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Father Knows Best-But Which Father-California's Presumption of Legitimacy Loses Its Conclusiveness: Michael H. v. Gerald D. and Its Aftermath

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FATHER KNOWS BEST—BUT WHICH FATHER? CALIFORNIA'S PRESUMPTION OF LEGITIMACY LOSES ITS CONCLUSIVENESS: *MICHAEL H. v. GERALD D.* AND ITS AFTERMATH

King John—Sirrah, your brother is legitimate;
Your father's wife did after wedlock bear him;
And, if she did play false, the fault was hers;
Which fault lies on the hazards of all husbands
That marry wives.[1]

I. INTRODUCTION

The presumption of legitimacy, that a woman's husband is the father of any children born into their marriage, was a fundamental principle of the common law[2] and has long been accepted by the California legislature and courts.[3] Until fairly recently, this presumption of legiti-

1. WILLIAM SHAKESPEARE, KING JOHN act 1, sc. 1 (William G. Clark & William A. Wright eds., 1980).

2. The presumption was first termed the marital presumption, and was known as Lord Mansfield's Rule. *See* Goodright v. Moss, 98 Eng. Rep. 1257, 1258 (1777). It provided that a woman's husband is the father of all children born during their marriage. *See id.* "[I]t is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious . . . ." *Id.*

3. California codified the presumption for the first time in 1872. CAL. CIV. PROC. CODE § 1962(5), *as amended*, ch. 948, § 3, 1955 Cal. Stat. 1835 (repealed Jan. 1, 1967). This enactment was based on the fact that it was impossible to establish paternity when it was in dispute. *In re* Estate of Mills, 137 Cal. 298, 302, 70 P. 91, 93 (1902). Several early cases upheld the conclusiveness of the presumption. *In re* Estate of McNamara, 181 Cal. 82, 100, 183 P. 552, 563 (1919); *In re* Estate of Walker, 176 Cal. 402, 413, 168 P. 689, 700 (1917); *Mills*, 137 Cal. at 302, 70 P. at 93. However, even before the rule was adopted by the legislature, the presumption was accepted by courts and was treated as an established rule of evidence. *See, e.g.*, People v. Anderson, 26 Cal. 129, 133-34 (1864).

The California legislature continued to keep the conclusive presumption intact until 1990, although technology that would make the determination of paternity nearly foolproof has been available for a number of years. *See* SIDNEY B. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS §§ 11.01-11.06 (4th ed. 1990); Comment, *The California Blood Test Act v. The Presumption of Legitimacy*, 7 STAN. L. REV. 388, 391-92 (1955). Before 1991, section 621 of the California Evidence Code provided as follows:

> (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests . . .

macy was a conclusive presumption[4] and was quite controversial.[5] The validity of the presumption was premised primarily on the notion that the state had several strong interests in cases involving the presumption;[6] most important was its interest in preserving the integrity of the family.[7]

Although these state interests may be significant and perhaps even admirable, they sometimes bear little or no relation to the facts of a particular case. For this reason, there has been much controversy and criticism of the application of the presumption.[8] Furthermore, state interests

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are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

CAL. EVID. CODE § 621(a)-(d) (West Supp. 1990), *amended by* ch. 543, § 2 (codified at CAL. EVID. CODE § 621(b)-(d) (West Supp. 1991)).

4. A conclusive presumption is "one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebutable. . . . Few in number and often statutory, the majority view is that a conclusive presumption is in reality a substantive rule of law, not a rule of evidence." BLACK'S LAW DICTIONARY 1186 (6th ed. 1990).

The United States Supreme Court has questioned the use of conclusive presumptions as a means of dictating social policy. Vlandis v. Kline, 412 U.S. 441, 446 (1973). In *Vlandis*, the Court stated that conclusive presumptions are constitutionally suspect in cases where (1) the presumed facts are not universally true; (2) reasonable alternative means exist to determine actual facts; and (3) the presumption affects an important right or a right which is constitutionally protected. *Id.* at 448-52.

5. *See infra* note 8.

6. *See infra* notes 24-27 and accompanying text.

7. *See McNamara*, 181 Cal. at 95, 183 P. at 557; *Walker*, 176 Cal. at 410, 168 P. at 691-92; *Mills*, 137 Cal. at 302, 70 P. at 93. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 486-94, 499 (Goldberg, J., concurring).

8. *See, e.g.*, Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Magdalene Schoch, *Determination of Paternity By Blood-Grouping Tests: The European Experience*, 16 S. CAL. L. REV. 177 (1943); Albert T. Blanford, Jr., Note, *Evidence: Bastards: Infants: Parent and Child: Blood Tests As Proof of Non-Parentage*, 39 CAL. L. REV. 277 (1951); John J.O. Bois, Sr., Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437 (1962); James J. Brown, Comment, *Presumptions of Legitimacy and Related Problems*, 23 S. CAL. L. REV. 538 (1950); Comment, *The California Blood Test Act v. The Presumption of Legitimacy*, 7 STAN. L. REV. 388 (1955); Note, *Evidence: Disputable Presumption of Parentage in California*, 11 HASTINGS L.J. 200 (1959); Comment, *Legitimation Through Acts: Acknowledgment: Reception into Family*, 13 CAL. L. REV. 68 (1924); Stephen M. Robertson, Note, *California's Conclusive Presumption of Legitimacy:* Jackson v. Jackson *and Evidence Code Section 621*, 19 HASTINGS L.J. 963 (1968); J.E.T. Rutter, Note, *Evidence—Bastards—"Exception" to the Conclusive Presumption of Legitimacy*, 28 S. CAL. L. REV. 185 (1955); Anson M. Whitfield, Note, *Evidence:*

are not the only interests at stake in these cases.[9] The mother of the child, the husband of the mother, the father of the child, if not the husband, who is usually referred to as the putative father,[10] and the child, each have interests, some or all of which may be opposed to the state's interests. Perhaps most important of all is the "best interests of the child,"[11] which is the measure that the United States Supreme Court considers of paramount importance in cases in which putative fathers assert their paternal rights.[12] To further complicate matters, not only are the interests of these various individuals adverse to those of the state, but these interests may, and frequently do, conflict with one another.

Until very recently, California's conclusive presumption was truly conclusive to all except the husband and the wife, and even when the wife wished to attempt rebuttal she had to be joined by the biological father.[13] However, in August 1990 the California legislature amended California's conclusive presumption to enable a putative father or child, in addition to the husband or wife, to attempt to rebut the presumption under certain conditions.[14] The amendment seems to have been inspired in large part by the United States Supreme Court's affirmance in 1989 of the California Court of Appeal decision in *Michael H. v. Gerald D.*,[15] and the subsequent lobbying of the California legislature by Michael H., the nonvictorious party in that case.[16]

In *Michael H.*, a putative father who had an established relationship[17] with his child was denied the opportunity to prove his paternity

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Presumptions of Legitimacy: Cohabitation and the Use of Blood Tests—Kusior v. Silver, 48 CAL. L. REV. 852 (1960).

9. See *infra* notes 28-31 and accompanying text for a brief discussion of some of the other interests that play a role in cases involving the conclusive presumption of legitimacy.

10. A putative father is the "alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990).

11. The "best interests of the child" is the standard courts use to determine the care and custody needs of a child when the family can no longer meet those needs. ELEANOR RUBIN, THE SUPREME COURT AND THE FAMILY 165-67 (1986). The major premise of the "best interests of the child" standard is that adults are capable of acting in their own best interests without government assistance or interference, whereas children are presumed to be incompetent to protect their own interests. *Id.* Children are viewed as being dependent on others to assume this responsibility for them. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 1 (1973).

12. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 254 (1978).

13. *See supra* note 3.

14. Ch. 543, § 2 (codified at CAL. EVID. CODE § 621(b)-(d) (West Supp. 1991)).

15. 491 U.S. 110 (1989), *aff'g* 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).

16. Marcia Coyle, *After the Gavel Comes Down*, NAT'L L.J., Feb. 25, 1991, at 1.

17. See *infra* notes 72, 87-93 & 97-103 and accompanying text, for an explanation of the significance of an established relationship.

and legal right to visitation.[18] At the time the case was heard by the United States Supreme Court, the child was living with the mother and her husband.[19] The plurality's opinion held that the state was not required to recognize a claim of paternity asserted by a man other than the mother's husband.[20] The Court's ruling was based upon the specific facts presented, which were that during both the conception and birth of the child, the mother was married to and cohabiting with her husband, and that the mother and father, at the time of the suit, wished to raise the child as their own.[21] However, the Court implied that the presumption of legitimacy might be disregarded under different circumstances.[22]

This Comment analyzes recent developments in California's conclusive presumption of legitimacy, and how these developments affect putative fathers and their rights. The Comment first explains how California courts have applied the presumption in the past, and then discusses the *Michael H.* decision. The Comment then examines post-*Michael H.* cases, and demonstrates how California courts have interpreted *Michael H.* to allow them to disregard the presumption when presented with different facts. A discussion and critique of the recent amendment to section 621 of the California Evidence Code, California's conclusive presumption, which allows a putative father or child an opportunity to attempt to rebut the presumption, follows. Finally, because the amendment will not always obtain just results, the author proposes an alternative which would better further all the interests implicated in these difficult and emotional cases.

II. BACKGROUND

To better understand all of the complex issues which arise in cases involving the conclusive presumption of legitimacy, it is necessary to first recognize the various interests that may come into play when these cases are litigated. It will also be helpful to review the status of the constitutional rights of unwed fathers, to determine whether these rights are being adequately protected or violated by application of the conclusive

18. *Michael H.*, 491 U.S. at 126-30.

19. *Id.* at 115.

20. *Id.* at 129-30.

21. *Id.* Justice Scalia wrote for the plurality and was joined by Chief Justice Rehnquist and in part by Justices O'Connor and Kennedy. Justice Stevens wrote a separate opinion concurring in the judgment. *Id.* at 132-36. The plurality stated that it is not unconstitutional for the state to choose the husband instead of the natural father as the exclusive legal father of the child and to prohibit inquiries into the paternity of a child in this particular situation, where the mother and her husband wished to raise the child jointly. *Id.*

22. *Id.* at 129.

presumption. Finally, this section concludes with a discussion of California courts' treatment of the conclusive presumption prior to *Michael H. v. Gerald D.*,[23] in order to put that decision in proper perspective.

A. Competing Policies

There are many interests invoked in cases involving the conclusive presumption of legitimacy. The state has a strong interest in these cases, but it clearly is not the only concerned party. The child's mother, the child's biological father, the child, and the mother's husband, are all parties keenly interested in the outcome of these cases.

The state has several interests in these cases. First, the state has a very strong interest in preserving the integrity of the family;[24] it also has a strong desire to protect the innocent child from the social stigma of illegitimacy.[25] Furthermore, the state wants to ensure that an individual, rather than it, will assume the financial burden of supporting the child.[26] Finally, another legitimate interest that the state might assert in support of the conclusive presumption is speed and efficiency of judicial determinations.[27]

The putative father also has a stake in the outcome of these cases, as does the mother's husband, the child, and the child's mother. The putative father may have an interest in developing or maintaining a relationship with his child, regardless of the child's present living arrangements, and thus may wish to judicially establish his claimed biological relationship.[28] The mother's husband may have an interest in disproving his paternity if he suspects his wife's child is not biologically his.[29] On the other hand, the mother's husband may wish to keep his family intact,

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23. 491 U.S. 110 (1989), *aff'g* 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).

24. Michelle W. v. Ronald W., 39 Cal. 3d 354, 362-63, 703 P.2d 88, 92-93, 216 Cal. Rptr. 748, 752 (1985); Estate of Cornelious, 35 Cal. 3d 461, 464-65, 198 Cal. Rptr. 543, 545, 674 P.2d 245, 247 (1984); *see* Kusior v. Silver, 54 Cal. 2d 603, 619, 354 P.2d 657, 667-68, 7 Cal. Rptr. 129, 139 (1960); *In re* Estate of McNamara, 181 Cal. 82, 95, 183 P. 552, 557 (1919); *In re* Estate of Walker, 176 Cal. 402, 410, 168 P. 689, 691-92 (1917); *In re* Estate of Mills, 137 Cal. 298, 302, 70 P. 91, 93 (1902).

25. *In re* Lisa R., 13 Cal. 3d 636, 650, 532 P.2d 123, 132, 119 Cal. Rptr. 475, 484 (1975); *In re* Estate of Lund, 26 Cal. 2d 472, 480, 159 P.2d 643, 648 (1945); *McNamara*, 181 Cal. at 95, 183 P. at 557; *Walker*, 176 Cal. at 410, 168 P. at 691-92; *Mills*, 137 Cal. at 302, 70 P. at 93-94.

26. *Lisa R.*, 13 Cal. 3d at 650, 532 P.2d at 132, 119 Cal. Rptr. at 484.

27. *Id.*

28. *See* Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1008, 236 Cal. Rptr. 810, 818 (1987).

