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Diane C. Wilson

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The Uniform Parentage Act: What It Will Mean for the Putative Father in California

In recent years the issue of the rights of out-of-wedlock children has reached the courts with increasing frequency, and many commentators have been persuaded of the need to bring the laws pertaining to these children more closely in line with contemporary social attitudes. Although the subject is not widely regarded as a matter of grave public concern, the number of persons affected by this litigation is not insubstantial. In California alone a total of 12.6 percent of all children born in 1970 were the children of unmarried parents; in the Black community 42.3 percent were born out of wedlock. The implications for public welfare and aid to dependent children programs are obvious where so many homes are potentially fatherless and mothers must bear the economic and emotional costs of rearing children alone. Not to be overlooked are the social and psychological ramifications of depriving children and parents of opportunities to establish lasting relationships.

The person most often overlooked in discussions of the “illegitimacy problem” is the father. Until quite recently, his rights vis-a-vis his children have gone virtually unrecognized. Too often, it was simply assumed that he had little interest in his children and no commitment to caring for them. Now, however, a growing number of these fathers are seeking to define and enforce their affirmative rights to participate in their children’s futures.

1. With implementation of the Uniform Parentage Act, the terms “legitimate” and “illegitimate” should be without legal significance. Accordingly, where possible, less pejorative terms, such as “out-of-wedlock” and “nonmarital” will be employed to describe children of unmarried parents.


4. See generally H. Krause, Illegitimacy: Law and Social Policy (1971). Professor Krause has been writing on the topic of illegitimacy for a number of years, and his article, Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy, 44 Texas L. Rev. 829 (1966), was instrumental in prompting the National Conference of Commissioners on Uniform State Laws to undertake a study of the subject. Uniform Parentage Act, Prefatory Note at 3.
Responding to a changing social and legal environment, the National Conference of Commissioners on Uniform State Laws in 1973 adopted the Uniform Parentage Act, which was subsequently approved by the American Bar Association. The act, in modified form, was passed by the California legislature in September 1975, and became effective January 1, 1976. This note will explore the act with a view toward determining how the status of unwed fathers is changed thereby and what problems may be anticipated from the new legislation.

Initially, however, a brief historical summary of the common law tradition from which present laws evolved will be presented, followed by a consideration of California's legislative and judicial treatment of the nonmarital family prior to enactment of the Uniform Act. Finally, the act itself will be reviewed and an attempt will be made to define its strengths and weaknesses.

From Common Law Origins to Stanley v. Illinois

Traditionally, nonmarital parents have been viewed with righteous indignation by legislatures and courts. At common law, the "sins" of the parents were visited upon their children with a vengeance. The child of a nonmarital union was a legal nonentity; he was variously known as filius nullius, "the son of no one," or filius populi, "the son of the people." He was considered a ward of the parish, and his parents, therefore, had no legal relationship with him and no obligation to provide for his support. The child had no inheritance rights with respect to either parent, and only the issue of his body could be his heirs. No statutes provided for legitimation of the child by the subsequent intermarriage of his parents or by any means other than a special act of Parliament. Since adoption was unknown at common law, the child was unable even to acquire foster parents.

The first change in the status of out-of-wedlock children came with the enactment of statutes requiring that both parents support their

7. 1 W. BLACKSTONE, COMMENTARIES *459.
9. According to Blackstone, "The incapacity of a bastard consists principally in this, that he cannot be heir to anyone, neither can he have heirs, but of his own body. . . ." 1 W. BLACKSTONE, COMMENTARIES *459.
10. A child conceived out of wedlock could be legitimated only if his parents intermarried prior to his birth. 1 W. BLACKSTONE, COMMENTARIES *454-55.
11. SCHATKIN, supra note 8, § 1.08, at 1-26.
illegitimate offspring. Such statutes were intended to remove from the parish the financial burden of caring for the children. To the drafters of these statutes, the child's welfare was of secondary importance, and, as a result, the legal status of nonmarital children remained unaltered. Not until the nineteenth century did the law begin to recognize the unwed mother's legal right to custody of her child.

The common law doctrine of filius nullius was generally adopted by the American states. Initially, the putative father was treated as having at most a moral obligation to provide support for his child. He owed no legal duties to the child and had no custodial or other rights with regard to him. Gradually, however, many jurisdictions retreated from this position and imposed a statutory duty upon the father to render financial assistance to his children. More recently, limited paternal rights of visitation and custody have been recognized by the courts, although the mother has continued to enjoy primary custodial rights. Legitimation statutes, which allow the putative father to alter the child's status to that of a "legitimate" child by receiving him into his home and otherwise acknowledging him as his own, now offer a method for expanding the father's rights. However, this procedure has often been strictly limited by the courts. The right of the unwed father to receive notice of adoption proceedings involving his children has been almost nonexistent; only the mother's consent to the adoption is statutorily required in most jurisdictions—unless the father has legitimated the child.

In the late 1960's and early 1970's, however, the United States Supreme Court decided a number of cases that conceded certain constitutional rights of "illegitimates" and their parents. In 1968, the Court rendered two opinions, Levy v. Louisiana and Glona v. American

12. One such statute was the English Poor Law Act of 1576. Schatkin, supra note 8, § 1.09, at 1-30.
13. Schatkin, supra note 8, § 1.08, at 1-28.
16. Virtually all states now require that the father support his nonmarital children to some degree. See generally H. Clark, The Law of Domestic Relations § 5.3 (1968).
18. Id. at 236-37. For a discussion of legitimation statutes, see H. Clark, The Law of Domestic Relations § 5.2 (1968), and Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1582 n.6 (1972).
Guarantee & Liability Insurance Co., which struck down Louisiana's wrongful death statute on equal protection grounds. In *Levy*, the Court found invidious discrimination in the Louisiana statute in its denial of recovery to nonmarital children for the wrongful death of their mother. Similarly, the Court in *Glona* reasoned that no rational basis existed for the state's refusal to allow the mother of nonmarital children to sue under the statute for the deaths of those children. While a number of courts believed these cases required equality between marital and nonmarital children in their legal relationships with both parents, there remained considerable uncertainty as to how these decisions would affect the child's relationship with his unmarried father. The Supreme Court itself added to the confusion when in 1971 it announced its decision in *Labine v. Vincent*. In that case, the Court refused to extend the principle of *Levy* to invalidate a law that prohibited a nonmarital child from inheriting from her intestate father even though he had acknowledged her as his child. The following year, however, the Court again reversed its position in two memorable decisions. In one of these opinions, *Weber v. Aetna Casualty & Surety Co.*, the Court awarded workmen's compensation benefits to the unacknowledged nonmarital children of a deceased workman, a ruling that amounted to a complete about-face on the issue of out-of-wedlock children's rights.

Perhaps the most celebrated of the 1972 cases dealing with the rights of unwed fathers was *Stanley v. Illinois*, wherein the Court

21. *Id.* at 73.
26. In a recent case, however, the Court appears to have reversed itself again in favor of the position taken in *Labine*. *Matthews v. Lucas*, 44 U.S.L.W. 5139 (U.S. June 29, 1976). In *Matthews*, a legislative classification based upon legitimacy was held not to be subject to the strict scrutiny test of equal protection. Provisions of the Social Security Act require nonmarital children to establish eligibility for surviving children's benefits by proving their dependency on the deceased wage earner-parent. Marital children, in contrast, are presumed to be dependent without such proof. In upholding the law, the Court stated, "Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the fifth amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny." *Id.* at 5143. *Cf.* Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).
27. 405 U.S. 645 (1972).
recognized for the first time a putative father's parental rights. Peter Stanley, petitioner in the case, had never married the mother of his children although they had lived together intermittently for a period of eighteen years. When the mother died, the children were separated from Stanley pursuant to an Illinois statute under which the children of a nonmarital union automatically became wards of the state upon the death of their mother. This legislative scheme made no provision for a hearing to determine the father's fitness and did not require proof of neglect before the children were removed from their father's care.

