and welfare of the children involved.*"¹²³ In deciding this manner, the court did not hide from the controversial topic but took on its role to supplement where legislation was lacking, noting:

115. *Id.* at 875.

116. *Id.* (noting that a support conference was held before a hearing officer and on February 12, 2002, the trial court entered a final order effective May 22, 1998, directing H.A.N. to pay child support to the mother for the five children).

117. *Id.* at 876. ("H.A.N.'s *in loco parentis* status allowed her to have standing to petition for custody of the children.").

118. *Id.* at 874.

119. *L.S.K.*, A.2d at 877; *see also supra* note 77 and accompanying text.

120. *L.S.K.*, 813 A.2d at 878 ("[C]ourts must construct a fair, workable and responsible basis for the protection of children . . . in order to protect the best interest of the children involved, both parties are to be responsible for the emotional and financial needs of the children.").

121. *Id.*

122. *Id.* (The court also noted that H.A.N. was involved in the children's day-to-day care and schooling, as well as health needs for over eight years.).

123. *Id.*

We recognize this is a matter which is better addressed by the legislature rather than the courts. However, in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have *vis a vis* each other.¹²⁴

The court relied on the doctrine of *in loco parentis* in making its equitable decision.¹²⁵ This doctrine recognizes parenthood in an adult who acts like a parent and voluntarily takes over custodial duties as if she were the parent. It imposes on this person the same duties and responsibilities as would be imposed on a natural parent.¹²⁶ *Spells v. Spells* formulated the *in loco parentis* doctrine as follows:

[A] person may put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. This status, [known as *in loco parentis*] embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties The rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child.¹²⁷

In loco parentis has been used in cases brought by step-parents attempting to overcome the barriers raised by not being a biological parent.¹²⁸ The weakness of an *in loco parentis* argument is that courts apply it selectively. However, some courts concerned with the best interests of children are unwilling to ignore the importance of parental relationships children develop with those who are not their legal parents.¹²⁹ It was the Superior Court's innovative legal framework of combining *in loco parentis* status and the Doctrine of Estoppel that led to its decision to enforce child support on a former same-sex partner.¹³⁰

B. "We're Having a Baby – But You're Supporting It!" Public Policy and Refusing to Enforce an Agreement to Support a Child: *T.F. v. B.L*

Most courts are hesitant to apply the estoppel theory and recognize legal parenthood for same-sex partners. Public policy arguments are often used to

124. *Id.*

125. *Id.* at 876.

126. Polikoff, *supra* note 1, at 502.

127. *Id.* at 502-03. See also *Spells v. Spells*, 378 A.2d 879, 881-82 (Pa. Super. Ct. 1977).

128. *Seeger v. Seeger*, 547 A.R.2d 424, 428 (Pa. Super 1988) (holding that partial custody and visitation were appropriate for a nonbiological father who had raised his wife's child as his own); *Gribble v. Gribble*, 583 P.2d 64, 68 (Utah 1978) (holding that a stepfather standing *in loco parentis* to his stepson was a parent for purposes of the statute authorizing visitation by parents, grandparents, and other relatives).

129. Polikoff, *supra* note 1, at 503.

130. *L.S.K.*, 813 A.2d at 874.

rationalize a contrary decision. In doing so, courts ignore the public policy of providing for the best interest of the child. Thus, the role of public policy is on both sides of the enforcement battle. Considerations of public policy have been used to support decisions both enforcing and not enforcing child support obligations.

T.F. and B.L., two women who had a “commitment ceremony,” began living together in the fall of 1996, and for the next four years pooled their money and nominated each other as beneficiaries of their life insurance policies and retirement plans.¹³¹ Not unlike many couples beginning their life together, T.F. and B.L. began discussing raising a child.¹³² B.L. was hesitant at first and unsure of her ability to be a parent, but later told T.F. that she too wanted to have a child. Excited about the possible new addition to their family, the couple talked extensively about the life-changing decision.¹³³ They discussed B.L.’s reasons for her change of heart as well as such topics as whether they would rather have a boy or a girl, baptism, schooling, and the division of labor between the couple should they have the child.¹³⁴ As a result of their conversations, T.F. scheduled several appointments at a fertility clinic and both women attended the appointments.¹³⁵ After rejecting other options such as adoption or a foster child, the couple *decided together* to proceed with the T.F.’s artificial insemination.¹³⁶

