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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

ELISA MARIA B., Petitioner, v. THE SUPERIOR COURT OF EL DORADO COUNTY, Respondent; EMILY B. et al., Real Parties in Interest.	C042077 (Super. Ct. No. PFS20010244)

ORIGINAL PROCEEDINGS. Petition for Writ of Mandate. Gregory Ward Dwyer, Commissioner. Writ issued.

Hanke & Williams and Shelly L. Hanke for Petitioner.

No appearance for Respondent.

Bill Lockyer, Attorney General, James M. Humes, Senior Assistant Attorney General, Frank S. Furtek and Mary Dahlberg, Deputy Attorneys General, for Real Party in Interest El Dorado County.

Valerie Ackerman for National Center for Youth Law; Alice Bussiere for Youth Law Center; and Shannan Wilber for Legal Services for Children as Amici Curiae on behalf of Real Party in Interest Emily B.

This case poses the question whether a person in a same-sex relationship, who encourages her partner to give birth to a child via artificial insemination and who then holds out the child as her own, can be required to pay child support after she and her partner split up.

While together as partners in a same-sex relationship, Elisa B. and Emily B. each gave birth to a child conceived by artificial insemination. Elisa delivered a boy, and Emily had twins, a girl and a boy. They selected the children's names together, hyphenated the women's last names as the children's surname, and considered them to be "children of both [women]." In Emily's words, they agreed that she "would be the stay-at-home mother" and that Elisa would be "the primary breadwinner for the family." Providing financial support and medical insurance coverage for them, Elisa claimed all three children as dependants for income tax purposes. In time, the women's relationship soured and they split up. Elisa agreed to provide financial support for Emily's twins "when [she] could" and made monthly payments of $1,000. Almost a year and a half later, Elisa stopped sending money and stopped seeing the twins because she did not want to have to deal with Emily due to the tension between them.

Emily was now receiving public assistance for the twins, and the County of El Dorado (the County) filed an action to establish that Elisa is a "parent" of the twins and to impose a child support obligation based upon Elisa's alleged income of over $10,000 a month. Elisa opposed the action on the grounds inter alia that

(1) she is "not the other parent" of the twins, (2) "a lesbian partner who is neither the biological nor adoptive parent is not entitled to custody of children conceived during a same-sex bilateral relationship," and (3) "[s]ince the Court cannot award custody or visitation of [the twins] to [her], the Court cannot order [her] to pay child support for those same children."

The trial court found that Elisa "is accountable as a de facto legal parent for the support of [the twins]" and also that because she "consented to the creation of these children and encouraged their creation," she is precluded by principles of promissory or equitable estoppel from disclaiming financial responsibility for them.

Elisa filed a petition for writ of mandate in this court, seeking to compel the trial court to vacate its support order and to dismiss the action. She contends the trial court has no authority to order a lesbian partner in a same-sex relationship to pay child support when the partner is not the biological or adoptive mother of the children. According to Elisa, a parental obligation of support may not be imposed on her because she is not a parent under the Uniform Parentage Act (the UPA) (Fam. Code, § 7600 et seq.; further section references are to the Family Code unless otherwise specified), and the court erred in concluding she is estopped from disclaiming responsibility for the financial support of the children. Moreover, she argues, imposing a support obligation on her violates principles of equal protection of law because it places a greater burden on her than on a similarly-

situated unmarried man whose partner conceives a child through artificial insemination.

We issued an alternative writ and stayed the trial court's order. We now conclude that a peremptory writ of mandate should issue directing the trial court to vacate its order and to enter judgment in favor of Elisa.

As we will explain, we conclude that Elisa is not a parent of the twins within the meaning of the UPA and, thus, the UPA cannot be used to impose a child support obligation on her. And she is not entitled to the parental rights and obligations provided by recent registered domestic partners legislation because it does not become effective until January 1, 2005, and in any event, she and Emily were not registered domestic partners. Furthermore, Elisa is not estopped from disclaiming financial responsibility for the twins under the circumstances of this case. Accordingly, we shall reverse the judgment.

BACKGROUND

Elisa and Emily moved in together in August 1993 and maintained an exclusive relationship. They exchanged rings to symbolize their union, and Elisa had the words Emily Por Vida (Emily For Life) tattooed on her arm. The women set up a joint bank account and pooled their resources for household expenses.

