California's Conclusive Presumption of Paternity and the Expansion of Unwed Fathers' Rights

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CALIFORNIA'S CONCLUSIVE PRESUMPTION OF PATERNITY AND THE EXPANSION OF UNWED FATHERS' RIGHTS

I. INTRODUCTION

California's conclusive presumption of paternity provides that when a mother is married and living with her husband at the time of conception, the husband is conclusively presumed to be her child's father. With only a few narrow exceptions, the conclusive presumption of paternity denies an unwed father the opportunity to establish his paternity because he is precluded from offering evidence that the husband is not the father.

In a changing society, where divorce, remarriage, and single parent homes are increasingly prevalent, the California courts continue to struggle with the rights of the unwed father. Until recently, most unwed fathers could only attack the pre-

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1. CAL. FAM. CODE § 7540 (West 1994). Section 7540 provides:
   "Except as provided in Section 7541, 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." Id.

2. A conclusive presumption bars all factual evidence to disprove the existence of the presumed fact. A conclusive presumption "[e]xists when an ultimate fact is presumed to be true upon proof of another fact, and no evidence, no matter how persuasive, can rebut it." BLACK'S LAW DICTIONARY 434 (6th ed. 1991).

3. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 79 tbl. 97, 80 tbl. 101 (114th ed. 1994). In 1991, 28 percent of births in the nation and 33.3 percent of the births in California were to unwed mothers.
sumption on constitutional grounds. Two California Appellate
decisions have expanded the unwed father's right to challenge
the presumption of the husband's paternity. In these cases,
the two unwed fathers successfully rebutted the conclusive pre­
sumption of the husband's paternity by establishing their pre­
sumed father status under an exception to the California Family Code section 7540 enacted in 1990. The courts in Comino v. Kelly and Steven W. v. Matthew S. gave this rebuttable pre­
sumption more strength than the critics predicted, allowing
the presumed father to prove his relationship without having
to mount a constitutional attack.

This comment begins with the history of the conclusive
presumption of paternity in California, from its common law
roots to its modern day affirmation in Michael H. v. Gerald D. This background will discuss the adoption of the Uniform Par­
entage Act in California and its application in paternity pro­
ceedings. In an effort to advocate the need for its repeal,
this comment will also discuss the modern trend in the California courts to circumvent the conclusive presumption.\textsuperscript{11}

The comment then argues that California Family Code Section 7611(d)\textsuperscript{12}, as a complement to section 7540, has proven a viable statutory inroad for unwed fathers seeking paternity as evidenced in \textit{Comino v. Kelly}\textsuperscript{13} and \textit{Steven W. v. Matthew S.}\textsuperscript{14} These two recent cases, along with section 7611(d), broadened the definition of a presumed father and the class of people who may contest the husband's paternity. Previously, California courts employed a fact-based balancing test of the private and state interests in particular familial relationships when the conclusive presumption of section 7540 was under constitutional attack.\textsuperscript{15} Now, based on the rebuttable presumption found in section 7611(d), courts have given the established parent-child relationships of at least two unwed fathers meaningful consideration when the husband or the child's mother attempted to use the conclusive presumption as a defense to a paternity action by the natural father.\textsuperscript{16}

The comment concludes that this rebuttable presumption enables an unwed father to establish his parental rights regardless of the mother's marital status. By protecting developed parent-child relationships, California law has become more closely aligned with the Uniform Parentage Act, which aims to eliminate any differentiation between a married and an unmarried parent's legal relationship with the child.\textsuperscript{17} The


\textsuperscript{12} \textit{CAL. FAM. CODE} § 7611(d) (West 1994). Section 7611 states that a man may be presumed to be a child's father if, among other things, "he receives the child into his home and openly holds out the child as his natural child." \textit{Id.}

\textsuperscript{13} 30 Cal. Rptr. 2d 728 (Cal. App. 4 Dist. 1994).

\textsuperscript{14} 39 Cal. Rptr. 2d 535 (Cal. App. 1 Dist. 1995).

\textsuperscript{15} \textit{In re Lisa R.}, 532 P.2d 123 (1975).

\textsuperscript{16} \textit{See} Comino, 30 Cal. Rptr. 2d 728; Steven W., 39 Cal. Rptr. 2d 535.

\textsuperscript{17} \textit{UNIF. PARENTAGE ACT} § 2, 9B U.L.A. 295, 296 (West 1987 and Supp. 1995). Section 2 provides:

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." \textit{Id.}
courts have demonstrated the dwindling usefulness of the conclusive presumption in paternity disputes by placing greater importance on an assessment of the child's existing relationships.\textsuperscript{18}

II. BACKGROUND

The conclusive presumption of paternity was introduced at common law in order to reduce instances of illegitimacy. The adoption of the Uniform Parentage Act in 1976 purportedly dispensed with the legal distinction of children based on the marital status of their parents. In California, however, the statute did not allow children or unwed fathers to submit rebuttal evidence to challenge the presumption of the mother's husband's paternity until 1990. Thus, almost fifteen years after California adopted the UPA, it finally began to dismantle the legal constructs which explicitly preferred the mother's husband to the unwed father.

A. THE COMMON LAW AND ILLEGITIMACY

At common law, the presumption of a husband's paternity was intended to protect children from the stigma of illegitimacy and to promote marital peace and happiness.\textsuperscript{19} A child born out of wedlock was known as \textit{nullius filius}, literally "no one's son."\textsuperscript{20} An illegitimate child was denied virtually all legal rights to inheritance.\textsuperscript{21} The parents had no legal relationship with the child, but were nonetheless obligated to support the child.\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{18} See Mary Kay Kisthardt, \textit{Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.}, 65 Tul. L. Rev. 585, 636 (1991). On the inappropriateness of the presumption in paternity determinations, Professor Kisthardt stated: "A conclusive marital presumption highlights form over substance and does not take into account the relationships that may be 'familial' but which do not constitute a 'unitary family.'" Id.
  \item \textsuperscript{20} 1 W. Blackstone, \textit{Commentaries} *458 (1803).
  \item \textsuperscript{21} Id. "The rights [of the bastard] are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody, and sometimes called \textit{filius nullius}, sometimes, \textit{filius populi}.(footnotes omitted)" Id. at *458-459.
  \item \textsuperscript{22} Diane C. Wilson, \textit{The Uniform Parentage Act: What it Will Mean for the
A child born to a married couple was presumed to be legitimate. The presumption was intended to ensure that a child born to a married woman was not denied legitimate status. In some jurisdictions, the presumption of legitimacy could be rebutted only by the mother or her husband. Either party would have to show that the husband did not have access to the wife at the approximate time of conception. According to Lord Mansfield's rule, followed in other jurisdictions, neither the mother nor her husband were even allowed to rebut the presumption.

