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When it Comes to Parents, Three's No Longer a Crowd: California's Answer to *In re M.C.*

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When it Comes to Parents, Three's No Longer a Crowd: California's Answer to In re M.C.

Cover Page Footnote

J.D., May 2016, Loyola Law School, Los Angeles.

**WHEN IT COMES TO PARENTS,
THREE'S NO LONGER A CROWD:
CALIFORNIA'S ANSWER TO *IN RE M.C.***

*Jason de Jesus**

The California Legislature recently amended the California Family Code by granting courts the authority and discretion to find that a child can have more than two parents. This Article addresses the issues raised by this amendment, focusing on the rare instances in which rejecting a third parent's claim for custody would be detrimental to the child. By exploring public perceptions of multiple parentage and assessing recent cases highlighting the discretion courts use to find that a child has more than two parents, this Article concludes that recognizing that a child has more than two parents can protect not only the rights and benefits of children, but also their emotional, psychological, and financial needs.

* J.D., May 2016, Loyola Law School, Los Angeles.

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I. INTRODUCTION

How many parents does it take to raise a child? According to proverbial wisdom, it takes a whole village. This Article seeks to address the issues surrounding the California Legislature's decision to allow more than two parents into the proverbial village.

Ordinarily, a child has only two parents; however, the American family structure has evolved such that a child can have more than two parental figures. Consider a situation in which a child, M.C., is born during the marriage of Melissa and Irene, but conceived as a result of a premarital relationship between Melissa and Jesus, the biological father. Alternatively, consider a situation in which M.C. is conceived with the help of a sperm or ova donor who establishes a parent-like relationship with M.C. In either situation, California courts would presume that Melissa and Irene are M.C.'s parents.

If M.C. is taken into protective custody as a result of Melissa's involvement in the stabbing of Irene, should the court place M.C. into foster care or should it recognize Jesus as a third legal parent?¹ If Jesus helped raise M.C. with Melissa and Irene, would failure to recognize Jesus' parental rights be detrimental to M.C.?

In light of these situations, the California Legislature amended the Family Code,² granting courts the authority and discretion to find that M.C. has more than two parents.³ To do so, courts must consider all relevant factors and find that "recognizing only two parents would be detrimental to the child."⁴

Since the adoption of the Uniform Parentage Act (UPA), California has expressly recognized that establishing parentage, the legal recognition of a parent-child relationship, is vital to children:

There is a compelling state interest in establishing [parentage] for all children. Establishing [parentage] is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights. Knowledge of family medical history is

1. Facts based on *In re M.C.*, 123 Cal. Rptr. 3d 856 (Ct. App. 2011).

2. Unless otherwise indicated, all statutory references in this Article are to California statutes.

3. CAL. FAM. CODE §§ 7601(c), 7612(c) (West 2013).

4. *Id.* § 7612(c).

often necessary for correct medical diagnosis and treatment. Additionally, knowing one's [parent] is important to a child's development.⁵

Similarly, establishing parentage is vital to parents since the law accords them the fundamental right "to make decisions concerning the care, custody, and control of their children."⁶

The UPA governs the determination of parentage, as well as custody, visitation, and child support, and establishes the following key ideas: (1) parentage confers parental rights, privileges, duties, and obligations;⁷ (2) biological relationship to a child is not always sufficient to establish parentage;⁸ and (3) a person can establish parentage by qualifying as a "presumed parent," pursuant to a series of rebuttable parental presumptions listed in Family Code sections 7611 and 7612.⁹

Historically, courts interpreted these presumptions to limit a child to a maximum of two parents.¹⁰ This interpretation comported with the traditional family unit, consisting of a husband and wife, and their biological children. Additionally, courts applied the two-parent limitation to adoption cases, where the biological parents' legal relationship with a child must be terminated and replaced by that of the adoptive parent.¹¹

However, significant societal changes since the adoption of the UPA necessitated the legal recognition of multiple parentage—that a child can have more than two parents. First, medical and technological advances compelled courts to recognize non-traditional presumptions of parentage. In response to genetic testing improving the courts' ability to determine biological paternity, courts interpreted the UPA to protect the bond between a child and a father, usually the mother's husband, who later discovered that he was not

5. *Id.* § 7570(a). Likewise, the Legislature has recognized the public's interest in "a simple system allowing for the establishment of voluntary paternity" since it would increase the ease of establishing paternity, increase the number of children who have greater access to child support and public benefits, and decrease the amount of court resources required to determine paternity. *Id.* § 7570(b).

6. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

7. FAM. § 7601.

8. *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002); *see* FAM. § 7612(a), (d).

9. FAM. §§ 7611, 7612; *see infra* Part III.

10. *In re M.C.*, 123 Cal. Rptr. 3d 856, 870 (Ct. App. 2011).

11. *Sharon S. v. Super. Ct.*, 73 P.3d 554 (Cal. 2003).

biologically related to the child.¹² Additionally, since assisted reproductive technology allows mothers to share a biological link with children born via gestational surrogate, courts granted parental rights to persons who intended to raise children resulting from surrogacy agreements.¹³ Because technological advances have expanded the definition of a parent, legal recognition of multiple parentage is essential to preserve the parental rights of those newly defined parents.

Second, in 2005, the California Supreme Court acknowledged the parental rights of same-sex couples.¹⁴ In determining same-sex parentage, the court focused on the couples' intent to raise a child and whether each partner qualified as a presumed parent under the UPA.¹⁵ The court recognized "the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public."¹⁶ Although the courts continued to prohibit children from having more than two parents, the policy factors discussed in the same-sex parentage cases similarly justify the legal recognition of more than two parents.

Lastly, the American family structure has evolved to include more than two parents in situations involving stepfamilies, assisted reproduction, adoption, and foster care. Consequently, courts faced an increasing number of cases in which more than two individuals sought to establish parentage status over the same child. Although some cases presented situations where recognizing more than two legal parents was necessary to protect a child's best interests, the courts instead limited their decision to only two parents. As a case in point, the *In re M.C.*¹⁷ court agreed that limiting a child to two parents was unfair in light of changing social views; however, the court expressed that it was the Legislature's responsibility, not the court's, to make such significant policy determinations.¹⁸

12. *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 610–11 (Ct. App. 2004); *Steven W. v. Matthew S.*, 39 Cal. Rptr. 2d 535, 538 (Ct. App. 1995); see FAM. §§ 7540, 7611(a).

13. *Johnson v. Calvert*, P.2d 776, 782 (Cal. 1993).

14. See *Elisa B. v. Super. Ct.*, 117 P.3d 660 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 690 (Cal. 2005).

15. *Elisa B.*, 117 P.3d at 669.

16. *Id.*

17. 123 Cal. Rptr. 3d 856 (Ct. App. 2011).

18. *S.M. v. E.C.*, No. F065817, 2014 Cal. App. LEXIS 4574, at *14 (Ct. App. June 27, 2014).

Consequently, the California Legislature amended the Family Code, granting courts the authority and discretion to find that a child can have more than two parents.¹⁹ To do so, courts must consider all relevant factors and find that “recognizing only two parents would be detrimental to the child.”²⁰ By approving Senate Bill 274 (“S.B. 274”), the Legislature recognized that parent-child relationships can include more than two parents, and it appreciated the legal and emotional protections that those relationships inherently provide. Moreover, S.B. 274 serves the best interest of children and provides children with vital rights and benefits that they had been unfairly denied.

This Article addresses the issues regarding California’s amendment of its Family Code, and focuses on the rare instances when rejecting a claim of a third parent for custody or visitation would be detrimental to the child.

Part II discusses the necessity of S.B. 274 and summarizes the amendments to the Family Code. Part III analyzes the UPA presumptions of parenthood, addressing who may bring an action for parentage and how courts resolve conflicting claims of parentage. Part IV takes a closer look at *In re M.C.*, the California case to which the Legislature responded by enacting S.B. 274, the so-called “three parent rule.”²¹ Part V explores public perceptions of multiple parentage, particularly the oppositions’ arguments and the supporters’ responses. Part VI critically assesses recent cases highlighting the broad discretion courts use in finding that a child has more than two parents. Lastly, Part VII concludes that allowing more than two parents into California’s proverbial village not only protects the rights and benefits of children like M.C., but also their emotional, psychological, and financial needs.

II. BACKGROUND

In California, both the family courts and the juvenile dependency courts have the authority to determine parentage and to legally recognize a parent-child relationship and the specific rights a

19. CAL. FAM. CODE §§ 7601(c), 7612(c) (West 2013).

20. *Id.* § 7612(c).

