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# The Unwed Father's Custody Claim in California: When Does The Parental Preference Doctrine Apply?

## I. INTRODUCTION

The number of nonmarital<sup>1</sup> births in America has increased dramatically during the second half of the twentieth century. In 1949, for example, approximately four percent of all children were born out of wedlock, while that figure today has exploded to nearly twenty-five percent.<sup>2</sup> In 1970, eight-tenths of one percent of all American families were headed by a parent who had never been married.<sup>3</sup> By 1986, that number had increased nine times to 7.3 percent.<sup>4</sup> Moreover, statistics suggest that this figure will continue to increase as nonmarital parenthood gains greater acceptance among America's adult population.<sup>5</sup>

Not surprisingly, this situation has created numerous social and legal issues which have challenged the legislatures and courts at both state and federal levels. The issue which this comment addresses concerns the fathers of these children and their treatment under the laws of California. Specifically, this comment will address California's treatment of the unwed father who seeks custody of his newborn child when the mother has chosen to relinquish the child and place it for adoption. In Part II, the historical treatment of unwed fathers under the common law will be discussed. Part III surveys the

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1. The negative connotations often associated with words like "bastard" and "illegitimate" have led to the use of "[m]ore euphonious terms" for more than twenty-five years. See *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 256, 190 N.E.2d 849, 856 (1963), *cert. denied*, 379 U.S. 945 (1964). Accordingly, the terms "nonmarital" and "out of wedlock" will be used in this comment when possible.

2. Krauthammer, *If It's Unhealthy Maybe We'll Stop*, Washington Post, Jan. 13, 1989, at A21. The total number of nonmarital births in 1965 was 291,000, and has increased to around 900,000 in 1989. Statuto, *Family Affair*, Spring 1989 POL'Y REV. 88. This increase has occurred in spite of the decrease in the total number of births by over 500,000 since 1960. Eberstadt, *Is Illegitimacy a Public-Health Hazard?*, 40 NAT'L REV. 36 (Dec. 30, 1988).

3. Williams & Williams, *Identifying Daddy*, 28 JUDGES JOURNAL 2, 2 (Summer 1989) [hereinafter *Identifying Daddy*].

4. *Id.*

5. For example, less than one-half of the total number of nonmarital births in 1973 were to adult women, while by 1986 that fraction had increased to more than two-thirds. Eberstadt, *supra* note 2, at 36.

constitutional rights<sup>6</sup> of unwed fathers, as set forth by the United States Supreme Court. Part IV will present the major cases and statutory developments which have led to the unwed father's present status in California. Part V will discuss the constitutional shortcomings of California's present statutory scheme, in light of the unwed father's rights to Due Process and Equal Protection under the laws. Finally, Part VI will present some suggestions for resolving these shortcomings.

## II. THE TREATMENT OF UNWED FATHERS AT COMMON LAW

Traditionally, the child born out of wedlock was considered by the law to be a non-person, often referred to as *filius nullius* ("the son of no one") or *filius populi* ("the son of the people").<sup>7</sup> As such, he or she had none of the legal rights normally created by a parent-child relationship, such as the right to be supported and the right of inheritance.<sup>8</sup> The parents of the nonmarital child were viewed with "righteous indignation," and had neither the right to custody nor the duty to support.<sup>9</sup> Such an approach, it was thought, discouraged nonmarital relations by socially stigmatizing both the child and the parents.<sup>10</sup>

Eventually, things began to change. First, the duty to support the nonmarital child was imposed upon the fathers, and the mothers were granted the legal right to custody.<sup>11</sup> Gradually, the father was given visitation rights, as well as custody rights to a child whom he had properly "legitimated."<sup>12</sup> The father's right to custody, however, is subject to the mother's right of custody, which is considered primary.<sup>13</sup>

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6. Under our present social, legal, and political structure, much emphasis is placed on the "rights" of specific individuals or groups in specific situations. Conflict arises, of course, when the exercise of one person's rights prohibits the exercise of another's. In the circumstances addressed here, for example, most of the conflict centers around the attempt to simultaneously protect the rights of the father, the mother, the child, and the adoptive parents. For a compelling discussion of how and why the law should de-emphasize "rights" in favor of "relationship and responsibility" in family matters, see Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988).

7. Note, *The Uniform Parentage Act: What it Will Mean for the Putative Father in California*, 28 HASTINGS L.J. 191, 192 (1976).

8. *Id.*

9. *Id.*

10. See Note, *Father of an Illegitimate Child—His Right to Be Heard*, 50 MINN. L. REV. 1071, 1072-73 (1966).

11. Note, *supra* note 7, at 193.

12. *Id.* Such acts of legitimation have generally included the marriage of the father and mother after the child's birth, and the father's act of receiving the child into his home and acknowledging the child as his own. *Id.* at 196. See also *infra* notes 36, 74 and accompanying text.

13. Note, *supra* note 7, at 193. At least two separate issues are involved when discussing the unwed father's right to custody. This comment addresses the issue of the father's custodial rights when the mother has chosen to relinquish her custodial rights

In sharp contrast to the common law's treatment of unwed parents is the long-recognized "Parental Preference Doctrine." Under this doctrine, "a court must award physical custody of a minor to a parent, if fit to exercise custody, as against a stranger."<sup>14</sup> Put another way, the best interest of a child requires "that it be raised by its parent unless the parent is disqualified by gross misconduct."<sup>15</sup> Although the doctrine is rooted in the belief that a parent's right to his child is like that of a property owner's right to his chattel,<sup>16</sup> the rationale behind its prominence today is that "a parent fit to exercise custody may have a better understanding of the best interests of his child than does the juvenile court."<sup>17</sup> The United States Supreme Court affirmed this doctrine in *Prince v. Massachusetts*,<sup>18</sup> when it stated that "[i]t is cardinal with us that the custody, care, and nurture of the child rest first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>19</sup> Despite the prevailing recognition of the importance of the parental preference doctrine, however, the unwed father—as a non-entity under the law—was not granted the benefit of the doctrine at common law.<sup>20</sup>

### III. THE CONSTITUTIONAL RIGHTS OF UNWED FATHERS: THE SUPREME COURT DECISIONS

The common law status of the unwed father who seeks legal recognition of his parental status has been changed dramatically as a result of four Supreme Court decisions.<sup>21</sup> The following brief

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through the adoption process. The issues presented when the unwed father seeks custody from the unwed mother who wants custody herself are beyond the scope of this comment.

14. *In re B.G.*, 11 Cal. 3d 679, 693-94, 523 P.2d 244, 254, 114 Cal. Rptr. 444, 454 (1974) (footnote omitted).

15. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 61-62 (1985). See also Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 322 (1984) ("If the Constitution has a place for any intrinsic human rights that are not explicitly mentioned in it, the natural parent's interest in maintaining a relationship with his or her child is one of those rights").

16. See *In re Campell*, 130 Cal. 380, 62 P. 613 (1900).

17. *In re B.G.*, 11 Cal. 3d at 694, 523 P.2d at 254, 114 Cal. Rptr. at 454.

18. 321 U.S. 158 (1944).

19. *Id.* at 166 (citation omitted).

20. See *supra* notes 9-13 and accompanying text.

21. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972).

descriptions<sup>22</sup> of these cases and their holdings present the constitutional rights of the unwed father as presently recognized by the Court.

#### A. Stanley v. Illinois

The first case, decided in 1972, was *Stanley v. Illinois*.<sup>23</sup> Peter and Joan Stanley had lived together intermittently for eighteen years, although they never married.<sup>24</sup> During this time, they had three children, each of whom Peter had acknowledged and held out to be his own. When Joan died, however, the State of Illinois instituted a dependency proceeding through which the children were placed with court-appointed guardians, after first being declared wards of the state.<sup>25</sup> Stanley was given neither notice of, nor the opportunity to be heard at this proceeding, because the Illinois law which required the state to consider the relationship of the child to his "parent" did not include unwed fathers in its definition of the word "parent."<sup>26</sup>

The Illinois Supreme Court upheld the constitutionality of the law,<sup>27</sup> but the United States Supreme Court reversed, holding that the denial of a hearing on Peter Stanley's fitness violated an unwed father's equal protection rights.<sup>28</sup> The Court announced that the private interest "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>29</sup> With this in mind, the Court rejected the state's contention that since most unwed fathers are unsuitable as parents, a presumption of their unfitness was justified.<sup>30</sup>

Although *Stanley* provided unwed fathers with the procedural protections of due process, and recognized that the unwed father's interest in his children is entitled to constitutional protection, there is much that the decision did not do. Because the proceeding in *Stanley* involved the issues of neglect and dependency, rather than the issues of custody or adoption, some commentators were disappointed that

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22. For a more extensive discussion of these cases, see Buchanan, *supra* note 15.

23. 405 U.S. 645 (1972). For a more extensive discussion of this particular case, see Note, *Constitutional Law—Stanley v. Illinois: New Rights for Putative Fathers*, 21 DE PAUL L. REV. 1036 (1972).

24. *Stanley*, 405 U.S. at 646.

25. *Id.*

26. *Id.* at 649-50. The State was required to prove "unfitness in fact" when a marital mother or father or an unwed mother was involved, but when only an unwed father was involved his unfitness was presumed at law.

27. *In re Stanley*, 45 Ill. 2d 132, 256 N.E.2d 814 (1970), *rev'd sub nom. Stanley v. Illinois*, 405 U.S. 645 (1972). The court considered the law rationally related to the purpose of the state's Juvenile Court Act. *Id.* at 134, 256 N.E. at 815.

28. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

29. *Id.* at 651. The Court also labeled Stanley's interest as "cognizable and substantial." *Id.* at 652.

30. *Id.* at 654-55.

many questions, especially in the context of an adoption, remained unanswered.<sup>31</sup>

### B. *Quilloin v. Walcott*

Six years after *Stanley*, the Court provided some answers in *Quilloin v. Walcott*.<sup>32</sup> Leon Quilloin and Ardell Walcott, who never married nor lived together, became parents of a child born in December, 1964. Three years later, the mother, who had always had sole custody of the child, married Randy Walcott, and together they raised the child.<sup>33</sup> Although Quilloin had visited the child and provided gifts and support on an irregular basis, he had never sought custody of the child or attempted to legitimate it.<sup>34</sup> In 1976, when the child was twelve years old, Randy Walcott sought to terminate Quilloin's paternal rights and adopt the child as his own. Quilloin received notice and an opportunity to be heard, but his objection to the adoption was overruled.<sup>35</sup>

In upholding the constitutionality of the Georgia court's decision, the Supreme Court placed great emphasis on the fact that for twelve years Quilloin had never had, nor sought custody, nor petitioned to have the child legitimated by court order.<sup>36</sup> Distinguishing *Stanley's* concern with the need for an actual showing of unfitness, the Court noted:

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31. See, e.g., Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975):

It is clear from these developments that the unmarried father has *some* rights when the mother gives the nonmarital child up for adoption. The problem of defining the scope of these rights remains. Is consent to adoption by the unmarried father required? If so and if he refuses to consent, is the adoption frustrated by his veto or his silence? If his consent is not required, does he have a right to notice of a pending adoption and a right to be heard? If there is a right to notice and hearing, how far does it go? Does it include the unknown father who cannot be identified? If the father appears and objects to the adoption but does not desire custody himself, may the adoption go forward? What should be the rule when the father desires custody, but is found to be incapable of caring for the child?

*Id.* at 55 (emphasis in original).

32. 434 U.S. 246 (1978).

33. *Id.* at 247.

34. *Id.* at 249, 251.

35. *Id.* at 250-51. Under Georgia law, an unwed father had no power to object to the adoption of his child unless he had legitimated the child by either (1) marrying the mother and acknowledging the child as his own, or (2) obtaining a court order declaring the child legitimate. *Id.* at 249.

36. *Id.* at 249, 256. The Court noted that Quilloin had never taken "any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.* at 256.

[T]his is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child."<sup>37</sup>

Thus, the Court found the Georgia statutes to be constitutional "as applied in this case."<sup>38</sup> Additionally, the Court set forth two important policies: "[T]he importance of preserving an existing family unit, and the requirement that there be a substantial relationship between the father and child as a basis for the father's assertion of full parental rights."<sup>39</sup>

### C. Caban v. Mohammed

This "substantial relationship" factor was considered important again the next year in *Caban v. Mohammed*.<sup>40</sup> Abdiel Caban and Maria Mohammed lived together unmarried from 1968 to 1973, during which time they had two children. Caban was named as the father on both children's birth certificates, acknowledged them as his children, and helped to support them financially.<sup>41</sup> When Mohammed left Caban and moved in with Kazim Mohammed, whom she married one month later, she took the children with her. After Caban refused to return the children from a period of visitation, the Mohammeds began custody proceedings and ultimately petitioned to adopt the children. Although Caban and his new wife cross-petitioned for adoption, the New York court granted Mohammed's petition and rejected Caban's on the grounds that New York law required only married parents or an unmarried mother to consent to an adoption.<sup>42</sup>

After the state courts affirmed the decision,<sup>43</sup> the Supreme Court reversed, holding by a one-vote margin that the right to block an adoption cannot be accorded to parents on the basis of gender alone.<sup>44</sup> New York's classification, Justice Powell wrote for the majority, "both excludes some loving fathers from full participation in the decision whether their children will be adopted, and, at the same time, enables some alienated mothers arbitrarily to cut off the pater-

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37. *Id.* at 255.

