The Irrebuttable Presumption of California Evidence Code Section 621

Section 621 of the California Evidence Code establishes an irrebuttable presumption of paternity in certain circumstances. This article examines the constitutionality of section 621 and current capabilities of blood testing. It concludes that section 621 should be abolished.

Most states have laws which embody strong presumptions that children born in wedlock are legitimate.[1] In California such presumptions are expressly mandated by Evidence Code section 621[2] and Civil Code section 7004.[3] A child conceived during the coha-

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[1] H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 15-16 (1971).

[2] "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." CAL. EVID. CODE § 621 (West Cum. Supp. 1978).

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

(1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.

(2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

bitation of a potent and fertile husband and his wife is irrebuttably presumed to be a child of the marriage.[4] A child conceived or born during the marriage when the husband and wife are not cohabiting is rebuttably presumed to be a child of the marriage.[5]

Despite limited judicial exceptions, section 621 is a rigid legitimacy presumption.[6] A consequence of section 621's irrebutable presumption is that the child's natural father, when he is not the husband, cannot establish paternity.[7] Thus the presumption prevents the natural father from establishing a legal father-child relationship, which is the basis for familial rights such as custody and visitation.[8] Moreover, the child has no right to receive support from the natural father when his paternity cannot be demonstrated.[9]

The continued use of section 621 is no longer justified. Public policy originally favored the use of irrebuttable presumptions of paternity because of the social and legal stigmas arising from illegitimacy.[10] Today, however, legal distinctions based on illegitimacy are virtually eliminated[11] and the underlying social mores have changed.[12] Also, at the time such presumptions arose, scien-

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(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

CAL. CIV. CODE § 7004 (West Cum. Supp. 1978).

[4] CAL. EVID. CODE § 621 (West Cum. Supp. 1978), *set forth in* note 2 *supra*.

[5] CAL. CIV. CODE § 7004 (West Cum. Supp. 1978), *set forth in* note 3 *supra*.

[6] Krause, *Creation of Relationships of Kinship*, 4 INT'L ENCYCLOPEDIA OF COMP. LAW, ch. 6, §§ 24, 27 (1976).

[7] Paternity is the condition of being a father. BLACK'S LAW DICTIONARY 1283 (rev. 4th ed. 1968). A husband to whom CAL. EVID. CODE § 621 (West Cum. Supp. 1978) applies is the presumed father of the child and this may not be rebutted. CAL. CIV. CODE § 7004 (West Cum. Supp. 1978).

[8] CAL. CIV. CODE §§ 7000-7018 (West Cum. Supp. 1978).

[9] *Id.* § 7012.

[10] Comment, *The Uniform Parentage Act: What It Will Mean for the Putative Father in California*, 28 HASTINGS L. J. 191, 211 (1976).

[11] *See* Clark, *Constitutional Protection of the Illegitimate Child?*, this issue.

[12] *Id.*

tific methods for ascertaining paternity did not exist.[13] Improvements in medical technology, however, now provide a reliable method for ascertaining paternity.[14] Furthermore, recent court decisions[15] indicate that use of irrebuttable presumptions to preclude a natural father from establishing paternity may constitute a denial of his due process rights as well as violate the equal protection clause.

More importantly, section 621 should be reevaluated because it can result in circumstances contrary to the child's best interests. For example, while the child may have a stable relationship with his or her mother, the mother's husband may refuse to treat the child as his own yet refuse to consent to its adoption by the natural father.[16] Thus, on one hand, the child has a legal father who will not accept him or her socially, while on the other hand, the man who is willing to accept the social role of father is not allowed to exercise legal control over the child and is denied potential parental rights. In such a situation current law denies the child the opportunity for a complete social and legal parent-child relationship with an adult male.

This article contends that section 621 should be abolished and that section 7004 should govern all cases in which paternity is challenged. Such a change would permit the admission of blood test evidence to rebut the presumption of paternity of the husband.[17] Section I summarizes the current use of section 621. Section II discussed blood testing and its applicability to determin-

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[13] Comment, *supra* note 10, at 211.

[14] For a discussion of blood testing to determine paternity, *see* notes 48-92 and accompanying text *infra*.

[15] Stanley v. Illinois, 405 U.S. 645 (1972) (the Court held that the state could not presume that all unmarried fathers are unfit parents nor deny to unwed fathers the hearing on fitness accorded to all other parents whose custody of their children is challenged); In re Lisa R., 13 Cal. 3d 631, 532 P.2d 123, 119 Cal. Rptr. 475 (1975) (the court held that the state could not use a rebuttable presumption to preclude a natural father from establishing paternity where the child's mother and legal father are dead).

[16] Furthermore, the child in the care and custody of the mother will not be considered abandoned and free from paternal control unless the husband has failed to communicate with or support the child for one year. CAL. CIV. CODE § 232 (West Cum. Supp. 1978). For a discussion of problems surrounding the natural father and custody, *see* Comment, *The Rights of Fathers of Non-Marital Children to Custody, Visitation and Consent to Adoption*, this issue, and in regards to adoption, *see* Comment, *Stepparent Custody: An Alternative to Stepparent Adoption*, this issue.

[17] Kusior v. Silver, 54 Cal. 2d 603, 620, 354 P.2d 657, 668-69, 7 Cal. Rptr. 129, 140-41 (1960).

ing paternity. Finally, section III examines the constitutionality of section 621.

I. The Current Application of Section 621

State laws generally provide that a child borne of a married woman during marriage is legitimate and presume that the woman's husband is the father of the child.[18] In California, such a presumption is found in section 621 of the Evidence Code.[19] At present, once the four requirements of section 621 are met, the husband is irrebuttably presumed to be the child's legal father.