21. S.B. 274, 2013–2014 Reg. Sess. (Cal. 2013); *In re M.C.*, 123 Cal. Rptr. 3d 856 (Ct. App. 2011). The California Supreme Court held that under the Uniform Parentage Act, adopted by California as part of its Family Code, a child can only have two legal parents.

parent has over a child.²² In determining parentage, both courts issue orders pursuant to the UPA.²³

In family courts, plaintiffs can bring actions against a parent to determine the existence of a parent and child relationship, child support, custody, visitation, and adoption according to what is in the “best interest of the child.”²⁴ Additionally, plaintiffs can request orders for custody, visitation, or child support as part of a case that establishes the child’s parentage.²⁵

Dependency courts, on the other hand, decide cases regarding the safety and protection of children who have been or are at risk of serious physical, emotional, or sexual harm.²⁶ At dependency court hearings, a juvenile court may find that a child is a “dependent child of the court,” thereby assuming jurisdiction over the child, if the child has suffered serious harm or is at substantial risk for suffering serious harm by the child’s parents or guardians.²⁷ Once a petition has been filed to declare a child a dependent, the juvenile court has exclusive jurisdiction to hear an action filed under the Family Code to determine parentage pursuant to the UPA.²⁸

Additionally, dependency courts may issue orders to limit a parent’s control over a dependent child.²⁹ If the court finds that returning a child to the parent would be detrimental, the court may select one of three permanency plans in order of the following preference: (1) terminate the rights of the parents and place the child for adoption; (2) appoint a relative as legal guardian; or (3) order that the child be placed in long-term foster care.³⁰ Since juvenile court findings significantly impact a parent-child relationship, designation

22. FAM. §§ 7630, 7500 *et. seq.*; CAL. WELF. & INST. CODE § 245.5 (West 2008); CAL. R. CT. 5.635 (West 2013).

23. FAM. §§ 7600–7730; WELF. & INST. §§ 316.2, 726.4; CAL. R. CT. 5.635.

24. *See generally* CAL. FAM. CODE §§ 7630-50, 7660-71 (West 2014) (stating that “the judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child.”).

25. *Id.*

26. WELF. & INST. § 300.

27. *Id.*

28. WELF. & INST. §§ 316.2, 726.4; CAL. R. CT. 5.635.

29. WELF. & INST. § 361.

30. WELF. & INST. § 366.26. As an exception, the court may find that termination of parental rights would be detrimental to the child if “the parent has regular visitation and contact with the child and the child would benefit from continuing the relationship.” WELF. & INST. § 366.26(c)(1)(B)(i) (West 2014).

as a presumed parent is essential because it entitles the parent to appointed counsel, custody absent a finding of detriment, and a reunification plan.³¹

A. *Senate Bill 274 Was Necessary*

Prior to S.B. 274, California courts interpreted the UPA to prohibit children from having more than two legal parents.³² The two-parent limitation became problematic once family structures expanded beyond the traditional family unit, making it less uncommon for families to consist of more than two parents.

Situations involving more than two parents usually occur in cases involving a biological mother, a biological father, and a presumed parent who treated the child as his or her own.³³ Additionally, the situation also occurs in cases involving gestational surrogates or sperm donors who remain in the resulting child's life.³⁴

In re M.C. exemplifies the rare situation, prior to S.B. 274, in which California law detrimentally limited the recognition of parental rights to only two parents. Despite finding that M.C. had three presumed parents, the court remanded the matter to the juvenile court to resolve the competing parental presumptions in accordance with the Family Code at the time.³⁵ The California Court of Appeal held that, pursuant to the UPA, a child cannot have more than two parents.³⁶ Fortunately, California Senator Mark Leno introduced S.B. 274 on February 14, 2013, to abrogate the *In re M.C.* decision.³⁷

Prior to the enactment of S.B. 274, children, like M.C., completely lost access to persons they relied on as their parents since California did not provide visitation rights to non-parents.³⁸ Forcing

31. *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003); see WELF. & INST. §§ 317(a), 361.2(a), 361.5(a).

32. *In re M.C.*, 123 Cal. Rptr. 3d 856, 877 (Ct. App. 2011); *Scott v. Super. Ct.*, 89 Cal. Rptr. 3d 843, 847 (Ct. App. 2009).

33. *In re M.C.*, 123 Cal. Rptr. 3d at 856; *Scott*, 89 Cal. Rptr. 3d at 845–46; *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 309 (Ct. App. 2006).

34. *Johnson v. Calvert*, P.2d 776, 781–82 (1993).

35. *In re M.C.*, 123 Cal. Rptr. at 877. At the time of the case, California courts resolved conflicting parental claims by applying Family Code section 7612(b) to determine which parental presumption is weightier in consideration of policy and logic.

36. *Id.* at 877.

37. S.B. 274, 2013–2014 Reg. Sess. (Cal. 2013); *In re M.C.*, 123 Cal. Rptr. 3d at 856.

38. *Should a Court Be Permitted to Find That a Child Has More Than Two Legal Parents: Hearing on S.B. 274 Before the Assemb. Comm. on Judiciary*, 2013–2014 Reg. Sess. (Cal. 2013) [hereinafter *Hearing on S.B. 274*].

M.C. to separate from a third parent could potentially cause devastating psychological, emotional, and financial consequences.³⁹ Furthermore, the law forced third parents to relinquish substantial rights including custody and visitation,⁴⁰ services and earnings of the child,⁴¹ access to school and medical records,⁴² the right to determine the child's residence and education,⁴³ and the right to authorize medical care.⁴⁴

Undoubtedly, S.B. 274 serves childrens' best interest by recognizing parent-child relationships that include more than two parents and appreciating the legal and emotional protections that those relationships provide.⁴⁵ Moreover, legal recognition of multiple parentage provides the child with vital rights, including the right to financial support from all parents; access to health insurance, benefits, and inheritance; and more placement options as an alternative to foster care.⁴⁶

B. Summary of Existing Law (Post-S.B. 274)

On October 4, 2013, California Governor Jerry Brown signed S.B. 274 into law. S.B. 274 granted courts the authority to find that a child can have more than two legal parents.⁴⁷ In enacting the bill, the Legislature declared that courts must have the power to protect children from the devastating psychological and emotional harms that result from separating a child from a parent.⁴⁸ S.B. 274 amended Family Code section 7612, subdivision (c), to provide:

In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant

39. See *In re M.C.*, 123 Cal. Rptr. 3d at 877; *Hearing on S.B. 274*, *supra* note 38.

40. See CAL. FAM. CODE § 3020 (West 2004).

41. *Id.* § 7500.

42. See CAL. EDUC. CODE § 51101 (West 2008); FAM. § 3025 (West 2014).

43. See EDUC. § 51101; FAM. § 7501 (West 2013).

44. See FAM. § 6910 (West 2014).

45. *Hearing on S.B. 274*, *supra* note 38; *Governor Signs Bill Protecting Children Who Have More Than Two Legal Parents*, NCLR (Oct. 4, 2013), <http://www.nclrights.org/press-room/press-release/governor-signs-bill-protecting-children-who-have-more-than-two-legal-parents/>.

46. NCLR, *supra* note 45.

47. S.B. 274, 2013–2014 Reg. Sess., §§ 1, 6 (Cal. 2013).

48. *Id.* § 1.

factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time.⁴⁹

Contrary to the opposition's view, S.B. 274 did not redefine the presumptions and standards for determining parenthood.⁵⁰ Rather, the bill merely provided courts with a statutory basis on which to recognize families with more than two parents. Accordingly, S.B. 274 required that any source of law regarding the rights, protections, benefits, responsibilities, obligations, and duties of parents, "shall be interpreted to apply to every parent of a child where that child has been found to have more than two parents"⁵¹

For example, S.B. 274 amended Family Code section 3040 by requiring courts to allocate custody and visitation to more than two parents based on the existing "best interest of the child" standard.⁵² However, the bill did not require a court to grant all parents legal or physical custody of the child if it found that it would not be in the best interest of the child considering the factors in Family Code sections 3011 and 3020.⁵³ When applying the best-interest-of-the-child standard, the court must "address the child's need for continuity and stability by preserving established patterns of care and emotional bonds."⁵⁴

Similarly, S.B. 274 added Family Code section 4052.5, requiring courts to apply the existing statewide uniform guideline when dividing child support obligations among more than two parents.⁵⁵ The current statewide uniform guideline requires courts to

49. *Id.* § 6; *see* FAM. § 7612(c).

50. *Hearing on S.B. 274, supra* note 38. In order for a court to recognize legal parentage for more than two persons of a single child, the court must still find that each person is a presumed parent under the Family Code.

