

**Dependency Determination of Parentage: What Were They Thinking?!?!?!?  
COURSE OUTLINE**

Hon. Dylan M. Sullivan, El Dorado County Superior Court  
Hon. Shawna M. Schwarz, Santa Clara County Superior Court

**Agenda:**

- Parentage actions in different courts
- Parentage in Child Support Court
- Dependency Court
- Categories of fathers/parents
- Establishing and rebutting parentage
- Gender neutral
- Multiple presumptions
- Hypo

**Parentage actions in different courts**

- Family Law Court
  - UPA Action – FC §§ 7610-7614, 7630-7650
  - UIFSA Action – FC §§5700.101 – 5700.905
  - DCSS Action – FC §§ 17200, 17404, 17410, 17414
- Dependency Court – WIC §316.2 using Family Law Code
- Domestic Violence Prevention Act Proceedings – FC §6200 *et seq.*
- Probate – anytime – Probate Code §6453 for intestate succession

**Parentage in Child Support Court**

- Hold people responsible for their reproduction costs. Title IV-D
- Eliminate discrimination of “illegitimate” children (child born outside of marriage). Gomez v. Perez (1973) 409 U.S. 535.
- Preserve child-parent relationships

**Dependency Court**

- “The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a proscribed period of time.”
- Dependency court is about:
  - Child abuse and neglect
  - Returning kids to parents – ie, reunification
  - If no return, permanency
- Mandate re paternity: inquire and establish
  - WIC 316.2: The court shall inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers.

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- CA Rule of Court 5.635: The juvenile court has a duty to inquire, and if not otherwise determined, to attempt to determine the parentage of each child who is the subject of a petition....
- WIC mandates; parentage law in Family Code.
- Rights in Dependency Court: What parents are entitled to in dependency is determined by what kind of parentage they have....
  - Notice
  - Attend hearings
  - Appointed counsel
  - Reports
  - Custody
  - Visitation
  - ICWA applicability
  - Placement
  - Reunification
- Reunification
  - WIC 361.5(a): Whenever child is removed from custody of parent or guardian, court shall order child welfare services for mother and statutorily presumed father OR guardian (Probate guardian).
  - Presumed fathers are entitled to reunification
  - Services shall be ordered to mom and presumed father or to Probate Ct legal guardians.
  - Juvenile Court **may** order services for the biological father if the court determines that the services will benefit the child.
  - Reunification: mandatory for presumed father.
  - Reunification: discretionary to biological father if in best interest of child.
  - “Presumed fatherhood, for purposes of dependency proceedings, denotes one who ‘promptly comes forward and demonstrates a full commitment to ... paternal responsibilities– emotional, financial and otherwise.’” (In re Jerry P.)

### Categories of fathers/parents

- In dependency case law, fathers are divided into four categories: alleged, natural (or biological), presumed, and de facto. (We’re not going to talk about de facto.)
  - Alleged
  - Natural / biological father
    - Declared / adjudicated
  - Presumed: conclusive and rebuttable
    - §7540 marriage (conclusive)
    - §7610(a) mother
    - §7610(b) adoptive parent
    - §7570 VDOP
    - Kelsey S.
    - §7611 presumptions

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- Marriage
- §7611(d) holding out
- Presumed is the gold standard. “Presumed father status ranks the highest. “ (In re Jerry P. (2002) 95 Cal.App.4th 793, 801).
- Rights fathers get in dependency flow from what type of father he is....
- Note about biology:
  - Paternity is not about genetics. Father in dependency doesn’t have to be bio father.
    - Alleged – don’t know if he’s bio
    - Natural/bio – usually the actual biological father
    - Declared/adjudicated – may or may not be biological father
    - Presumed – may or may not be biological father
- LOTS of case law about parentage – most of it around §7611(d)

**Establishing and rebutting parentage: §7540 marital presumption (conclusive)**

- “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.
  - Married at time of conception
  - Cohabiting at time of conception
    - Not just weekends (Brian C. v. Ginger K. (2000) 77 CA 4th 1198)
    - Husband neither impotent nor sterile
- Conclusive presumption
- Unless negative DNA test
- Rebutting:
  - Requested w/in two years by husband, child, mother, or presumed father
  - No rebutting where artificial insemination
  - Technically, it’s rebuttable (per In re Jesusa V., (2004) 32 Cal.4th 588)

**Establishing and rebutting parentage: §7611(a)(b)(c) marital presumptions (rebuttable)**

- 7611 (a)-(c): Marriage (or attempted) before, during & after
- 7611 (d): receive into home + holding out as own
- Rebut 7611 Presumptions:
  - Clear and Convincing Evidence
  - A judgment establishing paternity, including POP declarations

**Establishing and rebutting parentage: VDOP / POP Declarations (§7570 et seq – Paternity Opportunity Program)**

- General info:
  - Program authorized by law 1/1/95, started late 1996....
  - Allows parents to sign a Voluntary Declaration of Paternity (VDOP) or POP Dec.