Elisa wanted to share her life with Emily and have children. Both women wanted to experience childbirth. They discarded the idea of using a private sperm donor because he potentially would have parental rights to custody and visitation. Thus, they chose a fertility clinic together, and Elisa began the insemination process

in 1996. After Elisa became pregnant, Emily began the process using the same sperm donor so their children would be related. Most of the inseminations occurred at the clinic, but on one occasion, Elisa inseminated Emily in their home using the donor's sperm.

Emily and Elisa attended each other's childbirth classes and medical appointments, and were present at the birth of each other's children. Elisa gave birth to a boy in 1997, and Emily gave birth to twins in 1998. The women jointly chose the children's names and gave them a hyphenated surname, which was a combination of their own surnames. They did this so the children would be considered a family and the children of both of the women. The women breast-fed all three children and pumped breast milk for any child to use as necessary. Elisa considers herself and Emily to both be the mothers of all the children.

Prior to the children's births, Emily and Elisa talked with an attorney because they wanted to adopt each other's child. But they did not follow through on the idea.

After the twins were born, Emily did not return to work. As the women had agreed, she stayed at home with a full-time nanny to care for all the children. Elisa, who was the higher wage earner, provided financial support for the family, paid for dependent medical insurance coverage for the three children, and claimed them as dependants for income tax purposes.

Elisa testified she never agreed Emily would be "a stay-at-home mom" forever; rather, the plan was for Emily to return to work in a few years and for the children to go to daycare. According to Elisa,

the women did not have any financial discussions about child support until after they separated.

Six years after they began living together, they separated in November 1999. Emily and the twins remained in the house owned by Elisa, who continued to pay the mortgage and agreed to help out Emily financially "when [she] could." After the house was sold in November 2000, Emily and the twins moved to an apartment and Elisa orally agreed to pay Emily $1,000 a month for support.[1] Although Emily thought this support agreement was indefinite, she conceded that they did not discuss how long Elisa would provide financial assistance. However, according to Emily, Elisa did say that she would always provide a home for Emily and the children.

In May 2001, Elisa informed Emily that she was no longer a full-time employee and that she would not be able to assist Emily anymore because all of Elisa's resources were needed to support herself and her son.

In June 2001, the county filed a complaint "regarding parental obligations" against Elisa to "establish [her] parentage" of the twins and to impose a child support obligation for them pursuant to section 17400 because the twins were receiving public assistance.[2]

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[1] Emily, who began receiving public assistance for her children in December 1999, knew accepting this money from Elisa would constitute "welfare fraud."

[2] Section 17400 states in pertinent part: "(a) Each county shall maintain a local child support agency, as specified in Section 17304, that shall have the responsibility for promptly and effectively establishing, modifying, and enforcing child support obligations, including medical support, enforcing

The trial court ruled that because Elisa intended to create children with Emily and used reproductive technology to do so, Elisa was accountable for supporting the twins as a de facto legal parent. In the court's view, Elisa should be "held to the same legal duty and responsibility of a man found to be a presumed father" under the UPA. The court also held that a support obligation was appropriate pursuant to principles of promissory or equitable estoppel. Accordingly, it ordered Elisa to pay child support of $907.50 per month for each child, for a monthly total of $1,815.

DISCUSSION

I

Elisa contends she is not a parent of the twins within the meaning of the UPA and, thus, she does not have any of the rights *or obligations* arising from the parent and child relationship, e.g., she has no legal obligation to pay child support for the twins.

The UPA, which "'provides a comprehensive scheme for judicial determination of paternity,'" (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1050), also is utilized in resolving questions of

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spousal support orders established by a court of competent jurisdiction, and determining paternity in the case of a child born out of wedlock. The local child support agency shall take appropriate action, including criminal action in cooperation with the district attorneys, to establish, modify, and enforce child support and, when appropriate, enforce spousal support orders when the child is receiving public assistance, including Medi-Cal, and, when requested, shall take the same actions on behalf of a child who is not receiving public assistance, including Medi-Cal."

maternity. (§ 7610, subd. (a); *In re Karen C.* (2002) 101 Cal.App.4th 932, 936-939 (hereafter *Karen C.*).)

As used in the UPA, the term "'[p]arent and child relationship' . . . means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship." (§ 7601; *Johnson v. Calvert* (1993) 5 Cal.4th 84, 89 (hereafter *Johnson*).) This legal relationship encompasses two kinds of parents, "natural" and "adoptive" (§ 7601), and "extends equally to every child and to every parent, regardless of the marital status of the parents" (§ 7602).

