

# PARENTAGE LITIGATION

## REFERENCE GUIDE

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2017 EDITION

By

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I.  
CALIFORNIA'S STATUTORY SCHEME OF PARENTAGE

A. INTRODUCTION

California's parentage law is made up of a series of statutes that wind a trail from common law to the reflection of modern day values. These statutes have been and continue to be explained, analyzed, and interpreted in decisions by the appellate courts throughout the state and even by the United States Supreme Court in cases that arise from a wide spectrum of areas of law including family, probate, and dependency.

Although parentage statutes are found in other codes, the focus of this reference guide is principally on those statutes found in the *Family Code*. However, the case law discussed will not be so limited in that the courts freely share application of the parentage statutes in those other areas of the law.

B. UNIFORM PARENTAGE ACT

The cornerstone of California's statutory scheme of parentage is the *Uniform Parentage Act* ("UPA"). The UPA was approved by the National Conference of Commissioners on Uniform State Laws in 1973. The UPA was inspired by a Texas law review article entitled "A Proposed Uniform Act on Legitimacy," and was encouraged by the United States Supreme Court decisions in *Weber v. Aetna Casualty & Surety Company* (1972) 406 U.S. 164 [92 S.Ct. 1400, 31 L.Ed.2d. 768] (Louisiana's worker's compensation statute, which relegated illegitimate children to the status of "other dependents," was held unconstitutional) and *Gomez v. Perez* (1973) 409 U.S. 535 [93 S.Ct. 872, 35 L.Ed.2d. 56] (a Texas court was reversed for denying substantial benefits to illegitimate children which were generally accorded to children). The UPA made a revolutionary change in the law by abolishing the incidents of illegitimacy and establishing legal equality of children without regard to the marital status of their parents. *Uniform Parentage Act, Prefatory Note*.

The UPA was adopted by the California Legislature in 1975. A press release issued on October 2, 1975 described the new legislation this way: "The bill, as amended, would revise or repeal various laws which now provide for labeling children as legitimate or illegitimate and defining their rights and those of their parents accordingly. In place of these cruel and outdated provisions, [the bill] would enact the Uniform Parentage Act which bases parent and child rights on the existence of a parent and child relationship rather than on the marital status of the parents." Effective January 1, 1994, the UPA was incorporated into the California *Family Code* ("FC") section 7600 et seq., and the introductory provisions state:

"'Parent and child relationship' as used in this part 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." *FC §7601*

*And,*

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *FC §7602.*

Effective January 1, 2014, the Legislature added to these introductory provisions of California's UPA the following:

"This part does not preclude a finding that a child has a parent and child relationship with more than two parents." *FC §7601(c).*

*And,*

"For purposes of state law, administrative regulations, court rules, government policies, common law, and any other provision or source of law governing the rights, protections, benefits, responsibilities, obligations, and duties of parents, any reference to two parents shall be applied to every parent of a child where that child has been found to have more than two parents under this part." *FC §7601(d).*

*COMMENT:* To carry out this policy that the court is not precluded from finding that a child has parent and child relationship with more than two parents, the Legislature added **subsection (c) of *Family Code* section 7612.** (See section II.D. for a discussion of *Family Code* section 7612(c).)

### **C. OTHER FAMILY CODE PARENTAGE STATUTES**

California's statutory scheme of parentage is not limited to the provisions of the UPA. Additional *Family Code* provisions which are relevant to establishing parentage are as follows:

*Family Code* section 7540 et seq., the conclusive presumption of paternity and its rebuttal provisions;

*Family Code* section 7550 et seq., the Uniform Act on Blood Tests to Determine Paternity;

*Family Code* section 7570 et seq., the establishment of paternity by voluntary declaration; and

*Family Code* section 17400 et seq., actions brought by local child support agencies.

Also see section III.A. for a discussion of other statutes that are relevant to establishing parentage.



**II.**  
**METHODS OF ESTABLISHING PARENTAGE**

**A. CONCLUSIVE PRESUMPTION**

**1. *Family Code section 7540***

The conclusive presumption of paternity is codified in *Family Code section 7540*:

"[T]he child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

The conclusive presumption reflects the ancient principle that when a husband and wife are living together in matrimony, the integrity of their family should not be impugned, and the husband is deemed responsible for his wife's child.

Historically, the rule promoted the social policies of preservation of the integrity of the family, protection of the welfare of children by avoiding the stigma of illegitimacy and keeping them off welfare rolls, and insurance of the stability of title and inheritance. *Estate of Cornelious* (1984) 35 Cal.3d 461.

More recently, the courts have declared that the conclusive presumption promotes the social policies of identification of the child's father by establishing, as a matter of law, that the father is the man with whom the child has had an ongoing father and child relationship, even though the presumption may not comport with biological reality. *Susan H. v. Jack S.* (1994) 30 Cal.App.4th 1435.

**2. *Necessary Foundational Facts***

The conclusive presumption applies only if the foundational facts of (1) marriage, (2) cohabitation, and (3) the husband's potency and fertility *all co-exist* at the time of conception. *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911.

"Sterility" for purposes of *Family Code section 7540* is defined in its "strictest sense": it is limited to cases where a preponderance of the evidence shows that the husband could not produce live sperm at the time of conception; proof of only a low sperm count or impaired fertility is not sufficient to avoid the application of the presumption. *In re Marriage of Freeman* (1996) 45 Cal.App. 4th 1437.

3. ***The Conclusive Presumption May Be Applied Against A Man Who Is Biologically Related To The Child***

a. ***Michael H. v. Gerald D.***

The United States Supreme Court in ***Michael H. v. Gerald D.*** (1989) 491 U.S. 110 [109 S.Ct. 2333, 105 L.Ed.2d. 91] held by a plurality decision that California's conclusive presumption did not infringe upon the due process rights of a man who wished to establish paternity of a child born to another man's wife. The court stated that the conclusive presumption implements a substantive rule of law that declares it to be generally irrelevant for paternity purposes whether a child conceived during and born into an existing marriage was fathered by someone other than the husband.

Acting on the appeal of the alleged biological father and the child, the Second Appellate District affirmed the trial court's granting of the husband's motion for summary judgment on the grounds that he was the child's father by virtue of the conclusive presumption of paternity (***Michael H. v. Gerald D.*** (1987) 191 Cal.App.3d 995). The California Supreme Court denied review, and the United States Supreme Court granted hearing of the alleged biological father's claim.

The facts, which the plurality opinion labeled "extraordinary," are such that Carole and Gerald were married and commenced living together as husband and wife in 1976. While still married and living together as husband and wife, Carole conceived and in May 1981 gave birth to Victoria. Carole had had an extra-marital affair with Michael during the period she conceived Victoria. After Victoria was born, Carole told Michael she believed the child could be his. Carole, Michael and Victoria had blood tests performed at UCLA that showed there was a 98.07% probability that Michael was Victoria's biological father. Carole separated from Gerald in October 1981. Thereafter, Carole and Victoria stayed with Michael in the Virgin Islands for three months, after which Carole left Michael. Then Carole and Gerald reconciled. In November 1982, Michael brought his paternity action. In August 1983, Carole and Victoria again took up residence with Michael. They lived with Michael until April 1984. In June 1984, Carole again reconciled with Gerald and joined him in New York, where thereafter they continued to live in a family unit with Victoria and two other children subsequently born into their marriage.

b. ***Michelle W. v. Ronald W.***

The California Supreme Court in ***Michelle W. v. Ronald W.*** (1985) 39 Cal.3d 354 held that the conclusive presumption of paternity did not deny due process to the alleged biological father who had not claimed paternity until he married the child's mother six years after the child's birth.

The facts are such that Judith and Ronald were married in May 1965 and lived together as husband and wife until their separation in 1977. In 1973, Judith and Donald began having sexual relations, although Judith and Ronald were married and living together. In October 1974, Judith gave birth to Michelle. Until their marital separation in 1977, Judith, Ronald, Michelle and older daughter Tamara lived together in a family unit. When Judith and Ronald separated, they executed a marital settlement agreement wherein Judith was awarded custody of Michelle, Ronald was awarded rights of visitation, Ronald's obligation to provide child support for Michelle was described, and the issue of paternity was not raised. Thereafter, Ronald regularly and continually exercised his visitation rights with Michelle. In November 1980, Judith married Donald, and since that marriage, Michelle has lived in Donald's home and he has held her out to be his natural child.

In March 1981, a paternity action was brought by Donald and six-year-old Michelle, through her guardian ad litem. The trial court granted summary judgment establishing that Ronald was the father of Michelle, based upon the uncontradicted facts that Ronald and Judith were living together as a married couple at the time of Michelle's conception and birth, and that Ronald was neither impotent nor sterile. The California Supreme Court affirmed the trial court's ruling, holding that the conclusive presumption did not violate Donald's due process rights because "Donald's private interest in establishing a biological relationship in a court of law is overridden by the substantial state interests in familial stability and the welfare of the child." (*Michelle W. v. Ronald W.*, *supra*, 39 Cal.3d 354 at p. 363.) With respect to Michelle's claim, the Supreme Court questioned whether Michelle was the real actor behind this "child" paternity suit in that her guardian ad litem was a family friend of Donald and Judith, and was represented by the same attorney as Donald; the court reasoned, nonetheless, that Michelle's rights were no greater than those afforded to Donald.

#### 4. ***Marital Separation Or Dissolution Does Not Affect The Application Of The Conclusive Presumption***

Although the conclusive presumption can only arise in the context of a marital relationship, the presumption is not rendered inapplicable upon marital dissolution. The familial relationship between the presumed father and the child does not usually terminate upon dissolution of marriage. As the court in *Susan H. v. Jack S.*, *supra*, 30 Cal.App.4th 1435 observed, "the state has a legitimate interest in the 'social stability of the dissolving family' and an interest in not only 'preserving an intact family, but preserving the integrity of the divorcing family.'"

Other examples of the application of the conclusive presumption notwithstanding dissolution of marriage include the conclusive presumption being invoked by the mother to obtain a support order against the husband in dissolution proceedings (*In re Marriage of B.* (1981) 124 Cal.App.3d 524) by the husband to defend his relationship

with the child even where the marriage had been dissolved (*Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619); and, as discussed hereinabove, by the presumed father after the mother divorced him, obtained child support, and then married the biological father (*Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354).

5. ***The Conclusive Presumption Will Be Applied Unless There Is No Parent-Child Relationship To Preserve***

The conclusive presumption will not be applied if its application does not promote the social policies for which it was intended -- protecting the parent-child relationship -- and thereby offends due process. Or, put more simply, as illustrated below, the presumption will not be applied if its application would lead to an "absurd result that defies reason and common sense."

To determine whether a party is denied due process by being prevented from proving who is the biological father, the court must weigh competing state and private interest. But, the state's interest of preserving and protecting the developed parent-child relationship will always outweigh a party's private interest of establishing biological parentage. Therefore, the courts have held that the conclusive presumption will be applied unless there is no existent parent-child relationship to preserve. For example:

a. The presumption was not applied to make the husband the father where the child's mother and her husband had died, the husband had never lived with the child, and the husband had renounced his paternity and relinquished the child for adoption. *In re Lisa R.* (1975) 13 Cal.3d 636.

b. The presumption was not applied to make the husband the father where the mother and child separated from the husband when the child was eight days old, the mother and child moved in with the biological father whom the mother then married, and the child was raised to perceive the biological father rather than the husband as her father. *In re Melissa G.* (1989) 213 Cal.App.3d 1082.

c. The presumption was not applied where the husband and wife separated before either of them knew she was pregnant, the husband remained unaware of the child's existence for the next 13 years, and the child knew the husband was not her father. *County of Orange v. Leslie B.* (1993) 14 Cal.App.4th 976 (given these facts, the application of the conclusive presumption leads to an "absurd result that defies reason and common sense").

d. The presumption was not applied to make the husband the father where the mother separated from the husband before the child was born, the husband never lived with the child, neither the husband nor child perceived themselves to be

related, and the child was raised to believe another man was his father. *Comino v. Kelley* (1994) 25 Cal.App.4th 678.