In striking down the statute, the Court in Stanley held that due process entitled the unwed father to a hearing on his fitness as a parent before a decision regarding custody of his children could be made. The state's presumption that all unmarried fathers are unsuitable and neglectful parents, said the Court, served only the state's convenience and failed to protect the fathers' "cognizable and substantial" interest in retaining custody of their children.\(^2\) Such fathers must therefore be notified of pending actions affecting their parental rights and be given an opportunity to be heard. The Court further determined that where, as in the Illinois plan, other parents are provided the opportunity for a hearing, it is a denial of equal protection if such a hearing is withheld from unmarried fathers.

Predictably, Stanley provoked a flood of commentary\(^2\) and provided an impetus to states in their efforts to modernize laws dealing with nonmarital families. California's adoption of the Uniform Parentage Act was such a response.\(^3\) Before considering the act in some detail, California's statutory and decisional law prior to enactment of the new legislation will be examined in order to provide background on specific problems faced by putative fathers. As will be seen, several of these problems will persist under the new law.

**California Law Prior to the Uniform Parentage Act**

As is true of the majority of states, California has historically failed to recognize adequately the rights of the unmarried father in many instances. While both parents have been required to provide support for the child,\(^3\) the unwed mother has been exclusively entitled to the

\(^{28}\) *Id.* at 652.


\(^{30}\) Letter from Senator Anthony C. Beilenson to Sister Bertille Prus, April 2, 1975, in author's files.

child's custody, services and earnings. California has been one of a handful of states that occasionally have allowed the putative father visitation rights over the objections of the mother, but this right has not been consistently granted. Furthermore, until Stanley, only the mother's approval was necessary in adoption proceedings, the putative father's having neither a right to notification nor a right to be heard on the subject.

Legitimation

The California father has been able to establish rights to his child where he has “legitimated” him, either by subsequently marrying the mother or by “adopting” the child pursuant to special statutory provisions set out in Civil Code section 230. This section required that the father publicly acknowledge the child as his, receive him into his family (with the consent of the father's wife if he was married), and otherwise treat the child as his own. Compliance with these provisions equalized the father's rights with those of the mother in regard to custody, visitation, and adoption.

If the child's mother opposed the putative father’s attempt to conform to the legitimation statute, difficulties often arose, and inconsistent interpretations of the prerequisites of section 230 have appeared in the cases over the years. In Lavell v. Adoption Institute, for

32. Cal. Civ. Code § 197 (West Supp. 1976). Where the mother is dead, the courts have awarded custody to the unwed father who could demonstrate his fitness. See, e.g., Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954). In Smith the court stressed that giving the father custody would lead to legitimation of the children under former section 230 of the Civil Code. Id. at 94, 265 P.2d at 890. Justice Traynor's concurring opinion illustrates the reluctance of many in the judiciary to extend parental rights freely to unwed fathers. According to Justice Traynor, before an unwed father could be adjudged a fit parent, he should first be required to explain why he had not legitimated his child. 42 Cal. 2d at 98, 265 P.2d at 892-93. See also Note, Custody: A Dominant Right of the Father of an Illegitimate Child After the Death of the Mother?, 42 Calif. L. Rev. 514 (1954).

33. See, e.g., Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949). The putative father in Strong had been able to establish a close relationship with his child and had, in fact, probably legitimated him. The court did not discuss the legitimation issue.


37. Id. § 9, at 531.
example, the court liberally construed the father's obligation to receive the child into his home. In that case, the mother of a nonmarital child had been living with the child's father for two years but left his home shortly before the child was born. The father readily acknowledged his paternity and attempted to accept the child into his home, but he was prevented from doing so by the mother, who had chosen to relinquish the child for adoption. In the father's suit to prevent the adoption, the court held that he had legitimated the child prior to its birth, having satisfied the receipt requirement by living with and supporting the pregnant mother and attempting in good faith to provide a home for the child. The court's opinion recognized a custodial right in natural parents, whether they are married or not, that is superior to that of strangers seeking to adopt a child. The Lavell decision seemed to bode well for the unmarried father.

Subsequent courts, however, did not always embrace a policy favoring legitimation by the natural father. In a number of more recent decisions, fathers' claims of constructive compliance with section 230 were rejected. Many of these opinions read into section 230 a requirement that the child's mother consent to legitimation; thus, if the mother refused to allow the father to take the child physically into his home for a period of time, the father could not accomplish legitimation.

39. See note 37 & accompanying text supra.
40. 185 Cal. App. 2d at 560.
41. See, e.g., Adoption of Pierce, 15 Cal. App. 3d 244, 93 Cal. Rptr. 171 (1971) (unwed father's consent to adoption unnecessary although he had made support payments and had been granted visitation rights pursuant to a court order); Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965) (unwed father's petition for guardianship denied although he had publicly acknowledged his child and purchased clothing and furnishings for her); Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964) (acknowledged father's consent to adoption unnecessary although he had attempted to pay the mother's expenses and provide a home for the child). These cases were recently overruled by the California Supreme Court. See note 46 & accompanying text infra.
42. In one case, the father had visited his child a number of times but, because the mother or a nurse was present during these visits, the court found that there had been "no relinquishment of complete guardianship control by the mother" and the father could not therefore meet the statutory requirements. Adoption of Pierce, 15 Cal. App. 3d 244, 93 Cal. Rptr. 171 (1971).

Some courts have apparently felt that extension of rights to unwed fathers would lead to abuse of the adoption system. A California court of appeal has theorized that the work of social workers and others involved in the adoption process would be immeasurably increased if the fathers were allowed to participate in adoptions, and that any relaxation of Civil Code section 230 would give rise to fraud and coercion by fathers seeking to profit from the adoption of their children. Adoption of Irby, 226 Cal. App. 2d 238, 241-42, 37 Cal. Rptr. 879, 882 (1964).
Stanley paved the way for a challenge to this judge-made requirement, and in July 1975, the California Supreme Court spoke to the issue. *In re Richard M.*[^43^] was a habeas corpus action by the mother of an out-of-wedlock child (Richard) to regain custody of the child from the putative father. Evidence showed that the father had readily acknowledged Richard as his child. Although the mother had not lived with the father prior to Richard's birth, she and the child had stayed at his home for about one month after Richard was born. Thereafter, the father visited Richard frequently, often bringing him to his home for visits of several days duration. Following one of these visits, the father refused to return the child to the mother's home, and she instituted this action. The father argued that he had met the requirements of section 230, thereby legitimating Richard and equalizing his rights and obligations to the child with those of the mother. Relying on earlier cases,[^44^] the mother countered that legitimation required the mother's prior consent and relinquishment of custody.

In upholding the father's right to custody, the court in *Richard M.* pointed out that the evidence amply supported a finding of legitimation under section 230. Refusing to accept the view that maternal consent was an essential element of legitimation, the court noted:

>[Section 230] does not mention the natural mother, does not require her consent, and does not indicate that the father must acquire custody of the child [through the mother's voluntary relinquishment]. Nor do we find any basis for imposing this added burden upon the father's ability to legitimate his offspring, particularly in light of public policy favoring legitimation.[^45^]

Prior cases inconsistent with the opinion were disapproved.[^46^]

The *Richard M.* holding thus dispensed with any requirement that the child's mother consent to legitimation. However, as is pointed out in the following discussion of the Uniform Parentage Act, problems may persist under the new law because of the court's failure to define clearly and specifically the degree of physical control of the child that must be

[^43^]: 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975). The father in *Richard M.* advanced the argument that California law violates the equal protection clause of the fourteenth amendment, as well as article I, section 7 of the California Constitution, insofar as it denies to fathers of out-of-wedlock children those custody rights enjoyed by other parents. The court, however, chose to dispose of the custody question by application of section 230 and refused to reach the constitutional issues.

[^44^]: 14 Cal. 3d at 796, 537 P.2d at 371, 122 Cal. Rptr. at 539.

[^45^]: *Id.* at 797, 537 P.2d at 371, 122 Cal. Rptr. at 539. Specifically mentioned were the following: Cheryl Lynn H. v. Superior Ct., 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974); Adoption of Pierce, 15 Cal. App. 3d 244, 93 Cal. Rptr. 171 (1971); Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964). See notes 41 & 42 supra.
exercised by a father seeking to "receive" a child into his home for purposes of legitimation. 47

Applicable Evidence Code Presumptions

While the holding in Richard M. clarified the rights of nonmarital fathers on the issue of legitimation, other problems remained with regard to two presumptions, one rebuttable and one conclusive, contained in the Evidence Code. Codified by the legislature in 1872, these presumptions have been retained intact through subsequent revisions of the code, and courts have continued to struggle with their application.