In the past, there was rarely a question concerning the identity of a child's mother; she was the woman who gave birth to or adopted the child. However, technological advances have made many variations of motherhood possible. For example, it is possible for one woman to provide the genetic material necessary for reproduction and for another woman to gestate and give birth to the child. "[B]oth genetic consanguinity and giving birth [are] means of establishing a mother and child relationship . . . ." (*Johnson, supra,* 5 Cal.4th at p. 93.)

"Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible." (*Johnson, supra,* 5 Cal.4th at p. 92, fn. omitted.) Therefore, "when the two means [genetic consanguinity and giving birth] do not coincide in one woman, she who 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 p. 93, fn. omitted.)

Here, Elisa has no genetic consanguinity with the twins, she did not give birth to them, and she has not adopted them. In contrast, Emily conceived the twins by artificial insemination and gave birth to them with the intent of raising them as her own. Accordingly, Emily is the natural mother of the twins--a fact that neither she nor Elisa has disputed--and Elisa has no legal maternal relationship with the children under the UPA because "for any child California law recognizes only one natural mother." (*Johnson, supra,* 5 Cal.4th at p. 92.)

Since Elisa is not the twins' natural mother and, for obvious reasons, she is not their father, and because she did not adopt the twins, Elisa does not have any of the rights, privileges, duties, or obligations of a parent under the UPA. This conclusion is consistent with prior decisions regarding the parental status of a lesbian with respect to the children of her former lesbian partner.

For example, in *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597 (hereafter *Curiale*), a woman unsuccessfully sought to establish de facto parental status to assert "rights of custody and/or visitation" with the child of her former lesbian partner. (*Id*. at pp. 1598-1599.) This court held that although the UPA confers standing upon any interested person to bring an action to establish the existence of a parent-child relationship (§ 7650; former Civ. Code, § 7015), "[t]he Legislature has not conferred upon one in plaintiff's position, [a woman who did not have a biological or

adoptive relationship with the child of her former partner in a same-sex relationship], any right of custody or visitation upon the termination of the relationship." (*Curiale, supra,* 222 Cal.App.3d at p. 1600; accord, *West v. Superior Court* (1997) 59 Cal.App.4th 302, 305-306 (hereafter *West*).)

Likewise, *Nancy S. v. Michele G.* (1991) 228 Cal.App.3d 831 (hereafter *Nancy S.*) held that a lesbian who was not the natural or adoptive mother of her former partner's two children "could not establish the existence of a parent-child relationship under the [UPA]" even if "she helped facilitate the conception and birth of both children and immediately after their birth assumed all the responsibilities of a parent." (*Id.* at p. 836.)

Those decisions pointed out that given the "'complex practical, social and constitutional ramifications'" of expanding the class of persons entitled to assert parental rights under the UPA, this public policy decision should be left to the Legislature. (*West, supra,* 59 Cal.App.4th at p. 306; *Nancy S.*, *supra*, 228 Cal.App.3d at p. 840; *Curiale, supra,* 222 Cal.App.3d at pp. 1600-1601.) The same must be said for the expansion of the class of persons responsible for parental obligations.

Faced with this established case law holding that a partner in a same-sex relationship lacks parental rights with respect to the other partner's children and is not a parent under the UPA, the Legislature has not amended the UPA to provide otherwise. But in 2003, the Legislature added section 297.5 to the Family Code, which states: "The rights and obligations of registered domestic partners with respect to a child of either of them shall

be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses." (Stats. 2003, ch. 421 (Assem. Bill No. 205), § 4, operative Jan. 1, 2005.)

Section 297.5 does not apply to this case because it is not effective until January 1, 2005, and in any event, there is no evidence that Elisa and Emily ever registered as domestic partners with the Secretary of State, which is a prerequisite to the application of section 297.5. (§ 297.) Consequently, we must apply the parental definitions set forth in the UPA.

In sum, because Elisa is not the twins' natural mother and because, for obvious reasons, she is not their father, she does not have any of the rights and privileges of a parent under the UPA. Since Elisa is not a parent under the UPA for purposes of enjoying parental rights, she is not a parent for purposes of the obligations imposed by the UPA, including child support.

II

The County contends that *Curiale*, *Nancy S.*, and *West* are no longer good law in light of two more recent cases, *In re Nicholas H.* (2002) 28 Cal.4th 56 (hereafter *Nicholas H.*) and *Karen C., supra,* 101 Cal.App.4th 932.

In the County's view, *Nicholas H.* and *Karen C.* support a determination that (1) Elisa is a presumed parent under section 7611, subdivision (d), even though she is not biologically related to the twins and the statutory language in section 7611 indicates

it applies to paternity determinations, and (2) as a presumed parent, Elisa has an obligation to support the twins. We disagree.

