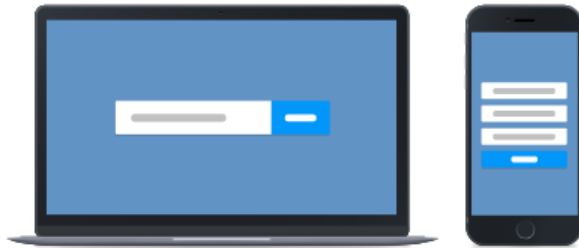


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# PATERNITY: A Case Study

# DIRECTED DISCUSSION

- What errors did the juvenile court make regarding paternity?
  - How would you go about arguing presumed father status?
- Would there be any adverse consequences from doing so?
- Did the juvenile court properly consider the three-parent statute?
- Does the case raise any ethical issues?

# CASE STUDY

Mother and Stepfather were living together with four children, two of whom were biological to Stepfather. Only one of the children (Christian, a 14-year-old boy) is at issue in this case.

Mother and Stepfather divorced in 2016 but subsequently reconciled and were living together.

# MOTHER

- Drinking problem
- Physically abusive to the children
- Engaged in domestic violence with Stepfather
- Threatened suicide in front of the children
  - Christian had to take a knife away from Mother after she threatened to harm herself with it.

# STEPFATHER

- Failed to protect the children from Mother's drinking problem
- Often left the children alone with her
- Often left the home for several days after an argument
- Left the children alone with Mother when he went to work
- Had a domestic violence history with Mother
- Previously failed to cooperate with efforts from the Agency to alleviate the protective concerns

# YOUR CLIENT: BIOLOGICAL FATHER

- Noncustodial
- Only marginally involved in Christian's life since Christian was two years old
- Father and Mother were never married
- Paid a limited amount of child support
  - \$235 a month ordered in 2012
  - He made \$6,000 per month at the time of the detention hearing (\$72,000 per year)
  - His child support was in arrears
- Unaware of Mother's drinking problem
- 2004: Christian had been sexually abused by his stepbrother while in Father's care.
  - Stepbrother no longer lived with Father

# YOUR CLIENT: BIOLOGICAL FATHER

- Not sure if he was on Christian's birth certificate
  - Not at the hospital for Christian's birth because Mother would not tell him where the hospital was
- Had a paternity declaration on file with child support services
  - A paternity test revealed he is Christian's biological father
- Tried to stay in touch with Christian and went to family court repeatedly, but met with resistance from Mother
- Requested presumed father status
- Was able to take immediate custody
- No evidence of criminal or drug history



# TWO COURTS, TWO OUTCOMES

## 2012 Family Court Decision

- Family court order issued judgment of legal fatherhood as to Father
  - Joint legal custody and full physical custody to Mother
- The court ordered Father to pay child support
- Paternity declaration on file with Child Support Services
- Gave joint legal custody to Father

## 2016 Family Court Decision

- Divorce between Mother and Stepfather
- Stepfather named Christian's legal father
- Stepfather granted legal and physical custody
  - Stepfather had been raising Christian since Christian was 2 years old
- Allegedly, Father was never notified of these proceedings
  - His whereabouts were "unknown"

# POST-FAMILY COURT DECISIONS

- The juvenile court did not allow Father's counsel to return to family court to straighten out the conflicting paternity orders.
  - "The juvenile court's jurisdiction has divested the family court of jurisdiction."

# PETITION

The Agency filed a petition alleging:

- Mother suffered from substance abuse;
- Stepfather failed to protect and engaged in domestic violence with Mother; and
- Father was not a household member and failed to support Christian.

# DETENTION

- The court was aware of the conflicting family court orders.
- The court reserved as to the paternity finding for Christian, but ordered Christian to remain in the care of Stepfather.
- The court ordered visitation and services for Father.