The couple both selected the anonymous donor, and used joint funds for insemination and prenatal care expenses.¹³⁷ After several insemination procedures, T.F. became pregnant.¹³⁸ The couples’ relationship deteriorated in the following months, and B.L. moved out of the shared apartment in May 2000. Prior to leaving, B.L. expressed her regrets about being a “separated parent,” and said she desired to adopt the child and promised to talk later about the details. Two months later, T.F. gave birth to a boy.¹³⁹

The Supreme Judicial Court of Massachusetts held that B.L. was not responsible for supporting the child that she had previously agreed to raise.¹⁴⁰ Ultimately, the court’s reasoning and analysis builds a better argument for the opposite outcome: enforcement of child support.

131. T.F. v. B.L., 813 N.E.2d 1244, 1247 (Mass. 2004).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. T.F., 813 N.E.2d at 1247.

138. *Id.*

139. *Id.* at 1247-48.

140. *Id.* at 1253 (“Because the defendant is not a parent under any of the statutory provisions enacted to establish parenthood, she has no duty to support the child financially, and she may not be ordered to pay support.”).

The court affirmed the trial judge's finding that there was an agreement by B.L. to accept the responsibilities of becoming a parent in consideration for T.F.'s conceiving and bearing a child.¹⁴¹ The two women lived together for several years, pooled their finances, and had extensive conversations regarding the child.¹⁴² It is reasonable to conclude that T.F. relied upon B.L.'s agreement. B.L. did not object to having a child. Rather, the court noted, she actively participated in medical decisions, procedures, and discussions about the child's future and finances related to the conception and raising of the child.¹⁴³ The majority held that a finding of implied contract on these facts was permissible.¹⁴⁴

T.F.'s roadblock, which serves as a roadblock for same-sex parents across the country attempting to enforce child support against former partners, lies solely in the court's public policy argument. All other discussion by the court regarding enforcement seems to support a contrary decision. For example, the majority recognized that contracts between unmarried cohabitants regarding property, finance, and other matters are normally enforceable in Massachusetts, and furthermore, contracts that may concern the welfare and support of children are enforceable provided they do not contravene the best interest of the child.¹⁴⁵ The majority also recognized that "contracts between unmarried same-sex couples concerning the welfare and support of a child stand on the same footing as any other agreement between unmarried cohabitants."¹⁴⁶ Rather than hinge its decision on the fair and equitable outcome that is dictated by the facts, the majority held that this contract violates or conflicts with public policy and treats it as void.¹⁴⁷ The court stated, "[t]he decision to become, or not to become a parent is a personal right of such delicate and intimate character that direct enforcement . . . by any process of the court should never be attempted."¹⁴⁸

In demonstrating the public policy not to enforce agreements to become parents, the majority refers to a case previously decided by the court, *A.Z. v. B.L.*, where a plaintiff prevented his estranged wife from using his own sperm (which had been frozen and stored by an *in vitro* fertilization clinic) to create a child.¹⁴⁹ In *A.Z.*, the Supreme Judicial Court of Massachusetts refused to enforce an agreement that compelled the husband to become a parent against

141. *Id.* at 1249.

142. *Id.*

143. *T.F.*, 813 N.E.2d t 1249.

144. *Id.*

145. *Id.* at 1249-50 (giving reasoning which supports an opposite conclusion).

146. *Id.* at 1250.

147. *Id.*

148. *Id.* (referring to principles expressed by the court in *A.Z. v. B.Z.*, 431 Mass. 150, 160 (2000)).

149. *Id.* at 1250; *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000).

his will.¹⁵⁰ *A.Z.* is a case where a husband is preventing a wife from creating a child from his sperm.¹⁵¹ In *T.F.*, however, a child has already been created through the efforts of both parents. The court finds that the same public policy issue, not to enforce agreements to become parents, is underlying both cases.¹⁵²

The majority completely ignores a very important and significant factual difference between these two cases. *B.L.* not only consented to the birth, but also attended the insemination procedure. It was not until after the child was conceived, that *B.L.* decided she no longer wanted to be a parent. But in *A.Z.*, a child has not already been born and the court is in the position to prevent the conception. There is no life that will be affected by not enforcing the agreement. The court in *B.L.* is not merely deciding whether to enforce a contract that only affects two adults and some sperm, but whether to enforce a contract affecting the rest of a child's life who was conceived after a carefully deliberated agreement. The majority takes no notice of the public policy implications of leaving a child to be supported financially by only one income.

