

FAMILY LAW — SAME-SEX COUPLES' PARENTAL RIGHTS AND OBLIGATIONS — CALIFORNIA SUPREME COURT HOLDS CHILD SUPPORT PROVISIONS OF ITS UNIFORM PARENTAGE ACT APPLICABLE TO SAME-SEX COUPLES. — *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005).

Alternative methods of conception have facilitated the development of new family structures, challenging “the notion of family as beginning with a heterosexual couple, and the notion that every child has two . . . [legal] parents to . . . whom [she] is biologically related.”<sup>1</sup> Despite the increasing prevalence of nontraditional families, lawmakers have been slow to reform laws developed when the idea of what constitutes a family was more narrow.<sup>2</sup> Recently, in *Elisa B. v. Superior Court*,<sup>3</sup> the California Supreme Court tackled a question generated by this state of affairs: whether California’s Uniform Parentage Act<sup>4</sup> (UPA) imposes parental obligations on a woman whose former lesbian partner conceived a child by artificial insemination. The court answered this question in the affirmative, obligating the woman to pay child support for twins conceived during the relationship.<sup>5</sup> Given the sympathetic facts of the biological mother’s case, the court’s desire to compel her former partner to pay support is understandable. But the court misstepped by deciding the case under California’s statutory framework. Rather than holding that the UPA was inapplicable to the situation and making a parentage determination based on equitable considerations, the court stretched existing law to the point of misapplication and introduced uncertainty into the law in its attempt to bring the case within the statute’s coverage. The *Elisa B.* decision thus represents a missed opportunity to alert the California legislature that its Family Code is outdated and ill-equipped to address the scientific and sociological changes that have transformed family structures.<sup>6</sup>

*Elisa B.* began a relationship with Emily B. in 1993.<sup>7</sup> The couple referred to themselves as “partners” and exchanged rings, but they

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<sup>1</sup> MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 124 (2001).

<sup>2</sup> *See id.* at 4–5 (discussing the legal and social controversies that have emerged as the definition of “family” has evolved).

<sup>3</sup> 117 P.3d 660 (Cal. 2005).

<sup>4</sup> CAL. FAM. CODE §§ 7600–7730 (West 2004).

<sup>5</sup> *Elisa B.*, 117 P.3d at 662.

<sup>6</sup> *See* Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California To Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 638–79 (2003) (criticizing California’s outdated approach).

<sup>7</sup> *Elisa B.*, 117 P.3d at 663.

never signed a legal domestic partnership agreement.<sup>8</sup> Both women wanted to have children, and they each became pregnant via artificial insemination; Elisa gave birth to a son in 1997, and Emily delivered twins in 1998.<sup>9</sup> Elisa returned to work and supported the household financially, while Emily stayed home with the children.<sup>10</sup> Although the women consulted an attorney about the possibility of adopting each other's children, they neither followed through with adoption nor executed a written agreement concerning the children.<sup>11</sup> After the couple separated in 1999, Elisa agreed to continue supporting Emily and the twins. She paid Emily's mortgage and other expenses until early 2001, when she told Emily she could no longer afford to do so.<sup>12</sup> Emily began receiving public assistance to provide for her children.<sup>13</sup>

The County of El Dorado filed a parentage action against Elisa in the superior court to impose a child support obligation.<sup>14</sup> The court found that Elisa intended to create children with Emily through artificial insemination. Drawing on section 7613 of the California Family Code, which treats a husband as the natural father of a child if he consents to his wife's insemination with another man's sperm, the court reasoned that Elisa was similarly liable for support.<sup>15</sup> The court also found that promissory and equitable estoppel prevented Elisa from disclaiming financial responsibility for the children, as she had "consented to . . . and encouraged their creation."<sup>16</sup> The court ordered Elisa to pay \$1815 per month in child support.<sup>17</sup>

The California Court of Appeal reversed the judgment and vacated the order.<sup>18</sup> Applying the statement in *Johnson v. Calvert*<sup>19</sup> that "for any child California law recognizes only one natural mother,"<sup>20</sup> the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 663–64.