51. FAM. § 7601(d) (West 2013).

52. S.B. 274, 2013–2014 Reg. Sess., § 2 (Cal. 2013); *see* FAM. § 3040(a) (West 2004 & Supp. 2015).

53. FAM. §§ 3040(d), 3011, 3020 (West 2004 & Supp. 2015) (providing a court shall consider the health, safety, and welfare of the child, the history of abuse of any of the parents, the nature and amount of contact with the child, any habitual and continued use of alcohol or controlled substances, and the frequent and continuing contact with both parents after the parents have ended their relationship or dissolved their marriage).

54. *Id.* § 3040(d).

55. S.B. 274, 2013–2014 Reg. Sess., § 3 (Cal. 2013); *see* FAM. § 4052.5(a) (West Supp. 2015).

divide child support obligations based on each parent's income and the amount of time each parent spends with the child.⁵⁶ Moreover, if applying the statewide uniform guideline is unjust and inappropriate, the court can divide child support obligations in a just and appropriate manner.⁵⁷

Lastly, S.B. 274 codified the holding in *Sharon S. v. Superior Court*⁵⁸ by allowing for second parent and third parent adoptions.⁵⁹ This provision, conditioned upon the consent of all parents involved, allows adopted children to maintain the emotional, psychological, and financial bonds with their biological parents that traditionally were terminated upon adoption.

III. UNIFORM PARENTAGE ACT PRESUMPTIONS OF PARENTHOOD

The UPA defines the parent and child relationship as “the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.”⁶⁰

The UPA provides the statutory framework by which California courts determine legal parentage. Under this statutory scheme, California law distinguishes “alleged,” “biological,” and “presumed” parents.⁶¹ An “alleged” parent is a person claiming to be the parent of a child, but whose biological relationship to the child has not been established, or, in the alternative, has not achieved presumed parent status.⁶² A “biological” parent is one who has established a biological relationship with the child, but has not achieved presumed parent status.⁶³

“Presumed” parents are accorded far greater parental rights than alleged or biological parents.⁶⁴ To qualify as a presumed parent, an

56. FAM. § 4052.5(a).

57. *Id.* §§ 4052.5(b), 4057(b)(5)(D).

58. S.B. 274, 2013–2014 Reg. Sess. (Cal. 2013); *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003).

59. FAM. § 8617(b) (West 2013); *Sharon S.*, 73 P.3d at 570.

60. FAM. § 7601(b).

61. *In re M.C.*, 123 Cal. Rptr. 3d 856, 868 (Cal. Ct. App. 2011).

62. *Id.*

63. *Id.*

64. *See id.* For example, in a dependency hearing, the need to establish a “presumed” parent status is pivotal; it determines the extent to which the person may participate in the proceedings and the rights to which he or she is entitled. Only “presumed” parents are entitled to receive reunification services and custody of the child. *Id.* (quoting CAL. WELF. & INST. CODE §§ 361.2, 361.5 (West 2008 & Supp. 2015)).

alleged parent must establish, by a preponderance of the evidence, the foundational facts supporting his or her entitlement to presumed parent status.⁶⁵ Once an alleged parent establishes this foundation, clear and convincing evidence is required to rebut the statutory presumption.⁶⁶

A. UPA Presumptions of Parenthood

Presumed parent status is governed by sections 7540 and 7611 of the Family Code, which enumerates several rebuttable presumptions under which a person may qualify for this status.⁶⁷ Depending on the type of presumption an alleged parent seeks, the court may require the alleged parent to file the action within a limited amount of time.

Generally, courts base the presumed parent status on the familial relationship between the person and the child, rather than any biological connection.⁶⁸ “The [parenthood] presumptions are driven, not by biological [parenthood], but by the state’s interest in the welfare of the child and the integrity of the family.”⁶⁹

The Family Code provides a “conclusive presumption” of parenthood to a husband living with the child’s mother during conception.⁷⁰ Codified in section 7540, the conclusive presumption provides that “the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”⁷¹ If a child is conceived by a married woman who cohabited with her husband at the time of the child’s conception, the husband’s conclusive presumption can outweigh the rights of an alleged biological father.⁷² On the other hand, if a husband did not cohabit with his wife during conception, and the child is biologically related to another father, the husband cannot claim a “conclusive presumption” under section 7540.⁷³

65. *Id.*

66. *Id.* (referring to FAM. § 7612(a)).

67. FAM. §§ 7540, 7611.

68. *See In re J.L.*, 72 Cal. Rptr. 3d 27, 32 (Ct. App. 2008).

69. *In re Jesusa V.*, 85 P.3d 2, 20 (Cal. 2004) (quoting *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003)).

70. FAM. §§ 7540.

71. *Id.*

72. *See, e.g., Michael M. v. Giovanna F.*, 7 Cal. Rptr. 2d 460 (Ct. App. 1992).

73. *In re Danny M.*, No. A138844 & A140256, 2014 Cal. App. LEXIS 3943, at *27 (June 3, 2014). For example, although the husband in *In re Danny M.* cohabited with his wife during the birth of the child and held the child out as his own natural child, he did not qualify under the

Additionally, section 7611 sets forth a series of rebuttable presumptions, applied gender neutrally, under which an alleged parent may qualify as a presumed parent.⁷⁴ Persons who qualify under the 7611 presumptions of parentage can bring an action at any time to declare the existence of a parent and child relationship and to establish presumed parent status.⁷⁵

The qualifications pursuant to section 7611, subdivisions (a) through (c), focus specifically on the marital relationship between the presumed parent and the child's natural mother.⁷⁶ Under 7611, subdivision (a), alleged parents may qualify as presumed parents if they were married to the child's natural mother during the time of birth.⁷⁷ Subdivisions (b) and (c) qualify an alleged parent if he or she attempted to marry the child's natural mother any time before or after the child's birth.⁷⁸

Subdivision (d) focuses specifically on the relationship between the alleged parent and the child.⁷⁹ An alleged parent may qualify as a presumed parent under subdivision (d), if he or she "receive[d] the child into his or her home and openly [held] out the child as his or her natural child."⁸⁰ The presumed parent must "receive the child into the home substantially enough to signify assumption of parental responsibility for the child."⁸¹

section 7540 "conclusive presumption" since he did not cohabit with his wife during the time of conception.

74. FAM. § 7611. Although the section 7611 presumptions lacked gender-neutral language prior to amendment in 2013, courts have determined that the presumptions must be applied gender neutrally. *See, e.g.,* Elisa B. v. Superior Court, 117 P.3d 660, 664–65 (Cal. 2005) (finding that the paternity presumptions in the Family Code must be applied equally to mothers).

75. FAM. § 7630 (West 2013 & Supp. 2015). Interested parties that qualify under section 7630(a) include the following: (1) the child; (2) the child's natural parent; (3) an adoption agency; (4) a prospective parent; (5) an "alleged" parent, or a parent who was married to or attempted to marry the child's "natural mother" within 300 days of the child's birth; (6) persons who received the child into their own home and openly held out the child as their natural child; and (7) a party to an assisted reproduction agreement. Alternatively, persons who seek to declare the nonexistence of a parent and child relationship, particularly those who do not want legal authority or obligation over the child, must bring an action "within a reasonable time after obtaining knowledge of relevant facts."

76. *Id.* § 7611(a)–(c).

77. *Id.* § 7611(a). Alleged parents may also qualify under subdivision (a) if the child was born within 300 days after the marriage was terminated by death, annulment, declaration of invalidity, divorce, or separation.

78. *Id.* § 7611(b)–(c).

79. *Id.* § 7611(d).

80. *Id.*

81. *In re* Danny M., No. A138844 & A140256, 2014 Cal. App. LEXIS 3943, at *36–37 (June 3, 2014).

B. Which Presumption Is Greater?

Courts do not automatically prefer one presumption over another.⁸² Instead, courts must guide their determinations by the core considerations of “the integrity of the family and protection of the child’s well-being.”⁸³

To resolve conflicting parentage claims, courts apply Family Code section 7612 on a case-by-case basis, assessing “the existence and nature of the social relationship between a putative [parent] and child.”⁸⁴ Unless the court determines that a child has more than two parents, if two or more presumptions conflict, the court must conduct a fact-based analysis, considering policy and logic.⁸⁵ Furthermore, the 7612 analysis provides that the 7611 presumptions of parenthood “may be rebutted in an appropriate action only by clear and convincing evidence.”⁸⁶

The court does not automatically prefer a person who is biologically related to a child, but must weigh all relevant factors in determining the presumed parents.⁸⁷ Parenthood “presumptions are driven, not by biological paternity, but by the state’s interest in the welfare of the child and the integrity of the family.”⁸⁸

For example, the court in *Steven W. v. Matthew S.*⁸⁹ recognized that “[a] man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved” and that the “relationship is much more important, to the child at least, than a biological relationship of actual paternity”⁹⁰ Similarly, the California Supreme Court held in *In*

82. *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 613 (Ct. App. 2004).