California codified the common law conclusive presumption of paternity in 1872, which stated that the child of a woman who was living with her husband at the time of conception is conclusively presumed to be the husband's child. Originally, the statute provided only two narrow exceptions to rebut the conclusive presumption: a showing of impotency or sterility.

B. THE UNIFORM PARENTAGE ACT HAD LIMITED EFFECT ON THE CONCLUSIVE PRESUMPTION OF PATERNITY

In the 1960's and 70's, the rights of unwed fathers and children of unwed parents began to expand. Many statutes that discriminated against children of unwed parents were ruled unconstitutional. In 1975, because these decisions left

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23. BLACKSTONE, supra note 20, at *446.
25. Id. at 119.
26. BLACKSTONE, supra note 20, at *457.
27. Kisthardt, supra note 18, at 589.
28. Wilson, supra note 22, at 199, 201.
29. CAL. EVID. CODE § 621 (West 1954)(current version at CAL. FAM. CODE § 7540 (West 1994)).
31. Wilson, supra note 22, at 193.
a "statutory void" in this area of the law, the Uniform Parentage Act (hereinafter "UPA") was drafted. The UPA eliminated the legal distinction between illegitimate and legitimate children.

The UPA was created in order to give children equal legal status regardless of their parents' marital status. In place of the legitimacy language, the UPA substituted the "parent-child relationship," intending to shift the legal focus from the parents' marital status to the child's familial relationships. California continued to prefer the married parent to the single parent, however, by retaining the conclusive presumption of paternity after it adopted the Uniform Parentage Act in 1976.

Although the unwed father could fall under one of the five rebuttable presumptions used to establish fatherhood, he still could not use that presumptive status to assert his paternity if the mother was married to and living with another man. Not until 1990, after the United States Supreme Court decision in Michael H. v. Gerald D., did the California legislature expand the class of parties who could rebut the conclusive presumption to include an unwed, presumed father under Family Code section 7611.

645 (1972) (The Court struck down a statute as unconstitutional which denied an unwed father a hearing on his fitness as a parent before removing his children after the mother's death.).


37. UNIF. PARENTAGE ACT § 2, 9B U.L.A. at 296. Section 2 provides:

"The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Id. California's current version of this section is codified at CAL. FAM. CODE § 7602 (West 1994).

38. CAL. CIV. CODE § 7004(a) (1992), replaced by CAL. FAM. CODE § 7611 (West 1994).


40. CAL. EVID. CODE § 621 (West 1990), replaced by CAL. FAM. CODE § 7540
C. THE CONCLUSIVE PRESUMPTION OF PATERNITY IS CONSTITUTIONAL: MICHAEL H. v. GERALD D. 41

In Michael H. v. Gerald D., the United States Supreme Court upheld California's conclusive presumption of paternity. 42 In Michael H., an unwed father attacked section 7540 on due process grounds in an effort to maintain his relationship with his biological daughter. 43 The Court held that in the interest of family integrity, when a mother is married to another man, the unwed father cannot rebut the presumption that the husband is the father. 44 This approach failed to give weight to whether the unwed father was the natural father or whether he had a developed relationship with his child. 45

Carole D. and Gerald D. were married in 1976, later settling in southern California. 46 During the summer of 1978, Carole D. began an extramarital affair with Michael H., and in September 1980, Carole D. conceived a child. 47 Her husband, Gerald D., was named as the father on the birth certificate, and held the child out as his own. 48 After the child's birth however, Carole D. informed Michael H. that he was the child's biological father. 49

In October 1981, several months after the child's birth, the husband moved to New York, and Carole D. remained in California. 50 During this period of separation, Carole D. and the child spent time with Michael H., the natural father, who held

(West 1994).


42. Id. at 110.
43. Id. at 129.
44. Id. at 120.
45. Id. at 121, 127.
46. Michael H., 491 U.S. at 113.
47. Id. at 113.
48. Id. at 113-14.
49. Id. at 114. The blood test results determined natural father's paternity with a 98.07% probability. Id.
50. Id.
the child out as his own. From January to March 1982, the threesome lived together until the mother moved in with a third man, during which time she continued to visit her hus­band in New York.

In November 1982, when the mother refused to allow the natural father to visit the child, the father filed a filiation action in California Superior Court in order to establish his paternity and to obtain visitation rights. While contesting this action in the spring of 1983, the mother returned to her husband in New York.

At the end of the summer of 1983, Carole D. reconciled with Michael H. and dropped her summary judgment mo­tion. For the next eight months, Michael H. again lived with Carole D. and their daughter in a family arrangement. In April 1984, the mother and Michael H. drew up a stipulation to his paternity. Then, in June 1984, the mother reconciled once again with her husband, and ordered her attorneys not to file the stipulation.

In October of 1984, the husband intervened in the suit, and filed a summary judgment motion asserting the conclusive presumption of his paternity. The trial court found that the mother and her husband were married and cohabiting at the time of the child's conception. Under section 7540, the elements of the presumption were fulfilled, and the court granted summary judgment in favor of the husband's presumed paternity.

51. Michael H., 491 U.S. at 114.
52. Id.
53. Id. A filiation action is defined as "[a] special statutory proceeding in the nature of a civil action to enforce a civil obligation or duty specifically for the purpose of establishing parentage and the putative father's duty to support his illegitimate child." BLACK'S LAW DICTIONARY 434 (6th ed. 1991).
54. Id.
55. Id.
56. Michael H., 491 U.S. at 114.
57. Id.
58. Id. at 115.
59. Id.
60. Id. The court relied on affidavits attesting that husband and mother were cohabiting at conception and that husband is neither impotent nor sterile. Id.
Having been denied standing to rebut the application of the conclusive presumption of the husband's paternity, on appeal the natural father argued that the conclusive presumption violated both his procedural and substantive due process rights under the United States Constitution, and was therefore unconstitutional. The California Court of Appeal rejected the due process arguments and affirmed the lower court's decision to apply the conclusive presumption. The California Supreme Court denied discretionary review, but the United States Supreme Court granted certiorari on the issue of the conclusive presumption's constitutionality.

