# The California Parentage Puzzle: Making Sense of California Parentage Law

*Deborah H. Wald*

*Deborah Wald is the founder of Wald & Thorndal, PC, a family law practice based in San Francisco, California. Her primary practice areas include parentage litigation, adoption and assisted reproduction Law. Ms. Wald is an adjunct professor at the University of San Francisco law school, and a member of the American Academy of Assisted Reproductive Technology Attorneys, the Academy of California Adoption Lawyers and the Academy of California Family Formation Lawyers*

There is significant confusion, among the family law bar, about how courts are making legal parentage determinations.1 Factors considered, in different cases and contexts, include: (1) marital or domestic partnership presumptions; (2) procreative intentions; (3) parental behavior; and (4) genetics. How to reconcile these factors—and which should control, when different ways of prioritizing them would lead to different outcomes—is the subject of much consternation. Case law includes decisions where marital presumptions trumped biology[2] and countervailing decisions where a genetic father was allowed to assert parental rights despite the child having been born into an intact marriage;[3] decisions where parental behavior trumped both genetics and marital presumptions;[4] and decisions where procreative intent trumped everything else.[5] How is a family law practitioner to advise a client, who is facing a potential dispute about the parentage of a child, about likely outcomes?

In the "traditional" heterosexual, marital family, all four factors point in the same direction. The husband and wife, ideally, *intend* to become parents. They are able to conceive together, and then go on to co-parent their child. Genetics, intentions, and behavior all support a finding that the husband is the father and the wife is the mother, and this finding is consistent with the marital presumptions of Family Code sections 7540 and 7611, subdivision (a).

But what happens when the factors point in different directions?

If one looks only superficially at all recent California parentage cases, without a close consideration of the facts of each case, the process for determining legal parentage may appear unpredictable, and possibly even irrational. But upon closer consideration of the cases, and giving the *facts* of each case a central role, some increasingly clear rules and guidelines emerge.

In cases where procreation is brought about through highly intentional conduct, as in cases of assisted reproduction, intentions are given primacy. Thus, in the context of surrogacy, we have been instructed to look at whose conduct caused the conception of the child with the intent to parent that child (the "intended parent"), and this person generally has been found to be the parent regardless of genetics. Typically, the intended parents are able to obtain judgments of parentage prior to the child's birth. Duration of the parental relationship is irrelevant.

On the other hand, in cases of more haphazard procreation—often coming before the courts in the dependency context—parental behavior is at the core of the court's concern. Put simply, the courts have taken the position that children should be able to rely on the continuing financial and emotional support of the people who have raised them as parents. In this context, duration of the parental bond is a relevant factor.

## The Marital Presumptions

There are two different marital presumptions in our Family Code: the conclusive presumption of section 7540, and the rebuttable presumption of section 7611. The conclusive marital presumption provides that a husband is *conclusively* presumed to be the father of a child born to his wife, as long as the husband and wife were cohabiting at the time of conception and the husband is neither impotent nor sterile. Put in simple terms, this presumption codifies the principle that if a husband *could be* the father, and *wants to be* the father, he *will be* the father regardless of actual genetic paternity—in fact, a man other than the husband generally does not have standing to request an order for genetic testing.[6]

However, even with regard to the rebuttable marital presumption of 7611, subdivision (a), the California Supreme Court has made clear that California will defend marital families from outside interference to the extent the husband is functioning as the child's parent. In *Dawn D. v. Superior Court (Jerry K.)*,[7] a married woman became pregnant while separated from her husband. Although she was living with the genetic father when the pregnancy

occurred, she reconciled with her husband and was once again cohabiting with him by the time the baby was born. The genetic father filed a parentage action prior to the child's birth, and completed a parenting course in preparation for the child's arrival. He attempted to negotiate an agreement for child support and visitation with the mother and her husband, but they would not agree to contact. Litigation ensued, which ultimately made it to the California Supreme Court. There, it was held that the biological father did not even have standing to pursue his paternity claim, despite having done everything he could to attempt to take responsibility for the child. Although Justice Werdeger wrote the majority opinion, Justice Kennard's concurrence most eloquently states the court's position: "A man who wishes to father a child and ensure his relationship with that child can do so by finding a partner, entering into a marriage, and undertaking the responsibilities marriage imposes. One who instead fathers a child with a woman married to another man takes the risk that the child will be raised within that marriage and that he will be excluded from participation in the child's life. The due process clause of the United States Constitution provides no insurance against that risk and is not an instrument for disrupting the marital family in order to satisfy the biological father's unilateral desire, however strong, to turn his genetic relationship into a personal relationship."[8]

This marital presumption should, under Family Code section 297.5, subdivision (d),[9] be equally applicable to same-sex state-registered domestic partners or married same-sex couples. If a woman who is in a state-registered domestic partnership or a marriage gives birth to a child while cohabiting with her partner, the partner's parental relationship with that child should be protected over a unilateral effort by the child's genetic father to assert a parental claim. Thus, the parentage presumptions can be relied on to protect parental relationships wherever children are conceived within the context of legally sanctioned unions, regardless of the sex or sexual orientation of the parents.

