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## A Gender-Neutral Reading of New Mexico's Uniform Parentage Act: Protecting New Mexican Families Regardless of Sexuality

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# A GENDER-NEUTRAL READING OF NEW MEXICO'S UNIFORM PARENTAGE ACT: PROTECTING NEW MEXICAN FAMILIES REGARDLESS OF SEXUALITY

Julio C. Romero\*

## I. INTRODUCTION

The 2010 U.S. Census reports that nearly 650,000 same-sex couples live in the United States and, among those, 17 percent are raising children in their homes.<sup>1</sup> In New Mexico alone, there are nearly 6,000 same-sex couples, approximately seven same-sex couples per every 1,000 households.<sup>2</sup> Without a dissolution of marriage act applicable to same-sex partnerships, the application of New Mexico's Uniform Parentage Act (UPA) to custodial disputes becomes extremely important to presumed parents and children within a same-sex household. The pressing issue in child custody cases is whether same-sex partners who have lived together and have brought children into the relationship have the right to continue to parent those children following the dissolution of their relationship.

The New Mexico Supreme Court's opinion in *Chatterjee v. King* (*Chatterjee*) addresses the tension in applying the UPA to same-sex family custody disputes.<sup>3</sup> This case note explores the way in which the New Mexico Supreme Court broadened the definition of "parent" under the UPA to include same-sex partners and the impact the decision may have on New Mexican families. Section II explains the development of the common-law approach to custody and the creation of the UPA. Section III discusses the issues raised in *Chatterjee* regarding standing in same-sex partner custody cases, in light of the court's gender-neutral approach to defining parents under the UPA. Last, Section IV examines the constitu-

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1. THE WILLIAMS INSTITUTE, UNITED STATES CENSUS SNAPSHOT: 2010, *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf> (last visited May 10, 2013).

2. *Id.*

3. *See Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283.

tional issues and policy considerations raised in *Chatterjee* and argues that substantive due process, equal protection, and legislative intent of the UPA require the court's gender-neutral approach to defining parents under the UPA; the section also briefly addresses the implications of *Chatterjee* for the New Mexico bar.

## II. BACKGROUND

At English common law, the marital relationship of a child's parents at the child's birth or conception determined the child's legal relationship to his or her parents.<sup>4</sup> A child was considered "legitimate" only if the parents were married at the time of conception or birth; absent these facts, the child was deemed "illegitimate."<sup>5</sup> The law did not recognize the relationship of non-marital children to either biological parent, nor did it recognize them as part of any familial relationship.<sup>6</sup> Not until the late nineteenth century did states begin to recognize that illegitimate children were part of their mother's family.<sup>7</sup> However, under this framework, slave children or children of a white male and black female were still illegitimate because miscegenation was illegal and the child derived his or her social status from the mother—a slave.<sup>8</sup>

Illegitimate children had no legal rights.<sup>9</sup> For example, illegitimate children could not inherit from their fathers or bring actions for their fathers' wrongful death, and they were ineligible to acquire benefits as a

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4. See Lord Mansfield's Rule, expounded in *Goodright v. Moss*, (1777) 98 Eng. Rep. 1257 (K.B.) 1258; 2 Cowp. 591, 593, which stated that "it is a rule, founded in decency, morality, and policy, that [the spouses] . . . shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious . . ." See also *Uniform Parentage Act Summary*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, <http://uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> (last visited May 29, 2013) [hereinafter NCCUSL].

5. The parents of a legitimate child must be married to each other at the time of the child's birth or the child must be born within the gestational period after the marriage ends. The marriage must be or must have been a lawful marriage. At common law (and in the modern era), there remains a strong presumption in the law that a child born to a married woman is the child of the woman's husband. In the past, this presumption was very difficult to overcome. See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 10–17 (1971); NCCUSL, *supra* note 4.

6. DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 278 (2006).

7. *Id.* at 279.

8. *Id.* ("If both parents were slaves, their offspring were illegitimate, since marriage between slaves was not legally binding. It is likely that black fathers had no parental rights over their offspring, as they could do nothing when their 'wives' were beaten and raped by white men.")

9. See KRAUSE, *supra* note 5, at 10–17; NCCUSL, *supra* note 4.

result of not having a legally defined father.<sup>10</sup> Fathers were neither saddled with the obligations of parenting nor granted prospects of custody, visitation, or adoption.<sup>11</sup> Illegitimate children had no right to parental support, and unmarried fathers had no rights to custody.<sup>12</sup> Despite these harsh effects, society and the law long upheld this system on policy grounds rooted in traditional notions of morality and fidelity.<sup>13</sup>

#### A. *The Model Uniform Parentage Act*

Through a series of cases in the 1960s and 1970s, the U.S. Supreme Court eliminated the common-law notion of illegitimacy.<sup>14</sup> In 1973, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the first version of the UPA.<sup>15</sup> The original purpose of the act was to create uniformity in the law concerning children born out

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10. See KRAUSE, *supra* note 5, at 10–17 (1971); NCCUSL, *supra* note 4.

11. See NCCUSL, *supra* note 4; Harry D. Krause, *Bringing the Bastard into the Great Society: A Proposed Uniform Act of Legitimacy*, 44 TEX. L. REV. 829, 857 (1966).

12. NCCUSL, *supra* note 4.

13. Laurence C. Nolan, “Unwed Children” and Their Parents Before the United States Supreme Court from *Levy* to *Michael H.*: Unlikely Participants in Constitutional Jurisprudence, 28 CAP. U. L. REV. 1, 6 (1999); ABRAMS, *supra* note 6, at 278; Susan F. Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL’Y & L. 347, 350–51 (2011/2012) (“Illegitimacy has always, by design, operated as a means of regulating sex and, in turn, conveying a moral message about sex. It has accomplished these objectives in several ways. First, illegitimacy has served family law’s ‘channeling function,’ seeking to confine sexual activity within marriage by creating a disfavored status for children conceived and born outside marriage. Second, its doctrinal and evidentiary supports—such as the presumption of legitimacy and Lord Mansfield’s Rule—have covered up illicit sex, by treating a married woman’s offspring as the children of her husband, even when he is not the genetic father. Illegitimacy has long made marital sex normative and everything else second-class at best and deviant at worst.”).

14. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that the Due Process Clause of the Fourteenth Amendment entitles unwed fathers to hearings on parental fitness before a child could be taken from that father in dependency proceeding after the death of the child’s natural mother); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972) (holding that Louisiana workers’ compensation statutes denying equal recovery rights to illegitimate children violated equal protection clause); *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that illegitimate children had the right to recover for wrongful death of the parent of the legitimate child had the same right); *Glonn v. Am. Guar. Co.*, 391 U.S. 73 (1968) (holding that states cannot deny parents of an illegitimate child the right to bring a tort action for wrongful death of the child if the parent of a legitimate child had the same right).