83. *In re Danny M.*, 2014 Cal. App. LEXIS 3943, at *41 (citing *Neil S. v. Mary L.*, 131 Cal. Rptr. 3d 51, 57 (Ct. App. 2011)); *see* *Adoption of Kelsey S.*, 823 P.2d 1216, 1234 (Cal. 1992); *see also* *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 614 (Ct. App. 2004) (“In resolving such a conflict, the trial court must at all times be guided by the principle that the goal of our [parentage] statutes is ‘the protection of the child’s well-being.’”)

84. CAL. FAM. CODE § 7612 (West 2013); *In re Danny M.*, 2014 Cal. App. LEXIS 3943, at *41 (citing *Neil S.*, 131 Cal. Rptr. 3d at 57).

85. FAM. § 7612(b).

86. *Id.* § 7612(a).

87. *Id.*; *In re Jesusa V.*, 85 P.3d 2, 13 (Cal. 2004). Proving a lack of a biological relationship to a child does not automatically qualify as the “clear and convincing evidence” required to rebut the presumptions of parenthood. *See* *Elisa B. v. Superior Court*, 117 P.3d 660, 667 (Cal. 2005) (noting that a natural parent within the meaning of the UPA could be a person with no biological connection to the child.)

88. *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Ct. App. 2003).

89. 39 Cal. Rptr. 2d 535, 539 (Ct. App. 1995).

90. *Id.* at 539.

*re Nicholas H.*⁹¹ that even though the man claiming paternity was not biologically related to the child, it was not an appropriate action to rebut the presumption of parenthood because it would have otherwise produced a harsh result of leaving the child fatherless.⁹²

Likewise, courts do not automatically prefer the presumption of a spousal relationship under 7611, subdivision (a).⁹³ In *Craig L. v. Sandy S.*,⁹⁴ the court noted that “a *per se* rule, which would require termination of an existing paternal relationship in favor of preserving any marriage, without regard to the harm the child might suffer, is at direct odds with the entire statutory framework governing paternity actions.”⁹⁵

In addition to a presumption of parenthood under subdivision (d), a biological father may qualify as a *Kelsey S.*⁹⁶ father and possess a federal constitutional right to due process that “prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.”⁹⁷ Generally, a *Kelsey S.* father is an unwed biological father who “has sufficiently and timely demonstrated a full commitment to his parental responsibilities” but has been precluded from attaining presumed father status by the mother or a third party.⁹⁸ In such a situation, the biological father’s “federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.”⁹⁹

Lastly, Family Code section 3020(a) requires courts to determine the best interest of the child and whether recognizing the alleged presumptions of parenthood would be detrimental to the child.¹⁰⁰ Section 3020(a) expressly declares that “the perpetration of child abuse or domestic violence in a household where a child

91. 46 P.3d 932 (Cal. 2002).

92. *Id.* at 933–34.

93. *In re Jesusa V.*, 85 P.3d at 13; *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 612–15 (Ct. App. 2004).

94. 22 Cal. Rptr. 3d 606 (Ct. App. 2004).

95. *Id.* at 613.

96. 823 P.2d 1216 (Cal. 1992).

97. *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992).

98. *Id.* at 1237; *see In re M.C.*, 123 Cal. Rptr. 3d 856, 868 (Ct. App. 2011), *In re Elijah V.*, 25 Cal. Rptr. 3d 774 (Ct. App. 2005).

99. *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992). The *Kelsey S.* court reasoned that “the child’s well-being is presumptively best served by continuation of the father’s parental relationship.” *Id.*

100. CAL. FAM. CODE § 3020(a) (West 2004).

resides is detrimental to the child.”¹⁰¹

IV. A CLOSER LOOK AT *IN RE M.C.*

The California Legislature enacted S.B. 274, the so called “three parent rule,” as a direct response to *In re M.C.*¹⁰² In that case, the California Court of Appeal reversed a juvenile court’s finding that a child, M.C., had three presumed parents, and held that, under the UPA, M.C. can only have two legal parents.¹⁰³ The issue decided was whether a child born during the marriage of two women, but conceived as the result of a premarital relationship, may have three legal parents: a biological mother, the mother’s wife, and the biological father who promptly came forward and demonstrated his commitment to his parental responsibilities.¹⁰⁴

A. *The Facts*

M.C.’s childhood experience is tragic and far from typical. She was born into Melissa and Irene’s violent and volatile relationship.¹⁰⁵ Although the couple did not fight during the pregnancy or in front of M.C., they often engaged in physical violence.¹⁰⁶ M.C.’s biological mother, Melissa, suffered from bipolar disorder and severe depression, and on several occasions she had been involuntarily hospitalized due to suicidal ideations.¹⁰⁷ Additionally, Melissa had a significant history of drug abuse and continued to regularly drink and smoke marijuana.¹⁰⁸

In February 2008, Melissa and Irene became registered domestic partners, but they separated on May 25, 2008.¹⁰⁹ In June 2008, Melissa began an intimate relationship with Jesus and became pregnant with M.C.¹¹⁰ During the first few months of the pregnancy, Melissa lived with Jesus and his family, and Jesus provided financial support and ensured Melissa received prenatal medical care.¹¹¹

101. *Id.*; see *In re Jesusa V.*, 85 P.3d 2, 15-16 (Cal. 2004).

102. 564 S.B. 274 (Cal. 2013); see *In re M.C.*, 123 Cal. Rptr. 3d at 856.

103. *In re M.C.*, 123 Cal. Rptr. 3d at 878.

104. *Id.* at 867.

105. *Id.* at 862–63.

106. *Id.* at 863–64. In May 2009, Irene pushed Melissa into a closet and a window. *Id.* at 864.

107. *Id.*

108. *Id.*

109. *Id.* at 861.

110. *Id.*

111. *Id.*

In July 2008, Melissa filed a petition to dissolve the domestic partnership and sought a temporary restraining order against Irene based on allegations of abuse and physical violence.¹¹² However, in September 2008, Melissa left Jesus without providing any contact information, reconciled with Irene, and married Irene a month later.¹¹³

Melissa gave birth to M.C. in March 2009 with Irene present.¹¹⁴ Although M.C. was initially given the surname Melissa shared with Irene, Melissa was the only parent listed on M.C.'s birth certificate.¹¹⁵

Unfortunately, it was only three to four weeks until Melissa moved out, taking M.C. with her.¹¹⁶ In May 2009, Irene filed a request for an order seeking joint legal and physical custody of M.C.¹¹⁷ Melissa opposed the request and obtained a restraining order, which required Irene to refrain from contacting M.C.¹¹⁸ The restraining order was replaced in July 2009 by a court order granting Irene weekly monitored visitation.¹¹⁹

In June 2009, Melissa contacted Jesus, who had moved to Oklahoma to pursue a job opportunity, telling him that she left Irene and needed financial assistance for M.C.¹²⁰ Jesus agreed and regularly sent money.¹²¹ Melissa and Jesus maintained contact, and Melissa regularly took M.C. to visit Jesus's family.¹²²

In September 2009, the Los Angeles County Department of Children and Family Services (DCFS) took M.C. into protective custody after Melissa's new boyfriend, Jose, stabbed Irene with a knife in both her neck and back, leaving her in critical condition.¹²³ "Melissa was arrested and charged as an accessory to attempted murder" for her involvement in the attack.¹²⁴ Initially, Melissa denied any involvement in the stabbing; but a recorded telephone call

112. *Id.* at 861–62.

113. *Id.* at 862.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 862 n.3.

120. *Id.* at 862.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

revealed that Melissa planned for Jose to attack Irene.¹²⁵ Moreover, Melissa admitted that she and Jose routinely used drugs in front of M.C. and smoked methamphetamines in the car with M.C. in the backseat.¹²⁶

B. The Juvenile Court Recognizes Three Parents

The dependency court asserted jurisdiction over M.C. and placed her in shelter care.¹²⁷ In its reasoning, the court acknowledged Melissa and Irene's history of domestic violence, Melissa's incarceration, and Melissa's history of substance abuse.¹²⁸

Unsurprisingly, DCFS hesitated to place M.C. in Irene's care.¹²⁹ In addition to Irene's injury and the possibility of being attacked by Jose, who remained at large, Irene could not provide suitable living conditions.¹³⁰ Among other things, Irene was unemployed, received general relief and food stamps, lacked transportation, and lived in a two-bedroom apartment with neither beds nor a refrigerator.¹³¹

After its investigation, DCFS recommended that the juvenile court find Jesus to be M.C.'s presumed father and order M.C.'s placement with Jesus in Oklahoma.¹³² Jesus told DCFS that he always intended to be M.C.'s father regardless of his relationship with Melissa.¹³³ Jesus was willing to do whatever necessary to have M.C. released to his care.¹³⁴ Although Jesus did not pay child support or assert visitation and custody of M.C. after her birth, Jesus regularly sent funds to care for her.¹³⁵ Additionally, Jesus was employed at a grocery store as an assistant produce manager, he had stable and adequate housing, and both his fiancée and M.C.'s grandmother could help care for M.C.¹³⁶

The juvenile court ultimately found that M.C. had three parents: Melissa—M.C.'s biological mother—and both Jesus and Irene—

125. *Id.* at 863.

