
NOTE

One Parent, Two Parents, Three Parents, More? California's Third Parent Law Should Go Back to the Floor

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TABLE OF CONTENTS

INTRODUCTION	2167
I. BACKGROUND.....	2174
A. <i>Parental Rights Are Fundamental Rights</i>	2174
B. <i>Establishing Parentage in California</i>	2176
C. <i>California's Family Law Often Changes Responsively to Cases</i>	2179
D. <i>Presumptions of Parentage as Applied to Women</i>	2182
II. ANALYSIS	2184
A. <i>California's Third Parent Law Adopts Section 3041's Detriment Standard Without Its Constitutional Safeguards</i>	2184

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B.	<i>By Failing to Presume Fit Parents Act in Their Child's Best Interests, California's Third Parent Law Is Unconstitutional Under Troxel v. Granville</i>	2195
C.	<i>California's Presumed Parent Law Violates Public Policy by Allowing Men and Same-sex Women to Establish Parentage but not Heterosexual Women</i>	2198
III.	SOLUTION.....	2201
A.	<i>Judicial Solution</i>	2201
B.	<i>Statutory Solution</i>	2203
	CONCLUSION.....	2204

INTRODUCTION

Frank spends holidays with his biological daughter, Sarah, once every three years. Sarah spends the other holidays divided between her other two parents, Maggie and Henry (Maggie's ex-husband).¹ Frank has always been involved in Sarah's life, but Maggie and Frank separated shortly after Sarah was born. Maggie and Henry married when Sarah was one year old. When they divorced, Henry sought legal and physical custody rights to Sarah as a third parent under California Family Code section 7612 subdivision (c).² Now Frank must share all legal custody decisions and physical custody time with his former partner, Maggie, and her ex-husband, Henry. What happens when any, or all, of these parents find new partners? Should Frank's new wife, Cassidy, be able to obtain legal and physical custody rights to Sarah if she assumes the role of a parent during Frank's custodial time? What about Maggie's new boyfriend, Sam? Can Frank, who has no control over who Maggie dates or marries, object to Henry or Sam being a legal third (or fourth) parent? What if Maggie allowed Henry and Sam to take on parental roles for Sarah during her custodial time? Some of the answers to these questions, discussed further herein, are surprising.

Disputes over who has legal custody or parental rights to a child are not new. In 1973, the Uniform Law Commission introduced the Uniform Parentage Act ("UPA") to address disputes over parentage.³ The UPA protects the rights of "non-marital" or "illegitimate" children by separating the parent-child relationship from the parents' marriage.⁴ Before the UPA, a child born out of wedlock did not have

¹ All persons in this hypothetical are fictional. This hypothetical is based in part on actual cases brought under section 7612 subdivision (c) of the California Family Code, discussed in more detail later in this Note. These fictional characters will be used again in the argument Section to better illustrate the flaws in California's Third Parent Law, S.B. 274. This hypothetical involves heterosexual couples because, although the proponents of California's Third Parent Law were primarily same-sex couple advocates, the majority of published cases arising under subdivision (c) involve heterosexual couples.

² Unless otherwise specified, all references herein are to the California Family Code.

³ See David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, & Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 129 (2006); Emmalee M. Miller, Note, *Are You My Mother? Missouri Denies Custodial Rights to Same-Sex Parent*, 75 MO. L. REV. 1377, 1384 (2010); Jenny Wald, *Legitimate Parents: Construing California's Uniform Parentage Act to Protect Children Born into Nontraditional Families*, 6 J. CTR. FOR FAM. CHILD. & CTS. 139, 140 (2005).

⁴ Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 370 (2002) ("The 1973 [Uniform Parentage] Act codified the decisions of the U.S. Supreme Court and

the right to support and inheritance from their biological father because only the mother was the legal parent.⁵ The UPA responds to United States Supreme Court decisions that found state laws treating children differently based on the marital status of their parents unconstitutional.⁶ Nearly half of the states codified the UPA in its entirety.⁷ On July 11, 1992, California adopted the UPA in whole as section 7600 et seq. of the Family Code.⁸

lower courts throughout the country at the time — a recognition that the Equal Protection Clause of the Constitution mandates equal treatment for children born in or out of wedlock.”); Douglas Nejaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2276 (2018) (“The 1973 Uniform Parentage Act (UPA), which many states adopted, endeavored to extend legal protection ‘equally to every child and to every parent, regardless of the marital status of the parents.’”); Wald, *supra* note 3, at 140 (“The primary purpose of the statute was to eliminate the distinction between legitimate and illegitimate children.”).

⁵ See Jacobs, *supra* note 4, at 370; Nejaime, *supra* note 4, at 2276.

⁶ CSG Comm. on Suggested State Legislation, *Uniform Parentage Act Statement*, COUNCIL OF STATE GOV'TS (May 17, 2009, 12:00 PM), <http://knowledgecenter.csg.org/kc/content/uniform-parentage-act-statement> (“The U.S. Supreme Court eliminated illegitimacy as a legal barrier in a number of cases in the 1960’s and 70’s. The old-fashioned paternity actions simply did not respond to these changes in fundamental law. The 1973 Uniform Parentage Act was law for a new generation. Section 2 of the Uniform Parentage Act confirmed and completed the revolution with very simple language: ‘The parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent.’ The rest of the 1973 Uniform Parentage Act was devoted to a modern civil paternity action in which the sole issue was identifying the natural father of any child.”); see also *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972) (“[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual — as well as an unjust — way of deterring the parent.”); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (“The State of Illinois assumes custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect. The children of unmarried fathers, however, are declared dependent children without a hearing on parental fitness and without proof of neglect We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.”); Wald, *supra* note 3, at 141.

⁷ See, e.g., ALA. CODE § 26-17-101 (2018); CAL. FAM. CODE §§ 7600-7730 (2018); COLO. REV. STAT. § 19-4 (2018); DEL. CODE ANN. § 13-8 (2018); HAW. REV. STAT. § 584-1-26 (2018); KAN. STAT. ANN. § 23-2201 (2018); MINN. STAT. ANN. §§ 257.51-74 (2018); MO. REV. STAT. §§ 210.817-852 (2018); MONT. CODE ANN. § 40-6-101 (2018); NEV. REV. STAT. § 126.011 (2018) (“To determine parentage in Nevada, courts must look to the Nevada Parentage Act, which is modeled after the Uniform Parentage Act (UPA).” *St. Mary v. Damon*, 309 P.3d 1027, 1030 (Nev. 2013)); N.J. REV. STAT. §§ 9:17-38 to -59 (2018); N.M. STAT. ANN. § 40-11 (2018); N.D. CENT. CODE §§ 14-17-01 to -26 (2004) (repealed 2005); OHIO REV. CODE §§ 3111.01-19 (2018); TEX. FAM.

Prior to 2013, courts interpreted California law as allowing only two legal parents.⁹ On October 4, 2013, Governor Jerry Brown signed S.B. 274 (“California’s Third Parent Law”),¹⁰ which modified several sections of the California Family Code to redefine how many legal parents a child could have.¹¹ California’s Third Parent Law added section 7612 subdivision (c),¹² thereby granting courts the power to find a child has more than two legal parents if a finding otherwise would be detrimental to the child.¹³

California’s Third Parent Law aimed to abrogate the Second District Court of Appeal’s holding in *In re M.C.*¹⁴ *In re M.C.* involved a married

CODE tit. 5, subtit. B, §§ 160.001-763 (2018); WASH. REV. CODE §§ 26.26.101-914 (2018); WYO. STAT. ANN. §§ 14-2-101 to -120 (2018). Five states codified the Uniform Act on Paternity instead. KY. REV. STAT. ANN. §§ 406.005-180 (2018); ME. STAT. tit. 19-A, §§ 1551-1570 (2018); MISS. CODE ANN. § 93-9-1 (2018); N.H. REV. STAT. §§ 168-A:1-A:13 (2018); UTAH CODE ANN. §§ 78B-15-301 to -313 (2018). But see Rhode Island that codified parts of both the Uniform Parentage Act and the Uniform Act on Paternity. 15 R.I. GEN LAWS ANN. § 15-8-1 (2018).

⁸ Uniform Parentage Act, CAL. FAM. CODE §§ 7600-7730 (2018).

⁹ *Id.* § 7612(b) (“If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”); *In re M.C.*, 123 Cal. Rptr. 3d 856, 869 (Ct. App. 2011), *superseded by statute*, S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013) (“As the [California] Supreme Court explained in *Jesusa V.*, ‘[a]lthough more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, there can be only one presumed father.’” (citing *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004))).

¹⁰ S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013); *see also* CAL. FAM. CODE § 7612(c) (2018).

¹¹ *SB-274 Family Law: Parentage: Child Custody & Support*, CAL. LEGIS. INFO. (2018), http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201320140SB274.

¹² S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013). California’s Third Parent Law also changed sections 3040, 4057, 7601, 7612, and 8617 and added section 4052.5 insofar as the law now accommodates more than two parents regarding custody, child support, and adoption. *Id.*

¹³ FAM. § 7612(c) (“In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.”).

¹⁴ Assemb. Floor Analysis, Leora Gershenzon, Assemb. 2013-14-SB274, Reg. Sess., at 4 (Cal. 2013) (according to Leora Gershenzon in the Senate Floor’s Analysis of S.B. 274, “[t]he need for greater flexibility in the number of legal parents was clarified in *In*

same-sex couple, Irene and Melissa, and their child who was conceived when the biological mother, Melissa, had an affair with a man named Jesus.¹⁵ Melissa and Irene attempted to raise the baby together but filed for divorce soon after M.C. was born.¹⁶ Evidence presented at trial showed Irene was abusive to Melissa.¹⁷ Irene sought legal rights to M.C. under a gender-neutral reading of the marital presumption.¹⁸ Sparked by anger over this custody dispute, Melissa and her new significant other attempted to murder Irene.¹⁹ Melissa was arrested and Irene hospitalized, leaving M.C. a dependent of the state.²⁰ Jesus originally intended to raise M.C. as his own, but Melissa left him while she was pregnant and he did not know how to find her.²¹ Jesus had no contact with M.C. before Child Protective Services (“CPS”) filed a dependency petition.²² When a social worker contacted Jesus, he requested placement of M.C. so that he and his new wife could raise her in Oklahoma.²³

re M.C. (2011).”); see also Gabrielle Bluestone, *California Children Can Now Legally Have Three Parents*, GAWKER (Oct. 5, 2013, 11:30 AM), <http://gawker.com/california-children-can-now-legally-have-three-parents-1441519480> (“The legislation was inspired by a 2011 court decision where the child of a lesbian couple was left stranded after one of her mothers was hospitalized and the other was jailed. Because a court found that the child’s biological father did not have parenting rights, the child was sent to foster care.”); Joanna L. Grossman, *California Allows Children to Have More than Two Legal Parents*, VERDICT (Oct. 15, 2013), <https://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents> (“The California bill was passed in reaction to a 2011 case, *In re M.C.*, in which two women and a man each seemed to meet the criteria to be a legal parent of the same child. But the state appellate court held that, given many prior pronouncements from the state’s highest court on the subject, it could not award that status to all three. However, it invited the legislature to reconsider the so-called ‘rule of two,’ an invitation that was accepted.”).

¹⁵ CAL. FAM. CODE § 7612(c) (2018); *In re M.C.*, 123 Cal. Rptr. 3d 856, 861-62 (Ct. App. 2011).

¹⁶ FAM. § 7612(c); *M.C.*, 123 Cal. Rptr. 3d at 862; see also CAL. WELF. & INST. CODE § 300(a)-(b) (2018) (“The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child’s parent or guardian The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child”). The record reflected that the biological mother and her wife were in an abusive relationship. *M.C.*, 123 Cal. Rptr. 3d. at 864-65.

¹⁷ *M.C.*, 123 Cal. Rptr. 3d. at 862.

¹⁸ *Id.* at 871-72.

¹⁹ *Id.* at 863.

²⁰ *Id.* at 863-64.

²¹ *Id.* at 861-62.

²² *Id.* at 871-72.

²³ *Id.* at 865-66. Based on the Interstate Compact on the Placement of Children

Should Melissa, Irene, and Jesus all be legal parents, receive reunification services, and potentially share legal and physical custody rights to M.C.? How does Jesus's wife fit in to the picture if at all? The juvenile court found that Irene, Melissa, and Jesus all qualified as presumed parents and were therefore entitled to reunification services.²⁴ However, the Second District Court of Appeal found that the UPA did not allow more than two people to be the legal parents of a child.²⁵ The court found that "important policy determinations," such as finding that a child has more than two legal parents, "are best left to the Legislature."²⁶ Accordingly, the Second District reversed and remanded so the lower court could determine which of the three people who met the statutory requirements of presumed parents were the two legal parents.²⁷

("ICPC") regulations, the biological father could not take custody of the child until he completed a home study in Oklahoma. *Id.*; see also Interstate Compact on the Placement of Children, CAL. FAM. CODE § 7901 (2018).