In *Nicholas H.*, Thomas, a man seeking to establish paternity, conceded that he was not the biological father of Nicholas. But Thomas was listed as the father on the birth certificate, received Nicholas into his home, and openly raised him as his natural child. Thomas sought to establish paternity pursuant to the presumption of paternity set forth in section 7611, subdivision (d) (§ 7611(d)). (*Nicholas H.*, *supra*, 28 Cal.4th at pp. 59-62.) Section 7611(d) provides that "[a] man is presumed to be the natural father of a child" if "[h]e receives the child into his home and openly holds out the child as his natural child." The Court of Appeal concluded that pursuant to section 7612, the presumption of paternity was rebutted by Thomas's concession that he is not Nicholas's biological father. (*Nicholas H.*, *supra*, 28 Cal.4th at p. 62.) Section 7612 states in pertinent part: "(a) . . . a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. [¶] (b) If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. [¶] (c) The presumption under Section 7611 is rebutted by a judgment establishing paternity of the child by another man."

The California Supreme Court held that evidence establishing Thomas is not Nicholas's biological father did not overcome the presumption of paternity set forth in section 7611(d). The court

explained: (1) the presumption "'*may*'" be rebutted only "'*in an appropriate action*'"; and (2) rebutting the presumption that Thomas is Nicholas's father was inappropriate because it would render the child fatherless since his alleged biological father had not come forward to assert his parental rights, his paternity had not been judicially established, and he could not be located. (*Nicholas H.*, *supra*, 28 Cal.4th at pp. 58-59, 61, 63, 70, quoting § 7612, subd. (a), italics added; see also *In re Raphael P.* (2002) 97 Cal.App.4th 716, 735-736 ["We can discern no policy that would support a requirement of failing to legally recognize a man who has acted as a child's only father, regardless of his relationship with the child and desire to accept paternal responsibility, solely because he is determined not to be the biological father"].)

Nicholas H. noted, however, that rebutting the presumption of paternity with evidence that a man is not the biological father of a child would be appropriate where "another candidate is vying for parental rights and seeks to rebut a section 7611(d) presumption in order to perfect his claim, or in which a court decides that the legal rights and obligations of parenthood should devolve upon an unwilling candidate." (*Nicholas H.*, *supra*, 28 Cal.4th at p. 70.)

Karen C. held the principles applicable to presumed paternity discussed in *Nicholas H.* apply equally to women. (*Karen C.*, *supra*, 101 Cal.App.4th at pp. 937-939.) Hence, the fact that the woman who had raised Karen since birth was not her birth mother did not preclude a finding of maternity where Karen's birth mother was not a candidate for a declaration of maternity. (*Id.* at pp. 934, 938.)

Thus, *Nicholas H*. and *Karen C*. are inapposite because they concerned situations where (1) no other competing father or mother was claiming parentage and was available to care for and support the child, and (2) the non-biological "parent" was willingly seeking a declaration of parenthood, along with the rights and obligations entailed therein. These facts were critical to the decisions in *Nicholas H.* and *Karen C.* that the proposed parents' lack of biological ties did not rebut the presumption of parenthood in section 7611(d).

Here, the twins have a natural, biological mother, Emily, who is not disclaiming her maternal rights and obligations, and the children can have only one natural mother. (*Johnson, supra,* 5 Cal.4th at p. 92.) Furthermore, because the trial court is attempting to impose the legal obligations of parenthood upon an unwilling candidate, this is an appropriate action for Elisa's lack of biological ties to be used to rebut the presumption in section 7611(d) upon which the County relies. (*Nicholas H., supra*, 28 Cal.4th at p. 70.)

Nothing in *Nicholas H.* or *Karen C*. even remotely suggests section 7611(d) can be used to establish that a woman in a same-sex relationship is the presumed parent of her partner's biological children while the mother is still alive, has not abandoned her children, and has not relinquished her parental rights. "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

III

The County also relies on *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410 (hereafter *Buzzanca*) to support its position that Elisa's intention to create a child through artificial insemination makes her a parent of the twins.

In *Buzzanca*, a husband and wife "agreed to have an embryo genetically unrelated to either of them implanted in a woman--a surrogate--who would carry and give birth to the child for them," and a surrogacy agreement was memorialized in writing after the embryo was implanted. (*Buzzanca, supra,* 61 Cal.App.4th at pp. 1412, 1414.) Before the child was born, the husband filed a petition for dissolution of marriage, asserting there were no children of the marriage. The wife responded that they were expecting a child by way of surrogate contract, and the child was born six days later. (*Id*. at p. 1413.) "[N]o bona fide attempt [was] made to establish the surrogate as the lawful mother." (*Id*. at p. 1421, fn. omitted.)