29. *See In re* Marriage of Stephen & Sharyne B., 124 Cal. App. 3d 524, 526-27, 177 Cal. Rptr. 429, 430 (1981).

even if the child is not biologically related to him.[30] Finally, both the child and the child's mother may have personal interests in establishing the biological father's identity.[31]

B. United States Supreme Court Rulings on the Rights of Unwed Fathers

The rights of fathers with respect to their illegitimate children have been established by a series of United States Supreme Court cases dealing with the termination of parental rights and consent to adoption.[32] *Stanley v. Illinois*[33] was the first case to come before the Supreme Court that began the process of changing the status of the unwed father who was looking for recognition of his parental status. In *Stanley*, an unmarried man and woman, Peter and Joan Stanley, had three children while "intermittently" living together for over eighteen years.[34] When Joan died, the state of Illinois, pursuant to its statute which did not recognize parental rights for fathers of illegitimate children,[35] declared the children wards of the state and assumed their custody.[36]

Peter Stanley, the biological father of the children, sued the state, claiming that he had been deprived of the equal protection of the laws guaranteed to him by the Fourteenth Amendment.[37] The Illinois Supreme Court rejected Stanley's claim.[38] The United States Supreme

30. *See Michael H.*, 191 Cal. App. 3d at 1009, 236 Cal. Rptr. at 818.

31. Ruddock v. Ohls, 91 Cal. App. 3d 271, 277, 154 Cal. Rptr. 87, 91 (1979); *see* Schumm v. Berg, 37 C.2d 174, 184, 231 P.2d 39, 44 (1951).

32. *See* Lehr v. Robertson, 463 U.S. 248 (1983) (holding that father who has participated in raising his illegitimate children and has developed relationship with those children has constitutionally protected parental rights); Caban v. Mohammed, 441 U.S. 380 (1979) (holding invalid on equal protection grounds statute under which man's children could be adopted by their biological mother and her husband without biological father's consent, when statute did require mother's consent for adoption); Quilloin v. Walcott, 434 U.S. 246 (1978) (holding that biological father's due process rights were not violated by state's application of best interests of child standard); Stanley v. Illinois, 405 U.S. 645 (1972) (holding invalid Illinois statute which erected conclusive presumption that unwed fathers were unfit parents).

33. 405 U.S. 645 (1972).

34. *Id.* at 646.

35. ILL. REV. STAT. ch. 37, paras. 701-14 (1972).

36. *Stanley*, 405 U.S. at 646. Under the Illinois law in effect at the time, the children of unwed fathers became wards of the state upon the mother's death. *Id.* at 649. Therefore, when Joan Stanley died, the State of Illinois instituted a dependency proceeding at which the Stanley children were declared wards of the state and placed with court-appointed guardians. *Id.*

37. *Id.* Stanley pointed out that married fathers and unwed mothers could not be deprived of their children without first being shown to be unfit parents. *Id.* at 658. He argued that since he had never been found to be an unfit parent, his Fourteenth Amendment equal protection right, U.S. CONST. amend. XIV, § 1, had been violated. *Stanley*, 405 U.S. at 646.

38. *In re* Stanley, 256 N.E.2d 814 (Ill. 1970), *rev'd*, 405 U.S. 645 (1972). The Illinois

Court reversed, holding that a father has a Fourteenth Amendment due process right[39] to a hearing on his fitness as a parent before the state may remove his children from his custody.[40] Furthermore, the Court held that Illinois, in denying such a hearing to Peter Stanley while granting it to all other parents whose custody of their children is challenged, violated the Equal Protection Clause of the Fourteenth Amendment.[41]

The Court noted that the rights to conceive and to raise one's children have been deemed " 'essential,' "[42] " 'basic civil rights of man,' "[43] and " '[r]ights far more precious . . . than property rights.' "[44] The Court also noted that the law has not refused to recognize family relationships unlegitimized by a marriage ceremony.[45] The Court concluded that a parent's interest in "the companionship, care, custody, and management of his or her children" warrants a great deal of respect from the Court.[46] The Court decided that Stanley's interest in retaining custody of his children was "cognizable and substantial."[47] In sum, the United States Supreme Court held that unwed fathers who are exercising or have exercised custodial responsibilities for their children have a constitutionally protected interest in maintaining that established relationship.[48]

Six years later, however, in *Quilloin v. Walcott*,[49] the Supreme Court unanimously upheld a Georgia statute[50] which provided that only the mother of an illegitimate child need consent to the adoption of that child.[51] In *Quilloin*, the mother's husband sought to adopt the child af-

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Supreme Court admitted that Stanley had not been shown to be an unfit parent. *Id.* at 815-16. Nevertheless, the court rejected his equal protection claim, holding that Stanley could be separated from his children simply upon proof that he and Joan had not been married. *Id.*

39. U.S. CONST. amend. XIV, § 1.

40. *Stanley*, 405 U.S. at 649.

41. *Id.* at 658; U.S. CONST. amend. XIV, § 1. " 'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' line as it chooses.' " *Stanley*, 405 U.S. at 652 (quoting Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968)).

42. *Stanley*, 405 U.S. at 651 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

43. *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

44. *Id.* (quoting May v. Anderson, 345 U.S. 528, 533 (1953)).

45. *Id.*

46. *Id.* The Court implied that more respect was called for in a circumstance such as this, where there could be no economic gain, than in a situation where the possibility of such gain existed. *Id.*

47. *Id.* at 652.

48. *Id.* at 649-52. The Court also held that in determining custody, trial courts must apply the same standard for unwed fathers, unwed mothers and married parents. *Id.*

49. 434 U.S. 246 (1978).

50. GA. CODE ANN. § 74-403(3) (Harrison 1975) (providing in pertinent part that "illegitimate children—if the child be illegitimate, the consent of the mother alone shall suffice").

51. *Quilloin*, 434 U.S. at 256.

ter the child had been living with his mother and her husband for about nine years.[52] The child's biological father, Leon Quilloin, had notice of the adoption petition and participated in a hearing in which he asked that he be declared the child's legitimate father, that he be granted visitation rights, and that the court deny the adoption by the mother's husband, Randall Walcott.[53]

Although the child, Darrell, had never been abandoned or deprived of anything, Leon Quilloin had provided support only on an irregular basis[54] and had not taken steps to support or legitimate[55] the child over more than eleven years.[56] The Court in *Quilloin* noted that unlike the biological father in *Stanley*, the biological father in *Quilloin* had never been a *de facto* member of the child's family unit.[57] The Court rejected Leon Quilloin's equal protection argument on the ground that his interests were "readily distinguishable" from those of a father who had been married to the mother and divorced, stating that Leon had "never exercised actual or legal custody over his child, and thus ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[58] Thus, the Court used *Quilloin* to limit its holding in *Stanley*.

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52. *Id.* at 247.

53. *Id.* at 249-50.

54. *Id.* at 251. As the biological father, Leon Quilloin had a statutory duty to support his child, but for reasons which were not discussed in the Court's opinion, the mother never brought an action to enforce this duty. *Id.* n.9. However, Darrell had visited Leon on many occasions, and Leon had given Darrell toys and gifts "from time to time." *Id.* at 251.

55. Georgia law provided that a child born in wedlock could not be adopted without both parents' consent, unless the parent had either voluntarily surrendered rights in the child or had been adjudicated to be an unfit parent. GA. CODE ANN. § 74-403(1), (2) (Harrison 1975). Even if the child's parents were divorced or separated at the time of the adoption proceedings, either parent still retained veto power. However, only the consent of the mother was required for adoption of an illegimate child. *Id.* § 74-403(3).

In order to obtain the same veto authority other parents automatically possess, the father of a child born out of wedlock had to legitimate his children in either one of two ways. He could either marry the mother and acknowledge the child as his own, *id.* § 74-101, or obtain a court order declaring the child legitimate and capable of inheriting from him, *id.* § 74-103. Unless the father legitimated the child, the mother was the only recognized parent and was given sole authority to exercise all parental prerogatives, including the power to veto adoption of the child. *Id.* § 74-203.

56. *Quilloin*, 434 U.S. at 249. The mother had recently decided that Leon's visits with Darrell were having unhealthy and disruptive effects on both Darrell and her other son, who was born several years after she and Walcott were married. *Id.* at 251. Although Darrell wanted to be adopted by Walcott, he also wanted to continue his visits with Leon after his adoption. *Id.* n.11.

57. *Id.* at 253. Peter Stanley, the biological father in *Stanley*, had lived with his children and their mother "intermittently" for more than eighteen years. *Stanley*, 405 U.S. at 646.

58. *Quilloin*, 434 U.S. at 253.

Only a little more than a year after its decision in *Quilloin*, the Supreme Court, in *Caban v. Mohammed*,[59] invalidated a New York statute similar to the statute it had previously upheld in the *Quilloin* case.[60] The New York statute, like the Georgia statute at issue in *Quilloin*, provided that an illegitimate child could be adopted if the mother alone consented; the consent of the father was not required.[61]

The two children involved in *Caban* were born when their parents, Abdiel Caban and Maria Mohammed, were living together; Caban and Mohammed represented themselves as husband and wife although they were never legally married.[62] Caban lived with the children and Mohammed until Mohammed took the children and left him to move in with another man, Kazim Mohammed, whom she later married.[63] Caban was able to see the children each week when Mohammed brought them to visit her mother.[64] However, following a custody dispute with Caban and his new wife,[65] Mohammed and her husband filed an adoption petition pursuant to a New York statute.[66] In response, the Cabans filed a cross-petition for adoption.[67] After a hearing, the trial court approved

59. 441 U.S. 380 (1979).

60. *Id.* at 393-94. At the time of the decision, section 111 of the New York Domestic Relations Law provided in pertinent part that "consent to adoption shall be required as follows . . . (a) Of the parents or surviving parents whether adult or infant, of a child born in wedlock; [and] (c) of the mother, whether adult or infant, of a child born out of wedlock." N.Y. DOM. REL. LAW § 111 (McKinney 1977). The relevant section of the Georgia Annotated Code, § 74-403(3), provided that, as to adoption, "[i]f the child be illegitimate, the consent of the mother shall suffice." GA. CODE ANN. § 74-403(3).

61. N.Y. DOM. REL. LAW § 111(1).

62. *Caban*, 441 U.S. at 382. In fact, throughout the time the couple was living together, Abdiel Caban was married to another woman. *Id.*

63. *Id.*

64. *Id.* Mohammed's mother, Delores Gonzales, lived one floor above Caban, and when Mohammed moved out, Gonzales and Caban remained on friendly terms. *Id.* When Mohammed brought the children to see their grandmother, Gonzales allowed Caban to see them. *Id.*

65. *Id.* Gonzales, the children's grandmother, moved to Puerto Rico, and at their mother's request, she took the children with her. According to the Mohammeds, they planned to join the children in Puerto Rico as soon as they had saved enough money to move there and start a business. *Id.* Caban eventually went to Puerto Rico, where the children's grandmother gave the children to him, believing that Caban would return them in a few days. However, Caban took the children and went back to New York. *Id.*

When the children's mother found out they were with Caban, she attempted to get them back from him. When her efforts failed, she and her husband instituted custody proceedings in the New York Family Court. *Id.* That court placed the children in the temporary custody of the Mohammeds and gave Caban and his new wife, Nina, visiting privileges. *Id.*

66. *Id.* at 383. The statute stated, "An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse." N.Y. DOM. REL. LAW § 110 (McKinney 1977).

67. *Caban*, 441 U.S. at 383.

the adoption by Mohammed and her husband,[68] and Caban appealed.[69]

The Supreme Court held that the distinction made by the New York statute between the mothers and fathers of illegitimate children violated the Equal Protection Clause of the Fourteenth Amendment.[70] The Court rejected the argument that the statute could be justified as promoting the state's interest in providing for the adoption of illegitimate children, on the ground that the statute bore no reasonable relation to that interest.[71] However, the three dissenters in *Caban* were prepared to "assume that, *if and when one develops*, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process."[72]

In *Lehr v. Robertson*,[73] the Supreme Court addressed the amended version of the New York statute at issue in *Caban*, including its provision for notice of adoption to fathers of illegitimate children.[74] The statute provided that mothers of illegitimate children must notify the father of pending adoption proceedings if the father has filed a notice of intent to

68. *Id.* at 383-84. The hearing on the petition and cross-petition was held before a law assistant to a New York Surrogate. *Id.* at 383. The surrogate granted the Mohammeds' petition to adopt the children and cut off all of Caban's parental rights and obligations, pursuant to section 117 of the New York Domestic Relations Law, N.Y. DOM. REL. LAW § 117 (McKinney 1977). *Caban*, 441 U.S. at 383-84. The New York Supreme Court, Appellate Division, affirmed. *Id.* at 384.

Section 117 of the New York Domestic Relations Law provided, in pertinent part, "[a]fter the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated." N.Y. DOM. REL. LAW § 117.

69. *Caban*, 441 U.S. at 385. In his appeal to the United States Supreme Court, Caban made two claims. First, he argued that the distinction drawn by New York law between the adoption rights of an unwed father and those of other parents violated the Fourteenth Amendment's Equal Protection Clause. *Id.* His second argument was that the Court's previous decision in *Quilloin v. Walcott* recognized that natural fathers have a due process right to maintain a parental relationship with their children where there has been no finding of parental unfitness. *Id.*

70. *Id.* at 394. The Court explained that the gender-based classification in section 111 was overbroad. By classifying unwed fathers as being less qualified than mothers to exercise judgment concerning their children's lives, the statute excluded some loving fathers from participating in the decision as to whether their children would be adopted. *Id.* At the same time, section 111 also enabled some alienated mothers to arbitrarily cut off the father's parental rights. *Id.*

71. *Id.*

72. *Id.* at 414 (Stevens, J., dissenting) (emphasis added) (Burger, C.J., and Rehnquist, J., joined in dissent).