126. *Id.*

127. *Id.* at 862.

128. *Id.*

129. *Id.* at 864.

130. *Id.*

131. *Id.* at 863–64.

132. *Id.* at 865.

133. *Id.*

134. *Id.* at 866.

135. *Id.* at 865.

136. *Id.*

M.C.'s presumed parents.¹³⁷ The juvenile court declared M.C. a dependent of the court, placed M.C. in the care of her maternal grandparents, and ordered reunification services for Jesus, Irene, and Melissa.¹³⁸ The court granted Jesus unmonitored visitation and overnight visits and ordered DCFS to determine whether Jesus's Oklahoma home was suitable for M.C.¹³⁹ The court also granted Irene and Melissa monitored visits.¹⁴⁰

C. The Court of Appeal's Two-Parent Decision

On appeal, M.C. and the amici curiae argued that the juvenile court's finding of three parents should be affirmed.¹⁴¹ On the other hand, Melissa and Irene insisted that the juvenile court erred in finding Jesus to be M.C.'s presumed father.¹⁴² Additionally, although Jesus did not dispute Melissa or Irene's claim to parentage, he argued that the court erred when it refused to place M.C. in his custody.¹⁴³

The Court of Appeal agreed with M.C. and the amici curiae that the UPA was "ill equipped" to accommodate the evolving family structure and "novel parenting relationships."¹⁴⁴ At the time, if two or more claims for presumed parent status conflicted, the UPA required courts to resolve the conflicting claims by applying a fact-based analysis and to limit its determination to a maximum of two parents.¹⁴⁵

However, the court declared that recognizing three parents would involve complex and important policy determinations that were best left to the Legislature.¹⁴⁶ The court reasoned that it was bound to the California Supreme Court's rejection of the concept of three parents.¹⁴⁷ On several occasions, the California Supreme Court had concluded that a child may only have one presumed father and one natural mother.¹⁴⁸

137. *Id.*

138. *Id.* at 866.

139. *Id.* at 866-67.

140. *Id.* at 866.

141. *Id.* at 867.

142. *Id.*

143. *Id.*

144. *Id.* at 869-70.

145. *See id.*

146. *See id.* at 870.

147. *Id.* at 870.

148. *Id.*; *see* *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666 (Cal. 2005); *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004) (although more than one individual may fulfill the statutory qualifications that

Additionally, the *In re M.C.* court stated that it would be inappropriate to find that M.C. has three parents since she never had safety or stability with any of the parents.¹⁴⁹ First, Melissa was never capable of providing M.C. with a stable home: she suffered from significant mental illness, and she had a lengthy history of drug and alcohol abuse.¹⁵⁰ Second, the court questioned whether Irene could pull her own life together enough to be considered a suitable caretaker.¹⁵¹ Irene had significant domestic violence issues and lacked appropriate housing, parenting skills, employment, and transportation.¹⁵² Lastly, although Jesus appeared to be the most stable and capable parent available, he had not attempted to establish a parent-child bond prior to the dependency proceeding.¹⁵³

On the merits, the court found that both Melissa and Irene were undisputedly M.C.'s presumed mothers.¹⁵⁴ Melissa qualified as M.C.'s biological or natural mother pursuant to section 7610 of the Family Code since she gave birth to M.C.¹⁵⁵ Irene qualified as a presumed mother under both section 7611 subdivision (a), the marital presumption, and subdivision (d), since Irene received M.C. into her home and openly held out M.C. as her own child.¹⁵⁶

Additionally, the court concluded that Jesus was a quasi-presumptive father.¹⁵⁷ Although Jesus could not qualify as a presumed father under section 7611 subdivision (d) since he never physically received M.C. into his home, Jesus satisfied the requirements of a *Kelsey S.* father.¹⁵⁸ Jesus held himself out as M.C.'s father as soon as he learned Melissa was pregnant, and he acknowledged paternity to Melissa, his fiancée, and his family.¹⁵⁹

gives rise to a presumption of parenthood, there can be only one presumed father); *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993) (“[F]or any child, California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.”).

149. *In re M.C.*, 123 Cal. Rptr. 3d at 870.

150. *Id.*

151. *Id.*

152. *Id.* at 870–71.

153. *Id.* at 871.

154. *Id.*

155. *Id.*

156. *Id.* at 872.

157. *Id.*

158. *Id.* at 872–73, 875. To satisfy the *Kelsey S.* requirements, a child's biological father must prove that he promptly stepped forward and demonstrated a willingness to assume full parental responsibilities, but was thwarted by the mother or a third party. *Id.* at 875.

159. *Id.* at 875.

Additionally, Melissa prevented Jesus from establishing his presumed father status when she left him without providing any contact information.¹⁶⁰ Furthermore, when Melissa contacted Jesus in June 2009, he promptly provided support for M.C. and maintained communication.¹⁶¹

Ultimately, the Court of Appeal reversed the juvenile court's three parent decision and remanded the case to resolve the conflicting parentage presumptions pursuant to section 7612.¹⁶² Section 7612 provides that certain presumptions of parenthood may be rebutted by clear and convincing evidence.¹⁶³ But because the court found no clear and convincing evidence that any of the three potential parents were unfit to retain their parental status, it concluded that the juvenile court must apply the section 7612 analysis to resolve the conflicting parental claims.¹⁶⁴

Unfortunately, the court's decision prolonged M.C.'s separation from her biological father. M.C.'s tragic ordeal illustrated the need to amend the antiquated Family Code to expand the number of parents a child can have, particularly in situations in which it would be detrimental to the child to recognize only two parents.

V. PUBLIC PERCEPTION

In its early stages, the three-parent concept was met with great criticism. S.B. 274 critics argued that the three-parent law may result in unintended consequences, that S.B. 274 was unnecessary because the pre-existing law already provided alternatives to recognizing three parents, that recognizing three parents would destroy the traditional family unit, and that S.B. 274 ultimately harms the children.¹⁶⁵

S.B. 274 authors and advocates responded by explaining that the bill was necessary to protect the rights and benefits of both children and parents in limited situations. Additionally, the authors clarified that the bill did not significantly alter the law since it required courts to apply the pre-existing law to situations involving three parents.¹⁶⁶

160. *Id.*

161. *Id.*

162. *Id.* at 878.

163. CAL. FAM. CODE § 7612 (West 2013).

164. *In re M.C.*, 123 Cal. Rptr. 3d at 877.

165. *Hearing on S.B. 274*, *supra* note 38.

166. S.B. 274, 2013–2014 Reg. Sess. § 1(d) (Cal. 2013).

A. *Hard Cases Make Bad Law: The Opponents' Arguments*

Prior to approving S.B. 274, Governor Brown vetoed an earlier version of the “three-parent Bill,” Senate Bill 1476 (“S.B. 1476”),¹⁶⁷ and urged more study of the bill’s possible ramifications.¹⁶⁸ Brown commented, “I am sympathetic to the author’s interest in protecting children. But I am troubled by the fact that some family law specialists believe the bill’s ambiguities may have unintended consequences.”¹⁶⁹

As Brown mentioned, family law specialists including the Capitol Resource Institute (CRI) and the Association of Family and Conciliation Courts (AFCC) argued that the consequences of the “three parent law” are far-reaching and tragic.¹⁷⁰ The CRI wrote, “[S.B. 274] does not thoughtfully consider the numerous areas of law affected by such a redefinition of parenthood.”¹⁷¹ For example, the CRI argued that S.B. 274 would “obfuscate child custody and support proceedings in an already overburdened court system.”¹⁷² Additionally, the AFCC predicted that the under-resourced family court system could not handle the increase in litigation if family law attorneys advise stepparents and grandparents to seek parental status.¹⁷³

The AFCC simply did not see the necessity of S.B. 274 since the existing law at the time provided alternatives to recognizing three parents. The AFCC recognized that grandparent and stepparent visitation statutes already allowed non-parents to maintain their relationship with the child or even have custody regardless of the parents’ objection.¹⁷⁴ Furthermore, other critics claimed that “[i]f both biological parents are neglectful or otherwise out of the picture, a judge should award custody to grandparents or other natural relatives, not create a ‘third parent’ out of thin air.”¹⁷⁵

167. S.B. 1476 would have given judges authority to recognize multiple parents if doing so is “required in the best interest of the child.” S.B. 1476, 2011–2012 Reg. Sess. (Cal. 2012). In contrast, S.B. 274 grants courts the authority to recognize multiple parents if it would be detrimental to the child to only recognize two parents.