Limitations on the Marital Presumptions

Recent cases have established two limitations on the marital presumptions. First, the marital presumption is not gender neutral.[10] While a husband can invoke the marital presumption with regard to a child born into his marriage, whether or not he is the genetic father of that child, a wife cannot invoke the marital presumption with regard to a child conceived by her husband and another woman. Thus, to use a tired old stereotype, if a man gets his secretary pregnant, he and his wife cannot show up at the hospital when the secretary gives birth and say "thanks for the baby," because this would violate the secretary's rights as a mother. Although, pursuant to Family Code section 7650, the same methods available for establishing the father-child relationship are also used to establish the mother-child relationship "insofar as practicable," this is one area where gender neutrality is simply not a practical option. For this reason, while the marital presumption presumably will apply to a married or state-registered lesbian couple where one of the partners is giving birth, it may not apply where a gay male couple in a legal union is having a child together through surrogacy (since the child will be born to a woman outside of the union).[11]

The second limitation on the marital presumptions arises when the genetic father has been allowed to establish an actual parental relationship with the child. In *Craig L. v. Sandy S.*,[12] a married woman became pregnant. She gave birth, but at the hospital post-natal testing disclosed information that precluded the husband as the genetic father. At that point, Sandy admitted to having had a brief extra-marital affair with a family friend Craig (who also happened to be the family lawyer). The disclosure led to a brief separation, but ultimately the couple and baby were reunited as a family in the marital home. However, Craig and his wife were involved in the child's life in the following ways: Craig signed a support agreement and made support payments to Sandy; when Sandy returned to work, Craig's wife took care of the baby 3-4 days per week in Craig's marital home; and when the child was a few months old, the families initiated one overnight visit per week between the child, Craig and Craig's wife. Craig asserted that he had held the child out to his family and friends as his natural son. When Sandy and her husband tried to terminate contact, Craig filed a petition with the court to establish his status as the child's father under Family Code section 7611, subdivision (d); Sandy's husband responded that because he was Sandy's husband at the time of the child's conception and birth, he was the child's presumed father. Although the trial court denied Craig standing to pursue his claim, based on the conclusive marital presumption (which it believed was, in fact, conclusive), the Court of Appeal disagreed and held that Craig had standing to pursue his claim of paternity, based on his factual assertion that he met the definitions of a presumed father set forth in section 7611(d). As stated by the Court of Appeal, "we have found no case which holds that … the state's interest in marriage will always

outweigh the interests of a man and a child with whom the man has established a paternal relationship. … [I]n weighing the conflicting interests … the trial court must in the end make a determination which gives the greatest weight to Jeffrey's well being."

Thus, while marital presumptions are a strong consideration in cases where children are born into legally recognized unions (whether marriages or state-registered domestic partnerships), they will not always be determinative.

### Procreative Intentions

The role of intentions in determining legal parentage has become increasingly important as more and more children are conceived through assisted reproduction. Until the 1990's, there was no law in California to address parentage issues where the genetic mother was not also gestating the child. Then, in 1993, our Supreme Court had no choice but to weigh in on surrogacy in *Johnson v. Calvert*.[13] In that case, a married couple had provided the gametes for an *in vitro* fertilization procedure (i.e., the IVF procedure was done using the husband's sperm and the wife's eggs), but the resulting embryos were implanted in the womb of a surrogate—or, as used in the assisted reproduction arena, a "gestational carrier." After a number of disagreements between the parties, the carrier decided that she wanted to keep and raise the child herself and a lengthy court battle ensued. In the end, the Supreme Court determined that *either* genetics or gestation can be used to establish maternity, and that therefore *both* women had cognizable claims. However, the court went on to rule that a child cannot have two "natural" mothers, and held that in cases where there is a "tie" between the genetic mother of the child and the woman who has gestated the child, the "tie breaker" will be intent at the time of conception.[14]

Although the court's ruling in *Johnson v. Calvert* could have been narrowly construed to apply only to cases where there is a tie between an identified genetic mother and an identified gestational mother, both of whom are actually asserting maternity, it has been read far more broadly to signify that in cases of assisted reproduction, the determinative factor for establishing legal parentage will be intent at the time of conception. This broadening of the concept that legal parentage can rest on procreative intentions reached its apex in *In re Marriage of Buzzanca*.[15]

In *Buzzanca*, a married couple set about conceiving a child together despite the fact that *both* husband and wife were functionally infertile. They obtained sperm from a sperm bank, obtained eggs from an anonymous egg donor, and had the eggs fertilized through an IVF procedure. The resulting embryos were implanted into the womb of a paid gestational carrier. Then the Buzzancas broke up. In their dissolution papers, Mrs. Buzzanca listed the baby as a child of the marriage; Mr. Buzzanca denied that there were any children of the marriage, and tried to disclaim legal responsibility for the child. There were, if all players were counted, at least six adults involved in creating the Buzzanca child: the husband, the wife, the egg donor, the sperm donor, the gestational carrier, and the gestational carrier's husband. But the trial court found, through a somewhat rigid and formulaic application of the Uniform Parentage Act, that the Buzzanca child had *no legal parents*.[16]

The Court of Appeal, clearly shocked by this result, set out a very concise rule for determining parentage in cases of assisted reproduction: where a married couple uses medical procedures to conceive a child, with the intent to parent that child, they will be held to the legal responsibilities of parents regardless of their genetic connection to the child.