38. *Id.* at 256. It is clear that the Court's holding was limited to the facts before it.

39. Note, *The Grudging and Crabbed Approach to Due Process for the Unwed Father: Lehr v. Robertson*, 16 CONN. L. REV. 571, 578 (1984).

40. 441 U.S. 380 (1979).

41. *Id.* at 382.

42. *Id.* at 383-84.

43. See *In re David Andrew C.*, 56 App. Div. 2d 627, 391 N.Y.S. 846 (1977); *In re David A. C.*, 43 N.Y.2d 708, 372 N.E.2d 92 (1977).

44. *Caban*, 441 U.S. 380, 391, 393-94.

nal rights of fathers."<sup>45</sup> Clearly, however, Powell recognized that some distinctions could pass constitutional muster, for "[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."<sup>46</sup>

#### D. *Lehr v. Robertson*

The Court's most recent opinion came in 1983, six years after *Caban*. In *Lehr v. Robertson*<sup>47</sup> the Court returned to the issue of procedural due process presented in *Stanley*. The daughter of Jonathan Lehr and Lorraine Robertson was born November 9, 1976. Although the two had lived together until the time of the child's birth, Lehr never sought to marry Robertson, nor did he provide financial support for her or the child.<sup>48</sup> When the child was eight months old, Lorraine Robertson married Richard Robertson, and two years later they began adoption proceedings in the Family Court of Ulster County, New York.<sup>49</sup> One month after commencement of the proceedings, Lehr, who had not been notified of these proceedings, filed a petition in the Family Court of Westchester County, to establish paternity and gain visitation rights. The Westchester Court notified the Robertsons and the Ulster County Court of Lehr's petition. Despite its knowledge of the other proceedings, the Ulster County Court granted the Robertsons' adoption petition without providing notice to Lehr, because Lehr had failed to protect his interest by entering his

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45. *Id.* at 394. The Court found that the gender-based classification was not substantially related to the state's interests in providing adoptive homes to illegitimate children, nor was it appropriately based on "fundamental difference[s] between maternal and paternal relations." *Id.* at 388-91.

46. *Id.* at 392. Powell distinguished such a situation from the one presented in this case, "where the father has established a substantial relationship with the child and has admitted his paternity." *Id.* at 393 (footnote omitted). Justice Stevens, in his dissent, viewed the Court's holding as limited to cases "involving the adoption of an older child against the wishes of a natural father who previously has participated in the rearing of the child and who admits paternity." *Id.* at 409 (Stevens, J., dissenting) (emphasis in original). Thus, he expressed approval of a rule which would grant the unwed mother of a newborn child the exclusive right to consent to its adoption. *Id.* at 407. The majority, however, refused to express a view on such a rule. *Id.* at 392 n.11.

47. 463 U.S. 248 (1983). For a more extensive discussion of *Lehr*, see Note, Lehr v. Robertson: A Constricted View of the Rights of Putative Fathers, 4 PACE L. REV. 477 (1984); Note, Lehr v. Robertson: Unwed Fathers and Adoptions: How Much Process is Due?, 7 HARV. WOMEN'S L.J. 265 (1984).

48. *Lehr*, 463 U.S. at 251-52.

49. *Id.* at 250.

name in the state's "putative father registry."<sup>50</sup>

Lehr's petition to vacate the adoption order was denied by the Ulster County Court, and the state appellate courts affirmed.<sup>51</sup> The United States Supreme Court also affirmed, rejecting Lehr's claim that his due process and equal protection rights had been violated. As to the due process issue, the Court held that the difference between the developed relationship presented in *Stanley* and *Caban*, and the "potential" relationship presented in *Quilloin* and *Lehr*, was "both clear and significant."<sup>52</sup> Protection under the due process clause, the Court held, is provided when an unwed father exhibits a desire to commit to the child, not as a result of "the mere existence of a biological link."<sup>53</sup>

The Court similarly rejected the equal protection claim, holding that "[i]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."<sup>54</sup>

The dissenters, led by Justice White, attacked the holding as a "grudging and crabbed approach to due process."<sup>55</sup> It was illogical, White argued, to deny notice on the grounds that Lehr had failed to enter his name in the putative father registry, when he had made his

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50. *Id.* at 250-51. New York law required notice to be given to seven categories of unwed fathers:

- (a) any person adjudicated by a court in this state to be the father of the child;
- (b) any person adjudicated by a court of another state . . . to be the father of the child, when a certified copy of the court order has been filed with the putative father registry . . .;
- (c) any person who has timely filed [in the putative father registry] an unrevoked notice of intent to claim paternity of the child . . .;
- (d) any person who is recorded on the child's birth certificate as the child's father;
- (e) any person who is openly living with the child and the child's mother . . . and who is holding himself out to be the child's father;
- (f) any person who has been identified as the child's father by the mother in written, sworn statement; and
- (g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to [its surrender].
- (h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child . . . .

N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1988). See *Lehr*, 463 U.S. at 251 n.5. Lehr failed to qualify under any of these categories.

51. *Lehr*, 463 U.S. at 253-54.

52. *Id.* at 261.

53. *Id.* The Court further explained that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." His protection under the Constitution, however, is dependent on whether or not he "grasps that opportunity." *Id.* at 262.

54. *Id.* at 267-68 (footnotes omitted). Clearly, the Court placed great weight on the fact that in the two years of the child's life, Lehr had failed to establish a "custodial, personal, or financial relationship" with his daughter. *Id.*

55. *Id.* at 275 (White, J., dissenting).

interest clear by filing suit to establish paternity.<sup>56</sup> Furthermore, White noted that Lehr had not developed a substantial relationship with his daughter because Robertson had prevented him from doing so.<sup>57</sup> Due process should be accorded, White urged, since the state had provided that an unwed father's consent is required if he was "prevented from [developing the necessary relationship] by the person or authorized agency having lawful custody of the child."<sup>58</sup>

### *E. Summary of the Supreme Court Decisions*

Consideration of these Supreme Court cases makes it clear that the unwed father is no longer to be treated as a non-entity under the law. The Due Process and Equal Protection Clauses protect his parental right to develop and maintain a relationship with his children, contingent upon his willingness to "act as a father toward his children."<sup>59</sup> As one commentator has explained:

[T]he message [of these opinions] is that if an unwed biological father is willing and able to perform those functions that society has always deemed critical for the protection and development of children, the Constitution requires the state to allow him to do so initially and to continue doing so, in the absence of circumstances not of the state's own making.<sup>60</sup>

## IV. CALIFORNIA'S TREATMENT OF UNWED FATHERS

### *A. The Historical Background*

In 1872, California enacted Civil Code section 224, which provided in part: "A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living . . . ."<sup>61</sup> Under this provision, the common law's treatment of unwed fathers as a legal non-entity,<sup>62</sup> without any rights in his child, was codified in California law.<sup>63</sup>

The Parental Preference Doctrine was adopted into California's statutory scheme when California Civil Code section 4600 was en-

56. *Id.*

57. *Id.* at 269.

58. *Id.* at 271 n.3 (citation omitted).

59. *Caban v. Mohammed*, 441 U.S. 380, 389 n.7 (1979); *Lehr*, 463 U.S. at 261.

60. *Buchanan*, *supra* note 15, at 382.

61. CAL. CIV. CODE § 224 (West 1872), *amended by* CAL. CIV. CODE § 224 (West 1975).

62. *See supra* notes 9-13 and accompanying text.

63. For a decision based on this view of the unwed father, see *Adoption of Barnett*, 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1960) (the California Supreme Court, when evaluating the validity of a mother's consent to relinquish her child, refused to consider the lack of consent of the unwed father).

acted.<sup>64</sup> In section 4600(c), the Legislature protected the preference for biological parents by providing that custody could not be awarded to a nonparent without the consent of the child's parent, unless the court found that custody with the parent would be detrimental to the child. Further, the court must find that custody with the nonparent serves the child's best interest. A question left undetermined, however, was whether this preference would be afforded to the unwed father, whose consent was not required for an adoption under section 224.

### B. *The Uniform Parentage Act and the Unwed Father*

Exactly one hundred years after the original enactment of California Civil Code section 224, the Supreme Court held in *Stanley v. Illinois*<sup>65</sup> that an unwed father's interest in his child "undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>66</sup> In response to this decision,<sup>67</sup> the National Conference of Commissioners on Uniform State Laws adopted the Uniform Parentage Act,<sup>68</sup> which was subsequently enacted in modified form<sup>69</sup> by the California Legislature.<sup>70</sup>

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64. California Civil Code section 4600 was adopted in 1969 as part of the Family Law Act, (CAL. CIV. CODE §§ 4000-5004 (West 1983)), and provides in pertinent part:

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child

.....  
CAL. CIV. CODE § 4600(c) (West 1983 & Supp. 1990). For a full discussion of the legislative history behind the adoption of section 4600, see Bodenheimer, *supra* note 31, at 23-25.

65. 405 U.S. 645 (1972).

66. *Id.* at 651. See *supra* note 29 and accompanying text.

67. "The Uniform Parentage Act . . . was intended to fulfill the mandate of *Stanley* and its predecessors by 'providing substantive legal equality for all children regardless of the marital status of their parents.'" Note, *supra* note 7, at 204 (quoting Unif. Parentage Act, Prefatory Note, 9B U.L.A. 287, 289 (Master ed. 1987)).

68. 9B U.L.A. 287 (Master ed. 1987).

69. See *infra* notes 247-63 and accompanying text for a discussion of the modifications California made when adopting the Uniform Parentage Act (UPA).

70. 1975 Cal. Stat. c. 1244, p. 3196 § 11, codified at CAL. CIV. CODE §§ 7000-7021 (West 1983 & Supp. 1990). The UPA has been approved by the American Bar Association, Note, *supra* note 7, at 192, and enacted in full or in part by seventeen states: Alabama, ALA. CODE §§ 26-17-1 to -21 (1975); California, CAL. CIV. CODE §§ 7000-7021 (West 1983 & Supp. 1990); Colorado, COLO. REV. STAT. §§ 19-4-101 to -129 (Supp. 1988); Delaware, DEL. CODE ANN. tit. 13, §§ 81- to -18 (Supp. 1985); Hawaii, HAW. REV. STAT. §§ 584-1 to -26 (Supp. 1987); Illinois, ILL. ANN. STAT. ch. 40, para. 2501-526 (Smith-Hurd Supp. 1989); Kansas, KAN. STAT. ANN. §§ 38-1110 to -1129 (1986); Minnesota, MINN. STAT. ANN. §§ 257.51 to .74 (West 1982); Missouri, MO. ANN. STAT. §§ 210.817 to .852 (Vernon Supp. 1989); Montana, MONT. CODE ANN. §§ 40-6-101 to -135 (1989); Nevada, NEV. REV. STAT. §§ 126.011 to .391 (1987); New Jersey, N.J. STAT. ANN. §§ 9:17-38 to -59 (West Supp. 1989); North Dakota, N.D. CENT. CODE §§ 14-17-01 to -26 (1981 & Supp. 1989); Ohio, OHIO REV. CODE ANN. §§ 3111.01 to .38 (Anderson 1989); Rhode Island,

Under the Uniform Parentage Act (UPA), "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."<sup>71</sup> Accordingly, the labels "legitimate" and "illegitimate" are not used in the Act. Furthermore, fathers are not classified solely on the basis of marital status, but rather are either "presumed" or "not presumed" to be the natural father of the child.<sup>72</sup> In general, a father becomes presumed under the UPA by doing the acts by which he could have "legitimated" his child under the prior laws.<sup>73</sup> Basically, this occurs when the father and mother have entered into a marriage which is either valid or apparently valid, or when the father receives the child into

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R.I. GEN. LAWS §§ 15-8-1 to -27 (1988); Washington, WASH. REV. CODE ANN. §§ 26.26.010 to .905 (Supp. 1989); and Wyoming, WYO. STAT. §§ 14-2-101 to -120 (1977).

71. CAL. CIV. CODE § 7002 (West 1983 & Supp. 1990); Unif. Parentage Act § 2, 9B U.L.A. 287, 296 (1987).

72. CAL. CIV. CODE § 7004(a) (West 1983 & Supp. 1990); Unif. Parentage Act § 4(a), 9B U.L.A. 297, 298 (1987). Although the UPA does not provide a label for the father who is not "presumed," he is often referred to as an "alleged natural father" or a "natural father." For the purpose of this comment, the terms "alleged" and "non-presumed" will be employed. This section of the California UPA provides:

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

- (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.
- (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,
  - (i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or
  - (ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.
- (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,
  - (i) With his consent, he is named as the child's father on the child's birth certificate, or
  - (ii) He is obligated to support the child under a written voluntary promise or by court order.
- (4) He receives the child into his home and openly holds out the child as his natural child.