# DISPOSITION

- The court found Stepfather was Christian's presumed father, but was silent as to Father.
  - Cited no authority for its paternity findings (or lack thereof)
- The court ordered
  - Christian be removed from Mother and non-custodial Father
    - both under section 361.5, subdivision (c)(1)
  - Reunification services for Mother and Father

# PATERNITY FINDINGS (OR LACK THEREOF)

- Father: No paternity findings
  - However, the court ordered family reunification services and visitation for Father.
- Stepfather: “a second presumed father...an additional presumed father...”
  - At various points the court said, “you are both fathers...” and “In my mind [Father] is the biological father. [Stepfather] is the presumed father.”
  - At one point Mother’s counsel said, “[Counsel] was going to be asking this court to declare [Stepfather] as a presumed father. Obviously, [Father] is as well...” Nobody else objected or commented.

# CUSTODY

- Father requested custody of Christian
- Christian wanted to live with Stepfather and did not want to live with Father because
  - Christian “did not feel comfortable” and “felt weird” with Father
  - The court found it would cause severe emotional detriment to place Christian with Father
- The court placed Christian with custodial Stepfather under:
  - Section 360, subdivision (c)
  - A family maintenance plan
  - On condition Mother remain out of the home

# APPEAL

Father appealed from the disposition. He wanted custody.



# DIRECTED DISCUSSION

- What errors did the juvenile court make regarding paternity?
  - How would you go about arguing presumed father status?
- Would there be any adverse consequences from doing so?
- Did the juvenile court properly consider the three-parent statute?
- Does the case raise any ethical issues?

**Does Father qualify as a presumed father?**

# STATUTORY LAWS ON PRESUMED FATHERHOOD

Cal. Fam. Code § 7540: Conclusive presumption by marriage; Child of spouses who cohabitated at the time of conception and birth.

- § 7541: Rebuttable by DNA within 2 years from the date of child's birth;
- § 7541(b): Standing to challenge.

# STATUTORY LAWS ON PRESUMED FATHERHOOD

Cal. Fam. Code § 7570 et. seq.: Voluntary declaration of paternity

- § 7576: valid declaration results in a conclusive presumption with same force and effect as presumption under § 7540;
- § 7581(d): presumption established by this section is rebuttable by DNA; request for genetic testing must be made within 3 years from the date executed
- § 7612(e): within 2 years of the date executed a person who is a presumed parent under § 7611 may petition to set aside the declaration of paternity.

# STATUTORY LAWS ON PRESUMED FATHERHOOD

Cal. Fam. Code § 7611: Criteria for unmarried parents

- Most common is presumption raised is under subd. (d):  
Presumed parent receives child into his/her home and holds child out as his/her natural child.
- Rebuttable pursuant to § 7612.

# PRESUMED FATHERS

- “Presumed father status ranks highest.” (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.)
- Entitled to appointed counsel, custody (absent a detriment finding), and reunification services. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.)
- Must fall within one of the categories enumerated in Family Code § 7611. (*In re Vincent M.* (2008) 161 Cal.App.4th 943; See also *Adoption of A.S.* (2012) 212 Cal.App.4th 188, 205.)
  - Can be rebutted by clear & convincing evidence (see § 7612).
- A person requesting presumed parent status under section 7611, subdivision (d) must have a “fully developed parental relationship” with the child. (*R.M. v. T.A.* (2015) 233 Cal.App.4th 760, 776, italics omitted.)

## *KELSEY S. FATHERS*

- Father must show he did everything he could to assume parental responsibilities, but a third party thwarted him from fulfilling those responsibilities. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816; *Adoption of Emilio G.* (2015) 235 Cal.App.4th 1133; *Adoption of Baby Boy W.* (2014) 232 Cal.App.4th 438.)
- A *Kelsey S.* father has a constitutional right to block an adoption. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849.)