Citing section 7613, *Buzzanca* held that the husband and wife were the lawful parents of the child even though neither one of them was biologically related to the child. (*Buzzanca, supra,* 61 Cal.App.4th at pp. 1417-1428.) Section 7613 treats a husband as the natural father of a child if the husband's wife is artificially inseminated with another man's sperm under supervision of a licensed physician and with the husband's written consent.[3] By analogy,

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[3] Section 7613 states in pertinent part: "(a) If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated

Buzzanca concluded that the couple's consent to the creation of a child via the surrogacy agreement made them the legal parents of the child, who would not have been born but for the husband's and wife's intention to become parents and their initiation of the surrogacy agreement. (*Id*. at pp. 1412-1413, 1418, 1425-1426, 1428.)

In reaching this legal conclusion, *Buzzanca* relied in part on *Johnson, supra,* 5 Cal.4th 84, another case that resorted to an intention to procreate in resolving a parentage dispute. (*Buzzanca*, *supra*, 61 Cal.App.4th at pp. 1415-1418.) In *Johnson,* a childless couple and a woman entered into a contract providing that an embryo created by the gametes of the couple would be implanted in the other woman's uterus, that the child born would be the couple's child, and that the surrogate would relinquish all parental rights to the child in return for a specified fee and life insurance policy. Despite the terms of the contract, the surrogate claimed she was entitled to parental rights and sought a declaration of maternity. (*Johnson, supra,* 5 Cal.4th at pp. 87-88.) *Johnson* found that where two women have presented acceptable proof of maternity, in that one provided the gamete used to create the embryo and the other gave birth as a surrogate, the court has to inquire into the parties' intentions as manifested in the surrogacy agreement in order to determine

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in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon's failure to do so does not affect the father and child relationship."

maternity. (*Johnson, supra,* 5 Cal.4th at p. 93.) *Johnson* held that the husband and wife were the child's parents, not the surrogate, because "[t]hey affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist." (*Ibid*.)

This case is distinguishable from *Buzzanca* and *Johnson*. Emily did not carry the twins as a surrogate for Elisa, who carried and gave birth to her own child. And the *Buzzanca* holding was limited to the facts before it, i.e., a paternity dispute by a *married* man who was the only available father and who had consented to a reproductive procedure designed to provide him and his wife with a child. *Buzzanca* did not address whether its reasoning would apply to an unmarried couple or a same-sex couple. (*Buzzanca, supra,* 61 Cal.App.4th at pp. 1419-1420, fn. 11.) In any event, the twins can have only one natural mother under the UPA. (*Johnson, supra,* 5 Cal.4th at p. 92.) Nothing in *Buzzanca* or *Johnson* holds that a woman's intention to create and raise a child can be used to establish the child has *two* mothers. In fact, *Johnson* declined to adopt the suggestion that it find the child therein had two mothers. (*Johnson, supra,* 5 Cal.4th at p. 92, fn. 8.) Instead, *Johnson* resorted to the intention to procreate to determine which of the two women vying for a declaration of maternity, the wife or the surrogate, was the child's mother. (*Id*. at p. 93.)

Accordingly, Elisa's intention to have Emily bring a child into the world is irrelevant to a determination of the identity of the twins' natural mother. Emily indisputably is their natural mother because she conceived and gave birth to them. And for obvious

biological reasons, Elisa cannot be the children's father. There are no other parental options available under the UPA and, absent a parental relationship, the UPA does not impose an obligation of child support.

As pointed out by the Washington Court of Appeals under similar circumstances: "If the marriage statute, adoption statute, UPA presumptions or surrogacy statute are inadequate when an unmarried couple, same gender or not, conceive artificially, it is up to the Legislature to make any changes. If a new test for an *intended parent* is to be created, the Legislature must do the creating. (*State ex rel. D.R.M.* (2001) 109 Wash.App. 182, 195 [34 P.3d 887, pp. 894-895].)

In sum, the County has failed to establish that Elisa is a parent under the UPA with an obligation to support the children, and the trial court erred in imposing such an obligation under the UPA.