168. *Hearing on S.B. 274*, *supra* note 38.

169. *Id.*

170. *See id.*

171. *Hearing on S.B. 274 Before the Senate Rules Comm.*, 2013–2014 Sess. (Cal. 2013).

172. *Id.*

173. Letter from Diane Wasznicky, Legislation Comm. Chair, AFCC Cal., to Senator Leno, Cal. Senator (Apr. 17, 2013), http://www.afcc-ca.org/pdfs/AFCC_SB_274.pdf.

174. *Id.*

175. Randy Thomasson, *Jerry Brown Blows Up the Natural Family*, SAVECALIFORNIA.COM

Others argued that the bill would destroy the traditional family unit, ultimately harming the children.¹⁷⁶ President of Save California.com, Randy Thomasson, similarly argued that the word “parent” lost its unique legal meaning, “SB 274 blows up the family unit by redefining ‘natural parent’ to mean ‘a nonadoptive parent . . . whether biologically related to the child or not.’ Governor Brown is contributing to the demise of family stability.”¹⁷⁷

The opposition claimed that recognizing three or more parents without establishing an upper limit is detrimental to the best interest of children.¹⁷⁸ Randy Thomasson reported, “If three legal parents are OK, why not four or five or six legal parents? Can you imagine the conflicts this sets up in civil court, family court, probate court, and other arenas of battle?”¹⁷⁹ Others argued that children should not have to worry about having their time divided among three or more parents who cannot agree on how to raise the child.¹⁸⁰ They feared that children would “be pulled in every direction, their loyalties challenged and their sense of morality further corrupted and confused.”¹⁸¹

Moreover, the AFCC disagreed with the S.B. 274 sponsors’ premise that the claims for multiple parentage would be rare and almost exclusively used by the LGBT community.¹⁸² They argued that heterosexual stepparents and grandparents would primarily use the bill, and that more adults would qualify as presumed parents by conforming their behavior to the requirements.¹⁸³

Lastly, Rush Limbaugh, among others, misguidedly viewed S.B. 274 through the lens of the debate on legalizing same-sex marriage. Limbaugh proclaimed, “So marriage is now gonna [sic] be not a

(Oct. 4, 2013), <http://savecalifornia.com/10-4-13-jerry-brown-blows-up-the-natural-family.html>.

176. Blog writer Jim Daly wrote, “with attempts to redefine God’s design of the family, when radicals win, it’s the children who ultimately lose.” Jim Daly, *One Consequence of Gay Marriage*, DALY FOCUS (Sept. 13, 2012), <http://jimdaly.focusonthefamily.com/one-consequence-of-same-sex-marriage/>.

177. Thomasson, *supra* note 175. Thomasson believed, “the vast bulk of social science evidence demonstrates that children’s health, education, and behavior are better in traditional father-mother households.” *Id.*

178. *Hearing on S.B. 274*, *supra* note 38. The AFCC stated, “there is nothing in the statute which would prohibit the courts from allowing more than three ‘parents’ for a child”

179. Thomasson, *supra* note 175.

180. *Hearing on S.B. 274*, *supra* note 38.

181. Daly, *supra* note 176.

182. Letter from Diane Wasznicky, *supra* note 173.

183. *Hearing on S.B. 274*, *supra* note 38.

union of a man and a woman. It's going to be between two men, two women. Well, since we're changing the definition of marriage, what is to prevent three people from getting married? . . . What if somebody wants to marry their pet dog?"¹⁸⁴

B. Response to Criticism

In response, the authors and sponsors of S.B. 274 highlighted the necessity of the bill and worked to clarify the bill's language and limit any ambiguities. Additionally, the authors provided guidance to apply the pre-existing law to situations in which a court finds that a child has more than two parents.¹⁸⁵

1. Necessity

Prior to the enactment of S.B. 274, courts interpreted the UPA to prohibit a child from having more than two parents.¹⁸⁶ When more than two people claimed a right to parentage, courts had no choice but to determine which two parents would remain in the child's life. This lack of discretion affected families frequently consisting of a child's biological mother, a biological father, and a presumed third parent.¹⁸⁷ Additionally, families involving the use of assisted reproduction, adoption, and foster care were similarly affected.

Since California does not provide visitation rights to non-parents except under extremely limited circumstances,¹⁸⁸ children were completely losing access to presumed third parents without the

184. Rush Limbaugh, *Bill to Allow for More Than Two Parents*, RUSH LIMBAUGH SHOW (Jul. 2, 2012), http://www.rushlimbaugh.com/daily/2012/07/02/bill_to_allow_for_more_than_two_parents. However, Leno and CAI continue to be clear that the bill does nothing to change the definition of a parent, but rather seeks only to help judges rule in the best interest of children should they be in a situation in which life's circumstances have provided them with more than two individuals who love and care for them as a parent.

185. The revised bill provided that "all of the rights and responsibilities of parentage arising under state law, administrative regulations, court rules, government policies, common law, and any other provision or source of existing law apply equally to every legal parent where a child is found to have more than two parents." CAL. FAM. CODE § 7601(c) (West 2013); S.B. 274, 2013–2014 Reg. Sess. § 1(d) (Cal. 2013).

186. *In re M.C.*, 123 Cal. Rptr. 3d 856, 870 (Ct. App. 2011); *Elisa B. v. Super. Ct.*, 117 P.3d 660, 666 (Cal. 2005); *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004) (although more than one individual may fulfill the statutory qualifications that gives rise to a presumption of parenthood, there can be only one presumed father); *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993) ("[F]or any child, California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.").

187. *In re M.C.*, 123 Cal Rptr. 3d at 869.

188. FAM. §§ 3101–3104.

courts having any recourse.¹⁸⁹ California law forced parents to relinquish their substantial parental rights and forced the child to separate from a loved one he or she had always considered a parent, potentially causing psychological, emotional, and financial consequences.¹⁹⁰ By modifying the law to accommodate for more than two parents, California joined other states in preventing such devastating harms to the child.¹⁹¹

Proponents argued that S.B. 274 served childrens' best interest by recognizing parent-child relationships that include more than two parents and appreciating the legal and emotional protections that those relationships can provide.¹⁹² Additionally, legal recognition of multiple parentage provides the child with vital rights, including the right to financial support from all parents; access to health insurance, benefits, and inheritance; and more placement options as an alternative to foster care.¹⁹³

2. Addressing the Upper Limit

The authors expressly provided guidance in S.B. 274 to address the bill's lack of a maximum number of parents a child may have. First, S.B. 274 declares the clear legislative intent "that this Bill will only apply in the rare case where a child truly has more than two parents, and a finding that a child has more than two parents is necessary to protect the child from the detriment of being separated from one of his or her parents."¹⁹⁴ This legislative intent statement guides courts only to apply S.B. 274, under the detriment standard, to

189. *Hearing on S.B. 274, supra* note 38.

190. *Id.*

191. In 2007, a Pennsylvania court ruled that a biological mother, her same-sex partner, and the sperm donor who had been involved as a parent since infancy all had an obligation to support a child and were entitled to at least partial custody of the child. *Jacob v. Shultz-Jacob*, 923 A.2d 473, 473 (Pa. 2007). A Maine court found that, in addition to two biological parents, a child may have a non-biological, de facto parent with parental rights and responsibilities. *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149–51 (Me. 2004). Delaware's de facto parent statute, which came about in response to a case in which a lesbian woman was denied joint custody of a child that only her partner had adopted, authorizes a court to find three or more parents of a child. DEL. CODE ANN. tit. 13, § 8-201 (West 2014). Similarly, the District of Columbia recognizes that a de facto parent has the same rights and responsibilities of parents. D.C. CODE § 16-831.01 (2013). Louisiana has recognized the concept of dual paternity, thus giving parental responsibilities to three parents: the mother, the presumed father based on marriage, and the biological father. *See Smith v. Cole*, 553 So. 2d 847, 854–55 (La. 1989).

192. *Hearing on S.B. 274, supra* note 38.

193. *Id.*

194. S.B. 274, 2013–2014 Reg. Sess. § 1(d) (Cal. 2013).

the rare number of cases involving more than two presumed parents.