6. ***The Conclusive Presumption Is Subject To A Limited Two Year Genetic Test Rebuttal Period***

***Family Code section 7541*** opens a limited window of opportunity for statutorily defined parties to request genetic tests in an effort to rebut the conclusive presumption of the husband's paternity:

a. The motion for genetic tests must be filed not later than two years from the child's date of birth.

b. The motion for genetic tests may only be filed by the following persons:

(1) The husband;

(2) The presumed father, within the meaning of ***Family Code sections 7611 and 7612***;

(3) The child through or by the child's guardian ad litem; and

(4) The mother of the child, if the child's biological father has filed an affidavit with the court acknowledging parentage of the child.

The requirements must be strictly adhered to if genetic tests are used to rebut the conclusive presumption. *Miller v. Miller* (1998) 64 Cal.App.4th 111 (private blood tests, not ordered by the court, performed more than two years after the child's birth had "no legal significance" and therefore could not rebut the conclusive presumption).

***COMMENT:*** Prior to 1980, the conclusive presumption was, indeed, conclusive. It was not until 1980 that the Legislature amended the presumption [then found in former ***Evidence Code section 621***] to allow "blood tests" to be used to rebut a husband's paternity under the above-described limited circumstances. The term "blood tests" is still used in ***Family Code section 7541***; however, in doing so, reference is made to ***Family Code section 7555 et seq.*** which therein uses the more technologically advanced term of "genetic tests". And that term is used herein when referencing the tests of ***Family Code section 7541***.

## B. VOLUNTARY DECLARATION

The statutory scheme of establishing parentage by voluntary declaration (also known as a "POP", an acronym for Paternity Opportunity Program) is set forth in *Family Code section 7570 et seq.* Its purpose is to speedily identify the father of children born to *unmarried mothers* so that the children may know their medical histories, know their fathers, and receive the financial support and monetary benefits due them.

In *H.S. v. Superior Court (S.G.)* (2010) 183 Cal.App.4th 1502 it was held that a voluntary declaration executed by a married mother is voidable because it would undermine family stability policies underlying the marital presumptions and standing statutes.

### 1. *Signing Of The Voluntary Declaration*

Although hospitals must try to obtain signed declarations before the infant born to the unmarried mother leaves the hospital, attesting parents may mail a notarized declaration to the Department of Child Support Services at any time after the child's birth. *FC §§7571(a) and 7571(d)*. Additionally, attesting parents may sign a declaration in person at a local child support agency office where staff witnessing the parents' signatures must forward the signed declaration to the Department of Child Support Services. *FC §7571(f)*.

The voluntary declaration of paternity must be executed on a form developed by the Department of Child Support Services and must contain the information and admonishments set forth in *Family Code section 7574*.

### 2. *The Voluntary Declaration Has The Same Force And Effect As A Judgment Of Paternity*

The signing and filing of a voluntary declaration "shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support." *FC §7573*.

In *Kevin Q. v. Lauren W.* (2009) 174 Cal.App.4th 1557, the court held that the voluntary declaration is not a mere presumption to be weighed against parentage presumptions or otherwise subject to rebuttal. Unless and until the voluntary declaration is set aside, it trumps the *Family Code section 7611* rebuttable presumptions, and has the same force and effect of a judgment. (See section II.C. for a complete discussion of *Family Code section 7611* presumptions.)

The facts of *Kevin Q.* are such that Kevin, who for 20 months received Lauren's child into his home and openly held out that child as his natural child (unequivocally qualifying as a presumed father under *Family Code* section 7611(d)), brought an action to establish his parentage of that child. In response, Lauren and biological father (who had no previous relationship with the child) properly signed a voluntary declaration of paternity, and used that voluntary declaration to defend against Kevin's parentage action. The Court of Appeal reversed the trial court's adjudication of Kevin's paternity, holding that the voluntary declaration functioned as a judgment of paternity, and a judgment of paternity trumps the rebuttable presumption of paternity.

*COMMENT: Kevin Q.* reminds us of the distinction that a presumption under *Family Code* section 7611(d) is a "rebuttable presumption", whereas a properly executed voluntary declaration of paternity has the same effect as a judgment, and therefore is not weighed or balanced against any other presumption -- as the case states, the effect of a judgment trumps presumptions.

### 3. *Birth Certificate Requirements*

*Health & Safety Code ("H&SC")* section 102425(a) sets forth the information that is required to be on a birth certificate, including the father's full name, birth place, and date of birth. If the parents are not married to each other, the father's name may be listed on the birth certificate only if the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is prepared. If there is no voluntary declaration, the birth certificate can be amended later to reflect the father's name only after paternity has legally been established or by a subsequently properly executed voluntary declaration of paternity.

*Health and Safety Code* section 102767 authorizes an application to delete a father's name from a birth certificate after the rescission of a voluntary declaration of paternity under *Family Code* section 7575(a).

### 4. *Rescission/Setting Aside Of The Voluntary Declaration*

#### a. *Rescission/Setting Aside Under Family Code* section 7575

Paternity established by the voluntary declaration may be nullified in the following ways:

(1) The filing of a statutory prescribed rescission form with the Department of Child Support Services within 60 days of the date of the execution of the declaration by the attesting father or mother (unless a court order of custody, visitation, or child support has been entered in an action in which the person seeking to rescind was a party). *FC* §7575(a).

(2) If, within the first two years of the life of the child, a motion for genetic blood tests is filed by either the local child support agency, the mother or the man who signed the voluntary declaration, and the genetic test results establish that man is not the child's father, the court may set aside the voluntary declaration of paternity unless the court determines that denial of the request to set aside the voluntary declaration is in the best interest of the child taking into consideration all of the following factors:

- The child's age.
- The length of time since the execution of the voluntary declaration by the man who signed the declaration.
- The nature, duration, and quality of the relationship between the man who signed the declaration and the child.
- Whether the man who signed the declaration has requested the parent-child relationship continue.
- Whether the biological father has indicated that he does not oppose such a continued relationship.
- Whether it would be beneficial or detrimental to the child in establishing the biological parentage of the child.
- Whether the man who signed the declaration has made it more difficult to find or obtain support from the biological father.
- Additional factors that the court deems relevant to its determination of the best interest of the child. *FC §7575(b)*.

(3) A motion for genetic tests may also be brought in an action to determine the existence or non-existence of the father and child relationship pursuant to *Family Code section 7630*, or in an action to establish an order for child custody, visitation or child support based upon the voluntary declaration. And if the genetic tests establish that the man who signed the voluntary declaration is not the child's father the court, in these proceedings, may also set aside the voluntary declaration subject to considering the above listed factors. *In re J.L.* (2008) 159 Cal.App.4th 1010.

In *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, the trial court erred for setting aside the declaration without evaluating the relationship between the child and the man who signed the voluntary declaration. Also see *In re William K.* (2008) 161 Cal.App.4th 1 in which it was held that it was not in the child's best interest



to set aside the voluntary declaration even though the father listed on the birth certificate was not the child's biological father.

(4) A motion to set aside the declaration may be brought by the mother or presumed father under *Code of Civil Procedure* section 473 [mistake, inadvertence, or excusable neglect]. The section 473 timetable begins to run on the date that the court makes a finding of paternity based upon the voluntary declaration of paternity in an action for custody, visitation, or child support. *FC §7575(c)*.

In *County of Los Angeles v. Sheldon P.* (2002) 102 Cal.App.4th 1337 the appellate court affirmed the trial court's finding that the mother showed mistake, surprise, or excusable neglect when she signed a voluntary declaration of paternity naming her friend who was not the biological father under circumstances where she was asked to sign the declaration very shortly after giving birth, while she was taking pain medication, was not given the explanatory materials required by statute, and no one explained the document.

**b. Rescission/Setting Aside Under *Family Code* section 7612(e)**

Under *Family Code* section 7612(e), within the first two years of the execution of a voluntary declaration, a person who is presumed to be a parent under *Family Code* section 7611 may file a petition to set aside that voluntary declaration. The court's ruling on such a petition to set aside shall take into account:

(1) The validity of the voluntary declaration of paternity (as discussed hereinbelow).

(2) The best interests of the child based upon the court's consideration of the factors set forth in *Family Code* section 7575(b) (as discussed hereinabove).

(3) The best interests of the child based upon the nature, duration, and quality of the petitioning party's relationship with the child and the benefit or detriment to the child of continuing that relationship.

(4) In the event of any conflict between the presumption under *Family Code* section 7611 and the voluntary declaration of paternity the weightier considerations of policy and logic shall control.

*COMMENT: Subsection (e) of Family Code section 7612* was added to by the Legislature effective January 1, 2012 in response to *Kevin Q. v. Lauren W.* (discussed hereinabove) which did not allow a presumed father to challenge the voluntary declaration executed by the mother and an absentee father. However, *section 7612(e)* does

not result in *Kevin Q. v. Lauren W.* no longer being good law, rather it merely allows a presumed father, under certain circumstances, to challenge the voluntary declaration of paternity.

#### 5. *Invalid Voluntary Declaration*

Under *Family Code* section 7612(f), a voluntary declaration is *invalid* if, at the time the declaration was signed, any of the following conditions exist:

a. The child already had a presumed parent under *Family Code* section 7540. (See section II.A. for a complete discussion of the conclusive presumption.)

b. The child already had a presumed parent under **subsection (a), (b), or (c)** of *Family Code* section 7611. (See section II.C. for a complete discussion of the rebuttable presumptions.)

c. The man signing the declaration is a semen donor whose rights and obligations are controlled by *Family Code* section 7613(b). (See section II.F. for a complete discussion of the rights and obligations of a semen donor.)

#### 6. *Recognition Of Out-Of-State Voluntary Declaration*

A paternity affidavit signed by a man in another state which had the same force and effect as a judgment in that state is entitled to full faith and credit in California. *In re Mary G.* (2007) 151 Cal.App.4th 184 (the voluntary affidavit signed in Michigan confirmed presumed father status in California).

### C. SECTION 7611 REBUTTABLE PRESUMPTIONS

#### 1. *Establishing The Presumptions*

A person is presumed to be the natural parent of a child if that person meets any of the following four principal conditions:

##### a. **Marital Presumptions**

(1) If the child is born during the marriage of the presumed parent and the child's natural mother, or 300 days after the marriage is terminated by death, annulment, declaration of invalidity, divorce, or judgment of separation. *FC* §7611(a).

In *Lisa I. v. Superior Court (Philip V.)* (2005) 133 Cal.App.4th 605, a husband qualified as a presumed father under *Family Code* section 7611(a) where the child was conceived more than a year and a half after the mother and

her husband separated and the child was born more than six months after their divorce judgment was entered.