The *Buzzanca* case had national repercussions, and has been referenced around the country in the ongoing debate about the role of intentions in determining legal parentage. In California, it has set the tone for the entire assisted reproduction arena, and the principles it stands for have attained broad acceptance. Trial courts now routinely are issuing judgments in surrogacy cases, often before the baby is actually born, determining that the "intended parents" are the legal parents and that the gestational carrier and her husband—if she has one—are not. Statutory authority now exists for much of this: Family Code section 7630, subdivision (f) provides that a party to an assisted reproduction agreement "may bring an action at any time to establish a parent and child relationship consistent with the intent expressed in that assisted reproduction agreement." Family Code section 7606 defines an assisted reproduction agreement as "a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract," and defines assisted reproduction broadly, as including "conception by any means other than sexual intercourse." Section 7633 provides that "an order or judgment [under this chapter] may be entered before the birth of the child, and enforcement of that order or judgment shall be stayed until the birth of the child."[17]

Although this approach to establishing parentage has generally been applied in the context of surrogacy mat-

ters, the statutory language is sufficiently broad to encompass any conception involving assisted reproduction. Thus, in any case involving donated eggs or sperm and/or IVF procedures, the parties should be able to establish legal parentage at any time after conception—including prior to birth where desired and appropriate—without regard for showing an actual, developed parental relationship between the adult seeking to establish legal parentage and the child.

It is also worth noting that the Supreme Court's dicta in *Johnson v. Calvert* that both the genetic mother and the gestational mother could not be legal mothers, because a child cannot have two "natural" mothers, has subsequently been expressly rejected by the Court. In another case where there was both a genetic mother and a gestational mother—but where the two women had been in a committed same-sex relationship for several years before conception and continued to live together and raise the children in their shared home for five years after birth—the Supreme Court determined that both the gestational mother and the genetic mother were legal parents to their twins.[18]

### Parental Behavior

Parental behavior has always been a factor in determining parental rights and responsibilities. The extended family model has often provided for children to be raised by family members who are not the genetic parents, and different cultures provide different informal mechanisms for assuring that children are cared for by the community members best able to do so. In many instances, these parental caretakers are considered "parents" for all purposes, with no one except those most intimately involved being any the wiser.

In addition, many of our most basic family law concepts predate the advent of effective paternity testing; it is only a relatively recent matter that we are able to determine with scientific certainty whether or not a particular man actually is the biological father of a particular child. Thus, the concept of establishing parentage by what I informally refer to as the "if it looks like a duck and quacks like a duck, it's a duck" method is actually nothing new.

This approach to determining legal parentage is codified at Family Code section 7611, subdivision (d), which provides that a man is presumed to be a father if he "receives the child into his home and openly holds out the child as his natural child." Although some courts had applied this rule to vest legal paternity in men known not to be the biological fathers of the children they were raising, until 2002 there was a split in authority as to whether *proof* that the man who had raised a child as his own was not, in fact, the genetic father rebutted the 7611, subdivision (d) paternity presumption as a matter of law.

Most of the cases where the 7611, subdivision (d) presumption was applied in favor of a non-biological father prior to 2002 involved situations where the man who had received the child and held it out as his own had done so under a false belief that he was the genetic father, and there is a strong undercurrent of estoppel in the language of those cases (i.e., where a mother has affirmatively misled a man into believing he is the father, in order to gain his support of herself and her child, she is estopped from subsequently denying that man's paternity when she no longer wants him involved in their lives). It was this estoppel subtext that allowed family courts to continue to find that men who raised children were legal fathers despite a lack of actual genetic paternity, but that lesbian partners who raised children with the biological mothers were not legal mothers.

For example, contrast *Steven W. v. Matthew S.*[19] with *Nancy S. v. Michelle G.*[20] In *Steven W.*, the Court of Appeal, First District, found that Steven was the legal father of a child whom he had raised with the mother, despite the fact that the mother was married to Matthew at the time of the child's conception and birth *and despite the fact that Matthew—her husband—turned out to be the child's genetic father*. As stated by that court, "in the case of an older child [over two years of age] the familial relationship between the child and the man purporting to be the child's father is considerably more palpable than the biological relationship of actual paternity. A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved…. This social relationship is much more important, to the child at least, than a biological relationship of actual paternity." By way of contrast, in *Nancy S.*, the Court of Appeal, First District came to the opposite conclusion in the case of two children raised by a lesbian couple. Michele was able to establish that she and Nancy had been in a committed relationship for over ten years when their daughter was born, and for approximately fifteen years when their son was born. Both children were given Michele's last name, and Michele was listed as the "father" on both birth certificates. When the women broke up, Michele retained primary custody of the daughter through an informal arrangement between the women.