Second, S.B. 274 was written to be even more limiting than its previously vetoed predecessor, S.B. 1476.¹⁹⁵ In addition to the presumed parent requirements, S.B. 1476 would have authorized a court to find more than two parents if “required to serve the best interests of the child.”¹⁹⁶ S.B. 1476’s best interest standards and determinations were based on the presumed parent’s actions and the quality of the presumed parents’ relationship with the child. In determining a child’s best interest under S.B. 1476, “a court shall consider the nature, duration, and quality of the presumed or claimed parents’ relationships with the child and the benefit or detriment to the child of continuing those relationships.”¹⁹⁷

In contrast, S.B. 274 went beyond the best interest of the child standard by requiring courts to find that recognizing only two parents would be “detrimental to the child.”¹⁹⁸ In determining the detriment, courts are required to “consider all relevant factors, including the harm of removing the child from a stable placement with a parent who has fulfilled the child’s physical and psychological needs for a substantial period of time.”¹⁹⁹ The detriment standard focuses on the child’s needs, specifically the need to prevent the harm that would result from rejecting a third parent’s claim for parentage. Absent a finding of detriment by a court, children will continue to have no more than two parents. S.B.274 Bill puts the interest of the child above all else by relying on the detriment standard.²⁰⁰

Moreover, the proponents reiterated that the number of cases affected by S.B. 274 is extremely limited since the bill did not change the pre-existing law as to who may qualify as a presumed parent.²⁰¹ To be found a parent under S.B. 274, a person must still qualify under the existing UPA presumptions of parenthood. Most stepparents and grandparents will not qualify as presumed parents simply because they do not hold the child out to the world as their own son or daughter.²⁰² Simply stated, the bill “will never, under any

195. S.B. 1476, 2012–2013 Reg. Sess. (Cal. 2012).

196. *Id.*

197. *Id.*

198. S.B. 274, 2013–2014 Reg. Sess. § 6 (Cal. 2013).

199. *Id.*

200. *Hearing on S.B. 274, supra* note 38.

201. *Id.*

202. *Id.*

circumstances, mean that a child automatically has more than two parents.”²⁰³

3. Applying the Existing Guidelines for Custody, Visitation, and Support

S.B. 274 did not significantly alter the court's parental determination analysis since the pre-existing law already provided guidance on resolving paternity conflicts. Essentially, the bill only provided the flexibility for courts to determine in their analysis, that a child has more than two parents if the child would suffer detriment if the court failed to recognize a third parent.

Under pre-existing law, Family Code section 7612, subsection (b), provided that if two or more presumptions of parenthood conflict, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”²⁰⁴ Courts applied this section 7612 analysis to determine which presumption of parenthood prevailed. S.B. 274 did not limit that analysis; rather, it provided courts the flexibility to find more than two parents.²⁰⁵

S.B. 274 tightened provisions and provided guidance to courts in awarding custody, visitation, and support in the event that the court has found that a child has more than two parents.²⁰⁶ In regard to allocating custody and visitation, S.B. 274 requires courts to apply the same rule that they apply in custody disputes between only two parents.²⁰⁷ In cases involving only two parents, although there is a statutory presumption for joint custody if both parents agree to it and if it is in the best interest of the child,²⁰⁸ the courts can, and often do, award legal and physical custody to one parent while awarding visitation rights to the other. However, when applying this rule to situations involving three parents, courts are not required to allocate custody to all parents.²⁰⁹ For example, the court may allocate custody

203. Deborah H. Wald, *SB 274: The Law and Multi-Parent Families*, 36 FAM. L. NEWS 28, 29 (2014).

204. CAL. FAM. CODE § 7612(b) (West 2014).

205. *Hearing on S.B. 274*, *supra* note 38.

206. *Id.*

207. Specifically, the bill added Family Code section 3040, subdivision (d), requiring courts to “allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child’s need for continuity and stability by preserving established patterns of care and emotional bonds.” *Id.*; *see* FAM. § 3040(d) (West 2004).

208. FAM. § 3080.

209. *Hearing on S.B. 274*, *supra* note 38; *see* CAL. FAM. CODE § 3040(d) (West 2004).

to two parents and restrict the third parent to only visitation rights if it would be in the best interest of the child.

In regard to determining child support, S.B. 274 provides courts the guidance and flexibility in rare cases to depart from the state child support guidelines.²¹⁰ The bill still requires courts to complete a guideline calculation for each parent prior to departing from the state child support guidelines.²¹¹ While this may be more cumbersome, the guideline complies with federal requirements.²¹² Additionally, the authors of S.B. 274 anticipated that cases with more than two parents will be extremely rare and very fact specific.²¹³ Therefore, the child support agencies will not be particularly burdened.

Lastly, S.B. 274 only had a minor effect on costs. Since there will only be a handful of cases where courts will find a child has more than two parents, the California Department of Child Support Services did not need to reprogram the statewide support system or make any changes to the uniform guidelines.²¹⁴

As evidence of the S.B. 274 sponsors' success in addressing the issues raised by the opposition, the bill passed through the Assembly, and, most importantly, Governor Brown signed the bill into law.

VI. THE AFTERMATH: WHAT HAS HAPPENED SINCE?

Since S.B. 274 became law, the California Courts of Appeal have decided at least two cases involving a child who could have more than two parents.²¹⁵ The following two cases demonstrate the court's discretion to determine whether a child may have more than two parents.

210. S.B. 274, 2013–2014 Reg. Sess. § 3 (Cal. 2013).

211. *Hearing on S.B. 274*, *supra* note 38 (“[T]he guideline can be run in a multi-step process that involves first calculating all parents’ net income, then running the guideline program with the high earner as one parent and the income and time share of remaining parents combined as the other parent in the program. The process is then repeated for the remaining parents (with the highest earner excluded), with the highest earner of that smaller group listed as the high earner and the parents remaining as the other parent (with time shares adjusted appropriately).”).

212. *Id.*

213. *Id.*

214. *Id.* Additionally, the child support agencies already deal with complex family structures so any financial and resource costs would be insignificant. Likewise, courts would only see minor costs resulting from a minute increase in court time relating to allocating custody and determining child support obligations.

215. *See* S.M. v. E.C., No. F065817, 2014 Cal. App. LEXIS 4574, at *4 (June 27, 2014); *In re* Danny M., No. A138844 & A140256, 2014 Cal. App. LEXIS 3943 (June 3, 2014).

In *S.M. v. E.C.*,²¹⁶ the court granted a limited remand for the trial court to determine whether a sperm donor who held out the child as his own natural child could be considered a third parent. Even though the parties did not suggest on appeal that the child may have more than two legal parents,²¹⁷ the court nonetheless concluded that the matter was an appropriate case to determine whether finding only two parents would be detrimental to the child.²¹⁸

In contrast, the *In re Danny M.*²¹⁹ court did not consider granting a remand to determine whether the child had more than two parents. The biological father and the husband of the biological mother sought recognition of presumed father status.²²⁰ The Court of Appeal noted its authority to find that a child may have more than two parents,²²¹ however, the court weighed the competing presumptions pursuant to the 7612 analysis and affirmed the trial court's decision that the biological father was the child's sole presumed father.²²²

A. *S.M. v. E.C.*

In *S.M. v. E.C.*, a lesbian couple in a registered domestic partnership, E.C. and Y.M., paid a sperm donor, S.M., to provide sperm for conception. During the time the couple tried to conceive, E.C. and S.M. had a secret romantic relationship, and it was undetermined whether the child was born as a result of sperm supplied under the artificial insemination agreement or the sexual relationship.²²³ E.C. and Y.M. separated six months after the birth of the child.²²⁴ Shortly thereafter, S.M. moved in with E.C., and S.M. held out the minor as his own natural child.²²⁵ Y.M. filed a petition for custody and support.²²⁶ E.C. filed a petition for dissolution of the domestic partnership and named the minor as a child of the relationship.²²⁷

216. No. F065817, 2014 Cal. App. LEXIS 4574 (Ct. App. June 27, 2014).

217. *Id.* at *26–27.

218. *Id.* at *29.

219. *In re Danny M.*, No. A138844 & A140256, 2014 Cal. App. LEXIS 3943 (June 3, 2014).

220. *Id.* at *1.

221. *Id.* at *24 n 7.

222. *Id.* at *40–41.

223. *S.M.*, 2014 Cal. App. LEXIS 4574, at *1–3.

224. *Id.* at *3.

225. *Id.*

226. *Id.*

227. *Id.* at *4.