The facts demonstrate that *T.F.* and *B.L.* thoroughly discussed their decision to create a child, and endured a lot in order to finally do so. By contrast, there are three million unplanned pregnancies that occur in the United States each year.¹⁵³ Courts do not hesitate to enforce child support obligations on biological un-wed parents of children who are conceived by accident.¹⁵⁴ A child who is conceived intentionally by two consenting adults, however, may be left with the support of only one parent. There is only one parent's income that will go toward feeding the child, clothing the child, and paying for the child's education.

The policy espoused by the court of not enforcing agreements to become parents has no true application to this case. Here, we are not talking about a decision to become a parent. A decision has already been made by *B.L.* to become a parent, and since the conception took place, *B.L.* has become a parent. She had adequate time to consider this delicate decision. Now, *B.L.* should be forced to be responsible for bringing this child into the world. The argument of the majority fails because they are analyzing the case as if the child was never born.

The irrationality of referring to a public policy that is applied to cases where a child is not yet conceived, to a case where a child is already conceived, leaves gaping holes in the majority's opinion and suggests that the

150. *T.F.*, 813 N.E.2d at 1252.

151. *Id.* at 1059.

152. *Id.* at 1251.

153. American Pregnancy Association, *Unplanned Pregnancy*, <http://www.AmericanPregnancy.org/unplannedpregnancy/index.htm> (last visited Oct. 15, 2005).

154. ELLMAN ET AL., *supra* note 18, at 955, 973-74 (2004).

court was reaching for an excuse. Was public policy driving the majority's decision, or was this argument merely an attempt by the court to remain out of the midst of a broiling public controversy – legal recognition of same-sex families?

The dissent, noticing the difference between a contract over sperm, and one that has resulted in a child, acknowledges that the agreement to create a child was unenforceable, but insists correctly that the agreement includes an enforceable promise to pay child support.¹⁵⁵

The decision to create this child was even more conscious and deliberate than the decision that is made by some couples who are both biological parents and conceive a child by direct sexual intercourse A person cannot participate, in the way the defendant did, in bringing a child into the world, and then walk away from support obligation.¹⁵⁶

Judge Greaney, writing the dissent, is successful in introducing public policies that support a decision to enforce the contract. He notes that the Massachusetts Legislature, as the legislature in most other states, has long recognized the importance of child support for all children. It has expressed the idea that "dependent children shall be maintained, as completely as possible, from the resources of their parents' and not by the taxpayers, and that support determination should be made in 'the best interests of the child.'"¹⁵⁷ Furthermore, the Massachusetts Legislature has in many ways supported assisted reproductive technologies and has made clear that the parentage of children born as a result of artificial insemination does not depend on biology but may be determined on the basis of consent.¹⁵⁸

With these policies in mind, the majority failed to focus its decision on the rights of the child that was born. Although courts are reluctant to enforce parenthood contracts, the case presented here introduces a completely different issue. The court is not determining whether an individual should be forced to have a child, but rather whether an individual who has already assisted in having a child should be required to help support it.

VI. POSSIBLE PRECAUTIONARY MEASURES FOR SAME-SEX PARENTS

The decisions of state courts to recognize actions brought to enforce child support on former same-sex partners vary greatly from one jurisdiction to the next, and rely on state and local guidelines and procedures that govern the action in the court in which it is filed.¹⁵⁹ As state courts continue to strike

155. *T.F.*, 813 N.E.2d at 1255 (Greaney, J., dissenting).

156. *Id.*

157. *Id.*

158. *Id.*

159. JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 2 (2d ed. 2001) ("State courts . . . must interpret and apply state family law statutes to each particular legal

down these support enforcement attempts, plaintiffs continue to find new arguments to persuade the court that ordering child support is consistent with the present laws of the state and coherent with the state's public policy of finding for the best interest of the child.