73. 463 U.S. 248 (1983).

74. *Id.* at 251; N.Y. DOM. REL. LAW § 111-a 2(c) (McKinney 1977 & Supp. 1982-1983).

claim paternity of the child in the state's putative father registry.[75]

The child in *Lehr*, Jessica M., was born out of wedlock.[76] Eight months after the child's birth, her mother, Lorraine, married Richard Robertson, who was not Jessica's biological father.[77] When Jessica was two years old, Richard filed a petition to adopt her.[78] Jessica's biological father, Jonathan Lehr, had not supported, lived with, nor cared for Jessica since her birth,[79] and until Richard filed the adoption petition, Jonathan had also failed to file any notice of intent to claim paternity pursuant to the statute.[80]

Shortly after Richard filed the adoption petition, Jonathan filed a petition in a different New York court claiming paternity and seeking visitation rights.[81] The adoption was granted without notice to Jonathan,[82] and he petitioned to the United States Supreme Court, alleging that he had been deprived of both due process[83] and equal protection[84] by the state court's decision.[85]

The Supreme Court in *Lehr* held that the biological father's due process rights had not been violated by the state's failure to give notice to

75. N.Y. DOM. REL. LAW § 111-a 2(c). The registry of such notices was provided for by N.Y. SOC. SERV. LAW § 372-c (McKinney Supp. 1982-1983).

76. *Lehr*, 463 U.S. at 250.

77. *Id.*

78. *Id.*

79. *Id.* at 252. Lehr had lived with Lorraine prior to Jessica's birth and had visited her in the hospital when Jessica was born. *Id.* However, he was not named on Jessica's birth certificate. *Id.* Furthermore, he did not live with Lorraine or Jessica after Jessica's birth, he never provided them with any financial support, and he never offered to marry Lorraine. *Id.*

80. *Id.* at 251.

81. Jessica's mother and her husband, Richard, filed the adoption petition in the Family Court of Ulster County, N.Y. *Id.* at 250. Jonathan, the biological father, filed the paternity and visitation rights petition in Westchester County, N.Y., one month later. *Id.* at 252.

82. *Id.* at 253. Jonathan found out about the adoption proceedings when he received a change of venue order concerning his paternity suit. *Id.* When his attorney attempted to have the adoption proceedings stayed, the judge informed the attorney that he had already signed the adoption order earlier that same day. *Id.* Because Jonathan had not filed a notice of intent to claim paternity, the judge believed that Jonathan did not fall within the statutory classification of putative fathers to whom notice must be given. *Id.* Therefore, Jonathan never received notice of the adoption proceeding. *Id.*

83. U.S. CONST. amend. XIV, § 1.

84. *Id.*

85. *Lehr*, 463 U.S. at 253-55. Jonathan asserted that his due process rights had been violated because he had a liberty interest, as a putative father, in his actual or potential relationship with his child. *Id.* at 255. He argued that this interest was destroyed without due process of law when he was deprived of a hearing and an opportunity to be heard *before* the state granted the mother's adoption. *Id.* Jonathan also claimed that the gender-based classification of the New York statute, which both denied him the right to consent to his illegitimate child's adoption and granted him fewer procedural rights than it granted to the child's mother, violated the Equal Protection Clause. U.S. CONST. amend. XIV, § 1; *Lehr*, 463 U.S. at 255.

the father before the adoption proceeding.[86] The Court reasoned that the mere biological relationship between father and child did not warrant the same constitutional protection as a father-child relationship in which the father had cared for, supported, and associated with the child.[87]

The Court contrasted the developed father-child relationships implicated in *Stanley* and *Caban*, with the potential father-child relationship involved in *Quilloin* and this case.[88] The Court in *Lehr* stated that when an unwed father demonstrates his commitment to his parental responsibilities by "com[ing] forward to participate in the rearing of his child,"[89] his interest in establishing a relationship and maintaining contact with his child acquires substantial protection under the Due Process Clause. It is then that he has acted " 'as a father toward his children.' "[90] However, "the mere existence of a biological link does not merit equivalent constitutional protection."[91] The Court stated:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.[92]

The Court held that the New York statute categorizing fathers and differentiating between those who filed a notice of intent to claim paternity and those who did not, provided an adequate method for determining those fathers who have developed an emotional as distinguished from a merely biological relationship with their children.[93] For this reason, the Court approved the statute's notice provision.[94]

The Court also held that the Equal Protection Clause was not violated in this case because the mother and biological father, Lorraine and Jonathan, were not similarly situated, and therefore the statute could make a valid distinction between them.[95] They were not similarly situated because Lorraine had had custody of the child and had cared for her

86. *Lehr*, 463 U.S. at 265.
87. *Id.* at 261.
88. *Id.*
89. *Id.* (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)).
90. *Id.* (quoting Caban v. Mohammed, 441 U.S. 380, 389 n.7 (1979)).
91. *Id.*
92. *Id.* (quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (quote cited as appearing in Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)).
93. *Id.*
94. *Id.* at 264-66.
95. *Id.* at 267.

while Jonathan had never had a custodial, personal, or financial relationship with Jessica.[96] The Court stated that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."[97]

The biological father in *Lehr*, like the father in *Quilloin*, "had never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[98] Therefore, the Court held that the biological father in *Lehr* had never established a substantial relationship with his daughter, and thus the New York statute did not deny him equal protection.[99] The Court explained that if one parent had an established custodial relationship with the child and the other parent had either abandoned or never established a relationship with the child, the Equal Protection Clause would not prevent a state from according the two parents different legal rights.[100]

The Court in *Lehr* discussed the importance of the biological relationship that is developed between a parent and his or her biological child, and said that the state may not deny biological parents the opportunity to establish a protected custodial relationship.[101] The biological connection between parent and child affords an opportunity interest to the biological father, because "it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[102] However, the Constitution will only protect the biological father's interest if the biological father "grasp[s] that opportunity" and accepts his parental responsibilities.[103]

These Supreme Court cases established the rights of unwed fathers, by recognizing that the Due Process and Equal Protection Clauses protect the father's parental right to develop and maintain a relationship with his children, so long as the father has demonstrated his willingness to "act as a father toward his children."[104] As one commentator has written:

> [I]f an unwed biological father is willing and able to perform those functions that society has always deemed critical for the

96. *Id.*
97. *Id.* at 266-67.
98. *Id.* at 267.
99. *Id.*
100. *Id.* at 267-68.
101. *Id.* at 262-63.
102. *Id.* at 262.
103. *Id.*
104. *Id.* at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 389 n. 7 (1979)).

protection and development of children, the Constitution requires the state to allow him to do so initially and to continue doing so, in the absence of circumstances not of the state's own making.[105]

C. *California Cases Challenging the Conclusive Presumption of Legitimacy Establish a Balancing of the Interests Test*

Michael H. v. Gerald D.[106] was not the first challenge to California's conclusive presumption of legitimacy.[107] In *In re Lisa R.*,[108] decided by the California Supreme Court in 1975, the court adopted a case-by-case balancing test for reviewing constitutional challenges to the conclusive presumption of legitimacy.[109] The test weighed the state's interest in upholding the presumption against the competing private interests in rebutting it.[110]

Although the balancing test that was developed in *Lisa R.* resulted in a successful rebuttal of the conclusive presumption in that case, two other California cases mandated application of the presumption because the state's interests outweighed those of the putative father. In both *Estate of Cornelious*[111] and *Michelle W. v. Ronald W.*,[112] California courts weighed the interests of the parties against those of the state, found the state's interests stronger, and applied the conclusive presumption.[113]

1. In re *Lisa R.*

In *Lisa R.*, the California court adjudged two-year-old Lisa a dependent ward of the court[114] under section 600(a) of the California Welfare

105. Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 382 (1984).

106. 491 U.S. 110 (1989), *aff'g* 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).

107. *See, e.g.*, Estate of Cornelious, 35 Cal. 3d 461, 674 P.2d 245, 198 Cal. Rptr. 543 (1984); *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975). For a list of some of the commentators who have debated and criticized the application of the conclusive presumption in California, see *supra* note 8.

108. 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

109. *Id.* at 648, 532 P.2d at 131, 119 Cal. Rptr. at 483.

110. *Id.*

111. 35 Cal. 3d 461, 674 P.2d 245, 198 Cal. Rptr. 543 (1984).

112. 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985).

113. *Michelle W.*, 39 Cal. 3d at 360, 703 P.2d at 91, 216 Cal. Rptr. at 750-51; *Cornelious*, 35 Cal. 3d at 467, 674 P.2d at 249, 198 Cal. Rptr. at 547.

114. 13 Cal. 3d at 640, 532 P.2d at 125, 119 Cal. Rptr. at 477. The petition seeking a dependency determination for Lisa stated that Lisa's mother had been found in her home along with Lisa and another minor child. *Id.* Lisa's mother was intoxicated and the home was

and Institutions Code;[115] her mother was an alcoholic and her mother's husband was a drug addict.[116] After having been adjudged a dependent, Lisa lived with several foster families until she was five years old.[117] By this time, both her mother and father were dead.[118] Victor R. stepped in, claimed to be Lisa's biological father, and sought to prove his paternity.[119] The trial court applied the conclusive presumption, found that

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filled with gas. *Id.* The petition also noted that Lisa's mother had been intoxicated on numerous occasions in Lisa's presence during a six-month period. *Id.*

A probation officer's report supported the petition. *Id.* The report claimed that Lisa's mother had pleaded guilty to a child-neglect charge and was on probation at the time, and that her husband had a record of narcotic violations and was in custody. *Id.* Lisa's mother had told the probation officer that Lisa was conceived during a casual extra-marital affair while she was separated from her husband. *Id.*

At the time of the initiation of the probation officer's investigations, Lisa's mother was residing in an alcoholic rehabilitation home. *Id.* She was pregnant, contemplating an abortion, and had been asked to leave the home. By the time the report was filed, she had been incarcerated in the county jail for drunkenness. *Id.*

115. CAL. WELF. & INST. CODE § 600(a) (West 1973) (current version at CAL. WELF. & INST. CODE § 300 (West 1984 & Supp. 1991)). Section 600 provided in pertinent part:

> Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court.
>
> (a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control.

Id.

116. *Lisa R.*, 13 Cal. 3d at 640, 532 P.2d at 125, 119 Cal. Rptr. at 477.

117. *Id.* at 640-41, 532 P.2d at 125-26, 119 Cal. Rptr. at 477-78. Lisa's status as a dependent child was reviewed annually. At the time of Lisa's second annual review, she had been living at a foster home, and her foster parents had expressed their desire to adopt her. *Id.* at 641, 532 P. 2d at 125-26, 119 Cal. Rptr. at 477-78. However, Lisa's mother had not given her consent for the adoption. *Id.*

At the fourth annual review, the probation officer's report identified Victor R. as "Lisa's Putative Father," who had commenced proceedings to have Lisa placed in his custody. *Id.* at 641, 532 P.2d at 126, 119 Cal. Rptr. at 478.

118. *Id.* at 641-42, 532 P.2d at 125-26, 119 Cal. Rptr. at 477-78. At the second annual review of Lisa's dependency status, a probation officer's report stated that Lisa's mother's husband, who had been identified as Lisa's "legal father," had died as a result of a drug overdose. *Id.* at 641, 532 P.2d at 125-26, 119 Cal. Rptr. at 477-78. The report also identified Victor R. as the "father" of Lisa. *Id.* At the fourth annual review of Lisa's status, the probation officer reported that Lisa's mother had died shortly before the hearing date. *Id.* at 641-42, 532 P.2d at 126, 119 Cal. Rptr. at 478.

119. *Id.* at 641, 532 P.2d at 126, 119 Cal. Rptr. at 478. Victor had only seen Lisa five times in the previous five years, and he had had no visits with her during the past two. *Id.* The reason Victor gave for his lack of visits was that he had believed he was not allowed to visit Lisa. *Id.*

The information provided to the court stated that Victor had been confined to a state hospital for emotional problems twice; that a physician had concluded that he suffered from conditions from which cure was doubtful without "good intensive psychiatric care;" and that a case worker, in response to Victor's application for aid to the totally disabled, had reported

Lisa was the legitimate issue of the marriage of her mother and presumed father, and denied Victor R. the opportunity to establish his paternity.[120]

The California Supreme Court began its analysis by stating that there was no intact family present in this case.[121] Because there was no intact family to protect, the court focused on the interests of the putative father, paying particular attention to: (1) the type of relationship Victor had had with Lisa's mother; (2) the fact that Victor had asserted his rights immediately when he discovered that Lisa was a dependent ward of the court; and (3) the otherwise harsh result that would occur because Victor had no alternative remedy through which to protect his interests.[122]

Then, the court discussed the state's potential interests: (1) carrying out the purposes of the juvenile court's laws; (2) relieving a child of the stigma of illegitimacy; (3) promoting marriage; and (4) promoting speed and efficiency of judicial inquiries.[123] When the court balanced the putative father's interests against those of the state, the court found that Victor's interests in establishing his relationship with Lisa outweighed the state's interests.[124] Thus, the court held that the presumption which precluded him from offering evidence to prove that he was the child's father was unreasonable, arbitrary, capricious, and a denial of due process.[125]

2. *Estate of Cornelious*

In *Cornelious*, a female adult claimed to be the decedent's illegitimate daughter and petitioned the court to be appointed as administratrix of his estate.[126] The California Supreme Court affirmed the trial court's application of the conclusive presumption and denial of her request.[127] The court held that the woman's interest in proving that the decedent was her biological father did not outweigh the state's interest in preventing her from rebutting the presumption.[128] The court reasoned that the woman's only interest in claiming to be the decedent's daughter was fi-

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that Victor's conduct had been deemed by his common-law wife to endanger the lives of Victor, his common-law wife, and her four-year-old daughter whom Victor had previously abused. *Id.* at 641-42, 532 P.2d at 126, 119 Cal. Rptr. at 478.