CAL. CIV. CODE § 7004(a) (West 1983).

73. Adoption of Michael D., 209 Cal. App. 3d 122, 130, 256 Cal. Rptr. 884, 889 (1989).

his home and holds the child out as his own. Different rights are afforded to unwed fathers based on their classification, and the courts have defended this difference as one which "reflects the Legislature's resolution of a long-recognized tension between the best interests of the child and the personal desires of a male parent who has neither gone through a marriage ceremony with the mother nor shared a home with the child."<sup>74</sup>

## 1. California's Version of the UPA and the Original Civil Code Section 7017

Section 7017 of California's version of the UPA specifically addressed the rights of presumed and alleged fathers when the mother wished to relinquish the child for adoption.<sup>75</sup> Under subsection (a), a presumed father, or one who had legitimated his child "under prior law of this state or under the law of another jurisdiction", was to be given notice of the adoption proceeding, along with all the parental rights under the Act.<sup>76</sup> Under subsection (b), if the child did not have a presumed father, the mother, or the agency or person to whom the child was to be relinquished, was required to file a petition to terminate the rights of the child's natural father.<sup>77</sup> Subsection (c) provided the method by which the nonpresumed natural father was to be identified,<sup>78</sup> and subsection (d) required notice be given to him.<sup>79</sup> If the natural father failed to appear or to claim custodial rights at the section 7017 hearing, his rights to the child would be terminated. Subsection (d) further provided:

If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child.<sup>80</sup>

## 2. The Early Application of Section 7017 in the California Courts

The original section 7017 clearly stated that only the *presumed* fa-

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74. *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 308, 160 Cal. Rptr. 862, 865 (1979).

75. CAL. CIV. CODE § 7017 (West 1975), *amended by* CAL. CIV. CODE § 7017 (West 1986).

76. CAL. CIV. CODE § 7017(a)(1).

77. *Id.* § 7017(b).

78. *Id.* § 7017(c).

79. *Id.* § 7017(d). Recognizing that there may be more than one "possible" natural father, the UPA provides for notice and opportunity to all who may be identified under subsection (c). *Id.*

80. *Id.* (originally enacted as Uniform Parentage Act, 7017 ch. 1244, § 11, Stat. 3196, 3200-01 (1975)).

ther's consent was required for the adoption of his child. Everything was not so clear, however, and the courts began to struggle with two issues in particular: (1) what exactly was intended under the section 7004 provision which allowed a father to become presumed by "receiv[ing] the child into his home"; and (2) did the parental preference doctrine of section 4600 apply to a section 7017 termination hearing?<sup>81</sup>

Addressing the first issue, a California appellate court held in *Cheryl H. v. Superior Court*<sup>82</sup> (prior to the adoption of the UPA) that a mother may prevent the father's legitimation of the child by refusing to either marry him or give him custody of the child so that he might receive it into his home.<sup>83</sup> This holding was expressly disapproved the following year in *In re Richard M.*,<sup>84</sup> in which the California Supreme Court stated that it was "not persuaded by the mother's argument that her consent and voluntary relinquishment of custody were conditions precedent to the boy's reception into his father's family."<sup>85</sup> Relying on a policy of liberal construction in favor of legitimation,<sup>86</sup> and on previous cases which had recognized "constructive" reception of the child when actual reception was impossible or prevented,<sup>87</sup> the Court held that the father had legitimated his child by "acknowledg[ing] paternity to his family and friends . . . caring for [the child] and administering to his needs . . . [and taking] the child into his home for frequent visits . . . ."<sup>88</sup>

Two years later in *In re Reyna*,<sup>89</sup> the California Court of Appeals for the Fifth District rejected the claim of a father who argued that he had constructively received the child simply by acknowledging paternity, since the mother had prevented him from having any contact with his child. The court distinguished *In re Richard M.* on the fact that Richard's father had received the child for visits, and thus had some contact, while this father had never had any physical contact with the child, nor any personal relationship with the mother since

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81. If section 4600 applied, then the court could not deny custody to the natural father—whether presumed or alleged—without first showing that custody in the father would be detrimental to the child. See *supra* note 62.

82. 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974).

83. *Id.* at 277-78, 115 Cal. Rptr. at 852.

84. 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975).

85. *Id.* at 796, 537 P.2d at 371, 122 Cal. Rptr. at 539.

86. *Id.* at 793, 537 P.2d at 369, 122 Cal. Rptr. at 537.

87. *Id.* at 794-95, 537 P.2d at 369-70, 122 Cal. Rptr. at 537-38.

88. *Id.* at 799, 537 P.2d at 373, 122 Cal. Rptr. at 541.

89. 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976).

conception.<sup>90</sup> The court then introduced an idea over which many courts would later disagree<sup>91</sup> when it suggested that the trial court should award custody even to the nonpresumed father unless it would be detrimental to the child,<sup>92</sup> and that "legitimation will become effected immediately if [the father] is awarded custody and physically receives the child into his family."<sup>93</sup>

The key issue, which later led to the amendment of section 7017,<sup>94</sup> was whether the court could terminate the rights of a nonpresumed natural father who had appeared at the section 7017 hearing and requested custody, without first determining that granting custody to the father would be detrimental to the child. In other words, did the parental preference doctrine of section 4600 apply to a nonpresumed father in a section 7017 termination hearing? After several state appellate courts had addressed the question, most of them holding that the detriment test of section 4600 did apply,<sup>95</sup> the California Supreme Court decided the issue in the case of *In re Baby Girl M.*<sup>96</sup>

### 3. The Case of *In re Baby Girl M.*

The impact of *Baby Girl M.* was clearly expressed in the first two sentences of the opinion:

We are asked to determine whether the trial court erred in terminating a natural father's parental rights by considering only the best interests of the child without first considering whether an award of custody to him would be detrimental to the child. We conclude Civil Code section 4600 is applicable to all section 7017, subdivision (d) termination proceedings and reverse the judgment.<sup>97</sup>

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90. *Id.* at 301, 126 Cal. Rptr. at 146.

91. Support for the idea that the court could or even should grant custody to the father in order to allow him to legitimate the child (or to become presumed) had been expressed in *Adoption of Rebecca B.*, 68 Cal. App. 3d 193, 198 n.4, 137 Cal. Rptr. 100, 103 n.4 (1977). See also *People v. Carrillo*, 162 Cal. App. 3d 585, 596 n.13, 208 Cal. Rptr. 684, 692 n.13 (1984); *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 318, 160 Cal. Rptr. 862, 872 (1979) (Jefferson, J., dissenting); *In re Tricia M.*, 74 Cal. App. 3d 125, 134, 141 Cal. Rptr. 554, 560 (1977). The idea was criticized by the majority in *W.E.J.*, 100 Cal. App. 3d at 311, 160 Cal. Rptr. at 867.

92. *Reyna*, 55 Cal. App. 3d at 297, 126 Cal. Rptr. at 144 ("To restrict the parental preference rule of section 4600 to fathers of legitimate children, in our opinion, would be to deny [the father of an illegitimate child] the equal protection of the laws.").

93. *Id.* at 301, 126 Cal. Rptr. at 147.

94. See *infra* notes 128-30.

95. The application of section 4600 to a section 7017 hearing was approved in *Reyna*, 55 Cal. App. 3d at 296-97, 126 Cal. Rptr. at 144 ("[W]e construe the word 'parent' as used in section 4600 to include the father of an illegitimate child.") See also *Adoption of Baby Boy D.*, 159 Cal. App. 3d 8, 17-18, 205 Cal. Rptr. 361, 366 (1984) ("Since . . . a section 7017 proceeding . . . is a proceeding which places in issue the custody of the child [citation omitted], it appears the [parental preference] doctrine is applicable . . ."); *In re Cheryl E.*, 161 Cal. App. 3d 587, 606, 207 Cal. Rptr. 728, 741-42 (1984).

96. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

97. *Id.* at 67-68, 688 P.2d at 919-20, 207 Cal. Rptr. at 310-11.

Edward McNamara was in his thirties and working as an estimator for a general contractor when he met and began dating the woman who would become the mother of his daughter Katie.<sup>98</sup> Edward and the mother dated from August to November of 1980, and neither of them knew she was pregnant when they ended their relationship. On July 18, 1981, Katie was born, and was placed in a foster home soon after her mother relinquished her for adoption.<sup>99</sup> Edward never knew of the pregnancy and was not notified of the birth until August 1, 1981. He immediately contacted the San Diego Department of Social Welfare, which was handling Katie's adoption, and expressed an interest in her placement. On August 10, Katie's mother filed a section 7017 petition to terminate Edward's rights. On August 17, Edward requested custody, and on August 24, Katie was placed with Robert and Pamela Moses, the prospective adoptive parents.<sup>100</sup>

The section 7017 hearing was held in December, 1981, and although the court found Edward to be "a good parent [who] can provide a good, loving home for this child," the petition to terminate his rights and award custody to the Moses' was granted.<sup>101</sup> Because Edward was not a presumed father under section 7004(a), the court's decision was based on the best interests test, rather than the detriment test provided by the parental preference doctrine.<sup>102</sup>

Nearly two years later, the decision was reversed by the Court of Appeals for the Fourth District.<sup>103</sup> Rejecting the argument that its decision would grant the nonpresumed father the power to veto an adoption,<sup>104</sup> the court applied section 4600 and stated: "[T]he doctrine of parental preference in custody matters is not merely ideology, but rather, is a recognized right. There must be a reasonable opportunity to assert and effectuate this right."<sup>105</sup>

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98. For a more extensive description of the extremely emotional facts of this case, see Beyette, *The Unwed Father; Edward McNamara has Fought Seven Years for the Child He Lost Before He Knew She Existed*, L.A. Times, Apr. 26, 1988, § 5 (View), at 1, col. 2; Beyette, *Unwed Father: The Other Side; Pamela, Robert Moses May Yet Lose the Child Placed With Them Almost Seven Years Ago*, L.A. Times, June 8, 1988, § 5 (View), at 1, col. 2; Gorney, *The Disputed Kinship of Katie Moses; At Issue, an Unwed Father's Rights and a Child's Future*, Wash. Post, Nov. 28, 1988, at D1, col. 4.

99. *Baby Girl M.*, 37 Cal. 3d at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

100. *Id.*

101. *Id.*

102. *Id.*

103. 141 Cal. App. 3d 432, 191 Cal. Rptr. 339 (1983) (opinion deleted at 141 Cal. App. 3d 432).

104. 191 Cal. Rptr. at 344.

105. *Id.*

In October, 1984, the California Supreme Court agreed.<sup>106</sup> Much of the Court's reasoning was based on its interpretation of the Legislature's intent behind section 7017.<sup>107</sup> Furthermore, the Court found its holding to be consistent with the policy behind the UPA.<sup>108</sup> Finally, the Court reviewed the related Supreme Court cases,<sup>109</sup> and implied that its holding was required by constitutional mandates.<sup>110</sup> The case was reversed and remanded for a new hearing in which the detriment test was to be applied.<sup>111</sup>

On remand, the trial court again terminated Edward's rights, finding that it would be detrimental to remove Katie, now three-and-a-half years old, from the Moses' home in order to place custody with Edward. Again, Edward appealed, arguing that the trial court had improperly applied the detriment standard by refusing him custody on this basis, even though he was found to be a fit and loving parent.<sup>112</sup> The court of appeals reluctantly affirmed, stating: "Any resolution of this issue would in some sense be unfair. It is only because the operative legal standards focus on the *child's* welfare that we can affirm the trial court judgment terminating Edward's parental rights."<sup>113</sup> The California Supreme Court denied review.

The United States Supreme Court granted Edward's petition for

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106. *In re Baby Girl M.*, 37 Cal. 3d 85, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

107. The court acknowledged that the idea of depriving nonpresumed fathers of the section 4600 parental preference had originally been part of the section 7017 proposals, but noted that "[a]fter lengthy debate . . . the author [had] agreed to amend it out of the bill." *Id.* at 71, 688 P.2d at 922, 207 Cal. Rptr. at 313.

108. *Id.* at 71-73, 688 P.2d at 922-23, 207 Cal. Rptr. at 313-14. Reading the UPA together with CAL. CIV. CODE §§ 221-240 (West 1982 & Supp. 1990), the Court held that the rights of an unwed mother and a presumed father took precedence over those of the nonpresumed natural father, for "[i]n the context of section 7017, the mother must relinquish the child for adoption before the natural father has any rights." *Baby Girl M.*, 37 Cal. 3d at 72-73, 688 P.2d at 922-23, 207 Cal. Rptr. at 313-14. Once this occurs, however, the father's rights attach, and section 4600 applies. *Id.* at 72, 688 P.2d at 923, 207 Cal. Rptr. at 314.