# IS PRIOR FAMILY COURT JUDGMENT ONE OF THE WAYS A MAN CAN ATTAIN PRESUMED FATHER STATUS (COLLATERAL ESTOPPEL)?

- Do the two family court findings of paternity have collateral estoppel effect on the juvenile court?
- *In re E.O.* (2010) 182 Cal.App.4th 722, 727-728.
  - Answers the question no; can be used to support the proposition that Father was not presumed.
- *In re M.A.* (2018) 20 Cal.App.5th 899.
  - Answered the question yes; but was then depublished.
- *In re Cheyenne B.* (2012) 203 Cal.App.4th 1361, 1367.
  - Section 7376 does not require a trial court to find a man to be a presumed father solely on the basis of having a prior paternity judgment.



# PRESUMED FATHER?

Father had a tenuous relationship with Christian

“Fully developed relationship with the child” (*RM v. TA* (2015) 233 Cal.App.4th 760, 776.)

Father’s child support payments were in arrears

“Concerns that [a man] is not an appropriate father for [a child] can, and should be, addressed through our laws on custody and termination of parental rights, not through an initial paternity determination.” (*In re Jesusa v.* (2004) 32 Cal.4th 588, 634.)

# PRESUMED FATHER?

Father could not demonstrate he was on Christian's birth certificate

Father had a paternity declaration on file with Child Support Services

Stepfather raised and supported Christian

# PRESUMED FATHER?

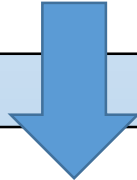
The court found Stepfather to be “a second presumed father, another presumed father”

The court said “You are both fathers . . . In my mind, [Father] is the biological father; [Stepfather] is the presumed father

No one objected or commented when Mother’s attorney said, “[Counsel] was going to be asking this court to declare [Stepfather] as a presumed father. Obviously, [Father] is as well...”

# PRESUMED FATHER?

The court ordered family reunification services to Father without a finding that such services would benefit Christian.



361.5(a) – court may order services for a biological father if the services may benefit the child

The court never made a finding that Father was Christian's presumed father

## DID THE JUVENILE COURT MAKE AN IMPLIED FINDING THAT FATHER IS A PRESUMED FATHER?

- The court found Stepfather to be: “a *second* presumed father, *another* presumed father....”
- Father’s biological paternity had been established in a family law case 12 years ago. He was found the legal father and ordered to pay child support. (Collateral estoppel.)
- Father had been paying some child support.
- The court granted Father reunification services and visitation, but did not make the required finding that services would benefit Christian.
  - (See § 361.5, subd. (a) [court can order services for a mere biological father only if the court finds the services would benefit the child.])

# *KELSEY S. FATHER?*

Father was not at hospital for Christian's birth because Mother would not tell him where it was

Father tried to maintain contact with Christian

Father repeatedly went to family court

## Does Father qualify as a presumed father?

A. Yes – Based on the family court orders.

B. Yes – Based on Fam. Code § 7611(d) [hold the child out as his own and receive child into his home].

C. Yes – Under Kelsey S. [acted as presumed father, but prevented from receiving the child in his home].

D. Maybe – Under an implied finding of presumed father status.

E. No – He does not have an existing relationship with Christian.

Father received reunification services and visitation and was treated as a presumed father.  
**Are there adverse consequences for raising the issue of paternity on appeal?**





# ARE THERE POTENTIAL ADVERSE CONSEQUENCES?

See manual §§ 1.29, 4.71, 4.91

1. If the matter is remanded to the juvenile court, the court may enter a finding that Father is merely biological.
2. If the court finds Father is a mere biological father, could it further find Father is not entitled to reunification services under § 361.5? (that is, could Father's services/visitation be ended based on the results of the appeal?)
  - a. Under § 361.5(a), reunification services for bio-father are discretionary; only ordered if will benefit the child.
  - b. Father may lose the services he has right now.
3. The court might give Father less visitation or no visitation.

**Would these potential consequences be moot by the time the matter is remanded?**

## Are there adverse consequences for raising the issue of paternity on appeal?

A. Yes – Father could lose reunification services if he is designated as biological father.

B. Yes – The three-parent statute analysis carries a significant risk that Father would not be designated a third parent.