The presumption of paternity under section 621 only arises when all four requirements are met. If the mother and presumed father are legally married, cohabiting at the time of conception, and the husband is both potent and fertile,[20] then the husband is irrebuttably presumed the legal father of a child born during the marriage.

The legal status of husband and wife exists from the date of the marriage ceremony to the date of the final decree of marital dissolution.[21] The presumption of section 621, however, applies only to husbands and wives who cohabit.[22] Thus, the presumption applies even when the husband and wife cohabit after the granting of an interlocutory decree of marital dissolution but not if they are physically separated.[23] The California Supreme Court in *Kusior v. Silver*[24] held that the cohabitation requirement of section 621 is satisfied only when a man and a woman live together ostensibly as husband and wife.[25] If husband and wife are not living together, evidence that they had the opportunity to engage in sexual intercourse is insufficient to trigger application of the irrebuttable presumption.[26] Conversely, where proof of cohabita-

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[18] H. Krause, *supra* note 1, at 15-16.

[19] Cal. Evid. Code § 621 (West Cum. Supp. 1978), *set forth in* note 2 *supra*.

[20] Potency is the ability of the male to perform sexual intercourse. Dorland's Illustrated Medical Dictionary 1208 (24th ed. 1965). Fertility is the capacity to conceive or induce conception. *Id.* at 546.

[21] Nelson v. Nelson, 7 Cal. 2d 449, 60 P.2d 982 (1936); Louis v. Louis, 7 Cal. App. 3d 851, 86 Cal. Rptr. 834 (1st Dist. 1970); Price v. Price, 242 Cal. App. 2d 705, 51 Cal. Rptr. 699 (5th Dist. 1966).

[22] Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

[23] *See* cases cited note 21 *supra*.

[24] 54 Cal. 2d 603, 354 P. 2d 657, 7 Cal. Rptr. 129 (1960).

[25] *Id.* at 611, 354 P.2d at 662, 7 Cal. Rptr. at 134. *See* Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Questionable Constitutionality*, 35 So. Cal. L. Rev. 437, 441-43 (1962).

[26] Kusior v. Silver, 54 Cal. 2d 603, 616, 354 P.2d 657, 666, 7 Cal. Rptr. 129, 138 (1960).

tion exists, evidence of lack of sexual intercourse is inadmissible to rebut the presumption.[27]

Additionally, the presumption of section 621 is applicable only if the husband is both potent and fertile.[28] The husband's impotency has prevented application of the presumption since 1872.[29] The fertility requirement, however, was originally placed in section 621 by the judiciary. In 1954 the California Court of Appeal held that when the husband's sterility is capable of definite determination, the irrebuttable presumption of paternity is not applicable because it is clear that the husband could not be the father.[30] In 1975 the legislature amended section 621 to codify the fertility requirement.[31] The courts do, however, subject evidence of impotency and sterility to close examination.[32] Thus, in one case, the admission by physicians that vasectomies are not always successful weakened the credibility of the husband's evidence.[33] Consequently, proof of impotency or sterility is difficult and strengthens the presumption's use.

There are two judicial exceptions to section 621. Under one exception, the husband first must show that the period of gestation calculated from the period of cohabitation is abnormal. If he also shows that the wife had intercourse with another man during the probable period of conception, the courts will not apply section 621.[34] This exception originated in *Estate of McNamara*,[35] because the 304-day period following cohabitation implied a

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[27] *Id.* at 610, 354 P.2d at 661, 7 Cal. Rptr. at 133.

[28] In re Marriage of Groner, 23 Cal. App. 3d 115, 99 Cal. Rptr. 765 (2d Dist. 1972); Benes v. Young, 187 Cal. App. 2d 270, 9 Cal. Rptr. 500 (2d Dist. 1961). *See* Comment, *supra* note 25, at 541-42; 20 STAN. L. REV. 754, 756-57 (1968).

[29] CAL. EVID. CODE § 621, Historical Note at 577 (West 1966).

[30] Hughes v. Hughes, 125 Cal. App. 2d 781, 271 P.2d 172 (4th Dist. 1954), *cited in* 8 SANTA CLARA LAW. 248, 255 (1968).

[31] 1975 Cal. Stats. 3194, ch. 1244, § 13.

[32] Tosh v. Tosh, 214 Cal. App. 2d 483, 486, 29 Cal. Rptr. 613, 615 (1st Dist. 1963).

[33] The admission by both physicians that vasectomy does not always accomplish its purpose; the concession by both that the first test, made soon after the operation, could not be relied upon; the uncertainty surrounding the specimens used in the later tests; and the possibility that a second vasectomy, after the pregnancy occurred, had been performed by another doctor, act as subtrahends from the experts' opinions that appellant was sterile.

Id.

[34] Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919). *See* Comment, *supra* note 25, at 448-51.

[35] 181 Cal. 82, 183 P. 552 (1919).

"quite exceptional" gestation period and the court declared that paternity in another man could be determined with reasonable certainty.[36] Although the average gestation period is 280 days,[37] section 621 has not been applied for gestation periods, based on cohabitation coinciding with intercourse, of more than 297 or less than 200 days.[38] Thus, to come under the abnormal gestation period exception, there must be a substantial discrepancy between a normal gestation period and that calculated from an implied act of intercourse during cohabitation.

Under a second exception the courts refuse to apply section 621 in cases where blood test evidence, in connection with other evidence, can be used to prove that conception could not have occurred during cohabitation of husband and wife.[39] For example, in *Jackson v. Jackson*,[40] the husband and wife cohabited for only

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[36] Husband and wife last cohabited 304 days before the birth of the child. The wife and McNamara began cohabiting immediately thereafter. The wife saw her husband only once after their separation, under circumstances that precluded the possiblity of sexual intercourse. *Id.* at 86, 183 P. at 553-54.