<sup>13</sup> *Elisa Maria B. v. Superior Court*, 13 Cal. Rptr. 3d 494, 497 (Ct. App. 2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (citing CAL. FAM. CODE § 7613 (West 2004)).

<sup>16</sup> *Id.* (internal quotation mark omitted). Courts are increasingly using these equitable doctrines, as well as the doctrine of de facto parentage, to determine parentage. See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 325–29 (2004).

<sup>17</sup> *Elisa Maria B.*, 13 Cal. Rptr. 3d at 499.

<sup>18</sup> *Id.* at 497.

<sup>19</sup> 851 P.2d 776 (Cal. 1993).

<sup>20</sup> *Id.* at 781. In *Johnson*, the court affirmed a judgment that a man and his wife were the legal parents under the UPA of a child born to a surrogate mother who had been implanted with the couple's own fertilized egg. See *id.* at 782, 787. The court found itself in a difficult situation because all three individuals fulfilled a requirement of natural parentage — the husband and wife had provided the sperm and egg, while the surrogate mother had given birth to the child. To avoid holding that both women were natural mothers of the child, the court stated that "she who

court concluded that Emily was the only legal mother, so Elisa had no “rights, privileges, duties, or obligations . . . under the UPA.”<sup>21</sup> The court also rejected the trial court’s analogy to section 7613 on the ground that courts had not applied that statute to either unmarried or same-sex couples in past cases.<sup>22</sup> The court noted that although the legislature had recently amended the Family Code to state that “[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses,”<sup>23</sup> the legislature had not chosen to include a provision for same-sex partners without a legally recognized relationship.<sup>24</sup>

The Supreme Court of California unanimously reversed. Writing for the court,<sup>25</sup> Judge Moreno held that the court’s “one natural mother” statement in *Johnson* did not stand for the broad proposition that a child cannot have two mothers, explaining that the *Johnson* court simply did not want “[t]o recognize parental rights in a *third* party.”<sup>26</sup> The court stated that there is “no reason why both parents of a child cannot be women,” citing the recent amendment of the Family Code to include domestic partners as evidence of this conclusion.<sup>27</sup> Analyzing the case under the UPA, the court then concluded that Elisa had parental obligations. Section 7611(d) of the California Family Code, as interpreted by the courts, states that an individual is presumed to be the natural parent of a child if that individual “receives the child into his [or her] home and openly holds out the child as his [or her] natural child.”<sup>28</sup> In several prior California dependency actions, each of which involved a voluntary attempt by a presumed parent to prove that he or she was a child’s parent, the courts had stressed that evidence of no biological relationship between a presumed parent

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intended to procreate the child — that is, she who intended to bring about the birth of a child that she intended to raise as her own — is the natural mother under California law.” *Id.* at 782.

<sup>21</sup> *Elisa Maria B.*, 13 Cal. Rptr. 3d at 499–500.

<sup>22</sup> *Id.* at 503–04. In *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998), the Court of Appeal applied this provision to the surrogacy context, reasoning that the couple’s consent to the creation of the child via surrogacy establishes intent to bring the child into the world, just as a husband’s consent to his wife’s insemination demonstrates his intent in the insemination context. *See id.* at 286.

<sup>23</sup> CAL. FAM. CODE § 297.5 (West 2004).

<sup>24</sup> *Elisa Maria B.*, 13 Cal. Rptr. 3d at 500.

<sup>25</sup> Judge Kennard wrote a brief concurrence arguing that the outcome of this case was “a foregone conclusion” under a prior case, *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002). *See Elisa B.*, 117 P.3d at 672 (Kennard, J., concurring).

<sup>26</sup> *Elisa B.*, 117 P.3d at 665–66 (majority opinion) (quoting *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993)) (emphasis added).

<sup>27</sup> *Id.* at 666.