15. NCCUSL, *supra* note 4.

of wedlock.<sup>16</sup> Consistent with the U.S. Supreme Court rulings, the first Model UPA sought to address unequal treatment of illegitimate children in child support and inheritance disputes.<sup>17</sup> In 2002, the NCCUSL substantially revised the UPA to account for the impact of advances in genetic testing, surrogacy, and in-vitro fertilization on parentage law.<sup>18</sup> The Model UPA discarded the common-law notion of an illegitimate child by replacing an inquiry focused on marital status with one evaluating the parent-child relationship.<sup>19</sup> The Model UPA shifted custodial and parentage rights into a modern era.<sup>20</sup>

### B. *The New Mexico UPA*

The UPA allows men and women who are not biologically related to a child to acknowledge their parental status before or upon the birth of a child.<sup>21</sup> Initially, New Mexico's UPA provided a method to declare the existence of a mother and child relationship that stated: "Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of the [UPA] applicable to the father and child relationship apply."<sup>22</sup> Section 40-11-2 of the UPA stated:

[P]arent and child relationship means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship.<sup>23</sup>

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16. UNIF. PARENTAGE ACT § 2 cmt. (1973) (amended 2000), 9B U.L.A. 390 (2001).

17. See NCCUSL, *supra* note 4; *Smith v. Gordon*, 968 A.2d 1, 9 (Del. 2009), *superseded by statute*, DEL. CODE ANN. tit. 13, § 8-201 (2010), *as recognized in* *Smith v. Guest*, 16 A.3d 920 (2011).

18. NCCUSL, *supra* note 4. See also *ABRAMS*, *supra* note 6, at 278.

19. "The parent and child relationship extends equally to every child and to every parent, regardless of the parents' marital status." UNIF. PARENTAGE ACT § 2 (1973) (amended 2000), 9B U.L.A. 390 (2001). See *Smith v. Gordon*, 968 A.2d 1, 9 (Del. 2009).

20. See NCCUSL, *supra* note 4.

21. NMSA 1978, § 40-11A-201 (2010).

22. Uniform Parentage Act, NMSA 1978, § 40-11-2 (2004), *repealed by* Laws 2009, ch. 215, § 19, effective January 1, 2010; recodified as New Mexico Uniform Parentage Act, NMSA 1978, §§ 40-11A-101 to 903 (2010)). The provision of UPA allowing an "interested party" to bring an action to determine the existence of a "parent and child relationship" and addressing the father-child relationship was removed from the recodified UPA. However, parent-child relationships have been broadened under Section 40-11A-201.

23. *Chatterjee v. King*, 2012-NMSC-019, ¶ 13, 280 P.3d 283, 287.

For a mother, Section 40-11-4(A) provided that a natural mother may be established by proof of her having given birth to the child, *or as provided by* Section 40-11-21.<sup>24</sup> Section 40-11-5(A)(4) provides, in relevant part, that:

[A] man is presumed to be the natural father of a child if . . . while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child.<sup>25</sup>

Unlike parent-child relationships defined under common-law notions of legitimacy, the UPA confers duties, rights, privileges, and obligations to both natural and adoptive parents. As a result, the primary purpose of determining parentage under the UPA is to provide support for the child.<sup>26</sup>

Prior to *Chatterjee*, New Mexico courts had never examined the meaning of the phrase “existence of parent-child relationship” under the UPA for same-sex couples. There has never been a UPA provision specifically allowing a non-biological mother to secure parental rights through anything other than adoption.<sup>27</sup> Courts applying the UPA have recognized the existence of legal parent-child relationships in which the father and child are not biologically related.<sup>28</sup> Furthermore, in protecting the rights of non-biological fathers, the New Mexico Court of Appeals has stated that it is “aware of no constitutional doctrine that insists on a genetic basis for parenthood.”<sup>29</sup> By acknowledging the parentage of non-biological fathers, New Mexico courts have already taken an expansive view of the parent and child relationship as defined under Section 40-11A-201 of the UPA.<sup>30</sup> Prior to *Chatterjee*, that law granted non-biological

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24. *Chatterjee*, 2012-NMSC-019, ¶ 13, 280 P.3d 283, 287.

25. *Id.* ¶ 15, 280 P.3d at 287-88.

26. *See Padilla v. Montano*, 116 N.M. 398, 401, 862 P.2d 1257, 1260 (Ct. App. 1993).

27. *Chatterjee*, 2012-NMSC-019, ¶ 7, 280 P.3d 283, 286.

28. *Tedford v. Gregory*, 1998-NMCA-067, ¶ 15, 959 P.2d 540, 545 (The court foreshadowed a broader parent-child relationship: “[T]he court will not determine paternity solely on the basis of a biological relationship between the child and the putative father.”).

29. *Lane v. Lane*, 1996-NMCA-023, ¶ 16, 912 P.2d 290, 294.

30. NMSA 1978, § 40-11A-201 (2010). Prior to 2009 recodification of UPA, courts interpreted “Establishment of parent-child relationship[s]” under NMSA 1978, Section 40-11-2 (1986) (defining the parent and child relationship as “the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations. It includes the mother and child relationship and the father and child relationship.”).

fathers the same rights as natural and adoptive parents.<sup>31</sup> *Chatterjee* extended these holdings to apply to presumptive same-sex parents, permitting the New Mexico UPA to remain consistent with the Model UPA's ultimate legislative intent: eliminating the harsh effects the English common law imposed on children born out of wedlock.<sup>32</sup> The following section addresses the issues presented in *Chatterjee* and how the court analyzed the parent and child relationship under New Mexico's UPA.

### III. STATEMENT OF THE CASE

*Chatterjee* discusses whether a same-sex parent has standing to assert a custody claim under the UPA.<sup>33</sup> The following subsections discuss the pertinent facts of *Chatterjee*, the procedural history, the analysis of the majority opinion, and a summary of the concurring opinion.

#### A. Facts

Two women, Petitioner Bani Chatterjee and Respondent Taya King, were in a committed, long-term domestic relationship when they decided to adopt a child from Russia.<sup>34</sup> Chatterjee and King traveled together to Russia to adopt Alliya in 2000 when she was 13 months old.<sup>35</sup> They were advised that the Russian adoption agency would be disinclined to allow an adoption by same-sex parents and would also view King's ethnicity more favorably than that of Chatterjee.<sup>36</sup> As a result, although both Chatterjee and King assumed full parental responsibility for the child, they did not attempt to adopt the child jointly; King became the sole adoptive parent.<sup>37</sup>

Chatterjee and King raised Alliya together for nine years.<sup>38</sup> King encouraged Alliya to love and depend upon Chatterjee, and consequently Chatterjee and Alliya developed a strong parent-child bond.<sup>39</sup> Aware of having two mothers, Alliya referred to King as "Mom" or "Mommy" and

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31. *Lane*, 1996-NMCA-023, ¶ 16, 912 P.2d 290, 294.

32. *Chatterjee*, 2012-NMSC-019, 280 P.3d 283.

33. *Id.* ¶ 4, 280 P.3d at 285; *Chatterjee v. King*, 2011-NMCA-012, ¶ 1, 253 P.3d 915, 917.

34. *Chatterjee*, 2012-NMSC-019, ¶ 1, 280 P.3d 283, 284; Brief for Petitioner at 2, *Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283 (No. 32-789) (*Chatterjee* and King lived together in a committed domestic relationship from 1993 to 2008).