The trial court found that in addition to E.C., both Y.M. and S.M. were presumed parents.²²⁸ The trial court believed it would be in the child's best interest to maintain a relationship with all three presumed parents; however, the existing legal authority at the time prohibited a child from having more than two parents.²²⁹ Accordingly, the trial court was required to resolve Y.M. and S.M.'s competing claims by applying the fact-based analysis pursuant to section 7612, subdivision (b).²³⁰

In its analysis, the court struggled to find a weightier factor that tipped the scales.²³¹ Both S.M. and Y.M. had nearly evenly matched legal positions.²³² S.M. was the child's biological parent, but he was not present at the child's birth and did not declare any parental interest until months after the child was born.²³³ Equally, Y.M. was not a biological parent, but assisted during pregnancy.²³⁴

Initially, the court established the "ongoing stability of the family unit"²³⁵ as the determining factor, which weighed in favor of designating S.M. as the child's second parent.²³⁶ The court tentatively ruled that S.M. was the second parent, settling on the fact that E.C. and S.M. were in a committed relationship and it would be in the best interest of the child to be raised in an intact family.²³⁷

However, the court reconsidered its tentative ruling and determined that the "commitment to the child" was the determining factor.²³⁸ The court found that Y.M. was the second parent because her commitment to the child exceeded the commitment of S.M.²³⁹ In contrast to Y.M.'s complete commitment to parent the child since conception, S.M. began his sexual relationship with E.C. and

228. *Id.* at *16–18. First, the biological mother was automatically presumed a parent since she gave birth to the child. Second, the former registered domestic partner was presumed to be a parent under Family Code section 7611, subdivision (a), since registered domestic partners are legally entitled to all the rights and benefits granted to spouses. Third, the sperm donor was found to be a presumed parent under subdivision (d) since he received the child into his home and openly held out the child as his.

229. *S.M.*, 2014 Cal. App. LEXIS 4574, at *9, 14.

230. *Id.* at *19–20.

231. *Id.* at *14.

232. *Id.* at *8.

233. *Id.* at *8, 15–16.

234. *Id.*

235. *Id.* at *8.

236. *Id.* at *7.

237. *Id.* at *8, 14–15.

238. *Id.* at *20.

239. *Id.* at *21.

provided sperm for artificial insemination without any intent to be the father of the resulting child.²⁴⁰ The court criticized S.M.'s lack of commitment, namely to his other son and that son's mother, during his initial relationship with E.C.²⁴¹ S.M. made no effort to assist during the pregnancy, and he was not present at the birth even though he was aware that the biological mother may have conceived as a result of their sexual relationship.²⁴² Additionally, S.M. kept his relationship with the child a secret, choosing to preserve personal and employment relationships over acknowledging his child.²⁴³

While affirming the trial court's judgment, the Court of Appeal granted a limited remand to consider the amendment of section 7612 on the issue of legal parentage.²⁴⁴ Even though the parties did not suggest that the child may have more than two legal parents,²⁴⁵ the court nonetheless determined that the matter was an appropriate case to determine whether finding only two parents would be detrimental to the child.²⁴⁶ In determining the appropriateness of the remand, the court considered the trial court's "frustration in being limited to designating two parents for the child" and the "general directive in section 4 favoring retroactive application of changes in the Family Code."²⁴⁷ Additionally, the court recognized that the Legislature had responded to the "many scholars [who] believe[d] that limiting a child to two parents [was] unfair in light of changing social views" and that it was the Legislature's responsibility and not the courts' to make policy determinations.²⁴⁸

B. In re Danny M.

In *In re Danny M.*, two men sought recognition as the child's sole presumed father: David, the mother's husband, with whom she

240. *Id.* at *20.

241. *Id.* at *15–17.

242. *Id.* at *15.

243. *Id.*

244. *Id.* *29.

245. *Id.* at *26–27.

246. *Id.* at *29.

247. *Id.* at *30. The court observed that "the general directive in section 4 favors retroactive application of changes in the Family Law Code, despite the general rule that favors prospective application of changes in the law." Pursuant to section 4, subdivision (c), "[a] new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking an action." *Id.* at *28–29.

248. *Id.* at *29–30.

had two children during their twenty year marriage; and Kelly, the biological father with whom she had a previous child prior to her marriage.²⁴⁹ During an eight-month separation from David, the mother rekindled a long-time relationship with Kelly and cohabited with him in hopes of producing another child.²⁵⁰ The mother and Kelly separated shortly thereafter, and David moved back into the family home.

Nine months later, the mother gave birth to Kelly's biological daughter, Danny. Six months after the birth, the mother and David informed Kelly and brought Danny to visit him.²⁵¹ During a separate visit, Kelly cared for Danny, feeding, bathing, changing Danny's diaper, and putting her to sleep.²⁵²

In November 2012, eleven months after Danny was born, the family caught the attention of the Contra Costa County Children and Family Services Bureau because the children reportedly had chronic head lice and poor school attendance.²⁵³ After a brief investigation, the Bureau filed dependency petitions on behalf of the three children.²⁵⁴ The court found that both David and Kelly qualified as presumed fathers. David qualified as a presumed parent under section 7611, subdivisions (a) and (d) because he was married to the mother at the time of the Danny's birth and held her out as his own natural daughter.²⁵⁵ Kelly was a *Kelsey S.* father since he immediately stepped forward once he learned about Danny and actively tried to play a substantial role in her life.²⁵⁶

The facts of the dependency case suggested that David did not and would not provide a supportive parent-child relationship.²⁵⁷ David failed to ensure the children attended school regularly, had ongoing problems with substance abuse, attempted suicide with prescription pills in the presence of his children, engaged in

249. *In re Danny M.*, No. A138844 & A140256, 2014 Cal. App. LEXIS 3943, at *1, 3 (June 3, 2014).

250. *Id.* at *3, 15.

251. *Id.* at *3, 11.

252. *Id.* at *12.

253. *Id.* at *3.

254. *Id.* at *7.

255. *Id.* at *29–30. The husband did not qualify as a presumed parent under section 7540, which requires cohabitation, since the child was conceived while the mother was still living with the biological father, rather than the husband. *Id.* at *26–27.

256. *Id.* at *36–40. The Court of Appeal doubted that the child's two visits to the biological father's home satisfied the requirements under section 7611(d).

257. *Id.* at *42–43.

controlling and harsh behavior with his wife and children, and on multiple occasions, physically attacked the mother.²⁵⁸

Since California's three-parent law was not enacted at the time, the juvenile court was required to choose one presumed father over the other, pursuant to section 7612, subdivision (b), on the "weightier considerations of policy and logic."²⁵⁹ The court found that David's relationship with the child was longer, but of questionable quality.²⁶⁰ In contrast, Kelly's relationship, "while comparatively brief, displayed none of the problems that had necessitated the child's removal from the father's custody."²⁶¹ The appellate court found that under the statutory scheme then in place, prior to the enactment of S.B. 274, the trial court made a reasonable choice and did not abuse its discretion on choosing Kelly as the sole presumed father.²⁶²

Had the law been in effect at the time, the court may have arrived at the same conclusion. Among other disturbing facts, the court found that on multiple occasions, David physically attacked the mother. Under Family Code section 3020, "the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child."²⁶³ To find that the child has more than two parents and recognize the parentage of the abusive father would contravene the detrimental standard of the three-parentage law.

In sum, *S.M. v. E.C.* and *In re Danny M.* illustrate the court's discretion to determine whether a child may have more than two parents. Particularly, *In re Danny M.* addresses the concerns regarding possible abuse of the three-parent law by demonstrating its limited application. Courts still require alleged parents to qualify under the UPA presumptions of parentage prior to determining whether the matter is an appropriate case to find that a child has more than two parents. Furthermore, although courts now have the authority to find more than two parents, they may apply the 7612 analysis to find only one or two parents.

VII. CONCLUSION

If it takes a village to raise a child, why limit the number of

258. *Id.* at *8, 43.

259. *Id.* at *24, 40–41.

260. *Id.* at *44.

261. *Id.*

262. *Id.* at *41, 47.

263. CAL. FAM. CODE § 3020(a) (West 2004).

parents a child can have? M.C.'s tragic case demonstrates the inadequacies of California's Family Code in light of the evolving family structure and proves that courts need more tools to protect the best interests of children. From M.C.'s perspective, it seems so resoundingly obvious that courts should recognize three parents in cases where a third parent intended to raise the child and in cases where a third parent has already established a relationship with the child.

Arguably, granting courts the discretion to find that a child has more than two parents can open the doors to possible abuse. However, the California Legislature expressly intended that the law only applies in the rare case in which a child truly has more than two parents and recognizing more than two parents is necessary to protect the child from detriment. Moreover, the law advises courts to consider *all* relevant factors, including the harm of removing the child from a stable placement with a parent.

A two-parent limit contravenes the rights of children that the Family Code seeks to protect and unfairly disregards the parental rights inherent in parent-child relationships. Most importantly, a two-parent limit detrimentally harms the child by disregarding the emotional, psychological, and financial bonds inherent in a child-parent relationship. Therefore, by recognizing that more than two parents can coexist in California's proverbial village, California not only protect the rights and benefits of children like M.C., but also their emotional, psychological, and financial needs.