109. See *supra* notes 23-61 and accompanying text.

110. *Baby Girl M.*, 37 Cal. 3d at 73-74, 688 P.2d at 923-24, 207 Cal. Rptr. at 314-15. The Court noted that:

The Supreme Court has not directly considered a fact situation similar to ours, where a mother has relinquished a newborn child and refused the father any contact. Thus the court has not addressed whether the natural father's parental rights may be terminated by only a best interests standard, or if a further finding of detriment is required.

*Id.* at 74, 688 P.2d at 924, 207 Cal. Rptr. at 315. The court's constitutional reasoning was based in large part on Buchanan's article, in which it had been asserted that "the state may not deny biological parents the opportunity to establish a protected custodial relationship." Buchanan, *supra* note 15 at 351.

111. *Baby Girl M.*, 37 Cal. 3d at 76, 688 P.2d at 925-26, 207 Cal. Rptr. at 316-17.

112. *In re Baby Girl M.*, 191 Cal. App. 3d 786, 236 Cal. Rptr. 660 (1987) (ordered not published by California Supreme Court, July 30, 1987).

113. *Id.* at 788, 236 Cal. Rptr. at 661 (emphasis in original). By this time, Katie was nearly six years old, and had lived all her life with the Moses'.

For a discussion of the problems created by the delays in the appellate process, see *Identifying Daddy*, *supra* note 3.

certiorari,<sup>114</sup> but later dismissed the appeal for want of a properly presented federal question.<sup>115</sup>

#### 4. The Case of *Michael U. v. Jamie B.*

Less than one year after *Baby Girl M.*, the California Supreme Court's decision received its first major challenge in *Michael U. v. Jamie B.*<sup>116</sup> Michael was 16 and Jamie was 12 when their son Eric was conceived.<sup>117</sup> Michael and his parents were informed of the pregnancy and they expressed a desire to raise the child, but Jamie's family preferred to have the child adopted by a married couple.<sup>118</sup> After Eric was born, Jamie filed a section 7017 petition to terminate Michael's parental rights so that Eric could be placed up for adoption. Michael, a nonpresumed father under section 7004(a), petitioned to establish paternity and for an order granting him custody of Eric. After a hearing in which the trial court applied the detriment test, Michael was granted custody of Eric, and Jamie was given visitation rights.<sup>119</sup> This decision was made despite evidence that Michael often used marijuana, had bragged to Jamie about his sexual relations with other teenage girls, was not employed, and had experienced serious academic and disciplinary problems that required him to enroll in a continuing high school education program.<sup>120</sup>

Nevertheless, the Court of Appeals for the Fourth District affirmed the decision, deferring to the broad discretion of the trial court finding that there was ample evidence to support the lower court's holding.<sup>121</sup> The California Supreme Court, which acknowl-

114. *McNamara v. County of San Diego Dep't of Social Services*, 485 U.S. 1005 (1988).

115. 109 S. Ct. 546 (1988). The dismissal by the Supreme Court, however, does not negate the existence of a constitutional issue, for a dismissal "on the 'want of a properly presented federal question' . . . simply means that the federal question, substantial though it may be, was not raised at the proper point in the state court proceedings or in accordance with reasonable state court rules." STERN & GRESSMAN, SUP. CT. PRAC. 380-81 (5th ed. 1978).

116. 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985). The Court decided *Baby Girl M.* in October, 1984, and *Michael U.* in September, 1985.

117. *Id.* at 790, 705 P.2d at 364, 218 Cal. Rptr. at 40. For a more extensive presentation of the emotional facts of this case—primarily portraying the stress placed on Eric's adoptive family—see De Salvo, *Parents vs. Father: Ordeal Like Living With Dying Child*, *Couple Say*, L.A. Times, Apr. 12, 1985, § 2, at 1, col. 2 (Orange County ed.).

118. *Michael U.*, 39 Cal. 3d at 790, 705 P.2d at 364, 218 Cal. Rptr. at 40.

119. *Id.* at 790, 705 P.2d at 364, 218 Cal. Rptr. at 40-41.

120. *Id.* at 793-94, 705 P.2d at 366, 218 Cal. Rptr. at 43.

121. *Michael U. v. Jamie B.*, 160 Cal. App. 3d 193, 206 Cal. Rptr. 323 (1984) (opinion deleted at 160 Cal. App. 3d 193). Evidence had been presented that Michael, now 19, had matured a great deal and had shown signs of a willingness and ability to act as a

edged that Michael was entitled to the detriment test of section 4600,<sup>122</sup> reversed the decision, holding that it was an abuse of discretion and not supported by substantial evidence.<sup>123</sup>

In his concurring opinion, Justice Kaus stated: "[T]he more I think about it, the more certain I am that the trouble with this case is not so much the fact-finding process, but this court's unfortunate misstep in *In re Baby Girl M.*"<sup>124</sup> Justice Mosk agreed in his separate concurring opinion.<sup>125</sup> But Justice Reynoso dissented, siding with the court of appeals' determination that the trial court decision was supported by substantial evidence.<sup>126</sup> Reynoso defended *Baby Girl M.* and the detriment standard, and considered the majority's opinion "unfortunate . . . because the standards the Legislature has established (Civ. Code § 4600) and our own guidelines [*Baby Girl M.*] have been weakened, bringing uncertainty to the law."<sup>127</sup>

### C. Section 7017: The 1986 Amendment

In 1986, the California Legislature amended section 7017, undoubtedly in response to the *Baby Girl M.* and *Michael U.* decisions.<sup>128</sup> Through this amendment, the Legislature seemingly spoke clearly: The custody rights of an unwed father, not presumed under section 7004, are to be determined by applying the best interest of the child test.<sup>129</sup> Thus, if custody by the father is in the child's best interest,

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father to his child. This evidence included the fact that he had enrolled in a parenting class at a local community college. 206 Cal. Rptr. at 328. Associate Justice Crosby, however, stated in his dissenting opinion: "I believe this is one of those rare instances where we should reweigh the evidence on appeal . . ." 206 Cal. Rptr. at 331. (Crosby, J., dissenting).

122. *Michael U.*, 39 Cal. 3d at 795, 705 P.2d at 368, 218 Cal. Rptr. at 44.

123. *Id.* at 796, 705 P.2d at 368, 218 Cal. Rptr. at 45.

124. *Id.* at 796-97, 705 P.2d at 368, 218 Cal. Rptr. at 45 (citation omitted) (Kaus, J., concurring).

125. *Id.* at 797, 705 P.2d at 369, 218 Cal. Rptr. at 45 (Mosk, J., concurring) ("This dramatically illustrates the fallacy of any test other than the best interest of the child.").

126. *Id.* at 798-800, 705 P.2d at 369-71, 218 Cal. Rptr. at 46-47 (Reynoso, J., dissenting).

127. *Id.* at 798, 705 P.2d at 369, 218 Cal. Rptr. at 46 (Reynoso, J., dissenting).

128. Cal. Stat. ch. 1370 § 2 (1986). "In amending section 7017 the Legislature meant to explicitly overrule *Baby Girl M.*" Adoption of Christopher S., 197 Cal. App. 3d 433, 438-39 n.4, 242 Cal. Rptr. 866, 869 n.4 (1987).

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

If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child and the effects of a change of placement on the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming

then the father's consent will be required for the adoption to occur. If adoption is in the child's best interest, then the father's rights are terminated and his consent is not required. Finally, the Legislature added: "Section 4600 does not apply to this proceeding. Nothing in this section changes the rights of a presumed father."<sup>130</sup>

Despite the clarity that the amended version of section 7017 appeared to have provided, the "uncertainty [in] the law"<sup>131</sup> regarding the rights of unwed fathers in California remains. Two recent California appellate court cases reveal this uncertainty.

#### *D. The Case of Jermstad v. McNelis*<sup>132</sup>

Tom Jermstad and Nancy McNelis began dating in June, 1986.<sup>133</sup> Jermstad, an officer in the merchant marine, was required to spend much of his time at sea. However, during approximately half the time that he was on leave, he stayed with McNelis. In December of 1986, Jermstad called McNelis while he was at sea, and she informed him of her pregnancy. When he returned, they discussed the possibility of living together or getting married, but McNelis decided against either choice. They then considered adoption as an alternative, an idea which McNelis preferred, but of which Jermstad was unsure.<sup>134</sup>

In April or May of 1987, McNelis selected a couple, the Ellisons, as the child's prospective adoptive parents. Jermstad then expressed his desire to have custody of the child, and the Ellisons informed him that they would "back out."<sup>135</sup> However, after McNelis told Jermstad that she would keep the child herself if he sought custody, he informed the Ellisons that he had changed his mind.<sup>136</sup>

In July of 1987, Jermstad met a woman named Joanne, whom he married six weeks later. Joanne had two children of her own, but

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parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that that person's consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child. Section 4600 does not apply to this proceeding. Nothing in this section changes the rights of a presumed father.

CAL. CIV. CODE § 7017(d)(2) (West Supp. 1990).

130. *Id.*

131. *See supra* note 125 and accompanying text.

132. 210 Cal. App. 3d 528, 258 Cal. Rptr. 519 (1989).

133. *Id.* at 533, 258 Cal. Rptr. at 520.

134. *Id.* at 533, 258 Cal. Rptr. at 520-21.

135. *Id.* at 533, 258 Cal. Rptr. at 521.

136. *Id.*

was unable to have more, and she encouraged Jermstad not to give up his child. On August 20, the day the child was born, Jermstad informed McNelis and the Ellisons that he wanted to raise his child. Two days later, he and Joanne were married.<sup>137</sup>

Jermstad's petition to establish paternity and gain custody of his child led to a section 7017 hearing on September 30.<sup>138</sup> At this hearing, the court found that Jermstad was the child's father and awarded him custody, apparently on the basis of the best interests test.<sup>139</sup> McNelis appealed the decision, arguing that the court should have terminated Jermstad's rights because he was not a presumed father under section 7004, and that the court inappropriately accorded Jermstad a parental preference.<sup>140</sup>

The court of appeals viewed McNelis' first claim as an argument that the natural mother should have the right to place the child for adoption regardless of the wishes of the natural, nonpresumed father.<sup>141</sup> McNelis argued that this result was required by the earlier cases of *Adoption of Marie R.*<sup>142</sup> and *W.E.J. v. Superior Court*,<sup>143</sup> which held that the mother may prevent the father from becoming presumed, so that in such a case only the mother's consent to the adoption would be required.<sup>144</sup> The court rejected this argument on the grounds that it did "not square with the provisions of the Uniform Parentage Act."<sup>145</sup> Noting that *Marie R.* and *W.E.J.* had been decided prior to, and thus on the basis of laws other than, the UPA, the court relied on section 7010<sup>146</sup> of the Act to hold that, under sec-

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137. *Id.* at 534, 258 Cal. Rptr. at 521.

138. *Id.* at 535, 258 Cal. Rptr. at 522. Two days after Jermstad filed his petition, the Ellisons filed a petition for adoption of the child in a different court. The section 7017 hearing held on September 30 was considered to be between Jermstad and McNelis. The Ellisons were not made parties to this hearing, nor did they move to intervene, even though they had received notice of the hearing. On appeal, McNelis argued that the court erred in its failure to require joinder of the Ellisons at this hearing, but the court rejected this argument. *Id.* at 534-42, 258 Cal. Rptr. at 521-26.

139. The court made no express finding of detriment, nor did it expressly find that its holding was in the best interest of the child. The judge, however, did state: "I'm going to have to take a look at what's best," and "I don't think that the mother would be the appropriate custodial parent." *Id.* at 537, 258 Cal. Rptr. at 523. The court of appeals' rejection of the mother's argument that the trial court inappropriately applied a parental preference by applying the detriment test is, in a sense dicta, for the appellate court concluded its opinion by noting that it was required to assume that the trial court's decision was made by applying the best interests test. Thus, the court explained, "McNelis cannot prevail in any event." *Id.* at 552, 258 Cal. Rptr. at 533.

140. *Id.* at 542, 544, 258 Cal. Rptr. at 526, 528.

141. *Id.* at 542, 258 Cal. Rptr. at 527.

142. 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978).

143. 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979).

144. See *supra* notes 84-94 and accompanying text.

145. *Jermstad v. McNelis*, 210 Cal. App. 3d 528, 542-43, 258 Cal. Rptr. 519, 527 (1989).