However, when this arrangement broke down, the women ended up in court over custody, visitation and support. After an ugly battle that ended up in the Court of Appeal, and with acknowledgment that the result was "tragic" for the children, that court ultimately ruled that Michele was a legal stranger to the children who did not have standing to seek custody or even visitation, despite her primary parental role up to that point.[21]

All of this changed in 2002, in *In re Nicholas H.* ,[22] a dependency case where the presumed father had not met the mother until after she was pregnant, and therefore knew from the beginning that he was not the biological father of her child. In that case, our Supreme Court held that proof of a lack of genetic paternity *does not* automatically rebut the paternity presumption that arises when a man receives a child into his home and holds that child out as his natural child. The Court clarified that while proof of genetic paternity in another man can rebut the 7611, subdivision (d) presumption of paternity *in an appropriate action* (e.g., in a paternity action by another man seeking to play the role of father), a case where rebuttal of the presumption would leave the child fatherless—and possibly homeless—was not "an appropriate action" to allow rebuttal of the 7611, subdivision (d) presumption.[23]

*Nicholas H.* was followed by several cases where the paternity presumption of 7611, subdivision (d) was applied to find "presumed mothers" in the dependency context,[24] and paved the way for the Supreme Court's historic ruling, three years later, in *Elisa B. v. Superior Court (Emily B.)*,[25] that a woman who receives a child into her home and holds that child out as her natural child can thereby establish presumed motherhood, under 7611(d), even if that means that the child will have two "natural" mothers.[26]

The 7611, subdivision (d) parentage presumption (to use gender neutral language), has two distinct parts to it: the person asserting parentage must (1) receive the child into his or her home, and (2) hold the child out as his or her own child. The petitioner has the burden of proving these two points by a preponderance of the evidence. Although the cases are somewhat inconsistent on what constitutes "receiving," it is clear that what it fundamentally requires is that the presumed parent take responsibility for the child's daily care on at least a limited basis. Thus, where a presumed father did not have custody of the child, but received the child into his home for visitation and cared for the child himself during these visits, this was sufficient to meet the "receiving" requirement even though the child never actually lived with the presumed father.[27]

It is important to note that the threshold issue of whether a person asserting presumed parentage has met the statutory requirements of 7611 is separate and distinct from an analysis of whether that presumption should be *rebutted* which, under 7612, subdivision (a), can only be done "in an appropriate action only by clear and convincing evidence." As a general rule, the phrase "an appropriate action" is being interpreted to mean an action in which there are *competing presumptions of paternity*, as opposed to an action in which rebuttal of the presumption would leave a child with only one parent.[28] However, where the person asserting paternity has engaged in truly reprehensible conduct rendering that person unfit to parent a child, this can also serve as a basis for rebuttal of the presumption.[29]

As a general rule, the decision whether to allow rebuttal of the 7611 presumption rests in the sound discretion of the trial court. However, in *Elisa B. v. Superior Court (Emily B.)*, our Supreme Court put some limits on that discretion. In that case, both members of a lesbian couple became pregnant within a short period, using the sperm of the same anonymous sperm donor. Elisa gave birth to a singleton, while Emily had twins. All three children were given hyphenated last names, and the couple referred to them as "our triplets." Because one of the twins was born with Down Syndrome, Emily stayed home to parent full time while Elisa worked outside the home and supported the family. Both women nursed all three children, and Elisa claimed all three as dependents for tax purposes.

When the women broke up, Elisa left the home with the one child she had birthed, leaving Emily to care for and support the other two. Emily was forced to seek public assistance, and the county pursued Elisa for child support. Although the lower courts denied the county's parentage claim against Elisa, following prior case authority and the Supreme Court's determination in *Johnson v. Calvert* that a child cannot have two "natural" mothers, the Supreme Court reversed. In so doing, the Supreme Court determined that no remand was necessary because it would be an abuse of discretion for the trial court to find that Elisa was not a presumed parent, under the facts as presented. The court ruled that the presumption of 7611, subdivision (d), which generally is a rebuttable presumption, cannot be rebutted by the trial court if (1) the presumed parent participated in the child's conception with the understanding s/he would be a parent; (2) the presumed parent voluntarily accepted the responsibilities of parenthood after the child was born; and (3) there is no other person with a

competing claim to being the child's second parent.

Although the Supreme Court did not address the issue of whether the presumed parent had to remain in the home parenting the child for any particular duration after birth to qualify as an *Elisa B.* parent, this issue was subsequently resolved in *Charisma R. v. Kristina S.*, where the Court of Appeal determined that the period of active parenting need not be for any particular duration as long as it is "sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship."[30] Another recent case, *In re J.O.*, has also clarified that once presumed parentage is established by receipt into the home and holding out in an unambiguous manner, a break in the parent-child relationship will not terminate the presumption.[31] Thus, where a man had received children into his home and contributed to their support, as well as openly holding them out as his own natural children; had left California to relocate to Missouri with the intention of bringing his family there to join him; had maintained contact from Missouri and sent support for the children until the mother asked him to cease contact because she was in a new relationship and did not want him involved with them any more; and had then respected mother's wishes and ended his involvement with mother and children for a substantial period of time; his failure to be involved, even for a period of many years, did not change the fact that he was the children's presumed father, especially in the absence of another person to fill that role.