Section 661 of the Evidence Code, 48 which came into play when a husband and wife were not cohabiting, provided that the child of a woman who was or had been married was presumed to be a legitimate child of that marriage if born during the marriage or within 300 days of its termination. While this presumption was rebuttable by clear and convincing proof, such proof could be offered only by the husband or wife, by their descendants, or, in certain actions not here relevant, by the state. 49 Cases challenging the presumption of section 661 were generally brought by husbands seeking to avoid support obligations to children not their own or by wives seeking a declaration of paternity in someone other than their husbands. A man claiming paternity of such a child had, by the terms of the statute, no standing to raise the issue; his rights were entirely dependent upon the actions of those parties designated in section 661. 50

An unwed father's recent challenge to section 661 saw the first step taken to alter this disadvantaged position. In In re Lisa R. 51 evidence showed that the child (Lisa) was conceived and born while the mother was living with Victor H. during a separation from her husband. Victor was listed on the birth certificate and in welfare records as Lisa's putative father. Following the child's birth the mother returned with

47. See notes 113-19 & accompanying text infra.
48. Cal. Stat. 1965, ch. 299, § 661, at 1297 (repealed 1975). Section 661 read as follows: "A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof."
49. The state is empowered to bring a criminal action for parental nonsupport of dependent children. CAL. PEN. CODE § 270 (West 1976).
Lisa to her husband, over Victor's objections. In 1969, at the age of three, Lisa was removed from her mother's custody and placed in a foster home as a ward of the court following a finding of neglect and maternal unfitness. The mother and her husband had both died prior to the fourth annual review of Lisa's dependency status in juvenile court, and Victor attempted to offer proof of his paternity in order to establish his right to custody. The juvenile court determined that under section 661 Victor had no standing to offer proof and that he should therefore be excluded from the hearing.

In the court of appeal, Victor argued that section 661, as applied in the lower court, deprived him of due process. The appellate court, however, reluctantly affirmed the juvenile court order, noting that "[a]lthough it is called 'rebuttable,' as a practical matter the presumption of section 661 is conclusive upon parties other than those to whom it extends the right of dispute." Victor thus had no standing to assert his paternity.

Victor carried his case to the California Supreme Court, which handed down its decision in March 1975. Relying heavily on Stanley, the court weighed the competing private and state interests. Victor's private interests arose, the court reasoned, from the fact that he had lived with Lisa's mother both before and after Lisa's birth, had contributed to her support, and had visited Lisa when he was able to do so. Also, he had no other remedy to protect his paternal interest in Lisa. Recognizing the state's interests in guarding the welfare of children and promoting marriage, the court nevertheless held, "for reasons at least as compelling as those in Stanley, that a presumption which precludes to appellant in the instant circumstances a right to offer evidence to prove that he is the father of the minor child is unreasonable, arbitrary and capricious, and a denial of due process."

This opinion is in line with both the general policy in the courts favoring legitimation and with the United States Supreme Court's

53. Id. at 862.
55. The court in Lisa reasoned that, while the state had a legitimate interest in relieving a child of the stigma of illegitimacy, this did not warrant conclusiveness of the presumption. The court pointed out that a putative father attempting to establish his paternity would doubtless intend to legitimate the child. 13 Cal. 3d at 650, 532 P.2d at 132, 119 Cal. Rptr. at 484. Moreover, in Lisa's case, she would be legitimate regardless of the outcome of Victor's suit. Because she was born while her mother was married, she would be considered a legitimate child of that marriage if Victor was unsuccessful in rebutting the presumption of section 661. If he succeeded in rebutting the presumption, Lisa would become a legitimate child of Victor through operation of Civil Code section 230. 13 Cal. 3d at 648 n.14, 532 P.2d at 131, 119 Cal. Rptr. at 483.
56. 13 Cal. 3d at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485 (emphasis added).
57. See, e.g., Rodriguez v. Rodriguez, 329 F. Supp. 597 (N.D. Cal. 1971); Hurst
finding of parental rights in the unwed father in Stanley. It remains to be seen whether the reasoning in Lisa will be extended to cover the case in which the mother and her husband are still alive and claiming custody. Despite this uncertainty, however, the unwed father appears to have achieved a limited victory where the presumed father has died, at least in those cases in which he can demonstrate legitimation and a failure of maternal care.

While the trend toward liberalizing the rights of putative fathers may indicate that courts will eventually apply the Lisa ruling to all men desiring to rebut the presumption of section 661, such is not the case with regard to the conclusive presumption of Evidence Code section 621. This section applies to those cases in which the mother of a child is cohabiting with her husband. Thus, a child born to a woman living with her husband is conclusively presumed to be the legitimate child of the husband. Despite the fact that the trend nationally is away from the use of conclusive presumptions and in the face of increasing criticism, the California legislature has consistently reaffirmed section 621. The supreme court lent support to this legislative position by upholding the constitutionality of the presumption, contending that "[a] conclusive presumption is in actuality a substantive rule of law and cannot be said to be unconstitutional unless it transcends . . . a power of the legislature."

In implementing section 621, the courts have attempted to narrow the area to which it must apply. The statute's requirement of cohabitation has been strictly construed to mean the living together of a man and woman as husband and wife at the time of probable conception. While in the original code section impotency of the husband was the only


58. There is some doubt as to whether Lisa will apply in other situations. In its discussion of the reasons upon which it based its decision, the court in Lisa made several apparently restrictive references to the "circumstances of the instant case." For example, the court stated, "Although a state has a legitimate interest in promoting marriage, and in furtherance of that policy of not impugning a family unit . . . that policy cannot be served when the family unit has been dissolved as here by the death not only of the mother but of the presumed father." 13 Cal. 3d at 650, 532 P.2d at 132, 119 Cal. Rptr. at 484.


62. Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919).
exception to application of the conclusive presumption, over the years the courts added sterility as a second exception.

Critics of the conclusive presumption assail it because, practically speaking, it can and does have the effect of prohibiting introduction of any rebuttal evidence, regardless of its strength, in actions where the paternity of a husband who is living with his wife is challenged. The continued exclusion of blood test evidence in cases to which section 621 applies, despite its proven soundness in determining nonpaternity, has been particularly controversial.

California's adoption in 1953 of a modified version of the Uniform Act on Blood Tests to Determine Paternity resulted in no change in the operation of section 621. As drafted by the National Conference of Commissioners on Uniform State Laws, the Blood Test Act contains a provision that "[t]he presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of the experts, as disclosed by the evidence based upon the [blood] tests, show that the husband is not the father of the child." The California version of the Uniform Act omitted that section, prompting courts and commentators to assume that the legislature intended to affirm the strong social policy embodied in section 621 of the Evidence Code.

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63. Prior to enactment of the Uniform Parentage Act, Evidence Code section 621 read as follows: "Notwithstanding any other provision of law, the issue of a wife co-habitating with her husband, who is not impotent, is conclusively presumed to be legitimate." Cal. Evid. Code § 621 (West 1954).

64. Hughes v. Hughes, 125 Cal. App. 2d 781, 786, 271 P.2d 172, 175 (1954). Dicta in some court opinions has underscored the courts' reluctance to apply section 621 where "the circumstances were such as to render it impossible that [the husband] could be the father of the child." Estate of Walker, 176 Cal. 402, 410, 168 P. 689, 692 (1917). For example, one early case seemed to pave the way for a "racial difference" exception where a Caucasian husband and wife had a mulatto child. Estate of McNamara, 181 Cal. 82, 96, 183 P. 552, 557-58 (1919). However, this possibility was ruled out with some finality in Hess v. Whitsett, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1967). In that case, a child with negroid features and complexion was conclusively presumed to be the child of a Caucasian couple, despite the wife's admission that she had had intercourse with the black defendant during the period of conception. The court in Hess stressed that the operation of the conclusive presumption should not be subject to judicially created exceptions.