In a plurality opinion written by Justice Scalia, the Court denied constitutional protection to the relationship between the unwed father and his daughter. The plurality focused primarily on the substantive due process argument. The natural father asserted that the integrity of the mother's marriage was not a sufficient state interest to support termination of his relationship with his child. The plurality responded that the success of such an argument required that the relationship be a traditionally constitutionally protected liberty interest. The Court refused to expand the definition of the unitary family to include the mother's lover because such a relationship does not fit the mold of "traditionally respected relationships" for purposes of constitutional protection.

64. 236 Cal. Rptr. 810 (Cal. Ct. App. 2 Dist. 1987).
66. Id. at 110.
67. Id.
68. Id. at 113.
69. Id. at 121.
70. Michael H., 491 U.S. at 121.
71. Id.
72. Id. at 123 n.3.

The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family . . . Perhaps, it can be expanded beyond this, but it will bear no resemblance to traditionally respected relationships - and will thus cease to have any constitutional significance - if it is stretched so far as to include the relationship established between a married woman, her lover, and their child.

Id.
continued deference to the California legislature, and adherence to a strict reading of the Constitution, the Court refused to recognize an unwed father's liberty interest in his parental relationships when it conflicted with an established marital family unit.

The Court defended the statute on policy grounds. Throughout the opinion, it maintained that the primary policy consideration underlying the conclusive presumption was the integrity of the marital family. The Court assumed for purposes of this argument that this family unit, by virtue of the sanctity of the unitary family arrangement, was a solid and nurturing one. In doing so, the Court ignored the inconsistent and unstable nature of the mother's three relationships over the first three years of the child's life. Because the couple had decided to raise the child, the Court invoked society's preference for the traditional family unit, as it is manifested in the statute. So, rather than assess the importance of the child's relationship with her father, the Court relied on traditional notions of the nuclear family to terminate the natural father's established relationship with the child.

In response to this argument, the natural father argued that a prior line of Supreme Court cases granted him a liberty

73. Id. at 122 citing to Justice White's dissent in Moore v. Cleveland, 431 U.S. 494, 544 (1977).
74. Id. at 122 citing again to Justice White's dissent in Moore, 431 U.S. at 544.
75. Michael H., 491 U.S. at 129-130.
76. Id. at 129-130.
77. Id. at 120. "Of course the conclusive presumption not only expresses the state's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy." Id.
78. Id. at 123. This characterization of this family directly contradicts Justice Scalia's prior reference to the child's various living arrangements as "quasifamily units". Id. at 114.
79. Id. at 113, 114.
80. Michael H., 491 U.S. at 129 n.7 . "That tradition [to prefer the unitary family to the unwed father] reflects a 'balancing' that has already been made by society itself." Id.
81. See Kisthardt, supra note 18, at 633 (1991). Professor Kisthardt stated: "The plurality bases much of its decision on the value of protecting the 'morally correct' intact family. The Court refers to legislative intent and public policy, but in a manner that limits the discussion to a narrow view of the type of family that is morally acceptable to the current Court." Id.
interest in his established parental relationships.82 By narrowly defining the interest at stake as that of an "adulterous natural father," the Court concluded that historically the natural father had never been afforded constitutional protection in such circumstances.83 The Court distinguished the prior cases because there was no existing family unit at stake.84 The Court further held that, though some jurisdictions had granted biological fathers standing, there were no cases in which the natural father had been given full parental or substantive rights in the face of an existing family unit.85 The Court held that there is no justification for the natural father's liberty interest due to the lack of precedent protecting the unwed father in these circumstances,86 coupled with society's traditional views toward the marital institution.87

Finally, the Court concluded that even if the natural father had established a relationship with the child which placed him on equal footing with the husband,88 society's views toward marriage, as reflected in the legislation itself, tipped the balance in the husband's favor.89 The Court refused to establish rights of dual fatherhood.90 According to the Court, the

83. Id. at 129 n.7.
84. Id. at 123. "As we view [these cases], they rest not upon such isolated factors but upon the historic respect - indeed, sanctity would not be too strong a term - traditionally accorded to the relationships that develop within the unitary family." Id. But cf. Id. at 157-158 wherein Justice White states: "Prior cases here have recognized the liberty interest of a father in his relationship with his child."
85. Id. at 127.
86. Id. at 125.
87. Michael H., 491 U.S. at 124.

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of the natural father and his child has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection.

Id.

88. See supra note 78.
89. Michael H., 491 U.S. at 119.
90. Id. at 118. Justice Scalia relied on the observation that California law does not provide for dual fatherhood.
natural father's opportunity to develop the parental relationship conflicted with the husband's opportunity to do the same. Therefore, because the court considered marriage a priority, the husband's opportunity preempted the unwed father's relationship. Despite the questionable stability of the marriage itself, the plurality protected the ideal of the unitary family at the expense of the established relationship between the unwed father and the child.

In dissenting opinions, Justices Brennan and White took issue with the plurality's assertion that unwed fathers do not have a constitutionally protected interest when the mother is married to someone else. Essentially, the plurality ruled that the unwed father has no rights in such circumstances because the state has an interest in protecting the integrity of the family unit.

Justice Brennan contended that the plurality's reliance on tradition as a source of protected liberty interests provided less guidance in practice than the plurality claimed. He argued that California's conclusive presumption of paternity was originally intended to protect children from the stigma of illegitimacy when accurate determination of biological paternity was impossible. With the advent of blood tests and DNA matching, the only remaining justification for the presumption would

91. Id. at 129. "Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter." Id.
92. Id.
93. Id. at 136, 157.
95. Id. at 137. "Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of 'liberty', the plurality has not found the objective boundary that it seeks." Id.
96. Id. at 140.

In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.

Id.
be the state's interest in the family unit. The dissenters argued that the plurality erroneously allowed the state's interest to determine the existence of the liberty interest in question and adamantly disputed the plurality's narrow focus on society's traditional reverence for the marital family.

Both Justices Brennan and White pointed out that had the Court taken a similar traditional tack in a line of its prior relevant cases, those decisions would have had drastically different results. They also asserted that an unwed father's interest in his substantial parent-child relationship is not a newly recognized interest and that the plurality was mistaken in this regard.