Finally, especially in the context of same-sex relationships, it is important to note that no formal union is required between the parents in order to establish parental rights as a presumed parent. In *Elisa B.*, Elisa and Emily had not registered with the state of California as domestic partners and were not married. Application of the rules enunciated in *Elisa B.* cannot rest on whether the person asserting parental rights was in a recognized union with the birth parent without violating a fundamental precept of our Family Code—i.e., that children are to be treated the same under the Code whether or not their parents are married.[32] There also was no written agreement between the parties in *Elisa B.*, setting out their intention to be co-parents. The court simply analyzed the evidence before it—as in any other case—and determined, based on the totality of the circumstances, that presumed parentage had been established by a preponderance of the evidence and that this was not an appropriate case to allow for rebuttal of the parentage presumption.

## Genetics

As a matter of California family law, genetics is probably the least important of the factors going into determining legal parentage. Genetic mothers can be egg donors or legal mothers; genetic fathers can be sperm donors, "alleged" fathers, or presumed fathers. Each of these categories has its own legal definition and import—some come with legal rights and responsibilities, and others do not. Simply knowing the genetic relationship between adult and child does not answer any significant question under California law at this point. That said, it cannot be concluded that genetics do not matter. They are simply one piece in the parentage puzzle.

## Sperm Donors

Contrary to popular opinion, the difference between a sperm donor and a father *is not* whether the donor is known to the recipient, nor does it matter if the insemination itself occurred at home or in a medical environment. A sperm donor, as a matter of California law, is "a donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife."[33] Thus, a man who gives his sperm directly to a friend or colleague for purposes of artificial insemination is a father, not a sperm donor; and a man who provides his sperm to a physician, who then turns the sperm over to the woman wishing to use it to get pregnant, is a sperm donor and not a father, even if the person who ultimately uses the sperm is his best friend or sometimes girlfriend, and even if the woman takes the sperm home and inseminates herself there.

The critical case on California sperm donation law is *Steven S. v. Deborah D.*[34] That case involved an unmarried on-again-off-again couple, Steven and Deborah. Deborah had an intimate sexual relationship with Steven, but conceived a child using sperm that Steven had provided to a sperm bank for her use in trying to become pregnant. Steven accompanied Deborah to her first ultrasound appointment to witness the baby's heartbeat, attended a joint therapy session with Deborah to discuss issues relating to the child, and when Deborah gave birth, she called Steven from the hospital saying "Congratulations! You're a father!" Steven went to the hospital the day he learned that the child had been born, and the child was given Steven's last name as the child's middle name. Steven visited the child in Deborah's home, and both parties openly acknowledged that Steven was the "father." However,

Steven never married Deborah and never lived with Deborah and the child. In determining Steven's legal status in relation to the child, the Court of Appeal found that the language of 7613, subdivision (b) is clear on its face, and that there is nothing to indicate any intention on the part of the legislators who drafted it to create an exception based on the intimacy of the relationship between donor and recipient. Since the sperm Deborah used to conceive was sperm that Steven had provided to a sperm bank for the purpose of inseminating a woman who was not Steven's wife, Steven was a sperm donor and not a father.

Similarly, in *Robert B. v. Susan B.*,[35] in an assisted reproduction mess in which a clinic accidentally implanted embryos created by Robert and his wife for their own use into a single woman—Susan—who had intended to use anonymously donated embryos to become a single mother, the Court of Appeal found that Robert was the legal father of Susan's child, and not a sperm donor, because when Robert provided his sperm to the physician it was for the sole and exclusive purpose of impregnating his own wife, and therefore did not bring him under 7613, subdivision (b).[36]

From these cases, it appears that intentions do not matter in the situation of sperm donation. Instead, the courts will strictly apply the language of 7613 to assure that a man who has provided his sperm to a physician or sperm bank will be a legal sperm donor, and not a father, unless the purpose of his sperm deposit was to fertilize his own wife.[37]

### Voluntary Declarations of Paternity

As required by federal law, California has a simplified procedure to allow unmarried couples to establish the legal parentage of the biological father, through both mother and father signing a Voluntary Declaration of Paternity (VDP) and filing it with the state.[38] An unmarried woman cannot put the father's name on the birth certificate without first entering into a VDP; the federal government requires that an unmarried man who wants to be recognized as the legal father of his child voluntarily provide the necessary information to facilitate collection of child support as a condition of this recognition. By statute, a VDP carries the same weight as a judgment of paternity. However, the VDP process *is not* intended to resolve conflicting presumptions, thus it generally is only available to *unmarried* women (since a presumption of paternity exists for any husband whose wife gives birth, whether conclusive or rebuttable).[39]