²⁴ M.C., 123 Cal. Rptr. 3d. at 866-67; see also CAL. WELF. & INST. CODE § 361.5 (2018) ("[T]he juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians."). The wife qualified under a statute that allows a person married to the mother at the time of conception to be a presumed parent. M.C., 123 Cal. Rptr. 3d. at 871-72; see also CAL. FAM. CODE § 7611(a) (2018) ("The presumed parent 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 judgment of separation is entered by a court."). The biological father qualified as a "Kelsey S." father. M.C., 123 Cal. Rptr. 3d. at 872-75. See generally *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (en banc) (courts have interpreted this decision to allow a father who promptly came forward to assert their parental rights, although previously prevented from coming forward by the other parent or a third party, to qualify as a presumed parent even if they did not otherwise qualify under the UPA). The biological mother qualified by virtue of giving birth to the child. M.C., 123 Cal. Rptr. 3d. at 867 ("Under the UPA, the parent-child relationship between a child and his or her natural mother is presumptively established, most often and easily, 'by proof of her having given birth to the child.'"); see also CAL. FAM. CODE § 7610(a) (2018).

²⁵ M.C., 123 Cal. Rptr. 3d. at 877; see also Uniform Parentage Act, CAL. FAM. CODE § 7600-7730 (2018). Before California's Third Parent Law, the court had to weigh all competing claims for parentage. *Id.* § 7612(b) ("If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.").

²⁶ M.C., 123 Cal. Rptr. 3d. at 870.

²⁷ *Id.* at 877; see also CAL. FAM. CODE § 7612(b) (2018) ("If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption under Section 7611 conflicts with a claim pursuant to Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.").

Had California's Third Parent Law been in effect when the Second District decided *In re M.C.*, all three presumed parents could have been M.C.'s legal parents.²⁸ But is that the best outcome for M.C.? Melissa, the biological mother, was found guilty of attempted murder and would be in jail for the remainder of M.C.'s minority.²⁹ Irene, Melissa's ex-wife, was abusive and did not regularly visit M.C. during the juvenile proceeding.³⁰ Jesus, the biological father, did not have a relationship with M.C. and had never met Irene.³¹ Should all three of these people receive reunification services and potentially co-parent M.C. together?

The California Legislature intended to abrogate *In re M.C.*'s holding by enacting California's Third Parent Law.³² Although many proponents of California's Third Parent Law were LGBTQ groups, the majority of the appellate cases that have arisen under this new law involve heterosexual parents.³³ The Legislature's primary concern was LGBTQ parents and families involved in juvenile court.³⁴ However, the Legislature did not adequately discuss the consequence this law would have on all parents.³⁵

²⁸ S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013); *see also* CAL. FAM. CODE § 7612(c) (2018).

²⁹ *M.C.*, 123 Cal. Rptr. 3d. at 862.

³⁰ *See id.* at 862-63; *see also* CAL. WELF. & INST. CODE § 300(a)-(b) (2018) ("The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child"). The record reflected that the biological mother and her wife were in an abusive relationship. *M.C.*, 123 Cal. Rptr. 3d. at 862-63.

³¹ *Id.* at 863-66. Also, Jesus may not be able to become a legal parent under section 7612 subdivision (c) because courts have interpreted this to only apply to existing parent-child relationships, not potential ones. *See infra* Parts II.A, II.B. Interestingly, no court has ruled on a *Kelsey S.* father seeking parental status as a legal third parent. *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992).

³² S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013); *see also* CAL. FAM. CODE § 7612(c) (2018).

³³ *See* Senate Floor Analyses, Leno D., Senate. 2013-14-SB274, Reg. Sess., at 7 (Cal. 2013). This bill was supported by Children's Advocacy Institute (co-source), National Center for Lesbian Rights (co-source), Association of Family Conciliation Courts, California Alliance, Capitol Resource Institute, Equality California, Legal Services for Children, Our Family Coalition, Public Counsel, and American Academy of Matrimonial Lawyers Wald and Thorndal P.C. *Id.* at 7-8.

³⁴ *See id.* at 8 ("[I]f a child has more than two parents, legal acknowledgement of more than two of those parents may keep the child out of foster care by giving the court more placement options.").

³⁵ *Id.* The Capitol Resource Institute argues "[t]he bill does not thoughtfully

This Note analyzes the constitutionality of California's Third Parent Law.³⁶ Part I traces the development of parental rights as a fundamental right, introduces how parental rights are established in California, and identifies conflicts that arise when more than two people seek those rights.³⁷ Part II argues that California Family Code section 7612 subdivision (c) is unconstitutional because it violates the substantive due process clause of the Fourteenth Amendment.³⁸ This is because California's Third Parent Law adopts the guardianship detriment standard from section 3041 without its constitutional safeguards.³⁹ Next, Part II argues that California's Third Parent Law violates the existing parents' due process rights because the law does not presume fit parents are acting in their child's best interest when they object to the addition of a third parent.⁴⁰ Further, as applied, California's Third Parent Law goes against public policy by creating a presumption of parentage for men in a relationship with the biological mother but not for women in a relationship with the biological father.⁴¹ Part IV suggests that courts or the California Legislature should correct the deficiencies in the California statute by: (1) changing the detriment standard; (2) creating a presumption against adding a third parent if either of the two existing legal parents objects; and (3) allowing this law to apply equally to men and women.⁴²

consider the numerous areas of law affected by such a redefinition of parenthood." *Id.* In the final Senate Bill Analysis, Governor Brown wrote "I am troubled by the fact that some family law specialists believe the bill's ambiguities may have unintended consequences." *Id.* at 6-7.

³⁶ CAL. FAM. CODE § 7612(c) (2018). Nothing in this Note suggests that the consensual adoption provision, that allows a person to adopt a child as a third parent without removing any of the existing legal parents' rights, has any constitutional flaws. S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013); Senate Floor Analyses, Leno D., *supra* note 33, at 5 (stating this bill "[p]rovides that the termination of parental duties and responsibilities may be waived if both of the existing parent(s) and the prospective adoptive parent(s) sign a waiver at any time prior to the finalization of the adoption."). This provision in and of itself allows LGBTQ families to create their own family structure as they see fit. See CAL. FAM. CODE § 8617(b) (2018).

³⁷ *Infra* Parts I.B, I.C.

³⁸ *Infra* Part II; see also U.S. CONST. amend. XIV.

³⁹ *Infra* Part II.A.

⁴⁰ *Infra* Part II.B.

⁴¹ *Infra* Part II.C.

⁴² *Infra* Part III.

I. BACKGROUND

A. Parental Rights Are Fundamental Rights

Parental rights are fundamental rights protected by the Fourteenth Amendment of the U.S. Constitution.⁴³ So long as parents provide adequate care for their child, or are “fit,”⁴⁴ the state may not interfere with “the private realm of the family.”⁴⁵ Although parental rights initially developed in the context of primary education,⁴⁶ courts gradually expanded these fundamental rights to the parent-child relationship generally.⁴⁷ In *Lassiter v. Department of Social Services*, Justice Blackmun’s dissent identified the U.S. Supreme Court’s gradual recognition of parental rights as fundamental rights.⁴⁸ He noted “[t]he

⁴³ See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (affirming the fundamental liberty interest of natural parents in the care, custody, and management of their child); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (holding that parents have the right to care, custody, and control of their child).

⁴⁴ *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)) (stating there is a presumption that fit parents act in the best interests of their children).

⁴⁵ *Id.*; see also *Reno v. Flores*, 507 U.S. 292, 346 (1993).

⁴⁶ See, e.g., *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 639-40 (1974) (“[F]reedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) (holding that liberty in due process clause includes the right to bring up children and control their education); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (affirming parents’ right to make decisions regarding child’s education); *Prince*, 321 U.S. at 166 (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

⁴⁷ See, e.g., *Parham*, 442 U.S. 584 (stating the presumption that fit parents act in the best interests of their children); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (finding that “[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest” it would offend the Due Process Clause (citing *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977))); *Santosky*, 455 U.S. 745 (holding the state must support allegations by clear and convincing evidence before the state can irrevocably sever a parent-child relationship); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that an unwed father has the right to a hearing regarding his fitness as a parent before the state may declare the children wards of the state); *Troxel*, 530 U.S. 57 (stating the presumption that fit parents act in the best interests of their child); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding the First and Fourteenth Amendments, and the U.S. Constitution prevent the state from forcing Amish parents to send their children to high school).

⁴⁸ *Lassiter v. Dep’t of Soc. Serv.*, 452 U.S. 18, 42 (1981). Justice Blackmun spoke again about the importance of parental rights in *Santosky v. Kramer*, this time on

[liberty] interest of a parent in the companionship, care, custody, and management of [their] children . . . [is] among those ‘essential to the orderly pursuit of happiness’”⁴⁹ Accordingly, unless there is a strong opposing interest, parents’ fundamental rights deserve protection and deference.⁵⁰

Another U.S. Supreme Court case, *Troxel v. Granville*, further established that parents have a fundamental right to the care, custody, and control of their child.⁵¹ There, the U.S. Supreme Court held that states must presume that a fit parent is acting in the best interests of their child.⁵² Accordingly, parents are entitled to make decisions regarding the care, custody, and control of their child without unwarranted state interference.⁵³ In *Troxel*, the deceased father’s parents sought visitation with their grandchild under a Washington statute that allowed any interested person to seek visitation.⁵⁴ The mother was willing to give the paternal grandparents visitation, but not as much time as they requested.⁵⁵ Based on the trial court’s perception of the best interests of the child, the trial court granted the paternal grandparents more visitation than the mother wanted to give.⁵⁶ When the mother succeeded on appeal, the paternal grandparents appealed that decision to the U.S. Supreme Court.⁵⁷

The U.S. Supreme Court struck down the Washington statute in its entirety.⁵⁸ Justice O’Connor, writing for the plurality, found: “It is not within the province of the state to make significant decisions concerning the custody of children [B]etween parents and judges,

behalf of the majority. *Santosky*, 455 U.S. at 753-54 (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”). The lower court found the parents were unfit by a “fair preponderance of the evidence” standard and initiated a termination of the parental rights for all three of the Santoskys’ children. *Id.* at 748-49. The Santoskys appealed to the U.S. Supreme Court claiming the low burden of proof was an infringement of their right to due process under the U.S. Constitution. *Id.* The U.S. Supreme Court agreed. *Id.* at 758.

⁴⁹ *Lassiter*, 452 U.S. at 38 (internal citations omitted).

⁵⁰ *Id.* at 27.

⁵¹ *Troxel*, 530 U.S. 57.

⁵² *Id.* at 68.

⁵³ *Id.* at 60-63.

⁵⁴ *Id.* at 61.

⁵⁵ *Id.*

⁵⁶ *Id.* at 63.

⁵⁷ *Id.*

⁵⁸ *Id.* at 73.

‘the parents should be the ones to choose whether to expose their children to certain people or ideas.’”⁵⁹ This holding establishes that parents have the right to determine which people and ideas their child should be exposed to.⁶⁰

Because California allows courts to find that a child has more than two legal parents, the state gives a former non-parent the legal right to make significant legal decisions for the child.⁶¹ Furthermore, by adding more than two parents, the state dilutes the existing parents’ legal authority to make decisions regarding the care, custody, and control of their child.⁶² This grant of legal and physical custody rights to a former non-parent requires as much, if not more, protection for the existing parents as a grant of grandparent visitation.⁶³

B. *Establishing Parentage in California*

To trigger the Fourteenth Amendment’s protections,⁶⁴ a person must establish they are a legal parent.⁶⁵ State law determines the legal parents of a child.⁶⁶ According to California Family Code section 7610, a parent-child relationship is “a relationship between a child and his or her natural or adoptive parent.”⁶⁷ California Family Code sections 7610 and 7611 define who can be “presumed” a “natural” parent.⁶⁸ Under section 7611 et seq., a person is presumed to be the parent of a child if they are married to the biological mother,⁶⁹ attempt

⁵⁹ *Id.* at 63 (internal citations omitted).

⁶⁰ *Id.*

⁶¹ See CAL. FAM. CODE § 3040(d) (2018) (“In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child”); see also *id.* § 3101 (allowing step-parents visitation but no legal custody rights); § 3102 (allowing close relatives visitation but no legal custody rights); § 3103 (allowing grandparents visitation but no legal rights); § 3105 (allowing former guardians visitation but no legal custody rights).

⁶² *Id.* § 3040(d) (holding that in cases with more than two parents, “[t]he court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child”).

⁶³ See sources cited *supra* note 61 and accompanying text; see also *Thomas R. v. Tonja V.*, No. B280834, 2018 WL 4786311 (Cal. Ct. App. Oct. 4, 2018) (both maternal grandparents sought presumed parent status).