The plurality opinion was widely criticized as a departure from that line of Supreme Court cases which expanded the unwed father's rights on both Due Process and Equal

97. Id.
98. Id. at 145.
100. Id. at 142-43, 157. Justice Brennan stated:
On four prior occasions, we have considered whether unwed fathers have a constitutionally protected interest in their relationships with their children. See Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380, 397 (1979); Lehr v. Robertson, 463 U.S. 248 (1983). Though different in factual and legal circumstances, these cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.

Id. at 142-43.
Protection grounds. These critics argued that earlier cases recognized the importance of the established parent-child relationship when determining paternity. They also noted that the plurality’s reliance on the notion of the unitary family ignored the realities of most modern American family circumstances.

D. THE RESPONSE TO MICHAEL H. V. GERALD D.: THE 1990 AMENDMENT TO THE CONCLUSIVE PRESUMPTION - FAMILY CODE SECTION 7611(D)

After Michael H., the California Legislature amended the conclusive presumption of section 7540 to allow the presumed father and the child to rebut the presumption with blood test evidence. Under this section, a man is presumed to be a child’s father if he fulfills the criteria of one of the five rebuttable presumptions adopted from the Uniform Parentage Act, known in California as Family Code section 7611.

104. See, e.g., Kisthardt, supra note 18, at 627.
106. CAL. FAM. CODE § 7541 (West 1994). Section 7541 provides in relevant part:

(a) Notwithstanding Section 7540, if the court finds that the conclusions of all the experts, as disclosed by the evidence based on blood tests performed pursuant to Chapter 2 (commencing with Section 7550), are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(b) The notice of motion for blood tests under this section may be filed not later than two years from the child’s date of birth by the husband, or for the purposes of establishing paternity by the presumed father or the child through or by the child’s guardian ad litem. As used in this subdivision, “presumed father” has the meaning given in Sections 7611 and 7612.

Id.

108. CAL. FAM. CODE § 7611 (West 1994 and Supp. 1996). Section 7611 provides:

A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions:

(a) He and the child’s natural mother are or have
Relevant here are the presumptions which provide that a man is presumed to be the child's father under this section if he and the mother are married at the time of birth; if the child is born within 300 days of the termination of the marriage; if the couple has attempted to marry before or after the child's birth; or if the man receives the child into his home and openly holds out the child as his own. California courts have also placed natural fathers and husbands on equal footing under these rebuttable presumptions in order to assess the family circumstances, without being bound by the conclusive presump-

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 judgment of separation is entered by a court.

(b) 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 either of the following is true:

1. 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.

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

(c) 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 compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true:

1. With his consent, he is named as the child's father on the child's birth certificate.

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

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

(e) 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 subdivision shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

Id.

109. Id.
tion.  

Given its vague language and limited applicability, section 7611(d), which states that a man is presumed to be a child's father if he receives the child into his home, was criticized as an inadequate remedy for the unwed father's dwindling legal status. Prior to this statutory revision however, only the mother or her husband were permitted to admit rebuttal evidence, and unwed fathers were limited to attacking the constitutionality of the statute. Now, the unwed father may establish himself as a presumed father under section 7611(d). He may then directly dispute the conclusive presumption as an acknowledged, interested party by demonstrating that he has "openly held the child out as his own and has received the child into his home." This revision reflects the reasoning of the earlier Supreme Court holdings that a father and child have a constitutionally protected interest in protecting and maintaining their relationship.

111. These rebuttable presumptions previously pertained to unwed fathers who wanted to stay adoption proceedings. In re Adoption of Kelsey S., 823 P.2d 1216 (1992). A father who wants the right to consent to his child's adoption first must establish his status as a presumed father under one the five presumptions. CAL. CIV. CODE § 7017 (1990), replaced by CAL. FAM. CODE § 7660 (West 1994).
112. See Halpern, supra note 7, at 305. Halpern contends that the definition of a "presumed father" under this subsection subjects the father to the "whims of the child's mother". Arguably, the mother may intentionally prevent the father from seeing the child and in that way keep the father from meeting any relationship standard. Id. at 307.
113. CAL. EVID. CODE § 621 (West 1981)(current version at CAL. FAM. CODE § 7540 (West 1994)).
117. See Kisthardt, supra note 18, at 621. Professor Kisthardt, commenting on Justice Brennan's dissent in Michael H., stated: "Focusing on the relationship between Michael and Victoria, he [Brennan] concluded that previous Court holdings are clear; a biological link plus an established relationship gives rise to a
III. POST-MICHAEL H. CALIFORNIA CASE LAW: ACKNOWLEDGMENT OF THE UNWED FATHER-CHILD RELATIONSHIP BEFORE THE 1990 AMENDMENT

Within a year after the United States Supreme Court decided *Michael H. v. Gerald D.*,118 two California Courts of Appeal refused to apply the conclusive presumption of paternity.119 Though the *Michael H.* Court had just upheld the constitutionality of the presumption, these two courts granted paternity to the natural father. Because the statute did not provide any meaningful exceptions to the conclusive presumption and the Legislature had yet to amend the UPA, the courts devised ways around it in order to grant paternity to the man with the established relationship.120 The court decided *In re Guardianship of Ethan S.* based on the doctrine of equitable estoppel,121 while the court in *In re Melissa G.* refused to apply the presumption on constitutional grounds.122 Such case law laid the foundation for statutory change in favor of the unwed father who has a relationship with his child despite the mother's marriage to another man.

A. *IN RE MELISSA G.*123

In *In re Melissa G.*, a married woman gave birth to Melissa, whom she conceived with a man who was not her husband.124 Eight days after the birth, the married couple separated.125 The husband was named as the father on the birth certificate, and the child was named as a child of the marriage at dissolution.126 After the dissolution, the ex-husband visited

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120. *See supra* notes 121-22.
121. *Ethan S.*, 271 Cal. Rptr. at 129.
124. *Id.* at 895.
125. *Id.*
126. *Id.*
the other children of the marriage but not Melissa.\textsuperscript{127}

For four years, the mother was married to the natural father with whom she and the children lived as a family and during that time had another child with him.\textsuperscript{128} When the mother was hospitalized for alcohol abuse and the child’s natural father was arrested for spousal abuse, the children were taken into protective custody.\textsuperscript{129} The older children of the first marriage were placed with their father, the ex-husband.\textsuperscript{130} Melissa and a younger child of the second marriage were placed together in a foster home.\textsuperscript{131}