As a general rule, where there are multiple parties with justiciable claims of presumed parentage, the trial court has to weigh those competing presumptions and determine which presumption controls.[40] However, in *Kevin Q. v. Lauren W.*—a case frequently described as the worst family law decision of 2009—the Fourth District Court of Appeal determined that a VDP can be entered into at any time—including in the midst of parentage litigation—and automatically trumps any claim to parentage under 7611.[41] In that case, a man (Kevin) who had lived with mother and child for the first 20 months of the child's life, and had held the child out as his own child, filed a petition to establish himself as the child's presumed father only a month after mother and child moved out of his home. The evidence establishing the man's presumed parentage under 7611, subdivision (d) was ample—Kevin received the child into his own home, Kevin's parents believed the child to be their grandchild, Kevin provided health insurance for the child and claimed the child as a tax dependent, paid all the child's medical bills, bought a larger home for the family to live in, and in every way treated the child as his own son. When it became clear that he was going to win his parentage action, mother went out and found the biological father, who up until that point had had no contact whatsoever with the child, and induced him to enter into a VDP by her promise that he need not participate in parenting the child or provide financial support for the child. Nevertheless, the Court of Appeal found that the VDP trumped Kevin's parentage claim as a matter of law.

The Third District reached a somewhat inconsistent conclusion in *In re William K.*.[42] In that case, the mother planned a pregnancy with Ronald, with the intention of them raising a child together. However, after she was already pregnant, she discovered that Ronald was a registered sex offender. In an effort to protect the child, and after Ronald went to prison on a parole violation, she entered into a VDP with W.K., even though W.K. was not the biological father. The child ended up in dependency proceedings, where Ronald did his best to establish himself as a presumed father, offering evidence that he had had on ongoing relationship with the mother before she became pregnant; that the pregnancy was planned and they had both intended for him to assume parental responsibilities; that upon his release from prison, he had brought blankets and clothing for the baby; that he had completed paternity testing establishing that he was the genetic father; that he had been in contact with the baby's caseworker and had sent cards and provided a camera for

photographs; and that he had completed a parenting class, participated in a substance abuse assessment, and had regular visitation with his older son.

The Court of Appeal entered into a detailed analysis of all the various statutory bases for challenging a VDP, and determined that—even though Ronald was not one of the people designated by the statute as having standing to bring a motion for genetic testing in order to set aside a VDP—"the court could entertain such a motion [to set aside a VDP under Family Code section 7575] based upon the results of the available genetic testing and would have discretion to set aside the VDP unless it determined that denial of the motion was in the best interests of the child."

*In re William K.* provides some reassurance that VDP's will not be treated as final adjudications of paternity under all circumstances, allowing the courts some discretion to weigh competing presumptions and address the best interests of the children in some cases. However, it is important to note that the VDP father in *William K.* was not the actual genetic father, rendering the VDP inherently suspect. *Kevin Q.* suggests that where the VDP father *is* the actual genetic father, no set aside motion will be possible, even where there is no doubt that it would be better for the child if a different presumed parent's claim was found to control. Legislation has been submitted in Sacramento to amend Family Code section 7612 to statutorily overrule *Kevin Q.* and correct this problem, but it is too early as of the date of this writing to know whether the proposed statute will become law.

Having reviewed the various factors that go into figuring out California parentage, the question remains: how should the courts determine parentage for any particular child? There are many cases where a different person would be chosen if one looked to genetics versus looking to conduct; and looking to intentions could point to yet a third person as the "parent." It is easy to throw one's hands up and decide that there is too much inconsistency in the case law and no useful rules exist. But a thorough reading of the statutes and the case law show that resolution is possible.

I submit that the cases become far more reconcilable if one looks at *intentional procreation* separately from *haphazard procreation.* In circumstances where the conception of children is plainly intentional—and especially in situations where assisted reproduction (egg donation, sperm donation and/or surrogacy) are used to conceive a child—the intentions should control. As noted by our Supreme Court, "the interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.' … Thus, '[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike.'"[43] Where there is a written assisted reproduction agreement, an action can be brought at any point—including prior to birth of the child—to adjudicate parentage in accord with the intentions embodied by that agreement. Where no such agreement exists (as is often the case with couples purchasing anonymous donor sperm from a sperm bank), it may not be possible to adjudicate parentage until the child is born. But *Elisa B.* and *Charisma R.* tell us that, in these cases, parentage can be adjudicated promptly after birth, without concern for the duration of the actual parent-child relationship, as long as satisfactory evidence exists that the presumed parent actively participated in and consented to conception of the child with the understanding s/he would be a co-parent. It is in the best interest of children to have their parentage resolved as early as possible in their lives; court disputes over legal parentage are ugly, and invariably take a huge emotional and financial toll on all involved. Thus, allowing for prompt adjudications of parentage in cases of intentional procreation is in everyone's interest, and will best serve the needs of California's children.