(2) If before the child's birth, the presumed parent and the child's natural mother have attempted to legally marry each other, although the attempted marriage is or could be declared invalid, and either of the following is true: (1) if the attempted marriage could be declared invalid only by a court order, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity or divorce, or (2) if the attempted marriage is invalid without a court order, the child is born within 300 days after termination of cohabitation. **FC §7611(b).**

(3) If after the child is born, the presumed parent and the child's natural mother have married, or attempted to legally marry, although the attempted marriage is or could be declared invalid, and either of the following is true: (1) with his or her consent, the presumed parent is named as the child's parent on the child's birth certificate, or (2) the presumed parent is obligated to support the child under a written voluntary promise or by court order. **FC §7611(c).**

#### **b. Holdout Presumption**

If the presumed parent receives the child into his or her home and openly holds out the child as his or her natural child. **FC §7611(d).**

In *Comino v. Kelley* (1994) 25 Cal.App.4th 678, Paul Comino, a man not biologically related to the child, was found to be the child's presumed father based upon the following facts: a few weeks before the birth of the child, the mother moved into Paul's home; Paul and the mother attended La Maze childbirth classes together; Paul was present at the delivery and cut the umbilical cord; with the mother's consent, the child was named Joshua Paul Comino; Paul was identified as the father on the child's birth certificate which was signed by the mother; the mother sent out birth announcements identifying Paul as the father; and for the next two and one-half years, Paul, the mother, and the child lived together as a family unit in all common respects.

It is the totality of both elements -- reception of the child into the presumed parent's home and public acknowledgement of the child as his or her natural child -- which reflects a commitment towards developing and maintaining a substantial parent-child relationship that raises a person to the level of a **Family Code section 7611(d)** presumed parent:

- A person may become a presumed parent even if he or she has not lived with the child's birth or adoptive parent. See *R.M. v. T.A.* (2015) 233 Cal.App.4th 760.

- A person may become a presumed parent regardless of whether the child's birth or adoptive parent intended that person to obtain parental status if the birth or adoptive parent allowed and encouraged that person to become a presumed parent. See *S.Y. v. S.B.* (2011) 201 Cal.App.4th 1023.

- However, a person does not become a presumed parent by simply living with the mother and the child if he or she does not openly hold the child out as his or her natural child and there is no evidence that he or she is living with the child for any other reason than to be with the child's mother. See *Miller v. Miller* (1998) 64 Cal.App.4th 111.

**Family Code section 7611(d)** does not contain any specific durational requirement; it merely requires the party seeking presumed parent status to have received the child into his or her home and openly held the child out as his or hers in a fashion that is "sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship, but need not be for any specific duration." *Charisma R. v. Kristina S. (Charisma R. II)* (2009) 175 Cal.App.4th 361 (living in a family unit during the child's first three months of life was sufficient to become a presumed parent given involvement throughout the insemination process, birth, and for those three months). However, the courts have declined to adopt the doctrine of constructive receipt of a child into a man's home. *Dawn D. v. Superior Court (Jerry K.)* (1998) 17 Cal.4th 932 (a man was found not to have met the statutory conditions for presumed fatherhood because he did not actually receive the child into his home, despite his considerable efforts to do so, including filing a complaint before the child's birth to establish parentage and requesting joint legal and physical custody).

## 2. *Rebutting The Presumptions*

**Family Code section 7612** sets forth that the **Family Code section 7611** presumptions are rebuttable presumptions affecting the burden of proof and rebutted in the following two manners:

a. May be rebutted in an appropriate action by clear and convincing evidence, **Family Code section 7612(a)**.

b. Is rebutted by a judgment establishing paternity of the child by another man, **Family Code section 7612(d)**.

**COMMENT: Kevin Q. v. Lauren W.** (2009) 174 Cal.App.4th 1557 reminds us that a properly executed voluntary declaration of paternity has the same effect as a judgment, and therefore rebuts a presumption under **Family Code section 7611**; also see *In re Levi H.* (2011) 197 Cal.App.4th 1279 ["... voluntary declaration trumps presumed father status under section 7611, subdivision (d) despite any inequities."]

3. ***The Presumptions Are Not Necessarily Rebutted By Proof That The Presumed Father Is Not The Biological Father -- In re Nicholas H.***

In *In re Nicholas H.* (2002) 28 Cal.4th 56 the California Supreme Court held that a presumption arising under ***Family Code* section 7611** is not necessarily rebutted by clear and convincing evidence that the presumed father is not the biological father. The court pointed to the rebuttal language in ***Family Code* section 7612(a)** ("may be rebutted") as evidence that the statute does not contemplate an automatic rule that biological paternity rebuts the ***section 7611*** presumption in all cases, without concern for whether rebuttal was "appropriate" in the particular circumstances.

*Nicholas H.* arises from a juvenile dependency proceeding in which the mother was attempting to deny the presumed father's parentage, even though there was no other man claiming parental rights to the child. The facts are such that when Kimberly was pregnant with Nicholas, she moved in with Thomas who was not Nicholas's biological father, as he admitted. Nevertheless, Thomas wanted to act as a father to Nicholas so he participated in Nicholas's birth, was listed on Nicholas's birth certificate as his father, and provided a home for Kimberly and Nicholas for several years. As the court observed, "Thomas lived with Nicholas for long periods of time, he has provided Nicholas with significant financial support over the years, and he has consistently referred to and treated Nicholas as his son. In addition, there is undisputed evidence that Nicholas has a strong emotional bond with Thomas and that Thomas is the only father Nicholas has ever known."

Given these facts, the Supreme Court found that this was not "an appropriate action" in which the presumption of Thomas's paternity "may" be rebutted, because the rebuttal of the ***Family Code* section 7611(d)** presumption will render Nicholas fatherless.

*COMMENT:* Thus, *Nicholas H.* firmly implanted the proposition that the lack of a biological connection with the child will not preclude a claim of parentage if the following questions are both proven true:

(1) Does the man qualify as a presumed father under ***Family Code* section 7611(d)** because:

- He received the child into his home; and
- He openly held out the child as his natural child?

(2) Are the facts of the case such that it is not "an appropriate" action in which the presumption may be rebutted (i.e., would rebutting the presumption leave the child without a second parent)?

4. *If There Are Two Or More Rebuttable Presumptions, The Weightier Presumption Will Control*

*Family Code* section 7612(b) provides that if two or more presumptions arise under *Family Code* section 7611 which conflict, the presumption which on the facts is founded on weightier considerations of policy and logic will control.

a. *Steven W. v. Matthew S.*

In *Steven W. v. Matthew S.* (1995) 33 Cal.App.4th 1108, two men were presumed to be the child's father. The mother separated from Matthew and began living with Steven. The mother informed Steven that she was pregnant with his child, and together they told their friends, co-workers, and Steven's family the news. Steven attended childbirth classes and pre-natal doctor appointments with the mother, and he was present in the delivery room when the child was born. The mother named the child Michael, which is Steven's middle name, and identified Steven as his father on the birth certificate. For the next two and one-half years, Steven, the mother, and Michael lived together as a family unit. Thereafter, the mother and the child moved into Matthew's home, and Matthew thereafter also held the child out as his own. The mother and Matthew continued to permit Steven regular and continuing custodial time with the child.

The trial court found that both Matthew and Steven were presumed fathers [Matthew was a presumed because he was married to the mother when the child was born (*FC* §7611(a)), he had taken the child into his home and held the child out as his own (*FC* §7611(d)), and blood test results established that he was the child's biological father (*FC* §7555); Steven was a presumed father because he had taken the child into his home and held the child out as his own (*FC* §7611(d))]. But, in light of the facts, the trial court found, and the appellate court affirmed, that the conflict between the presumptions weighed in favor of Steven, and therefore Steven was adjudged to be the father of the child.

b. *In re Jesusa V.*

In *In re Jesusa V.* (2004) 32 Cal.4th 588, the California Supreme Court extended its *Nicholas H.* holding to find that the lack of biological ties does not preclude a finding of presumed parentage where the presumed parent has a close relationship with the child. Whereas *Nicholas H.*'s holding was based upon the fact that there was only one presumed father seeking to establish his parentage with no other candidate as a possible father, in *Jesusa V.* there were two presumed fathers (one of whom is biologically related) who were competing to be adjudged the father of the child.

The facts of *Jesusa V.* are such that Paul and Jesusa's mother had been married for 18 years and had five children together. During a three-year marital

separation, Jesusa's mother became pregnant by her relationship with Heriberto giving birth to Jesusa. When Jesusa was less than two years old, Heriberto was arrested for raping and beating Jesusa's mother. At juvenile court proceedings following Heriberto's arrest, Paul promptly requested presumed father status. The trial court found that Paul has a substantial relationship with Jesusa; not only is Paul married to Jesusa's mother, he is the father of Jesusa's five siblings, all of whom live with him and have themselves established a close relationship with Jesusa; although Jesusa and her mother resided with Heriberto before his arrest and incarceration, they visited Paul at his home nearly every weekend; Paul provided shelter to Jesusa and her mother during periods of conflict between the mother and Heriberto, which periods sometimes lasted as long as a month.

Based on these facts, it was found that both Heriberto and Paul each could claim a presumption of fatherhood. And, applying the reasoning of *Nicholas H.*, it was further found that this was "an appropriate action" in which the presumption of Heriberto's paternity could be rebutted notwithstanding that he was biologically related to the child. And applying the reasoning of *Steven W.*, the California Supreme Court found no abuse of discretion in the fact that the juvenile court undertook to identify the presumption "which on the facts is found on the weightier considerations of policy and logic" and determined that Paul's presumption outweighed that of Heriberto's.

#### 5. *The Presumptions Are Applied On A Gender Neutral Basis*

*Family Code* section 7650 provides that "insofar as practicable" the provisions of the UPA apply to a determination of the existence or non-existence of a mother and child relationship.

##### a. *Elisa B. v. Superior Court (Emily B.)*

In *Elisa B. v. Superior Court (Emily B.)* (2005) 37 Cal.4th 108 the California Supreme Court held that a birth mother's former lesbian partner, who has no biological ties to the child, can establish a parent-child relationship under a gender neutral application of *Family Code* section 7611(d). In that case, Elisa B. and Emily B. began living together in a lesbian relationship in August 1993. They later exchanged rings, established a joint bank account, and pooled their resources for household expenses. Both wishing to experience childbirth, they went to a fertility clinic together and underwent artificial insemination using semen from the same anonymous donor so that their children would be biologically related. Elisa gave birth to a son in 1997, and Emily gave birth to twins in 1998. They gave their children hyphenated surnames by combining their last names and each cared for all three children at one time or another. Both moms breastfed all three children. By agreement, Emily was the stay-at-home mom caring for all three children, and Elisa was the primary breadwinner. In November 1999, Emily and Elisa separated, and until May 2001, Elisa continued to assist in the support of Emily and the twins, after which Emily began receiving AFDC for the twins. In June 2001, El Dorado

County filed a complaint against Elisa to establish her parentage of the twins and for a child support order.

After granting review, the California Supreme Court found that Elisa is a presumed mother of the twins under *Family Code* section 7611(d) because (1) she received the children into her home and (2) she openly held them out as her natural children. And, having found that Elisa qualified as a presumed parent, applying the reasoning of *Nicholas H.* (discussed hereinabove), the court then found this is not an appropriate action in which to rebut that presumption with proof that she is not the children's biological mother because (1) she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, (2) she voluntarily accepted the rights and obligations of parenthood after the children were born, and (3) there are no competing claims to her being the children's second parent.

In holding that Elisa could become the second parent of Emily's twins, *Elisa B.* disapproved those cases which had previously denied same-sex couples access to the judicial process for a determination of paternity/maternity. See *Curiale v. Reagan* (1990) 222 Cal.App.3d 1597, *Nancy S. v. Michelle G.* (1991) 228 Cal.App.3d 831, and *West v. Superior Court (Lockrem)* (1997) 59 Cal.App.4th 302.