<sup>28</sup> CAL. FAM. CODE § 7611(d). The Court of Appeal held in *In re Karen C.*, 124 Cal. Rptr. 2d 677 (Ct. App. 2002), that this section of the UPA applies equally to women. *See id.* at 681–82; *see also Johnson*, 851 P.2d at 780.

and a child could be presented only in an “appropriate action.”<sup>29</sup> Because Elisa consented to Emily’s insemination, received the children into her home, and held them out as her own by claiming them on her tax returns and providing them with health insurance, she was presumed to be a natural mother.<sup>30</sup> Furthermore, the court held, this case was not an “appropriate action” in which to rebut that presumption because the children would thereby be deprived of the support of a second parent.<sup>31</sup> The court bolstered its analysis with reference to section 7613, the same artificial insemination provision of the UPA that the trial court applied, on the ground that Elisa had consented to the children’s creation, causing them to be born.<sup>32</sup>

In reaching this decision, the California Supreme Court refused to recognize that same-sex couples who give birth to children through artificial insemination are not addressed by the UPA<sup>33</sup> and significantly overreached its authority in its attempt to decide the case within the statutory framework. First, the court misapplied section 7611(d) when it found that Elisa satisfied the statute’s requirements for presumed parenthood by analogizing Elisa and Emily’s situation to juvenile dependency proceedings, in which an individual petitions the state to be declared the presumptive parent of a child. Second, the court created confusion for lower courts by comparing Elisa to “a husband who consented to the artificial insemination of his wife”<sup>34</sup> without addressing the fact that California courts have applied the artificial insemination provision only to married couples. By applying inappropriate standards and making inapt analogies, the court not only mistakenly held the UPA applicable to the case before it, but also muddled California family law by confusing the standards that lower courts must apply in particular types of family law actions. The application of equitable doctrines also would have failed to provide a clear standard, but it would have prevented confusion in existing case law. Further, such a move would have alerted the legislature to the need to amend the Family Code to create a clear rule.

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<sup>29</sup> See *Elisa B.*, 117 P.3d at 667–68 (citing *Nicholas H.*, 46 P.3d 932; *In re Salvador M.*, 4 Cal. Rptr. 3d 705 (Ct. App. 2003); *In re Karen C.*, 124 Cal. Rptr. 2d 677); see also CAL. FAM. CODE § 7612(a).

<sup>30</sup> See *Elisa B.*, 117 P.3d at 667.

<sup>31</sup> *Id.* at 668–69. The court also pointed out that Emily was financially unable to support her children, so the county would bear the burden of providing for them if Elisa did not. *Id.* at 669.

<sup>32</sup> *Id.* at 670.

<sup>33</sup> The codification of the UPA in California’s Family Code lacks a specific provision for parentage claims of unmarried couples (heterosexual or homosexual) who conceive through artificial insemination using donated genetic material. The only provision pertaining to artificial insemination is in section 7613, which provides that the husband of a wife who was inseminated with donor sperm is treated at law as if he were the natural father of the child conceived. No provisions explicitly address a same-sex couple who cohabit but lack a domestic partnership agreement.

<sup>34</sup> *Elisa B.*, 117 P.3d at 670; see also CAL. FAM. CODE § 7613.

In its effort to find Elisa to be a parent under the UPA, the court misapplied section 7611(d) of the Family Code, which provides that an individual is a presumed parent if he or she “receives the child into his [or her] home and openly holds the child out as his [or her] natural child.”<sup>35</sup> California had previously used this provision — one of a number of ways for individuals to establish themselves as presumed parents — only in cases involving existing relationships in which an individual was voluntarily seeking rights and obligations with respect to a child.<sup>36</sup> Courts in these cases, however, did not address the question of when or for how long an individual must take a child into her home and hold the child out as her own for the provision to be satisfied. For example, in *In re Karen C.*,<sup>37</sup> the petitioner used section 7611(d) to establish that she was the natural mother of Karen because she had taken Karen into her home immediately after the child’s birth, had raised Karen as her own child, and had been “the only ‘parent’ [the child] ever had.”<sup>38</sup> The Court of Appeal similarly applied section 7611(d) in a dependency action in *In re Salvador M.*,<sup>39</sup> in which a woman who had raised her half-brother as her son since his birth was able to establish herself as his natural parent.<sup>40</sup> In applying section 7611(d), the court emphasized “the state’s interest in maintaining the [existing] family relationship”<sup>41</sup> and pointed out that there was no other person fulfilling the requirements of a parent.