The Code was amended in 1975 to include sterility as one of the exceptions to the operation of the conclusive presumption. Cal. Evid. Code § 621 (West 1966 & Supp. 1976).


68. See, e.g., Kusior v. Silver, 54 Cal. 2d 603, 616, 354 P.2d 657, 7 Cal. Rptr.
Thus, blood tests should be admitted only in those cases to which the rebuttable presumption of section 661 applies—that is, where the husband and wife are not cohabiting.

There are a few cases under section 621 that have admitted blood tests into evidence, but they have been circuitously reasoned. Jackson v. Jackson,69 for example, was a rather unusual case involving a marriage in which the partners cohabited for only four days. When his wife left him, the husband sued for annulment of the marriage. The wife countered with an allegation that she was pregnant with the plaintiff-husband’s child, and the husband was ordered to pay support and maternity expenses to her. Following the child’s birth approximately nine months after termination of cohabitation, the trial court ordered the husband, wife, and child to submit to blood tests. These tests demonstrated that the husband could not have fathered the child and he moved to terminate the support orders, using the tests as evidence. The trial judge refused to admit the blood tests into evidence and denied his motion.

On appeal, the California Supreme Court reversed the trial court’s order and held that blood tests were valid as evidence for the limited purpose of proving that conception, by the husband or by any other man, did not occur during cohabitation. Justice McComb, who authored the opinion, reasoned that “the husband is entitled to avoid the operation of the ‘conclusive presumption’ by proof that although there was cohabitation it was impossible that the child was conceived during the period of cohabitation.”70 Thus, the blood tests were evidence that the child was not conceived while the husband was having intercourse with his wife, and the court assumed that the husband would be able to account for his wife’s whereabouts during their brief marriage, thus proving that she had not had intercourse with any other man while she was living with her husband. Once it was shown that the child was not conceived during cohabitation, the rebuttable presumption of section 661 would apply and evidence, including blood tests, would be admissible on the issue of paternity.71 The court concluded by noting that “when the issue is whether the child could possibly have been con-

129 (1960). Had the legislature adopted section 5 of the Uniform Act it would not have altered the situation in any case. Evidence Code section 621 applies “notwithstanding any other provision of law.” CAL. EVID. CODE § 621 (West Supp. 1976).
69. 67 Cal. 2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).
70. Id. at 247, 430 P.2d at 290, 60 Cal. Rptr. at 650.
71. The court’s opinion is confusing in that Justice McComb indicated that “if the husband and wife are not in fact residing together, an exception to the application of the conclusive presumption arises; the presumption is rebuttable and blood test evidence may be admitted to rebut it.” Id. Actually, if the marriage partners were not living together, section 621 did not apply at all; instead, section 661 applied.
ceived during cohabitation, the evidentiary rule is 'any competent evidence relevant to the question is admissible.' 72

Subsequent courts have declined to extend this admission of blood tests to rebut the presumption of section 621, even when results clearly impossible by the laws of nature are produced. Commentators have argued that if the courts on their own could, in the face of clear statutory language to the contrary, adopt a sterility exception to the presumption, they should likewise create a blood test exception to prevent unreasonable decisions. 73 To date, no court has undertaken this task and, in light of past decisions, there is little reason to hope for such a development in the near future. Critics of section 621 have instead pinned their hopes on the legislature either to repeal the presumption or to add a blood test exception to its operation. These hopes were again thwarted when the conclusive presumption was reaffirmed by the legislature in the bill incorporating the Uniform Parentage Act.

The Uniform Parentage Act

The Uniform Parentage Act, as drafted by the National Conference of Commissioners on Uniform State Laws, 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." 74 The commissioners developed these new provisions because, in their view, "the bulk of current law on the subject of children born out of wedlock is either unconstitutional or subject to grave constitutional doubt." 75

In substance, the act eliminates reference to legitimacy and illegitimacy, and instead refers only to "the parent and child relationship." 76 This is defined as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." 77 This relationship extends

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72. 67 Cal. 2d at 248, 430 P.2d at 291, 60 Cal. Rptr. at 651.
74. UNIFORM PARENTAGE ACT, Prefatory Note at 5.
75. Id. at 4.
76. Because the Supreme Court decisions discussed earlier clearly equalized the substantive legal position of out-of-wedlock children with that of legitimate children, the commissioners dispensed with the detailed substantive provisions of their earlier drafts of the act regarding parental obligations for maintenance, education and support of non-marital children. Id. at 5.
77. Id. § 1.
to every parent and child without reference to the parents' marital status.\textsuperscript{78}

The remainder of the act deals with the procedural aspects of distinguishing persons against whom the child's rights to support, inheritance, death benefits and the like may be asserted. Provisions detail the methods for ascertaining the identity of the child's father.\textsuperscript{79} To accommodate the rare case in which dispute arises regarding the mother's identity, a procedure for determining the existence of the mother and child relationship is also included.\textsuperscript{80}

The history of the recent legislative change in California can be traced to 1973, when S.B. 1336, a bill designed to equalize the rights of nonmarital children with those of marital children, was introduced in the State Senate. Following its passage by the Senate in early 1974, it was amended at the request of the California Bar Association to incorporate the provisions of the Uniform Act. Action on the bill was deferred for study of the amendments, and the bill was reintroduced by its author in 1975 as S.B. 347. The bill as finally passed by the legislature in September 1975 included major amendments proposed by the State Department of Health's adoption units and vital statistics section, as well as suggestions by the State Bar's Family Law Committee and the California Family Support Council.\textsuperscript{81}

In considering the significance of California's adoption of the Uniform Parentage Act, it is necessary to keep in mind that California did not pass the act \textit{in toto}. Several lengthy portions of the commissioners' draft were excluded in S.B. 347.\textsuperscript{82} However, S.B. 347 did adopt,

\begin{itemize}
\item \textsuperscript{78} \textit{Id.} \textsuperscript{\textcopyright} \textsuperscript{2.}
\item \textsuperscript{79} \textit{Id.} §§ 4-6. Section 4 sets out five situations in which a man is presumed to be a child's natural father. These provisions are dealt with at length in the succeeding pages of this Note. See notes 84-88 \& accompanying text \textit{infra}.
\item Section 5 provides that "if, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." The husband's written consent must be filed with the State Department of Health where it will be kept in a sealed file. Records are available for inspection only upon court order for good cause shown.
\item Section 6 contains provisions for bringing an action to determine the existence of the father and child relationship. This section is also considered in depth later in the text. See notes 91-93 \& accompanying text \textit{infra}.
\item \textsuperscript{80} \textbf{UNIFORM PARENTAGE ACT} § 21 provides: "Any interested party may bring an action to determine the existence or non-existence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply."
\item \textsuperscript{81} Statement of Senator Anthony C. Beilenson regarding Senate Bill No. 347, August 7, 1975, in author's files.
\item \textsuperscript{82} Among the deletions was section 7 of the national Uniform Act which provides a three-year statute of limitations for actions to determine the existence of a father
\end{itemize}
without change, the definition of the "parent and child relationship" and its application to all parents and children.\textsuperscript{83} It also retained, with modification and deletions, major provisions concerning presumptions of paternity, determination of the father and child relationship by court action, jurisdiction and court procedures, notice of adoption, and termination of parental rights.

The discussion that follows will concentrate on the procedural problems which can be expected to persist under the modified law. For the sake of clarity, the inquiry will be broken down into sections concerning presumptions, legitimation, and adoption and custody.

**Presumptions**

As is true of the commissioners’ proposal, S.B. 347 first sets up a series of presumptions to cover those cases where external circumstances point toward a particular man as the father of a child.\textsuperscript{84} Under these provisions, a man is presumed to be a child’s father in the following situations:

1) Evidence Code section 621: Unless a husband is impotent or sterile, he is \textit{conclusively} presumed to be the father of any children

and child relationship as to a child with no presumed father. The minutes of the State Bar Committee on Family Law indicate that its members voted to omit the provision because it was “unnecessary and of questionable constitutionality.” Combined Minutes, Committee on Family Law, May 3, 1975 and June 14, 1975, at 2. Presumably, the Legislature acquiesced in this suggestion. The California legislation thus contains no statute of limitations with regard to establishing the existence of a father and child relationship where there is no presumed father.