146. CAL. CIV. CODE § 7010(c)(1) (West Supp. 1990) provides: "The judgment or order may contain any other provision directed against the appropriate party to the pro-

tion 7006, the court could grant custody to the father so that he could become presumed, despite the mother's wishes to the contrary.<sup>147</sup>

The issue raised by McNelis' second argument was whether the 1986 amendment to section 7017 resulted in a prohibition of the application of the parental preference doctrine to the claim of a non-presumed father, so that his claim to custody could only be evaluated in light of the best interests of the child.<sup>148</sup> Although such a result had appeared to be the obvious purpose for the 1986 amendment,<sup>149</sup> the court rejected this interpretation, concluding that:

McNelis's reading of the amended statute is untenable since it would deny the natural father the equal protection of the laws which applies in cases, such as this one, in which the natural father promptly seeks to shoulder the burdens of paternity. We read section 7017 in conformity with the constitution where, as here, its language lends itself to a construction consistent with the higher law. The natural father must be afforded a parental preference under the amended statute where he promptly acknowledges paternity and seeks custody of the child.<sup>150</sup>

The court explained its holding by evaluating the major relevant decisions by the United States and California Supreme Courts. As to the United States Supreme Court cases, the court explained that the father in *Stanley*<sup>151</sup> received constitutional protection because he had had continuous custody of his children up until the mother's death.<sup>152</sup> The father in *Quilloin*,<sup>153</sup> on the other hand, was not deserving of due process or equal protection because in the twelve years of his child's life he neither had, nor sought custody, and thus was not similarly situated to a married father.<sup>154</sup> In *Caban*,<sup>155</sup> the father's right to equal protection was violated because he was not given power to veto an adoption, while the mother was given such power, even though both had developed relationships with their children.<sup>156</sup> The *Jermstad* court noted, however, that the question of whether such a classification would be justified in the case of the parents of a

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ceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, . . . or any other matter in the best interest of the child." *Id.*

147. *Jermstad*, 210 Cal. App. 3d at 543-44, 258 Cal. Rptr. at 527. See *supra* notes 84-94 and accompanying text.

148. *Jermstad*, 210 Cal. App. 3d at 544, 258 Cal. Rptr. at 528.

149. See *supra* notes 128-30 and accompanying text.

150. *Jermstad*, 210 Cal. App. 3d at 545, 258 Cal. Rptr. at 529.

151. See *supra* notes 23-31 and accompanying text.

152. *Jermstad*, 210 Cal. App. 3d at 546, 258 Cal. Rptr. at 529.

153. See *supra* notes 32-39 and accompanying text.

154. *Jermstad*, 210 Cal. App. 3d at 546, 258 Cal. Rptr. at 529.

155. See *supra* notes 40-46 and accompanying text.

156. *Jermstad*, 210 Cal. App. at 546-47, 258 Cal. Rptr. at 529.

newborn child had been left open by the Court.<sup>157</sup> Finally, the *Jermstad* court found that the father in *Lehr*<sup>158</sup> had not been denied due process since he had failed to come forward to establish a relationship with his child by entering his name in the putative father's registry. Further, since he had not sought to establish a legal tie to his child until the child was over two years old, there was no equal protection violation.<sup>159</sup>

The court then turned to the California cases, noting first that, in the case of *Adoption of Baby Boy D.*,<sup>160</sup> it was held that the Constitution required that the parental preference doctrine be applied to the natural father.<sup>161</sup> Turning to *In re Baby Girl M.*,<sup>162</sup> the court admitted that "[t]he precise grounds of the [California Supreme Court's] holding are unclear."<sup>163</sup> The analysis of that opinion, however, "strongly suggests that . . . a parental preference is required in these circumstances as a matter of federal constitutional law."<sup>164</sup> Finally, the court considered *Michael U. v. Jamie B.*,<sup>165</sup> and noted that, although three justices had criticized the *Baby Girl M.* decision,<sup>166</sup> "a majority of the justices did not reconsider the precedent."<sup>167</sup>

Having reviewed these cases, the court determined that the Constitution requires the claim of an unwed father who had promptly acknowledged paternity and come forward seeking custody, to be evaluated in light of the detriment test of the parental preference doctrine.

Thus the court was forced to consider the effect of the amendment to section 7017, an effect which McNelis argued was to deny parental preference to such a father.<sup>168</sup> The court rejected the argument that the amendment had created this effect:

There are two impediments to this sweeping claim. The first is that to the extent that the majority opinion in *Adoption of Baby Girl M.* rests on federal constitutional considerations it is not subject to being overturned by a legislative enactment . . . . The second impediment is that the totality of the changes worked by the 1986 amendment suggest that the statute does not prohibit a parental preference, but rather frees the trial court from the constraints of section 4600 in circumstances in which a parental preference is not supported

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157. *Id.* See *supra* note 46.

158. See *supra* notes 47-58 and accompanying text.

159. *Jermstad*, 210 Cal. App. 3d at 547, 258 Cal. Rptr. at 529-30.

160. 159 Cal. App. 3d 8, 205 Cal. Rptr. 361 (1984).

161. *Jermstad*, 210 Cal. App. 3d at 548, 258 Cal. Rptr. at 530.

162. See *supra* notes 96-111 and accompanying text.

163. *Jermstad*, 210 Cal. App. 3d at 548, 258 Cal. Rptr. at 531. See *supra* notes 109-10 and accompanying text.

164. *Jermstad*, 210 Cal. App. 3d at 548, 258 Cal. Rptr. at 531 (citation omitted).

165. See *supra* notes 116-27 and accompanying text.

166. See *supra* notes 124-25 and accompanying text.

167. *Jermstad*, 210 Cal. App. 3d at 549, 258 Cal. Rptr. at 531.

168. *Id.* McNelis argued that the amendment not only prohibited a parental preference in such a case, but also overruled *Baby Girl M.* This argument had been accepted in the 1987 case of *Adoption of Christopher S.*, *supra* note 128.

by constitutional considerations.<sup>169</sup>

Thus the court held that, if section 7017 denied the detriment test to a father who had promptly come forward to raise his child, the statute would be unconstitutional.<sup>170</sup> The court considered such a result to be unnecessary, however, and determined that section 7017 "lends itself to conformity with the constitutional concerns."<sup>171</sup> The true effect of the amendment, the court held, was to free the court from having to apply the detriment test to *all* nonpresumed fathers, as *Baby Girl M.* had apparently held, so that the claim of a nonpresumed father who had *not* promptly come forward to accept responsibility for the child could be evaluated using only the best interest test.<sup>172</sup>

Essentially, the *Jermstad* rule is that an unwed father in California may receive a parental preference, and thus the detriment test, in one of two ways: (1) by becoming presumed under section 7004(a), in which case parental preference is provided by section 4600; or (2) by promptly coming forward to accept the burdens of the paternal relationship, including the exercise of custody, in which case parental preference is provided by the Constitution.

#### *E. Adoption of Kelsey S.*<sup>173</sup>

Kelsey S. was born to Kari Ann S. on May 18, 1988. Kari had never married Kelsey's father, Rickie Allen M., although they had lived together sporadically prior to Kelsey's birth.<sup>174</sup> Two days later, on May 20, 1988, Rickie brought an action to establish a parental relationship and to seek custody of Kelsey under California Civil Code section 7006.<sup>175</sup> Four days after this action was filed, Kelsey's prospective adoptive parents, the A's, filed a petition for adoption under section 226. One week later, on May 31, the A's filed a petition to terminate Rickie's parental rights under section 7017. These actions were consolidated, and the court issued a temporary order granting visitation privileges to Rickie and the A's, leaving custody with

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169. *Jermstad*, 210 Cal. App. 3d at 549, 258 Cal. Rptr. at 531.

170. *Id.* at 550, 258 Cal. Rptr. at 532.

171. *Id.* at 551, 258 Cal. Rptr. at 532.

172. *Id.* at 551-52, 258 Cal. Rptr. at 533.

173. *Adoption of Kelsey S.*, 218 Cal. App. 3d 130, 266 Cal. Rptr. 760, review granted, — Cal. 3d —, 740 P.2d 238, 269 Cal. Rptr. 74 (1990).

174. *Id.* at 133, 266 Cal. Rptr. at 761-62. The fact that Kari and Rickie had lived together was not mentioned in the court's opinion, but was provided in a telephone interview with Alys Brigs, Rickie's attorney in this matter (Mar. 2, 1990).

175. *Kelsey S.*, 218 Cal. App. 3d at 133, 266 Cal. Rptr. at 762.

Hearings on the petitions commenced on August 3, and on August 15 the court found that Rickie was not a presumed father under section 7004.<sup>177</sup> On August 26, the court terminated Rickie's rights, holding that such termination was, by a "bare preponderance of the evidence," in the best interest of the child.<sup>178</sup> On appeal before California's sixth appellate district, Rickie argued that the trial court erred in not finding him to be a presumed father since he had "constructively received" Kelsey into his home and, even as a non-presumed father, the Constitution required that he be given the benefit of the detriment test under the parental preference doctrine.<sup>179</sup>

As to his first contention, Rickie argued that "since he took immediate steps to establish a parental relationship with Kelsey and to seek his custody, the trial court should have determined that he constructively received Kelsey into his home."<sup>180</sup> Relying on *Adoption of Marie R.*,<sup>181</sup> which had "squarely rejected the argument that constructive receipt was sufficient to elevate a natural father to presumed father status,"<sup>182</sup> the court rejected Rickie's constructive receipt argument, noting that Rickie "never received Kelsey into his home or had any relationship with his son."<sup>183</sup>

Rickie's alternative argument—that the Constitution mandates that he receive the parental preference even as a nonpresumed father—was similarly rejected by the court.<sup>184</sup> In rejecting this argument, the court first discussed the California Supreme Court's decision in *In re Baby Girl M.*,<sup>185</sup> in which it was held that the detriment test of the parental preference doctrine should be applied.<sup>186</sup> Referring to the subsequent decision in *Michael U. v. Jamie B.*,<sup>187</sup> the court stated "[t]he Supreme Court's mandate in *Baby Girl M.* remains equivocal, however."<sup>188</sup> After discussing the amendment to

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176. *Id.*

177. *Id.* See *supra* note 72 for the text of section 7004(a).

178. *Kelsey S.*, 218 Cal. App. 3d at 133, 266 Cal. Rptr. at 762. One of Rickie's arguments on appeal was that the trial court used the wrong standard of proof when it applied the preponderance of the evidence test in a section 7017 hearing. The court rejected his argument that the appropriate burden of proof should be clear and convincing evidence. *Id.* at 139-40, 266 Cal. Rptr. at 766.

179. *Id.* at 133-34, 266 Cal. Rptr. at 762.

180. *Id.* Rickie relied on the holding in *Adoption of Michael D.*, 209 Cal. App. 3d 122, 256 Cal. Rptr. 122 (1978).

181. 79 Cal. App. 3d 624, 245 Cal. Rptr. 122 (1978).

182. *Kelsey S.*, 218 Cal. App. at 135, 266 Cal. Rptr. at 763.

183. *Id.*

184. *Id.* at 139-40, 266 Cal. Rptr. at 765-66.

185. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

186. See *supra* note 97 and accompanying text.

187. 39 Cal. 3d 787, 705 P.2d 361, 218 Cal. Rptr. 39 (1985).

188. *Kelsey S.*, 218 Cal. App. 3d at 137, 266 Cal. Rptr. at 764.

section 7017, the court stated that it was "persuaded that this amendment was intended to free trial courts from the Supreme Court's mandate that the detriment standard should be applied to the claims of unwed fathers seeking custody of their children."<sup>189</sup>

The court then discussed the recent decision in *Jermstad v. McNelis*,<sup>190</sup> with which it directly disagreed: "We do not read the constitutional restraints imposed by the Supreme Court as broadly as does the Third Appellate District."<sup>191</sup> Referring to *Stanley*,<sup>192</sup> *Quilloin*,<sup>193</sup> *Caban*,<sup>194</sup> and *Lehr*,<sup>195</sup> the court asserted that "[n]o Supreme Court case has mandated that a father, like [Rickie], who moves promptly to grasp full custodial responsibility for his child, *must* be awarded custody."<sup>196</sup> Further, "no Supreme Court case has held the substantive rights of unwed fathers with only 'potential' relationships to their children equal to those of the children's mothers."<sup>197</sup> Based on these views of what the Supreme Court has (and has not) held, the court concluded "that a natural father's biological relationship to his child, standing alone, does not entitle him to an absolute right to that child's custody absent a showing of detriment."<sup>198</sup>

#### F. *The Approaching Impact of Jermstad and Kelsey S.*

Whatever else may be said about the opposing views in *Jermstad* and *Kelsey S.*, together they serve to reveal the confusion that continues to plague this area of the law, even after the amendment to section 7017. Whether or not *Jermstad* is merely a "maverick" opinion,<sup>199</sup> never to be repeated, the constitutional arguments will undoubtedly be raised again. In time, the California Supreme Court, and perhaps even the United States Supreme Court, must decide whether the Constitution demands that the parental preference available to married parents and unmarried mothers must also be

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189. *Id.*

190. 210 Cal. App. 3d 528, 258 Cal. Rptr. 519 (1989).

191. *Kelsey S.*, 218 Cal. App. 3d at 138, 266 Cal. Rptr. at 765.

192. *Stanley v. Illinois*, 405 U.S. 645 (1972).

193. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

194. *Caban v. Mohammed*, 441 U.S. 380 (1979).

195. *Lehr v. Robertson*, 463 U.S. 248 (1984).

196. *Kelsey S.*, 218 Cal. App. at 138, 266 Cal. Rptr. at 765 (emphasis in original).

197. *Id.*

198. *Id.* at 139, 266 Cal. Rptr. at 766.