120. 41 Cal. App. 3d 89, 115 Cal. Rptr. 859 (1974).

121. *Lisa R.*, 13 Cal. 3d at 639, 532 P.2d at 125, 119 Cal. Rptr. at 477.

122. *Id.* at 649, 532 P.2d at 131-32, 119 Cal. Rptr. at 483-84.

123. *Id.* at 650-51, 532 P.2d at 132-33, 119 Cal. Rptr. at 484-85.

124. *Id.* at 649-51, 532 P.2d at 132-33, 119 Cal. Rptr. at 484-85.

125. *Id.* at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485.

126. *Cornelious*, 35 Cal. 3d at 463, 674 P.2d at 247, 198 Cal. Rptr. at 544.

127. *Id.* at 467-68, 674 P.2d at 249, 198 Cal. Rptr. at 547.

128. *Id.* at 467, 674 P.2d at 249, 198 Cal. Rptr. at 547.

nancial; she hoped to gain a right to inherit.[129] There was no possibility of developing a relationship with the biological father, since he was deceased.[130] On the other hand, the state's interest was substantial because the policies promoted by the conclusive presumption of legitimacy were served by the application of the presumption.[131] The woman had been raised and supported by her presumed father who had previously died, believing that he was her biological father.[132]

Cornelious demonstrates the strength of the state's interest in protecting and preserving the integrity of the family. The presumed father was dead, so the family unit no longer existed. Nevertheless, the court determined that the family the presumed father had established while alive was of sufficient and significant interest to warrant applying the conclusive presumption.[133]

3. *Michelle W. v. Ronald W.*

In *Michelle W.*, Michelle and her stepfather, Donald, brought an action to prove that Donald was Michelle's biological father.[134] Michelle was born while her mother was married to Ronald, but the marriage was dissolved when Michelle was five years old.[135] Neither party raised the issue of paternity in the dissolution. Ronald agreed to pay child support, and he visited Michelle regularly after the marriage ended.[136]

However, when Michelle was six years old, her mother married Donald and refused to allow Ronald to continue his visits with Michelle.[137] One year later, Donald and Michelle brought an action to establish Donald's paternity.[138] The trial court applied the presumption of section 621 because the facts established that Ronald had lived with Michelle's mother for nine years before Michelle's birth, and Ronald was neither impotent nor sterile. As a result, the court held that Ronald was conclusively presumed to be Michelle's father.[139]

On appeal, the California Supreme Court, in affirming the trial court's ruling that the presumption should apply, balanced Michelle's

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Michelle W.*, 39 Cal. 3d at 359, 703 P.2d at 90, 216 Cal. Rptr. at 750.
135. *Id.* at 358-59, 703 P.2d at 90, 216 Cal. Rptr. at 749-50.
136. *Id.* at 359, 703 P.2d at 90, 216 Cal. Rptr. at 750.
137. *Id.*
138. *Id.*
139. *Id.*

and Donald's private interests against the state's interests.[140] The court found that the public interest in protecting the family unit substantially outweighed Michelle's and Donald's private interests.[141] The court also noted that unlike the putative father in *Lisa R.*, Donald was not attempting to establish a legal relationship with a child who otherwise had no parents.[142] Accordingly, the court ruled that the state's interest in upholding the integrity of the family and protecting the child's welfare outweighed Donald's interests.[143] Even though the original family unit of Ronald, Michelle and her mother no longer existed, the court concluded that application of the presumption furthered the state's policy of upholding the integrity of the family.

III. *MICHAEL H. V. GERALD D.*: THE UNITED STATES SUPREME COURT'S MOST RECENT GUIDANCE

A. The Facts

On May 9, 1976, Carole D. and Gerald D. were married; subsequently, they established a home in California.[144] During the summer of 1978, Carole and a neighbor, Michael H., began an adulterous affair; in September 1980, Carole conceived a child, and on May 11, 1981, Victoria was born.[145] Shortly after the child's birth, Carole told Michael that she thought he might be Victoria's father.[146] Gerald's name, however, was listed on the birth certificate as Victoria's father, and he always held her out to the world as his child.[147]

Gerald and Carole separated in October 1981.[148] On October 29, 1981, Carole, Michael and Victoria took blood tests which showed a 98.07% probability that Michael was Victoria's biological father.[149] In January 1982, Carole and Victoria went to live on the island of St. Thomas with Michael.[150] The three lived together for three months, dur-

140. *Id.* at 360, 703 P.2d at 91, 216 Cal. Rptr. at 751.
141. *Id.* at 360, 363, 703 P.2d at 91, 93, 216 Cal. Rptr. at 751, 753.
142. *Id.* at 362, 703 P.2d at 92, 216 Cal. Rptr. at 752.
143. *Id.*
144. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989), *aff'g* 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987). Both Gerald and Carole traveled a great deal; Carole was an international model and Gerald was an oil company executive. *Id.*
145. *Id.*
146. *Id.* at 114.
147. *Id.* at 113-14.
148. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1000, 236 Cal. Rptr. 810, 813 (1987), *aff'd*, 491 U.S. 110 (1989).
149. *Id.*
150. *Id.* at 1000-01.

ing which time Michael held Victoria out as his child.[151] In March, Carole left Michael and went back to California, where she resided with still another man, Scott K.[152] Later in the spring of 1982, and again in the summer of the same year, Carole and Victoria visited Gerald in New York City.[153] The three even vacationed together in Europe in the fall of 1982, but Carole and Victoria then returned to live with Scott in California.[154]

In November 1982, Michael filed a filiation[155] action in a California superior court to establish his paternity and right to visitation after Carole denied his request for visitation.[156] In March 1983, the court appointed an attorney and guardian *ad litem*[157] to represent Victoria's interests. Victoria's attorney and guardian *ad litem* then filed a cross-complaint which asserted that if Victoria had more than one psychological or *de facto* father, she was entitled to maintain her filial relationship with both.[158]

From March 1983 through July 1983, Carole and Victoria lived with Gerald in New York,[159] but in August, Carole and Victoria returned to California and once again took up residence with Michael.[160] Carole then removed her summary judgment motion from the calendar.[161] From August 1983 through April 1984, Carole, Victoria and Michael lived together in California.[162] Michael held Victoria out as his daughter,[163] and she called him "Daddy."[164] In April 1984, Carole and Michael signed a stipulation which stated that Michael was Victoria's biological father;[165] however, the next month Carole left Michael and

151. *Michael H.*, 491 U.S. at 114.

152. *Id.*

153. *Id.*

154. *Id.*

155. A filiation action is an action brought for the purpose of establishing parentage. BLACK'S LAW DICTIONARY 628 (6th ed. 1990).

156. *Michael H.*, 491 U.S. at 114. Michael filed this action because Carole had not permitted him to see Victoria. *Id.*

157. A guardian *ad litem* is one who is appointed to prosecute or defend a suit on behalf of a party who lacks the capacity to protect his or her own interests. BLACK'S LAW DICTIONARY 43 (6th ed. 1990).

158. *Michael H.*, 491 U.S. at 114.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* Michael still maintained his apartment in St. Thomas, but when he was in Los Angeles he lived with Carole and Victoria in Carole's apartment. *Id.*

163. *Id.*

164. *Michael H.*, 191 Cal. App. 3d at 1001, 236 Cal. Rptr. at 813.

165. *Michael H.*, 491 U.S. at 114-15.

told her attorneys not to file the stipulation.[166]

In May 1984, Victoria's guardian *ad litem*/attorney and Michael sought visitation rights for Michael *pendente lite*.[167] To assist the court in determining whether visitation would be in Victoria's best interests, the court appointed a psychologist to evaluate Michael, Victoria, Carole and Gerald.[168]

In his report, the psychologist recommended that Carole retain sole custody,[169] but that Michael be permitted to remain "a member of [Victoria's] family," because he perceived Michael "as the single adult in Victoria's life most committed to caring for her needs on a long-term basis."[170] The psychologist recommended that Michael be allowed continued contact with Victoria pursuant to a restricted visitation schedule.[171] The court agreed and ordered that Michael be provided with limited visitation privileges *pendente lite*.[172] In the meantime, however, in June 1984, Carole and Gerald again reconciled in New York.[173]

B. Reasoning of the Plurality

The United States Supreme Court did not issue a majority opinion in the *Michael H.* case.[174] Five Justices agreed to reject Michael's claim that he had "a constitutionally protected liberty interest" in his relationship with Victoria.[175] Justice Scalia, writing for the plurality, stated that

166. *Id.* at 115.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Michael H.*, 191 Cal. App. 3d at 1001, 236 Cal. Rptr. at 813.
171. *Michael H.*, 491 U.S. at 115.
172. *Id.*
173. *Id.* They were still living together in New York with Victoria and two other children since born into their marriage at the time this case was heard before the United States Supreme Court. *Id.*
174. Justice Scalia affirmed the California court's rulings in an opinion that only Chief Justice Rehnquist joined in full. *Id.* at 132. Justices O'Connor and Kennedy joined in all of the plurality's opinion except for a lengthy footnote in which Justice Scalia put forth a strict test for determining when the Court will recognize traditional interests protected by the Constitution. *Id.* at 127-28 n.6. Justice O'Connor wrote a separate concurrence in which Justice Kennedy joined. *Id.* at 132 (O'Connor, J., concurring).
175. *Id.* at 123-24; *id.* at 132 (O'Connor, J., concurring). Justice Scalia's opinion relied on his interpretation of substantive due process. In two separate dissents—one written by Justice Brennan, joined by Justices Marshall and Blackmun, and the other written by Justice White, joined by Justice Brennan—four Justices agreed that Michael had a constitutionally protected liberty interest in his relationship with Victoria and was entitled at least to a hearing at which he could prove his paternity. *Id.* at 136-57 (Brennan, J., dissenting); *id.* at 157-63 (White, J., dissenting). All the dissenters agreed that a law which does not provide a man with an opportunity to establish his paternity in court has violated that man's liberty interest. *Id.*

Michael was seeking a declaration that he was *the* father of Victoria, and the immediate benefit he sought to obtain from such a declaration was visitation rights.[176] However, in Justice Scalia's view, if the Court declared that Michael was Victoria's father, other rights, such as the right to be considered the custodial parent, would necessarily follow.[177] By denying Michael status as the father, all parental rights, including visitation rights, were automatically denied.[178]

Michael raised two related challenges to the constitutionality of section 621 of the California Evidence Code,[179] which denied putative fathers the right to establish paternity unless the child's mother agreed.[180] First, he asserted that requirements of procedural due process prevented the state of California from terminating his substantive due process liberty interest in his relationship with Victoria without affording him an opportunity to demonstrate his paternity in an evidentiary hearing.[181] Justice Scalia responded to this claim by stating:

> We believe this claim derives from a fundamental misconception of the nature of the California statute. While [section] 621 is phrased in terms of a presumption, that rule of evidence is the implementation of a substantive rule of law. California declares it to be, except in limited circumstances, *irrelevant* for paternity purposes whether a child conceived during and born into an existing marriage was begotten by someone other than the husband and had a prior relationship with him.[182]

According to Justice Scalia, the conclusive presumption of section 621 not only expresses the state's substantive policy, but also furthers it by

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176. *Id.*

177. *Id.*

178. *Id.* at 119. Although section 4601 of the California Civil Code, CAL. CIV. CODE § 4601 (West Supp. 1991), gives the court discretion to award visitation rights to a nonparent, the superior court, affirmed by the court of appeal, held that California law denies visitation to a putative father who has been prevented by section 621 of the California Evidence Code, CAL. EVID. CODE § 621 (West Supp. 1991), from establishing his paternity, unless the mother agrees that the putative father should have visitation. *Michael H.*, 491 U.S. at 115-16.

179. CAL. EVID. CODE § 621.

180. *Michael H.*, 491 U.S. at 119.

181. *Id.* The Fourteenth Amendment's Due Process Clause states that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amend XIV, § 1.

182. *Michael H.*, 491 U.S. at 119. Justice Scalia went on to quote from the court of appeal:

> The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.