The ex-husband of the mother’s first marriage sought to assert the conclusive presumption of his paternity in order to obtain custody of Melissa.\textsuperscript{132} The trial court disregarded the blood tests that confirmed the second husband’s biological fatherhood,\textsuperscript{133} and ruled in favor of the ex-husband.\textsuperscript{134} The court found a conclusive presumption under section 7540 and held that the first husband was the child’s father as a matter of law.\textsuperscript{135}

The California Court of Appeal overturned the trial court’s application of the presumption of paternity.\textsuperscript{136} The court relied in part on \textit{Michael H.}, which recognized a natural father’s constitutionally protected interest in a situation where no marital union existed at the time of disposition.\textsuperscript{137} Here, be-

\begin{itemize}
\item \textsuperscript{127} Id.
\item \textsuperscript{128} \textit{Melissa G.}, 261 Cal. Rptr. at 895.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} \textit{Melissa G.}, 261 Cal. Rptr. at 895. The blood test results showed 99.1 percent probability that the second husband was the child’s father. \textit{Id.}
\item \textsuperscript{134} \textit{Id.} The first husband contended that application of the conclusive presumption precluded consideration of rebuttal evidence such as the blood test results. \textit{Id.}
\item \textsuperscript{135} \textit{Id.} The trial court based its reasoning on Michelle W. v. Ronald W., 703 P.2d 88 (1985), and Michael H. v. Gerald D., 491 U.S. 110 (1989), finding that because the mother and husband were married and cohabiting at the time of conception, they were presumptively the parents of the child. \textit{Id.}
\item \textsuperscript{136} \textit{Id.} at 898. The Court of Appeal found that the underlying purpose of the statute would not be served by depriving the child of her relationship with her sister in order to place her with a father she with whom she has no relationship. \textit{Id.}
\item \textsuperscript{137} \textit{Id.} at 897. "The Supreme Court’s affirmance in \textit{Michael H.} was limited to
cause the initial family unit no longer existed and only lasted eight days after the child's conception, the state had no interest in protecting it.138 The *Melissa G.* court also found that the first husband had not established any substantial relationship with the child.139 Societal interests were better served because the natural father had assumed the primary paternal role for the four years of the child's life.140

By focusing on a prior line of similar cases preceding *Michael H.*, the *Melissa G.* court found that precedent protected fathers who had actively established substantial relationships with their children and voluntarily provided emotional and financial support.141 The *Melissa G.* court applied the holdings which emphasized the importance of protecting and encouraging substantial relationships whether it be the husband's or the unwed father's relationship.142

The *Melissa G.* court employed a balancing of interests to decide whether to remove the child from the foster home where she was placed with her closest family relation, her sister.143 Because there was no marital union to protect and both established familial relationships were outside the non-existent marriage, the facts weighed against applying the conclusive presumption.144 The *Melissa G.* court held that the state and private interests in protecting the child's relationships con-

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138. *Melissa G.*, 261 Cal. Rptr. at 898. The court compared the extant marriage in *Michael H.* with this case where the marriage dissolved eight days after the child's birth and concluded: "[t]he 'categorical preference' for an extant marital union which Justice Scalia recognized as being expressed by the statute thus has no application to this case." Id.

139. Id.

140. Id.


142. 261 Cal. Rptr. at 898.


144. Id. at 898.
controlled. 145 The underlying purpose of the presumption would not be served by presuming the first husband to be the father, even though the older children already lived with him and the natural father was in prison, because that would deprive the child of her most substantial relationship. 146

The Melissa G. court looked beyond the mother's marriage at the time of conception, and gave more weight to the established parent-child relationship between Melissa and her natural father. 147 The court refused to create family relationships for abstract legal purposes, 148 though it had protected parties' private interests in preserving established family relationships. 149 As unwed fathers in California fought against the conclusive presumption of the husband's paternity for their parental rights, Melissa G. was a step toward satisfaction for those fathers who have a relationship warranting special protection from the law.

B. IN RE GUARDIANSHIP OF ETHAN S. 150

In In re Ethan S., the mother conceived her child during a weekend extramarital encounter. 151 Wayne, the natural father was always known by the child to be the father; 152 the child called him "dad" and called his mother's husband by his first name. 153 When the mother divorced her husband, she moved to Australia and left the child in California. 154 The child lived with the ex-husband, during which time Wayne

145. Id.
146. Id.
147. Id. at 898. The court found a way around the presumption using the Michael H. opinion, which stated that the classification and the policy it serves must fit in order to apply the presumption. Id.
148. See Caban v. Mohammed, 441 U.S. 380, 397 (1979). The United States Supreme Court has repeatedly held the view that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Id.
151. Id. at 123.
152. Id.
153. Id.
154. Id.
maintained consistent contact, and the ex-husband represented that Wayne was the child's father. 156

Four years later, the child moved in with Wayne, the natural father, attended elementary school, and began to develop a strong bond with Wayne and the paternal grandparents. 156 During this time, Wayne established himself as the child's legal guardian. 157 After the ex-husband attempted to abduct the child from his classroom, the natural father sought sole custody of the child. 158 In his answer to the natural father's custody action, the ex-husband asserted the conclusive presumption of his own paternity on the grounds that he and the child's mother were married and cohabiting at the time of the child's conception. 159 Upon a recommendation from the child's psychotherapist, 160 the lower court denied the ex-husband any parental rights and granted the natural father and the grandparents joint custody. 161

The California Court of Appeal refused to apply the conclusive presumption of section 7540 and affirmed the lower court's grant of summary judgment for the natural father. 162 Rather than decide the case on constitutional grounds, the Ethan S. court based its decision on equitable estoppel. 163 It held that because the ex-husband permitted and encouraged the natural father to establish a relationship with the child and neglected to do so himself in any meaningful way, he was

155. Ethan S., 271 Cal. Rptr. at 123.
156. Id. at 124.
157. Id.
158. Id.
159. Id.
160. Ethan S., 271 Cal. Rptr. at 125. Ethan's psychotherapist found that he had formed strong bonds both with his natural father and his grandparents. He did not believe that his mother's ex-husband was his father and resented that the ex-husband's attempts to intrude on his life with his father's family. Id.
161. Id. at 125, 126. The court concluded that the child's best interests would be served with fewer disruptions in his home life. Id. at 125.
162. Id. at 129.
163. Id. California Evidence Code section 623 states: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Id.
estopped from asserting rights under the conclusive presumption of section 7540.164