*COMMENT:* Thus, in a same-sex case the analysis for determining whether the alleged parent is the second parent is as follows:

(1) Does the alleged parent qualify as a presumed parent under *Family Code* section 7611(d), because:

- The alleged parent received the child into her home; and
- The alleged parent openly held the child out as her natural child?

(2) Are the facts of the case such that it is not "an appropriate" action in which the presumption may be rebutted with proof that the alleged parent is not biologically related, which is answered by the following questions:

- Did the alleged parent actively participate in causing the child to be conceived with the understanding she would raise that child as her own together with the other mother?



- Did the alleged parent voluntarily accept the rights and obligations of parenthood after the child was born?
- There are no competing claims that someone else is the second parent?

See *E.C. v. J.V.* (2012) 202 Cal.App.4th 1076 in which the Court of Appeal remanded to the trial court for it to analyze the facts with a clear understanding of the above criteria.

*COMMENT:* Whereas *Elisa B.* arose in a context of defending against a county's complaint to establish parentage for the purpose of collecting AFDC reimbursement and prospective child support, *Charisma R. v. Kristina S. (Charisma R. I)* (2006) 140 Cal.App.4th 301 was a private action in which the court found that a former lesbian domestic partner can affirmatively file a complaint to establish parental relationship with the child who was born to her former partner.

#### **b. Recognition Of Same-Sex Marriages**

As a result of the United States Supreme Court case of *Hollingsworth v. Perry* (2013) \_\_\_ U.S. \_\_\_ [133 S.Ct. 2652, 186 L.Ed.2d. 764] the appellate court's holding that California's Proposition 8 same-sex marriage ban was unconstitutional was not reversed thereby allowing Governor Jerry Brown to declare that, "in light of the decision, I have directed the California Department of Public Health to advise the state's counties that they must begin issuing marriage licenses to same-sex couples in California..."

*COMMENT:* As discussed, several of the parentage presumption statutes are dependent upon marriage, and given California's recognition of same-sex marriages those presumptive statutes are not limited to a husband and wife marital relationship.

#### **c. Registered Domestic Partners**

*Family Code section 297 et seq.* permits domestic partners to register with the Secretary of State. The registered domestic partners are to be given the same rights, protection, and benefits, and are subject to the same responsibilities, obligations, and duties under the law, as are granted to and imposed upon spouses. In particular, *Family Code section 297.5(d)* provides:

"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."

Thus, if the partners register in conformity with the statute, the non-birth parent in an existing or former same-sex relationship will have the right to seek the rights and obligations of parentage with respect to a child born into the relationship as do spouses and former spouses.

#### 6. *The Presumptions Are Applicable In All Types Of Cases*

Notwithstanding that *Nicholas H.*, *Jesusa V.*, and *Elisa B.* all arose from dependency proceedings, their holdings that under certain circumstances biology is not determinative of parentage are not limited to the dependency context. The reasoning of these three California Supreme Court cases are built upon the shoulders of non-dependency family law UPA cases, which are cited extensively throughout those Supreme Court opinions; and, indeed, dependency cases and family law UPA cases freely share the reasoning that under the appropriate circumstances biology should not be used to deprive a child of two parents to support and nurture him/her.

See *Librers v. Black* (2005) 129 Cal.App.4th 114, which arose as an action under the UPA, in which the court rejected the argument that *Nicholas H.* and *Jesusa V.* were not applicable but rather limited to the dependency context. The court stated that *Family Code* sections 7611 and 7612 apply to determine parentage in adoptions, family law matters and UPA petitions, and in dependency cases.

### D. MORE THAN TWO PERSONS MAY BE PARENTS OF A CHILD

#### 1. *Family Code section 7612(c)*

A court may "in an appropriate action" find that more than two persons with a claim of parentage are the parents *if* the court finds that recognizing only two parents would be "detrimental" to the child. In determining detriment under this statute, courts must "consider all relevant factors including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period of time." *FC* §7612(c).

In enacting *Family Code* section 7612(c), which became effective January 1, 2014, the Legislature included in its express findings that "this bill will only apply in *the rare case* where a child truly has more than two parents, and a finding that a child has more than two parents is necessary to protect the child from the detriment of being separated from one of his her parents", Sen. Bill No. 274 (2013-2014 Reg. Sess.) § 1.

2. *Applies to Preserve Existing Parent-Child Relationships*

"[A]n appropriate action" in which the court finds that a child has more than two parents *is an action to preserve* the existing parent-child relationship between a putative third parent and a child; *it is not an action to create* potential parent-child relationships.

a. *In re Donovan L.*

*In re Donovan L.* (2016) 244 Cal.App.4th 1072 interprets "an appropriate action" within the meaning of *Family Code* section 7612(c) to be "one in which there is an *existing* parent-child relationship between the child and the putative third parent such that 'recognizing only two parents would be detrimental to the child.'" *Donovan L.* arose out of a dependency proceeding in which the juvenile court ruled that the child "DJ" had three parents under *Family Code* section 7612(c) despite having found that the putative third parent, "David", who was DJ's biological father, had not yet developed a parent-child relationship with DJ. The appellate court reversed noting that the "detriment to the child" standard protects from "the loss of an *existing* relationship with a nonparent" and further noted that courts making parentage determinations under the UPA "seek to protect *existing* relationships rather than foster potential relationships." Thus, because David and DJ did not have a parent-child relationship at the time of the contested disposition hearing on parentage, the juvenile court's determination of detriment was error:

"'[A]n appropriate action' for application of section 7612, subdivision (c) requires a court to find an existing, rather than potential, relationship between a putative third parent and the child..." (*Id.* at p. 1091)

b. *Martinez v. Vaziri*

In *Martinez v. Vaziri* (2016) 246 Cal.App.4th 373, the court found it to be "an appropriate action" in which recognizing only two parents would be detrimental to the child within the meaning of *Family Code* section 7612(c). In *Martinez*, the uncontradicted facts are that the biological father had abandoned mother during her pregnancy, and had been incarcerated for extended periods since the child's birth; the putative father was involved in all aspects of the mother's pregnancy and birth, lived with

the mother and child for the first few months of the child's life, and continued to regularly visit with the child thereafter, the mother admitted that the putative father had been the male role model in the child's life and the child refers to him as father. Relying upon *In re Donovan L.*, *supra*, 244 Cal.App.4th 1072, the court concluded that even though the child was not living with the putative father, there was an existing parent-child relationship between the putative father and the child which, if not protected, would be detrimental to the child.

## **E. PARENTAGE BY EQUITABLE ESTOPPEL**

The doctrine of equitable estoppel is a rule of fundamental fairness whereby a party is precluded from benefitting from their inconsistent conduct which has induced reliance to the detriment of another. See *Evidence Code* ("EvC") **section 623** which is the statutory doctrine of equitable estoppel.

In the context of a parentage action, the equitable estoppel doctrine may impose upon an alleged parent the obligation to support a child apart from the statutory presumptions and apart from whether the alleged parent is genetically related to the child.

### **1. *Applies Only If The Alleged Father Knows The Truth That He Is Not Biologically Related To The Child.***

A line of marital dissolution cases hold that the conduct of a husband with no biological ties to a child may nonetheless estop the husband from avoiding parental obligations even after the husband's marriage to the child's mother is dissolved. *Clevenger v. Clevenger* (1961) 189 Cal.App.2d 658; *In re Marriage of Valle* (1975) 53 Cal.App.3d 837; *In re Marriage of Johnson* (1979) 88 Cal.App.3d 848.

The estoppel cases are based in large part on the same social policies that are promoted by the statutory presumptions of parentage, graphically stated as follows:

"The relationship of father and child is too sacred to be thrown off like an old sock, used and unwanted. We are dealing with the care and education of a child during his minority and with the obligations of the party who has assumed as a father to discharge it. The law is not so insensitive as to countenance the breach of an obligation in so vital and deep a relation, undertaken, partially fulfilled, and suddenly surrendered. [citing *Clevenger*]" (*In re Marriage of Johnson*, *supra*, 88 Cal.App.3d at p. 852.)

All of the following elements must be satisfied to give rise to this equitable estoppel:

- a. The putative father represented to the child that he was his/her father;
- b. The child relied upon the representation by accepting and treating the putative father as his/her natural father;
- c. The child was ignorant of the true facts; and
- d. The representation was of such long duration that it frustrated the realistic opportunity to discover the natural father.

In *In re Marriage of Valle* and *In re Marriage of Johnson*, the estoppel theory was applied to six-year parent-child relationships. The court in *Johnson* emphasized that no express representation of paternity is needed where such a representation can be implied from the husband's conduct: in that case, the mother's son, Jimmy, was born 10 days prior to the marriage of the mother and her husband; the husband, who knew he was not genetically related to Jimmy, had been present in the hospital at Jimmy's birth, held the baby, and participated in the name selection; the husband played a major role in the life of Jimmy for six years before the parties separated; and even after separation, until the dissolution proceeding commenced, the husband maintained a visitation schedule with Jimmy.

*COMMENT: Valle* was one of the early cases to open the possibility that if a husband is estopped to deny paternity for purposes of imposing the obligation to pay child support, "we perceive no good reason why the trial court should not have jurisdiction to award child custody when the parenthood is established by estoppel and when the issue is fairly and properly litigated with both parties present." (*In re Marriage of Valle, supra*, 53 Cal.App.3d at p. 842.)

In *In re Marriage of Pedregon* (2003) 107 Cal.App.4th 1284 it was held that a husband was obligated to pay child support based on parentage by estoppel given a 12-year parent-child relationship: in that case, the mother's son, David, was 10 months old when husband met the mother, 18 months old when husband moved in with mother and David, and 22 months old when husband married mother; husband treated David as his son, and David considers husband as his father; David used husband's last name as requested by husband, and calls husband "Daddy"; even at 12 years of age, David was unaware that husband is not his biological father; David has never met or heard of his biological father; and wife has not maintained contact with David's natural father.

2. ***Does Not Apply If The Alleged Father Believes He Is The Child's Biological Father***

In *Clevenger v. Clevenger* (discussed hereinabove) and its progeny, it was emphasized that the doctrine of equitable *estoppel* was narrowly limited to cases in which the alleged father represents to the child that he is the child's natural father, knowing that he was not, and the child believes him to be the natural father.

However, in *County of San Diego v. Arzaga* (2007) 152 Cal.App.4th 1336, it was found that the doctrine of paternity by estoppel did not apply to an alleged father where the factual circumstances established that he acted as the child's father believing that he was the child's biological father.

The facts of *Arzaga* were such that during an on-again/off-again relationship with Arzaga, Maria became pregnant and gave birth to a daughter. Maria told Arzaga he was the child's father. Although they never married, Arzaga and Maria (with the child) would stay at each other's houses several days a week; the child grew to address Arzaga as "Papi"; and, Arzaga was a constant father figure in the child's life. Even after Maria and Arzaga's relationship ended, Arzaga continued to visit with the child until she turned 14 years old, and until the child was 16 years old, she always believed Arzaga was her father. The trial court found that Arzaga believed he was the child's biological father and acted accordingly, and only stopped acting as her father when he received genetic tests. Based upon these facts, the trial court found that Arzaga was estopped from denying his parentage of the then 16-year-old child. The appellate court reversed, holding that the doctrine of parentage by estoppel did not apply to a man who mistakenly believed he was the child's biological father.