Id. at 119-20 (quoting *Michael H. v. Gerald D.*, 191 Cal. App. 3d 995, 1005, 236 Cal. Rptr. 810, 816 (1987), *aff'd*, 491 U.S. 110 (1989)).

excluding inquiries into the child's paternity that might destroy family integrity and privacy.[183]

Michael based his second argument on his substantive due process liberty interests.[184] He contended that he had a due process liberty interest in his parental relationship with Victoria, and protecting Gerald's and Carole's marriage was not a sufficiently strong state interest to support termination of his constitutionally protected father-daughter relationship with Victoria.[185] Justice Scalia noted that Michael's assumption that he had a liberty interest in his relationship with Victoria was erroneous.[186] Justice Scalia determined that such a constitutionally protected liberty interest did not exist and therefore Michael's substantive due process argument failed.[187]

Justice Scalia limited his opinion, however, to cases in which the husband and wife wish to raise the wife's child together.[188] His limitation to the specific facts of *Michael H.* was because "it is at least possible that our traditions lead to a different conclusion with regard to adulterous fathering of a child whom the marital parents do not wish to raise as their own."[189]

Thus, Justice Scalia left the door open for courts to avoid applying the conclusive presumption when the family is no longer intact, that is, in cases in which the husband and wife are no longer together or do not wish to raise the wife's child jointly. Although the plurality found that section 621 was constitutional in the circumstances presented in *Michael H.*, the plurality did not address the issue of whether the presumption might be unfair to a putative father or child in other circumstances. Gerald and Carole together represented an intact family, and since the state's strongest interest has always been to protect intact families, the presumption was used to uphold the integrity of this family.[190]

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183. *Id.* at 120.

184. *Id.* at 121. Substantive due process arguments are based upon rights found in the Fifth and Fourteenth Amendments. For a discussion of substantive due process, see LAURENCE H. TRIBE, CONSTITUTIONAL LAW §§ 15-1 to -21 (2d ed. 1988).

185. *Michael H.*, 491 U.S. at 121.

186. *Id.*

187. *Id.* at 121-30.

188. *Id.* at 129. Justice Scalia distinguished any substantive constitutional claims that otherwise might exist in a case such as this. He limited his opinion to the circumstances presented—that is, "that the mother is, at the time of the child's conception and birth, married to and cohabiting with another man, both of whom wish to raise the child as the offspring of their union." *Id.*

189. *Id.* at 129 n.7.

190. If Carole had decided to leave Gerald and marry Michael instead, there would have been no pre-existing family to protect, and Justice Scalia's reasoning would not have applied.

IV. THE AFTERMATH OF *MICHAEL H.* IN CALIFORNIA

A. California Cases after Michael H.

In *Michael H. v. Gerald D.*,[191] the United States Supreme Court appeared to require application of California's conclusive presumption of legitimacy, to foreclose a putative father from establishing or maintaining a previously established relationship with his child when that child was already part of an existing family. However, none of the cases which have come before the California courts and raised the presumption subsequent to the *Michael H.* decision have applied the presumption.[192] In each of these cases in which the California courts have refused to apply the presumption, there was no intact family to protect, as there was in *Michael H.*

In *In re Melissa G.*,[193] the Court of Appeal for the Sixth District held that the trial court's application of section 621 was unconstitutional, because application of the conclusive presumption would not serve the interests it was intended to protect in light of the specific facts presented.[194] If the conclusive presumption had been applied, the child, Melissa, would have had to live with a man with whom she had never lived,[195] and would have been separated from her sister, with whom she had lived and had developed a strong attachment.[196] In the even more unusual case of *Szwed v. Headrick (In re Guardianship of Szwed)*,[197] the court of appeal held that a woman's former husband was estopped from using section 621 to assert paternity.[198] This case was unusual because the former husband was estopped based on his previous assertion of *another* man's paternity, *not his own*.

1. In re *Melissa G.*

During the marriage of Rita D. and Fermin G., four children were

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In that case, it is possible that the Court might have allowed Michael to attempt to rebut the presumption.

191. 491 U.S. 110 (1989), *aff'g* 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).

192. Szwed v. Headrick (*In re* Guardianship of Szwed), 221 Cal. App. 3d 1403, 271 Cal. Rptr. 121 (1990); *In re* Melissa G., 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989); *see also* Leslie v. Superior Court (*Madsen*), 228 Cal. App. 3d 556, 279 Cal. Rptr. 46 (1991) (allowing putative father to bring paternity action because evidence did not show that mother was married to and cohabiting with presumptive natural father at time of child's possible conception, thereby making conclusive presumption of legitimacy inapplicable).

193. 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989).

194. *Id.* at 1089, 261 Cal. Rptr. at 898.

195. *Id.*

196. *Id.*

197. 221 Cal. App. 3d 1403, 271 Cal. Rptr. 121 (1990).

198. *Id.* at 1415-17, 271 Cal. Rptr. at 129-30.

born—Lenora, Eugene, James and Melissa.[199] Melissa, the youngest, was born in August 1983, only eight days before Rita and Fermin separated.[200] Although Rita had told a social worker that another man, Felix, was Melissa's father, Rita had listed Fermin as the father on Melissa's birth certificate, and had named Fermin as the father of Melissa in their divorce.[201]

In December 1983, Rita and Felix began living together.[202] They married in August 1984, and Shannon, their daughter, was born in February 1985.[203] Melissa lived with Rita and Felix and the four other children between August 1983 and July 1987.[204] Rita was arrested several times during this period, and each time she spent two or three days in jail.[205] Felix took care of Melissa when Rita was in jail.[206] Fermin never visited Melissa, although he did visit the three older children.[207] In July 1987, Felix was arrested for spousal abuse.[208] Several months later Rita was hospitalized,[209] and in November 1987 the children were found living in "an abandoned truck trailer, without adult supervision . . . [or] heat, cooking or sanitary facilities."[210]

The court took all five children into protective custody, and gave Fermin custody of Lenora, James and Eugene.[211] Melissa and Shannon were placed together in the same foster home.[212] In order to determine Melissa's paternity, the court ordered blood tests; these blood tests revealed a 99.1% probability that Felix was Melissa's biological father.[213] In its decision, which cited *Michael H. v. Gerald D.*,[214] the court concluded that it must apply section 621 and could not consider the blood test results.[215] Therefore, the court determined that Fermin was Me-

199. *Melissa G.*, 213 Cal. App. 3d at 1084, 261 Cal. Rptr. at 894-95.
200. *Id.* at 1084, 261 Cal. Rptr. at 895.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* The court suggested that Rita's arrests were related to her alcohol abuse. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* During several hearings, a California superior court heard evidence on the relationships between Fermin, Felix and Melissa. *Id.* at 1085, 261 Cal. Rptr. at 895. Fermin argued that the court should apply § 621 and disregard the blood test results. *Id.*
214. 491 U.S. 110 (1989), *aff'g* 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).
215. *Melissa G.*, 213 Cal. App. 3d at 1085, 261 Cal. Rptr. at 895.

lissa's father.[216]

When this case reached the California Supreme Court, the court reviewed several appellate court decisions which had previously considered the constitutionality of section 621.[217] The court also examined the United States Supreme Court decisions in *Michael H. v. Gerald D.*[218] and *Stanley v. Illinois*.[219] The California Supreme Court held that the application of California's conclusive presumption of legitimacy codified in section 621 was unconstitutional in *Melissa G.*[220]

In its analysis, the court distinguished *Michael H.* It pointed out that the United States Supreme Court's holding in that case was limited to situations in which a wife and husband were living together and wished to raise the child jointly.[221] The *Melissa G.* court emphasized that in *Michael H.*, Justice Scalia had left open the possibility that when there was no longer an intact family unit to protect, a putative father may have a constitutionally protected interest in a relationship with his child.[222] The *Melissa G.* court found no family unit to protect regarding the Fermin-Melissa parental relationship, because the marriage between Rita and Fermin had ended eight days after Melissa was born.[223] Furthermore, Rita and Felix had raised Melissa and Shannon until the time the children became dependents of the court.[224] The court noted, "[t]he 'categorical preference' for an extant marital union which Justice Scalia recognized, in *Michael H.*, as being expressed by the statute, thus has no application to this case."[225]

The *Melissa G.* court also found that Felix had a stronger interest in a paternal relationship with Melissa than Michael H. had had with Victoria.[226] Specifically, the court noted that Felix had lived with Melissa

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216. *Id.* In an appeal, Melissa, Felix and the Department of Social Services asked the court to reverse the trial court's order, while Fermin urged the appellate court to uphold the lower court's presumption of his paternity of Melissa. *Id.*

217. *See id.* at 1085-87, 261 Cal. Rptr. at 895-96 (discussing Michelle W. v. Ronald W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985); Estate of Cornelious, 35 Cal. 3d 461, 674 P.2d 245, 198 Cal. Rptr. 543 (1984); *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975)).

218. For a discussion of *Michael H.*, see *supra* notes 144-90 and accompanying text.

219. *See Melissa G.*, 213 Cal. App. 3d at 1086-87, 261 Cal. Rptr. at 896. For a discussion of Stanley v. Illinois, 405 U.S. 645 (1972), see *supra* notes 33-48 and accompanying text.

220. 213 Cal. App. 3d at 1089, 261 Cal. Rptr. at 898.

221. *Id.* at 1088, 261 Cal. Rptr. at 897.

222. *Id.*; *see Michael H.*, 491 U.S. at 129.

223. *Melissa G.*, 213 Cal. App. 3d at 1088-89, 261 Cal. Rptr. at 897-98.

224. *Id.*

225. *Id.* at 1089, 261 Cal. Rptr. at 898.

226. *Id.*

for almost four years, beginning shortly after her birth.[227] On the other hand, Michael H. had lived with Victoria for a total of only eleven non-consecutive months. Thus, the *Melissa G.* court determined that no real state interest in protecting the "family" of Fermin and Melissa existed, and in addition, the court found Felix's interests significant.

The court then considered the child's interests. It recognized that Melissa and her younger sister Shannon were "emotionally and psychologically bonded to each other, and that it would be detrimental to separate them."[228] Had the court applied the statutory presumption, Fermin would have been conclusively presumed to be Melissa's father, and Melissa would have been placed in Fermin's custody—while Felix would have had no chance of obtaining custody.[229] Therefore, application of the presumption would have resulted in the sisters' separation.

Although the court did not address whether Melissa's right to a sibling relationship rose to constitutional dimensions, it assumed that the public interest in Melissa's welfare encompassed her sibling relationship with Shannon.[230] It found that in light of this public interest, as well as Felix's private interest in establishing his parental relationship with Melissa, the balancing test mandated by the California Supreme Court in pre-*Michael H.* cases[231] weighed in favor of Felix and against applying the presumption.[232]

The *Melissa G.* court noted that in *Michael H.*, Justice Scalia had explained, "irrebutable presumption cases ultimately call into question not the adequacy of procedures but 'the adequacy of the 'fit' between the classification and the policy that the classification serves.' "[233] In *Melissa*

227. *Id.*

228. *Id.* However, Felix was the only father Melissa had ever known. *Id.* Shannon, on the other hand, would be placed in Felix's custody but not in that of Fermin, to whom she was biologically unrelated. *Id.* If the presumption had been applied, the two girls would be separated. *Id.* The court stated that Melissa had a right to a sibling relationship, which would be violated if the conclusive presumption was applied. *Id.*

229. *See id.*

230. *Id.* The court stated: "We are not asked to decide, and explicitly, do not hold that this interest has constitutional dimensions. [W]e need only assume for purposes of this case that the public interest in Melissa's welfare encompasses her sibling relationship with Shannon." *Id.*

231. *See, e.g.*, Michelle W. v. Ronald W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985); Estate of Cornelious, 35 Cal. 3d 461, 674 P.2d 245, 198 Cal. Rptr. 543 (1984); *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

232. *See Melissa G.*, 213 Cal. App. 3d at 1089, 261 Cal. Rptr. at 898.

233. *Id.* (quoting Michael H. v. Gerald D., 491 U.S. 110, 121 (1989)). "A conclusive presumption does . . . foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate." *Id.* at 120.

G., the court emphasized the particular facts before it, focusing primarily on the fact that there was no intact, existing family unit. Melissa had no available mother, her conclusively presumed father was a stranger to her, and her most important psychological relationship was with a sibling to whom she was presumed biologically unrelated, but with whom she had resided.[234] The court concluded that under these facts, the statute would not serve the interests it was intended to protect.[235] Accordingly, the court held the application of section 621 unconstitutional,[236] and was free to consider other interests. In this case, then, because there was no intact family which warranted protection, the court was able to protect both Melissa's and Felix's interests by refusing to apply the presumption.