Also omitted in S.B. 347 were sections 10 through 13 of the Uniform Act, providing details for mandatory pretrial hearings. Admissible in these proceedings would be blood tests and other evidence relating to paternity, including evidence of sexual intercourse, experts’ opinions concerning the statistical probability of the alleged father’s paternity based on duration of the pregnancy, and medical and anthropological evidence relating to paternity. On the basis of information produced in the hearing, the judge conducting the proceedings would recommend an appropriate settlement; if any party refused to accept the recommendation, the action would be set for trial. The drafters of the Uniform Act expected that such pretrial procedures would “greatly reduce the current high cost and inefficiency of paternity litigation.” UNIFORM PARENTAGE ACT, Prefatory Note at 4.

Those who studied the measure in California prior to passage of S.B. 347 apparently did not agree. For example, members of the Committee on Family Law felt that pretrial procedures were already available and that it was questionable that anyone would consent to the new system. They considered that institution of such hearings would be duplicative and would only increase the burden on the courts. Combined Minutes, Committee on Family Law, May 3, 1975 & June 14, 1975, at 2.


84. Section 7004 of the Civil Code corresponds generally with section 4 of the Uniform Parentage Act. Where the California legislation differs from the Uniform Act, such differences will be noted.
conceived by his wife while he is living with her. 85

2) A man is rebuttably presumed to be the father of a child under the following circumstances: 86

a) Civil Code section 7004(a)(1): If the child is born during a marriage in which the husband and wife are not cohabiting, or within 300 days of its legal termination; 87

b) Civil Code section 7004(a)(2): If, before the child's birth, he and the mother have attempted to marry each other and the child is born within 300 days of the termination of a marriage that could be declared invalid only by court order, or within 300 days of termination of cohabitation if the marriage was invalid without the necessity of a court order;

c) Civil Code section 7004(a)(3): If, after the child's birth, he and the mother marry or attempt to marry each other and with his consent he is named as the father on the birth certificate, or he is obligated to support the child under a written voluntary promise or by court order;

d) Civil Code section 7004(a)(4): If he receives the child into his home and openly holds it out as his natural child.

These new provisions for the most part simply reiterate existing California law. 88 S.B. 347 expressly retained the conclusive presumption of Evidence Code section 621, adding a sterility exception and removing reference to "legitimacy." 89 Section 7004(a)(1) of the new

85. This section was amended by S.B. 347 to include the judicially created sterility exception. CAL. EVID. CODE § 621 (West 1966 & Supp. 1976).

86. Except as provided in section 621 of the Evidence Code, presumptions under section 7004 of the California Civil Code may be rebutted by clear and convincing evidence. If two or more presumptions under this section conflict, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls." CAL. CIV. CODE § 7004(b) (West Supp. 1976).

87. The statute itself does not specifically mention cohabitation. It simply provides that a man is presumed to be the natural father of a child if "[h]e 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." CAL. CIV. CODE § 7004(a)(1) (West Supp. 1976), amending Cal. Stat. 1965, ch. 299, § 1, at 3013.

88. The commissioners provide a fifth presumption not adopted in California. Under it, a man is presumed to be the father of a child if he acknowledges his paternity in a writing filed with an appropriate court or vital statistics bureau, and the mother does not dispute the acknowledgement. If another man is presumed to be the child's father under one of the other four presumptions, acknowledgement can be effected only with such person's written consent or after the presumption has been rebutted. As with all of the presumptions in the commissioners' draft, this presumption is rebuttable only by clear and convincing evidence. UNIFORM PARENTAGE ACT § 4(a)(5).

legislation, which provides for a rebuttable presumption where a child is born during marriage or within 300 days of its termination, is essentially a restatement of Evidence Code section 661. The previous discussion of these Evidence Code presumptions thus remains relevant to an understanding of the problems the unwed father continues to face in California.

The putative father's opportunities to raise the issue of paternity remain limited. The new Civil Code section 7006 deals with the action to determine whether a father and child relationship exists. It restricts attack on the presumptions of paternity based on marriage or attempted marriage to a limited group. Only the child, the natural mother, or a man presumed to be the father of the child by reason of marriage may bring an action to declare or dispute the existence or nonexistence of the father and child relationship. This means that where the mother is or has been married within the previous 300 days, it will be difficult, if not impossible, for a man other than her husband to raise the paternity issue. The options open to a man claiming to be the father of a child where the child already has a presumed father are few. He may try to convince the child, the mother or the mother's husband to bring an action or he may allege that he "legitimated" the child under section 7004(a)(4) and is himself a presumed father. Where he is unsuccessful in establishing his standing, the presumptions of section 7004(a)(1), (2), and (3) will operate as conclusive presumptions as to him, much in the way that Evidence Code section 661 operated before In re Lisa R.

The court in Lisa did question the constitutionality of use of this type of presumption to frustrate the unwed father's attempts to present

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90. See notes 48-73 & accompanying text supra.
91. The presumptions based on marriage or attempted marriage are those contained in section 7004(a)(1)-(3) of the Civil Code. See text accompanying notes 84-87 supra.
92. CAL. CIV. CODE § 7006(a) (West Supp. 1976). These are the same persons who were empowered to contest the rebuttable presumption of the old Evidence Code section 661. See note 50 & accompanying text supra.
93. The "legitimation" provision of section 7004(a)(4) is discussed later in the text. See text accompanying notes 110-19 infra.
evidence of his paternity. However, as was noted in the previous discussion of the case, a constitutional argument will be accepted by the court in cases where the mother and the presumed father are still alive. At least some proponents of the Uniform Parentage Act in California apparently believe that Lisa is applicable only to cases in which the presumed father is dead. As adopted, S.B. 347 includes a provision dealing with paternity suits that is not contained in the original Uniform Parentage Act. The new Civil Code section 7006(c) reads as follows:

An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child . . . , the State Department of Health, the mother . . . , [or] a man alleged or alleging himself to be the father . . .

The minutes of the California Bar Association's Committee on Family Law indicate that the language pertaining to the deceased presumed father was intended "to cover the In re Lisa situation." Committee members, as well as the authors of S.B. 347, thus seemed to feel that addition of such a section was an adequate response to the due process arguments posited by the Lisa court.

A precise prediction as to how the courts will interpret the presumptions of section 7006 in light of Stanley and Lisa is, of course, impossible. While both cases offer hope of expansion of all putative fathers' rights, it must be borne in mind that both concerned particular sets of facts which invited sympathetic treatment by the courts. In Stanley, there was no presumed father—the unwed father had lived with his children for years and had always maintained a familial relationship with them. Their mother had died, which meant that if the children were taken from Stanley's care, they would be placed with strangers. Accordingly, the Supreme Court's decision in the case can be read as essentially continuing a "common theme which runs through the cases, those concerning both legitimate and illegitimate children . . . that an established family relationship is ordinarily to be preferred and protected." In Lisa the child had not lived with her putative father for several years and had, in fact, formed an attachment to foster parents who wished to adopt her. However, both the mother and the presumed father had died, leaving Lisa with only her putative father as her "natural" family. The California court was strongly influenced by the

95. See notes 51-58 & accompanying text supra.
96. CAL. CIV. CODE § 7006(c) (West Supp. 1976) (emphasis added).
Supreme Court’s recognition in Stanley of substantial rights in unwed fathers premised on “the rights to conceive and to raise one’s children.” Hence the Lisa court emphasized evidence indicating that Lisa’s father had “already legitimatized” her pursuant to Civil Code section 230.

The unwed father who cannot show any of the elements found in Stanley and Lisa—legitimation, nonexistence or death of a presumed father, and maternal unfitness or death—appears to be without recourse to challenge the presumptions of Civil Code section 7004. It is difficult, but necessary, to balance this apparent inequity with the rights of the other persons involved in these cases. In opposition to the vesting of unrestricted rights in the unwed father is a social policy that seeks to protect the interests of children, whether born in or out of wedlock, to stable home environments, parental support, and equality of legal status. Also, the rights of the unmarried mother to custody, privacy, and freedom from social stigma must be guarded. In light of these considerations, it is doubtful that courts will move with much speed in further expanding putative fathers’ rights to challenge rebuttable presumptions.