⁶⁴ U.S. CONST. amend. XIV; *supra* Part I.A.

⁶⁵ *Michael H. v. Gerald D.*, 491 U.S. 110, 123-26 (1989).

⁶⁶ *Id.*

⁶⁷ CAL. FAM. CODE § 7610 (2018).

⁶⁸ *Id.* §§ 7610, 7611.

⁶⁹ *Id.* § 7611(a).

to marry the biological mother,⁷⁰ or accept the child into their home and hold them out as their own.⁷¹ Courts also accept a Voluntary Declaration of Paternity (“VDP”), which identifies the signatory as the natural father of the child, if the mother and father both sign.⁷² The majority of competing claims to parentage stem from section 7611 subdivision (d).⁷³

Most cases arising under California’s Third Parent Law originate in the juvenile court system.⁷⁴ Juvenile courts draw several key distinctions to determine parentage.⁷⁵ In California juvenile courts, only presumed parents are entitled to reunification services if CPS removes a child from their parents’ home.⁷⁶ Also, a person who

⁷⁰ *Id.* § 7611(b).

⁷¹ *Id.* § 7611(d); *see also id.* § 7611(c), (e), (f) (additional provisions of natural parentage). Courts also consider if there was a voluntary declaration of paternity or an intended parent form. *See id.* §§ 7573, 7613.

⁷² *Kevin Q. v. Lauren W.*, 95 Cal. Rptr. 3d 477, 487 (Ct. App. 2009). A VDP does not have to be signed at the child’s birth but can be done at any point after. FAM. § 7574. Once a VDP is signed, the father holds presumed father status as if he had been married to the mother and the child was born of that marriage. *Id.* § 7576(a) (“Except as provided in subdivision (d), the child of a woman and a man executing a declaration of paternity under this chapter is conclusively presumed to be the man’s child. The presumption under this [S]ection has the same force and effect as the presumption under § 7540.”).

⁷³ *Compare Michael H. v. Gerald D.*, 491 U.S. 110 (finding only husband and wife could challenge marital presumption per state law), *with* FAM. § 7630(c); Stats. 1992, c. 162 (A.B. 2650), § 8 (operative Jan. 1, 1994) (repealing CAL. EVID. CODE § 621, the statute at issue in *Michael H.*). *Compare Kevin Q. v. Lauren W.*, 95 Cal. Rptr. 3d 477, 487 (Ct. App. 2009) (finding presumptions of parentage could not rebut a voluntary declaration of paternity (VDP)), *with* FAM. § 7576(a) (“The presumption under this section has the same force and effect as the presumption under section 7540.”). *Compare In re M.C.*, 123 Cal. Rptr. 3d 856 (Ct. App. 2011) (finding courts don’t have authority to find more than two legal parents), *with* FAM. § 7612(c) (allowing courts to find there are more than two legal parents).

⁷⁴ *See, e.g.*, cases arising in juvenile court; *In re M.A.*, 230 Cal. Rptr. 3d 51 (Ct. App. 2018); *In re L.L.*, 220 Cal. Rptr. 3d 904 (Ct. App. 2017); *In re M.R.*, 212 Cal. Rptr. 3d 807 (Ct. App. 2017); *In re Alexander P.*, 209 Cal. Rptr. 3d 130 (Ct. App. 2016); *In re Donovan L.*, 198 Cal. Rptr. 3d 550 (Ct. App. 2016); *In re M.Z.*, 209 Cal. Rptr. 3d 397 (Ct. App. 2016); *In re C.B.*, No. A152062, 2018 WL 4691171, at *1 (Cal. Ct. App. Oct. 1, 2018); *In re S.S.*, No. F076449, 2018 WL 4090869, at *1 (Cal. Ct. App. Aug. 28, 2018); *In re Alison L.*, No. B277791, 2017 WL 3668443, at *1 (Cal. Ct. App. Aug. 25, 2017); *In re Shawn R.*, No. D069688, 2016 WL 5940937, at *1 (Cal. Ct. App. Oct. 13, 2016); *In re B.K.*, No. A148410, 2016 WL 40136313, at *1 (Cal. Ct. App. Jul. 27, 2016); *In re S.Z.*, No. H041142, 2015 WL 2405689, at *1 (Cal. Ct. App. May 19, 2015).

⁷⁵ CAL. WELF. & INST. CODE § 300 (2018) (suggesting parentage distinctions generally arise from child abuse, drugs, or neglect).

⁷⁶ *Id.* § 361.5 (“[T]he juvenile court shall order the social worker to provide child

qualifies as both a presumed parent and a non-custodial parent may seek immediate placement of the child, thereby preventing removal by CPS.⁷⁷ Juvenile courts recognize alleged, biological, adjudicated, and presumed parents.⁷⁸ However, only presumed parents have their parental rights legally recognized and protected.⁷⁹

California's Third Parent Law fundamentally changes how courts address competing parentage claims. Prior to California's Third Parent Law, California Family Code section 7612 subdivision (b) required courts to weigh competing presumed parentage claims.⁸⁰ "[T]he presumption that . . . the facts [are] founded on . . . weightier considerations of policy and logic" determines which person achieves legal parent status.⁸¹ In contrast, California's Third Parent Law now also allows courts to find a child has more than two parents "if the court finds that recognizing only two parents would be detrimental to the child."⁸² In determining detriment to the child, the court must consider "the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time."⁸³ If the court does not find detriment as described above, then the court must weigh the

welfare services to the child and the child's mother and statutorily presumed father or guardians. Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child." (emphasis added)). *But see id.* § 361.5(b) (bypass provisions that allow a court to deny reunification services to presumed parents under certain conditions).

⁷⁷ *Id.* § 361.2 ("When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child."). This is significant because once the state removes a child from the home of the parents the clock starts ticking to determine how long the family can receive reunification services before the services end and the court may terminate parental rights. *See id.* § 361.5.

⁷⁸ *In re D.A.*, 139 Cal. Rptr. 3d 222, 231-32 (Ct. App. 2012) (observing that the UPA distinguishes between alleged, biological, and presumed fathers).

⁷⁹ WELF. & INST. § 361.5; *see also In re Jerry P.*, 116 Cal. Rptr. 2d 123 (Ct. App. 2002) ("Only a 'statutorily presumed father' is entitled to reunification services" (citing *In re Zacharia D.*, 862 P.2d 751 (Cal. 1993))).

⁸⁰ FAM. CODE § 7612(b).

⁸¹ *Id.*

⁸² *Id.* § 7612(c).

⁸³ *Id.*

competing presumed parent claims.⁸⁴ However, California Family Code section 7612 subdivision (c) does not require a finding that any of the parents are unfit or require the established legal parents' consent before the court can grant parental rights to more than two people.⁸⁵

C. *California's Family Law Often Changes Responsively to Cases*

As societal expectations change, courts and legislatures have tried to incorporate new family dynamics in a variety of ways. While inclusion of all family structures is an important and worthy cause, California's Third Parent Law has much broader implications than the California Legislature intended.⁸⁶ Although same-sex couple advocacy groups largely supported California's Third Parent Law, the law has had the greatest impact on heterosexual couples where more than one man seeks presumed father status.⁸⁷ Competing applications for parental rights are nothing new but California's Legislature frequently changes laws to accommodate rapidly evolving family dynamics.⁸⁸

The U.S. Supreme Court case, *Michael H. v. Gerald D.*, arose from a California statute that allowed only the husband or wife to question the paternity of a child born within the marriage.⁸⁹ In *Michael H.*, a married woman spent the first three years of her daughter's life going back and forth between the home of her husband, Gerald D., and the home of her daughter's biological father, Michael H.⁹⁰ Both men received the child into their home and held the child out as their own.⁹¹ California Family Code sections 7540 and 7611, however, provide the presumption that "a [married] man is the presumed

⁸⁴ See *id.* § 7612 (d).

⁸⁵ *Id.*

⁸⁶ S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013); see also FAM. § 7612(c).

⁸⁷ See generally the following third parent presumed parent cases involving heterosexual couples: *In re L.L.*, 220 Cal. Rptr. 3d 904, 915 (Ct. App. 2017); *In re M.R.*, 212 Cal. Rptr. 3d 807, 819 (Ct. App. 2017); *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016); *In re Donovan L.*, 198 Cal. Rptr. 3d 550, 561-62 (Ct. App. 2016); *Martinez v. Vaziri*, 200 Cal. Rptr. 3d 884, 892-93 (Ct. App. 2016); *In re M.Z.*, 209 Cal. Rptr. 3d 397, 405 (Ct. App. 2016); *In re Alison L.*, No. B277791, 2017 WL 3668443 (Cal. Ct. App. Aug. 25, 2018); *In re B.K.*, No. A148410, 2016 WL 40136313 (Cal. Ct. App. Jul. 27, 2016); *In re Shawn R.*, No. D069688, 2016 WL 5940937 (Cal. Ct. App. Oct. 13, 2016); *In re S.Z.*, No. H041142, 2015 WL 2405689 (Cal. Ct. App. May 19, 2015).

⁸⁸ See *supra* Part I.C.

⁸⁹ *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989).

⁹⁰ *Id.* at 113-15.

⁹¹ *Id.* at 114-15.

natural father of any child born within [that] marriage.”⁹² In *Michael H.*, the biological father was unable to establish parental rights because of the marital presumption.⁹³ The U.S. Supreme Court determined that the California statute was not a violation of the biological father’s due process rights because he was not legally a parent.⁹⁴

The California Legislature responded by amending California Family Code section 7630 subdivision (c) to allow any alleged father to challenge the section 7611 subdivision (a) marital presumption.⁹⁵ This change is apparent in *Brian C. v. Ginger K.* and *Craig L. v. Sandy S.*, in which the biological fathers overcame the marital presumption by establishing that they received the child into their home and held them out as their own.⁹⁶ Although these amendments allowed men to

⁹² CAL. FAM. CODE §§ 7611, 7650 (2018); *see also Michael H.*, 491 U.S. at 113-17.

⁹³ *Michael H.*, 491 U.S. at 126-29.

⁹⁴ *Id.* at 130-32. The California Supreme Court reaffirmed the statute at issue in *Michael H.* in *Dawn D. v. Superior Court*. *Dawn D. v. Superior Court*, 952 P.2d 1139, 1148 (Cal. 1998) (“[A man who] 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 connection into a personal relationship.”). In *Dawn D.*, a married woman got pregnant while living with another man. *Id.* at 1139-40. She returned to her husband and they raised the child as their own, refusing the offers of support from the biological father. *Id.* at 1139-41. The biological father filed an action to establish paternity. *Id.* at 1140. The California Supreme Court determined that the biological father did not have standing to establish paternity because he had no established relationship with the child. *Id.* at 1141. The husband, who had received the child into his home and held the child out as his own, achieved presumed parent status under multiple statutes. *Id.*; *see also* FAM. § 7611(d).

⁹⁵ FAM. § 7630(c); Stats. 1992, c. 162 (A.B. 2650), § 8 (operative Jan. 1, 1994) (repealing CAL. EVID. CODE § 621, the statute at issue in *Michael H.*, 491 U.S. 110).

⁹⁶ *See generally* *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294 (Ct. App. 2000). In *Brian C.*, married woman had an affair and listed the biological father as the father on the birth certificate instead of her husband. The biological father received the child into his home and held her out as his own. *See* FAM. § 7611(d). When the mother returned to her husband, she refused to allow the biological father to have contact with the child. The trial court granted summary judgment finding the mother was cohabiting with her husband who was not sterile at the time of conception. *See id.* § 7540. The appellate court reversed, holding the biological father had established a parent-child relationship and had standing to request a paternity test as a presumed parent. *See also* *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606 (Ct. App. 2004). In *Craig L.*, a married woman had an affair with a married man and became pregnant. The biological father paid child support and he and his wife visited the baby. When the mother and her husband decided to cut off the biological father’s visitation, they claimed the child was born of the marriage. *See* FAM. § 7611(a). The California appellate court found he did have a right to pursue a paternity claim as he had

challenge the marital presumption, until 2014, California law still required courts to weigh the competing claims and to grant parental rights to only one father.⁹⁷ Thus, through its amendment of California Family Code section 7630 subdivision (c), the California Legislature made clear that a biological connection with the child was more important than preserving the marital home.⁹⁸

The California Legislature again transformed the law to adapt to new family dynamics after the California Fourth District Court of Appeal decided *Kevin Q. v. Lauren W.*⁹⁹ In *Kevin Q.*, Kevin Q. shared a home with Lauren W. while she was pregnant with her second child.¹⁰⁰ Upon the child's birth, Kevin Q. accepted the child into his home and held him out as his own.¹⁰¹ Kevin Q. supported Lauren W. financially and emotionally during her pregnancy.¹⁰² Kevin Q. had a primary caretaking role with the child once he was born.¹⁰³ When Lauren W. subsequently moved out, Kevin Q. petitioned for parental rights.¹⁰⁴ After Kevin Q. filed a paternity action, Lauren W. had the biological father sign a VDP (which carries the same weight as a marital presumption).¹⁰⁵ The biological father did not maintain a relationship with the child.¹⁰⁶ The trial court determined that Kevin Q.'s presumed parent claim rested upon "weightier considerations of policy and logic" and granted Kevin Q. parental rights.¹⁰⁷ However, the Fourth District reversed, finding that the statute did not allow a VDP to be challenged.¹⁰⁸ This decision sparked legislation that allowed courts to weigh a parentage claim arising under California Family Code section 7611 subdivision (d) against a VDP.¹⁰⁹ This case is significant because Kevin Q. had no biological connection to the

received the child into his home and held the child out as his own. *See id.* § 7611(d). The appellate court reversed and remanded with instructions to weigh the competing parentage claims. *See id.* § 7612(b).