The supreme court attempted in this case to analogize Elisa’s situation to that of the presumed parents in the prior cases, claiming that Elisa likewise took the twins into her home and cared for them as her own, subjecting her to a similar finding of parentage. This analogy is problematic on two levels. First, the court failed to address the crucial difference between child support cases and dependency cases: child support actions *impose* obligations on an individual against her will, whereas dependency actions permit an individual to establish a sought-after legal relationship with a child. Second, the court ignored the ambiguity presented by its application of section 7611(d) to a non-dependency action: although Elisa had taken the twins into her home after their birth, she no longer served as their caregiver — in contrast to the adults in the dependency proceedings — and did not have an existing family relationship with the children that would be severed if the standard were found inapplicable. The court’s use of sec-

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<sup>35</sup> CAL. FAM. CODE § 7611(d).

<sup>36</sup> See, e.g., *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002); *In re Salvador M.*, 4 Cal. Rptr. 3d 705 (Ct. App. 2003); *In re Karen C.*, 124 Cal. Rptr. 2d 677 (Ct. App. 2002).

<sup>37</sup> 124 Cal. Rptr. 2d 677.

<sup>38</sup> *Id.* at 678.

<sup>39</sup> 4 Cal. Rptr. 3d 705.

<sup>40</sup> See *id.* at 706, 709.

<sup>41</sup> *Id.* at 709.

tion 7611(d) thus appears to expand the provision's applicability to individuals who take children into their homes and support them at any point, and further allows section 7611(d) to be used not only to preserve an existing supportive relationship, but also to create one against the would-be presumed parent's will. This decision therefore opens the door to the result specifically warned against in another dependency action, *In re Nicholas H.*:<sup>42</sup> that section 7611(d) might be used such that "the legal rights and obligations of parenthood should devolve upon an unwilling candidate."<sup>43</sup>

The court further misapplied California law by comparing *Elisa B.* to the situation in which a husband consents to the artificial insemination of his wife<sup>44</sup> and by referencing *People v. Sorensen*<sup>45</sup> for the proposition that "[o]ne who consents to the production of a child cannot create a temporary relation . . . , but the arrangement must . . . impose an obligation of supporting those for whose existence he is directly responsible."<sup>46</sup> The court ignored the fact that section 7613 had been held expressly inapplicable to unmarried heterosexual couples.<sup>47</sup> Though Elisa and Emily could not have established a legally recognized relationship at the time of the twins' conception,<sup>48</sup> the court nevertheless failed to clarify whether the existence of a legal relationship is still relevant to the application of section 7613 principles. Furthermore, the court's application of *Sorensen*, without explanation, to a couple without a legally recognized relationship creates the risk that same-sex and heterosexual couples might be treated differently. Rather than creating this confusion over the potential applicability of section 7613, the court should have found *Elisa B.* outside the coverage of the UPA and left to the legislature the task of modernizing the statute.

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<sup>42</sup> 46 P.3d 932 (Cal. 2002).

<sup>43</sup> *Id.* at 941.

<sup>44</sup> See CAL. FAM. CODE § 7613(a) (West 2004) (providing that "[i]f, . . . with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived"). Although courts have invalidated the references to gender in other parts of the UPA, see *supra* note 28, they have not declared the references to "husband" and "wife" in the artificial insemination provision gender-neutral.

<sup>45</sup> 437 P.2d 495 (Cal. 1968).

<sup>46</sup> *Elisa B.*, 117 P.3d at 670 (quoting *Sorensen*, 437 P.2d at 499) (internal quotation marks omitted).

<sup>47</sup> See *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 55 (Ct. App. 2000) (holding that a man who brought a paternity action against his former female partner, whom he had never married, for parental rights to a child conceived by artificial insemination during the couple's relationship had no standing under the UPA to assert parental rights). Although the *Elisa B.* court was not bound by the Court of Appeal decision, it should have addressed this contrary holding.