"While we are sensitive to the emotional detriment that can result to a child who has relied upon conduct of a person who has held himself out as a father, it would be unfair, in our view, to apply the doctrine to an individual whose conduct was based on his *mistaken* belief that he actually was the child's natural father." (*County of San Diego v. Arzaga*, *supra*, 152 Cal.App.4th at p. 1348)

*COMMENT:* Even though *Arzaga* may have been correct in not applying the doctrine of equitable estoppel, it resulted in leaving a 16-year-old child fatherless. There is no discussion in the case as to why Arzaga was not found to have been the child's presumed father under *Family Code section 7611(d)* and that it would not be an appropriate action in which to rebut that presumption because a 16-year-old child would be left fatherless.

## F. GENETIC TESTS

### 1. *Court Order For Genetic Testing*

**Family Code section 7551** provides that in any civil action or proceeding in which paternity is a relevant fact, the court must order the mother, child, and alleged father to submit to genetic tests on the motion of any party to the action, so long as the motion is made at a time that does not unduly delay the proceedings. Additionally, the court may order such tests on its own motion, or on suggestion made by or on behalf of any person who is involved.

However, **Family Code section 7551** is not applicable to cases involving the application of the conclusive presumption of **Family Code section 7540** -- if the conclusive presumption can be rebutted by genetic tests, it must be done subject to the limitations of **Family Code section 7541**; if those limitations do not apply, and therefore the presumption cannot be rebutted, then paternity is no longer a relevant fact.

### 2. *Presumption Based Upon Genetic Test Results*

a. There is a rebuttable presumption, affecting the burden of proof, of paternity if the results of genetic tests are that the alleged father cannot be excluded as a possible biological father, and that the paternity index is 100 or greater (probability of paternity of 99% or greater); and this presumption may be rebutted by a preponderance of the evidence. **FC §7555**.

b. The statute does not specify what classes of evidence may be used to rebut the presumption, but cases have held that the presumption may be rebutted in ways that include:

- Proof that the genetic testing was conducted improperly, or the wrong gene frequency table was used, or the opposing expert is biased, may demonstrate that the paternity index is not 100 or more, and therefore rebuts the presumption. **County of El Dorado v. Misura** (1995) 33 Cal.App.4th 73.

- Proof that the alleged father may be infertile or otherwise had no access to the mother during the period of conception would establish the prior probability of paternity is zero, and therefore shows non-paternity. **City and County of San Francisco v. Givens** (2000) 85 Cal.App.4th 51.

- Proof that another man who had access to the mother also has a high paternity index, which would raise a competing or inconsistent presumption (i.e., two related men could have access to the mother, or a woman may not know with which

of two related men she had intercourse). *County of El Dorado v. Misura, supra*, 33 Cal.App.4th 73.

(See section III.F.3. for a complete discussion of use of genetic testing and tests.)

*COMMENT:* A presumption created by genetic tests is rebutted only by a preponderance of the evidence, whereas a presumption under *Family Code* section 7611 requires the higher standard of clear and convincing evidence to rebut.

## G. ASSISTED REPRODUCTION

Until 2016, *Family Code* section 7613 provided that the spouse of a woman who conceived through assisted reproduction with semen donated by a man not her husband was treated as if he or she were the natural parent of the child. Furthermore, the statute provided that the donor of semen provided to a licensed physician or a licensed sperm bank for use in assisted reproduction of a woman other than the donor's wife was treated as if he were not the natural father of the child.

Effective January 1, 2016, *Family Code* section 7613 was amended and makes a significant change to the former statute by establishing clear guidelines for prospective parents and sperm donors who want to conceive a child without the involvement of a doctor or sperm bank, while ensuring that the donor will not be considered the father.

### 1. *Rights And Obligations Of The Intended Parent*

*Family Code* section 7613(a) provides if a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of the child conceived. The consent shall be in writing and signed by both the woman conceiving through assisted reproduction and the intended parent.

Even in the absence of strict compliance with *Family Code* section 7613(a), an intended parent may be treated as if he or she is the natural parent of a child born as a result of assisted reproduction if he or she unequivocally agreed to the assisted reproduction. *In re Marriage of Buzzanca* (1998) 61 Cal.App.4th 1410. The facts of *Buzzanca* are such that husband and wife agreed to have their genetically unrelated embryo implanted in a surrogate, but one month before the birth of the child, the husband filed a petition for dissolution of marriage and argued he was not the father of the child. Finding that the husband admitted that he agreed to the insemination and surrogacy, and even signed a consent form after insemination, the court applied *Family Code* section



7613(a) and found that the husband was estopped from denying that he was the father of the child.

2. ***Rights And Obligations Of The Semen Donor***

a. ***Family Code section 7613(b)(1)*** provides that the donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction of a woman other than the donor's spouse is treated in law as if he were ***not the natural parent*** of a child thereby conceived, unless otherwise agreed to in writing signed by the donor and the woman prior to the conception.

***Family Code section 7613(b)(1)*** is substantively the same as former ***Family Code section 7613(b)***, and in ***Jhordan C. v. Mary K.*** (1986) 179 Cal.App.3d 386, the court concluded that because there is no reference to marriage in **subsection (b)** of ***Family Code section 7613***, it applies to all women, married or not:

"Thus, the California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity." (***Jhordan C. v. Mary K.***, *supra*, 179 Cal.App.3d at p. 392.)

Thus, even if there had been an intimate relationship between the semen donor and the unmarried woman, his claim of paternity based solely upon his biological connection will be denied so long as the child was conceived as a result of the man's semen being provided to a licensed physician for insemination in the unmarried woman. ***Steven S. v. Deborah D.*** (2005) 127 Cal.App.4th 319. However, a semen donor is not precluded from establishing that he is a presumed father under ***Family Code section 7611(d)*** based upon post-birth conduct. ***Jason P. v. Danielle S.*** (2014) 226 Cal.App.4th 167 [where a semen donor had a substantial relationship with the child for over 2 1/2 years after the child's birth and the child referred to him as "Dada", the appellate court held that the semen donor was not precluded from establishing parentage based upon the **7611(d)** presumption.]

b. ***Family Code section 7613(b)(2)*** provides that if the semen is not provided to a licensed physician and surgeon or a licensed sperm bank, the donor of semen for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived if either of the following are met:

- The donor and the woman agree in writing prior to conception that the donor would not be a parent; or

- A court finds by clear and convincing evidence that the child was conceived through assisted reproduction and that, prior to the conception of the child, the woman and donor had an oral agreement that the donor would not be a parent.

c. *Family Code* section 7613(b)(3) provides that subsections (b)(1) and (b)(2) of *Family Code* section 7613 do not apply to a man who provided semen for use in assisted reproduction by a woman other than the man's spouse pursuant to a written agreement signed by the man and the woman prior to conception stating that they intended for the man to be a parent.

### 3. *Rights And Obligations Of The Ova Donor*

*Family Code* section 7613(c) provides that the donor of an ova for use in assisted reproduction by a woman other than the donor's spouse or non-marital partner is treated as if she were not the natural parent of a child thereby conceived unless the court finds satisfactory evidence that the donor and the woman intended for the donor to be a parent.

### 4. *Forms To Conform With The Requirements Of Family Code section 7613*

*Family Code* section 7613.5 sets forth optional forms -- explicitly not required to be used -- to conform to the requirements of the subsections of *Family Code* section 7613. These forms apply only in very limited circumstances and care should be given in their use.

*COMMENT:* If a child is conceived by way of assisted reproduction in compliance with the statutory requirements of *Family Code* section 7613, genetic tests may not be used to challenge parentage at any time and under any circumstances. *FC* §7541(e).

## H. PROMISE TO FURNISH SUPPORT

A court may enforce a written promise to furnish support to a child born out of a presumed or alleged parent-child relationship, without consideration. *FC* §7614(a). If the court finds that it is in the best interest of the child or parent, the court may order the name of the person paying support to be kept confidential and designate another person or an agency to receive and distribute the amounts paid in performance of the promise. *FC* §7614(b). However, such an agreement to furnish support does not a bar a parentage action to prove or disprove the parent-child relationship. *FC* §7632.

### **III.** **THE PARENTAGE ACTION**

#### **A. HOW A PARENTAGE ACTION MAY BE BROUGHT**

##### **1. *Actions May Be Brought In Proceedings Not Under The Family Code***

Although parentage statutes are found in other areas of law, the focus of this reference guide is principally on statutes found in the *Family Code*. However, California's parentage statutes are explained, analyzed and interpreted in cases that arise from a wide spectrum of areas of law including:

##### **a. Actions May Be Brought By The Local Child Support Agency**

The Department of Child Support Services ("DCSS") is charged with the duty to "administer all services and perform all functions necessary to establish, collect, and distribute child support." *FC* §17200. In carrying out its functions of establishing and enforcing child support orders, DCSS may bring an action in the name of the county on behalf of the child(ren) or a parent of the child(ren) to determine parentage/the appropriate child support payor. *FC* §17404(a).

*Family Code* section 17410 provides that in any action filed by the local child support agency where the minor child's paternity is in issue, before a hearing or trial of the paternity issue, the agency must provide the mother and the alleged father the opportunity to voluntarily acknowledge paternity by signing a paternity declaration as described in *Family Code* section 7574. (See section II.B. for a complete discussion of the voluntary declaration of paternity.) Additionally, *Family Code* section 17414 provides that the court shall enter a judgment of paternity upon the filing of a written stipulation between the parties if that stipulation is accompanied by a written advisement and waiver of rights which is signed by the alleged father.

##### **b. Actions May Be Brought In Dependency Proceedings**

Any minor child who has been abused, neglected, abandoned, has suffered, or is at risk of suffering serious physical harm, or otherwise comes within the description of *Welfare & Institutions Code* ("*W&IC*") section 300 may be subject to the jurisdiction of the juvenile dependency court; and the juvenile court has a duty to inquire about and determine parentage of each dependent child. *W&IC* section 316.2. The statutes and case law used to determine parentage in dependency court are the same as those used to determine parentage in UPA cases.

*COMMENT:* Dependency court case precedent is applicable to family law parentage actions, and conversely, family law parentage case precedent is applicable

to dependency cases. And, both dependency and family law parentage case precedent is applicable to cases under other codes in which parentage is at issue.

**c. Actions May Be Brought Under The Uniform Interstate Family Support Act (UIFSA)**

UIFSA (*FC* §§5700.101-5700.905) is a procedural device designed to provide a simplified and inexpensive mechanism for enforcement of child and spousal support obligations of obligors located outside the jurisdiction in which the dependent spouse or children are present.

Although the provisions of UIFSA are most often used to enforce existing support orders, it does have a provision that in initiating or responding to a child support claim, the court of this state may adjudicate parentage as a prerequisite to the making or enforcing of a child support order. *FC* §5700.402. This parentage provision requires the court to apply the procedural and substantive laws of the *Uniform Parentage Act*, as adopted and applied by the State of California.

*COMMENT:* The various statutes, rules and procedures incident to governmental actions, including, but not limited to, constitutional rights to counsel, no attorney-client relationship created by the district attorney action, and attorney fees, are beyond the scope of this reference guide. But, any private practitioner called upon to represent a client in such proceedings must be fully versed in all aspects of these district attorney proceedings.

**d. Actions May Be Brought Under The Domestic Violence Prevention Act**

In a proceeding under the Domestic Violence Prevention Act ("DVPA") (*Family Code* sections 6200-6409), the parentage issue may arise in connection with an application for child custody or support. However, that determination of parentage is for the limited purpose of obtaining an order of no visitation to the restrained party in the action. If the court does determine parentage for purposes of making a DVPA order, it is without prejudice to any action to establish a parent and child relationship. *FC* §6323(b)(1).