This is, of course, especially true of cases arising under the conclusive presumption of Evidence Code section 621. As mentioned previously, the legislature again retained this presumption in S.B. 347, adding a sterility exception and eliminating reference to legitimacy. The new California scheme once again makes no mention of a blood test exception to operation of the presumption, and the courts must continue to apply the reasoning of past decisions to prevent presentation of such evidence on the issue of paternity. While assaults on section 621 have so far proven unsuccessful, continued attempts to encourage the courts to evade the presumption where its application will produce results clearly contrary to nature seem to be the only available alternative.

In attacking section 621, aggrieved putative fathers may contend that operation of the presumption where rebuttal evidence exists de-

100. 13 Cal. 3d at 648 n.14, 532 P.2d at 131, 119 Cal. Rptr. at 482.
102. See notes 59-69 & accompanying text supra.
103. See note 85 & accompanying text supra.
104. Not everyone agreed with this decision. The California Bar Association’s Committee on Family Law, for example, voted to repeal section 621 in its entirety. Committee on Family Law, Combined Minutes, May 3, 1975 & June 14, 1975, at 4.
105. See notes 65-73 & accompanying text supra.
prives husbands and fathers of their fourteenth amendment due process rights, in that it cannot be overcome by any evidence other than that showing impotence, sterility, or non-cohabitation, regardless of how persuasive it might be. It thus denies these men the opportunity for a fair hearing of their cases. Moreover, arbitrary application of the presumption by the courts, in the face of evidence that would conclusively refute the presumption, is arguably a denial of equal protection. As the Supreme Court emphasized in Stanley:

"Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues . . . when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."107

Conclusive presumptions of legitimacy had their genesis in public policy considerations that favored mitigation of the stigma of illegitimacy at a time when scientific evidence relating to paternity was nonexistent. With changing social attitudes and increasing scientific knowledge, continued use of such presumptions appears to be unwarranted.

Legitimation

As observed earlier,109 Civil Code section 230 had controlled the legitimation of nonmarital children by their fathers. In enacting S.B. 347, California repealed section 230 in favor of the somewhat more liberal provision of the Uniform Parentage Act. As set out in the new Civil Code section 7004(a)(4), the simplified procedure presumes a man to be the natural father of a child if he receives the child into his home and openly acknowledges him as his own. Gone is the necessity of obtaining the permission of the man's wife, if he is married. And since In re Richard M.,110 courts are no longer free to read into the law any requirement of consent on the part of the child's mother.

The legitimation presumption raised under section 7004(a)(4) is rebuttable only by clear and convincing proof.110 According to section 7006(b) of the new legislation, any interested party may bring an action to determine whether a parent and child relationship does or does not exist under the section. Since such an action may be brought prior to the child's birth,111 the courts are free to adopt the reasoning of Lavell v.

106. For a lengthy discussion of the constitutional issues raised by section 621, see Comment, California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality, 35 S. CAL. L. REV. 437 (1962).
107. 405 U.S. at 656-57.
108. See note 37 & accompanying text supra.
110. CAL. CIV. CODE § 7004(b) (West Supp. 1976).
111. Id. § 7006(a).
Adoption Institute\textsuperscript{112} to presume parentage where the unmarried parents are living together at the time of probable conception and where the putative father publicly acknowledges his paternity.

One stumbling block remaining in this legislative scheme is the requirement that the father receive the child into his home. Although the court in \textit{Richard M.} painstakingly attempted to clarify the issue, the meaning of the reception requirement remains unclear. Stressing the public policy favoring "legitimation" and urging a liberal construction of the former section 230, the court in \textit{Richard M.} reasoned that the requirement is "satisfied by evidence that the father accepted the child as his own, usually demonstrated by an actual physical acceptance of the child into the father's home to the extent possible under the particular circumstances of the case."\textsuperscript{113} The court pointed out a number of cases in which the father's relationship with his child was rather tenuous. For example, in \textit{Hurst v. Hurst},\textsuperscript{114} one of the cases cited by the court, the unwed father rented an apartment in his name and the names of the mother and child. The court held that this conduct satisfied the statute although the father himself never resided in the apartment with the mother and child.

\textit{Richard M.} also recognized that prenatal legitimation, occasional temporary visits, and constructive reception, such as seeing the child in the mother's home, had fulfilled the requirement of section 230.\textsuperscript{115} Presumably, this reasoning would carry over to cases under the new section 7004(a)(4). It may be significant, however, that in most of these cases the father had seen his child, however fleetingly. A question still exists, therefore, as to whether the "reception" requirement will be satisfied in cases in which the father has not lived with the mother, is unable to acquire even temporary physical control of the child, and is not permitted to see it.\textsuperscript{116} Under such circumstances, if there is no

\textsuperscript{112} See text accompanying notes 38-41 \textit{supra}.
\textsuperscript{113} 14 Cal. 3d at 794, 537 P.2d at 369, 122 Cal. Rptr. at 537.
\textsuperscript{114} 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (1964).
\textsuperscript{115} 14 Cal. 3d at 792-95, 537 P.2d at 368-70, 122 Cal. Rptr. at 536-38; accord, Lavell v. Adoption Institute, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960) (legitimation); Estate of Peterson, 214 Cal. App. 2d 258, 29 Cal. Rptr. 384 (1963); Estate of Wilson, 164 Cal. App. 2d 385, 330 P.2d 452 (1958); Estate of Jones, 166 Cal. 108, 135 P. 288 (1913) (visits); Estate of Maxey, 257 Cal. App. 2d 391, 64 Cal. Rptr. 837 (1967) (constructive reception).
\textsuperscript{116} The court in \textit{Richard M.} noted that Blythe v. Ayres, 96 Cal. 532, 31 P. 915 (1892), probably went farthest in liberally construing the reception requirement. The father there was held to have satisfied the statute without ever actually having seen his child, although he openly acknowledged her and corresponded with her for several years. In commenting on the case, the \textit{Richard M.} court found it "noteworthy that this determination was subsequently criticized by this court in Estate of De Laveaga (1904) 142 Cal. 158, 169-70." 14 Cal. 3d at 795 n.9, 122 Cal. Rptr. at 538. It does not seem
presumed father or if the presumed father is dead, the putative father will be able to bring an action under Civil Code section 7006(c) to seek a declaration of his paternity. If he is successful in establishing his paternity under this section, he will have accomplished the same result as if he had "legitimated" the child—that is, he will have assumed the rights, privileges, and obligations of parenthood.

Where a presumed father exists, however, the unwed father who is unable to "legitimize" his child under Civil Code section 7004(a)(4) would appear to be without a remedy. As discussed in the preceding section on presumptions, only the child, its mother, or a man presumed to be the child's father by reason of marriage may bring an action to dispute the presumption of paternity that arises if the mother is or has been married. Thus, unless the putative father is able somehow to obtain either temporary custodial or visitation rights, he cannot himself become a presumed father through "legitimation" of his offspring and will thus be unable to proceed in court to challenge the presumed father's paternity.

Adoption and Custody

Problems also arise with respect to the nonmarital father's rights in adoption and custody proceedings. The Supreme Court in Stanley identified in the natural father an ill-defined right to the custody of his children. Unfortunately, the court did not indicate with precision the boundaries of that right, the instances in which it comes into play, or the circumstances under which the court can deprive a putative father of that right.

To acquire custody of his child under the Uniform Parentage Act, the unwed father must first establish the existence of a father and child relationship. He may accomplish this in several ways. He may certain, therefore, that the court would now accept a holding such as Blythe v. Ayres. The closest a man could come to legitimating his child without visitation would obviously be through prenatal legitimation, which seems to require that he live with the mother for a period of time prior to the child's birth.

117. This provision reads: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child, or personal representative of the child, the State Department of Health, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, 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." CAL. CIV. CODE § 7006(c) (West Supp. 1976). See notes 90-92 & accompanying text supra.

118. See note 92 & accompanying text supra.


120. 405 U.S. 645, 651-52 (1972).

become a presumed father by marrying the child's mother either before or after the birth. As indicated above, he may become a presumed father by receiving the child into his home and openly acknowledging it as his own. Alternatively, if there is no presumed father, he may bring a paternity action in superior court under Civil Code section 7006(c) to establish the relationship.