C. No – There is no downside to raising the argument because he has already been denied placement.

D. No – He will have received the benefits of presumed fatherhood until the appeal is decided.

According to Family Code § 7612(c), a child can have more than two parents if having only two parents is detrimental to the child. The juvenile court failed to find detriment as required by § 7612(c).

**How would you raise this issue in your brief?**

# CAL. FAMILY CODE SECTION 7612, SUBD. (C)

- Subdivision (c):
  - In an appropriate case, the court may find more than two person with a claim to parentage under this division if the court finds that recognizing only two would be detrimental to the child.
  - To determine detriment, the court shall consider all relevant factors, including:
    - Harm of removing the child from a stable placement with a parent who has fulfilled the child's physical and psychological needs, and
    - Who has assumed that role for a substantial period of time.
  - A finding of unfitness is not required for a finding of detriment.

The court failed to make a finding that having only two parents would be detrimental to Christian

## RELEVANT CASE LAW FOR § 7612, SUBD. (C)

- “The pattern of human relationships is complicated.” (*In re M.R.* (2017) 7 Cal.App.5th 886, 899.)
- *In re Donovan L., Jr.* (2016) 244 Cal.App.4th 1075 [bio-father who had an affair with married mother did not qualify as third parent because he had no existing relationship with child];
- *In re M.Z.* (2016) 5 Cal.App.5th 53 [mother’s boyfriend cannot be third parent for two children from another father when he has not acted as a parent];
- *In re Alexander P.* (2017) 4 Cal.App.5th 475 [granted presumed status for step-father who cared for child for 20 months (three presumed fathers in all)];

## RELEVANT CASE LAW FOR § 7612, SUBD. (C)

- *In re M.R.* (2017) 7 Cal.App.5th 886 [court finds prior boyfriend and former husband qualify as presumed parents – one for marriage and other for relationship with the child];
- *In re L.L.* (2017) 13 Cal.App.5th 1302 [split with *Alexander P.* finding once a presumed father, always a presumed father, even if relationship changes; but, to be a third parent, they must have a relationship with the child];
- *C.A. v. C.P.* (2018) 29 Cal.App.5th 27 [finding of three parents appropriate where co-worker who had an affair with married mother had strong bond with the child]

## How would you raise this issue in your brief?

A. Don't raise the error, it's inconsequential.

B. Argue the error is substantial that requires reversal.

C. Highlight the error but treat it as harmless.



# THE JUVENILE COURT SHOULD HAVE PROCEEDED UNDER SECTION 361.2, NOT SECTION 361(c)(1).

- The court made a detriment finding, which was arguably insufficient.
- The court ordered reunification services for Father, but did not find he was the presumed father.
- Father was noncustodial, but he requested custody.
- Absent a finding that Father was the presumed father, he was not entitled to custody, even under section 361.2.
  - (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451, 453-454 [“parent” is defined to mean a presumed parent]; See also *In re E.T.* (2013) 217 Cal.App.4th 426, 436-439 [only a presumed father is entitled to custody under section 361.2].)

The trial court found that placement with Father would be detrimental to Christian.

**Is this finding of detriment supported by substantial evidence?**

# WELFARE AND INSTITUTIONS CODE § 361.2

- Statute used for placement of a child with a non-custodial parent.
- Requirements include:
  - Child must not be living with that parent when the case began;
  - Non-custodial parent must request custody;
  - Court must place the child with his non-custodial parent unless court finds it is detrimental to the safety, protection, or physical or emotional well-being of the child
- “Parent” as used in this statute usually means a presumed father (not biological or alleged).
- The juvenile court is required to make a finding either in writing or on the record of the basis for its determination. (§ 361.2, subd. (c).)