Section 621 has not been applied in other cases involving pregnancies that would be exceptionally long or short if conception occurred while the wife was cohabiting with her husband. In Whitney v. Whitney, 169 Cal. App. 2d 209, 337 P.2d 219 (1st Dist. 1959), the court upheld the trial court's refusal to apply § 621 to a gestation period of 297 days calculated from the date of intercourse to birth because such a gestation period was sufficiently rare and infrequent so as not be within the normal range of pregnancies.

Other cases have involved "short" pregnancies. In Smith v. Heilman, 171 Cal. App. 2d 424, 340 P.2d 752 (3d Dist. 1959), the period between the first cohabitation of husband and wife after the husband's extended absence and the date of birth was 184 days. Because such a gestation period was approximately one month shorter than the shortest known gestation period for a mature birth, the court held that only the rebuttable presumptions of legitimacy applied. In Murr v. Murr, 87 Cal. App. 2d 511, 197 P.2d 369 (2d Dist. 1948), the mature child was born 188 or 190 days after the wife visited her husband who had been absent the previous six months; the court held the presumption as to legitimacy disputable. In Anderson v. Anderson, 214 Cal. 414, 5 P.2d 881 (1931), the fully-developed child was born three and one-half months after the marriage began and less than 200 days after the parties first engaged in sexual intercourse. The court held that the irrebuttable presumption of legitimacy should not prevail.

[37] The average gestation period is calculated from the first day of the last menstrual period. Dazey v. Dazey, 50 Cal. App. 2d 15, 20, 122 P.2d 308, 311 (2d Dist. 1942).

[38] These are the outer limits established by previous appellate decisions. *See* cases cited note 36 *supra*.

[39] Jackson v. Jackson, 67 Cal. 2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967); Louis v. Louis, 7 Cal. App. 3d 851, 86 Cal. Rptr. 834 (1st Dist. 1970); Keaton v. Keaton, 7 Cal. App. 3d 214, 86 Cal. Rptr. 562 (1st Dist. 1970).

[40] 67 Cal. 2d 245, 430 P.2d 289, 60 Cal. Rptr. 649 (1967).

four days following the wedding ceremony. The child was born approximately nine months later.[41] The California Supreme Court held that the trial court should have admitted the blood tests results which excluded the husband as the father of the child.[42] The husband should have had an opportunity to prove that he was not the legal father by demonstrating that the child was not conceived during his cohabitation with his wife.[43] The court also said that since any conception occurring during the four-day period would invoke the irrebuttable presumption of section 621, the husband had the burden of proving that no other man had sexual intercourse, or the opportunity therefor, with his wife during the cohabitation period.[44]

Once the requirements of section 621 are fulfilled the presumption of paternity is irrebuttable. At present, the section is interpreted strictly and no evidence is admissible to rebut the presumption. Thus, evidence of differing racial characteristics[45] or blood types of presumed parents and child is inadmissible.[46] Even where the husband and wife are of the same race and the child is of mixed race the court has held that the presumption applies because the legislature has not enacted a racial exception to sec-

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[41] *Id.* at 246, 430 P.2d at 289-90, 60 Cal. Rptr. at 649-50.

[42] *Id.* at 248, 430 P.2d at 290-91, 60 Cal. Rptr. at 650-51.

[43] *Id.*

[44] *Id.* at 248, 430 P.2d at 290, 60 Cal. Rptr. at 650; Louis v. Louis, 7 Cal. App. 3d 851, 854, 86 Cal. Rptr. 834, 836 (1st Dist. 1970); Keaton v. Keaton, 7 Cal. App. 3d 214, 217, 86 Cal. Rptr. 562, 564 (1st Dist. 1970).

The *Jackson* exception to the application of § 621 was discussed in two other California cases. In Keaton v. Keaton, 7 Cal. App. 3d 214, 86 Cal. Rptr. 562 (1st Dist. 1970) the court refused to apply the *Jackson* rule because husband and wife were cohabiting during the period of conception. The court took the opportunity to emphasize that, if during the four days of cohabitation in the *Jackson* case the wife had conceived as a result of sexual intercourse with another man, the conclusive presumption would apply regardless of any blood test result. *Id.* at 217, 86 Cal. Rptr. at 564. In Louis v. Louis, 7 Cal. App. 3d 851, 86 Cal. Rptr. at 834 (1st Dist. 1970), the court held that on remand blood test evidence would be admissible to prove that the conception was not by the husband while husband and wife were cohabiting. *Id.* at 854, 86 Cal. Rptr. at 836. The court also noted that any other competent and relevant evidence, including testimony as to whether the wife had the opportunity for sexual intercourse with another man, might be offered to prove or disprove the occurrence of conception during the period of cohabitation. *Id.* The court again emphasized that blood test evidence is not admissible to rebut paternity but is admissible only to disprove conception during the cohabitation of husband and wife. *Id.*

[45] Hess v. Whitsett, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (2d Dist. 1967).

[46] For a discussion of blood test evidence, *see* notes 61-89 and accompanying text *infra*.

tion 621 and no satisfactory scientific basis exists for such an exception.[47]

In summary, the courts apply section 621 mechanically. Thus, where husband and wife are legally married and cohabiting at the time of conception the presumption will apply. Only if the husband is impotent or sterile, the pregnancy would be of an unusual length, or blood tests and other evidence prove that conception did not occur during cohabitation of husband and wife will section 621 not apply.