35. Brief for Petitioner at 2, *Chatterjee*, 2012-NMSC-019, 280 P.3d 283.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

Chatterjee as “Mammo.”<sup>40</sup> Both parties mutually acknowledged one another as Alliya’s parents and publicly held themselves out as Alliya’s parents.<sup>41</sup> Friends of the couple, as well as the director of Alliya’s school, Alliya’s doctors, and Chatterjee’s colleagues, understood that Chatterjee and King parented Alliya together.<sup>42</sup> King registered Alliya at school with the last name of “Chatterjee-King,” listed Chatterjee as Alliya’s “other parent” on school registration documents, and used Chatterjee’s name and credit card number for Alliya’s tuition payment authorization forms.<sup>43</sup> Chatterjee supported King and Alliya financially by working full time and allowing King to stay at home with Alliya, covering Alliya under her health insurance plan, and designating Alliya as the beneficiary of Chatterjee’s retirement plan.<sup>44</sup> Chatterjee also took part in day-to-day parental responsibilities throughout the week, including helping Alliya get ready for school, volunteering in the classroom, and participating in parent-teacher conferences.<sup>45</sup>

However, Chatterjee never adopted Alliya, and King and Chatterjee eventually ended their long-term relationship.<sup>46</sup> King initially allowed Chatterjee to visit with Alliya but subsequently reduced the frequency of visits and ultimately terminated them.<sup>47</sup> Shortly thereafter, King moved to Colorado and sought to prevent Chatterjee from having any contact with Alliya.<sup>48</sup>

### B. Procedural History

On December 24, 2008, Chatterjee filed a petition in district court to establish parentage and determine custody and timesharing.<sup>49</sup> Chatterjee alleged she was a presumed natural parent under the former codification of the UPA.<sup>50</sup> Chatterjee further claimed to be an acting parent of Alliya

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40. *Id.* at 4.

41. *Id.* at 2–3.

42. *Id.* at 3.

43. *Id.* at 3–4.

44. *Id.* at 4.

45. *Id.* at 4.

46. *Chatterjee v. King*, 2012-NMSC-019, ¶ 1, 280 P.3d 283, 284; *Chatterjee v. King*, 2011-NMCA-012, ¶ 2, 253 P.3d 915, 918.

47. *Chatterjee*, 2011-NMCA-012, ¶ 2, 253 P.3d 915, 918.

48. *Chatterjee*, 2012-NMSC-019, ¶ 1, 280 P.3d 283, 284; *Chatterjee*, 2011-NMCA-012, 253 P.3d 915.

49. *Chatterjee*, 2012-NMSC-019, ¶ 2, 280 P.3d 283, 284; Brief for Petitioner at 5, *Chatterjee*, 2012-NMSC-019, 280 P.3d 283 (No. 32–789).

50. NMSA 1978, § 40-11-3 (1986); NMSA 1978, § 40-11-5 (1997); NMSA 1978, § 40-11-21 (1986); *Chatterjee*, 2012-NMSC-019, ¶ 2, 280 P.3d 283, 284.



and that she was entitled to relief in order to contribute to the support of Alliya.<sup>51</sup>

In response to Chatterjee's petition, King filed a motion to dismiss.<sup>52</sup> In the motion to dismiss, King neither admitted nor denied any of the facts that Chatterjee claimed in her petition.<sup>53</sup> King instead argued that Chatterjee was a third party seeking custody and visitation of Alliya and that Section 40-4-9.1(K) of the Dissolution of Marriage Act<sup>54</sup> prohibited a third party from receiving custody rights absent a showing of unfitness of the natural or adoptive parent.<sup>55</sup> On March 11, 2009, the district court dismissed the petition for failure to state a claim upon which relief could be granted.<sup>56</sup> Chatterjee appealed; the New Mexico Court of Appeals affirmed in part, reversed in part, and remanded to the district court.<sup>57</sup>

The New Mexico Court of Appeals held that Chatterjee did not have standing to seek joint custody absent a showing of King's unfitness because she was neither the biological nor the adoptive mother of Alliya.<sup>58</sup> The court of appeals further held that presumptions establishing a father and child relationship cannot be applied to women, and a mother and child relationship can only be established through biology and adoption.<sup>59</sup> Judge Vigil, who dissented in the court of appeals opinion, believed that Chatterjee had standing to pursue joint custody under the extraordinary circumstances doctrine.<sup>60</sup> The court of appeals reversed the dismissal of Chatterjee's petition and remanded to the district court, instructing the

51. *Chatterjee*, 2012-NMSC-019, ¶ 2, 280 P.3d 283, 284; Brief for Petitioner at 5, *Chatterjee*, 2012-NMSC-019, 280 P.3d 283.

52. *Chatterjee*, 2012-NMSC-019, ¶ 2, 280 P.3d 283, 284.

53. *Id.*

54. "When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent." NMSA 1978, §§ 40-4-1 to -20 (2011).

55. *Chatterjee*, 2012-NMSC-019, ¶ 2, 280 P.3d 283, 284.

56. *Id.*

57. *Chatterjee v. King*, 2011-NMCA-012, ¶ 40, 253 P.3d 915, 928.

58. *Id.* ¶ 29, 253 P.3d at 924-25.

59. *Id.* ¶¶ 27, 29, 253 P.3d at 924-25.

60. NMSA 1978, § 40-4-9.1(K) (1999) ("When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent."); *In re Adoption of J.J.B.*, 119 N.M. 638, 652, 894 P.2d 994, 1008 (1995) (holding that, despite the public policy in New Mexico as demonstrated by Section 40-9-9.1(K), when "[c]ustody based upon the biological parent-child relationship [is] at odds with the best interests of the child must prevail" and that "[a] parent's right is not absolute and under extraordinary circumstances, custody of a child may be awarded to a non[-]parent over the objections of a parent."); *Chatterjee*, 2011-NMCA-012, ¶ 49, 253 P.3d 915, 930 (Vigil, J. dissenting).

court to determine whether visitation with Chatterjee would be in Alliya's best interest.<sup>61</sup> On remand, the district court appointed a guardian ad litem for Alliya and accepted the guardian ad litem's recommendation that, pending appeal, contact and visitation with Chatterjee would be in Alliya's best interests.<sup>62</sup> Chatterjee appealed to the New Mexico Supreme Court; the court granted certiorari on January 27, 2011.<sup>63</sup> The New Mexico Supreme Court held that the petitioner had standing to bring an action to establish a parent and child relationship with the child pursuant to the UPA because the petitioner alleged sufficient facts to establish that she was a presumed natural parent under the Act.<sup>64</sup>

### *C. Reasoning of the New Mexico Supreme Court*

In a unanimous opinion written by Justice Chávez, the New Mexico Supreme Court held that Chatterjee had standing to bring an action to establish a parent and child relationship with Alliya pursuant to Section 40-11-21 because Chatterjee alleged sufficient facts to establish that she was a presumed natural parent under Section 40-11-5(A)(4).<sup>65</sup> The New Mexico Supreme Court reversed the court of appeals and remanded the case to the district court.<sup>66</sup>

The court reasoned Chatterjee had standing because: (1) the plain language of the UPA instructs courts to apply Section 40-11-5(A)(4) to women because it is practicable for a woman to hold a child out as her own by, among other things, providing full-time emotional and financial support for the child; (2) commentary by the drafters of the UPA supports applying provisions related to determining paternity to the determination of maternity; (3) the court's approach is consistent with the way courts in other jurisdictions have interpreted statutes similar to New Mexico's UPA; and (4) New Mexico's public policy encourages the sup-

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61. *Chatterjee*, 2011-NMCA-012, ¶¶ 39, 40, 253 P.3d 915, 928.