⁹⁷ FAM. § 7612(d) (before the legislature added section 7612(c), subdivision (d) was (c).); *see also* *Craig L.*, 22 Cal. Rptr. 3d 606; *Brian C.*, 92 Cal. Rptr. 2d 294.

⁹⁸ Sources cited *supra* notes 23–24.

⁹⁹ *Kevin Q. v. Lauren W.*, 95 Cal. Rptr. 3d 477, 487 (Ct. App. 2009).

¹⁰⁰ *Id.* at 479.

¹⁰¹ *Id.*

¹⁰² *Id.* at 479-80.

¹⁰³ *Id.* at 480.

¹⁰⁴ *Id.* at 479.

¹⁰⁵ *Id.* at 481.

¹⁰⁶ *See id.* at 481-82.

¹⁰⁷ *Id.* at 486; *see also* CAL. FAM. CODE § 7612(b) (2018).

¹⁰⁸ *Kevin Q.*, 95 Cal. Rptr. 3d at 487.

¹⁰⁹ FAM. § 7576(a).

child.¹¹⁰ After the enactment of the new legislation, however, Kevin Q. would have been able to challenge a VDP.¹¹¹

As these cases illustrate, the California Legislature often acts responsively to decisions that determine who can establish parental rights, just as it did in the aftermath of *In re M.C.*¹¹² California's legislative actions help courts adapt to changing family norms.¹¹³ However, such reflexive responses can lead to unintended consequences.¹¹⁴

D. Presumptions of Parentage as Applied to Women

California courts apply a different set of rules to women and men who seek presumed parent status based on their gender and the gender of their partner.¹¹⁵ In *Tuan Anh Nguyen v. INS*,¹¹⁶ the U.S. Supreme Court found proof of motherhood is birth itself, but identifying a child's father is not as obvious.¹¹⁷ California courts rely on *Tuan Anh Nguyen* to justify treating men and women differently in regards to parentage.¹¹⁸ Relying on *Tuan Anh Nguyen*, California Courts of Appeal found that differences between men and women in relation to the birth process justify treating women's claims to parentage differently than men's.¹¹⁹

While California courts have found it reasonable to apply a gender-neutral reading of California Family Code section 7611 to same-sex

¹¹⁰ *Kevin Q.*, 95 Cal. Rptr. 3d at 479.

¹¹¹ FAM. § 7576(a) ("The presumption under this section has the same force and effect as the presumption under section 7540.").

¹¹² *In re M.C.*, 123 Cal. Rptr. 3d 856, 869 (Ct. App. 2011).

¹¹³ *See supra* Part I.C.

¹¹⁴ *Cf. supra* Part I.C.; *infra* Part II.

¹¹⁵ *Compare M.C.*, 123 Cal. Rptr. 3d at 870 (granting presumed mother status to mother's wife), with *In re D.S.*, 143 Cal. Rptr. 3d 918, 919 (Ct. App. 2012) (denying father's wife presumed mother status), and *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 298-99 (Ct. App. 2006) (denying father's wife presumed parent status), and *Scott v. Superior Court*, 89 Cal. Rptr. 3d 843, 845 (Ct. App. 2009) (denying woman presumed mother status when not in relationship with father).

¹¹⁶ 533 U.S. 53 (2001).

¹¹⁷ *See id.* at 64. *But see* *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701-02 (2017) (finding statutory distinctions that differentiate between men and women in connection with the birth process violates equal protection).

¹¹⁸ *See, e.g., D.S.*, 143 Cal. Rptr. 3d at 924.

¹¹⁹ *See, e.g., id.* at 924-26; *Amy G.*, 47 Cal. Rptr. 3d 297; *In re Brian D.*, 130 Cal. Rptr. 3d 821 (2011); *see also* CAL. FAM. CODE § 7635(b) (2018) ("The natural parent, each person presumed to be a parent under § 7611, and each man alleged to be the natural father, may be made parties and shall be given notice of the action . . . and an opportunity to be heard.").

couples, they have refused to do so to heterosexual relationships.¹²⁰ In *Amy G. v. M.W.*, the child was conceived in an extramarital affair.¹²¹ The child resided with the biological father and his wife, Amy G.¹²² When the biological mother filed to establish maternity and visitation, Amy G. filed a parentage action requesting presumed mother status under California Family Code section 7611.¹²³ The Second District Court of Appeal rejected her claim, finding that “[w]hen a birth mother promptly comes forward . . . and the child’s father is undisputed . . . the father’s spouse cannot be presumed to be the child’s mother under any gender-neutral reading of [the law].”¹²⁴ Similarly, in *In re D.S.*, the Fourth District Court of Appeal found that women cannot establish parentage under section 7611 subdivision (d) — by accepting the child into their home and holding them out as their own¹²⁵ — except in enumerated rare cases.¹²⁶ This is significant because the mother’s partner may be considered a parent under section 7611 subdivision (d), regardless of their marital status, gender, or biological connection to the child.¹²⁷ Both the Second and Fourth District found that evidence of birth itself is sufficient justification to refuse to extend section 7611 subdivision (d) to women in a

¹²⁰ *Compare D.S.*, 143 Cal. Rptr. 3d at 924 (father’s girlfriend cannot establish parentage), and *Amy G.*, 47 Cal. Rptr. 3d at 299 (father’s wife cannot establish parentage), with *Elisa B. v. Superior Court*, 33 Cal. Rptr.3d 46, 58 (Cal. 2005) (mother’s girlfriend can establish parentage), and *In re M.C.*, 123 Cal. Rptr. 3d 856, 871-72 (Ct. App. 2011) (mother’s wife can establish parentage). See also FAM. § 7650 (“Insofar as practicable, the provisions of this part applicable to the father and child relationship apply.”).

¹²¹ *Amy G.*, 47 Cal. Rptr. 3d at 299.

¹²² *Id.* at 299-302.

¹²³ *Id.*; see also FAM. §§ 7611(a), (c), 7540.

¹²⁴ *Amy G.*, 47 Cal. Rptr. 3d at 309-10.

¹²⁵ FAM. § 7611(d).

¹²⁶ *In re D.S.*, 143 Cal. Rptr. 3d 918, 924-25 (Ct. App. 2012) (exceptions: (1) same-sex marriage involving two women; (2) same-sex relationships involving two women; (3) surrogacy; and (4) when there is no competing claim for maternity). In *In re D.S.*, a dependency action had been initiated against the father who had sole custody. *Id.* at 919-20. The stepmother in that case sought presumed parent status under a gender-neutral reading of section 7611 subdivision (d). *Id.* The juvenile court granted that request finding the children called her “Mom,” she had accepted them into her home, and openly held them out as her own. *Id.* The biological mother had no contact with the children for four years but requested reunification services when she learned of the dependency proceeding. *Id.* The juvenile court denied the biological mother’s request to vacate orders finding the stepmother a presumed mother. *Id.* at 928. The court of appeal reversed the decision finding a rebuttable presumption of maternity can only arise in a limited class of cases. *Id.* at 924-25.

¹²⁷ See *supra* Part I.D.

heterosexual relationship. California's double standard for men and women in establishing parentage gets compounded when one takes California's third parent law into account.

II. ANALYSIS

A. *California's Third Parent Law Adopts Section 3041's Detriment Standard Without Its Constitutional Safeguards*

The California Legislature failed to provide sufficient protection for existing parents' legal rights when they modeled the Third Parent Law's detriment standard after the guardianship detriment standard found in section 3041 subdivisions (c) and (d).¹²⁸ California Courts of Appeal's use of guardianship case law when determining detriment to the child under the Third Parent Law creates significant constitutional problems. First, courts are relying on guardianship cases, which are easily distinguishable from Third Parent cases. Second, courts' use of a preponderance of the evidence standard to determine detriment, taken out of context from guardianship case law, exacerbates the problem. When the California Legislature added section 7612 subdivision (c) to the California Family Code, lawmakers intended this provision to only reach "rare cases."¹²⁹ However, the cases in which courts apply section 7612 subdivision (c) are far from rare.¹³⁰ Thus, application of section

¹²⁸ Compare FAM. § 3041(c) ("[D]etriment to the child' includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents."), with *id.* § 7612(c) ("In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.").

¹²⁹ S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013) (allowing courts to find more than two parents in those "rare cases" where a child has more than two parents who act as parents in every way); see also FAM. § 7612(c) (allowing courts to find more than two parents only in "an appropriate action").

¹³⁰ See e.g., *In re Ma*, 230 Cal. Rptr. 3d 51, 63-64 (Ct. App. 2018); *In re L.L.*, 220 Cal. Rptr. 3d 904, 915 (Ct. App. 2017); *In re M.R.*, 212 Cal. Rptr. 3d 807, 819 (Ct. App. 2017); *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016); *In re M.Z.*, 209 Cal. Rptr. 3d 397, 405 (Ct. App. 2016); *Martinez v. Vaziri*, 200 Cal. Rptr. 3d 884, 892-93 (Ct. App. 2016); *In re Donovan L.*, 198 Cal. Rptr. 3d 550, 561-62 (Ct. App. 2016); *In re C.B.*, No. A152062, 2018 WL 4691171, at *1 (Cal. Ct. App. Oct. 1, 2018);

3041 subdivisions (c) and (d) to section 7612 subdivision (c)'s detriment standard, without the safeguards section 3041 provides, creates significant problems.¹³¹

The California Legislature's use of language from section 3041's detriment standard in section 7612 subdivision (c) appears reasonable at first glance.¹³² Most cases arising under section 7612 subdivision (c) involve two legal parents and a non-parent seeking presumed parent status.¹³³ California Family Code section 3041 allows courts to place custody of a child with a non-parent when granting custody to a parent would be detrimental to the child.¹³⁴ Not surprisingly, when courts first started interpreting California Family Code section 7612 subdivision (c), they relied on case law involving the detriment standard from section 3041 subdivision (c).¹³⁵

Despite similar language in sections 3041 subdivision (c) and 7612 subdivision (c), there are several key distinctions that require a stricter interpretation of detriment for establishing a third person's parentage.¹³⁶ When a non-parent obtains custody of a child under section 3041, they obtain a legal guardianship.¹³⁷ A parent may

In re S.S., No. F076449, 2018 WL 4090869, at *1 (Cal. Ct. App. Aug. 28, 2018); *In re* Alison L., No. B277791, 2017 WL 3668443, at *6 (Cal. Ct. App. Aug. 25, 2017); *In re* Shawn R., No. D069688, 2016 WL 5940937, at *15 (Cal. Ct. App. Oct. 13, 2016); *In re* B.K., No. A148410, 2016 WL 40136313, at *5-6 (Cal. Ct. App. Jul. 27, 2016); *In re* S.Z., No. H041142, 2015 WL 2405689, at *4-5 (Cal. Ct. App. May 19, 2015).

¹³¹ Compare FAM. § 3041(d), with *id.* § 7612. See also *supra* note 128.

¹³² See FAM. § 3041.

¹³³ See *Alexander P.*, 209 Cal. Rptr. 3d at 149; *Donovan L.*, 198 Cal. Rptr. 3d at 561-62; *L.L.*, 220 Cal. Rptr. 3d at 915; *Martinez*, 200 Cal. Rptr. 3d at 886; *M.R.*, 212 Cal. Rptr. 3d at 819; *M.Z.*, 209 Cal. Rptr. 3d at 405; *Alison L.*, 2017 WL 3668443, at *6; *B.K.*, 2016 WL 40136313, at *1; *Shawn R.*, 2016 WL 5940937, at *15; *S.Z.*, 2015 WL 2405689, at *1.

¹³⁴ FAM. § 3041(a) ("Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child.").