There are some precautionary measures same-sex partners can take to attempt to ensure issues of support do not later emerge after separation. Second-parent adoptions may be one way for lesbian co-parents to solidify their legal relationship with their children, as well as protect their legal rights should the couple later decide to separate.¹⁶⁰ Although many states granting legal parenting rights through adoption to a same-sex co-parent require termination of the biological parent's rights, a few states permit adoption by same-sex couples through second-parent adoption.¹⁶¹ Second-parent adoptions give the non-biological parent in a same-sex relationship the same rights to a child as the biological parent.¹⁶² A third party adopts the child, but does not disturb the rights of the biological parent.¹⁶³

Courts that have permitted such adoptions generally conclude that children are best served by having two legal parents. A child with two legal parents has two sources of support and inheritance rights, as well as access to an array of benefits, including health insurance, social security, and other benefits provided by the parents' employers.¹⁶⁴ If the adults' relationship later ends, their status as the child's legal parents gives them both standing to seek custody or visitation with the child. Additionally, both legal parents could be required to continue to support the child.¹⁶⁵

Currently seven states allow lesbian co-parents to adopt the biological or adoptive children of their partners.¹⁶⁶ In sixteen other states, the legality of co-parent adoption is questionable, as it has only been granted at the trial court

controversy. . . [because] [m]ost family law statutes are drafted as general guidelines. [S]tate court judges normally have broad discretion in resolving many family law disputes.”).

160. Osborne, *supra* note 104, at 368.

161. Martha Elizabeth Lieberman, Note, *The Status of Same Sex Adoption in the Keystone State Subsequent to the State Supreme Court's Decision in Adoption of R.B.F. and R.C.G.*, 12 J.L. & POL'Y 287, 297-300 (2003).

162. Tiffany L. Palmer, *Family Matters: Establishing Legal Parental Rights for Same-Sex Parents and their Children*, 30 HUM. RTS. 9, 10 (Sum. 2003) (“[M]any families relocate to a jurisdiction that allows second-parent adoption in order to obtain protected legal status.”).

163. Osborne, *supra* note 104, at 369.

164. Eleanor Michael, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family,”* 36 CONN. L. REV. 1439, 1455 (2004) (“A ‘financial well-being’ approach in the adoption context focuses on the practical benefits, as measured in dollars and cents, which a child would experience from being raised by a same-sex couple . . .”).

165. *Id.* at 1442.

166. Osborne, *supra* note 104, at 369 n.41 (“The states that allow second-parent adoption are California, Connecticut, Massachusetts, New Jersey, New York, Pennsylvania and Vermont.”).

level and has not been specifically approved at the appellate level or by the legislature.¹⁶⁷ One state specifically bars lesbians and gay men from adopting children.¹⁶⁸ Although second-parent adoption is gaining acceptance, it is generally easier for a gay individual to adopt a child than it is for a same-sex couple to adopt together.

Private contracting among lesbian partners to arrange parenting responsibilities should the two women separate may seem like the ideal solution to the planned lesbian family. A co-parenting agreement would prove the intent of both partners to create and raise the child and take on the legal responsibilities of parenthood, such as financially supporting the child.¹⁶⁹ Furthermore, it could also prevent battles over custody and visitation.¹⁷⁰ Unlike the children resulting from accidental births that often occur in circumstances involving heterosexual couples, the children created through artificial insemination by lesbian couples are almost always the result of careful deliberation and agreement. Both partners plan for the pregnancy, provide emotional and financial support for the child, and assume the responsibilities of equal co-parenthood.¹⁷¹ Yet, most courts refuse to consider these realities when petitioned to enforce these parenting agreements.¹⁷²

The contract, a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty, is a classic device for the enforcement of private agreements.¹⁷³ Courts, however, often prevent contract law from entering into intimate or family spheres. This reluctance is, in part, due to policy concerns of not wanting to "disrupt domestic harmony."¹⁷⁴ A policy rationale given to prevent contract law from entering the realm of un-wed cohabitants is the worry that it would "undermine marriage by threatening its exclusivity."¹⁷⁵ Imposition of the contract model on family agreements has traditionally been seen as inappropriate.

167. *Id.* at 369 n.46 ("The sixteen states that have approved second-parent adoption at the trial court level or through anecdotal evidence are Alabama, Alaska, Delaware, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas and Washington.").

168. *Id.* at 369 n.47; *see also* FLA. STAT. ANN. § 63.042(3) (West 2003) ("No person . . . may adopt if that person is a homosexual.").

169. Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1325 (1997) (quoting Kath Weston, a proponent of the private ordering of gay family relationships: "[E]ach gay man and lesbian [becomes] responsible for the exemplary act of creating an ideal environment through the fashioning of a family.").