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- Signed at hospital, after birth of child – usually. Can be signed other times, places.
- Signed by **unmarried** woman & man
  - It says the guy is the biological father, signed under penalty of perjury....
  - Regarding marital status:
    - Doesn't matter if man is married to other woman – highlights differences in biology regarding creation of children. Clear who mom is, have to figure out who dad is.
    - If mom is married, her husband is father, so no need to sign VDOP to establish paternity.
- Liam L. says VDOP = presumed (In re Liam L. (2000) 84 Cal.App.4th 739)
- But Jovanni B. (2013) – not entitled to presumed father status merely because he signed VDOP.
- Other state's affidavit counts (In re Mary G. (2007) 151 Cal.App.4th 184) – full faith & credit.
- All kids now before dependency court were born when POP was in effect.
- State has database – internet-based
- Has same effect as judgment. § FC § 7573
- Can be basis for establishment of order for child custody, support or visitation
- Voluntary Declaration + Birth Certificate. FC §7571
- Challenging VDOPs / POP Decs
  - Rescission:
    - w/n 60days, by attesting mother or father,
    - **except** if FL action where rescinding party is a party to FL action
  - Voidable:
    - mother married
  - Setting aside:
    - Petition for Genetic testing – where POP father isn't genetic father, as long as BIOC w/factors. FL 7575(b), 7630
    - CCP 473 (mistake, inadvertence or excusable neglect)
    - per FC §7612(e) by presumed parent; 2 year S/L (many factors – read statute)
  - Invalid Declaration, if:
    - Marriage presumptions apply (FL 7540 & 7611(a)-(c)) or
    - Signer is a Sperm Donor per FL 7613(b)
- Judgment & 7611 presumptions
  - POP declarations – putative 7611(d) parent only two years to bring action from signing of POP per FC 7612(e)
  - In re Levi H. – enforceable POP declarations controls irrespective of the disparities
  - Kevin Q v. Lauren W. (2009) 174 CA 4<sup>th</sup> 1557 – POP declaration is not a mere presumption or rebuttal to be weighed against the parentage presumptions
- Setting Aside Paternity Judgments (except marital dissolution actions) – Fam Code § 7645 – special procedure if genetic testing indicates judgment father isn't Bio father
  - Includes WIC 300/600 Paternity judgments
  - Statute of Limitations;

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- 2 yrs from time of father knew of judgment, or should have known
  - Court shall not order genetic testing if 2 yr statute ran
- Voluntary Declarations of Paternity – birth of Child
- Standing to bring Petition: mother, child, father with Paternity judgment
- Court has discretion to deny based on FL 7548 factors:
  - Age of child
  - Time since judgment
  - Length and quality of relationship between child & father
  - Has father requested relationship with child continue?
  - Benefit or detriment for child to establish relationship with Bio
  - Has judgment father made it more difficult to obtain \$ support from bio

### Gender neutral

- In re Nicolas H. (2002) 28 CA 4<sup>th</sup> 56 - Biology is not necessarily determinative (if result would leave child without a second parent)
- FC §7650 - to be applied as “practicable” to establish mother-child relationships
- Superior Court v. Elisa B (2005) 37 CA 4<sup>th</sup> 108 - 7611(d) non-bio mother required to support child because of the 7611(d) presumption (action brought by DCSS after bio mom went on ADCF to support children when split with non-bio mom)
  - Since Elisa B., the law recognizes marriage of same-sex couples making the 7611(a)-(c) applicable
  - Domestic Partnerships also provide presumed parent protections for same-sex couples per Fam C 297.5(d)

### Multiple presumptions – Fam Code §7612....

- **7540 marital presumption** trumps all (usually). Conclusive presumption. 7541 describes how to challenge. Also case law attenuates this in limited circumstances. Like if wife has affair, not considered “intact marriage” or where wife allows bio father to have relationship with child.
- **VDOP vs 7611:** weightier considerations of policy and logic if filed w/in two years of birth.
  - Per 7612(d), where man who qualifies as 7611 dad has filed petition pursuant to 7630 to set aside VDOP within two years of its execution, court may set aside VDOP taking into account:
    - validity of VDOP
    - best interests of child per factors in 7575(b)
    - best interests of child based upon nature, duration, quality of petitioning parties relationship with child and benefit/detriment of continuing that relationship
- **Competing 7610 & 7611:** Per 7612 (b) If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. Per 7612(d), the presumption under Section 7611 is rebutted by a judgment establishing paternity of the child by another man, unless court does 7612(c) (ie, finds more than two parents...)

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- **Judgment or POP prevails over 7611 presumption**
  - BUT: 7612(c)
  - Rare instances
  - Detriment to child if relationship doesn't continue
  - Seeks to maintain existing relationships, not create new relationships (or potential relationships, e.g. absent bio dad).
  - We will come back to the issue of more than two parents.
- Biology does not necessarily trump

**Fam Code §7612(b)**

- State interest in preserving/protecting a developed parent-child relationship outweighs party's private interest in establishing biological parenthood.
- Fam Code §7612(b) – where two or more § 7611 presumptions exist, the “weightier of logic and policy” determines which presumption succeeds
- Watch out for judgments & POP declarations
- And now: FC 7612(c) – allows for more than 2 parents!

**Fam Code §7612(c)**

- 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 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. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.
- Reserved for rare instances....

**Hypos**