During the time that the child lived with the natural father, he formed substantial bonds with the natural father and his parents.165 The child understood that the natural father was his true father and that his half siblings were the ex-husband's children.166 The ex-husband had never asserted his paternity and had expressly acquiesced to the natural father's paternity.167 The ex-husband told the child that the natural father was his father, and so, he was estopped from claiming otherwise.168

By estopping the husband from asserting his paternity, the Ethan S. court effectively protected the existing father-child relationship, making certain that the child's life would not be disrupted any further. The Ethan S. court recognized that preserving the developed parent-child relationship was best for the child and paramount to any outside claims.169 In order to fulfill the underlying purpose of the conclusive presumption, the Ethan S. court refused to apply section 7540.170 This decision represents a continuing trend in the California courts to set aside the conclusive presumption of paternity when enforcing the presumption displaces a child's established relationship with her father.171

164. Id. at 129.
165. Ethan S., 271 Cal. Rptr. at 130. The court states: "Ethan relied on that representation, building a life-long relationship with Wayne [the natural father] as his natural father and living with Wayne on that understanding, developing parent-like attachments with the 'grandparents' who stepped in when the ailing Wayne tragically died." Id.
166. Id.
167. Id. "We see no reason why estoppel should not apply in the more unusual case, as here, where the man tells the child he is not the father and that another man is." Id.
168. Id.
169. Id.
170. Ethan S., 271 Cal. Rptr. at 130. "In this case, there is no policy risk that applying the doctrine [of estoppel] will leave the child fatherless or unsupported. Also, if we view the cases cited above as justified by the policy of preserving existing father-child relationships, the same policy is served by an estoppel here." Id.
171. See supra parts III-IV for complete discussion.
IV. CALIFORNIA CASE LAW SINCE THE 1990 AMENDMENT: THE UNWED FATHER'S OPPORTUNITY TO REBUT THE CONCLUSIVE PRESUMPTION OF THE HUSBAND'S PATERNITY

Two recent California Court of Appeal decisions, *Comino v. Kelly*\(^{172}\) and *Steven W. v. Matthew S.*,\(^{173}\) represent a significant change in the unwed father's ability to challenge the conclusive presumption of paternity. These courts granted the unwed fathers paternity not because application of the statute under certain conditions was unconstitutional, but because the newly-enacted father-child relationship exception to section 7540 allows the unwed father to challenge the husband directly.\(^{174}\) Once the unwed father was able to demonstrate that he indeed had a meaningful relationship with the child, the courts did not automatically favor the husband.\(^{175}\) Rather, the courts treated the husband's presumed paternity as a rebuttable presumption, placing the unwed father on comparable footing.\(^{176}\) In effect, the father-child relationship, rather than the marital situation of the mother, became the primary factor in the paternity determination.

A. *COMINO V. KELLY*\(^{177}\)

In *Comino v. Kelly*, the mother and an acquaintance married in order to take advantage of military benefits which were only available to married couples.\(^{178}\) Aside from their marital status, the two were essentially roommates and never engaged in any sexual relations.\(^{179}\) During the marriage, the mother had a sexual relationship with another man, Paul, and became pregnant.\(^{180}\) The mother then moved in with Paul, and for two and a half years Paul assumed the role of the child's fa-

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172. 30 Cal. Rptr. 2d 728 (Cal. Ct. App. 4 Dist. 1994).
174. 30 Cal. Rptr. 2d at 728; 39 Cal. Rptr. 2d at 535.
175. Id.
176. Id.
177. 30 Cal. Rptr. 2d 728 (Cal. Ct. App. 4 Dist. 1994).
178. Id. at 729.
179. Id.
180. Id.
When the mother moved back in with her husband and threatened to restrict Paul’s visitation, Paul initiated a paternity action to establish his custodial rights. He was granted temporary joint legal and physical custody, with physical custody 50 percent of the time.

On appeal, the mother attempted to prevent the father from seeing his child by arguing that the court erred in not applying the conclusive presumption of paternity in favor of her husband. She maintained that she and her husband were cohabiting at the time of conception and therefore, pursuant to section 7540, her husband was the presumed father. She also argued that Paul was estopped from establishing his paternity because “he failed to carry his burden of establishing a biological link with [the child].” The husband joined the paternity suit, however, to deny any relationship with the child, legal or otherwise, and thus, clarified that the natural father was the appropriate choice.

1. The Conclusive Presumption Of The Husband’s Paternity

The California Court of Appeal affirmed the trial court’s refusal to apply the conclusive presumption of paternity to a situation where the marriage was “one in name only,... [where the child] never lived in a family unit with [his mother and her husband],” and where the unwed father held out the child as his own and received the child into his home for the child’s entire life.

The Comino court relied on an earlier California case which held that the courts “have refused to apply [the conclu-
sive presumption of former section 621] when the underlying policies are not furthered.”191 When deciding whether or not to apply the conclusive presumption, the Comino court held that the underlying purposes of the presumption192 would not be furthered if the presumption were applied in this case.193

First, the marriage was one of convenience and was therefore not deserving of the protection afforded by the presumption.194 There was no family unit to preserve and the integrity of the marriage was not jeopardized.195 Second, the societal interest in the child having a father was furthered by the natural, active father having custody.196 The husband showed no interest in taking that role, and in fact denied his paternity in his answer to the natural father’s complaint.197 Third, the state’s interest in securing an individual source of child support was satisfied by granting custody to the natural father who was fighting to take on parental responsibilities.198 Private and state interests in protecting the child’s welfare and financial well-being were satisfied by the unwed father, who voluntarily assumed a very active role in raising the child.199

In Comino, the marriage resembled a business arrangement more than an intimate relationship.200 To favor this marriage over the father-child relationship would “[lead] to an absurd result that defies reason and common sense. To apply the [presumption] is to rely upon a fiction to establish a legal fact which we know to be untrue, in order to protect policies which in this case do not exist.”201

191. Comino, 30 Cal. Rptr. 2d at 730.
192. Id. at 731. The court relied on Leslie B. which delineated the established policies underlying the presumption as follows: “Traditionally, it was stated that the presumption was designed [1] to preserve the integrity of the family unit, [2] protect children from the legal and social stigma of illegitimacy, and [3] promote individual rather than state responsibility for child support.” Id.
193. Id. at 731.
194. Id. at 729, 731.
195. Id. at 731.
196. Comino, 30 Cal. Rptr. 2d at 731.
197. Id.
198. Id.
199. Id.
200. Comino, 30 Cal. Rptr. 2d at 729.
201. Id.
2. The Presumption Of The Unwed Father's Paternity

In the second part of the holding, the Comino court further held that the natural father was the presumed father under Family Code section 7611(d), which provides that a man who receives the child into his home and openly holds the child out as his own is presumed to be the child's father. This decision marked the first time that a California court employed this rebuttable presumption since the change in the statutory language of the conclusive presumption. Now, without mounting a constitutional attack, this father could obtain legal rights to his relationship with his child.