¹³⁵ *E.g.*, *Donovan L.*, 198 Cal. Rptr. 3d at 561-62 ("Detriment under section 3041 considers 'the prospect that a successful, established custodial arrangement would be disrupted' . . . or the harm in 'removing a child from what has been a stable, continuous, and successful placement is detrimental to the child.'" (citing *In re* Guardianship of Ann S., 202 P.3d 1089 (Cal. 2009); *In re* Guardianship of L.V., 38 Cal. Rptr. 3d 894 (Ct. App. 2006))); see also, *e.g.*, *Alexander P.*, 209 Cal. Rptr. 3d at 149 ("The standard was borrowed from section 3041, which governs the award of custody to a nonparent over the objection of a parent. Under that section, detriment is found if the nonparent has achieved a successful, established relationship with the child." (citing *Donovan L.*, 198 Cal. Rptr. 3d 550)).

¹³⁶ See FAM. §§ 3041(c), 7612(c).

¹³⁷ *Erika K. v. Brett D.*, 75 Cal. Rptr. 3d 152, 157-58 (Ct. App. 2008) ("[T]he role

challenge a legal guardianship and regain custody if they can show a change of circumstances and that it is in the best interest of the child.¹³⁸ The former legal guardian would no longer maintain legal custody rights to the child.¹³⁹

Under section 7612 subdivision (c), however, courts may grant parental rights to a third person if having only two parents would be detrimental to the child.¹⁴⁰ Once a third person achieves presumed parent status, they are on equal footing with the other parents.¹⁴¹ That is, the only way to remove the parents' legal rights is to terminate them (which is a higher standard than changed circumstances and best interests of the child).¹⁴² Until a court terminates parental rights, third parents have the same due process protections as the other parents.¹⁴³ The finality and broad legal recognition of the third person as a legal parent demands a stricter interpretation of the detriment standard before courts find a third party to be a legal third parent.¹⁴⁴

Unlike section 7612 subdivision (c), courts are more likely to award custody to a non-parent under section 3041 based on psychological

and responsibilities of a guardian appointed under the Probate Code are essentially identical to those of a nonparent custodian selected under the Family Code.”).

¹³⁸ *In re Adoption of Myah M.*, 135 Cal. Rptr. 3d 636, 644 (Ct. App. 2011).

¹³⁹ CAL. PROB. CODE § 1601 (2018). *But see id.* § 1602 (courts may order visitation between minor child and former guardian if appropriate).

¹⁴⁰ *Compare* FAM. § 3041 (finding of detriment does not require finding of unfitness of parents), *with id.* § 7612(c) (finding of detriment does not require finding of unfitness of parents “or persons with a claim to parentage”).

¹⁴¹ *See* FAM. § 3040(d) (allowing courts to allocate legal and physical custody rights among the parents when there are more than two parents).

¹⁴² Parental rights may be terminated voluntarily or over the parents' objection through the courts. *Compare* CAL. WELF. & INST. CODE § 366.26 (2018) (granting juvenile courts the power to terminate parental rights and place the child for adoption if certain conditions have been met), *and* PROB. § 1516.5 (granting juvenile courts the power to terminate parental rights if a child has been under a guardianship for more than two years and other conditions are met), *with* FAM. § 8604 (“A child . . . shall not be adopted without the consent of the child’s birth parents, if living.”). Section 8604 is subject to exceptions under sections 8604(b), 8605, and 8606. *See* FAM. § 8604.

¹⁴³ *See* *Michael H. v. Gerald D.*, 491 U.S. 110, 130-32 (1989). State law determines who may become a legal parent. Once a person establishes they are a legal parent, due process protects those legal rights. *See also supra* Part I.A.

¹⁴⁴ *Compare* FAM. § 3040(d) (“In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child”), *with id.* § 3101 (allowing step parents visitation but no legal custody rights), *and id.* § 3102 (allowing close relatives visitation but no legal custody rights), *and id.* § 3103 (allowing grandparents visitation but no legal rights), *and id.* § 3105 (allowing former guardians visitation but no legal custody rights).

harm if there is also evidence that the existing parents' lack a meaningful parent-child bond.¹⁴⁵ The California Supreme Court in *In re B.G.* found that courts may "award custody to a nonparent against the claim of a parent only upon a clear showing that such award is essential to avert harm to the child."¹⁴⁶ Although the Legislature chose to make the central focus in section 3041 detriment of the child rather than parental fitness, it did not intend to award custody to non-parents "except in extreme and unusual cases."¹⁴⁷ In addition to abuse, neglect, or abandonment, courts may consider psychological harm from the loss of a relationship with a non-parent to be a factor of detriment.¹⁴⁸ However, in the guardianship context, psychological harm from loss of an existing relationship is only one factor of many the courts consider.¹⁴⁹

In the case *In re Donovan L.*, the Fourth District Court of Appeal addressed section 7612 subdivision (c)'s detriment standard for the first time.¹⁵⁰ The court relied heavily on section 3041 guardianship cases.¹⁵¹ Later courts that address the detriment standard in section 7612 subdivision (c) rely on the Fourth District Court of Appeal's analysis in *In re Donovan L.*¹⁵² Here, the Fourth District compared

¹⁴⁵ See *In re Guardianship of Olivia J.*, 101 Cal. Rptr. 2d 364, 372-74 (Ct. App. 2000); see, e.g., *In re Guardianship of Phillip B.*, 188 Cal. Rptr. 781 (Ct. App. 1983) (finding guardianship appropriate when parents were intentionally emotionally detached from their special needs child who petitioner had cared for since birth); *In re Zachary H.*, 86 Cal. Rptr. 2d 7 (Ct. App. 1999) (finding guardianship appropriate when the child had no relationship with the biological father and lived with the petitioners his entire life (four years)).

¹⁴⁶ *In re B.G.*, 523 P.2d 244, 257 (Cal. 1974).

¹⁴⁷ *Id.* ("The Legislature did not, however, intend to disturb the judicial practice of awarding custody to nonparents in preference to parents only in unusual and extreme cases." (citing MARVIN A. FREEMAN, ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 283-84 (2d ed. 1972))); see also *Olivia J.*, 101 Cal. Rptr. 2d at 368-69 ("[T]he right of parents to retain custody of a child is fundamental and may be disturbed 'only in extreme cases of persons acting in a fashion incompatible with parenthood.'" (quoting *In re Angelia P.*, 623 P.2d 198 (Cal. 1981); *In re Carmaleta B.*, 579 P.2d 514 (Cal. 1978) (en banc)); see also 4 CAL. ASSEMB. J., Reg. Sess. 8060-61 (Cal. 1969).

¹⁴⁸ *Olivia J.*, 101 Cal. Rptr. 2d at 372-74.

¹⁴⁹ See *id.*; see also CAL. FAM. CODE § 3041 (2018).

¹⁵⁰ See generally *In re Donovan L.*, 198 Cal. Rptr. 3d 550, 561-62 (Ct. App. 2016). The only California Court of Appeal case dealing with section 7612 subdivision (c) of the California Family Code before *In re Donovan L.* was *In re S.Z.*, No. H041142, 2015 WL 2405689 (Cal. Ct. App. May 19, 2015), which did not address detriment.

¹⁵¹ *Donovan L.*, 198 Cal. Rptr. 3d at 561-62 (citing *In re Guardianship of Ann S.*, 202 P.3d 1089 (Cal. 2009); *In re Guardianship of L.V.*, 38 Cal. Rptr. 3d 894 (Ct. App. 2006); *Olivia J.*, 101 Cal. Rptr. 2d 364).

¹⁵² See, e.g., *In re L.L.*, 220 Cal. Rptr. 3d 904, 915 (Ct. App. 2017) (relying on *In re*

section 7612 subdivision (c) to section 3041 subdivisions (c) and (d) to determine the detriment standard.¹⁵³

The court found that detriment exists when a “successful, established custodial arrangement would be disrupted . . . [or] a child [would be removed from] a stable, continuous, and successful placement”¹⁵⁴ This case involved a child whose biological father came forward to establish presumed parent status for the first time in juvenile court.¹⁵⁵ The biological father, much like the father in *In re M.C.*, had no relationship with the child before CPS filed a dependency petition.¹⁵⁶ Before CPS filed the petition, the child lived with his mother and stepfather, who also sought presumed parent status.¹⁵⁷ The Fourth District reversed the trial court’s order granting the biological father third parent status because the biological father had no relationship with the child.¹⁵⁸ To reach this decision, the court relied on three guardianship cases: *In re Guardianship of Ann S.*,¹⁵⁹ *In re Guardianship of L.V.*,¹⁶⁰ and *In re Guardianship of Olivia J.*¹⁶¹ The detriment standard used in these guardianship cases should not apply to cases arising under California’s Third Parent Law because this detriment standard fails to protect existing parents’ due process rights.¹⁶²

All three cases on which the *In re Donovan L.* court relied are distinguishable from presumed parent cases because they do not grant

Donovan L., for detriment standard); *In re M.R.*, 212 Cal. Rptr. 3d 807, 819 (Ct. App. 2017) (relying on *In re Donovan L.*, for detriment standard); *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016) (relying on *In re Donovan L.*, for detriment standard); *Martinez v. Vaziri*, 200 Cal. Rptr. 3d 884, 892-93 (Ct. App. 2016) (relying on *In re Donovan L.*, for detriment standard).

¹⁵³ *Donovan L.*, 198 Cal. Rptr. 3d at 561-62.

¹⁵⁴ *Id.* (citing *In re Guardianship of Ann S.*, 202 P.3d 1089 (Cal. 2009); *In re Guardianship of L.V.*, 38 Cal. Rptr. 3d 894 (Ct. App. 2006)).

¹⁵⁵ *Id.* at 553-57.

¹⁵⁶ *Id.* at 556.

¹⁵⁷ *Id.* at 553.

¹⁵⁸ *Id.* at 566.

¹⁵⁹ 202 P.3d 1089 (Cal. 2009) (in which guardians petition to adopt child after maintaining guardianship for more than two years).

¹⁶⁰ 38 Cal. Rptr. 3d 894 (Ct. App. 2006) (in which parents petitioned to terminate existing guardianship).

¹⁶¹ 101 Cal. Rptr. 2d 364 (Ct. App. 2000). Olivia J.’s mother’s same-sex domestic partner petitioned for guardianship before courts applied gender-neutral reading to presumed parent statutes for same-sex couples. The court reversed the trial courts demurrer, but found the likelihood of success on the merits low unless petitioner could show the “absence of a meaningful parent-child relationship.” *Id.*

¹⁶² See *infra* Part II.A.

non-parents new legal rights.¹⁶³ For example, *In re Guardianship of Ann S.* and *In re Guardianship of L.V.* are existing guardianship cases in which the parents already lost custody of their child to a non-parent.¹⁶⁴ Accordingly, those cases only maintain the status quo for a parent whose legal and physical custody rights were “suspended.”¹⁶⁵

However, the third case, *In re Guardianship of Olivia J.*, appears to align more closely with presumed parent cases.¹⁶⁶ *Olivia J.* involved a same-sex couple who had a child during their domestic partnership.¹⁶⁷ When the couple separated, the biological mother objected to her former partner having visitation or legal custody rights.¹⁶⁸ The First District Court of Appeal decided this case before California courts recognized a gender-neutral reading of section 7611 subdivision (d) for same-sex couples.¹⁶⁹ After the trial court granted the biological mother’s demurrer to a guardianship petition, the former partner appealed.¹⁷⁰ Due to the procedural posture of the case, the appellate court’s decision assumed the truth of all factual allegations in the complaint.¹⁷¹

The First District Court of Appeal stated that its reversal of the demurrer was not an indication of the case’s likelihood of success on the merits.¹⁷² In fact, the First District in *Olivia J.* concluded that the petition was unlikely to succeed unless the domestic partner showed the biological mother did not have a parent-child relationship with the child.¹⁷³ The court in *Olivia J.* did not suggest that an existing relationship with the child on its own could overcome the presumption of parental custody.¹⁷⁴ However, the *In re Donovan L.* court accepted the prior relationship portion from guardianship cases as sufficient evidence, on its own, of detriment if courts were to recognize only two legal parents.¹⁷⁵

¹⁶³ *Ann S.*, 202 P.3d 1089; *L.V.*, 38 Cal. Rptr. 3d 894; *Olivia J.*, 101 Cal. Rptr. 2d 364; see also *infra* Part II.B.

¹⁶⁴ See generally *Ann S.*, 202 P.3d 1089 (where guardian sought to adopt child); *L.V.*, 38 Cal. Rptr. 3d 894 (where parents sought to terminate existing guardianship).

¹⁶⁵ *Ann S.*, 202 P.3d at 1096-99; *L.V.*, 38 Cal. Rptr. 3d 901-02.

¹⁶⁶ *Olivia J.*, 101 Cal. Rptr. 2d 364.

¹⁶⁷ *Id.* at 365.

¹⁶⁸ *Id.* at 366.

¹⁶⁹ See *id.* at 369.

¹⁷⁰ *Id.* at 365.

¹⁷¹ *Id.* at 374.

¹⁷² *Id.* at 375.

¹⁷³ See *id.* at 374.

