

PATERNITY BASICS

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Updated September 2022

“There is a compelling state interest in establishing parentage for all children.” (Fam. Code, § 7570, subd. (a)(1).) Four possible types of fathers exist in juvenile court: alleged, biological, *Kelsey S.*,¹ and presumed. “A father’s status is significant in dependency cases because it determines the extent to which the father may participate in the proceedings and the rights to which he is entitled.” (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.)

The case of *In re Zacharia D.* describes these types of fathers. In that case, the California Supreme Court decided that only a presumed father is a “parent” entitled to reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 439.) The juvenile court removed an infant boy from his mother because he was born with a positive drug toxicology. (*Ibid.*) The baby’s biological father did not come forward until the 18-month review hearing, where the court ordered paternity testing at the biological father’s request. (*Id.* at p. 441.)

After the court had already set the section 366.26 hearing, father’s paternity test came back with a positive match. (*In re Zacharia D., supra*, 6 Cal.4th at pp. 441-442.) Father sought custody and visitation, and the court found him to be the biological father. (*Id.* at p. 442.) The court nevertheless terminated parental rights, and the parents appealed. (*Id.* at p. 444.) The Court of Appeal reversed, holding that the juvenile court could not terminate father’s parental rights without having first offered him reunification services. (*Ibid.*) The Court of Appeal ordered that the baby be placed with father. (*Id.* at p. 445.)

¹ *Adoption of Kelsey S.* (1993) 1 Cal.4th 816.

The California Supreme Court reversed. (*In re Zacharia D., supra*, 6 Cal.4th at p. 456.) It held that, “[i]f a man fails to achieve presumed father status prior to the expiration of any reunification period in a dependency case...he is not entitled to such services under section 361.5.” (*Id.* at p. 453.)

Alleged Fathers

An alleged father is not a party to the case until he appears and asserts a position. (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1356.) If he does so, an alleged father generally has standing to appeal the juvenile court’s denial of his request for presumed father status. “A party of record is a person named as a party to the proceedings or one who takes appropriate steps to become a party of record in the proceeding. A person does not become a party of record merely because his or her name and interest appear in documents filed with the court or are referenced in the judgment.” (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 712-713 [an alleged biological father was not a party to the case when he was noticed of the proceedings but failed to appear].)

An alleged father is entitled to notice of the proceedings. (*In re Zacharia D., supra*, 6 Cal.4th at p. 448.) He is not entitled to appointed counsel, visitation, reunification services, or placement. (*In re Paul H.* (2003) 111 Cal.App.4th 754, 760.) An alleged father might not have standing to appeal. (*In re Joseph G., supra*, 83 Cal.App.4th at p. 716; but see *In re T.G.* (2020) 58 Cal.App.5th 275, 291-292 [biological father has standing to raise an ICWA compliance issue].)

Alleged fathers have only three due process rights: 1) the right to notice under Welfare and Institutions Code section 316.2, subdivision (b); 2) the right to “assert a position”; and 3) the right to demonstrate

that he is a presumed father. (*In re Paul H.*, *supra*, 111 Cal.App.4th at p. 759; *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 596; *In re Joseph G.*, *supra*, 83 Cal.App.4th at p. 715; *In re Emily R.*, *supra*, 80 Cal.App.4th at p. 1356.)

Biological Fathers

A biological father likewise has limited rights; primarily the right to demonstrate he is presumed. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) Biological fathers may be eligible for reunification services, relative placement consideration, or placement, but only if the court determines the child would benefit. (Welf. & Inst. Code, § 361.5, subd. (a); *Francisco v. Superior Court*, *supra*, 91 Cal.App.4th at p. 596.) If a child has a presumed father and a biological father, the court must hold an evidentiary hearing to reconcile competing paternity interests. (Fam. Code, § 7612, subd. (b); *In re P.A.* (2011) 198 Cal.App.4th 974, 981.) However, a biological father may bring a section 388 petition to ask the juvenile court to reconsider its previous denial of presumed fatherhood based on new evidence or changed circumstances. (*In re Zacharia D.*, *supra*, 6 Cal.4th at pp. 454-455.) An alleged or biological father may have his parental status elevated to presumed father under Family Code section 7611, subdivision (d), if, at the time of the hearing, “[t]he presumed parent receives the child into his or her home and openly holds the child as his or her natural child.” (*In re Alexander P.* (2016) 4 Cal.App.5th 475, 493.)