II. Blood Test Evidence

Originally courts justified the use of section 621[48] because conclusive scientific determination of paternity was impossible.[49] Today, however, blood test evidence can ascertain paternity definitively,[50] yet California courts still refuse to admit such evidence to rebut the presumption of section 621.[51] This section examines the current use of blood test evidence in California paternity cases and the scientific capabilities of blood testing. It concludes that blood test evidence should be admissible in all paternity actions.[52]

California courts have consistently rejected blood test evidence to rebut the presumption of section 621. The California Supreme Court, in *Kusior v. Silver*,[53] held blood test evidence inadmissible to rebut the presumption of section 621. The court relied primarily on evidence of legislative intent. Case law prior to the *Kusior* decision had held that blood tests excluding the husband as the natural father were inadmissible to rebut the presumption of le-

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[47] Hess v. Whitsett, 257 Cal. App. 2d 552, 554, 556, 65 Cal. Rptr. 45, 47-48 (2d Dist. 1967); Comment, *supra* note 25, at 446-48; 20 Stan. L. Rev. 754, 761-62 (1968). In County of San Diego v. Brown, 80 Cal App. 3d 297, 145 Cal. Rptr. 483 (4th Dist. 1978), the court noted that human populations are highly polymorphic for skin color and that pigmentation might be linked with metabolic factors, thus making racial characteristics an unreliable basis for determining paternity. *Id.* at 301 n.3, 145 Cal. Rptr. at 485 n.3.

[48] Cal. Evid. Code § 621 (West Cum. Supp. 1978), *set forth in* note 2 *supra*.

[49] *See, e.g.*, Estate of McNamara, 181 Cal. 82, 95, 183 P. 552, 557 (1919).

[50] *See* notes 68-89 and accompanying text *infra*.

[51] Kusior v. Silver, 54 Cal.2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960). *See* notes 53-60 and accompanying text *infra*.

[52] *Id.* at 620-21, 354 P.2d at 688-89, 7 Cal. Rptr. at 140-41. Blood test evidence is now addmissible to challenge the rebuttable presumptions of paternity, now contained in Cal. Civ. Code § 7004 (West Cum. Supp. 1978), *set forth in* note 3 *supra*.

[53] 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

gitimacy of a child born in wedlock.[54] Since the legislature had refused to include in the California Evidence Code a provision of the Uniform Act on Blood Tests to Determine Paternity[55] providing that a party could overcome the presumption of the husband's paternity by blood test evidence,[56] the court found that the legislature intended to leave the prior case law unchanged.[57] The court also noted that the legislature had amended the former irrebuttable presumption statute[58] so that it would apply notwithstanding any other provision of law.[59] The court concluded that this amendment was intended to preclude the state from using blood test evidence in support actions to prove nonpaternity of the husband.[60]

In cases to which section 621 does not apply presumptions of paternity are rebuttable.[61] In cases where the presumptions are rebuttable, blood tests are admissible as evidence.[62] The law provides that, in a civil action where paternity is relevant, the court may order the mother, child and alleged father to submit to blood tests made by court-appointed experts.[63] The court determines that the alleged father is not the actual father if all the experts so conclude.[64] Otherwise, the trier of fact decides the issue, based upon all the evidence.[65]

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[54] Hill v. Johnson, 102 Cal. App. 2d 94, 226 P.2d 655 (2d Dist. 1951), *rev'd on other grounds*, Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

[55] UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY, *reprinted in* 9 UNIF. L. ANN. 102 (1957).

[56] "The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child." § 5, *Id.* at 113.

[57] Kusior v. Silver, 54 Cal. 2d 603, 617-18, 354 P.2d 657, 667, 7 Cal. Rptr. 129, 139 (1960).

[58] 1955 Cal. Stats. 1834, ch. 948, § 3 (current version at CAL. EVID. CODE § 621 (West Cum. Supp. 1978)).

[59] Kusior v. Silver, 54 Cal. 2d 603, 618, 354 P.2d 657, 667, 7 Cal. Rptr. 129, 139 (1960). At that time CALIFORNIA PENAL CODE § 270, 1955 Cal. Stats. 1834, ch. 948, § 1, authorized the use of any proof to establish nonpaternity of the husband in a support action.

[60] Kusior v. Silver, 54 Cal. 2d 603, 618, 354 P.2d 657, 667, 7 Cal. Rptr. 129, 139 (1960).

[61] *See* CAL. CIV. CODE § 7004 (West Cum. Supp. 1978), *set forth in* note 3 *supra*. The presumptions in § 7004 are rebutted by a court decree of paternity in another man. *Id.*, subd. (b).

[62] CAL. EVID. CODE §§ 890-897 (West 1966).

[63] *Id.* §§ 892-893.

[64] *Id.* § 895.

[65] *Id.*

Thus, although the courts have steadfastly refused to allow the use of blood test evidence to rebut the presumption of section 621, blood test evidence is admissible to prove that conception did not occur during cohabitation[66] and to refute rebuttable presumptions of paternity.[67] Furthermore, the courts have noted that blood test evidence is scientifically reliable as a means of excluding a man as a possible father.[68] There seems to be no scientifically based reason why blood tests are admissible in most contexts but not under section 621.

The use of blood testing to determine paternity is based on the fact that the child inherits blood antigens[69] from each parent.[70] Consequently, if a child possesses an antigen which is absent in both the mother and in the person named as the father, the latter cannot be the father.[71] A man also cannot be the child's father if the child's blood lacks an antigen contained in the alleged father's blood which genetically must have been transmitted to that child.[72] The possibility of a mutation invalidating the normal genetic inheritance pattern is estimated to be once in 40,000 persons.[73] Thus, deviations from these genetic principles occur so rarely that they may be ignored for purposes of legal application.[74]

The capabilities of blood testing have advanced rapidly in the middle of the twentieth century. In 1943 a man incorrectly alleged to be the father of a child had only a thirty-three percent chance of disproving paternity through blood testing; by 1947 he had a fifty-five percent chance.[75] Today blood testing can establish non-

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[66] *See* notes 34-38 and accompanying text *supra*.