IV

As an alternative ground for imposing upon Elisa a child support obligation, the trial court found that principles of promissory or equitable estoppel applied. It noted that (1) the twins would not exist but for Elisa's and Emily's joint decision to give birth to a child by medical technology; (2) Elisa consented to and encouraged the creation of the children and acted as a parent, providing them with financial, emotional, and psychological support; (3) after the parties separated, Elisa continued to visit and support the children; and (4) Emily indicated that she relied on Elisa's promise to raise and support her children, and would not have agreed to become

pregnant but for this agreement and understanding. Finding there was considerable evidence of an agreement, a breach of the agreement, and detrimental reliance on the agreement, the court concluded that "estoppel creates a duty to provide child support" in addition to any duty imposed under the UPA.

As we will explain, an obligation to support the children may not be imposed pursuant to either a promissory estoppel or an equitable estoppel theory under the circumstances of this case.

A

"Promissory estoppel applies whenever a 'promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance' would result in an 'injustice' if the promise were not enforced. (Rest.2d Contracts, § 90, subd. (1).)" (*Lange v. TIG Ins. Co.* (1998) 68 Cal.App.4th 1179, 1185.) The required elements are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the promisee's reliance must be both reasonable and foreseeable; and (4) the promisee must be injured by his or her reliance. (*Laks v. Coast Fed. Sav. & Loan Assn*. (1976) 60 Cal.App.3d 885, 890; see also *Lange v. TIG Insurance Co., supra,* 68 Cal.App.4th at p. 1185 ["To be binding, the promise must be clear and unambiguous"].)

"Generally, the determination of . . . estoppel is a question of fact, and the trier of fact's finding is binding on the appellate court. [Citations.] When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.

[Citations.]" (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319.)

Here, the essential facts are undisputed and disclose that before the twins were born, there was no clear and unambiguous promise by Emily that if Elisa had children, Emily would support them until they reached adulthood. Viewed in the light most favorable to the judgment, the parties agreed prior to the birth of the children that Emily would be a stay-at-home mother. According to Emily and Elisa, there were no other discussions about finances before the couple separated. However, when Elisa left, she said that she would take care of Emily and the children by paying the mortgage and attempting to help out financially. Emily believed this support would continue indefinitely because Elisa said she would always provide a home for her and the children. But Emily also testified that she applied for public assistance because she did not truly believe she would receive financial assistance from Elisa.

Emily was asked during cross-examination whether "[Elisa] told you that when you became pregnant, you would be taken care of for life, that you never had to work again?" Emily replied that they had agreed she would "work as an at-home mother with the children [they] jointly agreed to have together." The court asked "[i]f [Elisa] had not agreed to support the children conceived by you, . . . would you have agreed to become pregnant by artificial insemination?" Emily replied, "No." However, there is no evidence of any pre-conception discussions about Elisa supporting Emily's children in the event the two women separated. The only pre-birth

discussions were that Emily would be a stay-at-home mother while Elisa financially supported everyone, with some disagreement regarding how long Emily would stay at home. This is the only promise of support in the record upon which Emily could have relied, and it is a promise that Elisa kept while the parties were together. There is no testimony from either Emily or Elisa that prior to the children's conception or birth, Elisa clearly and unambiguously promised to support Emily's twins indefinitely, in addition to Elisa's own son, even if she and Emily separated and even though the law did not imbue Elisa with any parental rights with respect to Emily's twins.

And it is undisputed that Emily wanted to experience childbirth and have her own children, and that Elisa did not need Emily to be a surrogate mother for her because Elisa conceived and gave birth to a child of her own. In other words, Elisa did not need another woman's body to gestate a child on her behalf and did not seek to avoid the difficulties of pregnancy by having Emily bear children for her, and Emily was not induced to bear children she did not wish to have in order to fulfill Elisa's desire for parenthood. Furthermore, there is no evidence that Emily apprised Elisa of her expectation of indefinite child support.

Under these circumstances, and given the then state of the law concerning a same-sex partner's lack of any cognizable legal parental relationship with her partner's children, Elisa would not reasonably expect that her statements about financially supporting everyone while Emily cared for the two women's children would lead

Emily to believe that Elisa would support Emily's children if the couple separated.

Moreover, because the law did not impose parental obligations on a person who was not married to a person who has artificial insemination (§ 7613), who was not a parent or presumed parent (§§ 7601, 7611), or who had not agreed in writing to support the child (§ 7614)[4], it was not reasonable for Emily to rely upon a promise of child support that was silent or ambiguous about any post-separation support. Indeed, the fact that the women discussed adopting each other's children indicates they knew they would not otherwise have a legal parental relationship with their partner's children, with all the corresponding rights and responsibilities of parenthood.