The child is a mandatory party to any action to establish the parent and child relationship. The mother, presumed father, and each man alleged to be the father may be made parties and shall be given notice and an opportunity to be heard. These provisions are intended to meet the due process requirements of Stanley. Furthermore, the hearing or trial may be held in closed court, and all papers and records pertaining to the action, other than the final judgment, are subject to inspection only in exceptional cases upon court order for good cause shown. Judgment in such a suit may contain appropriate provisions concerning support obligations, custody, and visitation privileges. This judgment is determinative for all purposes except criminal non-support actions.

Thus, the putative father who is able to take advantage of the paternity proceeding would be able to request custody, whether he himself institutes the suit under section 7006(c) or the child, mother,

122. Id. § 7004(a)(2)-(3).
123. Id. § 7004(a)(4).
124. Id. § 7006(c).
125. Id. § 7008. The child is a mandatory party because he is regarded as the real party in interest.
126. Id. Section 9 of the commissioners' draft provides that the mother, each man presumed to be the father and each man alleged to be the father shall also be mandatory parties. This provision was opposed in California by the Family Support Council, a group composed of members of the attorney general's office, district attorneys and their investigators, probation officers, and welfare personnel. Its opposition arose from the belief that requiring so many mandatory parties would make it more difficult to try a paternity action or to settle the case, causing delay in establishing the parent and child relationship. This view apparently prevailed. Letter from Maureen K. Lenahan, Deputy District Attorney of Alameda County to Senator Anthony C. Beilenson, May 20, 1975, in author's files.
127. CAL. CIV. CODE § 7014 (West Supp. 1976). The commissioners required that these hearings be held in closed court. Such a requirement was regarded with disfavor in California on the grounds that "open trials are designed in part to prevent arbitrary and abusive court proceedings," and the public's interest in preserving its right to view court actions and thus control their fairness is of greater importance than providing secrecy for the parties. Closing of the courtroom to outsiders was accordingly made discretionary. Bill Digest, Assembly Committee on Judiciary, at 7-8.
128. CAL. CIV. CODE § 7010(c) (West Supp. 1976).
129. Id. § 7010(a). The judgment of the court in a civil proceeding is not determinative in a criminal action because the standard of proof is greater in a criminal proceeding.
130. Id. § 7006(c) (West Supp. 1976).
or presumed father does so under section 7006(a)(2). Once his paternity is established, his status becomes that of the child's legal, as well as biological, father, with rights and duties equal to those of the child's mother. The court should then base its award of custody on considerations of parental fitness and the best interests of the child. In addition to the ability of each parent to provide a suitable home and adequate financial support for the child, a dominant factor in the court's determination would be the child's present living situation. In the past courts have been reluctant to uproot a child who has an established home in which he is emotionally well-adjusted and well-cared for. Also, where the mother is fit, many courts have shown a bias in favor of maternal custody, particularly where very young children are involved. However, as social attitudes toward male and female roles change and more fathers actively participate in rearing their children, a gradual adjustment of judicial views can be expected to accommodate the interests of fathers who seek custody of their children. Even before these societal changes occur, visitation privileges will doubtless be readily granted to legal fathers who can demonstrate their fitness.

These opportunities for custody and visitation rights will be denied to those men who seek custody of a child with a living presumed father. As was discussed previously, the unwed father may undertake a court action to determine the existence of the father and child relationship only when there is no presumed father, unless he can "legitimate" the child under section 7004(a)(4). Absent the cooperation of one of the other parties involved, he will be unable to establish his paternity and will therefore be foreclosed from asserting custodial rights.

In the case of adoptions, the situation has improved somewhat for unwed fathers, as the Uniform Parentage Act makes several changes in the law in recognition of Stanley. Under prior law, the unwed father had no statutory right to notice of adoption proceedings and his consent to the adoption of his child was unnecessary. S.B. 347 provides some advances in this area.

As was true under the superseded statutes, a child who has a presumed father, either by reason of marriage or through "legitimation,"

131. See note 92 & accompanying text supra.
132. The "best interests of the child" is the traditional test employed by courts in determining the disposition of adoption and custody cases. See, e.g., Tabler, Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father, 11 J. FAMILY L. 242 (1971).
136. See note 35 & accompanying text supra.
cannot be placed for adoption without the consent of both parents.\(^{137}\) If the mother proposes to relinquish the child for adoption, the presumed father must be given notice and may prevent the adoption by withholding his consent.\(^{138}\)

However, if the mother relinquishes a child who has no presumed father, the agency or person to whom the child has been relinquished or the mother or person having custody of the child, must file a petition to terminate formally the parental rights of the father.\(^{139}\) This is also true if the child otherwise becomes the subject of adoption proceedings—for example, upon the mother’s death—and the alleged father has not denied paternity, waived his right to notice, or voluntarily relinquished or consented to the adoption.\(^{140}\) In such situations, the court must require that an effort to identify the natural father be made by the State Department of Health or the adoption agency.\(^{141}\) If the natural father is identified following this inquiry, or if more than one man is identified as a possible father, each must be given notice of the adoption proceeding.\(^{142}\) The parental rights of possible fathers will be terminated should

\(^{137}\) Cal. C iv. Code § 224 (West Supp. 1976). There are some exceptions to this general rule. If one parent has been awarded custody of the child and the other parent, for a period of one year, willfully fails to communicate with and pay for the care of such child when able to do so, then the custodial parent alone may consent to adoption after the noncustodial parent has been notified and required to appear in court. Consent is not required of a parent who has been judicially deprived of custody and control of the child, where a parent has deserted the child, or where a parent has relinquished the child for adoption.

\(^{138}\) This is true unless the father’s relationship to the child has been previously terminated or determined by a court not to exist, or the father has voluntarily relinquished the child or consented to adoption, or neglect or disinterest is shown. Cal. C iv. Code § 7017(a) (West Supp. 1976).

\(^{139}\) Id. § 7017(b). It was considered necessary by the drafters of the Uniform Parentage Act to make provision for formal termination of parental rights to protect the integrity of the adoption process and render the adoption of a child immune to attack. See Uniform Parentage Act § 25, Comment.


\(^{141}\) The inquiry must include whether the mother was married; whether she was cohabiting with a man at the time of conception; whether she has received support payments; or whether any man has formally or informally acknowledged his possible paternity. Id. § 7017(c).

\(^{142}\) Id. § 7017(d). Notice requirements are governed by subdivision (f) of section 7017, which reads: “Notice of the proceedings shall be given to every person identified as the natural father or a possible natural father in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil action in this state, provided that publication or posting of the notice of the proceeding shall not be required. Proof of giving of the notice shall be filed with the court before the petition is heard. However, if a person identified as the natural father or possible natural father cannot be located or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to such person.”

The commissioners’ draft contains an optional provision leaving to the court’s dis-
any of them fail to appear, or appearing, fail to claim custodial rights.\textsuperscript{148}

Problems may arise under the statute when a man alleging that he is the child's natural father actually appears to claim custodial rights. Where the father seeks custody, the court is empowered to determine parentage and custodial rights in the sequence it deems proper.\textsuperscript{144} If it finds that the man claiming custody is a presumed father, either by reason of marriage to the child's mother\textsuperscript{145} or through legitimation,\textsuperscript{146} the court must order that his consent to the adoption is required.\textsuperscript{147} However, where the man cannot prove that he is a presumed father, the court will order that only the mother's consent is necessary.\textsuperscript{148}

This means that a narrow application of the statute could potentially leave the unwed father who has not become a presumed father under section 7004(a) in virtually the same unfavorable position he occupied.
before enactment of the Uniform Act. However, the statute does afford the courts a method of alleviating the problem where justice requires. As pointed out, the court has the power to determine parenthood and custodial rights in whatever order it deems proper. Therefore, to protect the rights of the unwed father who can demonstrate both his paternity and his fitness to assume custody, the court may award custody to him. This would allow him to accomplish legitimation under section 7004(a)(4) and render him a presumed father. His consent would then be required before his child could be released for adoption.