2. *Szwed v. Headrick* (In re *Guardianship of Szwed*)

Ethan was born in July 1980 to Maureen Greenwald, who was married to and living with Lewis Headrick.[237] Two older children, Iris, who was Greenwald's child from a previous relationship, and Ezra Headrick, also lived in the home.[238] At the time Greenwald conceived Ethan, Headrick was traveling and Greenwald was having an extramarital affair with Wayne Szwed, a friend of Headrick's.[239] Greenwald was convinced that Szwed, not Headrick, was the father, and when Ethan was born, Headrick agreed that Ethan should have Szwed's surname.[240] Szwed consented to being designated as Ethan's father on the child's birth certificate.[241] Although Ethan lived with Headrick during his early years, he always called Szwed "Dad" and Headrick "Lewis."[242] When Greenwald and Headrick separated in November 1981, Headrick did not object to the dissolution petition naming Iris and Ezra, but not Ethan, as children of the marriage.[243]

After the divorce, Ethan stayed with Headrick and the two other children until 1985.[244] During these years, Headrick represented to everyone, including the county welfare department, that Szwed, not he, was

234. *Melissa G.*, 213 Cal. App. 3d at 1088-89, 261 Cal. Rptr. at 897-98.
235. *Id.* at 1089, 261 Cal. Rptr. at 898.
236. *Id.*
237. *Szwed*, 221 Cal. App. 3d at 1406, 271 Cal. Rptr. at 123.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 1406-07, 271 Cal. Rptr. at 123.
243. *Id.* at 1407, 271 Cal. Rptr. at 123.
244. *Id.* Ethan's mother, Iris Greenwald, had discontinued her contact with Ethan in December 1981 shortly after her separation from Headrick. She never sought custody of Ethan, and in 1984 she moved to Australia. *Id.*

Ethan's father.[245] Szwed remained friends with Headrick and visited Ethan periodically until March 1985, when Szwed moved Ethan to San Francisco to live with Szwed and Szwed's friend, Jack Haygood.[246] Ethan lived with Szwed for the next two years, attended school in San Francisco and formed strong bonds with Szwed's parents, Sy and Sophie Szwed, whom he considered his grandparents.[247]

In 1985, however, Headrick petitioned for appointment as Ethan's legal guardian.[248] In reaction, Szwed filed a complaint seeking sole custody as Ethan's biological father and a determination that Headrick was not Ethan's legal father.[249] Headrick's answer to Szwed's complaint claimed that he was Ethan's father under section 621 of the California Evidence Code.[250] The court referred the matter to the child-welfare-services division for an investigation and report.[251] The report recommended that Ethan remain with the Szweds, and described in some detail Headrick's quite unconventional and startling lifestyle raising Iris and Ezra.[252] As a result of this report, the court granted Szwed's motion for

245. *Id.*

246. *Id.* Szwed charged that the reason he moved Ethan to San Francisco was because Headrick was neglecting the children, and because Headrick had admitted to Szwed that he was having trouble caring for all three children. *Id.* Szwed also claimed that Headrick had told Szwed it "was his (Szwed's) turn to take care of Ethan." *Id.* Headrick claimed, however, that he left Ethan with Szwed only for a short period, and then had allowed him to stay because Ethan was a comfort to Haygood, who had AIDS; Haygood was also an old friend of Headrick's. *Id.*

247. *Id.* at 1408, 271 Cal. Rptr. at 124.

248. *Id.* at 1407, 271 Cal. Rptr. at 124. The petition named Greenwald and Szwed as the parents and himself as "the father of the minor's brother and sister." *Id.*

249. *Id.* at 1408, 271 Cal. Rptr. at 124. Szwed filed his complaint also as a response to "a violent confrontation" in April 1987, in which Headrick forcibly tried to take Ethan from his school. *Id.*

250. *Id.*

251. *Id.* at 1409, 271 Cal. Rptr. at 124.

252. *Id.*, 271 Cal. Rptr. at 125. The report claimed, among other things, that Headrick shared marijuana with the children " 'for 'medicinal' purposes,' " that he expected the children " 'to make their own living arrangements at [his] request or at their own inclination,' " and that he grew marijuana for a living. Szwed v. Headrick, 90 DAILY J. D.A.R. 7677, 7678 (Cal. Ct. App. 1990) (facts omitted from certified published opinion). The report concluded: " 'Lewis Headrick lives a counter culture lifestyle. His parenting style seems to force children into becoming 'responsible adults' far before they are ready.' " *Id.* The report issued the concern that Headrick could not " 'provide a secure, stable home where Ethan's emotional and physical needs would be met.' " *Id.*

In contrast, a juvenile probation report obtained from the San Francisco Juvenile Court which evaluated the Szwed home found that Ethan's grandparents were energetic, young and healthy. The report found the grandparents willing and able to provide a home for Ethan if Wayne Szwed did not regain his health, as Wayne had been diagnosed as having ARC, a precursor to AIDS. 221 Cal. App. 3d at 1409, 271 Cal. Rptr. at 125. The report found that Ethan's grandparents were able to give him a stable, nurturing environment. *Id.*

summary judgment.[253]

The judgment declared Szwed and Greenwald Ethan's father and mother, awarded Szwed and his parents joint legal and physical custody of Ethan, and ordered that Headrick have no custody or visitation rights.[254] Headrick appealed, arguing that the court should have applied the presumption of section 621.[255] He argued that the presumption was "conclusive" and had been upheld against constitutional attack to defeat the rights of a biological father.[256] The court of appeal rejected Headrick's arguments, stating that "[w]ithout grappling with constitutional issues, we may uphold the summary judgment on equitable estoppel grounds."[257] Headrick unsuccessfully argued that the doctrine of equitable estoppel should not apply.[258] Although he had represented that Ethan was not his natural son and that Szwed was indeed Ethan's father, Headrick argued a lack of evidence that Szwed would have done anything differently had he known that Headrick claimed to be Ethan's father.[259]

In its discussion, the court did not focus solely on the detriment caused to Szwed by Headrick's representations; estoppel could also be analyzed from Ethan's point of view.[260] The court noted that in a previous case, it had stated, "[t]he elements of estoppel have equal application to establish the relationship between a child and his putative father . . . . [In] this type of case the estoppel runs in favor of the child, not the spouse."[261]

> Thus, in order to establish an estoppel vis-a-vis the putative father, there must be a showing that (1) the putative father represented to the child that he was his father; (2) the child relied upon the representation by accepting and treating the putative

253. *Id.* at 1411, 271 Cal. Rptr. at 126.

254. *Id.*

255. *Id.* at 1415, 271 Cal. Rptr. at 129.

256. *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110 (1989); Estate of Cornelious, 35 Cal. 3d 461, 674 P.2d 245, 198 Cal. Rptr. 543 (1984)). *But see In re* Melissa G., 213 Cal. App. 3d 1082, 1085-89, 261 Cal. Rptr. 894, 895-98 (1989); *In re* Lisa R., 13 Cal. 3d 636, 647-51, 532 P.2d 123, 130-33, 119 Cal. Rptr. 475, 482-85 (1975) (holding application of presumption unconstitutional).

257. *Szwed*, 221 Cal. App. 3d at 1415, 271 Cal. Rptr. at 129. "The existence of an estoppel is generally a question of fact. However, it becomes a question of law when the evidence is not in conflict and is susceptible of only one reasonable inference." *Id.* at 1416, 271 Cal. Rptr. at 129.

258. *Id.*

259. *Id.*

260. *Id.* at 1416-17, 271 Cal. Rptr. at 129-30.

261. *Id.* at 1416, 271 Cal. Rptr. at 130 (quoting *In re* Marriage of Valle, 53 Cal. App. 3d 837, 841, 126 Cal. Rptr. 38, 41 (1975)).

> father as his father; (3) the child was ignorant of the true facts; and (4) the representation was of such duration that it frustrated the realistic opportunity to discover the natural father and to reestablish the child-parent relationship between the child and the natural father.[262]

In earlier cases, courts had used estoppel to compel a man to support a child when the man had told the child he was the father.[263] The court in *Szwed* found no reason why estoppel should not apply in the more unusual case, as here, where Headrick had told Ethan that Szwed, not Headrick, was Ethan's father.[264] The court noted that in this sort of case, there was no policy risk that applying the doctrine would leave the child unsupported or fatherless.[265] Also, if the previous cases were justified by the policy of preserving existing father-child relationships, the same policy would be served by invoking estoppel here.[266]

The court also balanced the competing interests and noted that Headrick's sole claim to the title "father" had been the presumption of section 621.[267] Although Szwed had not previously been adjudicated Ethan's biological father, he had been treated as such by everyone—even Headrick, until Headrick filed his action.[268] Headrick had never claimed to be Ethan's biological father and at the time of the suit had no existing parent-child relationship with Ethan.[269] His interest was thus "abstract" and not as "weighty" as that of an asserted biological parent.[270] Moreover, Headrick could not allege there was any threat to him to " 'disrupt an established family and damage reputations.' "[271]

The court in *Szwed* emphasized the existing father-child relationship between Szwed and Ethan and its interest in protecting such a relation-

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262. *Id.* (quoting *In re* Marriage of Valle, 53 Cal. App. 3d 837, 841, 126 Cal. Rptr. 38, 41 (1975)); *accord In re* Marriage of Johnson, 88 Cal. App. 3d 848, 852, 152 Cal. Rptr. 121, 123 (1979).

263. *See, e.g., Johnson*, 88 Cal. App. 3d at 850-51, 152 Cal. Rptr. at 123; *Valle*, 53 Cal. App. 3d at 840-41, 126 Cal. Rptr. at 41.

264. *Szwed*, 221 Cal. App. 3d at 1416, 271 Cal. Rptr. at 130.

265. *Id.*

266. *Id.*

267. *Id.* at 1413, 271 Cal. Rptr. at 128.

268. *Id.*

269. *Id.*

270. *Id.* He also had no current relationship with Ethan's mother, who had moved to Australia. *Id.*

271. *Id.* (quoting Salas v. Cortez, 24 Cal. 3d 22, 28, 593 P.2d 226, 230, 154 Cal. Rptr. 529, 534 (1979)).

ship.[272] In protecting the state's interests,[273] the court was also able to further the interests of both the putative father and the child. The court did not have to make a hard decision, because there was no family unit regarding Headrick and Ethan that the court felt compelled to protect. And, because Headrick had always represented that Szwed was Ethan's father, it was easy for the court to invoke the doctrine of estoppel to reach its decision.

B. Statutory Amendment After Michael H.: *Amendment to Section 621 of the California Evidence Code*

The California legislature amended section 621 of the California Evidence Code[274] after the United States Supreme Court decision in *Michael H. v. Gerald D.*[275] Section 621 now gives both the putative father and child the right to attempt to rebut the conclusive presumption of legitimacy in certain circumstances, whereas previously only the mother's husband or the mother had that right.[276] By enacting this amendment, California has joined the majority of states that allows the putative father and child the opportunity to attempt to rebut the presumption. The amendment seems to be the legislature's attempt to protect the rights of both putative fathers and their children. The amendment accomplishes its goal to some degree. However, this author contends the amendment fails on several grounds. Specifically, the amendment inadequately defines important terms, unjustly relegates the biological father's rights to the whims of the mother, is vague, has unfair requirements, and has an ambiguous statute of limitations clause.

The first problem with the amendment is that it specifies that the only father permitted to attempt to rebut the presumption is a "presumed father," and the definition provided for "presumed father" is too restrictive. The relevant portion of the amendment, subdivision (c), provides in pertinent part, "[t]he notice of motion for blood tests under subdivision (b) may be filed not later than two years from the child's date of birth by the husband, or for purposes of establishing paternity by the presumed father or the child through or by the child's guardian ad litem."[277] Subparagraph (h) of the amendment instructs the reader to look to section

272. *Id.* at 1413-14, 271 Cal. Rptr. at 128.

273. See *supra* notes 24-27 and accompanying text for a discussion of the state's interests in cases involving the conclusive presumption of legitimacy.

274. Ch. 543, § 2 (codified at CAL. EVID. CODE § 621(b)-(d) (West Supp. 1991)).

275. 491 U.S. 110 (1989), *aff'g* 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).

276. *See supra* note 3.

277. CAL. EVID. CODE § 621(c) (West Supp. 1991).

7004 of the California Civil Code[278] for the meaning of "presumed father."[279]

Section 7004 of the Civil Code is part of California's enactment of the Uniform Parentage Act[280] (UPA), which was adopted in response to problems in enforcing parental obligations, such as child support, to illegitimate children.[281] The definition of presumed father in section 7004 depends very heavily on the type of relationship the man has or had with the child's mother, and the mother's wishes regarding the father. Subparagraph (1) of section 7004 provides for situations where the man and the child's mother are or have been married; subparagraph (2) provides for situations where the man and the mother attempted to marry before the child was born; and subparagraph (3) provides for situations where the man and the mother attempted to marry after the child was born.[282]

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278. CAL. CIV. CODE § 7004 (West Supp. 1991).

279. CAL. EVID. CODE § 621(h) (West Supp. 1991).

280. UNIF. PARENTAGE ACT §§ 1-30, 9B U.L.A. 296-345 (1987 & Supp. 1990); *see* Uniform Parentage Act, ch. 1244, § 11, 1975 Cal. Stat. 3196-201 (codified at CAL. CIV. CODE §§ 7000-21 (West Supp. 1991)).

281. UNIF. PARENTAGE ACT § 15, 9B U.L.A. 324. One of the purposes of the UPA is to ensure that regardless of the marital status of the parents, all children of all parents have equal rights with respect to each other. *Id.* § 2, at 296. The UPA tries to eliminate many of the common-law notions about illegitimacy, and substitutes recognition of a parent-child relationship for the traditional labels of legitimacy and illegitimacy. *See id.* One example of the protection the UPA affords is requiring child support payments to illegitimate children. *E.g., id.* § 15, at 324.

The UPA has been adopted by seventeen states in various forms. *Id.* at 2 (Supp. 1990). These states are Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington and Wyoming. *Id.*

The UPA defines a parent-child relationship as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations." *Id.* § 1, at 296.