Hence, it was not reasonable for Emily to rely on Elisa's promise--to support everyone while Emily stayed at home and took care of the two women's children--as an indication that Elisa would continue to support Emily's children in the event they separated, absent a clear promise to this effect. (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 48 [for estoppel to apply, a person's reliance must be reasonable].)

In finding that promissory estoppel applied, the trial court relied on *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171 (hereafter

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[4] Section 7614, subdivision (a), states: "A promise in writing to furnish support for a child, growing out of a presumed or alleged father and child relationship, does not require consideration and, subject to Section 7632, is enforceable according to its terms."

Dunkin) for the proposition that the court can enforce an agreement between domestic partners regarding parentage.

In *Dunkin*, cohabitants Raymond Dunkin and Lisa Boskey wanted to have a child, but Dunkin was sterile. They entered into a written agreement, drafted by a fertility clinic, in which they consented to the creation of a child via artificial insemination, acknowledged their obligation to support the child, and agreed to treat the child born as the result of the procedure as their natural child. About two years after the child was born, Dunkin and Boskey ended their relationship, and she denied him any custody or visitation with the child. (*Dunkin, supra,* 82 Cal.App.4th at pp. 178-179.) Dunkin brought an action under the UPA to determine whether a parent and child relationship existed, but the trial court found that he lacked standing to sue for custody of a child conceived with another man's sperm. (*Id.* at p. 180.) Rather than appeal from the judgment, Dunkin filed an action against Boskey for breach of contract, but the court sustained a demurrer to the action, finding that Dunkin could not enforce the agreement. (*Id*. at pp. 179-180.)

In determining that the parties' agreement was valid and did not violate public policy, the appellate court noted Dunkin was not a father under the UPA. (*Dunkin, supra,* 82 Cal.App.4th at pp. 184-186.) Because Dunkin and Boskey were not married, section 7613, which states a husband who consents in writing to the artificial insemination of his wife is treated in law as if he were the natural father of the child conceived, was inapplicable. But the court was persuaded that Dunkin's "status has the elements of those of a lawful father . . . by virtue of his written consent to the

artificial insemination . . . and voluntary consequent assumption of fatherhood duties." (*Id*. at pp. 187-188.)

The written agreement could not grant Dunkin parental rights that the law otherwise expressly denied him, or infringe on the authority of the court to provide for the custody and support of the child. Nevertheless, the court held that, as between Dunkin and Boskey the agreement was binding and Boskey could not repudiate it with impunity. (*Dunkin, supra,* 82 Cal.App.4th at pp. 190-191.) Although Dunkin could not recover damages for the loss of his relationship with the child, he was entitled to require Boskey to disgorge any monetary benefit she received at his expense. (*Id*. at pp. 193, 195-197.)

Here, the trial court's reliance on *Dunkin,* which concerned an express written agreement, is misplaced. In this case, there is no similar agreement that clearly delineated the parties' promises and obligations with respect to the children. There was only an ambiguous promise by Elisa, which is insufficient to support a finding of promissory estoppel. (Compare *Karin T. v. Michael T*. (N.Y.Fam.Ct. 1985) 484 N.Y.S.2d 780 [127 Misc.2d 14] [woman who held herself out as a man and signed an artificial insemination agreement in connection with the insemination of her same-sex partner, which agreement indicated she was the husband and stated that she waived any rights to disclaim the children as her own, could not abrogate her responsibility to support the children or benefit from her fraud].)

Promissory estoppel is an equitable doctrine, and an action based on promissory estoppel is considered an equitable action,

rather than a legal one. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 7-9.) "'"'Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute [citation]. Neither a fiction nor a maxim may nullify a statute [citation]. Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly [citation].' [Citation.]" [Citation.]'" (*Timberline, Inc. v. Jaisinghani* (1997) 54 Cal.App.4th 1361, 1368, fn. 5.) "And courts are usually reluctant to develop new forms of equitable relief in a field normally assigned to legislative policy. [Citation]." (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 3, pp. 681-682.)

Whether and in what circumstances a person in a same-sex relationship, who is not related to children born during the relationship, should have the rights or obligations of a parent are matters plainly within the realm of legislative policy. Absent an express and unambiguous pre-conception or pre-birth agreement to support the children in the event the parties separated (see, e.g., § 7614), we will not create a new means of imposing a child support obligation on a nonparent when the then-existing law did not confer or enforce any parental rights with respect to the child.

B

It appears the trial court also may have relied on the doctrine of equitable estoppel; but this theory is equally unavailing under the circumstances of the present case.