In a DVPA the court may accept a stipulation of parentage by the parties, if parentage is uncontested, and enter a judgment establishing parentage, subject to the set aside provisions of *Family Code* section 7646. *FC* §6323(b)(2). (See section IV.D. for a complete discussion of set aside provisions.)

e. **Actions May Be Brought Under The Probate Code**

The child (whether a minor or an adult) of a decedent may seek to establish parentage with respect to that decedent for the purpose of intestate succession using the statutes and case law that apply to other parentage actions (i.e., a parent and child relationship is considered established if it is presumed and not rebutted). *ProbC* §6453.

*COMMENT:* There is no statute of limitations upon bringing a parentage action, and therefore it is not uncommon to see such actions brought in the probate court. Indeed, it is often said that when a well known celebrity dies, there will be a traffic jam around the courthouse because of the many parentage actions being filed wherein a child claims to be the decedent's pretermitted heir.

2. **Actions May Be Brought In Proceedings Under The Family Code**

a. **To Establish Parentage**

- A child, the child's natural mother, a person claiming to be presumed to be the child's parent under **subsection (a), (b) or (c)** of *Family Code* section 7611 [i.e. where the presumed parent married or attempted to marry the child's natural mother], at any time, may bring an action to declare the existence of the parent and child relationship presumed under **subsection (a), (b) or (c)** of *Family Code* section 7611. *FC* §7630(a)(1).

- Any interested party may bring an action, at any time, for the purpose of determining the existence of a parent and child relationship presumed under **subsection (d)** of *Family Code* section 7611 [i.e. where he or she received the child into his or her home and held the child out as his or her natural child] or under **subsection (f)** of *Family Code* section 7611 [consistent with the intent expressed in an assisted reproduction agreement].

- *Family Code* section 7630(c) permits an action to declare the existence of a parent and child relationship to be brought by (1) the child, (2) a personal representative of the child, (3) the Department of Children Support Services, (4) a presumed parent or the personal representative of that presumed parent or a parent of that presumed parent if that parent has died or is a minor, or (5) in cases in which the natural mother is the only presumed parent or the child is subject to the jurisdiction of the juvenile court or adoption is pending, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

*COMMENT:* There is some redundancy in **subsections (a) and (c) of Family Code section 7630**, but there is no apparent conflict in the classification of persons who may bring an action to establish the existence of a parent and child relationship.

**b. To Establish Non-Parentage**

- An action to establish the non-existence of the parent and child relationship presumed under **subsections (a), (b) or (c) of Family Code section 7611** [i.e. where the presumed parent married or attempted to marry the child's natural mother] may be brought only by the child, the child's natural parent, or a person presumed to be the child's parent; and only if the action is brought within a reasonable time after obtaining knowledge of the relevant fact. *FC §7630(a)(2)*.

- An action to establish the non-existence of a parent and child relationship presumed under **subsection (d) of Family Code section 7611** [i.e. where he or she received the child into his or her home and held the child out as his or her natural child] may, at any time, be brought by any interested party. *FC §7630(b)*

In *Said v. Jegan* (2007) 146 Cal.App.4th 1375, the child's mother named a man as the father on the child's birth certificate, and years later the man brought an action to establish his non-paternity. It was undisputed that the man did not qualify as a presumed father under the marital presumptions [**subsections (a), (b), and (c)**]. However, the mother filed a declaration in the action alleging facts which the man disputed but, if true, would give rise to the "holding out" presumption of his paternity under **subsection (d)**. The court held that the man had standing to bring an action to establish his non-paternity as an "interested party" under *Family Code section 7630(b)* because "when an interested party seeks to prove he is not a child's father under [**§7611(d)**], ... he need only allege facts showing he *might* be the presumed father, then go on to disprove those facts at trial," *Said v. Jegan, supra*, 146 Cal.App.4th at p. 1383 [emphasis in original].

*COMMENT: Said* leaves unanswered the question whether a man has standing to bring an action to establish his non-paternity where neither he nor the mother alleges that he qualifies as a presumed father under *Family Code section 7611*.

**c. When There Is A Presumed Father And Another Man Claiming Paternity**

*(1) Dawn D. v. Superior Court (Jerry K.)*

In *Dawn D. v. Superior Court (Jerry K.)* (1998) 17 Cal.4th 932, two men claimed to be the child's father: the mother's husband, whose paternity was

presumed under *Family Code* section 7611(a), and another man who alleged he was the child's biological father but admitted he did not qualify as a presumed father under any subsection of *Family Code* section 7611. Under these circumstances, the Supreme Court held that the man claiming to be the biological father lacked standing to bring an action to establish his paternity, and upheld the standing statute against the claim that it violates a biological father's fundamental liberty interest in establishing a relationship with his offspring. Relying on the United States Supreme Court case of *Michael H. v. Gerald D.*, the court held that the interest of a man who impregnates another man's wife in establishing a relationship with the child is not worthy of constitutional protection. In a concurring opinion, Justice Kennard sums up the social conscience of the court as follows:

"A man who wishes to father a child and ensure his relationship with that child can do so by finding a partner, entering into a marriage, and undertaking the responsibilities marriage imposes. One who instead fathers a child with a woman married to another man takes the risk that the child will be raised within that marriage and that he will be excluded from participation in the child's life."  
(*Dawn D. v. Superior Court (Jerry K.)*, *supra*, 17 Cal.4th at 947.)

*COMMENT: Dawn D.* does not appear to overrule *Michael M. v. Giovanna F.* (1992) 5 Cal.App.4th 1272, where the court held that the UPA's standing provisions *are* unconstitutional if they preclude a biological father from bringing an action to establish his paternity where the mother was unmarried at the time of conception but then marries another man before the child is born.

(2) *Craig L. v. Sandy S.*

Unlike the biological father in *Dawn D.* who had never developed a relationship with the child, in *Craig L. v. Sandy S.* (2004) 125 Cal.App.4th 36, the biological father alleged that since the child was born, he had assumed the paternal role in the child's life with the knowledge and consent of the mother and her husband: he signed a child support agreement and made the support payments; he and his wife took care of the child in their home three or four days a week when the mother went back to work shortly after birth; when the child was a few months old, the visits began including one overnight stay per week; and he held the child out to his family and friends as his

son. Relying on these facts, the biological father brought an action to establish his paternity and his standing to do so was challenged in a motion to quash filed by the mother's husband. Reversing the trial court's order granting the motion, the appellate court held that the biological father had standing to bring the action as an interested party because he qualified as a presumed father under *Family Code* section 7611(d).

#### **d. To Determine A Mother And Child Relationship**

Any interested person may bring an action to determine the existence or non-existence of a mother and child relationship. *FC* §7650. Persons who are "interested" include the woman claiming to be the child's mother, *In re Salvador M.* (2003) 111 Cal.App.4th 1353, and the child, *In re Karen C.* (2002) 101 Cal.App.4th 932.

### **B. WHEN THE ACTION MAY BE BROUGHT**

#### **1. No Statute Of Limitations**

A parentage action may be brought at any time; there is no statute of limitations that limits the bringing of a parentage action, and laches may not be asserted as a bar to the action. *Perez v. Singh* (1971) 21 Cal.App.3d. 870. Indeed, actions to establish parentage have been brought by adults in an effort to establish their parentage to a person who is deceased. See *Estate of Cornelious* (1984) 35 Cal.3d 461. (See section III.A.1.c. for further discussion of parentage actions in probate.)

However, an action to establish the non-parentage of a person presumed to be the child's parent under subsections (a), (b) of (c) *Family Code* section 7611 must be brought, by the statutorily appropriate persons, within a reasonable time after obtaining knowledge of the relevant facts. *FC* §7630(a)(2). And, there are strict limitations relative to bringing an action to rebut the conclusive presumption of *Family Code* section 7540 and an action to set aside the voluntary declaration of paternity. (See sections II.A. and II.B. for a complete discussion of the conclusive presumption and the voluntary declaration of paternity.)

#### **2. Before Birth**

An action to establish parentage may be brought before the birth of the child, but enforcement of any order or judgment must be stayed until the birth of the child. *FC* §7633.



## C. JURISDICTION AND VENUE

### 1. *Subject Matter Jurisdiction And Venue*

The superior court has jurisdiction in any proceedings brought under the *Family Code*. *FC* §200.

A parentage action may be brought in any county in which the child resides or is found, or if the father is deceased, in any county in which the proceedings for probate of his estate have been or could be commenced. *FC* §7620(b).

### 2. *Personal Jurisdiction*

A person who has had sexual intercourse in this state which may have resulted in the conception of a child submits to the jurisdiction of the courts of this state concerning any action brought under the UPA, which embraces both parentage and support actions. *FC* §7620(a). Also see *County of Humboldt v. Harris* (1988) 206 Cal.App.3d 857 (in light of the predecessor of *Family Code* section 7620(a) the father's alleged act of sexual intercourse with the child's mother in California, together with the subsequent birth of the child in the state and financial support by public assistance, constituted the requisite minimum contacts sufficient to satisfy due process requirements for personal jurisdiction).

## D. NOTICE OF THE PARENTAGE ACTION

### 1. *Notice To Respondents*

Notice of the parentage action must be given to respondents by serving them with a copy of the Summons and Petition in compliance with the requirements of the *Code of Civil Procedure* for service of process in civil actions.

### 2. *Notice To Non-Parties*

Even if they are not parties to the action, the natural parent, each person presumed to be a parent under *Family Code* section 7611, and each man alleged to be the natural father must be given notice of the action and an opportunity to appear. *FC* §7635(b).

In *Gabriel P. v. Suedi D.*, *supra*, 141 Cal.App.4th 850, the appellate court found that the trial court erred by entering judgment in favor of the biological father without joining the presumed father pursuant to *Code of Civil Procedure* section 389 [compulsory joinder of indispensable party].

The notice to a non-party must be given in accordance with the provisions of the *Code of Civil Procedure* for service of process in a civil action, provided that publication or posting of the notice of the proceeding shall not be required. If a person who requires notice cannot be located, or his or her whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to that person. *FC §7666(b)*.

*COMMENT:* Although there is no statutory provision as to who is required to give notice to a non-party, it would appear logical that the party who puts the non-party's parentage at issue would be required to give notice. For example, in an action brought by a woman naming a man as an alleged father, if that man raises an affirmative defense that a second man may be the natural father, the first man would be required to give the second man notice of the action.

### 3. *Notice To The Child*

A child(ren) 12 years of age or older, who is the subject of the action, *must* be made a party to the action and given notice. A child(ren) under 12 years of age *may* be made a party to the parentage action. *FC §7635*.

A minor who is a party to the parentage action must be represented by a guardian ad litem appointed by the court, whether the minor is the child whose parentage or non-parentage is sought to be established, or is a party in any other context. If the guardian ad litem is a relative of the child, that guardian ad litem need not be represented by counsel. *FC §7635*.

## E. **PENDENTE LITE ORDERS**

### 1. *Child Support*

#### a. **Payment Of Support**

The court has the discretion to make child support orders, in addition to ordering a parent to pay the reasonable expenses of the mother's pregnancy and confinement. *FC §7637*.

Before the court may order a party to pay pendente lite support, the requesting party must prove by a preponderance of the evidence that the party who is requested to pay support is the father of the child. *Carbone v. Superior Court of Napa County* (1941) 18 Cal.2d 768.