<sup>48</sup> Section 297 of the Family Code, which allows same-sex couples in California to register as domestic partners, was not passed until 2000, two years after the twins were born.

The court could have avoided violating precedent and creating ambiguity while still arriving at the same outcome by deciding *Elisa B.* under common law principles. Doing so would have demonstrated that California's codification of the UPA has become outdated and is inapplicable to many of the family formations that have become possible since the statute was adopted. The UPA was written in 1973, in an era when "the only way to create a child was by sexual intercourse between a man and a woman . . . and when society had a much narrower view of who should be allowed to have a parental relationship with a child."<sup>49</sup> Although the court admirably recognized that an outdated statute should not preclude the court from establishing Elisa as a parent of the twins, the court should not have attempted to fit Elisa's situation into a statutory framework that does not include any provisions for same-sex couples who conceive via artificial insemination. Other state courts confronted with similar cases have not attempted to stretch existing law in this manner, but have instead acknowledged that their states' versions of the UPA are inapplicable and applied common law rules of equity to achieve justice.<sup>50</sup> The Supreme Court of Washington, for example, recently addressed a similar situation involving the contested parentage of a child conceived by a lesbian couple through artificial insemination.<sup>51</sup> Rather than incorrectly applying Washington's codification of the UPA, the court acknowledged that there was no statutory remedy and applied the common law doctrine of de facto parentage to give the nonbiological parent standing to sue for rights and responsibilities.<sup>52</sup>

The use of equitable principles to fill in gaps in the UPA would not be without its problems; because each case would be decided on its facts, families not covered by the statute would not be able to rely on a predictable outcome or on settled case law. However, had the court pointed out, as did the Supreme Court of Washington, that the UPA does not encompass new family structures, it would have alerted the legislature of the need to modernize the statutory scheme to provide full protection for same-sex couples. Legislative action would ensure a clearer, more predictable standard for same-sex couples using alternative methods of reproduction and would help prevent lower courts in the future from misapplying existing doctrine in parentage decisions. Instead, the court simply stretched the principles of the UPA, which is not likely to be as immediately significant to the legislature — the illu-

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<sup>49</sup> Miller, *supra* note 6, at 638.

<sup>50</sup> See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 889–90 (Mass. 1999) (finding that a nonbiological partner's lack of standing to seek visitation rights under statutory law did not preclude the court from using its "equity jurisdiction" to confer those rights on such an individual).

<sup>51</sup> *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

<sup>52</sup> See *id.* at 177.

sion of a clear standard still exists on paper though not in practice. Clarity and regularity are particularly valuable in this area of law, where the need for predictability and the ability to plan are paramount. The UPA has replaced state-by-state varying statutes and common law precisely because of the need for a clear, unwavering rule. The return to the common law, the use of which the UPA is intended to replace, would be a red flag to the legislature that case-by-case adjudication might be on the horizon.

The court's error in *Elisa B.* was not in the outcome of the case, but rather in its misapplication of existing law to reach that result. The court clearly felt that the facts of the case warranted judicial intervention to provide support for the twins; the opinion reflects the court's cognizance of the fact that Elisa was earning a substantial salary at the time of trial and that Emily had been forced to apply for welfare to provide for the children. But the court could have easily reached the same result by finding Elisa liable by virtue of either equitable estoppel or de facto parentage. By deciding the case under the UPA, the court not only muddled existing family law doctrine by inappropriately applying the standard in section 7611(d) and confusing the applicability of section 7613, but it also failed to bring the outdated nature of the statute to the legislature's attention. Though the decision to apply statutory guidelines to Elisa's situation was momentous,<sup>53</sup> the court should have prompted the legislature to reform the UPA to reflect the changing nature of the family and to provide more protection for families not currently covered by the statute's provisions.

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<sup>53</sup> See Adam Liptak, *California Ruling Expands Same-Sex Parental Rights*, N.Y. TIMES, Aug. 23, 2005, at A10.