[67] *See* notes 61-65 and accompanying text *supra*.

[68] Jackson v. Jackson, 67 Cal. 2d 245, 248, 430 P.2d 289, 291, 60 Cal. Rptr. 649, 651 (1967); Kusior v. Silver, 54 Cal. 2d 603, 617, 354 P.2d 657, 666, 7 Cal. Rptr. 129, 138 (1960).

[69] Antigens are secreted soluble mucopolysaccharides possessing the H, A and B haptenic structures that are characteristic of erythrocytes (i.e., one of the elements found in blood) and some other tissues of the body. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 106 (24th ed. 1965).

[70] H. KRAUSE, *supra* note 1, at 124.

[71] *Id.*

[72] American Medical Association, Committee on Transfusion and Transplantation and American Bar Association, Section of Family Law, Committee on Standards for the Judicial Use of Scientific Evidence in the Ascertainment of Paternity, *Joint AMA-ABA Guidelines: Present Status of Serological Testing in Problems of Disputed Parentage*, 10 FAM. L. Q. 247, 259 (1976) (hereinafter cited as AMA-ABA Guidelines).

[73] *Id.* at 260.

[74] H. KRAUSE, *supra* note 1, at 124.

[75] S. SCHATKIN, *Foreword* to DISPUTED PATERNITY PROCEEDINGS at vii (3d ed. 1953).

paternity for about ninty-eight percent of all men incorrectly alleged to be the father of a child if all sixty-two of the known testing systems are used.[76] The American Bar Association and the American Medical Association recommend the use of seven serological[77] systems in routine paternity cases.[78] The use of only six blood group systems provides a cumulative probability of exclusion for a man not the father of sixty-three to seventy-two percent, depending on race.[79]

In rare cases when blood tests cannot disprove the alleged fathers' paternity, they can determine reliably the probability that a given individual is the father.[80] Some antigens are so rare that if they are found in an alleged father and also in the child, the likelihood of paternity is high and the possibility of coincidence low.[81] Where there is no rare antigen in the child's blood the probability of paternity is computable by comparing statistical norms or the blood tests of the two or more possible fathers who have not been excluded.[82] While estimation in such cases falls short of absolute certainty, statistical estimates are already used by California courts in paternity cases involving "long" and "short" pregnancies.[83] Thus, there seems to be no reason why the courts should not extend the use of estimates to disputed patern-

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[76] AMA-ABA Guidelines, *supra* note 72, at 252.

In 1968 a group of at least 50,000,000 persons could be differentiated by blood typing. H. KRAUSE, *supra* note 1, at 123. It has been estimated that except for identical twins there are no two persons with exactly the same detailed blood grouping. *Id.*

[77] Serology is the study of antigen-antibody reactions in vitro (i.e., in slides or test tubes). DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1368 (24th ed. 1965).

[78] AMA-ABA Guidelines, *supra* note 72, at 257. The AMA and the ABA recommend the use of the ABO, Rh, MNSs, Kell, Duffy, Kidd and HLA systems. The recommendation is not intended to exclude the use of additional systems when an investigator has special expertise in those systems. (The current California rule is that the test must be sufficiently established to have gained general acceptance by experts in the field. Huntington v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966).) The use of the seven systems was recommended because, in addition to the high cumulative probability of exclusion, anti-sera for the six blood groups are readily available and reliable and each system provides a reasonably high probability of exclusion in relation to cost.

[79] AMA-ABA Guidelines, *supra* note 72, at 257.

[80] H. KRAUSE, *supra* note 1, at 127; AMA-ABA Guidelines, *supra* note 72, at 260-63.

[81] H. KRAUSE, *supra* note 1, at 127; AMA-ABA Guidelines, *supra* note 72, at 260.

[82] AMA-ABA Guidelines, *supra* note 72, at 260.

[83] *See* notes 34-38 and accompanying text *supra*.

ity cases where blood test evidence is inconclusive.[84] Ultimately, the use of such evidence, in conjunction with other relevant evidence where necessary, improves the court's ability to determine accurately actual paternity.

Blood test evidence today is scientifically capable of excluding men who are not the father and identifying the actual father of a child by estimating the probability of paternity if necessary. Although some distrust of blood typing exists because of the possibility of fraud or error, these dangers are easily avoided.[85] In addition, another identification system known as tissue typing,[86] which is in use in other countries,[87] increases the probability of exclusion up to ninty-three percent.[88] Moreover, a recent California decision indicates the potential acceptance and usefulness of tissue typing in determining paternity.[89]

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[84] The use of estimates of the likelihood of paternity is recommended by the AMA and the ABA. AMA-ABA Guidelines, *supra* note 72, at 283. Estimates of the likelihood of paternity in cases where the alleged fathers are not excluded by blood tests are admissible evidence in many foreign countries. *Id.* at 260.

[85] *Id.* at 280-83. The AMA and the ABA recommend the adoption of standard procedures for conducting blood tests. To prevent the accomplishment of fraud by one party substituting a stranger for himself or herself at the time of testing the report recommends that all the persons to be tested should be present at the same time and identify each other. The samples should be identified by a detailed procedure to ensure reliability. *Id.* at 281-82. (California courts currently require that the expert witness be the physician who has drawn and read the blood samples. Testimony cannot be given by a physician when his or her technician drew the blood samples. Madden v. Madden, 160 Cal. App. 2d 422, 325 P.2d 538 (2d Dist. 1958)). To prevent lab error each test should be performed in duplicate, using a different source of blood grouping reagents for each, and each test should be read independently by two observers. It was the opinion of the committee that laboratories performing these tests should be accredited and required to meet rigorous standards as to personnel, space, equipment, reagents and records. AMA-ABA Guidelines, *supra* note 72, at 282-83.