62. *Chatterjee*, 2012-NMSC-019, ¶ 3, 280 P.3d 283, 285; Brief for Petitioner at 6, *Chatterjee*, 2012-NMSC-019, 280 P.3d 283 (No. 32-789) ("During the remand regarding interim visitation, the Court of Appeals continued to exercise concurrent jurisdiction on the merits." Chatterjee appealed after the court of appeals ultimately held that Chatterjee was not a parent under the UPA because the presumptions of paternity do not apply to women.).

63. *Chatterjee*, 2011-NMCA-012, ¶ 40, 253 P.3d 915, 928.

64. *Chatterjee*, 2012-NMSC-019, ¶ 5, 280 P.3d 283, 285; NMSA 1978, § 40-11-21 (2004).

65. *Chatterjee*, 2012-NMSC-019, ¶ 52, 280 P.3d 283, 297; NMSA 1978, § 40-11-5(A)(4) (2004) ("A man is presumed to be the natural father of a child if: (4) while the child is under the age of majority, he openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child.").

66. *Chatterjee*, 2012-NMSC-019, ¶ 52, 280 P.3d 283, 297.

port of children, financial and otherwise, by providers willing and able to care for the child.<sup>67</sup> This note will examine each one of these analytical paths in more detail.

### 1. Plain Language

Analyzing Section 40-11-2 for its plain meaning, the court held that Section 40-11-5(A)(4) applied to both men and women.<sup>68</sup> The supreme court disagreed with the court of appeals' conclusion that it was impracticable to use Section 40-11-5(A)(4) to prove maternity.<sup>69</sup> Instead, the court reasoned it was practicable to apply Section 40-11-5 to determine maternity in certain circumstances.<sup>70</sup> The court reasoned that a woman is capable of holding out a child as her natural child and establishing a personal, financial, or custodial relationship with that child because the parental presumption is based on a person's conduct, not a biological connection.<sup>71</sup> After concluding that the plain meaning of the statute can apply to two mothers, the court moved on to legislative intent.

### 2. Legislative Intent

Upon analyzing the drafters' intent,<sup>72</sup> the court noted that the authors of the original UPA, anticipating situations like the one in this case, provided in a comment that masculine terminology was used for the sake of simplicity and not to limit application of its provisions to males.<sup>73</sup> The court analyzed the comment to the 2001 model UPA, which states:

This Section permits the declaration of the mother and child relationship where that is in dispute. Since it is not believed that cases of this nature will arise frequently, Sections 4 to 20 are written principally in terms of ascertainment of *paternity*. While it is obvious that certain provisions in these Sections would not apply in an action to establish the mother and child relationship, the Commit-

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67. *Id.* ¶ 5, 280 P.3d at 285.

68. New Mexico has codified a Uniform Statute and Rule Construction Act and authorizes plain meaning statutory construction under NMSA 1978, Section 12-2A-18 (1997).

69. *Chatterjee*, 2012-NMSC-019, ¶ 14, 280 P.3d 283, 287; § 40-11-5(A)(4) ("When any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent.").

70. *Chatterjee*, 2012-NMSC-019, ¶ 15, 280 P.3d 283, 287-88.

71. *Id.*

72. New Mexico's Uniform Statute and Rule Construction Act codifies legislative intent as a method of statutory constructions under NMSA 1978, § 12-2A-20(C) (1997).

73. *Chatterjee*, 2012-NMSC-019, ¶ 19, 280 P.3d 283, 288-89.

tee decided not to burden these—already complex—provisions with references to the ascertainment of *maternity*. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions of Sections 4 to 20 should be applied.<sup>74</sup>

The court noted that the comment to the Model UPA does not specifically narrow the application of the action to biological maternity or paternity in establishing a parent and child relationship.<sup>75</sup> The court held that the commentary from the original UPA, together with the explicit instruction given in Section 40-11-21 (which provides that the paternity provisions may apply as far as practicable to establish natural motherhood), indicate that the Legislature intended Section 40-11-5(A)(4) to apply to both men and women.<sup>76</sup>

### 3. Application in Other Jurisdictions with Statutes Similar to the New Mexico UPA

The court examined how other states with statutes virtually identical to the New Mexico UPA have applied provisions relating to the father and child relationship to mother and child relationships.<sup>77</sup> The California Supreme Court held that it is practicable to apply the “hold-out” provision of the California Uniform Parentage Act to women in varying factual situations similar to that in *Chatterjee*.<sup>78</sup> Moreover, the court noted that the Colorado Court of Appeals also interpreted the Colorado Uniform Parentage Act as enabling language applicable to the paternity provisions to be applied to women.<sup>79</sup> Finally, the court also recognized that the Oregon Court of Appeals extended the parentage presumption to similarly situated women.<sup>80</sup> The court’s analysis of other statutes led it to

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74. UNIF. PARENTAGE ACT (1973) § 21 cmt., 9B U.L.A. 494 (2001).

75. *Chatterjee*, 2012-NMSC-019, ¶ 20, 280 P.3d 283, 289. See UNIF. PARENTAGE ACT § 21 cmt. (1973).

76. *Chatterjee*, 2012-NMSC-019, ¶ 20, 280 P.3d 283, 289.

77. *Id.* The New Mexico Legislature made interpretation of New Mexico legislation through analysis of similar or identical statutes in other jurisdictions an interpretive canon through Section 12-2A-20(B)(2).

78. *Chatterjee*, 2012-NMSC-019, ¶ 21, 280 P.3d 283, 289 (citing *Elisa B. v. Superior Court*, 117 P.3d 660, 666–67 (Cal. 2005)).

79. *Chatterjee*, 2012-NMSC-019, ¶ 20, 280 P.3d 283, 289 (“Insofar as practicable, the provisions of [the Colorado Uniform Parentage Act] applicable to the father and child relationship apply.”) (citing *In re Bryan D.*, 199 Cal.App.4th 127, 130 Cal.Rptr.3d 821, 830-31 (2011)).

80. *Chatterjee*, 2012-NMSC-019, ¶ 28, 280 P.3d 283, 291 (recognizing that in *Shineovich & Kemp*, 214 P.3d 29, 39–40 (Ore. 2009), “the Oregon Court of Appeals held that a statute recognizing a husband’s parentage based on his consent to assisted re-

address the public policy consequences of applying a strict gender-specific definition to presumed parents under the New Mexico UPA.<sup>81</sup>

#### 4. Public Policy Considerations: Gender-Neutral Definition of Parents under UPA

The court reasoned that, consistent with the underlying policy-based rationale<sup>82</sup> of the New Mexico UPA, equality in child welfare required laws that achieved equality in parentage.<sup>83</sup> Therefore, Alliya's need for love and support was no less critical simply because her second parent happened to be a woman.<sup>84</sup> The court highlighted how experts in child psychology recognize that sometimes the law is too limiting when it comes to actually addressing what is in a child's best interests.<sup>85</sup> Thus, the court held it was inappropriate to deny Chatterjee the opportunity to establish parentage, when denying Chatterjee this opportunity would only serve to harm Alliya.<sup>86</sup> Essentially, the court found that the child's best interests are served when loving parents physically, emotionally, and financially support the child from the time the child comes into their lives.<sup>87</sup>

#### D. Concurring Opinion

Justice Bosson authored a concurring opinion, agreeing with the outcome reached by the majority but arguing for a decision on narrower grounds.<sup>88</sup> Justice Bosson sought to limit the reach of the case to prevent someone not recognized as a parent by the child or the child's family from coming into a child's life at a much later date and claiming presumed parentage.<sup>89</sup> Justice Bosson's ultimate concern was that a biological mother would be forced into a "custody battle to retain control over

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production was unconstitutional unless it was equally applied to women in same-sex relationships who consent to their partners' inseminations.").