199. Christian R. Van Deusen, the attorney whose firm represented the mother and/or adoptive parents in *Michael U.*, *Jermstad*, and *Kelsey S.*, among others, is of the view that *Jermstad* is just such a case (telephone interview with Christian R. Van Deusen, Mar. 2, 1990).

made available to the unwed father who promptly acknowledges paternity and seeks custody, yet is prevented by the mother from developing a relationship with his child.<sup>200</sup>

## V. CALIFORNIA CIVIL CODE SECTION 7017 AND THE CONSTITUTIONAL CONCERNS

### A. *An Evaluation of the Jermstad View of Section 7017*

The *Jermstad* court's determination that section 7017 allows for a construction consistent with constitutional mandates must be rejected because it construes the amended statute beyond its own clear language. Section 7017 provides that, after determining that the non-presumed natural father is indeed the child's biological father, the court:

[S]hall then determine if it is *in the best interest* of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including *the efforts made by the father to obtain custody*, and the age and prior placement of the child and the effects of a change of placement on the child.<sup>201</sup>

Thus, under section 7017, the fact that the father may have made all possible efforts to obtain custody, and done so at the earliest possible opportunity, is mere evidence which the court *may* consider when applying the best interests test. In no way do the father's efforts, under section 7017, raise his interest to one deserving constitutional protection and a parental preference. Section 7017 and the *Jermstad* opinion are in clear opposition, and if the constitutional reasoning in *Jermstad* is correct, this provision of section 7017 must be rejected as unconstitutional.<sup>202</sup>

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200. *Jermstad* will not be the case which provides the basis for such a decision, since McNelis and the Van Deusen firm have elected not to pursue petitions for review of this case. A petition for de-certification, however, was submitted and denied. Telephone interview with Christian R. Van Deusen, Mar. 2, 1990. *Kelsey S.*, on the other hand, may very well be the case to present the issue since the California Supreme Court granted Rickie M.'s petition for review on May 3, 1990. It should be noted that by the time the appeals have been exhausted, even a decision in Rickie M.'s favor will probably do little to protect his parental status. Like Edward McNamara, the father in *In re Baby Girl M.*, Rickie will be faced with proving on remand that removing Kelsey from his current home in order to place custody with Rickie will not be detrimental to the child. Since Kelsey could be several years old by then, such a burden is practically impossible to overcome. See *supra* notes 111-13.

201. CAL. CIV. CODE § 7017(d)(2) (West Supp. 1990) (emphasis added). See *supra* note 129 for the full text of this provision.

202. Even if *Jermstad* were correct in its construction of the amended statute, the statute should still be rejected because it is too vague and unclear. There is too much at risk in the lives of those involved in a section 7017 hearing to allow the hearing to be controlled by laws which remain unclear. The harm inflicted on the children and adults involved when an incorrect decision is made, or when a correct decision is dragged through the lengthy appellate process, can be immense. See, e.g., *Baby Girl M.*,

### *B. The Equal Protection and Due Process Concerns*

The constitutional issue which must be resolved is clear: whether the due process and equal protection clauses of the fourteenth amendment require California to apply the parental preference doctrine to the custody claim of an unwed father who, although not qualified as a presumed father, has promptly come forward to accept the burdens of paternity and custody of his newborn child when the mother has relinquished it for adoption? It is the opinion of this commentator that the answer must be "yes."

It is important to first note that neither the California nor the United States Supreme Court has made an express holding on this specific issue.<sup>203</sup> The conclusion of this commentator has, however, been presented, discussed, and supported in several of the opinions discussed above.<sup>204</sup> The essence of the reasoning behind these opinions is presented in the following discussion.

#### 1. The Classifications Created and the Scrutiny Required

The discussion of the constitutional issue begins with the recognition that California's statutory scheme, on its face, creates classifications which affect the unwed father. One such classification is created by the fact that, while the protected status of the unwed father's interest is made subject to the presumed-nonpresumed evaluation, the interests of the unwed mother are protected without such a test.<sup>205</sup> In this respect, the law provides different protection to unwed mothers than to unwed fathers, creating a gender-based classification. A second classification is created among unwed fathers by providing greater protection (in the form of the detriment test of section 4600) to those who are presumed than to those who are not.<sup>206</sup>

It is a broadly recognized principle, however, that all laws classify,

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*supra* notes 96-115 and accompanying text. This harm can be avoided only by amending the statute to express more clearly its intent and effect.

203. Although it is clear that the United States Supreme Court has not rendered a decision on this issue, it is less clear whether the California Supreme Court has done so. The opinion in *Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984), made reference to the constitutional issues involved, but whether its holding was based on constitutional requirements was left unsaid. See *supra* note 110. The *Jermstad* court, although basing its reasoning in part on the *Baby Girl M.* opinion, recognized this lack of clarity. See *supra* notes 163-64 and accompanying text.

204. See *Jermstad v. McNelis*, 210 Cal. App. 3d 528, 258 Cal. Rptr. 519 (1989), *supra* notes 132-72; *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979) (dissenting opinion); *In re Reyna*, 55 Cal. App. 3d 288, 126 Cal. Rptr. 138 (1976).

205. See *supra* notes 72-74 and accompanying text.

206. See *supra* note 74 and accompanying text.

and the mere fact that greater protection is afforded to one person than to another does not in and of itself violate the equal protection clause.<sup>207</sup> Because of this, equal protection claims are generally evaluated in light of the "rational basis test," which requires only that the State's scheme of classification be rationally related to a permissible state objective.<sup>208</sup> Despite this general policy of deference to state power, however, the level of scrutiny employed by the Court is raised when the classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."<sup>209</sup> Thus, when a law creates an inherently suspect classification,<sup>210</sup> it is made subject to "the most rigid scrutiny,"<sup>211</sup> which requires that the law be justified by a compelling state interest and narrowly tailored to meet that interest.<sup>212</sup> The same strict level of scrutiny is applied when the classification is used to infringe on an individual's fundamental rights.<sup>213</sup>

Still other classifications, such as those based on gender, while not considered inherently suspect, are evaluated at a less exacting level of scrutiny, by a mid-tier test requiring the law to be "substantially related to an important state objective."<sup>214</sup>

It is clear that the present scheme in California has created a gender-based classification. It has also been made clear, however, that such classifications are justified when the father fails to "come forward to participate in the rearing of his child," but not when the father has "established a substantial relationship with the child and admitted his paternity."<sup>215</sup> What has not been decided is whether such a classification is justified when the father *has* come forward

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207. *Gulf, Colo. and Santa Fe R.R. Railroad v. Ellis*, 165 U.S. 150 (1897).

208. See *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Schweiker v. Wilson*, 450 U.S. 221 (1981). These cases are among the many that emphasize that the rational basis test is most useful in judicial evaluations of social and economic legislation.

209. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

210. The foremost among suspect classifications are those created on the basis of race, see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967). Also included in this category are classifications based on national origin and alienage; see *Mathews v. Diaz*, 426 U.S. 67 (1976); *Bernal v. Fainter*, 467 U.S. 216 (1984).

211. *Loving*, 388 U.S. at 11 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

212. See *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

213. See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) ("Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.") (emphasis in original).

214. See *Reed v. Reed*, 404 U.S. 71, (1971); *Craig v. Boren*, 429 U.S. 190 (1976); *Michael M. v. Superior Court*, 450 U.S. 464 (1981). The same level of scrutiny is applied to laws which classify on the basis of the marital status of an individual's parents (i.e., illegitimacy); see *Lalli v. Lalli*, 439 U.S. 259 (1978); *Clark v. Jeter*, 486 U.S. 456 (1988).

215. *Caban v. Mohammed*, 441 U.S. 380, 392-93, 406 (1979). See *supra* note 46 and accompanying text.

and admitted his paternity but has *not* established a substantial relationship because he has been prevented from doing so. In such a case, since the classification is based on the parent's gender, the Court should evaluate the validity of the law by applying the mid-tier level of judicial scrutiny.

More importantly, however, California's classification scheme should be required to withstand *strict* scrutiny, inasmuch as it impinges on the unwed father's fundamental right to raise his child. The existence of such a right was made clear in *Stanley*,<sup>216</sup> although the subsequent cases of *Quilloin*,<sup>217</sup> *Caban*,<sup>218</sup> and *Lehr*<sup>219</sup> limited this right to those fathers who had taken advantage of their opportunities to manifest their willingness to fulfill the responsibilities that attend the right. Thus, in *Quilloin*, this right did not exist for the father who had failed to seek custody of his child during the twelve years of the child's life,<sup>220</sup> nor did it exist for the father in *Lehr*, who had failed to protect his right by entering his name in New York's putative fathers registry.<sup>221</sup> The father in *Caban*, however, did enjoy this right because he had developed a substantial relationship with his child.<sup>222</sup>

In California, however, a court order declaring the child legitimate does not serve to protect the rights of the unwed father as it could have for *Quilloin*,<sup>223</sup> nor is there any type of registry available to effectuate this purpose, as there was for *Lehr*.<sup>224</sup> Instead, the only method available for the unwed father in California is to become presumed under section 7004(a),<sup>225</sup> which is available to him only if the mother chooses to make it so. But when the father has promptly exerted efforts to accept responsibility, but is prevented from doing so by the mother who has chosen to relinquish the child, the law should recognize his interest as being as fundamental as those of any other parent in his or her child. That being so, any infringement on this right, such as California's denial of the parental preference, should

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216. 405 U.S. 645 (1972). *See supra* note 29 and accompanying text.

217. 434 U.S. 246 (1978). *See supra* notes 32-39 and accompanying text.

218. 441 U.S. 380 (1979). *See supra* notes 40-46 and accompanying text.

219. 463 U.S. 248 (1984). *See supra* notes 47-57 and accompanying text.

220. *See supra* notes 37-38 and accompanying text. In order to obtain the power to object to the adoption of his child, the unwed father in Georgia merely had to obtain a court order declaring that the child was legitimate. *See supra* note 36.

221. *See supra* note 50 and accompanying text.

222. *See supra* note 46 and accompanying text.

223. *See supra* note 35.

224. *See supra* note 50 and accompanying text.

225. *See supra* note 72.

be subject to the most strict judicial scrutiny, so that the state must show that the law is narrowly tailored to meet a compelling state interest.

## 2. The State's Compelling Interests

There are many interests which a state has in a setting such as this. Clearly, the most important interest, and the one to which all the others relate, is the State's *parens patriae* interest in protecting the welfare of the child.<sup>226</sup> There is no doubt that this interest is compelling. But to effectuate such a broad interest requires methods which, because of their importance in protecting the welfare of the child, could be said to become in a sense "state interests" in and of themselves. Among these methods are the parental preference doctrine itself, which protects the child's welfare by recognizing the interests of the parents, and the adoption process, which protects the child when the parents are unable or unwilling to do so.

### a. *The Parental Preference Doctrine as a Compelling State Interest*

The establishment of the parental preference doctrine as the foremost method of protecting the child's welfare was made clear by the Court in *Prince v. Massachusetts*.<sup>227</sup> This doctrine recognizes that a child's mother and father are presumed to know better than the state how to provide for their child,<sup>228</sup> and thus the state should allow them to do so without interference unless it is clear that they are failing in this task.<sup>229</sup> Based on this, the rights of an individual to bear children and raise them as he or she wishes is considered fundamental under the Constitution, and limited only by the requirement that the parents fulfill this right by providing for the child and protecting it from harm.<sup>230</sup>

The parental preference doctrine, moreover, is not limited on the basis of the parents' marital status, for even in California the unwed mother and unwed *presumed* father benefit from it. In fact, the rec-

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226. See *Addington v. Texas*, 441 U.S. 418 (1979); *In re Gault*, 387 U.S. 1 (1967).

227. 321 U.S. 158 (1944). See *supra* note 18 and accompanying text. See also Note, *Not Necessarily in the Best Interests of the Child: In re Baby Girl M.*, 20 U.S.F. L. REV. 701, 706-07 n.35 (1986) ("The United States Supreme Court has applied the parental preference doctrine in rejecting most state attempts at regulating parental activity.").

228. See *supra* note 17 and accompanying text.

229. See *supra* note 15 and accompanying text.

230. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (parent's right to choose child's education). This right is limited only by the state's interest in protecting the child from harm. See *In re Phillip B.*, 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48, 50-51 (1979) ("It is fundamental that parental autonomy is constitutionally protected. . . . Inherent in the preference for parental autonomy is . . . the right of parents to raise their children as they think best . . . . State officials may [however] interfere in family matters to safeguard the child's health, educational development and emotional well-being.").

ognition that the unwed father's involvement in his children's lives promotes their welfare led Congress to adopt the Family Support Act of 1988.<sup>231</sup> It was Congress' concern over the unwillingness of unwed fathers to get involved in their child's life that led, in part, to the enactment of this legislation.<sup>232</sup> Yet the law in California serves to *discourage* the father from attempting to become involved in his child's life, for to the extent that the mother prevents him from doing so, his efforts will remain ineffective and unrewarded. Thus, a state's refusal to grant a parental preference to the unwed father who promptly seeks custody of and responsibility for his child not only lacks the necessary relationship to the state's interest of protecting the welfare of the child, but may in fact work against it.