A biological father has standing to challenge the juvenile court’s failure to comply with the Indian Child Welfare Act. (*In re T.G.* (2020) 58 Cal.App.5th 275, 291-292 [biological father has standing to raise an ICWA compliance issue].)

Kelsey S. Fathers

The third type of father is a *Kelsey S.* father. The name comes from the case of *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. In that case, the California Supreme Court held that the statutory scheme “violates the federal constitutional guarantees of equal protection and due process for unwed fathers *to the extent that* the statutes allow a mother unilaterally to preclude her child’s biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child’s best interest.” (*Id.* at p. 849, italics original.) To qualify as a *Kelsey S.* father, an unwed father must show he did everything he could to assume parental responsibilities, but a third party (usually the mother) prevented him from fulfilling those responsibilities. (*Id.* at pp. 849-850; see also *Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133, 1144; *Adoption of Baby Boy W.* (2014) 232 Cal.App.4th 438, 451.) A *Kelsey S.* father has a constitutional right to block an adoption, so long as he is willing to adopt the child himself. (*Adoption of Kelsey S., supra*, 1 Cal.4th at p. 849.)

Presumed Fathers

The largest number of rights is held by a presumed father, as the “[p]resumed father status ranks highest.” (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) A presumed father is entitled to appointed counsel, custody, and reunification services. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) To become a presumed father, a man must fall within one of the categories set forth in Family Code section 7611.²

² Note that a family court judgment of paternity is not one of the ways set forth in the statute, by which a man can become a presumed father.

(*In re Vincent M.* (2008) 161 Cal.App.4th 943, 954.) A man requesting presumed father status must have a “fully developed parental relationship” with the child. (*R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 776, italics omitted.) Family Code sections 7611 and 7540 provide that a man is a presumed father if the child was born during his marriage to the mother. However, a man can satisfy the statutory presumption even with no biological connection to the child or marital connection to the child’s mother, so long as he has an existing relationship with the child. (*Martinez v. Vaziri* (2016) 246 Cal.App.4th 373, 385.) To be entitled to reunification services, a man must establish that he is the presumed father before the expiration of any reunification period. (*In re Zacharia D., supra*, 6 Cal.4th at p. 453.)

A paternity judgment is determinative for all purposes except for actions brought pursuant to Penal Code section 270. (Fam. Code, § 7636.) Nevertheless, a family court finding of paternity does not require the juvenile court to identify the man as a presumed father. (*In re E.O.* (2010) 182 Cal.App.4th 722, 727 [a family court paternity judgment does not entitle a man to presumed father status in the juvenile court].) The identification of another man as the presumed father of a child does not on its own terminate a biological father’s parental relationship with the child. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 610.)

A presumption of presumed father status under Family Code section 7611 can be rebutted by clear and convincing evidence. (Fam. Code, § 7612, subd. (a).) The decision of whether the particular case is “an appropriate action” to rebut the presumed father’s status belongs

(See *In re E.O., supra*, 182 Cal.App.4th at p. 727 [a family court paternity judgment does not entitle a man to presumed father status in the juvenile court].)

to the superior court. (*Martinez v. Vaziri, supra*, 246 Cal.App.4th at p. 386; *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 122.)

A court can also find that a child has more than one presumed father “if the court finds that recognizing only two parents would be detrimental to the child.” (Fam. Code, § 7612, subd. (c).) Allowance of more than one presumed parent is intended to be reserved for the rare cases in which a child truly has more than two parents. (*In re Alexander P., supra*, 4 Cal.App.4th at p. 486.) For the court to find that a third parent is appropriate in any particular case, it must be established that there is already an existing, rather than potential, parental relationship between the putative third parent and the child. (*In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1090-1091.)