Upon examination of the nature, length, and quality of the father-child relationship, the Comino court determined that the relationship was substantial enough to qualify the father as a presumed father. The Comino court found that the natural father deserved recognition because he had assumed an active and caring paternal role in the child's life for three years. This represents a significant advance from Michael H., where the Court denied an unwed father, who had a similarly substantial relationship, any constitutional protection when the mother was married to and living with another man.

In Comino, despite the mother's assertion of the conclusive presumption, the unwed father had a right as the presumed father to fight for obtaining parental rights. The Comino court recognized and validated the unwed father-child relationship. This decision laid the groundwork, using Family Code

203. Id.
205. Comino, 30 Cal. Rptr. 2d at 732.
206. Id. "[T]here was uncontradicted evidence that [the natural father] received [the child] into his home, lived with him, held him out as his own and supported him for nearly two-and-a-half years." Id.
207. Michael H., 491 U.S. at 117.
208. Comino, 30 Cal. Rptr. 2d at 731. The court upheld the trial court's order that Comino "pay child support to Stephanie, and continued joint legal and physical custody." Id.
209. Id. at 731. "To the extent there is a recognizable societal concern for Josh-
section 7611(d), for any future unwed father who must challenge the conclusive presumption of paternity in order to preserve his father-child relationship.210

B. STEVEN W. v. MATHEW S.211

In Steven W. v. Matthew S., Steven W., the mother's boyfriend was led to believe that the child was his, and held the child out as his own for three years.212 While they were living together, the mother told Steven W. that she had divorced her husband, Matthew S.213 Before they obtained a divorce, the mother and her husband conceived a child while away on a clandestine weekend trip.214 For three years, the mother and Steven W. raised the child as a child of their relationship.215 Steven W. was named as the father on school records and the birth certificate, and the child was given his surname.216 When Steven W. discovered that the mother had deceived him about her marital situation, he moved out and initiated a paternity suit.217

The lower court refused to apply section 7540 even though the mother's boyfriend was asserting paternity, and was neither the biological father nor the mother's husband.218 Instead, the lower court found that both men were presumed fathers of the child; the husband under former Evidence Code section 621,219 and Steven W. under former Civil Code section 7004(a)(4).220

ua to have a father, that concern is served by avoiding the presumption that would prevent Joshua from enjoying a parental relationship with the only man he has ever known as a father." Id.

212. Id. at 539.
213. Id. at 536.
214. Id.
215. Steven W., 39 Cal. Rptr. 2d at 536-37. The unwed father and the mother bought a home, lived together and cared for the child. The unwed father was directly involved with the child's care. Id.
216. Id. at 537.
217. Id.
218. Id. at 539.
219. Id. at 538; CAL. EVID. CODE § 621 (1990), replaced by CAL. FAM. CODE § 7540 (West 1994).
220. Steven W., 39 Cal. Rptr. 2d at 539; CAL. CIV. CODE § 7004(a)(4) (1992),
1. The Conclusive Presumption Of The Husband’s Paternity

On appeal, the Steven W. court held that the trial court’s application of the conclusive presumption was based on an overly broad interpretation of the element of cohabiting. In California, cohabiting is strictly defined: “And by cohabitation is not meant simply the gratification of the sexual passion, but to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also.” The Steven W. court ruled that the mother’s weekend tryst with her husband failed to fulfill this element of the presumption, and held that the trial court erred in applying the conclusive presumption on this basis.

2. The Presumption Of The Unwed Father’s Paternity

Under California Civil Code section 7004(a)(4), Stephen was presumed to be the child’s father because he had received the child into his home and openly held out the child as his own, and the husband was also presumed to be the child’s father under 7004(a)(1). The Steven W. court upheld the lower court’s decision that Steven W.’s established relationship was controlling regardless of the husband’s presumptive status under the conclusive presumption.

California Family Code section 7612 provides that, when a conflict arises between the presumption of the husband’s paternity

replaced by CAL. FAM. CODE § 7611(d) (West 1994).
221. Steven W., 39 Cal. Rptr. 2d at 538.
223. Steven W., 39 Cal. Rptr. 2d at 538; CAL. CIV. CODE § 7004(a)(4) (1992), replaced by CAL. FAM. CODE § 7611(d) (West 1994).
224. Steven W., 39 Cal. Rptr. 2d at 539; CAL. CIV. CODE § 7004(a)(4) (1992), replaced by CAL. FAM. CODE § 7611(a) (West 1994).
225. Steven W., 39 Cal. Rptr. 2d at 539.
226. CAL. CIV. CODE § 7004(a) (1992), replaced by CAL. FAM. CODE § 7611 (West 1994).
227. CAL. CIV. CODE § 7004(b) (1992), replaced by CAL. FAM. CODE § 7612 (West 1994). Section 7004(b) provided in pertinent part: “If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” Id.
228. Steven W., 39 Cal. Rptr. 2d at 539.
nity and the presumption of another man's paternity, "the presumption which on the facts is founded on the weightier consideration of policy and logic controls." The court looked to the established relationship as the deciding factor. Steven assumed the role of the child's father from the child's birth; he cared for the child and participated in important decision making regarding the child's health, education, and care, and was known to others as the child's father. Steven's level of parental involvement was sharply contrasted with the mother's husband, who did not see the child until the child was almost three months old. Steven continued to share custody and support responsibilities after he moved out and the mother was living with her husband. A man who asserts his parental rights and assumes those responsibilities is deemed a more deserving parent regardless of the couple's marital status.