¹⁷⁴ See *supra* text accompanying note 161. See generally *Olivia J.*, 101 Cal. Rptr. 2d 364.

¹⁷⁵ See *In re Donovan L.*, 198 Cal. Rptr. 3d 550, 564-65 (Ct. App. 2016).

California courts use the same requirements that allow someone to establish parentage to also determine that it would be detrimental to the child if the court found only two legal parents.¹⁷⁶ Although California's Third Parent Law does require a finding that having only two parents would be detrimental to the child, the way in which courts apply the detriment standard makes the detriment finding requirement superfluous.¹⁷⁷ Courts have found the failure to preserve an existing parent-child relationship detrimental to the child without discussing any of the other factors which guardianship cases rely on.¹⁷⁸ Therefore, if a third person qualifies as a presumed parent under California Family Code section 7611 subdivision (d), then courts conclude it would be detrimental to the child if the court finds there are only two parents.¹⁷⁹

To confound the matter, courts appear to use section 3041 subdivision (d)'s preponderance of the evidence standard to determine if there would be detriment to a child.¹⁸⁰ This use of section 3041 subdivision (d)'s evidentiary standard is fundamentally at odds with third-parent petitions. The courts' use of section 3041's preponderance of the evidence standard further undermines the existing legal parents ability to maintain their liberty interests in the care, custody, and control of their child.¹⁸¹

The California Supreme Court in *In re Guardianship of Ann S.*, which was relied on by *In re Donovan L.*, highlighted the distinctions between

¹⁷⁶ Although, in a recent trend, courts have started requiring more than the loss of an existing relationship to qualify as detriment under section 7612 subdivision (c). See, e.g., *In re C.B.*, No. JV320477-B, 2018 WL 4691171, at *7 (Cal. Ct. App. Oct. 1, 2018) (trial court found substantial evidence of detriment if the maternal aunt was deemed a presumed parent despite the fact that the child had lived with maternal aunt for years); *L.B. v. C.B.*, No. B278489, 2018 WL 2714672, at *8 (Cal. Ct. App. Jun. 6, 2018) (providing that the burden is on the petitioning parent to show that they qualified as a third parent). However, these cases are unpublished and courts still rely on the published caselaw which applies the guardianship standard. E.g., *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016)).

¹⁷⁷ See CAL. FAM. CODE § 7612(c) (2018).

¹⁷⁸ *In re L.L.*, 220 Cal. Rptr. 3d 904, 915 (Ct. App. 2017); see also *Alexander P.*, 209 Cal. Rptr. 3d at 149 (finding a "disruption of established emotional bonds between a child and his or her caretakers" to be detrimental to the child).

¹⁷⁹ See, e.g., *L.L.*, 220 Cal. Rptr. 3d at 915 (stating that courts look to see if there is an existing parent-child relationship at the time of the hearing to determine if it would be detrimental to the child if this person is not a third parent).

¹⁸⁰ FAM. § 3041(d) (used for existing guardianship cases, as opposed to cases establishing guardianship).

¹⁸¹ See generally *id.* § 3040 (discussing how physical and legal custody should be granted in cases where a child has more than two legal parents).

existing guardianships and petitions to establish guardianships.¹⁸² According to the California Supreme Court, courts should use the preponderance of the evidence standard under section 3041 subdivision (d) after establishing a guardianship because the guardian is the only person who has responsibility for the child's care, custody, and control.¹⁸³ In guardianships, the parents' fundamental rights are "suspended" pending the guardianship.¹⁸⁴ Because the parents do not have legal rights while a guardianship is in place, their liberty interests are not violated by applying the best interests standard found in section 3041 subdivision (d).¹⁸⁵

In contrast, courts require clear and convincing evidence to place children in a guardianship. In petitions to establish a guardianship, California courts require clear and convincing evidence that placement with the parent would cause detriment to the child before they can place a child with a non-parent.¹⁸⁶ The higher burden of proof and requirement that placement with a non-parent is essential to avert harm recognize the parents' fundamental liberty interest in the care, custody, and control of their child.¹⁸⁷

¹⁸² *In re* Guardianship of Ann S., 202 P.3d 1089, 1097-99 (2009) (in which guardians petition to adopt child after maintaining guardianship for more than two years).

¹⁸³ *See id.* at 1097-98.

¹⁸⁴ *Id.* at 1098.

¹⁸⁵ *See id.*

¹⁸⁶ *In re* Guardianship of Jenna G., 74 Cal. Rptr. 2d 47, 49-50 (Ct. App. 1998). Although the California Supreme Court in *In re* B.G. did not specifically explain whether "a clear showing" meant proof by clear and convincing evidence, the holding in that case has been consistently interpreted as requiring proof by the clear and convincing evidence standard whenever the court makes findings under section 3041. *See also, e.g., In re* Cheryl H., 200 Cal. Rptr. 789, 798 (Ct. App. 1984) ("The more stringent standard of proof by clear and convincing evidence applies if a child is removed from her home and custody is awarded to a nonparent" pursuant to section 361 subdivision (b) of the California Welfare and Institutions Code); *In re* Jamie M., 184 Cal. Rptr. 778, 780 (Ct. App. 1982) ("Before a dispositional order which awards custody to a nonparent without the consent of the parents can be rendered, there must be a clear and convincing showing an award to the parents would be detrimental to the child and that an award of custody to a nonparent is essential to avert harm to the child and required to serve the best interests of the child."); *In re* W.O., 152 Cal. Rptr. 130, 132 (Ct. App. 1979) (stating that in section 300 of the California Welfare and Institutions Code proceedings, to remove a child from home, the finding that placement away from the parent is essential to avert harm to the child must be supported by clear and convincing evidence); *In re* Robert P., 132 Cal. Rptr. 5, 9-10 (Ct. App. 1976) (stating the standard of proof in proceedings to terminate parental rights under section 600 of the California Welfare and Institutions Code is clear and convincing evidence).

¹⁸⁷ *See supra* Part II.A.

Yet, California courts apply a lower evidentiary standard to determining parental rights than they do to granting temporary guardianships.¹⁸⁸ In section 7612 subdivision (c), courts are not using the clear and convincing evidence standard to determine detriment to the child. Despite granting more rights to non-parents, section 7612 subdivision (c)'s evidentiary standards are more lenient than those in section 3041 and other subdivisions within section 7612.¹⁸⁹ Courts require clear and convincing evidence to rebut an established parentage claim¹⁹⁰ and to grant custody to a non-parent,¹⁹¹ however no courts have applied that standard to cases arising under California's Third Parent Law.¹⁹² Courts apply a preponderance of the evidence

¹⁸⁸ See CAL. FAM. CODE § 7612(c) (2018).

¹⁸⁹ See *In re M.Z.*, 209 Cal. Rptr. 3d 397, 405 (Ct. App. 2016) (requiring clear and convincing evidence to rebut an existing parentage claim); see also FAM. § 7612(a).

¹⁹⁰ See, e.g., *In re L.L.*, 220 Cal. Rptr. 3d 904, 910 (Ct. App. 2017) (“A presumption under section 7611 generally ‘is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence.’” (citing FAM. § 7612(a))). But see *M.Z.*, 209 Cal. Rptr. 3d at 405 (stating that California courts use a preponderance of the evidence standard to establish parentage).

¹⁹¹ *Jenna G.*, 74 Cal. Rptr. 2d at 49-50. Although the California Supreme Court in *In re B.G.* did not specifically explain whether “a clear showing” meant proof by clear and convincing evidence, the holding in that case has been consistently interpreted as requiring proof by the clear and convincing evidence standard whenever the court makes findings under Section 3041. *Id.* at 50; see also, e.g., *Cheryl H.*, 200 Cal. Rptr. at 798 (“The more stringent standard of proof by clear and convincing evidence applies if a child is removed from her home and custody is awarded to a nonparent” pursuant to section 361 subdivision (b) of the California Welfare and Institutions Code.); *Jamie M.*, 184 Cal. Rptr. at 780 (“Before a dispositional order which awards custody to a nonparent without the consent of the parents can be rendered, there must be a clear and convincing showing an award to the parents would be detrimental to the child and that an award of custody to a nonparent is *essential* to avert harm to the child and *required to serve the best interests of the child.*”); *W.O.* 152 Cal. Rptr. at 132 (stating that in section 300 of the California Welfare and Institutions Code proceedings, to remove a child from home, the finding that placement away from the parent is essential to avert harm to the child must be supported by clear and convincing evidence); *Robert P.*, 132 Cal. Rptr. at 9-10 (stating the standard of proof in proceedings to terminate parental rights under section 600 of the California Welfare and Institutions Code is clear and convincing evidence).

¹⁹² See *L.L.*, 220 Cal. Rptr. 3d at 910; *In re M.R.*, 212 Cal. Rptr. 3d 807, 819 (Ct. App. 2017); *M.Z.*, 209 Cal. Rptr. 3d at 404; *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 145 (Ct. App. 2016); *Martinez v. Vaziri*, 200 Cal. Rptr. 3d 884, 892-93 (Ct. App. 2016); *In re Donovan L.*, 198 Cal. Rptr. 3d 550, 561-62 (Ct. App. 2016); *In re Alison L.*, No. DK08045, 2017 WL 3668443, at *6 (Cal. Ct. App. Aug. 25, 2017); *In re Shawn R.*, No. D069688, 2016 WL 5940937, at *12 (Cal. Ct. App. Oct. 13, 2016); *In re B.K.*, No. A148410, 2016 WL 40136313, at *5 (Cal. Ct. App. July 27, 2016); *In re S.Z.*, No. H041142, 2015 WL 2405689, at *4 (Cal. Ct. App. May 19, 2015).

standard to determine if it would be detrimental to the child to only have two legal parents.¹⁹³

The different evidentiary standards are significant in establishing the burden a person must meet to establish parentage. To place a child with a non-parent, the court must find that it is essential to avert harm to the child.¹⁹⁴ Once a non-parent establishes that they are a legal third parent, the court simply looks at the best interest of the child to determine the legal and physical custody arrangements for the child.¹⁹⁵ Courts are not required to give all parents legal or physical custody rights.¹⁹⁶

Proponents of California's Third Parent Law argue that courts' use of the preponderance of the evidence standard is consistent with the Legislature's use of section 3041 subdivisions (c) and (d).¹⁹⁷ Section 3041 subdivisions (c) and (d) allow courts to grant custody to a non-parent using a preponderance of the evidence standard if the court finds that the same non-parent has assumed the role of a parent.¹⁹⁸ The existing parents do not necessarily lose their parental rights,

¹⁹³ See *L.L.*, 220 Cal. Rptr. 3d at 915; *M.R.*, 212 Cal. Rptr. 3d at 819; *M.Z.*, 209 Cal. Rptr. 3d at 405; *Alexander P.*, 209 Cal. Rptr. 3d at 149; *Martinez*, 200 Cal. Rptr. 3d at 892-93; *Donovan L.*, 198 Cal. Rptr. 3d at 561-62; *Alison L.*, 2017 WL 3668443, at *6; *Shawn R.*, 2016 WL 5940937, at *12; *B.K.*, 2016 WL 40136313, at *5; *S.Z.*, 2015 WL 2405689, at *4.

¹⁹⁴ *In re B.G.*, 523 P.2d 244, 258 (Cal. 1974).

¹⁹⁵ See sources cited *supra* note 193 and accompanying text. This process could be misused to try to obtain legal or physical custody rights when other routes would not be as successful. See *Thomas R. v. Tonja V.*, No. B280834, 2018 WL 4786311, at *3 n.5 (Cal. App. Ct. Oct. 4, 2018) (maternal grandmother and grandfather both sought presumed parent status, in separate actions, after other avenues of seeking legal and physical custody rights failed).

¹⁹⁶ See CAL. FAM. CODE § 7612(c) (2018).

¹⁹⁷ See generally Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L. QUART. 495 (2014) (discussing how different states recognize equitable, psychological, or de facto parents as parents and arguing that the Model Third Party Child Custody and Visitation Act goes too far by requiring a showing of detriment or harm before placing a child with anyone other than the legal parents).

¹⁹⁸ FAM. § 3041(d) ("Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary."); see *id.* § 3041(c) ("[A] person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time . . ."); see also *Donovan L.*, 198 Cal. Rptr. 3d at 561-62 (finding "courts have concluded detriment under section 3041 may include the loss of an existing relationship with a nonparent").

although courts are not required to grant physical or legal custody to all parents. The California Legislature envisioned protecting existing parent-child relationships and used language from section 3041 subdivision (c).¹⁹⁹ Proponents of the court's analysis argue that it is appropriate to apply those same standards to third parent cases.²⁰⁰

The California Legislature's reliance on section 3041's detriment supports the proposition that it considered the potential third parent a legal non-parent.²⁰¹ This is further reinforced by the legislative comments, which direct courts to deny parental rights to a third person except in "rare cases" where a child "truly has more than two parents."²⁰² As discussed in the Background section of this Note, cases where more than two people *qualify* under the statutory requirements for presumed parent status are far from rare.²⁰³ If California courts were to require a stricter standard, such as clear and convincing evidence, to find detriment, that would effectuate the legislative intent of California's third parent law.