In cases of haphazard procreation—where children are born as a result of unplanned pregnancies, or within the context of multiple informal relationships that make it hard to determine how parental rights and responsibilities should be allocated—parental behavior must be the guidepost. Children have a right to rely on the adults who raise them as parents, whether or not those people are their genetic kin. Proof that a person has acted as a parent for a sufficient duration as to have created an enduring parent-child relationship should be sufficient to earn that person the legal title "parent," so as to assure children the stability and continuity they need to thrive.

Separately analyzing cases of intentional and haphazard procreation allows us to quickly determine which set of rules to follow, and should lead to far more uniformity of case law. If we, as practitioners, can be clear in this approach, the family courts—which often are as confused about the various methods for determining parentage as we are—are likely to follow. In this manner, California parentage law can continue to lead the country in protecting children in a wide variety of families, and the needs of California's children to have legally recognized relationships with their parents can be better met. ■

## Endnotes

1 Paternity determinations in the context of adoption cases, where the birth father is attempting to assert his paternity to prevent the birth mother from placing the child for adoption, or to stop the finalization of the adoption, are outside the scope of this article.

2 See, e.g., Dawn D. v. Superior Court (Jerry K.) (1998) 17 Cal.4th 932, where the California Supreme Court found in favor of the martial presumption.

3 See, e.g., Craig L. v. Sandy S. (2004) 125 Cal. App.4th 36, where the Court of Appeal, Fourth District found the conclusive marital presumption not to be conclusive due to the husband and wife having allowed ongoing contact between the child and its biological father.

4 See, e.g., Steven W. v. Matthew S. (1995) 33 Cal. App.4th 1108, where the Court of Appeal, First District found that a man who had raised a child as his own for several years – including after the man's break-up from the child's mother – had a controlling claim to paternity over the mother's husband who also was the genetic father of the child.

5 See, e.g., In re Marriage of Buzzanca (1998) 61 Cal.App.4th 1410, where the Court of Appeal, Fourth District, held that the husband and wife who had engaged in the highly intentional procreative conduct of obtaining donated eggs and sperm, having the eggs fertilized through in in vitro fertilization procedure, and then having the resulting embryos implanted into a contractual surrogate were the legal parents of the child despite having no genetic connection to the child and despite the fact that the child was not "born into" the marriage by virtue of her being gestated by someone other than the wife.

6 See Fam. Code, § 7541, whereby only the husband, the child, the child's mother or a presumed father can request blood tests. A biological father who has not met the requirements of Family Code section 7611 to become a presumed father would not have standing to make such a request.

7 Dawn D. v. Superior Court (Jerry K.), supra, 17 Cal.4th 932.

8 Dawn D. v. Superior Court (Jerry K.), supra, 17 Cal.4th at p. 947.

9 Fam. Code, § 297.5, subd. (d) provides that: "The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses."

10 Amy G. v. M.W. (2006) 142 Cal.App.4th 1.

11 However, as discussed below, a gay male couple having a child through surrogacy should not have to rely on the marital presumption since, in this instance of highly intentional conception, the intents of the parties should control.

12 Craig L. v. Sandy S. (2004) 125 Cal.App.4th 36.

13 Johnson v. Calvert (1993) 5 Cal.4th 84.

14 The court's determination that a child cannot have two "natural" mothers was subsequently overruled in Elisa B. v. Superior Court (Emily B.) (2005) 37 Cal.4th 108.

15 In re Marriage of Buzzanca, supra, 61 Cal. App.4th 1410.

16 The trial court found that neither sperm nor egg donor were parents, since they had each provided their gametes to third parties for anonymous use by an infertile couple. Family Code section 7613, subdivision (b) clearly relieves the sperm donor of parental rights or responsibilities, and presumably the trial court was precluded from finding legal maternity in the egg donor, since she was not asserting maternity and no one involved in the case actually knew who she was. The trial court also accepted a stipulation from the gestational carrier and her husband, whereby they affirmed that they were not the child's biological parents and had no interest in assuming legal rights or responsibilities for her. As to Mrs. Buzzanca, the court found that she was not a mother because she was not genetically related to the child and had not given birth to her; and as to Mr. Buzzanca, the court found that he was not a father because he was not genetically related to the child and his wife had not given birth to her. Thus, to coin a sports phrase, the child was "0 for 6."

17 Establishing parentage prior to birth assures that the intended parents can care for the child from the moment of birth, including providing health insurance for the child. It also provides reassurance to the gestational carrier that she will not be left with legal responsibility for a child that she is carrying as an act of kindness for an infertile individual or couple – and as a way of bringing in some extra income for her own family – and with no intent to raise the child. However, the decision that a judgment or order of parentage will be stayed until the child is actually born assures that the woman who is pregnant with the child remains legally empowered to make decisions about her own health care until the child is actually born, avoiding a conflict with Roe v. Wade or its progeny.