[86] This system uses the complex HLA histo-compatibility system. See AMA-ABA Guidelines, *supra* note 72, at 272.

[87] *Id.* at 276.

[88] The extensive number of antigens in the system that can be used to differentiate persons makes it apparent that the HLA typing system offers the most potent method to determine paternity. *Id.* at 274.

[89] Cramer v. Morrison, 88 Cal. App. 3d 873, 153 Cal. Rptr. 865 (4th Dist. 1979) is possibly the first appellate opinion in the United States to endorse the admissibility of the HLA test to prove paternity. 5 FAM. L. REP. (BNA) 1054. The test showed a 98.3% probability that the defendant was the father, i.e., only 1.7% of the population could be the father and the defendant was in that group. The appellate court found that the trial court erred in refusing to admit the test. It held that the HLA test was not barred by the California version of the UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY because the legislature

In light of the reliability of blood tests the legislature should allow the admission of blood test evidence to rebut the presumption of section 621 and prove paternity by adopting section 5 of the Uniform Act on Blood Tests to Determine Paternity.[90] Finally, since allowing blood test evidence under section 621 effectively eliminates its status as an irrebuttable presumption, section 621 is no longer necessary. Rather, the presumptions of section 7004[91] cover all paternity questions adequately. Moreover, section 7004, which was enacted with the Uniform Parentage Act,[92] incorporates more modern notions of paternity and illegitimacy.

IIII. CONSTITUTIONALITY OF SECTION 621

Both the United States Supreme Court and the California Supreme Court have held that the right to conceive and raise one's own child is cognizable and substantial.[93] Section 621,[94] however, may act to prohibit the natural father's exercise of that right by denying him the opportunity to establish the paternity of his child. Since section 621 bars establishment of the biological relationship, the natural father cannot establish the legal parent-child relationship that constitutionally and statutorily guaran-

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did not have this type of blood test in mind when it adopted the Act, nor by the general rule prohibiting evidence of probabilities as prejudicial because the HLA test interpretations are not based on arbitrarily assigned numerical values or on a statistical theory unsupported by the evidence. Cramer v. Morrison, 88 Cal. App. 3d 873, 880-85, 153 Cal. Rptr. 865, 868-872 (4th Dist. 1979). This issue of whether the HLA test had gained general acceptance in the relevant scientific community was not litigated or decided in the trial or appellate court. *Id.* at 885-88, 153 Cal. Rptr. 865, 872-874 (*Hearing denied*, March 29, 1979).

[90] While blood tests are admissible evidence under CAL. CIV. CODE § 7004 (West Cum. Supp. 1978), *set forth in* note 3 *supra*, § 5 of the UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY, *reprinted in* 9 UNIF. L. ANN. 113 (1957), *set forth in* note 56 *supra*, should be enacted at the same time CAL. EVID. CODE § 621 (West Cum. Supp. 1978) is abolished. By enacting § 5 the legislature will clearly express its intent that blood tests be used to overcome the presumption of legitimacy of a child born in wedlock.

[91] CAL. CIV. CODE § 7004 (West Cum. Supp. 1978), *set forth in* note 3 *supra*.

[92] 1975 Cal. Stats. 3194, ch. 1244, § 11.

[93] Wisconsin v. Yoder, 406 U.S. 205, 213-14, 231-34 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *In re* Lisa R., 13 Cal. 3d, 636, 647-51, 532 P.2d 123, 130-33, 119 Cal. Rptr. 475, 482-85 (1975).

[94] CAL. EVID. CODE § 621 (West Cum. Supp. 1978), *set forth in* note 2 *supra*.

tees him rights to custody and control of his child.[95]

In *Stanley v. Illinois*,[96] a landmark case establishing constitutional rights for unwed fathers, the Court held that a presumption which burdens all unwed fathers by distinguishing them from married fathers[97] is a denial of due process and equal protection.[98] Although *Stanley* dealt specifically with the denial of custody rights to unwed fathers, the case established that the right of a natural father to raise his children, legitimate or illegitimate, is an important right founded on the fourteenth amendment.[99] Thus, before separating children from their father, the state must advance a legitimate interest in removal and use constitutionally valid means to achieve those interests.[100] The Court concluded that all parents are constitutionally entitled to a hearing on fitness before their children are removed from their custody.[101] The Court said that although procedure by presumption is more efficient than individualized determination, efficiency is not a sufficient justification under the due process clause for denying the unwed father a hearing.[102]

Several California decisions have applied the *Stanley* analysis to other situations.[103] In *In re Lisa R.*,[104] the main issue was whether the unwed father could offer proof to establish his paternity, notwithstanding a standing requirement which precluded him from so doing.[105] California law presumed that a married woman's child was the legitimate issue of her marriage and only the mother, her husband, their descendants or the state could dispute the presumption.[106] Thus, as to the appellant, the presumption was irrebuttable because he lacked proper standing to

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[95] CAL. CIV. CODE §§ 7000-7018 (West Cum. Supp. 1978).

[96] 405 U.S. 645 (1972).

[97] In this context, married includes divorced and widowed fathers. *Id.* at 647.

[98] *Id.* at 649.

[99] *Id.* at 651.

[100] *Id.* at 652-53.

[101] *Id.* at 658.

[102] *Id.* at 656-58.