In that the law does not distinguish between children born out of wedlock and children born in a marriage, the factors that determine the amount of child

support under the Statewide Uniform Guideline apply upon proof of parentage. *FC §4050 et seq.*

**b. Limitation On Discovery Of Financial Information**

Although *Family Code section 3552* requires parents to produce income tax returns for the purpose of awarding child support, that code section does not apply in a parentage action until the issue of parentage is finally adjudicated. *Thomas B. v. Superior Court (Sherry H.)* (1985) 175 Cal.App.3d 255 (the court reasoned that the requirement to produce tax records applies only to "parents," and the Legislature did not intend that they apply before parentage is conclusively established).

With respect to pendente lite support, the court in *Thomas B.* held that no financial records are discoverable until a prima facie showing of parentage has been made.

Thus, strict compliance with *Thomas B.* would require that the trial court bifurcate the issue of parentage from the issue of support at the pendente lite order to show cause. For example, where a mother is claiming that a man is the natural father of her child, and seeking pendente lite child support, that man need not produce any financial records until after the mother establishes his paternity by a preponderance of the evidence.

*COMMENT:* As a practical matter, in many parentage cases, it is very easy for the mother to establish the prima facie case of parentage. In such a case, the alleged parent's insistence upon a bifurcated hearing of parentage before the production of their financial records may be seen as a dilatory tactic resulting in the alleged parent being assessed attorney fees therefor.

**2. Custody and Visitation**

The court also has the discretion to make custody and visitation orders directed to the parties of the proceeding. *FC §7637.*

As in the support context, proper proof of parentage for custody and visitation rights requires a showing of parentage by a preponderance of the evidence. *Gadbois v. Superior Court* (1981) 126 Cal.App.3d 653 (since pendente lite support can be ordered to be paid by a person alleged to be the parent, equity demands that with proper proof of parentage, an alleged parent may be afforded the same consideration for pendente lite custody and visitation rights).

In a case involving the conclusive presumption of paternity (*FC §7540*), the court can make orders of pendente lite custody and visitation only if the presumption is

timely rebutted by genetic tests pursuant to *Family Code* section 7541, and the custody or visitation order would be in the best interest of the child. *FC* §7604.

### 3. *Attorney Fees*

The court may order pendente lite attorney's fees, expert fees, and other costs of the proceeding, including blood tests. *FC* §§7640 and 7605. (See section III.F.7. for a complete discussion of attorney fees in actions brought under the UPA.)

## F. TRIAL ISSUES

### 1. *Right To Jury Trial?*

The courts have traditionally recognized that paternity is a legal issue to be tried by a jury, and remaining issues, such as support and custody/visitation, should be tried by the court without a jury. *Van Buskirk v. Todd* (1969) 269 Cal.App.2d 680. However, several appellate court cases have held that there is no right to a jury trial to determine paternity in actions that were brought by the District Attorney under the former *Welfare & Institutions Code* ("*W&IC*") sections (now actions brought by the local child support agencies pursuant to *Family Code* section 17400 et seq.).

*County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263 (no constitutional right to a jury trial in an action brought under former *Welfare & Institutions Code* section 11350, after the alleged father refused to submit to blood tests); *County of Butte v. Superior Court (Filipowicz)* (1989) 210 Cal.App.3d 555, 559 ("Code of Civil Procedure section 592 does not provide a jury trial as a matter of right in a paternity action arising under Welfare & Institutions Code section 11350."); *County of Sutter v. Davis* (1991) 234 Cal.App.3d 319 (the right to a jury trial is measured by the common law of England, and paternity defendants had no right to a jury trial under English common law as it existed then, and therefore, the California Constitution does not provide paternity defendants the right to a jury trial).

Although there is no case denying the right of a jury trial to an alleged father in a private paternity case (not brought by the local child support agencies), most counties in the state have applied the non-jury policy in both private and governmental paternity actions.

### 2. *Standard Of Proof*

The mother has the burden of proving, *by a preponderance of the evidence*, that the identified man is the father of her child. *Walsh v. Palma* (1984) 154 Cal.App.3d 290. The uncontradicted testimony of the mother that she had sexual relations with only

the alleged father is sufficient to meet her burden of proof. *Huntingdon v. Crowley* (1966) 64 Cal.2d 647.

The burden of proof may be stronger or shifted by the effect of the presumptions of parentage. For example, if a man is a presumed father by virtue of a rebuttable presumption under *Family Code* section 7611, the burden is on the party opposing the application of the presumption to rebut it by clear and convincing evidence. *FC* §7612. Similarly, the party seeking to rebut the conclusive presumption of *Family Code* section 7540 has the burden of doing so under the strict limitations of *Family Code* section 7541 (only statutorily identified parties may bring a motion within the first two years of the life of the child for blood and genetic testing to rebut the presumption of the husband's paternity).

### 3. *Use Of Genetic Tests*

As discussed hereinabove (section II.E.), except in limited circumstances, on its own motion or the motion of any party to the action, the court must order the mother, child, and the alleged father to submit to genetic tests. There is a rebuttable presumption, affecting the burden of proof, of paternity if the results of genetic tests are that the alleged father cannot be excluded as a possible biological father, and that the paternity index is 100 or greater (probability of paternity of 99% or greater). *FC* §7555.

#### a. **Refusal To Submit To Court-Ordered Blood And Genetic Testing**

If, after an order is made to do so, a party refuses to submit to the blood test, the court may resolve the issues of paternity against the refusing party, without a trial on the merits. *FC* §7551. *County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263. Additionally, a party's refusal to submit to court-ordered blood and genetic testing is admissible into evidence in any proceeding to determine paternity. *FC* §7551.

*COMMENT:* Good practice would dictate that if a party is refusing to submit to court-ordered blood tests, a motion to compel compliance should first be brought, and then, if the party still refuses, summary adjudication of the issue of paternity would be appropriate.

#### b. **Types Of Genetic Tests**

*Family Code* section 7551 does not name any particular genetic test or specify which test may be ordered, but does define "genetic tests" as "any genetic test that is generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Resources."

In years past, the HLA (Human Leukocyte Antigen) Test was the widely used parentage valuation blood test, and had been approved in many cases. However, DNA (Deoxyribonucleic acid) testing which can be less intrusive than HLA testing, has become commonplace in paternity evaluation testing.

**c. Exclusionary And Probability Test Results**

The paternity evaluation blood and genetic test results can conclusively exclude a particular person as the biological parent of the child, and therefore yield results in terms of whether a man is excluded as the biological father of a child. *County of El Dorado v. Misura* (1995) 33 Cal.App.4th 73. Thus, if the results exclude the man as the biological father, the issue of paternity must be resolved accordingly. *FC §7554*.

The same tests, however, cannot conclusively establish paternity. *County of El Dorado v. Misura, supra*, 33 Cal.App.4th 73. But, since the test results are exclusionary, if a man is not excluded as the biological father, the tests will yield a "probability of paternity" result, which is the statistical finding that there is a given numerical probability that the man is actually the child's father. *Ibid*. If the paternity index is 100 or greater (usually represented as a probability in excess of 99%), that man is legally presumed to be the child's biological father. *FC §7555*.

**d. Genetic Test Results Are Admissible Only Upon Laying A Foundation As To Their Authenticity And Accuracy**

Even if blood and genetic test results are relevant, they are not automatically admissible into evidence. The admissibility of those results depends on establishing the foundation for their admissibility, as follows:

*(1) Live Testimony*

An authorized custodian of records or other qualified employee of the laboratory at which the blood and genetic testing were performed may be called as a witness to testify as to the authenticity and accuracy of the test results.

*(2) Declaration Under Family Code section 7552.5*

The necessity for live testimony to lay the foundation and authenticate the test results is alleviated by following the procedure set forth in *Family Code section 7552.5*. This section permits the blood and genetic test results to be admitted into evidence at a hearing or trial to establish paternity, without the need for foundation testimony of authenticity and accuracy, if all of the statutorily defined requirements are met.

The statutory requirements of *Family Code section 7552.5* are that no later than 20 days before any hearing in which the test results may be admitted into evidence, a copy of those results were served upon all parties by any method of service authorized under *Code of Civil Procedure section 1010 et seq.* The test results *must be accompanied by a declaration* under penalty of perjury stating in substance each of the following:

- The declarant is the duly authorized custodian of the records or other qualified employee of the laboratory, and has the authority to certify the records.
- A statement which establishes in detail the chain of custody of all genetic samples collected, including the date on which the sample was collected, the identity of each person from whom a genetic sample was collected, the identity of the person who performed or witnessed the collecting of the genetic samples and packaged them for transmission to the laboratory, the date on which the genetic samples were received by the laboratory, the identity of the person who unpacked the samples and forwarded them to the person who performed the laboratory analysis of the genetic sample, and the identification and qualifications of all persons who performed the laboratory analysis and published the results.
- A statement which establishes that the procedures used by the laboratory to conduct the tests for which the test results are attached are used in the laboratory's ordinary course of business to ensure accuracy and proper identification of genetic samples.
- The genetic tests were prepared at or near the time of completion of the tests by personnel of the business qualified to perform genetic tests in the ordinary course of business.

(3) *Objection To Declaration Under Family Code section 7552.5*

Any party served with blood and genetic test results and a declaration under *Family Code section 7552.5* may file written objections no later than five days prior to the hearing at which paternity is at issue. *FC §7552.5(b)*. If the written objection is timely filed and served, an authorized custodian of records or other qualified employee of the laboratory must be called as a witness to testify as to their findings and be subject to cross-examination.

*COMMENT:* It would appear that the party objecting to the declaration, and forcing the live testimony of the expert, must have a very good reason to do so. Otherwise, that party can expect to be assessed the cost of the expert as well as attorney fees for requiring a hearing on the subject.

#### 4. *Defenses*

##### a. **Legal Defenses**

###### (1) *Presumptions*

The presumptions of *Family Code* sections 7540 and 7611 can be used at trial as a defense to the claim of parentage. (See sections II.A. and II.C. for a complete discussion of said presumptions.)

In *Susan H. v. Jack S.* (1994) 30 Cal.App.4th 1435, Susan brought an action against Jack alleging he was the biological father of her child. Because Susan was married and living with her husband at the time of conception, Jack successfully invoked the conclusive presumption of *Family Code* section 7540 as a defense to Susan's action.

###### (2) *Estoppel*

Given all the elements of estoppel, one can be estopped from denying his or another's parentage. (See section II.D. for complete discussion of equitable estoppel.)

Additionally, estoppel can be used as a defense against another person's legal claim of parentage. In *Guardianship of Ethan S.* (1990) 221 Cal.App.3d 1403, a consolidated guardianship and paternity action, a husband sought to establish that he was the father of a child born to his wife during their marriage (relying upon the conclusive presumption). However, until he had filed his paternity action, the husband had represented to that child that another man, the biological father, was his father, and the child grew up believing these representations to be true. Applying the equitable estoppel of *Clevenger, Valle, and Johnson*, the court found that the policy of preserving an existing father and child relationship between the child and his biological father is served by the estoppel and, therefore, held that the husband was estopped from denying the biological father's paternity.

###### (3) *Conception With Donated Semen*

*Family Code* section 7613(a) provides that if a woman conceives through assisted reproduction with semen or ova donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of the child thereby conceived. Therefore, that section provides a defense against the donor who might seek to establish his or her parentage; and conversely provides a defense to the donor against a claim of parentage by the intended parents.



**Family Code section 7613(b)(1)** provides that the donor of semen provided to a licensed physician or a licensed sperm bank for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived. Therefore, that section provides a defense for a woman against a semen donor who might seek to establish his parentage; and conversely provides a defense to a semen donor against a claim of parentage by the woman. (See section II.F. for a complete discussion of parentage by assisted reproduction.)