This holding validated the trial court's finding that the more developed relationship was the critical consideration and that this relationship controlled over the husband's legal status as a presumed father under section 7540. The unwed father was not the biological father, nor was he the mother's husband, yet the court granted him parental rights. Here, the Steven W. court expanded the application of this rebuttable

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229. CAL. CIV. CODE § 7004(b) (1992), replaced by CAL. FAM. CODE § 7612 (West 1994).
230. Steven W., 39 Cal. Rptr. 2d at 539. The court cited many cases in which the courts upheld the existing parent-child relationships on the grounds that: "(t)he state has an 'interest in preserving and protecting the developed parent-child . . . relationships which give young children social and emotional strength and stability.'" (citation omitted) Id. See, e.g., Susan H. v. Jack S., 37 Cal. Rptr. 2d 120 (1994); Michelle W. v. Ronald W., 703 P.2d 88 (1985); Comino v. Kelly, 30 Cal. Rptr. 2d 728 (1994).
231. Steven W., 39 Cal. Rptr. 2d at 539.
232. Id. at 537.
233. Id.
234. Id.; See, e.g., Lehr v. Robertson, 463 U.S. 248, 262 (1983). The Lehr Court held that: "(i)f the father] grasps the opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." Id. at 262.
235. Steven W., 39 Cal. Rptr. 2d at 538-39.
236. Id.
presumption to a new level, because, unlike *Comino*, this mar-
riage was authentic.\(^{237}\)

The *Steven W.* court concluded that "[g]iven the strong
social policy in favor of preserving the on-going father-child
relationship, the trial court did not err in finding that the
conflict between the presumptions weighed in favor of Ste­
ven.\(^{238}\) The *Steven W.* court allowed the unwed father's pre-
sumption of paternity to preempt the presumption of the
husband’s paternity due to the weight attributed to the parent-
child relationship while balancing competing interests.\(^{239}\)

The *Steven W.* court narrowly construed the conclusive
presumption while giving the father-child relationship greater
weight when employing the section 7611(d) exception.\(^{240}\) In
the future, men with developed parental relationships may be
protected more often when their interests conflict with the
mother’s husband’s interest in that relationship. As evidenced
by these cases, the competing rebuttable presumptions protect
the stability of a child’s surroundings more effectively than the
conclusive presumption in that they consider the relationship
between the parent and the child instead of the relationship
between the parents. In contrast, section 7540 is based solely
on the relationship between the parents. Thus, the applicabili-
ty of section 7540 has been undermined so as to render it vir-
tually ineffective. Therefore, it should be repealed.

V. RECOMMENDATION

Critics of the conclusive presumption of paternity argue
that it jeopardizes a child’s need for continuity in her parental
relationships.\(^{241}\) Studies show that because a child grows at-
tached to her parents at a very young age, if deprived of that

\(^{237}\) *Id.* at 536.

\(^{238}\) *Id.*

\(^{239}\) *Id.* "The courts have repeatedly held, in applying paternity presumptions,
that the extant parent-child relationship is to be preserved at the cost of biological
ties. *Id.*

\(^{240}\) See *supra* notes 210-39 and accompanying discussion.

\(^{241}\) See Jill Handley Anderson, *The Functioning Father: A Unified Approach to
Paternity Determinations*, 30 J. FAM. L. 847, 863 (1991); Kisthardt, *supra* note 18,
at 585.
relationship, the child is likely to experience problems in her emotional and intellectual development. Familial relationships in these paternity determinations are of paramount importance, therefore the parents’ marital status should be given less weight. Unlike the conclusive presumption, a legal concept of “family” centered around the established parent-child relationship would accommodate contemporary, alternative familial circumstances, and more effectively stabilize the child’s home environment and her guardian relationships in the tumultuous setting of a custody dispute.

Both Comino v. Kelly and Steven W. v. Matthew S. represent a continued trend in the California courts to abrogate the conclusive presumption of paternity. Now, with the addition of the exceptions in section 7611, unwed fathers who have established relationships with their children have an opportunity to rebut the presumption of the mother’s husband’s paternity. These two recent cases bolster this power to challenge the presumption of paternity both by acknowledging the importance of a developed parent-child relationship and by demonstrating how the section 7611(d) rebuttable presumption can operate to overcome the section 7540 conclusive presumption. The unwed father no longer needs to wage a constitu-

242. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD chs. 2-3 (1973) (The authors proposed that continuity in a child’s relationships, environment, and surroundings is essential for the child’s intellectual, emotional, physical, social, and moral growth. The authors emphasized how the importance of these elements is underestimated by adults.); RUTH S. PARRY ET AL., CUSTODY DISPUTES: EVALUATION AND INTERVENTION 67 (1986) (Continuity of care for the children found to have influenced at least 60% of all custody recommendations in control group.).

243. Anderson, supra note 241, at 872. “Clinging to nostalgic notions of the nuclear family or rigid presumptions of parenthood based on status facilitates the displacement of functioning fathers, resulting in harm to children.” Id.

244. See Kisthardt, supra note 18, at 632. “First, as our society has become more pluralistic, it has become increasingly more difficult for law to accommodate diverse views about family morals. It is therefore less acceptable for the state to expect conformity with any particular family pattern as ideal.” Id. See also, Traci Dallas, Note, Rebutting the Marital Presumption: A Developed Relationship Test, 88 COLUM. L. REV. 369, 389 (1988).


246. E.g., Comino, 30 Cal. Rptr. 2d 728; Steven W., 39 Cal. Rptr. 2d 535.

247. See supra part III for complete discussion.
tional attack to be heard on the importance of his relationship with his child.

While the statutory amendments are encouraging for the unwed father, until the conclusive presumption is repealed, unwed fathers remain at an unfair, unfounded disadvantage to the mother’s husband. Due to the changing face of the family and the absence of the stigma of illegitimacy, California courts are less apt to find the conclusive presumption of paternity. Section 7540 has become a procedural hindrance to ensuring a child’s emotional stability inasmuch as it still runs the risk of depriving a child of the only father he or she knows.

VI. CONCLUSION

The courts and the social scientists agree that paternity determinations which focus on the child’s existing relationships more often benefit the child. In stark contrast, the conclusive presumption of section 7540 maintains a technical definition of paternity based on the outmoded assumption that any marital family is better than none. Contemporary families warrant contemporary legal standards. Thus, the conclusive presumption of paternity of California Family Code section 7540 should be repealed.

Batya F. Smernoff

248. U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 79 tbl. 97, 80 tbl. 101 (114th ed. 1994). In 1991, 28 percent of births in the nation and 33.3 percent of the births in California were to unwed mothers. Id.

249. CAL. FAM. CODE § 7602 (West 1994). Section 7602 states: “The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.” Id.


251. See supra part II.C.

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