[103] The *Stanley* analysis has been used in the establishment of paternity, In re Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975); custody, In re Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (4th Dist. 1977); and visitation, Griffith v. Gibson, 73 Cal. App. 3d 465, 142 Cal. Rptr. 176 (4th Dist. 1977).

[104] 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

[105] *Id.* at 647, 532 P.2d at 130, 119 Cal. Rptr. at 482.

[106] CAL. EVID CODE § 661 (West 1966) (current version at CAL. CIV. CODE § 7004(a)(1) (West Cum. Supp. 1978)).

contest it.[107] The California Supreme Court held that a presumption which precluded evidence offered to prove paternity in this situation was arbitrary, unreasonable and denial of due process.[108] While the court may have been swayed because the child's legal parents were dead at the time the natural father sought to establish paternity,[109] nevertheless it found that the natural father's constitutional rights outweighed the state interests in protecting the child's welfare, removing the stigma of illegitimacy and preserving marriage.[110] Thus, the court concluded that the petitioning father should have standing.[111]

Lisa R.[112] and *Stanley*[113] stress the importance of the father-child relationship. While state goals of protecting the welfare of minors and promoting marriage are legitimate, these goals cannot bar completely the natural father's right to raise his children. The analysis of *Lisa R.* and *Stanley* is applicable to the irrebuttable presumption of section 621. Because section 621 interferes with establishing the natural father's relationship to his child, the statute must be analyzed to determine whether it has a real and substantial relationship to the state's asserted interests.

California courts have advanced several reasons for the application of an irrebuttable presumption of paternity.[114] These include preventing the bastardization of children conceived in wedlock, protecting the family unit and avoiding the alleged impossibility of determining paternity where two or more possible fathers

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[107] In re Lisa R., 13 Cal. 3d 636, 647, 532 P.2d 123, 130, 119 Cal. Rptr. 475, 482 (1975).

[108] *Id.* at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485.

[109] *Id.*

[110] *Id.* at 650-51, 532 P.2d at 132-33, 119 Cal. Rptr. at 484-85. The state interests asserted in *Lisa R.* were protection of the child's welfare, removal of the stigma of illegitimacy and preservation of marriage. According to the court, none of these interests were sufficient to justify the irrebuttability of the presumption as to the natural father. The court noted that the use of a presumption to bar the natural father from establishing paternity and possibly obtaining custody might defeat the state's interest in protecting the minor's welfare if the natural father were able to render proper parental care and control. The state's interest in relieving a child of the stigma of illegitimacy was insufficient because the court felt that a natural father seeking to establish his paternity would undoubtedly intend to legitimate the child as his own. The court also noted that although the state has a valid interest in promoting marriage, that policy cannot be served when the family unit has been dissolved.

[111] *Id.* at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485.

[112] In re Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

[113] Stanley v. Illinois, 405 U.S. 645 (1972).

[114] However, no legislative history is available to aid in determining the state's purposes in enacting § 621.

exist. Law review articles also suggest that an unarticulated rationale is the fear that the child might become a financial burden on the state because there would be no father identified to support the child.[115]

Two early California Supreme Court cases found that section 621 furthered the state's policy of preventing the bastardization of children.[116] Fear of imposing the stigma of illegitimacy on a child, however, is no longer a valid reason to retain section 621. The legal and social stigma attached to the label of illegitimacy has been greatly reduced.[117] United States Supreme Court decisions have established that illegitimate and legitimate children are legally equal in most areas of the law.[118] Furthermore, older cases did not recognize that a natural father who asserts paternity probably intends to legitimate the child so that the stigma of illegitimacy would not remain.[119]

Protecting the integrity of the family is a state interest cited by some cases to justify the irrebuttable presumption of section 621.[120] The relation between this interest and the presumption of section 621, however, is tenuous. When a woman bears a child not fathered by her husband the actual family relationship has often already broken down.[121] In such cases the legal presumption does nothing to repair the situation or further the state's interest in family integrity. In fact, application of the presumption may defeat the state's interest in the child's welfare by preventing the prosecution of a support action against the natural father or by frustrating the natural father and child who wish to establish a legal parent-child relationship. The family unit, if still intact, can be protected by the rebuttable presumptions of section 7004[122] which grant a limited class of persons standing to rebut paternity.[123]

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[115] Comment, *supra* note 25, at 466-67; 20 STAN. L. REV. 754, 759-60 (1968).

[116] Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919); Estate of Walker, 176 Cal. 402, 168 P. 689 (1917).

[117] Comment, *supra* note 25, at 465-66.

[118] Clark, *supra* note 11; Stenger, *The Supreme Court and Illegitimacy: 1968-1977*, 11 FAM. L. Q. 357 (1978).

[119] In re Lisa R., 13 Cal. 636, 650, 532 P.2d 123, 132, 119 Cal. Rptr. 475, 484 (1975).

[120] Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960); Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919). *See* 20 STAN. L. REV. 754, 758-59 (1968).

[121] Wareham v. Wareham, 195 Cal. App. 2d 64, 84, 15 Cal. Rptr. 465, 477-78 (2d Dist. 1961). *See* Comment, *supra* note 25, at 467.

[122] CAL. CIV. CODE § 7004 (West Cum. Supp. 1978), *set forth in* note 3 *supra*.

[123] The standing limitation is contained in CAL. CIV. CODE § 7006 (West Cum.

The validity of other reasons has also been eroded with the passage of time. Older cases emphasized the impossibility of definite identification of the father[124] as well as the risk of collusive testimony against a possible father who is not excluded by blood tests.[125] Because present blood testing techniques make it possible to determine paternity among almost any group of possible fathers[126] these concerns are no longer relevant.