282. *See* CAL. CIV. CODE § 7004 (West Supp. 1991). Section 7004 states:

(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in section 621 of the Evidence Code or in any of the following paragraphs:

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent com-

The subparagraph most relevant to the present discussion is subparagraph (4), which states that a man is presumed to be the natural father of a child if "he receives the child into his home and openly holds out the child as his natural child."[283]

Defining presumed father as subparagraph (4) of section 7004 does is unjust to unwed or putative fathers, because under it, a biological father's opportunity to qualify as a presumed father depends upon the wishes of the child's mother. If the mother does not wish to marry the biological father, or does not give him the opportunity to "receive[] the child into his home and openly hold[] out the child as his natural child,"[284] the biological father cannot meet the statutory requirements of "presumed father." Therefore, the statutory classification allows a mother or the state to prevent an unwed father from taking the opportunity interest identified by the United States Supreme Court in *Lehr v. Robertson*,[285] and developing a constitutionally cognizable relationship with his child.[286] For example, if a woman has a short-lived affair with a man and then ends their relationship, never telling him that she is pregnant, even if he discovers the truth at some later time, he has no legal recourse. If the mother prevents the father from seeing the child, it will be impossible for him to meet presumed father status under the amendment; he cannot even meet the "relationship" standard from *Lehr*. A putative father's rights should not depend on the whims of the mother.

It is interesting to note that this California statute, Civil Code sec-

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pliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

Id.

283. *Id.* § 7004(4).

284. *Id.*

285. 463 U.S. 248 (1983). In *Lehr*, the Court stated, "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Id.* at 262.

286. In W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), the court stated that "with respect to a non-marital child, the mother may, by her conduct, prevent the male from acquiring the status of 'presumed father' which would have given him a veto over adoption." *Id.* at 310, 160 Cal. Rptr. at 867; *see also In re* Marie R., 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978) (recognizing that mother may prevent natural father from establishing minimum contact required to become presumed father); Adoption of Rebecca B., 68 Cal. App. 3d 193, 198, 137 Cal. Rptr. 100, 103 (1977) (implying that mother may, by her conduct, prevent biological father from obtaining minimal contact with child required to confer presumed father status).

tion 7004(a), which makes the father's rights dependent upon the mother's wishes and behavior, represents a substantial modification of the UPA. Civil Code section 7004(a) omits subsection (5) of the UPA, which provides:

> (a) A man is presumed to be the natural father of a child if:
>
> . . . .
>
> (5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.[287]

The UPA, then, gives the father an opportunity to achieve presumed father status, even if the mother refuses to marry him or refuses to allow him to receive the child into his home. By filing a written acknowledgment of paternity, the father may become presumed unless the mother actually disputes his claim of paternity. However, even if the mother does dispute the father's paternity claim, the court may still determine that the man is the child's father. Although the UPA does not make the father's rights dependent on the mother's actions, California's modification of the UPA does. By cutting off a man's opportunity to be classified as a presumed father, the California statutory scheme prevents a father both from establishing a relationship with his child and from attempting to rebut the conclusive presumption of legitimacy.

Another problem with the statutory classification is that subparagraph (4) of section 7004 is vague. It simply states that for a natural father to qualify as a presumed father, he must "receive[] the child into his home and openly hold[] out the child as his natural child."[288] The statute gives no guidance as to how long the child must remain in the

287. UNIF. PARENTAGE ACT § 4(a)(5), 9B U.L.A. 299. California completely omitted this provision, but in 1987 added a different subsection (a)(5) to section 7004. The California provision states:

> (5) If the child was born and resides in a nation with which the United States engages in an orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure. This paragraph shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

CAL. CIV. CODE § 7004(a)(5) (West Supp. 1991).

288. CAL. CIV. CODE § 7004(4) (West Supp. 1991).

father's home or for how long the father must openly hold out the child as his own. Furthermore, it is conceivable that a situation could arise in which a man may know that a child is his, and may hold out that child as his biological child, but be prevented from residing with the child. In this case, the man would be denied presumed father status through no fault of his own.

These problems with subparagraph (4) of section 7004 of the Civil Code demonstrate that it will often be very difficult, if not impossible, for a man to meet the qualifications to achieve presumed father status. Therefore, the amendment to section 621 of the Evidence Code, which allows a presumed father an opportunity to attempt to rebut the conclusive presumption, but depends upon the definition of presumed father provided in section 7004 of the Civil Code, does not go far enough in allowing putative fathers the right to attempt to rebut the presumption. A broader definition of presumed father is necessary to protect the rights of these men and their potential parent-child relationships.

Of course, one of the aims of the Act, of which section 7004 of the Civil Code is one part, is to distinguish between natural and presumed fathers and to afford different rights to each.[289] This is as it should be, because the title "father" should not entitle a man to disrupt an existing family unit in which the child's best interests[290] are being met. A court should not rule in favor of a putative father where there is no evidence of an established relationship between the child and the putative father.[291] The United States Supreme Court has never recognized the biological relationship alone as creating a protected interest for putative fathers.[292] However, when there is evidence that an established relationship does exist, even if the putative father does not meet the stringent requirements enabling him to qualify as a presumed father, courts should protect both the putative father's rights to continue the relationship with his child, and the child's rights to continue the relationship with the putative father. In fact, if the best interests of the child standard were utilized as the overriding concern of the courts in these cases, it is unlikely that the court would find a reason to disrupt an ongoing, stable and harmonious relationship between a putative father and his child.

However, California's amendment permits the child to attempt to

289. UNIF. PARENTAGE ACT §§ 1-4, 9B U.L.A. 296-99.

290. See *supra* note 11 for an explanation of the best interests of the child doctrine, and *infra* notes 316-17 for some of the factors that are used by some courts in determining the best interests of the child.

291. *See supra* notes 48, 72, 87-93 & 97-103 and accompanying text.

292. Stanley v. Illinois, 405 U.S. 645 (1972); *see supra* notes 87-92 & 102-03.

rebut the presumption.[293] Therefore, even if a putative father does not meet the requirements of presumed father, and is thereby precluded from attempting to establish his paternity, the child will be able to bring an action. In this way, the amendment affords some protection to the child and the parent-child relationship.

The amendment can also be criticized on grounds that apply to the rights of both the presumed father and the child. The amendment to subparagraph (c) which was first proposed provided, "[t]he notice of motion for blood tests under subdivision (b) may be raised by the husband, a presumed father, or the child not later than two years from the child's date of birth."[294] However, the wording of the amendment that was eventually adopted is somewhat different. The relevant portion now provides, "[t]he notice of motion for blood tests under subdivision (b) may be filed not later than two years from the child's date of birth by the husband, or for purposes of establishing paternity by the presumed father, or the child through or by the child's guardian ad litem."[295] The amendment is not as clear as the earlier proposal about whether the two-year statute of limitations applies only to the husband, or is also applicable to the presumed father and child.

It is likely that the ambiguity regarding the statute of limitations in the amendment will stimulate controversy and questions. Although arguably, if the husband must file his motion for blood tests within two years, it is reasonable that a presumed father should be subject to the same time period, it seems clear that claims can be made to the contrary. A situation could arise in which a woman has a sexual relationship with a man, conceives a child, and then ends the relationship, without telling the man she is pregnant. He may not find out for several years about the child who resulted from that affair. A presumed father may therefore require more time than the husband in which to attempt to rebut the presumption.[296] A similar argument can be made for the child, because he or she may have no way of finding out that he or she has a putative father.

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293. *See supra* note 276, *infra* note 295 and accompanying text.

294. Cal. S.B. 2015 (unenacted version presented to Senate on Feb. 15, 1990; proposal then amended in Senate on Apr. 4, 1990, and amended in Assembly on July 6, 1990).

295. CAL. EVID. CODE § 621(c) (West Supp. 1991).

296. If this is the case, the putative father would have had no opportunity to establish a relationship with his child, and it may be detrimental to the child to allow this stranger to come into his life as his father after a long time. However, foreclosing a putative father from establishing a relationship with a child whom he has only recently discovered might also be a violation of the putative father's rights. See *infra* notes 326-31 and accompanying text for discussion of a method of balancing the child's interests with the putative father's interests.

Although the UPA places a time limit upon when persons, other than the child, may bring an action to determine the existence or nonexistence of the father-child relationship when there is a presumed father,[297] the UPA and most UPA states have a longer statute of limitations than does California.[298] The UPA allows such an action to be brought within "a reasonable time [period] after obtaining knowledge of relevant facts, but in no event later than [five] years after the child's birth."[299] There are seventeen states that have adopted the UPA and that include a time limit that restricts when such actions can be brought.[300] A majority of these states also have a five-year statute of limitations.[301] Although it is true that some states have a three- or four-year statute, California's two-year statute is the shortest among all the seventeen states that have adopted the UPA.[302]

California's amendment allows men who can meet the requirements to obtain presumed father status the opportunity to attempt to rebut the conclusive presumption.[303] It also allows children to attempt to rebut the presumption,[304] and by doing so, affords some protection to the child and the parent-child relationship. There are, however, some serious problems with the amendment. It does not go far enough in protecting putative fathers, and it also does not make any provision for protecting

297. UNIF. PARENTAGE ACT § 6(a)(2), 9B U.L.A. 289 (1987).

298. *Compare id.* (allowing child, biological mother, or presumed father to bring action up to five years after child's birth) *with* CAL. EVID. CODE § 621(c) (West Supp. 1991) (allowing husband, presumed father, or child to bring action up to two years from child's birth).

299. UNIF. PARENTAGE ACT § 6(a)(2), 9B U.L.A. 289.

300. ALA. CODE §§ 26-17-1 to -21 (1986 & Supp. 1990); CAL. CIV. CODE §§ 7000-7018 (West 1983 & Supp. 1991); COLO. REV. STAT. §§ 19-6-101 to -129 (1986); DEL. CODE ANN. tit. 13, §§ 801-819 (1990); HAW. REV. STAT. §§ 584-1 to -26 (1985 & Supp. 1990); ILL. ANN. STAT. ch. 40, paras. 2501-2526 (Smith-Hurd Supp. 1991); KAN. STAT. ANN. §§ 38-1110 to -1129 (1986); MINN. STAT. ANN. §§ 257.51-.74 (West 1982 & Supp. 1991); MO. ANN. STAT. §§ 210.817-.852 (Vernon Supp. 1991); MONT. CODE ANN. §§ 40-6-101 to -135 (1990); NEV. REV. STAT. §§ 126.011-.391 (1986 & Supp. 1989); N.J. STAT. ANN. §§ 9:17-38 to -59 (West Supp. 1991); N.D. CENT. CODE §§ 14-17-01 to -26 (1981); OHIO REV. CODE ANN. §§ 3111.01-.19 (Baldwin 1989 & Supp. 1990); R.I. GEN. LAWS §§ 15-8-1 to -27 (1988); WASH. REV. CODE ANN. §§ 26.26.010-.905 (West 1986 & Supp. 1991); WYO. STAT. §§ 14-2-101 to -120 (1986).

301. For states that have a five-year time limit restricting such actions see: ALA. CODE § 26-17-6(a) (1986 & Supp. 1990); COLO. REV. STAT. § 19-4-107(1)(b) (1986); HAW. REV. STAT. § 584-6(a)(2) (1985 & Supp. 1990); ILL. ANN. STAT. ch. 40, para. 2508 (Smith-Hurd Supp. 1991); MINN. STAT. ANN. § 257.57 (West 1982 & Supp. 1991); MO. ANN. STAT. § 210.826(1)-(2) (Vernon Supp. 1991); MONT. CODE ANN. § 40-6-108(1)(b) (1990); N.D. CENT. CODE § 14-17-05(1)(b) (1981); WYO. STAT. § 14-2-104(a)(ii) (1986).

302. CAL. EVID. CODE § 621(c) (West Supp. 1991).

303. *Id.*

304. *Id.*

the best interests of the child, even though it does allow the child to attempt to rebut the presumption.

V. PROPOSAL

Undoubtedly, upholding the integrity of the family unit is a worthy goal. In some cases, however, the integrity of the family unit has been disturbed even before a putative father attempts to rebut the conclusive presumption of legitimacy.[305] In such a case, allowing a man who may be the biological father and who has established a relationship with his child an opportunity to attempt to prove his paternity would do little harm to the integrity of the family, which has already been disrupted. Moreover, preventing him from doing so may even deprive him of his constitutional rights.[306]

Besides the fact that the family integrity may already have been disturbed, there are other reasons why upholding that integrity may not be the most important societal goal. In our contemporary society, nearly one out of every two marriages ends in divorce.[307] There is little need to uphold the sanctity and integrity of the traditional nuclear family where the marriage is defunct. Furthermore, the stigma of illegitimacy is decreasing in our society, which is composed of many non-traditional households, such as single parent homes and homes headed by step-parents.[308] Finally, if a man is coming forward with the desire to establish his paternity, the state will most likely be released from the financial burden of supporting that child.

Therefore, although maintaining the integrity of the family unit still does and will always warrant much protection, it should no longer be the most significant interest when deciding whether a putative father should be permitted to attempt to rebut the conclusive presumption. There are other interests that must play a more important role in making these determinations. That is why the traditional balancing test that has been applied in the past and that focuses on the integrity of the family unit has not always obtained just results.

Among the more important interests that must be considered in

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305. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); *In re* Melissa G., 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989).

306. See *supra* notes 32-105 and accompanying text for a discussion of the unwed father's rights, and how these rights were established by the United States Supreme Court.

307. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 79 (106th ed. 1986); U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 85 tbl. 127 (109th ed. 1989).