# WELFARE AND INSTITUTIONS CODE § 361.2

- Discusses placement of the child after it is deemed a child should be removed under WIC § 361
- Uses terms “both parents,” inferring that a child can only have two parents
  - i.e., “Order that the parent become the legal and physical *custodian* of the child. The court may also provide reasonable visitation by the *noncustodial* parent.” (§ 316.2, subdivision (b)(2), italics added.)
  - “... or that services be provided to *both* parents...” (§316.2, subdivision (b)(3), italics added.)

## RELEVANT CASE LAW FOR § 361.2

- *In re Luke M.* (2003) 107 Cal.App.4th 1412 [denial of placement with father in another state proper when court relied on strong sibling bond and reunification with mother];
- *In re Isayah C.* (2004) 118 Cal.App.4th 684 [error not to place child with father who is in prison if father can arrange for appropriate care];
- *In re Abram L.* (2003) 219 Cal.App.4th 452 [court erred in not placing teenage children with father when problems cited by trial court do not amount to detriment];

## RELEVANT CASE LAW FOR § 361.2

- *In re D'Anthony D.* (2014) 230 Cal.App.4th 292 [error for failing to consider placement with father under § 361.2 but harmless because child disclosed physical abuse by father];
- *In re C.M.* (2014) 232 Cal.App.4th 1394 [teenage child's reluctance to move to father's home is not sufficient for detriment];
- *In re Liam L.* (2015) 240 Cal.App.4th 1068 [placement with father out of state proper after mother had a year to reunify and father was able to care for children immediately];
- *In re K.B.* (2015) 239 Cal.App.4th 972 [placement of child with father is appropriate despite loss of sibling bond and limited relationship with non-custodial parent].

## Is the trial court's finding of detriment supported by substantial evidence?

A. Yes – Christian objected to being placed with Father because he felt weird and was uncomfortable.

B. Probably not – The child's preference is only one factor for the trial court to consider and is not determinative.

C. No – Father is able to take custody of Christian and there was no evidence of a risk to Christian's safety or physical or emotional well-being.

# IS THERE A PROBLEM WITH WIC § 361.2, IN LIGHT OF RELATIVELY NEW FAM. CODE § 7612?

- Section 361.2 presupposes there are only two candidates for placement, such that if the court removes the child from one parent, there is only one remaining parent to consider.
- The statute says that if the one remaining parent (noncustodial) requests placement, the court “shall” grant it.
  - What if there are two remaining parents?
  - What if one of them is already custodial?
  - Argue error in failing to remove from Stepfather?



## WOULD THE STATUTE LEAD TO ABSURD RESULTS?

- Stepfather was custodial; thus, he was not covered by §361.2.
- Section 361.2 says the court “shall” grant custody to the non-custodial parent.
- In a three-parent case, the statute, read literally, would force the court to place a child with a non-custodial parent even though a custodial parent is still available.

**What do you see as ethical problems in this case?**

## ETHICAL ISSUE: IS FATHER INDIGENT?

- Father has made \$6,000 per month throughout the duration of this case (\$72,000 per year).
  - If it becomes apparent after appointment that a client may not be indigent, counsel should notify ADI *immediately* and cease work on the case. (See Appellate Claims Manual, p. 22.)

# ETHICAL ISSUE: IS FATHER INDIGENT?

- Counsel may need to write a letter to the Court of Appeal.
- *People v. Nilsen* (1988) 199 Cal.App.3d 344
  - “If appointed counsel becomes aware of a significant change in defendant’s financial circumstances, he has a duty as an officer of the court to disclose that fact to the court.” (*Id.* at p. 351.)
  - Requires that the client have a *present* ability to pay.

## What do you see as ethical problems in this case?

A. Does counsel need to take action because Father is possibly not indigent and not entitled to appointed appellate counsel because he earns more than \$70,000 per year?

B. Should his appellate attorney raise paternity issues even if there are possible adverse consequences?

C. Should father be consulted on whether to raise a paternity issue even if it might favorably affect the placement issue?

D. Will father having presumed status adversely affect his child support payments?

**But what actually happened?**

**SADE C. LETTER**