It has been suggested that section 621 prevents additional financial burdens to the state for the support of illegitimate children.[127] The rationale appears to be that if the presumption of paternity were rebuttable, the husband who was not the natural father might avoid the duty of child support by rebutting the presumption. If the natural father could not be identified or located the child and mother would become dependent upon a public assistance program of the state. Because such circumstances arise infrequently, however, the actual burden placed on the state by abolishing section 621 would be inconsquential.[128] Furthermore, by establishing paternity in the natural father he would be responsible for the support of the child.

Thus, the state cannot meet the burden of showing that the means used to achieve its assserted goals are narrowly tailored to those goals. The constitutional infirmity of section 621 further argues for its abolition. Since section 621 is probably unconstitutional as applied to natural fathers attempting to establish paternity, the general provisions of section 7004 should become applicable. Under California law the mother's husband would then be rebuttably presumed to be the father of her child.[129] Such a presumption is a lesser infringement upon the natural father's rights and presumably constitutional.

Although the irrebuttable presumption of paternity contained in section 621 should be abolished, nevertheless a limit should be placed as to who can challenge the rebuttable presumption of paternity of a married woman's child. Only the child, the child's

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Supp. 1978).

[124] 'Estate of McNamara, 181 Cal. 82, 95, 183 P. 552, 557 (1919); Hughes v. Hughes, 125 Cal. App. 2d 781, 784, 271 P.2d 172, 173-74 (4th Dist. 1954).

[125] Hill v. Johnson, 102 Cal. App. 2d 94, 96, 226 P.2d 655, 656 (2d Dist. 1951), *rev'd on other grounds*, Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

[126] *See* notes 68-89 and accompanying text *infra*.

[127] Comment, *supra* note 25 at 466-67; 20 STAN. L. REV. 754, 759-60 (1968).

[128] Comment, *supra* note 25, at 467; 20 STAN. L. REV. 754, 759-60 (1968).

[129] CAL. CIV. CODE § 7004(a)(1) (West Cum. Supp. 1978), *set forth in* note 3 *supra*.

natural mother and the husband should have standing to rebut the presumption. If the mother is dead or a minor her personal representative or one of her parents should have standing. If the husband is dead the statutory provision should extend the class to include the state, the husband's personal representative and any man alleged or alleging himself to be the child's father. If the alleged or alleging father is dead or a minor the class should be further extended to include his personal representative or one of his parents.[130] A limitation on standing is necessary so that an alleged natural father cannot disrupt an intact family of child, mother and husband.[131] While this limitation on standing may seem to interfere with the natural father's rights, the United States Supreme Court has held that it is in a child's best interests to have a stable family and that a preference for stability over the natural father's rights does not deny him due process.[132] California courts essentially agree with this rule.[133]

Despite the probable unconstitutionality of section 621, the California Supreme Court and the United States Supreme Court have recently denied review to a constitutional challenge to it.[134] Therefore, the legislature is the vehicle through which the abolition of section 621 will have to be accomplished.

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[130] These are the classes which currently have standing to challenge the rebuttable presumptions of the husband's paternity. CAL. CIV. CODE § 7006 (West Cum. Supp. 1978). Section 7006(c) codifies In re Lisa R., 13 Cal. 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975); the natural father may bring an action to determine the existance of the father-child relationship when the child has no presumed father or the presumed father is dead.

[131] However, when the mother and the living husband have separated, the mother can bring an action to challenge the presumption by paternity by her husband and the natural father's paternity can be established in the same action. CAL. CIV. CODE § 7006(a)(2) (West Cum. Supp. 1978).

[132] Quilloin v. Walcott, 434 U.S. 246 (1977).

[133] In re Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (4th Dist. 1977). In re Tricia M. involved an unwed natural father trying to block the adoption of his child by strangers. The court said that if the father were found to be a proper person to have custody of the child, he could qualify as a presumed father and be awarded custody. However, if he were not a fit person to have custody, the adoption could proceed. *See also* Adoption of Rebecca B., 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (3d Dist. 1977).

[134] Smith v. Gummo, No. 40863 (Cal. Ct. App. 1st Dist. Oct. 5, 1977), *appeal dismissed*, 99 S.Ct. 57 (1978).

The California Courts of Appeal also refuse to respond favorably to challenges to the constitutionality of § 621. *See, e.g.*, People v. Thompson, 89 Cal. App. 3d 193, 152 Cal. Rptr. 478 (4th Dist. 1979); County of San Diego v. Brown, 80 Cal. App. 3d 297, 145 Cal. Rptr. 483 (4th Dist. 1978).

IV. CONCLUSION

The irrebuttable presumption of section 621[135] is applied when a legally married husband and wife are cohabiting at the time of the child's conception and the husband is not impotent or sterile. Under current law no person has standing to rebut the presumption nor may any evidence be admitted to rebut it. The effect of the presumption is that the natural father is denied the means to establish a legal parent-child relationship.

One justification given by the California courts for the presumption is the difficulty of determining paternity. This justification is no longer valid in light of modern developments in blood test technology. Furthermore, the irrebuttable presumption cannot survive constitutional scrutiny. The state's interests[136] cannot be achieved by enacting a blanket presumption. The presumption should be rebuttable and blood test evidence should be admissible to rebut it. If paternity of the husband were rebuttable the state's interests in protecting the integrity of the family and preventing the bastardization of children could be achieved by limiting the class of persons allowed to rebut the presumption. Also, the state interest in seeing the child adequately supported would be met by identification of the father with the aid of blood tests. Perhaps most importantly, the child would be the beneficiary of a complete paternal relationship.

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[135] CAL. EVID. CODE § 621 (West Cum. Supp. 1978), *set forth in* note 2 *supra*.
[136] *See* notes 114-128 and accompanying text *infra*.