It is argued, however, that by allowing the mother to prevent the father from obtaining a parental preference so that she can relinquish the child to adoptive parents without the obstacle of his vetoing the adoption, the child's welfare is protected through the parental preference afforded to the mother.<sup>233</sup> In essence, the argument is that the mother's choice to relinquish the child is not a forfeiture of her parental rights and responsibilities, but rather a fulfillment of them. To allow the father to interrupt this act of responsibility, it is argued, would be to prevent the mother from caring and providing for the child.

Such an argument, while in a sense very persuasive, fails on two points. First, the relinquishment of one's child is considered at law to be an abandonment of the child, not the fulfillment or exercise of a parental right.<sup>234</sup> Thus, once the child is abandoned by the mother

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231. Family Support Act, Pub. L. No. 100-485, 102 Stat. 2343 (Oct. 13, 1988).

232. *Identifying Daddy*, *supra* note 3, at 5.

233. See Bartlett, *supra* note 6, at 315-26, for a discussion of this argument.

234. *In re Brittany H.*, 198 Cal. App. 3d 533, 548, 243 Cal. Rptr 763, 771 (1983). In *Brittany H.*, Evette was 18 and unmarried when she selected Debbie and David J. as the prospective adoptive parents of her soon-to-be-born child. During the pregnancy, the J.s attended Lamaze classes with Evette, and helped pay for medical expenses. After the birth, the child was given to the J.s who selected the child's name. Evette, in the meantime, began to express dissatisfaction with the J.s, especially in regard to Debbie's decision to continue working while raising the child. On October 17, 1985, less than six months after the child's birth, Evette arrived at the J.s home with a deputy sheriff, seeking to take the child back. *Id.* at 542, 243 Cal. Rptr. at 767. Her intention, however, was not to withdraw consent to the child's adoption, but to have the child placed with one of three families whom she had selected since the child was born and placed with the J.s. *Id.* at 543, 243 Cal. Rptr. at 768.

In a suit brought by the J.s to terminate Evette's parental rights on the basis of abandonment, Evette argued that her attempt to remove the child on October 17 precluded a finding of abandonment, since this occurred within the six-month period stipulated in CAL. CIV. CODE § 232. Because of her intention to relinquish the child to a

who has primary rights, the father must be afforded a preference above the adoptive parents. The second point on which this argument fails is that it is based on an incorrect assumption, for "[i]t is extremely doubtful . . . that the child's best interests are always the mother's prime concern; or even if they are, that her decision will necessarily promote those best interests."<sup>235</sup> To allow the mother to make this decision without allowing the interested and willing father to intervene is to grant a deference to the mother's motives and reasoning that is undeserved.

Furthermore, such an argument creates a presumption against the unwed father which is likewise undeserved.<sup>236</sup> To create such a presumption on the grounds that he is normally a disinterested "casual inseminator,"<sup>237</sup> as some courts have done, is to ignore the facts, for studies indicate "that few nonmarital births emanate from casual relationships."<sup>238</sup> Furthermore, if the father in a particular case is a casual inseminator, then the mother is just as surely a "casual recipient" of insemination who, but for biological constraints, might just as quickly walk away from the results of the insemination. More importantly, when the father has promptly claimed paternity and sought custody of the child, the court is not dealing with a father who has walked away, but with one who has attempted to fulfill his responsibility and has been prevented from doing so by the mother and by the legal system which grants her this power.

In summary, the refusal to grant fundamental parental rights to the father who promptly acknowledges paternity and seeks custody, but is prevented from becoming presumed due to the actions of the mother, is not justified by, and in fact may interfere with, the state's

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new set of adoptive parents, however, the court found that she had abandoned her child despite her argument that she was only seeking to exercise her parental rights. *Id.* at 548, 243 Cal. Rptr. at 771. In rejecting this argument, the court stated:

If the intent of a natural parent to "exercise parental rights" were found to be controlling rather than an intent to abandon the child by giving it up for adoption, then the natural parent could move the child on the 29th day of the 5th month ad infinitum until a 'suitable' home is found.

*Id.* The court thus held that it is the "intent to abandon," and not the "exercise of parental rights," which is controlling when a parent relinquishes his or her child for adoption. *Id.*

235. Comment, *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U.C. DAVIS L. REV. 1, 11 (1973).

236. See Note, *supra* note 7, at 222 ("[I]t makes no more sense to insist that all unwed fathers are disinterested and unfit parents than it does to continue in the belief that all mothers are by nature interested in raising children.").

237. The term "casual inseminator" was used in *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 797, 705 P.2d 362, 369, 218 Cal. Rptr. 39, 45 (1985) (Mosk, J., concurring), and is one of several terms often used to emphasize the short-term relationship between some unwed fathers and mothers.

238. *Identifying Daddy*, *supra* note 3, at 5. The studies do show that the non-married father's willingness to remain involved with his child "declines rapidly over time." *Id.*

goal of protecting the child's welfare through the parental preference doctrine.

*b. The State's Compelling Interest in the Adoption Process*

A second method of protecting the child's welfare, and one which also should be considered a compelling state interest in and of itself, is the adoption process.<sup>239</sup> It is clear that, although "in times past, adoption primarily served the interests of the adopter in perpetuating his family name and fortune, today the paramount concern is the protection of the child's best interests. [All other concerns] are secondary."<sup>240</sup> Even the United States Supreme Court has recognized that the welfare, prompt placement, and final adoption of nonmarital children are significant governmental interests.<sup>241</sup> The argument that is often made is that by allowing all unwed fathers to interfere with the adoption process by granting them a parental preference, the adoption process will suffer from irreparable delays and a subsequent loss of confidence by prospective adoptive parents.<sup>242</sup>

Such an argument fails in two respects. First, adoption, while undoubtedly the most effective method of caring for unwanted or mistreated children, is just that—a method of caring for *unwanted* or *mistreated* children. In the case of a father who promptly seeks custody, the child suffers from neither of these ailments, and thus adoption is not necessary. To prefer adoption, even by a stable, two-parent family, over custody by a single, less than ideal father who is nevertheless capable of caring for his child, is to engage in a type of

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239. For a more extensive discussion of the state's interest in the adoption process, see Buchanan, *supra* note 15, at 331-32; Gorney, *The Disputed Kinship of Katie Moses At Issue, An Unwed Father's Rights and a Child's Future*, Wash. Post, Nov. 28, 1988, at D1, col. 1.

240. Bodenheimer, *supra* note 31 at 16.

241. *Lehr v. Robertson*, 463 U.S. 248, 265 (1984). The benefits of the adoption process have been well stated as follows:

Adoption safeguards the welfare of children whose parents are unwilling or unable to care for them; eliminates the need for long-term State guardianship—a role that, despite efforts on many levels, has proved almost impossible for governments to fill effectively or economically; and bestows on illegitimate children the benefits of legitimacy. Adoption also saves biological parents from distressful burdens with which they would be unable to cope, thus freeing them to lead more productive lives. It provides a practical alternative to abortion; and—critically—secures for adoptees and childless couples opportunities to develop and enjoy deeply satisfying parent-child relationships.

*Amicus Brief of Barker Foundation for Appellees, McNamara v. County of San Diego Dept. of Social Services*, 485 U.S. 1005 (1988).

242. See *Amicus Brief of Barker Foundation, supra* note 241.

"social engineering"<sup>243</sup> which borders on governmental interference more akin to the policies of dictatorial forms of government than to our own.<sup>244</sup>

Second, this argument fails because the delays and obstacles which are the feared result of granting this father a parental preference will not, in fact, be the actual result. The nonpresumed unwed father who deserves the parental preference, as the *Jermstad* court recognized,<sup>245</sup> is the one who *promptly* asserts his custody claim. Those who make this argument would be correct if the preference were to be applied to the father who, like Quilloin, seeks to obtain custody years after the child's birth, but the Constitution does not require this. It is the father who comes forth early, before the child is placed with and begins to develop a psychological relationship with the adoptive parents, who deserves a parental preference.<sup>246</sup>

In light of this, the denial of a parental preference to the father who promptly comes forward to accept the responsibilities of pater-nity is not justified by the state's interest in promoting the welfare of the child through the adoption process, and such a denial on these grounds thus violates the father's constitutional rights.

### 3. The Lack of a Sufficiently Tailored Approach: California's Modifications of the UPA

California's scheme, which makes the father's rights dependent on the mother's willingness to allow him to become presumed, not only differs from the situations faced by Quilloin<sup>247</sup> and Lehr,<sup>248</sup> but in fact represents a substantial modification of the original Uniform Parentage Act.<sup>249</sup> An overview of the major modifications which California has made will reveal how California's law, while aimed at

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243. *In re Baby Boy S.*, 194 Cal. App. 3d 925, 932, 240 Cal. Rptr. 60, 64 (1987) (when evaluating the competing custody claims of well-qualified adoptive parents and a less-ideal nonmarital mother, the court stated, "were this a situation of social engineering, the decision would be very easy for this court.").

244. In 1984, one California appellate court supported its refusal to sever parental ties on the basis of the best interest test alone by stating: "Whereas 1984 is upon us chronologically, we shall strive to stave off its Orwellian ramifications. Too near in our history another government attempted to impose its arbitrary decision on parental selection." *In re Cheryl E.*, 161 Cal. App. 3d 587, 607, 207 Cal. Rptr. 728, 742 (1984).

245. See *supra* note 150 and accompanying text.

246. It is noteworthy that even the adoptive parents of Baby Girl M. admitted that Edward McNamara "did not get a fair shake. He was wronged. That's not even particularly debateable." Beyette, *Unwed Father: The Other Side*, L.A. Times, June 8, 1988, part 5 at 1, col. 2.

247. See *supra* note 35. Quilloin could have protected his rights through judicial proceedings.

248. See *supra* note 50. Lehr could have protected his rights through New York's putative fathers registry.

249. See *In re Tricia M.*, 74 Cal. App. 3d 125, 130 n.2, 141 Cal. Rptr. 554, 558 n.2 (1977).

protecting the state's compelling interest in the child's welfare, is not narrowly tailored to avoid infringing on the unwed father's constitutional rights.

The first major modification was made in section 4(a) of the UPA, which was enacted in California as section 7004(a).<sup>250</sup> In this section, which provides the means through which an unwed father may become presumed, California omitted subsection (5) of the original Act, which provides:

(a) A man is presumed to be the natural father of a child if:

.....

(5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.<sup>251</sup>

Under this provision, the father is afforded an opportunity to become presumed even if the mother refuses to marry him or allow him to receive the child into his home. By filing a written acknowledgment of paternity, the father may become presumed unless the mother actually disputes his paternity claim. Even if she does this, however, the court will hear this dispute and may determine that the man is indeed the father of the child.

The second major modification was made in the adoption of section 6 of the UPA, which provides rules regarding who may bring an action to determine the existence of paternity. Subsection (c) of section 6, which addresses this issue when there is no presumed father involved, provides that such an action may be brought by the child or her representative, the appropriate state agency, the mother or her representative, or the alleged father or his representative.<sup>252</sup>

250. See *supra* note 72 for the text of § 7004(a).

251. Unif. Parentage Act § 4(a)(5), 9B U.L.A. 287, 299 (1987). Although California completely omitted this provision, a subsection (a)(5) was added to section 7004 in 1987. The California provision, which is completely different from the UPA provision provides:

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

CAL. CIV. CODE § 7004(a)(5) (West Supp. 1990).

252. Unif. Parentage Act § 6(c), 9B U.L.A. at 303 provides:

Although California adopted all of section 6(c), this provision was modified by the addition of the following two sentences: "Such an action shall be consolidated with a proceeding pursuant to subdivision (b) of Section 7017 if a proceeding has been filed under Section 7017. The parental rights of the alleged natural father shall be determined as set forth in subdivision (d) of Section 7017."<sup>253</sup> The last sentence of this addition limits the rights of the nonpresumed father, thus adding a feature which is not present in the UPA.<sup>254</sup>

The third and final major modification involves California's section 7017(d).<sup>255</sup> This subsection, which was adopted from sections 24 and 25 of the UPA,<sup>256</sup> provides in (d)(2) that the claim of a nonpresumed father is to be evaluated on the basis of the best interest of the child, and that "Section 4600 does not apply to this proceeding."<sup>257</sup> As has been demonstrated, it is this provision which has proven to be the source of confusion in the California courts.<sup>258</sup> Significantly, the UPA includes no such provision, but rather states simply that "If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine custodial rights."<sup>259</sup> No standard is provided by which the natural father's custody claim is to be evaluated, nor is it provided that a different standard is to be used when the custody claim is made by a presumed father.<sup>260</sup> Furthermore, the comment to this section makes clear the intent to distinguish fathers on the basis of the interest which they have shown in the child, not on their presumed or nonpresumed status.<sup>261</sup>

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An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 4 may be brought by the child, the mother or personal representative of the child, the [appropriate state agency], the personal representative or a parent of the mother if the mother has died, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

*Id.*

253. CAL. CIV. CODE § 7006(c) (West Supp. 1990).

254. *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 308, 160 Cal. Rptr. 862, 865 (1979).