The father whose paternity has been established in a prior proceeding faces no problem under this section. The adjudication of the issue of the existence of the parent and child relationship in such an action is determinative for nearly all purposes and his consent to adoption would thus be required.

Summary: Advantages of the Uniform Parentage Act

The foregoing discussion has emphasized some of the interpretative problems that may be encountered under the Uniform Parentage Act as it was adopted in California. However, the act is not without strengths and it makes several important advances.

The most obvious of these is the act's deletion of statutory reference to illegitimacy. This represents the first attempt by the legislature to erase the stigma that has so long been associated with out-of-wedlock birth. While a change in language alone cannot accomplish substantive legal adjustments, it does reflect an awareness of changing life styles and altered societal attitudes.

A second advance accomplished by this legislation is its measures providing limited protection, for the first time, of the efforts of the unwed father to assume responsibility for his children. Under the new law, he is entitled to notice of any proceedings that affect his parental rights and he may appear in court to seek custody when his child is relinquished by the mother for adoption. As under prior code sections, when no presumed father exists, the unwed father may bring an action to assert his paternity. Furthermore, the new law makes it easier for

149. This problem was brought to the attention of the legislature prior to passage of S.B. 347. Bill Digest, Assembly Committee on Judiciary, prepared for hearing date August 14, 1975, at 9.

150. Civil Code section 7017(d) provides: "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."

151. See note 129 & accompanying text supra.

152. The former Civil Code section 231 provided for inverse paternity actions. Cal. Stat. 1921, ch. 136, § 1, at 137 (repealed 1975). This is now possible under CAL. CIV. CODE § 7006(c) (West Supp. 1976).
him to become a presumed father himself. The abolition of the requirement of obtaining his wife's consent when he wishes to bring his nonmarital children into his home represents a victory and will make it easier for many fathers to establish parental relationships with their children.\(^\text{163}\)

A third advance, not previously touched upon, is the act's amendment of the Probate Code to allow nonmarital children to inherit from and through their father once the father and child relationship has been established.\(^\text{164}\) Thus, under the new law, nonmarital parents and children have inheritance rights equal to those enjoyed by marital families.

**Summary: Persistent Problems Under the Uniform Parentage Act**

As this note has attempted to illustrate, it is in its procedural aspects that the Uniform Parentage Act falls short of establishing complete equality for the nonmarital father. The major problems facing the putative father who wishes to assert his parental rights may be summarized as follows:

**Standing**

If a child's mother is married at the time of conception, her husband is presumed to be the child's legal father,\(^\text{165}\) and an unmarried man who alleges paternity of the child generally cannot bring an action to challenge this presumption. As to him, the presumption is conclusive. *Stanley v. Illinois*\(^\text{156}\) and *In re Lisa R.*\(^\text{157}\) stand for the proposition that such "procedure by presumption" is unacceptable as a denial of the putative father's constitutional rights, at least in those instances where no presumed father exists and the mother is dead or unfit to care for the child. It will be left to future courts to determine how far the holdings of those cases will be extended to include situations in which a presumed father is living and willing to assume custody of his wife's child.

One hopes that the courts will bear in mind that the interests of the child may very well best be served by allowing the unwed father to

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153. Difficulties often arose in the past, even when the unwed father and his wife although still married, had not been living together for some time. *See*, e.g., Adoption of Graham, 58 Cal. 2d 899, 377 P.2d 275, 27 Cal. Rptr. 163 (1962).


155. *See* note 87 & accompanying text *supra.*


freely contest the presumptions raised by Civil Code section 7004. It is difficult—if not ridiculous—to imagine droves of litigious unmarried men coming into court to demand that they be allowed to assume parental rights and obligations to children who are biological strangers to them. Rather, it seems reasonable to suppose that only those men with a genuine interest in a child would care to spend the time and money involved in pursuing a paternity action. Should a court in fact find a failure of good faith on the part of the unwed father, the best interests of the child would be a basis for awarding custody to the presumed father.

Conclusive Presumption of Evidence Code Section 621

Related to the issue of standing is the problem of Evidence Code section 621, wherein it is stated that children born to a married woman cohabiting with her husband are conclusively presumed to be the children of the husband, unless he is shown to be sterile or impotent. No other evidence of any kind is admissible to refute the presumption.

Original drafts of S.B. 347 provided for repeal of section 621, but it was retained in the bill as enacted. Since transcripts of hearings held on S.B. 347 are not available, it is not entirely clear why the legislature saw fit to preserve such a controversial provision. It is assumed that its retention serves to reiterate a legislative belief in a social policy that stresses the importance of "legitimacy" of children. It is contended, however, that continued emphasis on the concept of "legitimacy" is a holdover from a male oriented culture that defined the legal status of its children in terms of their paternity. Thus, the child whose father married its mother enjoyed a legal status—symbolized by the child's right to use his father's name—that was superior to that of the child whose parents did not marry. The child's identity was closely connected to that of his father, as women had few rights or obligations to pass on to their children. Lands were handed down through the father's kindred; social status was conferred by reference to the father; children bore their father's name. This patriarchal definition of the child's legal status no longer seems appropriate, particularly in light of the stated goal of the Uniform Parentage Act that "regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other." It should be recognized that all children are "legitimate" simply by virtue of birth—rights cannot be parceled out to them or to their parents on any basis other than complete equality.

Arguably, the legislature should have made California's laws consistent with modern trends by eliminating Evidence Code section 621

158. Uniform Parentage Act §§ 1-2, Comment.
altogether and making all presumptions of paternity rebuttable. Failing
that, legislative reform might have been directed toward responding to
the dicta of some early cases\(^\text{159}\) that would have provided a generalized
exception to operation of section 621 where circumstances rendered it
impossible for the husband to have fathered the child. This would have
effectively converted section 621 into a rebuttable presumption. A
more restrictive, but still desirable, approach would have been for the
legislature to specify particular exceptions to application of the section
in addition to impotence and sterility. Most important, it might have
added a blood test exception to make such tests admissible as evidence
when they clearly demonstrate that the husband could not be the child’s
father.

The legislature, of course, adopted none of these approaches. It
thus remains up to the courts to refuse to apply section 621 when unjust
results would be obtained through its operation. Such a refusal could
be based upon constitutional considerations of due process and equal
protection.\(^\text{160}\)

**Adoption**

Under the procedural provisions of the new Civil Code section
7006, a putative father’s consent to adoption of his child is required only
if he can establish that he is a presumed father—i.e., that he is or was
married to the child’s mother or that he has “legitimated” the child by
acknowledging it and accepting it into his home. To avoid foreclosing
the rights of putative fathers who have not been able to become “pre-
sumed” fathers, but who are nevertheless fit to assume custody, the
court may determine custodial rights prior to deciding the issue of
parentage. By awarding custody to the putative father, the court can
allow him to legitimate the child, thus equalizing his rights in the
adoption procedure with those of the child’s mother.

The importance of the adoption system in providing secure and
loving home environments for children whose natural parents cannot or
do not wish to raise them is obvious. However, in our rush to insure the
stability and efficiency of the adoption process, it is apparent that the
rights of the parties involved—particularly the unwed father—may well
suffer. It may be instructive in this regard to consider the growing
awareness of adopted children who have undertaken to search for their
“real” parents in an attempt to discover their familial roots. Would it
not be fairer to all of the parties in an adoption proceeding to ensure that
the rights of the putative father who wants to assume custody of his

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159. See note 64 **supra**.

160. For a discussion of this constitutional argument, see text accompanying notes
106-07 **supra**.
child and is adjudged qualified to do so are protected? After all, it 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.

It is to be hoped that courts will weigh these considerations in determining adoption issues.

**Conclusion**

Enactment of the Uniform Parentage Act in California may signal the approach of an increasingly realistic and nonpunitive legal stance toward unwed parents and their offspring. In a state in which the out-of-wedlock birthrate annually exceeds 10 percent of total births, such a restructuring of outmoded laws was surely long overdue. But the new law has not eliminated all of the problems faced by nonmarital families. Perhaps as our society continues to adapt to new lifestyles and challenges to traditional male-female roles, our laws will begin to keep pace with altered societal values.

We have a long way to go.

*Diane C. Wilson*