308. *See* 2 LYNN WARDLE ET AL., CONTEMPORARY FAMILY LAW: PRINCIPLES, POLICY AND PRACTICE § 9:01, at 3 (1988).

these cases is the "best interests of the child," which is a foremost consideration of California courts in most actions concerning minor children.[309] The doctrine states that the welfare and interests of the child should be the focal points of any action in which the child is involved.[310] Although it is true that the child's interests have been considered in previous conclusive presumption of legitimacy cases, the role the child's interests have played has not always been strong enough. Although it will often be in the child's best interests to maintain the family unit, a case may arise in which this assumption may not be true. For this reason, courts should explicitly consider the child's best interests when determining whether a putative father should be permitted to attempt to rebut the presumption.

Interestingly enough, for adoption purposes, the custody rights of an unwed father who does not qualify as a presumed father under section 7004 of the Civil Code[311] are already determined by applying the best interests of the child test.[312] That is, if custody by the father is in the child's best interest, then the father's consent is required for the adoption. However, if it is determined that adoption is in the child's best interest, then the father's rights are terminated and his consent is not required.

Nevertheless, the best interests standard is not the complete answer to the problem. It has been criticized because it lacks specificity and the criteria for its application are often unclear.[313] When making child cus-

309. *See, e.g.*, CAL. CIV. CODE § 7608 (West Supp. 1984) (courts must consider best interests of child in determining whether child should be deemed dependent child of court); *id.* § 7017(d)(2).

310. *See, e.g.*, *id.* § 4600(b) (West Supp. 1991) ("Custody should be awarded . . . according to the best interests of the child pursuant to section 4608."); *see supra* note 11.

311. *See supra* note 282.

312. California Civil Code § 7017(d)(2) provides:

> If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that that person's consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child. Section 4600 does not apply to this proceeding. Nothing in this section changes the rights of a presumed father.

CAL. CIV. CODE § 7017(d)(2) (West Supp. 1991).

313. *See, e.g.*, Lassiter v. Department of Social Servs., 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) ("the 'best interests of the child' standard offers little guidance to judges,

tody determinations in divorce situations, for example, California judges are instructed to look to section 4608 of the Civil Code, which requires courts to consider: (1) "[t]he health, safety, and welfare of the child"; (2) "[a]ny history of abuse by one parent against the child or against the other parent"; and (3) "[t]he nature and amount of contact with both parents."[314] In addition to these specified factors, section 4608 also instructs courts to consider any other factors they find relevant.[315]

In another section of the California Civil Code, in the adoption context, the legislature has specified the following criteria should be considered in determining what is in the best interests of the child:

> Consideration of the best interests of the child shall include, but not be limited to, an assessment of the child's age, the extent of bonding with the prospective adoptive parent or parents, the extent of bonding or the potential to bond with the natural parent or parents, and the ability of the natural parent or parents to provide adequate and proper care and guidance to the child.[316]

Although these specified criteria are still somewhat vague, and their application depend largely upon the facts of each particular case, they are at least a starting point. Other factors that have been considered in child custody determinations in California include: mental instability; alcohol and drug problems; frequent changes in residence; relationships with step-parents and step-siblings; heterosexual or homosexual relationships; children's preferences; and religion.[317]

Factors other than the best interests of the child and the state's interest in upholding the integrity of the family should also be considered.

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and may effectively encourage them to rely on their own personal values"); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 788 (2d ed. 1988); Christian Reichel Van Deusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417, 419 (1991); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480-86 (1984).

314. CAL. CIV. CODE § 4608 (West Supp. 1991).

315. *Id.*

316. *Id.* § 226(a); *see also id.* § 7017(d)(2) ("The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child and the effects of a change of placement on the child.").

317. *See, e.g.*, Birdsall v. Birdsall (*In re* Marriage of Birdsall), 197 Cal. App. 3d 1024, 243 Cal. Rptr. 287 (1988); Urband v. Urband (*In re* Marriage of Urband), 68 Cal. App. 3d 796, 797-98, 137 Cal. Rptr. 433, 433 (1977); Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); Immerman v. Immerman, 176 Cal. App. 2d 122, 126-27, 1 Cal. Rptr. 298, 301 (1959); Colombo v. Colombo, 71 Cal. App. 2d 577, 162 P.2d 995 (1945).

The Uniform Marriage and Divorce Act (UMDA) sets forth specific factors courts should consider when making custody determinations, which are to be made according to the best interest of the child. Section 402 of the UMDA provides that:

A putative father has an interest in establishing a relationship with his child,[318] and a mother may have an interest in establishing the biological father's identity.[319] Because many interests must be considered when a man wants to attempt to rebut the conclusive presumption of legitimacy, one solution would be to hold a preliminary hearing to enable the court to weigh the evidence and all the interests involved. Factors that should be considered include:

(1) the best interests of the child;

(2) the age of the child;

(3) the potential harm that might result to the child if paternity is disproved;

(4) whether there is an existing father-child relationship;

The Court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

Michigan's Child Custody Act enumerates factors for analyzing the best interests of the child that are even more exhaustive than those listed in the UMDA. The following are the factors to be considered by Michigan courts:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. STAT. ANN. § 25.312(3) (Callaghan 1984).

318. *See supra* note 28 and accompanying text.

319. *See supra* note 31 and accompanying text.

(5) the length of time after the putative father discovered that he might be the biological father before he acted;

(6) the length of time during which the putative father assumed the role of father; and

(7) all other factors that might affect the interests of those involved. Consideration of these factors would yield more just results than either the traditional balancing test previously used[320] or the recently enacted amendment to section 621 of the California Evidence Code.[321]

If the factors listed above had been considered in the *Michael H. v. Gerald D.*[322] decision, the outcome might have been different. The psychologist's report had recommended that Michael remain a member of Victoria's family.[323] The psychologist had perceived Michael "as the single adult in Victoria's life most committed to caring for her needs on a long-term basis."[324] Thus, the best interests of the child alone might have warranted allowing Michael to attempt to rebut the presumption. In addition to the best interests of the child, some other factors weighed in Michael's favor, including: (1) the length of time after Michael discovered that he might be Victoria's father and before he acted, which was immediately, and (2) the length of time during which he assumed the role of father, which was whenever Carole allowed him to do so.

Victoria was already seven years old when the United States Supreme Court finally heard the case.[325] This would weigh in favor of Gerald, both because of her age and because of the potential harm that might result to Victoria if Gerald's paternity were disproved, particularly because she had lived with him for so many years. Consideration of whether there was an existing father-child relationship would, most probably, also favor Gerald, because he had had more time and opportunity to establish such a relationship with Victoria, and it is therefore likely that such a relationship existed.

It is clear that any solution to the problem presented when an unwed father wishes to rebut the conclusive presumption of legitimacy must protect that unwed father's constitutional rights. However, these are very complex cases, and as previously stated, the unwed father's in-

320. See *supra* notes 114-43 and accompanying text for a discussion of cases that utilized the balancing test.

321. *See supra* note 277 and accompanying text.

322. 491 U.S. 110 (1989).

323. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1001, 236 Cal. Rptr. 810, 813 (1987), *aff'd*, 491 U.S. 110 (1989).

324. *Id.*

325. Victoria's date of birth is May 11, 1981. *Michael H.*, 491 U.S. at 113. The United States Supreme Court heard the case on October 1, 1988. *Id.* at 110.

terests are not the only interests that must be protected. The best interests of the child must be considered as well, along with the state's and mother's interests. An adequate proposal must consider all of the interests involved.

The Uniform Putative and Unknown Fathers Act (UPUFA) is, perhaps, a more interesting and more inclusive alternative than that presented above. In an attempt to clarify the rights of putative fathers with respect to their rights involving custody, visitation, and adoption of their children, the National Conference of Commissioners on Uniform State Laws approved the UPUFA in 1988.[326] Section 5 of the UPUFA provides a rather exhaustive list of fourteen factors that courts should use in determining the parental rights of the putative father, that is, whether those rights should be preserved or terminated.[327] The list includes such

326. UNIF. PUTATIVE AND UNKNOWN FATHERS ACT 9B U.L.A. at 22 (Supp. 1990). The intent of the Act was "to codify United States Supreme Court decisions and to provide answers to some questions left by those decisions." *Id.*

The prefatory note to the Act discussed the importance and timeliness of the attempt to clarify the legal aspects of putative and unknown fathers, "a group that is expanding annually at an astounding rate." *Id.* at 23. The note cited the dramatic increase in out-of-wedlock births. In 1960, 5.3% of all births were "illegitimate," while in 1980 illegitimate births accounted for 18.4% of all births. *Id.* at 22. In 1985, there were 828,200 out-of-wedlock births, which represented 22% of the 3.7 million births that year. Therefore, every fourth or fifth child born in 1985 had a putative or unknown father. *Id.*

There is no indication that these percentages of out-of-wedlock births will not continue to increase, especially since the number of unmarried cohabiting couples is still rising. In 1988, 2.6 million unmarried couples were living together, an increase from 1.9 million in 1985. *Id.* at 23. About 31% of these unmarried cohabitants, or 802,000, had children under 15 in their households, which was a fourfold increase over the 200,000 in 1970. *Id.*

327. *Id.* § 5, 9B U.L.A. The factors are as follows:

(1) the age of the child;
(2) the nature and quality of any relationship between the man and the child;
(3) the reasons for any lack of a relationship between the man and the child;
(4) whether a parent and child relationship has been established between the child and another man;
(5) whether the child has been abused or neglected;
(6) whether the man has a history of substance abuse or of abuse of the mother or the child;
(7) any proposed plan for the child;
(8) whether the man seeks custody and is able to provide the child with emotional or financial support and a home, whether or not he has had opportunity to establish a parent and child relationship with the child;
(9) whether the man visits the child, has shown any interest in visitation, or, desiring visitation, has been effectively denied an opportunity to visit the child;
(10) whether the man is providing financial support for the child according to his means;
(11) whether the man provided emotional or financial support for the mother during prenatal, natal, and postnatal care;
(12) the circumstances of the child's conception, including whether the child was conceived as a result of incest or forcible rape;
(13) whether the man has formally or informally acknowledged or declared his possible paternity of the child; and

factors as the quality of any relationship between the man and the child, the reasons for the lack of any relationship between the man and the child, whether there is a proposed plan for the child, whether the man has shown any interest in the child, including both financial and emotional support, and whether the man is seeking custody of the child, regardless of whether or not he has had a previous opportunity to establish a relationship with the child.[328] The UPUFA protects the putative father's rights as well as the child's welfare by including factors highly related to the best interests of the child.

The UPUFA goes even further to protect the child. If a man is determined by the court to be the father, "the court, after considering evidence of the factors in section 5, shall determine (i) whether a familial bond between the father and the child has been established; or (ii) whether the failure to establish a familial bond is justified, and the father has the desire and potential to establish the bond."[329] Section 6 continues:

> (d) If the court makes an affirmative determination under subsection (c), the court may terminate the parental rights of the father [, in accordance with [applicable state law],] only if failure to do so would be detrimental to the child. If the court does not make an affirmative determination, it may terminate the parental rights of the father if doing so is in the best interest of the child.[330]

Therefore, the UPUFA provides that when the court determines the father's failure to establish a relationship with his child is justified, and the father wishes to establish a relationship at the present time, he must be given the opportunity to do so unless it would be detrimental to the child. In this manner, the UPUFA protects the rights of a putative father who cannot qualify as a presumed father as defined under the California statutory scheme,[331] and it also protects the best interests of the child. By doing so, it is a more appropriate solution to the predicament presented by the conclusive presumption of legitimacy than is the amendment to section 621 of the California Evidence Code.[332]

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(14) other factors the court considers relevant to the standards for making an order, as stated in Section 6(d) and (g).

Id.

328. *Id.*

329. *Id.* § 6(c).

330. *Id.* § 6(d).

331. *See supra* note 282.

332. *See supra* note 277.

VI. CONCLUSION

The conclusive presumption of legitimacy has long been recognized.[333] Because of changing social needs and mores the presumption has been losing its conclusiveness, and California, like most states, now allows the husband, wife, putative father or child to attempt to rebut it when certain conditions are met.[334] A need for the presumption remains, however, because the stigma of illegitimacy still exists, and the state does not want to assume the financial burden of supporting children whose fathers are avoiding their responsibilities.[335] Most important, the state wants to protect and uphold the integrity of the family unit.[336]

Until now, despite the "conclusiveness" of this presumption, California courts have found ways to avoid its application.[337] Courts have applied the presumption in the presence of an intact family, but have disregarded the presumption and focused more on the interests of the putative father and child, and their relationship, in the absence of an intact family. It is likely that courts will continue to disregard the presumption when they wish to protect interests other than those of an intact family unit.

There are many factors that should be considered when a man wishes to dispute the presumption of legitimacy, because there are so many important interests involved.[338] The recent amendment to section 621[339] of the California Evidence Code does not adequately protect all the interests implicated in these complex cases. These cases may be too difficult for legislative solutions, and might be better handled in case-by-case determinations by courts. The alternatives proposed in this Comment are considerations that courts should take into account when determining whether a putative father should be permitted to attempt to rebut the presumption. These factors represent an attempt to protect all the interests involved, affording the most deference to the best interests of the child, while adequately protecting the unwed father's constitutional rights.

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333. *See supra* notes 2-3 and accompanying text.
334. *See supra* notes 3, 276, 295 and accompanying text.
335. *See supra* note 26 and accompanying text.
336. *See supra* note 24 and accompanying text.
337. *See supra* notes 114-25, 192-272 and accompanying text.
338. *See supra* notes 24-31 and accompanying text.
339. *See supra* notes 14 & 274.

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