255. See *supra* note 129 for the text of this provision.

256. Unif. Parentage Act §§ 24 and 25 provide the guidelines for the identification and notification of the unwed father when the mother chooses to relinquish the child for adoption. California combined parts of these two sections to create CAL. CIV. CODE § 7017.

257. See *supra* note 129 for the text of this provision.

258. See *supra* notes 128-200 and accompanying text.

259. Unif. Parentage Act § 25(c), 9B U.L.A. 287, 339 (1987).

260. See *supra* note 225 and accompanying text.

261. The comment to Unif. Parentage Act § 25 provides in part:

Subsections (b) through (e) provide a procedure by which the court may ascertain the identity of the father and permit speedy termination of his potential rights *if he shows no interest in the child*. If, on the other hand, the natural father or a man representing himself to be the natural father claims

Despite these differences, it is clear that both the UPA as originally drafted and as modified by California share a common goal: to protect the welfare of the nonmarital child. The original UPA, however, makes it clear that it attempts to meet this goal by "provid[ing] an efficient procedure by which the rights of the *disinterested* unmarried father may be terminated."<sup>262</sup> The California statutes, however, provide for termination of the father's rights based on the desire of the mother rather than the interest which the father has exhibited in his child. Whether such a result was intended by the Legislature or merely the unintended effect of the Legislature's attempt to fit the UPA into the scheme which was already intact<sup>263</sup> is unclear. The result, however, is quite clear: In its attempt to meet its compelling interest in protecting the welfare of its nonmarital children, California has failed to narrowly tailor its laws, and as a result, has infringed on the fundamental rights of the unwed father. The original UPA reveals the fact that this interest can be met without such an infringement.

### C. *A Model Approach: The Uniform Putative and Unknown Father's Act*

In 1988, the National Conference of Commissioners on Uniform State Laws approved the Uniform Putative and Unknown Father's Act.<sup>264</sup> The Act, which has been approved by the House of Delegates of the American Bar Association,<sup>265</sup> addresses the very issue of this article and attempts to "clarify the rights of putative and unknown

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custodial rights, the court is given authority to determine custodial rights. It is contemplated that there may be cases in which the man alleging himself to be the father is so clearly unfit to take custody of the child that the court would proceed to terminate his potential parental rights without deciding whether the man actually is the father of the child. If, on the other hand, the man alleging himself to be the father and claiming custody is *prima facie* fit to have custody of the child, an action to ascertain paternity is indicated, unless a voluntary acknowledgment can be obtained in accordance with Section 4(a)(5) of this Act.

Unif. Parentage Act § 25, 9B U.L.A. 287, 340-41 (1987) (emphasis in original).

262. Unif. Parentage Act, Prefatory Note, 9B. U.L.A. at 289 (emphasis added).

263. It is significant that the drafters of the UPA recognized the probability of difficulties arising out of an attempt to adopt only parts or modifications of the Act. For this reason, they warned: "A review of the Act will indicate that it is one interlocking and interdependent piece of legislation that does not lend itself to being enacted in part." Unif. Parentage Act, Prefatory Note, 9B U.L.A. 287, 289 (1987).

264. Uniform Putative and Unknown Fathers Act 9B U.L.A. at 16 (Master ed. Supp. 1989).

265. See ABA Adopts Uniform Putative and Unknown Fathers Act, 8 A.B.A. JUV. & CHILD WELFARE L. REP. 31 (April 1989).

fathers in legal proceedings involving custody, visitation, and adoption of their children.”<sup>266</sup>

Section 5 of the Act, which addresses the court’s determination of the father’s parental rights, provides a list of fourteen factors that the court should consider when “determining whether to protect or terminate the parental rights of a putative father.”<sup>267</sup> The court is to apply these factors in order to determine, under section 6, “(i) whether a familial bond between the father and the child has been established; or (ii) whether the failure to establish a familial bond is *justified*, and the father has the desire and potential to establish the bond.”<sup>268</sup>

Most importantly, section 6 continues by directing:

If either clause (i) or (ii) is determined affirmatively, the court may terminate the parental rights of the father . . . only if failure to do so *would be detrimental* to the child. If neither (i) or (ii) is determined affirmatively, the court may terminate the parental rights of the father if doing so will be *in the best interests* of the child.<sup>269</sup>

Thus, the UPUFA specifically provides that when the court determines that the failure of the father to establish a relationship with his child is justified, and he stands ready to do so at this time, he

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266. *Id.*

267. UPUFA § 5. The factors listed are:

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

*Id.*

268. UPUFA § 6(b) (emphasis added). Thus, the UPUFA supports the opinion of the *Jermstad* court, *see supra* note 150, that the court should consider the attempts made by the father who was prohibited by the mother from developing the necessary parent-child relationship.

269. UPUFA § 6(b) (emphasis added).

must be afforded a parental preference in the form of the detriment test.

As proposals for legislative change are presented in the following section of this article, the UPUFA should serve to show the desirability and feasibility of a statutory scheme which protects the rights of the interested nonpresumed father in California.

## VI. PROPOSALS FOR LEGISLATIVE CHANGE

The law in California which addresses the issues involved in the adoption of a newborn child consists of a complicated intertwining of several statutes which were enacted many years apart.<sup>270</sup> There is no doubt that the Legislature, each time it has made additions to this body of law, has carefully attempted to orchestrate an effective and workable interrelationship between the old and new laws. The same degree of care and precision will be required in order to amend the law to recognize the constitutional rights of the unwed father who has promptly acknowledged paternity and sought custody of his child. Because of this, the following proposals are not intended to provide a complete blueprint for the alterations to be made, but rather are intended to set forth an approach or a stepping-stone from which to begin.

The first proposal is that section 7017 should be amended so that it no longer provides for the claims of presumed and nonpresumed fathers to be evaluated by different standards, and thus becomes more like the original UPA.<sup>271</sup> As a result, the law would distinguish between unwed fathers on the basis of the interest which they have exhibited in their children and would focus on the appropriateness of

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270. California first enacted Civil Code section 224 in 1872, and by doing so refused to recognize the interests of the unwed father. *See supra* notes 61-63 and accompanying text. Section 224 was amended several times as a result of the subsequent enactment of both the Family Law Act, which includes section 4600, and the UPA, which includes sections 7004 and 7017. The 1975 amendment to the California Civil Code, made in conjunction with the adoption of the UPA, resulted in the removal of the distinction between legitimate and illegitimate children, so that section 224 now provides that "[a] child having a presumed father under subdivision (a) of Section 7004 cannot be adopted without the consent of its parents if living . . . nor a child with no presumed father under subdivision (a) of Section 7004 without the consent of its mother if living . . . ." CAL. CIV. CODE § 224 (West 1982).

271. In effect, such an amendment would result in an affirmation of the California Supreme Court's ruling in *In re Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984), that the parental preference of Section 4600 would apply to all unwed fathers, both presumed and nonpresumed. *See supra* note 97 and accompanying text.

terminating parental rights, rather than evaluating of the competing custody claims of the father and prospective adoptive parents.

The disadvantage of such an approach would be its result of granting a parental preference to every nonmarital father who is identified, so that the adoptive parents would bear the burden of showing detriment in every case. In effect, this would negate the purpose for the presumed-nonpresumed classification altogether, since the consent of all unwed fathers who are identified would be required for the adoption to take place. While such a result might be desired by some, it is not a result that seems to be mandated by the Constitution.<sup>272</sup>

A second proposal that has been suggested is that the court in a section 7017 hearing should grant custody to the nonpresumed yet interested father, so that he may become presumed under the law.<sup>273</sup> It is clear that section 7017, in its current form, allows this to occur, but the standard by which custody is granted is the best interests test,<sup>274</sup> and thus the claim of the nonpresumed but interested father does not receive protection under the parental preference doctrine. Therefore, this proposal would require section 7017 to be amended to provide that the father who is not presumed, but is adequately interested, should receive the parental preference of section 4600, while the uninterested father would not.<sup>275</sup> Such an amendment would

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272. In *Lehr*, the Court held that "the mere existence of a biological link," while granting the father an opportunity which no one else possesses, is not enough to create a constitutionally protected parental right. *Lehr v. Robertson*, 463 U.S. 248, 261 (1984). See *supra* note 53.

273. For a discussion of the background to this suggestion, see *supra* notes 92-94 and accompanying text. This proposal was expressly made in Judge Bernard Jefferson's dissenting opinion in *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), in which he explained that:

[Sections 7017 and 224] must be interpreted to permit an unmarried father to have an opportunity to gain the status of a "presumed natural father" by securing custody of his child. If the first opportunity for him to gain such custody comes as part of an adoption proceeding, filed within a few days after the birth of his child, that opportunity cannot be precluded by a trial court's determination that the best interests of the child require that he be excluded from acquiring such an opportunity, even though such a determination may be predicated in part on the fact that it is the mother's desire that neither she nor the father have any right to custody.

*Id.* at 331, 160 Cal. Rptr. at 880 (Jefferson, J., dissenting).

274. In *Jermstad*, for instance, the trial court granted custody to the father apparently based on a determination that such an outcome was in the child's best interests. *Jermstad v. McNelis*, 210 Cal. App. 3d 528, 537, 258 Cal. Rptr. 519, 523 (1989). In her brief submitted to the appellate court, *Jermstad*'s counsel argued that the appeal had been rendered moot by the fact that *Jermstad* "became a presumed father, and remains one, upon compliance with the trial court's order awarding him physical custody of the child." Brief for Respondent at 16.

275. Such an amendment would implement the ruling in *Jermstad* by providing two methods by which an unwed father may receive a parental preference: 1) by becoming presumed under section 7004(a); and 2) by promptly acknowledging paternity and seeking custody of the child. See *supra* note 172 and accompanying text.

provide protection for the interested father, but would do so, it seems, in a rather roundabout way.

A more direct method of accomplishing this is presented by this third proposal: The amendment of section 7004(a) to allow a father to become presumed by promptly coming forward to acknowledge paternity and seek custody of his child.<sup>276</sup> Once it is determined that he is indeed the father of the child, his prompt assertion of an interest in custody would thus demand that he receive the parental preference of section 4600. The benefit of such an approach is that the expanded application of the preference would encompass only the claims of the interested father, so that the claims of those who have not exhibited a sufficient interest in a timely manner would still be evaluated only by the best interests test. Thus, the problems of the first proposals could be avoided.

Of course, the adoption of such an approach would require the creation of specific methods through which the father would be able to exhibit the required interest in his child. Such methods could include a putative fathers registry, as was available to Lehr in New York.<sup>277</sup> Alternatively, or in addition to a registry, a method could be provided by which the father's interest could be expressed through an action to establish paternity and seek custody, brought within specific time constraints.<sup>278</sup>

These three proposals, as introduced above, are not presented as ideal solutions, for each one may be insufficient in various respects. The important thing is that they represent starting points from which the Legislature may begin to develop a means of protecting the interests of the unwed father whose paternal relationship demands constitutional protection.

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276. This suggestion was presented in Judge Jefferson's dissent in *W.E.J.*, when he stated:

I would therefore interpret Civil Code section 7004, subdivision (a)(4), as if it read expressly: "He receives the child into his home and openly holds the child out as his natural child or seeks to do so and is prevented from doing so by the acts of the mother of said child."

*W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 332, 160 Cal. Rptr. 862, 880 (1979).

277. See *supra* note 50 and accompanying text. This suggestion was made previously in Bodenheimer, *supra* note 31 at 56-57.

278. It should be noted that Section 7006(c) already provides that an alleged natural father may bring such an action. As a result of an amendment in 1986, however, this section now expressly limits the nonpresumed father's rights by providing that these rights "shall be determined as set forth in subdivision (d) of Section 7017." CAL. CIV. CODE § 7006(c) (West Supp. 1990).

## VII. CONCLUSION

It has been observed that "to an illegitimate child, the father is never putative." Likewise, to an interested father, the child is never illegitimate."<sup>279</sup> Recognizing the principle behind this observation, American law has moved far from its original stance of limiting and denying the rights of parents and children on the basis of marital status. The decisions of the United States Supreme Court in this area, as well as the development of statutory schemes such as the UPA, have been instrumental in this legal movement.

In California, however, the movement must continue, for the unwed father remains in a position in which his opportunity and right to raise and care for his child may be terminated by the mere showing that placing the child with a married couple would be "best." Although such a result may be desired when the father has failed to exhibit an interest in and concern for the child's welfare, the situation is different when the father has promptly acknowledged his paternity and has sought the opportunity to care for his child. In such a case, when there is no showing that custody with the father would be detrimental to the child, the equal protection and due process clauses of the Constitution demand that the father be given this opportunity.

JEFFREY S. BOYD

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279. Note, *supra* note 10 at 1083.