81. *Chatterjee*, 2012-NMSC-019, ¶ 34, 280 P.3d 283, 292.

82. New Mexico's Uniform Statute and Rule Construction Act requires statutes to be construed to avoid an unconstitutional or absurd result. NMSA 1978, § 12-2A-18(A)(3) (1997).

83. *Chatterjee*, 2012-NMSC-019, ¶ 34, 280 P.3d 283, 292.

84. *Id.*

85. *Id.* ("The attachment bonds that form between a child and a parent are formed regardless of a biological or legal connection.").

86. *Id.* ¶ 37, 280 P.3d at 293.

87. *Id.*

88. *Id.* ¶ 54, 280 P.3d at 297 (Bosson, R., concurring).

89. *Id.* ¶ 55, 280 P.3d at 297 (Bosson, J., concurring) ("[W]hen is a nonadoptive, nonbiological individual a presumed parent under the holding-out provision of the UPA? Then, when does biology (the lack of a biological relationship) rebut such a presumption of parentage?").

her own children.”<sup>90</sup> His concern was based entirely on the scenario of a “hypothetical man” entering the picture, living with a woman and her children, and later claiming parentage while asking for custody.<sup>91</sup> Alternatively, Justice Bosson also raised the scenario in which the same hypothetical man might have presumed parentage claimed against him by the mother seeking child support.<sup>92</sup> Justice Bosson’s concurrence raises constitutional and public policy concerns that are central to this note’s analysis, and this note will address them separately below.

#### IV. ANALYSIS AND IMPLICATIONS

By using a gender-neutral approach to define parents under the UPA, the court in *Chatterjee* shifted the custody analysis away from a gender-specific approach to one focused on the best interests of the child—the original intent behind the UPA.<sup>93</sup> The concurring opinion by Justice Bosson raises concerns about whether applying a broad holding-out provision under the UPA is sound constitutionally or as a matter of public policy. Justice Bosson’s hypothetical man highlights how a very broad holding-out provision undermines the rights of biological parents.<sup>94</sup> However, a broad, gender-neutral definition of parentage (as articulated by the majority in *Chatterjee*) is constitutionally limited to a person already acting as a functional parent for the child rather than any third party asserting a presumed parental right.<sup>95</sup>

The following analysis addresses Justice Bosson’s concerns and supports the majority’s holding through an alternative reasoning approach supported by: (a) substantive due process; (b) equal protection; and (c) public policy goals of the UPA that acknowledge the emotional and psychological bonds a child creates with a presumed parent. This section evaluates the court’s opinion and discusses whether substantive due process and the Equal Protection Clause of the Fourteenth Amendment re-

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90. *Id.* ¶ 58, 280 P.3d at 297-98 (Bosson, J., concurring).

91. *Id.* ¶ 57, 280 P.3d at 297 (Bosson, J., concurring) (The hypothetical presented by Justice Bosson is as follows: After the separation with, or death, of the children’s biological father, “Mother begins a serious relationship with a hypothetical Man who moves in and lives happily with Mother and her two young children. Man assists in financial aspects of the household, which almost automatically includes expenses that support the children. . . . After a few years, however, the relationship sours, and Mother asks Man to leave. . . . Man decides he does not want it to end entirely; he wants to share legal custody over the two children.”).

92. *Id.* ¶ 59, 280 P.3d at 298 (Bosson, J., concurring).

93. See ABRAMS, *supra* note 6, at 278–79.

94. Meyer v. Nebraska, 262 U.S. 390 (1923).

95. Troxel v. Granville, 530 U.S. 57 (2000).

quired the gender-neutral analysis in *Chatterjee*. Finally, this section evaluates the public policy benefits of a gender-neutral construction of “parent” under the UPA and the implications of such an application.

### A. Constitutional Hurdles

It is a well-established principle of statutory construction that a statute should be construed, if possible, to avoid constitutional questions.<sup>96</sup> If a statute is subject to two interpretations, one supporting its constitutionality and the other rendering it void, the court should adopt the interpretation that will uphold it.<sup>97</sup> Declining to construe the UPA in a gender-neutral manner—one that affords a child two parents of the same sex—discriminates against putative parents based on their gender, denies gay and lesbian partners equal parenting rights and responsibilities vis-à-vis heterosexual partners, and denies children of same-sex partners the care and support of two lawful parents.<sup>98</sup> The lack of any rational justification for employing a non-gender-neutral interpretation inhibits courts from fulfilling constitutional guarantees. Thus, the gender-neutral construction of the New Mexico UPA the court employs in *Chatterjee* adheres to long-standing constitutional principles of both equal protection and substantive due process.

#### 1. Substantive Due Process

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property without due process of law.”<sup>99</sup> The U.S. Supreme Court has long recognized that the Fourteenth Amendment’s Due Process Clause “guarantees more than fair process.”<sup>100</sup> The Due Process Clause has a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>101</sup>

For more than eighty-five years, the U.S. Supreme Court has held that the Due Process Clause protects the right of parents to “establish a

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96. *Lovlace Medical Center v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 607 (1991).

97. *Huey v. Lente*, 85 N.M. 597, 598, 514 P.2d 1093, 1094 (1973).

98. Although a gender-specific reading of the New Mexico UPA has a discriminatory impact upon same-sex couples, it is only facially discriminatory on the basis of gender. Absent any discriminatory legislative intent on the basis of sexual orientation, an equal protection and substantive due process analysis only applies to gender discrimination.

99. U.S. CONST. amend. XIV, § 1.

100. *Troxel*, 530 U.S. 57 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

101. *Glucksberg*, 521 U.S. 702.



home and bring up children” and “to control the education of their own [children].”<sup>102</sup> In *Pierce v. Society of Sisters*, the Court held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”<sup>103</sup> The Court explained that “[t]he child is not the mere creature of the State; *those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations.*”<sup>104</sup> The Court reaffirmed this principle in *Prince v. Massachusetts* by confirming that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>105</sup>

The procedural history of *Chatterjee* evidences considerable debate on the issue of a biological mother’s substantive due process rights.<sup>106</sup> Both *Chatterjee* and *King* addressed their respective substantive due process rights by applying *Troxel v. Granville*, the last case the U.S. Supreme Court heard regarding parents’ substantive due process rights against third parties in child visitation proceedings.<sup>107</sup> Although the majority opinion never addresses *Troxel*, or substantive due process for that matter, the concurring opinion uses its hypothetical man example in a clear attempt to draw a scenario that may threaten a biological mother’s constitutional rights.

In *Troxel*, the U.S. Supreme Court struck down a “breathtakingly broad” Washington visitation statute that permitted any person to seek visitation at any time based on the best interests of the child.<sup>108</sup> The mother in *Troxel* desired to limit her children’s visitation with the parents

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102. *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

103. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

104. *Pierce*, 268 U.S. at 534 (emphasis added).

105. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’” (citation omitted)); *Moore v. City of East Cleveland*, 431 U.S. 494, 499–508 (1977) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. A host of cases, tracing lineage to *Meyer* . . . have consistently acknowledged a ‘private realm of family life which the state cannot enter.’”).

106. See *Chatterjee v. King*, 2012-NMSC-019, ¶ 2, 280 P.3d 283, 284-85; Brief for Petitioner at 43-44; Answer Brief for Respondent at 44-45; Reply Brief for Petitioner at 18.

107. *Troxel v. Granville*, 530 U.S. 57 (2000).

108. *Id.* at 67.



of their deceased father, a man to whom she was never married.<sup>109</sup> The paternal grandparents invoked a Washington statute that permitted any person to petition to the superior court for visitation rights of any child at any time and that gave discretion to the court to grant visitation when in the best interest of the children, without regard to any change in circumstances.<sup>110</sup> The U.S. Supreme Court recognized that courts may award visitation or custody to persons other than a child's legal parents so long as there are "special factors" that warrant doing so.<sup>111</sup> The Supreme Court explained that the statute was unconstitutional as applied because there were no "special factors that might justify the State's interference with" a parent's childrearing decisions.<sup>112</sup> The majority indicated that, in contrast to the claim before them, they would look favorably at a visitation and/or custody claim from a de facto parent or a person with a substantial relationship to the child.<sup>113</sup> In a plurality opinion, *Troxel* affirmed the Washington Supreme Court's invalidation of a state statute because the Due Process Clause does not permit a state to "infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made."<sup>114</sup> Accordingly, *Troxel* recognized the parent's fundamental right to direct his or her children's care, custody, and control, and it impliedly rejected the substitution of a judge's opinion that a particular child would be better raised in a situation a trial judge prefers.<sup>115</sup>

Additionally, Justice Stevens, in his dissent to *Troxel*, argued that the child's voice is an important third-party voice often missing in custody disputes.<sup>116</sup> Similarly, in *Chatterjee*, had the court taken a gender-specific analysis, children would be peculiarly absent in future custody standing determinations. Children and their parents both have a protected fundamental interest in the preservation of a strong familial relationship.<sup>117</sup> N.M. Const. art. II, section 4 provides:

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109. *Id.* at 61.

110. *Id.*

111. *Id.*

112. *Id.* at 68.

113. *Id.* at 85.

114. *Id.* at 72-73.

115. ABRAMS, *supra* note 6, at 278.

116. *Troxel*, 530 U.S. at 88-89 (Stevens, J., dissenting).

117. *Id.*; *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and have constitutional rights.").

All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of *seeking and obtaining safety and happiness*.<sup>118</sup>

This provision, generally referred to as the “safety and happiness” clause, is a state constitutional right that courts should recognize as a fundamental right because courts use the term “fundamental right” to determine the level of scrutiny to employ under state law when assessing a penalty on the exercise of the right. In fact, New Mexico appellate courts have already indicated that the safety and happiness clause is judicially enforceable.<sup>119</sup> Numerous other state constitutions contain some variation of these inherent rights.<sup>120</sup> These inherent rights provisions provide protections for interests in personhood that are distinct from notions of privacy grounded in the federal penumbras and are crucial to substantive due process analysis.<sup>121</sup>

A gender-neutral reading of the New Mexico UPA protects the substantive due process rights of all affected parties similar to those in *Chatterjee*. Although Justice Bosson’s concurring opinion warns of the dangers of the hypothetical man, a gender-neutral reading of the New Mexico UPA reaches a different conclusion than *Troxel*. Instead, a gender-neutral reading of the New Mexico UPA secures the constitutional rights of the biological, natural, or presumed parent, as well as of the child. Unlike in *Troxel*, in which the child’s mother never encouraged a bond with a parental figure, Chatterjee and King shared an abundance of parental duties. King faced a custody dispute with a person already acting as a de facto parent. This distinction is important because the circumstances presented in *Chatterjee* limit the scope of the potential parties who can submit custody claims to those acting as de facto parents. Therefore, the

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118. N.M. CONST. art. II, § 4 (emphasis added).

119. See *State v. Booken*, 19 N.M. 404, 143 P. 479, 481 (1914); *State v. Sutton*, 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct. App. 1991); *State v. Vickery*, 85 N.M. 389, 396, 512 P.2d 962, 969 (Ct. App. 1973).

120. See, e.g., CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; IOWA CONST. art. I, § 1; NEV. CONST. art. I, § 1; N.J. CONST. art. I, ¶ 1; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 1; VT. CONST. ch. I, art. 1; MONT. CONST. art. II, § 3.

121. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”); Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1, 27-28 (1997/1998) (“Whereas “privacy” connotes bounded individual protection, “happiness,” or “happiness and safety” points more in the direction of an individual’s relationship to others.”).

argument that a gender-neutral construction of the UPA limits the mother's freedom is unpersuasive in this case because she is the one who invited the "hypothetical parent" to form the bond with the child.<sup>122</sup> Under the safety and happiness clause, both parents and the child have a right to form intimate relationships.<sup>123</sup> Removing such a right through a gender-specific construction violates the safety and happiness clause and substantive due process.<sup>124</sup>

Additionally, it is important to note that the New Mexico Legislature's recent recodification of the New Mexico UPA further narrowed the UPA's scope.<sup>125</sup> While *Chatterjee* employs a broadened gender-neutral construction of the UPA, the recodification narrows its application by demanding that a presumed parent asserting the holding-out provision of the UPA must have lived with the child for the first two years of the child's life. These constructions, by both *Chatterjee* and the UPA recodification, still distinguish New Mexico's application of the UPA from the overly broad statute in *Troxel*, which permitted "any interested party" to assert visiting rights with the child as long as that person served the best interest of the child in any direct or indirect form.<sup>126</sup> The recodification of the UPA would not have affected *Chatterjee*'s holding because, unlike *Troxel*, presumed parents in same-sex households already operate as functional families.<sup>127</sup> *Chatterjee* lived with Alliya from the day she was adopted and presented numerous examples in which she participated within the functional family of King, Alliya, and herself.<sup>128</sup> Thus, a gen-

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122. See Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1846-47 (1993).

123. See *Trujillo v. Bd. of Cnty. Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985) (holding that a sister had a right to intimate association with her sibling, and could bring a Section 1983 claim for deprivation of that right).

124. James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making about Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 846-47 (2003).

125. NMSA 1978, § 40-11A-204(A)(5) (2009) (A man is presumed to be the father under the UPA when "for the first two years of the child's life, he resided in the same household with the child as his own.").

126. *Troxel v. Granville*, 530 U.S. 57, 77-78 (2000).

127. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Stageman v. City of Ann Arbor*, 540 N.W.2d 724, 725 (Mich. App. 1995) ("functional family means a group of no more than 6 people plus their offspring, having a relationship which is functionally equivalent to a family. The relationship must be of a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit. Functional family does not include a society, club, fraternity, sorority, association, lodge, organization or group of students or other individuals where the common living arrangement or basis for the establishment of the housekeeping unit is temporary.") (quoting Ann Arbor Code § 5.7(4)).

128. *Moore*, 431 U.S. 494.

der-neutral reading of the UPA secures the substantive due process rights of the biological, natural, or presumed parent, as well the child.