(4) *Genetic Testing*

In most cases, unless a party chooses to attack the scientific validity of the genetic test results, a high paternity index and corresponding probability creates a rebuttable presumption which may be dispositive. (See section III.F.3. for a complete discussion of genetic tests.)

Proof that the alleged father may be infertile or otherwise had no access to the mother during the period of conception would establish the prior probability of paternity is zero, and therefore shows non-paternity. *City and County of San Francisco v. Givens* (2000) 85 Cal.App.4th 51.

*COMMENT:* Remember, no matter how high the paternity index may be, if the blood and genetic test results are not properly introduced into evidence, they cannot establish paternity or non-paternity. *Comino v. Kelley* (1994) 25 Cal.App.4th 678.

**b. Factual Defenses**

(1) *Impotence And Sterility*

The inability to inseminate, whether due to sterility or impotence, may constitute a defense. However, a low sperm count does not preclude insemination but merely makes it less likely, and therefore may not be a defense. *In re Marriage of Freeman* (1996) 45 Cal.App. 4th 1437.

(2) *SODDI*

"Some other dude did it."

Evidence is admissible to affirmatively prove that the mother had sexual intercourse with another man, or other men, during the possible period of conception. *Huntingdon v. Crowley* (1966) 64 Cal.2d 647. However, if genetic test results have been introduced creating a rebuttable presumption of a man's paternity, his proof of

the mother's sexual intercourse with another man is not sufficient to rebut his presumption without blood and genetic test evidence not excluding the other man. *County of El Dorado v. Misura*, *supra*, 33 Cal.App.4th 73.

(3) *Timing*

The putative father may acknowledge intercourse with the mother, but deny that the intercourse occurred during the period in which the mother most likely conceived.

Judicial notice can be taken that the normal gestation period is between 270 and 280 days. *Louis v. Louis* (1970) 7 Cal.App.3d 851.

(4) *No Sexual Intercourse*

Again, unless the trier of fact finds that there was sexual intercourse between the mother and the alleged father within the time period of possible conception, the genetic test results have no probative value and may be disregarded. *City and County of San Francisco v. Givens*, *supra*, 85 Cal.App.4th 51.

5. *Confidentiality Of Hearing And Records*

The hearing or trial may be held in closed court without admittance of any person other than those necessary to the action or proceeding. *FC §7643(a)*.

Even though it is not mandatory for the proceeding to be closed, it is common practice that if either party so moves the court, it will be ordered.

All papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in any public agency or elsewhere, are subject to inspection only upon an order of the court for good cause shown. *FC §7643(a)*. However, all papers and records pertaining to the action or proceeding are subject to inspection by the parties to the action, their attorneys, and agents acting pursuant to written authorization from the parties to the action or their attorneys. *FC §7643(b)*.

6. *Display of Child*

The court has discretion to view the child, or a photograph of the child, for comparison to the alleged father. *Gallina v. Antonelli* (1963) 220 Cal.App.2d 63. However, absent unusual circumstances, the court may refuse to view the child if it does not believe the viewing would be probative. *EvC section 352*.

7. *Attorneys Fees*

*Family Code* section 7640, which in 1994 was incorporated into the *Family Code* as part of the UPA, provides that the court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests. These fees and costs may be ordered paid by the parties, excluding any governmental entity, in proportions and at times determined by the court.

As part of 2004 California Legislation relative to attorney fees, *Family Code* section 7605 was created which provides that in a proceeding under the UPA to establish physical or legal custody of a child or a visitation order, and in any proceeding subsequent to entry of a related parentage judgment, the court shall ensure each party's access to legal representation by making an attorney fee order based on income and need assessments. (*Family Code* section 7605 includes the authority for an award of attorney fees in a post-judgment custody/visitation proceeding.)

In *Kevin Q. v. Lauren W. [Kevin Q. II]* (2011) 195 Cal.App.4th 633, after noting that *Family Code* section 7605 was part of a legislative package that also amended *Family Code* section 2030 the court held that a trial court's analysis in making an award of attorney fees under *Family Code* section 7605 is the same as the court's analysis in making an award of fees under *Family Code* section 2030.

*COMMENT: Kevin Q. II* is a "must read" for its excellent discussion of the requisite considerations in making an attorney fee order whether under *Family Code* section 2030 or *Family Code* section 7605. (Even the effect upon an award of attorney fees due to reoccurring gifts from the litigant's parent is discussed.)

Notwithstanding *Family Code* section 7640 or *Family Code* section 7605, in an action brought by the county, an alleged parent is not entitled to attorney's fees even though the establishment of parentage may be a prerequisite to liability. *County of Santa Barbara v. David R.* (1988) 200 Cal.App.3d 98. However, in *City and County of San Francisco v. Ragland* (1987) 188 Cal.App.3d 1375, the court awarded the defendant attorney's fees in a particularly egregious set of circumstances in which the district attorney's office, among other things, hid evidence, knew at various times the complaining witness had said she did not know who the father was, and had changed her mind.

IV.  
THE PARENTAGE JUDGMENT

A. EFFECT OF JUDGMENT

1. *Determinative For All Purposes*

The judgment or order of the court determining the existence or non-existence of the parent and child relationship is determinative for all purposes except for actions brought for child neglect under *Penal Code* ("*PenC*") section 271. *FC* §7636.

*Robert J. v. Leslie M.* (1997) 51 Cal.App.4th 1642 held that under the doctrine of res judicata, an adjudicated father's action to establish his non-paternity was barred in light of his prior stipulation to paternity, even though blood tests established that he was not the child's biological father.

The facts are such that, fearful that a paternity lawsuit would hurt his chances of getting a deputy sheriff's job, Robert stipulated to a district attorney's judgment without seeking genetic tests or consulting counsel. Robert paid child support and arranged to have his parents care for the child. Four years later, the mother finally agreed to genetic tests, which excluded Robert as the biological father. Robert then filed an action to establish his non-paternity of the child.

The court held that re-litigating the issue of paternity would not serve "the ends of justice." The child's interest in continuing to receive financial support from Robert, and emotional support from Robert's parents, as well as the state's interest in preserving the finality of support judgments, outweighed Robert's interest "in avoiding the financial consequences" of the paternity judgment:

"If there is one class of judgments where the doctrine of res judicata should be scrupulously honored, it is a paternity judgment." (*Robert J. v. Leslie M.*, *supra*, 51 Cal.App.4th at p. 1647.)

*Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81 held that a judgment establishing paternity, entered in an action brought by the county for reimbursement of public assistance, could not be challenged in a later guardianship proceeding brought by the child's grandparents, notwithstanding two blood tests excluded the purported father. The court reasoned that even though the doctrines of res judicata and collateral estoppel may not be invoked against the grandparents because they were not parties to the prior paternity action, there is "the public policy of maintaining parent-child relationships and insuring the finality of paternity judgments." (*Id.* at p. 85)

2. ***May Be Challenged By A Child Not A Party To The Action***

A prior parentage judgment may not be binding on the child if the child was not joined and made a party to the action.

In *Everett v. Everett* (1976) 57 Cal.App.3d 65 [*Everett I*], the mother arranged a lump sum settlement of a paternity claim and entered into a stipulated judgment that Chad Everett was not the father of the child. After the stipulated judgment of non-paternity, the child was not estopped from bringing its own paternity action against Chad Everett through a guardian ad litem.

In *Ruddock v. Ohls* (1979) 91 Cal.App.3d. 271, a mother and her husband adjudicated non-paternity in their dissolution proceeding. The mother and husband were estopped from re-litigating the issue of paternity in a subsequent proceeding, but the judgment was not binding upon the child who was not joined and made a party in the dissolution action.

**B. PROVISIONS AND ORDERS**

In addition to determining parentage, ***Family Code section 7637*** provides that the judgment or order may contain any other provision directed against the appropriate party to the proceedings, concerning:

1. The duty of support;
2. The custody of the child;
3. Visitation privileges with the child;
4. The furnishing of bond or other security for the payment of the judgment;
5. Any other matter in the best interest of the child; and
6. Directing the father to pay the legal expenses of the mother's pregnancy and confinement.

**C. CHANGE OF NAME OF CHILD**

If the parentage petition had included a request for change of the child's name, the judgment may include a provision changing the child's name. ***FC §7638***. If the judgment or order is at variance with the child's birth certificate (i.e., a judgment of paternity of a man different than that listed on the birth certificate), the court must order a new birth certificate be issued. ***FC §7639***.

## D. SETTING ASIDE JUDGMENT OF PATERNITY

*Family Code* section 7645 et seq. sets forth a special procedure for setting aside or vacating paternity judgments if genetic testing indicates that the previously established father of a child is not the biological father. The procedure applies to judgments that establish paternity, including those determinations made pursuant to sections 300, 601, or 602 of the *Welfare & Institutions Code* or a voluntary declaration of paternity. However, this procedure does not apply to a judgment in any action for marital dissolution.

### 1. Time Period For Bringing Motion

*Family Code* section 7646(a) authorizes that a motion to set aside or vacate a judgment if brought by the previously established mother of a child, the previously established father of a child, the child, or the legal representative of any of these persons within two years after:

- a. The previously established father having learned or should have learned about the paternity proceedings or judgment, whichever occurred first; or
- b. The birth of the child if paternity was established by a voluntary declaration of paternity.

The trial court must not order genetic testing to determine whether to set aside a paternity judgment if the two-year time period for bringing the motion has expired. *County of Orange v. Superior Court (Rothert)* (2007) 66 Cal.Rptr.3d 689.

*COMMENT:* The *Family Code* section 7646(a) time limits do not affect any rights under *Family Code* section 7575(c) to set aside a voluntary declaration of paternity on grounds of mistake, inadvertence, surprise, excusable neglect.

### 2. Conditions Of Granting Motion

*Family Code* section 7648 gives the court discretion to deny the motion if it finds that such a ruling would be in the child's best interests, considering all relevant factors including (1) the child's age, (2) the length of time since the paternity judgment, (3) the nature, duration, and quality of the relationship between the previously established father and the child, (4) whether the previously established father has requested the parent-child relationship continue, (5) whether the biological father has indicated that he does not oppose such a continued relationship, (6) whether it would be beneficial or detrimental to the child in establishing the biological parentage of the child, and (7) whether the previously established father has made it more difficult to find or obtain support from the biological father.

*Family Code* section 7645 et seq. does not impair a party's rights to seek to set aside a judgment pursuant to *Code of Civil Procedure* section 473 [mistake, inadvertence, or excusable neglect].

3. ***Support Orders Vacated/No Right Of Reimbursement***

If the court grants a motion to set aside or vacate a paternity judgment, it must also vacate any order for child support and arrearages that were based on that previous judgment. The previously established father has no right of reimbursement for any amount of support paid prior to granting the motion. *FC* §7648.4.

**E. ENFORCEMENT AND MODIFICATION OF THE JUDGMENT**

If there is a voluntary declaration of paternity in place, or parentage or a duty of support has been acknowledged or adjudicated, the obligation of the parent may be enforced in the same or other proceedings by (1) the parent, (2) the child, (3) the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support or funeral, or (4) any other parent, including a private agency, to the extent the person has furnished or is furnishing these expenses. *FC* §7641.

The court has continuing jurisdiction to modify a parentage judgment or order. Therefore, child support orders incorporated into a parentage judgment are modifiable as is any other child support order. *FC* §7642.

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