California courts' interpretation of the detriment standard makes it too easy to become a third legal parent so long as the petitioner can establish a prior relationship with the child.²⁰⁴ Courts require a stricter showing of detriment (clear and convincing evidence) before awarding custody to a non-parent than they do granting parental rights to a third person (preponderance of the evidence).²⁰⁵ Until a court makes the required findings under section 7612 subdivision (c), the third person seeking parentage technically is a non-parent.²⁰⁶ For these reasons, the detriment standard does not adequately protect the existing parents' fundamental liberty interest in the care, custody, and control of their child.²⁰⁷

¹⁹⁹ See *supra* Part II.A.

²⁰⁰ See generally sources cited *supra* note 198 and accompanying text.

²⁰¹ See FAM. § 3041.

²⁰² See S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013).

²⁰³ *Supra* Section I.C.

²⁰⁴ See, e.g., *In re M.R.*, 212 Cal. Rptr. 3d 807, 819 (Ct. App. 2017) (finding mother's boyfriend could establish presumed parent status as a third parent); *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016) (finding biological father and step father both qualified as presumed parents); *In re Shawn R.*, No. D069688, 2016 WL 5940937, at *15 (Cal. Ct. App. Oct. 13, 2016) (finding biological father and mother's boyfriend could both qualify as presumed parents).

²⁰⁵ See *supra* Section II.A.

²⁰⁶ See *supra* Section II.A.

²⁰⁷ See generally *supra* Parts I.A, I.B.

B. *By Failing to Presume Fit Parents Act in Their Child's Best Interests, California's Third Parent Law Is Unconstitutional Under Troxel v. Granville*

Generally, courts must defer to the parents when deciding who will have involvement in a child's life and to what extent.²⁰⁸ However, under existing California law, courts do not give deference to established legal parents when they object to the addition of a third legal parent.²⁰⁹ Before a court determines that a third party is a parent, legally they are not a parent.²¹⁰ As previously discussed, legal parents have constitutionally protected rights.²¹¹ As such, the state should give fit parents' decisions special weight when deciding to add a third parent.²¹²

Adding a third person who can obtain custody and make decisions regarding the care, custody, and control of a child dilutes the existing parents' legal authority.²¹³ In cases involving more than two legal parents, a court may give all parents joint legal custody.²¹⁴ Sharing legal custody means that the legal parents would have to agree on issues ranging from which school their child will attend to what medical procedures their child shall undergo.²¹⁵ The court may also give any of the parents sole legal custody.²¹⁶ If a former non-legal

²⁰⁸ *Troxel v. Granville*, 530 U.S. 57, 68-70 (2000).

²⁰⁹ *See, e.g., M.R.*, 212 Cal. Rptr. 3d 807 (no deference given to biological parents); *Alexander P.*, 209 Cal. Rptr. 3d 130 (same); *Shawn R.*, 2016 WL 5940937 (same).

²¹⁰ Supported by common sense and the California Legislature's use of language from section 3041 of the California Family Code's detriment standard in creating subdivision 7612 (c)'s detriment standard. *See also* Michael H. v. Gerald D., 491 U.S. 110, 120-22 (1989); *supra* Part II.A.

²¹¹ *See supra* Section I.A.

²¹² *See Troxel*, 530 U.S. at 68-70 (“[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.”).

²¹³ *See* CAL. FAM. CODE § 3040(d) (2018) (“In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 3020.”).

²¹⁴ *Id.*

²¹⁵ *See id.* § 3003 (stating that legal custody means the right to make decisions regarding the health, education, and welfare of the child).

²¹⁶ *Id.* § 3040(d) (stating that in cases with more than three parents, courts do not have to give all parents legal or physical custody rights); *see also id.* § 3040(c)

parent obtains sole legal custody, they would have the right to make all legal decisions for the child.²¹⁷ Even if the court does not initially grant the third legal parent any rights, the court can later change that order and reallocate legal and physical custody among the parents if there is a change in circumstances.²¹⁸ Adding an additional legal parent undermines the existing parents' ability to make decisions regarding their child. For these reasons, courts should give existing parents opinions special weight.

Proponents of California's Third Parent Law argue that section 7612 subdivision (c) only protects existing parent-child relationships.²¹⁹ They argue that the person seeking to establish parentage is not a "non-parent."²²⁰ A person who does not maintain a relationship with the child before petitioning the court for presumed parent status will not successfully establish third parent status.²²¹ The court in *In re Donovan L.* found that only persons who have maintained a parent-child relationship may qualify as a legal third parent.²²² Also, proponents argue that granting parental rights to a third person does not "suspend" the other parents' legal rights the way a guardianship would.²²³ In a guardianship, only the guardians would have legal rights and the ability to make decisions for the child.²²⁴ In contrast, in a third parent case, all three parents share those rights.²²⁵ Since the U.S. Supreme Court found that state law determines parental rights, determination of who the legal parents are remains within the state's

(providing that courts may award joint legal, joint physical, or sole custody to a parent). See generally *id.* § 3006 (defining sole legal custody); § 3007 (defining sole physical custody).

²¹⁷ FAM. § 3006.

²¹⁸ *In re Marriage of Burgess*, 913 P.2d 473, 481-82 (Cal. 1996).

²¹⁹ Senate Floor Analysis, Leno D., Senate. 2013-14-SB274, Reg. Sess., at 6 (Cal. 2013) (in which proponents argue "[this bill] protects children from harm by preserving the bonds between children and their parents, rather than preventing courts from recognizing that children may sometimes have more than two parents where severing one of these bonds would be detrimental to the child.").

²²⁰ See *id.* at 7.

²²¹ See *In re L.L.*, 220 Cal. Rptr. 3d 904, 915-16 (Ct. App. 2017).

²²² See *In re Donovan L.*, 198 Cal. Rptr. 3d 550, 564 (Ct. App. 2016).

²²³ Compare *In re Guardianship of Ann S.*, 202 P.3d 1089, 1094 (Cal. 2009) (in which guardians petition to adopt child after maintaining guardianship for more than two years), with *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016) (affirming the juvenile court's order granting parental rights to three people but reversing the juvenile court's order granting parental rights to a fourth person who did not have a prior existing relationship with the child).

²²⁴ See *Ann S.*, 202 P.3d at 1094.

²²⁵ CAL. FAM. CODE § 3040(d) (2018).

purview.²²⁶ Proponents of this statute argue adding a third parent is no different from adding a second parent, and courts clearly have discretion to do that.²²⁷

However, when courts add a second parent, it is fundamentally different from adding a third parent because one of the existing legal parents did not necessarily consent to the third person taking on a parental role. In a single parent situation, the sole parent invites the second parent to take on that role (either by engaging in a sexual relationship that resulted in the child²²⁸ or by encouraging the other person to take on a parental role in the child's life after they are born).²²⁹ In third parent cases, one of the two parents may not have consented to the putative third parent taking on that parent child role.

For example, in the hypothetical discussed earlier, the parent, Frank, who is not in a relationship with the putative third parent, Henry, has limited to no say on who his former partner, Maggie, allows to interact with their child.²³⁰ If Maggie allows Henry, or even the new boyfriend, Sam, to take on a parental role, a court may recognize that person as having a claim to parentage under California Family Code section 7611 subdivision (d). This is especially concerning as there is no maximum number of parents that may be added and no time limits to adding new parents.²³¹ Much like in *Troxel*, Frank is being forced to share legal and physical custody rights

²²⁶ Michael H. v. Gerald D., 491 U.S. 110, 120-22 (1989).

²²⁷ See *R.M. v. T.A.*, 182 Cal. Rptr. 3d 836, 853 (Ct. App. 2015) (in which although mother initially intended to raise the child as a single mother, her relationship developed with R.M. and he took on a parental role to the child which was sufficient to create a parent-child relationship); see also FAM. § 7610 (providing that the birth-mother and adopted parents are the only automatic natural parents). This necessarily means any two-parent home outside of adoption and assisted reproduction required adding a second parent. See generally *id.* § 7611 (presumptions of parentage).

²²⁸ It is important to note that there is a statutory exception for victims of rape or other violent crimes that resulted in the birth of a child. FAM. § 7611.5 (presumption against natural father status).

²²⁹ In *R.M. v. T.A.*, 182 Cal. Rptr. 3d at 853 the mother allowed her boyfriend to assume a parental role and told others that he was her child's father.

²³⁰ For the purpose of argument, I am using the hypothetical individuals described in the narrative portion of the introduction section of this Note. See *supra* Introduction.

²³¹ See *In re J.R.*, No. 17JD024486, 2018 WL 2426039, at *9-10 (Cal. App. Ct. May 30, 2018) (reversing juvenile court order that improperly relied on fact that child did not reside with appellant until after she was five years old); see also FAM. § 7612(c) (which only requires a finding that there would be detriment if the court only found two parents, but not placing any upward limit on additional parents).

with a non-parent third party, Henry, and later Sam, who Frank never intended to give parental rights to.

Pursuant to *Troxel*, there is a presumption that fit parents act in the best interests of their child.²³² The California Family Code does not provide a presumption that fit parents who object to the designation of a third parent are acting in their child's best interest.²³³ Further, in the cases that have arisen thus far, when an existing legal parent objects, California courts do not give that objection any special weight.²³⁴ The state's grant of legal rights to a third parent without regard to the objections of the existing parents effectuates the state's particular notion of the best interests of the child.²³⁵

Without proper deference to the existing legal parents' wishes, adding a third legal parent violates their constitutional rights.²³⁶ As discussed in Part I, once the court finds a third person is a legal parent, that third person then has a liberty interest protected by the Fourteenth Amendment.²³⁷ Thereafter, the other existing parents must share the care, custody, and control of their child with the third party.²³⁸ Therefore, by not assuming fit parents act in their child's best interests, the Third Parent Law's detriment standard violates the due process rights of the existing parents.

C. California's Presumed Parent Law Violates Public Policy by Allowing Men and Same-sex Women to Establish Parentage but not Heterosexual Women

Under California Family Code section 7611 subdivision (d), men may seek presumed parent status but women may not unless they fall under a limited class of exceptions.²³⁹ Regardless of their marital status

²³² *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

²³³ FAM. § 7612(c).

²³⁴ See *In re L.L.*, 220 Cal. Rptr. 3d 904, 915 (Ct. App. 2017); *In re M.R.*, 212 Cal. Rptr. 3d 807, 819 (Ct. App. 2017); *In re M.Z.*, 209 Cal. Rptr. 3d 397, 405 (Ct. App. 2016); *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016); *Martinez v. Vaziri*, 200 Cal. Rptr. 3d 884, 892-93 (Ct. App. 2016); *In re Donovan L.*, 198 Cal. Rptr. 3d 550, 561-62 (Ct. App. 2016); *In re Alison L.*, No. B277791, 2017 WL 3668443, at *6 (Cal. Ct. App. Aug. 25, 2017); *In re Shawn R.*, No. D069688, 2016 WL 5940937, at *15 (Cal. Ct. App. Oct. 13, 2016); *In re B.K.*, No. A148410, 2016 WL 40136313, at *6 (Cal. Ct. App. July 26, 2016); *In re S.Z.*, No. H041142, 2015 WL 2405689, at *5-6 (Cal. Ct. App. May 19, 2015).

²³⁵ See *Troxel*, 50 U.S. at 76.

²³⁶ See *supra* Part II.A; see also *Troxel*, 530 U.S. at 68.

²³⁷ See *supra* Parts I.A, I.B.

²³⁸ See *supra* Parts II.A, II.B.

²³⁹ *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 304-05 (Ct. App. 2006) (upholding

or biological relationship to the child, men and women in same-sex relationships may seek presumed parent status solely by accepting the child into their home and holding them out as their own.²⁴⁰ A heterosexual woman, on the other hand, must fall under a special category of cases to seek presumed parent status if she is not the birth mother.²⁴¹ As shown in Part II.A of this Note, merely qualifying for presumed parent status allows a person to be deemed a legal third parent.²⁴² The distinction between men, women in same-sex relationships, and heterosexual women in establishing parentage is no longer valid as a matter of public policy when courts may find that a child has more than two legal parents.²⁴³

Before California's Third Parent Law, California courts justified treating men, women in same-sex relationships, and heterosexual women differently because the UPA only allowed two legal parents.²⁴⁴ When courts could only find two legal parents, courts weighed competing claims of parentage to determine which claim rested more on facts and logic.²⁴⁵ Courts found that the woman who gave birth to the child was the natural mother.²⁴⁶ When weighed against any other presumed parent claim, proof of giving birth rested more on facts and logic than presumptions under section 7611 subdivision (d).²⁴⁷

order granting biological mother's motion to quash parentage petition by biological father's wife); *see also supra* Parts I.C, I.D.