## 2. Equal Protection

The Equal Protection Clause of the U.S. Constitution guarantees all individuals equal protection under the law.<sup>129</sup> Article II, section 18 of the New Mexico Constitution is effectively the state equivalent of the Equal Protection Clause.<sup>130</sup> The nature and importance of individual interests and the governmental purpose behind statutorily created classification determine the applicable standard of review under the Equal Protection Clause in a specific case.<sup>131</sup> Under the New Mexico Equal Rights Amendment, sex-based classifications are suspect and therefore subject to strict or intermediate scrutiny.<sup>132</sup> The New Mexico Equal Rights Amendment guarantees that “[e]quality of rights under law shall not be denied on account of the sex of any person” and requires the court to read the UPA to allow women to establish parentage in the same manners provided to men, and vice-versa.<sup>133</sup> “Equal protection, both federal and state, guarantees that the government will treat individuals similarly situated in an equal manner.”<sup>134</sup> “New Mexico’s constitution requires the State to pro-

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129. U.S. CONST. amend. XIV.

130. N.M. CONST. art. II, § 18 (“Equality of rights under law shall not be denied on account of the sex of any person.”).

131. *Mieras v. Dyncorp*, 1996-NMCA-095, ¶ 24, 925 P.2d 518, 525.

132. “There are three levels of equal protection review based on the New Mexico Constitution: rational basis review, intermediate scrutiny, and strict scrutiny.” *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 11, 120 P.3d 413, 418 (“Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class. This standard of review is the most deferential to the constitutionality of the legislation and the burden is on the party challenging the legislation to prove that it is not rationally related to a legitimate governmental purpose. . . . Strict scrutiny requires the most exacting review by a court. Only legislation that affects the exercise of a fundamental right or a suspect classification such as race or ancestry will be subject to strict scrutiny. . . . [I]ntermediate scrutiny is more probing than rational basis but less so than strict scrutiny. Like strict scrutiny, the burden is on the party supporting the legislation to prove the constitutionality of the legislation; however, the party must only prove that the classification or discrimination caused by the legislation is substantially related to an important government interest. This standard of review has been previously applied to classifications based on gender and illegitimacy.”) (citations omitted).

133. N.M. CONST. art. II, § 18.

134. *Breen*, 2005-NMSC-028, ¶ 7, 120 P.3d 413, 417 (citing N.M. CONST. art. II, § 18).

vide a compelling justification for using classifications to the disadvantage of the persons they classify.”<sup>135</sup>

While sex-based classifications receive intermediate or strict scrutiny, the court has acknowledged that “not all classifications based on physical characteristics unique to one sex are instances of invidious discrimination.”<sup>136</sup> Men and women, however, can still be similarly situated for the purposes of equal protection analysis where a law makes classifications using sex-based physical characteristics.<sup>137</sup> Consequently, New Mexico’s equal protection analysis requires the court to look beyond the classification to the purpose of the law to determine whether men and women are similarly situated.<sup>138</sup> Specifically, “to determine whether a classification based on a physical characteristic unique to one sex results in the denial of equality of rights under law within the meaning of New Mexico’s Equal Rights Amendment, [the court] must ascertain whether the classification operates to the disadvantage of persons so classified.”<sup>139</sup>

A gender-specific reading of the New Mexico UPA is facially discriminatory<sup>140</sup> on the basis of sex. Therefore, under both strict and intermediate scrutiny, the UPA’s sex-based classification is presumptively unconstitutional, and it is the government’s burden to prove that the law is either (1) narrowly tailored to further a compelling governmental interest; or (2) substantially related to an important government interest.<sup>141</sup>

Failing to adopt a gender-neutral interpretation of the UPA violates equal protection, as it constitutes discrimination based on gender. Two

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135. New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 43, 975 P.2d 841, 855.

136. *Johnson*, 1999-NMSC-005, ¶ 38, 975 P.2d 841, 854.

137. *Id.* ¶ 39, 975 P.2d at 854 (“It is equally erroneous to rely on the notion that a classification based on a unique physical characteristic is reasonable simply because it corresponds to some ‘natural’ grouping.”).

138. *Id.*

139. *Id.* ¶ 40, 975 P.2d at 854.

140. A facially discriminatory classification draws a distinction among people based on a particular characteristic that exists on the face of the law. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW* 718–19 (3d ed. 2009). Alternatively, a facially neutral law does not draw a distinction among people based on a particular characteristic, but may have discriminatory impacts or effects and, thus, require a heightened burden to prove that there is a discriminatory purpose behind the law. *Id.*

141. *See Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 13, 120 P.3d 413, 418; *Johnson*, 1999-NMSC-005, ¶¶ 36–37, 975 P.2d 841, 853 (holding that strict scrutiny applies to laws that implicate the reproductive rights of women: “Although we recognize that federal courts currently apply an intermediate level of scrutiny to gender-based classifications, our rationale for conducting a searching judicial inquiry regarding such classifications under the New Mexico Constitution may accord with the criteria for invoking more stringent judicial scrutiny under federal law.”).

similarly situated heterosexual parents who have a child encounter no difficulties regarding eligibility for lawful parentage under Section 40-11A-201 of the UPA. For lesbian partners, however, reading the UPA in a gender-specific manner always precludes one parent from establishing even the consideration of legal parentage eligibility. In other words, strict gender-specific readings always leave one lesbian parent unprotected under the UPA on the basis of gender and nothing more. If Chatterjee and King were both men, Chatterjee could have easily established parentage, because a gender-specific UPA only applies the presumption of parentage factors to fathers. Under a gender-specific application of the UPA, one or both presumed lesbian parents would become “a stranger to [the] laws” that easily apply to similarly situated heterosexual or male same-sex parents.<sup>142</sup> This contradicting result, which bars lesbian partners from attaining lawful parenthood, stems solely from a strict gender-based interpretation of the UPA.<sup>143</sup> Therefore, absent any compelling justification for such gender-based discrimination, a gender-specific construction of the UPA violates the Equal Protection Clause.

Finally, adopting a gender-based interpretation of the New Mexico UPA violates equal protection because it disadvantages children based solely on the circumstances of their birth. This method denies a child of same-sex partners the emotional and financial benefits of a second lawful parent to which children born to heterosexual couples are entitled. With respect to fundamental rights, equal protection directly outlaws unequal treatment solely based on circumstances of birth.<sup>144</sup> A gender-specific reading of the UPA discriminates against a particular class of children simply because the two people raising and caring for those children are of the same gender. Alternatively, a gender-neutral reading and application of the UPA increases the likelihood that children will receive the same benefits regardless of their parents' gender because the law supports two legally defined presumptive parents. Therefore, a gender-specific construction of the UPA violates equal protection while a gender-neutral reading does not.

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142. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

143. *Chatterjee v. King*, 2012-NMSC-019, ¶ 18, 280 P.3d 283, 288 (The New Mexico Supreme Court noted this exact contradiction: “If this Court interpreted Section 40-11-5(A)(4) as applying only to males, then a man in a same sex relationship claiming to be a natural parent because he held out a child as his own would have standing simply by virtue of his gender, while a woman in the same position would not. In other words, if two men were in Chatterjee’s and King’s exact situation, Chatterjee’s male counterpart would have standing under Section 40-11-5(A)(4) of the UPA to establish parentage, while Chatterjee would not.”).

144. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

## B. Public Policy

The Legislature developed the UPA with the intent of protecting the rights and legal interests of children as well as those of putative parents.<sup>145</sup> A gender-specific construction of the UPA is counterintuitive to this goal as the makeup of “traditional families” is changing.<sup>146</sup> Our society no longer features strictly biological families born to heterosexual couples.<sup>147</sup> A gender-neutral approach to defining parents must prevail in order to facilitate the legal identity of parents and the definition of families. The law must legitimize families without absolute deference to biological ties, presumed gender roles, living arrangements, or the timing of the initiation of the parent-child relationship.<sup>148</sup> Functional families<sup>149</sup> in New Mexico can only prevail with an approach that incorporates a child-centered analysis into the definition of a parent-child relationship under the UPA.<sup>150</sup> Rather than restricting parentage by biology or gender roles, the law must acknowledge that children create deep parent-child relationships beyond the confines of biology, genetics, or heterosexuality.<sup>151</sup>

To avoid the historically harsh results found at common law, the court correctly decided *Chatterjee* using a gender-neutral definition of parentage. A gender-neutral definition allows enough flexibility so that the law gives the same protection to all families, including those that are based on something other than biology or marriage. A child-centered approach, regardless of the parents’ gender or sexuality, allows courts to consider the relationships that make up the family over the form of the family.<sup>152</sup> In addition, the law must recognize parents not by their genetic contribution to the child’s creation or either parent’s gender, but rather for their emotional, psychological, and financial contributions to the

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145. UNIF. PARENTAGE ACT § 2 cmt. (1973) (amended 2000), 9B U.L.A. 390 (2001).

146. See THE WILLIAMS INSTITUTE, *supra* note 1.

147. See *id.*

148. Leslie J. Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 474 (1996).

149. NMSA 1978, § 40-15-3(A) (2005) (“It is the policy of the state that its laws and programs shall support intact, functional families and promote each family’s ability and responsibility to raise its children.”).

150. See Woodhouse, *supra* note 122, at 1753.

151. See Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J. L. & MED. 225 (2002) (Bioethicist Thomas Murray says “policy across domains should be informed by the recognition that ‘the flourishing of parents and children is intertwined; that by doing what is loving for the children, parents experience profound satisfactions and develop virtues that promote their own flourishing as well.’”).

152. Dwyer, *supra* note 124, at 846-47.



child.<sup>153</sup> Instead of discounting the non-traditional family, parentage laws should be flexible enough to acknowledge non-traditional parent-child relationships. Adopting a child-centered approach through a gender-neutral application of the UPA allows courts to consider relationships over biology. The UPA was created for this specific purpose—to end the mistreatment of children the law once deemed illegitimate by providing them the security of emotional and financial health.<sup>154</sup>

The most important moral requirement at stake here is that adults care and provide for their children. Morality does not require that those children be the adults' biological offspring. Instead, laws that base parental rights and duties on biological relationship alone are notably less effective at inducing responsible behavior.<sup>155</sup> The common-law notion of child custody rights was rooted in presumptions of morality, yet it led to absurd historical results that left illegitimate children as defenseless victims.<sup>156</sup> Therefore, public policy demands a departure from the antiquated laws that produce harsh results for children and parents alike. This departure requires that a parent's relationship with the child become the focal point in child custody disputes.<sup>157</sup>

### C. Implications

*Chatterjee* does leave the courts and lawyers in New Mexico with some uncertainty about what acts by a presumed parent satisfy the UPA's holding-out provision.<sup>158</sup> Subsequent cases need to apply a case-by-case analysis to determine whether presumed parents, regardless of sexuality, truly "held out" the child as their own.<sup>159</sup> This process may appear to im-

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153. Harris, *supra* note 148, at 480.

154. Nolan, *supra* note 13, at 6; *see also* ABRAMS, *supra* note 6, at 278.

155. Harris, *supra* note 148, at 485.

156. *Id.*

157. *See* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of a Nuclear Family Has Failed*, 70 V.A. L. REV. 879, 951 (1984); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 V.A. L. REV. 2401, 2450 (1995).

158. *Chatterjee v. King*, 2012-NMSC-019, ¶ 1, 280 P.3d 283, 284 (Neither the New Mexico Court of Appeals nor the New Mexico Supreme Court included the majority of the facts present in court filings by *Chatterjee* or *King*).

159. Cases after *Chatterjee* will need to further define the holding-out provision, as have the California cases following *Elisa B. v. Super. Ct.*, 117 P.3d 660 (Cal. 2005), in which California broadened its UPA to acknowledge same-sex parents. *See, e.g.*, *L.M. v. M.G.*, 145 Cal. Rptr. 3d 97 (Cal. App. 4th Dist. 2012) (holding that an adoptive mother's single-parent adoption decree did not conclusively rebut a same-sex cohabitant's UPA presumption of maternity, nor did the cohabitant's UPA presumption of maternity require the court to weigh any conflicting claims or presumptions of maternity); *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 11 (Cal. App. 3d Dist. 2011) (holding that the



pede judicial efficiency, as the courts will need to examine every aspect of the parent-child relationship; but over time, more accurate determinations of parentage in child custody disputes will benefit New Mexico's children. Emphasizing accuracy over efficiency through a case-by-case gender-neutral application of the UPA will protect the rights of children and the rights of their presumptive parents.

## V. CONCLUSION

*Chatterjee v. King* is the first case to highlight the challenges inherent in applying the UPA to same-sex family custody disputes: equal protection, substantive due process, and public policy issues that required a redefinition of the term "parent" under the law. Child custody disputes between unmarried same-sex partners who have lived together intimately and have brought children into the relationship are becoming more prominent every year. Without dissolution of marriage laws applicable to same-sex couples, children and presumptive parents' rights will undoubtedly benefit from the New Mexico Supreme Court's gender-neutral construction of the UPA in *Chatterjee*. The makeup of traditional families is changing, and *Chatterjee* helps New Mexico attorneys and judges facilitate a change to a more comprehensive custody determination: one more focused on the best interests of the child and the rights of presumed parents than on strict gender-role constructions.

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presumed mother met the burden of the holding-out provision by: (1) telling the natural mother she would co-parent a child with the natural mother, (2) sharing the cost of in vitro fertilization, (3) accompanying the natural mother to the hospital to give birth to the children, (4) sharing the home with the natural mother and the children, (5) the natural mother allowed the presumed mother to care for the children, (6) the natural mother encouraged the children to visit with the presumed mother's family in another state, (7) the presumed mother worked with the children in their classroom, and (8) the presumed mother provided financially for the children and even set up college savings accounts for the children); *In re Bryan D.*, 130 Cal. Rptr. 3d 821, 831 (Cal. App. 2d Dist. 2011) (holding that a grandmother could not be deemed a child's presumed mother even though she brought the child into her home because evidence indicated that the child referred to the grandmother as his grandmother; the child also still visited with his biological mother and referred to her as his mother.); *Scott v. Super. Ct.*, 89 Cal. Rptr. 3d 843, 847 (Cal. App. 3d Dist. 2009) (holding that the biological father's former live-in girlfriend could not be a presumed mother under the UPA, absent evidence that the children's biological mother's parental rights were terminated or that there was an action pending to terminate her parental rights).