18 See K.M. v. E.G. (2005) 37 Cal.4th 130.

19 Steven W. v. Matthew S., supra, 33 Cal. App.4th 1108.

20 Nancy S. v. Michele G. (1991) 228 Cal.App.3d 831.

21 The tragedy of the Nancy S. story does not end there. Subsequent to the Court of Appeal ruling, the daughter – who had primarily lived with Michele after the break-up – became clinically depressed. Nancy ultimately followed the recommendations of mental health professionals and allowed that child to move back in with Michele. Nancy subsequently moved to Kansas to be with a new partner, taking the son with her. Nancy tragically died in a car accident in Kansas shortly thereafter, with the son in the car. The child woke up in a hospital in Kansas, with Nancy dead, and when pressed by the staff there to tell them who his father was could only offer that he did not have a father but had another mother. He was on his way into foster care in Kansas when Nancy's family intervened, and was able to secure his return to California and to Michele, with whom he lived from then on. The nightmare these children were put through galvanized a generation of Bay Area attorneys to fight to get the law changed — a fight that did not succeed until over a decade later, in 2005, when the California Supreme Court explicitly overruled Nancy S. in Elisa B. v. Superior Court (Emily B), supra, 37 Cal.4th 108.

22 In re Nicholas H. (2002) 28 Cal.4th 56.

23 The statutory framework for this argument is found in Family Code section 7612, which states that "a presumption under 7611 is a rebuttable presumption … and may be rebutted in an appropriate action only by clear and convincing evidence."

24 The most notable of these cases was In re Salvador M. (2003) 111 Cal.App.4th 1353, where Salvador's biological sister was found to be his presumed mother because she had raised him from infancy along with her own children, after her and Salvador's mother had died, holding him out to the world as her own child.

25 Elisa B. v. Superior Court (Emily B), supra, 37 Cal.4th 108.

26 A number of California Supreme Court cases have made clear that the term "natural," as used in the Family Code, refers to any legal non-adoptive parent, and not necessarily to a genetic parent.

27 See In re A.A. (2003) 114 Cal.App.4th 771.

28 As recently noted by the Court of Appeal, Second District: "The Supreme Court has repeatedly stated that section 7612(a) should not be applied to rebut a presumption of fatherhood arising under section 7611, subdivision (d) where the result would be to leave children with fewer than two parents. [Citing and quoting from In re Nicholas H., supra, 28 Cal.4th 56.] ¶ The Supreme Court repeated the admonition against applying section 7612, subdivision (a) to rebut a presumption of parenthood arising under section 7611, subdivision (d) where the result would be to leave a child with fewer than two parents in Elisa B. v. Superior Court (2005) 37 Cal.4th 108 …." (In re J.O. (2009) 178 Cal.App.4th 139, 148-149.)

29 See, e.g., In re T.R. (2005) 132 Cal.App.4th 1202, where the Court of Appeal allowed rebuttal of the parentage presumption despite the lack of another candidate to fill the role of second parent, noting that "these positive factors [of having parented and supported the child, knowing she was not his biological child] cannot be viewed in a vacuum. [The presumed father] is a registered sex offender who was convicted of and imprisoned for molesting young girls…. Moreover, the current allegations of molestation [of the subject minor] were found to be true by clear and convincing evidence…. If an individual can qualify for presumed father status based on his good deeds consistent with parental responsibilities, it follows that under certain circumstances he can be disqualified by repugnant conduct that is detrimental to the child." (In re T.R., supra, 132 Cal.App.4th at pp. 1211-1212, emphasis added.)

30 Charisma R. v. Kristina S. (2009) 175 Cal. App.4th 361, 374 (subsequently disapproved on other grounds in Reid v. Google, Inc. (2010) 50 Cal.4th 512).

31 In re J.O., supra, 178 Cal.App.4th 139.

32 See Family Code section 7602, which provides that: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."

33 See Fam. Code, § 7613, subd. (b).

34 Steven S. v. Deborah D. (2005) 127 Cal.App.4th 319.

35 Robert B. v. Susan B. (2003) 109 Cal.App.4th 1109.

36 Family Code section 7613, subdivision (a) provides that a man who consents to his wife's insemination with donor sperm is considered the natural father of any child so conceived; and Family Code section 7613 subdivision (b) defines a sperm donor as a man who provides sperm to a physician or sperm bank for purposes of inseminating a woman other than his wife.

37 There is no published case, nor do I know of an unpublished case, where a sperm donor went on to receive the child into his home and unequivocally hold the child out as his natural child; therefore, it is yet to be determined whether this behavior would elevate a sperm donor

to a presumed father. In an abundance of caution, I always counsel clients using known sperm donors to be cautious in this regard.

38 See Fam. Code, §§ 7570-7577.

39 See H.S. v. Superior Court (S.G.) (2010) 183 Cal. App.4th 1502.

40 See Family Code section 7612, subdivision (b), which provides that "where there are two or more presumptions arising under 7610 or 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."

41 See Kevin Q. v. Lauren W. (2009) 175 Cal. App.4th 1119.

42 In re William K. (2008) 161 Cal.App.4th 1.

43 Johnson v. Calvert (1993) 5 Cal.4th 84, 94, quoting from Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality (1990) Wis. L.Rev. 297.