The doctrine of equitable estoppel is codified in Evidence Code section 623, which states: "Whenever a party has, by his own

statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

Equitable "[e]stoppel will be enforced to prevent a person from asserting a right where his conduct or silence makes it unconscionable for him to assert it." (*In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647, 658.) It is invoked as a defensive matter to prevent the party estopped from alleging or relying upon some fact or theory that would otherwise permit him or her to recover something from the party asserting estoppel. (*Green v. Travelers Indemnity Co.* (1986) 185 Cal.App.3d 544, 555.) The doctrine acts defensively only, and cannot be used as a sword by the one seeking to assert it to gain an unfair advantage, such as to confer substantive rights on a party who otherwise has none. (*Money Store Investment Corp. v. Southern Cal. Bank* (2002) 98 Cal.App.4th 722, 732; *In re Marriage of Umphrey, supra,* 218 Cal.App.3d at p. 658.)

Here, Emily and the County are attempting to use the doctrine offensively to establish a parental obligation of child support where the law does not otherwise impose such an obligation. Under the circumstances, it is doubtful that equitable estoppel applies. (Cf. *State ex rel. D.R.M.*, *supra*, 109 Wash.App. at pp. 195-196 [34 P.3d at p. 895].) In any event, this theory fails for many of the same reasons that promissory estoppel does not apply.

To establish equitable estoppel, generally four elements must be proved: "'"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act

that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury."'" (*Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 403-404, citations omitted.) This reliance must be reasonable. (*Golden West Baseball Co. v. City of Anaheim, supra,* 25 Cal.App.4th at p. 48.)

As we have explained, Emily's reliance on Elisa's ambiguous promise was not reasonable under the circumstances. Moreover, Elisa did not know and had no reason to know that Emily construed her agreement--to support both the women's children while Emily stayed home to care for them--as a promise to support Emily's children in the event the women separated.

Furthermore, it is unfair for the court to impose a child support obligation under an estoppel theory when the court cannot grant and enforce parental rights, such as custody and visitation, under the same theory over Emily's objections. If Emily relied to her detriment by having twins based on Elisa's promise of support, Elisa equally relied to her detriment because (1) her promise assuredly was based on a return promise of a parental relationship with the children, yet (2) the law will not enforce Emily's half of the bargain under an equitable estoppel theory if Emily chooses to exclude Elisa from the children's lives. (*Nancy S. v. Michele G.*, *supra*, 228 Cal.App.3d at pp. 839-840.)

For this reason, *L.S.K. v. H.A.N.* (Pa.Super. 2002) 813 A.2d 872, on which the County relies, is distinguishable. In that case, a same-sex partner (H.A.N.) sued her former partner (L.S.K.) for

custody of L.S.K.'s biological children. Thereafter, L.S.K. filed a complaint seeking child support from H.A.N. The trial court entered an order granting legal custody of the children to each party, and granting H.A.N. partial physical custody. The court found that H.A.N.'s conduct estopped her from claiming she was not liable for child support, and ordered her to pay certain sums for the support of the children. (*Id.* at pp. 874-876.) The appellate court upheld this determination, finding that H.A.N. could not maintain the status of *in loco parentis* to pursue an action for custody of the children and obtain such custody, yet deny any obligation for supporting the children. (*L.S.K. v. H.A.N., supra,* 813 A.2d at p. 878.)

Here, Elisa did not initiate an action against Emily seeking a court order granting visitation and custody, and the court did not issue such an order. Thus, the factors warranting the application of equitable estoppel in *L.S.K. v. H.A.N.* are absent in the present case.

In light of our determination that Elisa is not a parent of the twins and is not liable for their support, we need not address her claim that imposing a support obligation would violate her right to equal protection of laws.[5]

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[5] The National Center For Youth Law, the Youth Law Center, and Legal Services For Children have filed an amici curiae brief. To the extent their brief raises arguments not presented in Elisa's petition for writ of mandate, or raises arguments not tendered in the trial court, we decline to address them. (*California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1274-1275 [amicus curiae must accept the

DISPOSITION

Let a peremptory writ of mandate issue, directing the trial court to vacate its order and to enter a new order in favor of Elisa. Having served their purposes, the alternative writ is discharged, and the stay previously issued by this court is vacated upon the finality of this opinion. The parties shall bear their own costs in this original proceeding. (Cal. Rules of Court, rule 56.4(a).)

SCOTLAND, P.J.

We concur:

SIMS, J.

HULL, J.

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issues urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered].)