170. *Id.* at 1352.

171. *Id.*

172. *Id.*

173. *Id.* at 1327.

174. *Id.*

175. Christensen, *supra* note 169, at 1328.

Beyond the difficulties of getting courts to recognize and enforce such contracts, there are also problems in attempting to fit agreements based on relationships with traditional contract doctrine.¹⁷⁶ The focus of attention in most contracts is the deal making process to ensure that the exchange is the product of a bargain. It is difficult to say that many promises in intimate relationships are necessarily made with the intent of receiving something in return. More often, promises are found by the courts to be “mere gratuity.”¹⁷⁷ “‘Love and Affection’ it is often said, is insufficient consideration to sustain a bargain.”¹⁷⁸

Policy concerns still intervene and prevent courts from enforcing many family agreements involving children, leaving such decision making to public oversight.¹⁷⁹ Since the mid-nineteenth century, the “best interests of the child” has been the predominant standard judges would employ to resolve custody and visitation disputes.¹⁸⁰ Even if a contract is entered into before the conception of the child, there is no guarantee that the court will enforce it.¹⁸¹ Courts do not hesitate to ignore agreements that they deem not keeping with the best interests of the child.¹⁸² Some contracts obligating non-legal parents to provide support have been upheld. Domestic partners should research the law in their state to determine whether it may be beneficial to have such an agreement drafted by an attorney. If nothing else, the court may consider it as a factor in the determination.

VII. CONCLUSION

In areas of law where legislation has yet to provide for the best interests of children born through artificial insemination to same-sex parents, it is up to the courts to make sure these children continue to receive an equal amount of protection from our legal system. When courts refuse to take action to enforce child support upon former domestic partners, the result is discrimination of

176. *Id.* at 1329.

177. *Id.* at 1330; *see* *Kirskey v. Kirskey*, 8 Ala. 131, 132 (1845) (holding that, where a farmer’s promise to his brother’s widow of a place to live if she relocated to his farm lacked consideration as a “mere gratuity”); *Hertzog v. Hertzog*, 29 Pa. 465, 469 (1857) (stating a father’s promise to pay his adult son for services as a laborer was unenforceable because “the principal of family affection is sufficient to account for the employment, and does not demand the inference of a contract”).

178. Christensen, *supra* note 169, at 1331.

179. *Id.* at 1348.

180. *Id.* at 1349 (noting that a court refused to enforce a parental custody agreement because “the object of the law is ‘not to gratify the wishes of the parents’, but ‘for the protection of the children.’”).

181. *See* *Kristine H. v. Lisa R.*, 16 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2004) (holding that pre-birth judgment was void because a determination of parentage cannot rest simply on the parties’ agreement).

182. Christensen, *supra* note 169, at 1349.

children born through artificial insemination based on the marital status of their parents – and a step backwards in time to when we blamed children for their illegitimacy. As Professor Polikoff wrote over a decade ago:

When parents create a nontraditional family, that family becomes the reality of the child's life. The child may experience some stigma, but courts should delegitimize, not condone, disparaging community attitudes. The courts should protect children's interests within the context of nontraditional families, rather than attempt to eradicate such families by adhering to a fictitious, homogenous family model.¹⁸³

The current legal landscape for lesbian-parented family dissolution cases involving a claim for child support offers valuable insight for several reasons. First, it illustrates the array of decisions that courts around the country are making in these cases. It also captures the essence of a problem inherent in family law – that the state-based nature of family law leads to divergent results for children and non-legal parents around the country. Finally, these cases provide an opportunity for both legislatures and courts to recognize a solution that is truly dedicated to the best interest of the child.

Many children are born into families that do not conform to the one-mother/one-father model.¹⁸⁴ In recent decades, the law has taken great strides to eliminate the harsh discrimination of children born to un-wed mothers in the legal world, recognizing the innocence and helplessness of those children, and their right to the same opportunities as children born in the United States to married parents.¹⁸⁵ Steps now must be taken to prevent a similar harsh discrimination of children born into non-traditional same-sex families. Their innocence and helplessness regarding how they came to be should be reflected in how they are treated by the American legal system.

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183. Polikoff, *supra* note 1, at 482.

184. *Id.* at 573.

185. ELLMAN ET AL., *supra* note 18, at 1036-37 (2004).

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