²⁴⁰ *Supra* Part I.D; *see* CAL. FAM. CODE § 7611(d) (2018); *see, e.g., In re M.R.*, 212 Cal. Rptr. 3d 807, 819 (Ct. App. 2017) (finding mother's boyfriend could establish presumed parent status as a third parent); *In re Alexander P.*, 209 Cal. Rptr. 3d 130, 149 (Ct. App. 2016) (finding biological father and step father both qualified as presumed parents); *In re Shawn R.*, No. D069688, 2016 WL 5940937, at *15 (Cal. Ct. App. Oct. 13, 2016) (finding biological father and mother's boyfriend could both qualify as presumed parents).

²⁴¹ *See supra* Part I.D.

²⁴² *Supra* Part II.A.

²⁴³ *Cf.* sources cited *supra* notes 232, 233.

²⁴⁴ *See, e.g., In re M.C.*, 123 Cal. Rptr. 3d 856, 869 (Ct. App. 2011).

²⁴⁵ CAL. FAM. CODE § 7612(b) (2018) (this is still good law and courts must weigh competing parentage claims if there is no showing of detriment under section 7612 subdivision (c)); *see, e.g., In re D.S.*, 143 Cal. Rptr. 3d 918, 924-25 (Ct. App. 2012) (denying father's girlfriend presumed mother status); *Scott v. Superior Court*, 89 Cal. Rptr. 3d 843, 847-48 (Ct. App. 2009) (denying woman presumed mother status when not in relationship with father); *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 305-06 (Ct. App. 2006) (denying father's wife presumed parent status).

²⁴⁶ *See, e.g., D.S.*, 143 Cal. Rptr. 3d 918 (denying father's girlfriend presumed mother status); *Scott*, 89 Cal. Rptr. 3d at 849 (denying woman presumed mother status when not in relationship with father); *Amy G.*, 47 Cal. Rptr. 3d at 306 (denying father's wife presumed parent status).

²⁴⁷ *See, e.g., D.S.*, 143 Cal. Rptr. 3d at 928 (denying father's girlfriend presumed

Accordingly, no woman could challenge a biological mother's presumption of parentage unless she fell under one of the "special circumstances" described in *In re D.S.*²⁴⁸ As described in Part I, men do not have to fall under a special circumstance to seek presumed parent status.²⁴⁹

Under existing California law, there are very limited "special circumstances" where a person can apply for presumed mother status.²⁵⁰ California courts have refused to extend "presumed mother" status beyond narrowly drawn exceptions, including: (1) same-sex marriage involving two women; (2) same-sex relationships involving two women; (3) surrogacy; and (4) when there is no competing claim for maternity.²⁵¹ Unless a woman can show she falls under a special circumstance, her parentage petition cannot survive the pleading stage.²⁵²

In contrast, men are permitted to seek presumed father status, regardless of their marital status, biological connection to the child, or even relationship with the mother.²⁵³ If men may establish paternity as a third parent by accepting a child into their home and holding them out as their own, then all women, regardless of their sexual orientation, should be able to as well.²⁵⁴ A woman in a relationship

mother status); *Scott*, 89 Cal. Rptr. 3d at 849 (denying woman presumed mother status when not in relationship with father); *Amy G.*, 47 Cal. Rptr. 3d at 307-08 (denying father's wife presumed parent status).

²⁴⁸ *D.S.*, 143 Cal. Rptr. 3d at 928.

²⁴⁹ See *supra* Part I.C.

²⁵⁰ *D.S.*, 143 Cal. Rptr. 3d at 924-25.

²⁵¹ Compare *In re M.C.*, 123 Cal. Rptr. 3d 856, 877 (Ct. App. 2011) (woman in same-sex marriage able to establish presumed parent status), and *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 3 (Ct. App. 2011) (woman in same-sex relationship able to establish presumed parent status), and *Johnson v. Calvert*, 851 P.2d 776, 782 (1993) (en banc) (intended mother as opposed to surrogate birth mother was the presumed natural parent), with *In re Karen C.*, 124 Cal. Rptr. 2d 677, 683 (Ct. App. 2002) (woman who was the only person claiming presumed mother status permitted to establish parentage despite lack of biological connection), and *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708-09 (Ct. App. 2003) (same), with *In re Bryan D.*, 130 Cal. Rptr. 3d 821, 829 (Ct. App. 2011) (maternal grandmother who raised child unable to establish presumed parent status because child knows biological mother).

²⁵² See, e.g., *Amy G.*, 47 Cal. Rptr. 3d at 299 (dismissing *Amy G.*'s parentage petition at the pleading stage because she did not fall under a special circumstance).

²⁵³ See *supra* Part I.C.; see also *R.M. v. T.A.*, 182 Cal. Rptr. 3d 836, 853 (Ct. App. 2015).

²⁵⁴ Compare *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 313 (Ct. App. 2000) (man who accepted child into his home and held out as his own defeated marital presumption), and *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 615 (Ct. App. 2004) (same), with *D.S.*, 143 Cal. Rptr. 3d at 928 (denying father's girlfriend presumed

with the biological father, who develops a parent-child relationship, is no less a parent than a man or woman in a relationship with the biological mother. Accordingly, there is no distinction that warrants California's disparate treatment of women in heterosexual relationships.

In enacting the current version of California Family Code section 7612 subdivision (c), the California Legislature expressly found: "This bill does not change any of the requirements for establishing a claim to parentage under the Uniform Parentage Act."²⁵⁵ Thus, California Courts of Appeal evaluate all requests for presumed parent status using existing case law.²⁵⁶ The only change section 7612 subdivision (c) provides is that courts may now find a person qualifies as a third parent.²⁵⁷ After California's Third Parent Law, California law unjustifiably treats men, women in same-sex relationships, and women in heterosexual relationships differently when determining presumed parent status.²⁵⁸ The reasoning used in *In re D.S.* and other cases where heterosexual women seek presumed parent status no longer comports with public policy.²⁵⁹ When courts are not required to weigh all competing claims to parentage, they should treat men and women seeking parentage equally, without exception.

III. SOLUTION

A. *Judicial Solution*

Although the California Legislature passed California's Third Parent Law with good intentions, California Family Code section 7612 subdivision (c)'s detriment standard raises significant constitutional issues.²⁶⁰ As currently enacted, California's Third Parent Law fails to

mother status), and *Amy G.*, 47 Cal. Rptr. 3d at 310 (denying father's wife presumed parent status), and *Scott*, 89 Cal. Rptr. 3d at 849 (denying woman presumed mother status when not in relationship with father).

²⁵⁵ S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013); see, e.g., *Martinez v. Vaziri*, 200 Cal. Rptr. 3d 884, 887 (Ct. App. 2016) (third parent action wherein court looked to legislative findings to determine the intent of the bill).

²⁵⁶ See, e.g., *Martinez*, 200 Cal. Rptr. 3d at 887.

²⁵⁷ CAL. FAM. CODE § 7612(c) (2018); see, e.g., *Martinez*, 200 Cal. Rptr. 3d at 887.

²⁵⁸ *D.S.*, 143 Cal. Rptr. 3d at 924 (remains good law).

²⁵⁹ See *Amy G.*, 47 Cal. Rptr. 3d 297 (denying father's wife presumed parent status); *D.S.*, 143 Cal. Rptr. 3d 918 (denying father's girlfriend presumed mother status); *Scott*, 89 Cal. Rptr. 3d 843 (denying woman presumed mother status when not in relationship with father).

²⁶⁰ See *supra* Part II.

adequately protect existing parents' liberty interests in the care, custody, and control of their children.²⁶¹ While a court could find that the statute is unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment, a better judicial solution exists. Courts could easily remedy the defects in section 7612 subdivision (c) by changing the way courts interpret the statute in three ways.

First, California courts must apply a clear and convincing evidentiary standard to the Third Parent Law's detriment analysis.²⁶² As opposed to relying on case law for existing guardianships, courts must look to case law *establishing* legal guardianships for guidance on the detriment standard. In cases *establishing* guardianship, courts use the clear and convincing evidence standard to consider detriment. They also look at the harm to a child from the loss of an existing relationship as one of several factors in their detriment analysis.²⁶³ By recognizing that the existing parents retain a liberty interest in their child, courts should require petitioners seeking third parent status to meet a multi-factor test that considers the existing parents' relationship with the child and how the addition of a third parent will affect those relationships. Changing the way courts evaluate the detriment standard would effectuate the legislative intent to only allow third parents in "truly rare cases" and continue the established "preference for two parents."²⁶⁴

Second, courts must apply a presumption that fit custodial parents who oppose the designation of a third parent are acting in their child's best interest. By creating a rebuttable presumption that a child only has two parents, courts would protect the fundamental liberty interests of the existing parents.²⁶⁵ Petitioners could rebut the presumption by showing, through clear and convincing evidence, that having only two parents would be detrimental to the child by the standard discussed herein. This presumption would further support the legislative intent motivating California's Third Parent Law by balancing the best interests of the child with the parents' fundamental rights.²⁶⁶

²⁶¹ See *supra* Part II.

²⁶² Courts should use the same standard to rebut presumptions of parentage, clear and convincing evidence, that they use to add third parents. FAM. § 7612(a) (requiring clear and convincing evidence to rebut another person's presumption of parentage).

²⁶³ See *In re* B.G., 523 P.2d 244, 256-57 (Cal. 1974).

²⁶⁴ S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013); see also FAM. § 7612(c); R.M. v. T.A., 182 Cal. Rptr. 3d 836, 853 (Ct. App. 2015).

²⁶⁵ See U.S. CONST. amend. XIV, § 1.

²⁶⁶ Cal. S.B. 276; see also FAM. § 7612(c).

Third, courts must apply the same standard for alleged presumed mothers and presumed fathers, regardless of their sexual orientation. As it currently stands, California law allows men and women who enter into relationships with a biological mother to assume presumed parent status.²⁶⁷ In contrast, women who enter into relationships with a biological father cannot.²⁶⁸ When courts allow a child to have more than two legal parents, there is no justification for this disparate treatment based on gender.²⁶⁹

If courts change the way they interpret detriment under section 7612 subdivision (c) and women's claims for presumed parent status under section 7611 subdivision (d), they would be able to resolve the problems raised by this Note. This would maintain the state's interest in preserving unique family structures while protecting the existing legal parents. These proposed changes would further maintain the benefits section 7612 subdivision (c) sought to provide.

B. *Statutory Solution*

To address the problems raised in Part II of this Note, the California Legislature must change the language of section 7612 subdivision (c) and section 7611 subdivision (d).²⁷⁰ First, to address the problems raised in this Note as to the detriment standard, the Legislature must amend section 7612 subdivision (c) to require that courts find detriment by clear and convincing evidence. This amendment should articulate that the loss of an existing relationship is one of several factors the court must consider when making a finding of detriment. Second, to address the problems raised in respect to *Troxel*,²⁷¹ the Legislature must create a rebuttable presumption that fit parents who object to the designation of a third parent are acting in their child's best interests. The Legislature should make this finding rebuttable only by clear and convincing evidence that having only two legal parents would be detrimental to the child. This amendment would not affect cases arising under the California Welfare and Institution Code where courts find parental custody detrimental to the child, but would protect existing parents in Family Court.²⁷² Third, in response to the different treatment of men, women in same-sex relationships, and

²⁶⁷ *In re D.S.*, 143 Cal. Rptr. 3d 918, 924 (Ct. App. 2012).

²⁶⁸ *Id.*

²⁶⁹ See *supra* Part II.C.

²⁷⁰ See FAM. §§ 7611(d), 7612(c).

²⁷¹ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

²⁷² See CAL. WELF. & INST. CODE § 300 (2018).

heterosexual women, the Legislature must add an amendment to section 7611 subdivision (d) requiring courts to evaluate all presumptions to parentage under a gender-neutral reading, irrespective of the sexual orientation of the petitioner. As shown previously, slight modification to California Family Code sections 7612 subdivision (c) and 7611 subdivision (d) would protect parents' liberty interest while addressing the concerns raised by this Note.

CONCLUSION

California's Third Parent Law faces serious constitutional challenges that could undo the honest effort the California Legislature has undertaken to be inclusive of all families.²⁷³ Section 7612 subdivision (c)'s detriment standard adopts section 3041's detriment standard without its provision of constitutional safeguards.²⁷⁴ Moreover, California's Third Parent Law is unconstitutional under *Troxel* because it fails to presume fit parents act in their child's best interests.²⁷⁵ Further, after California's Third Parent Law, section 7611 subdivision (d) violates public policy by differentiating between men, women in same-sex relationships, and heterosexual women.²⁷⁶ Although the state may determine who the legal parents of a child are,²⁷⁷ the state is still restricted from unreasonable interference with fit parents' fundamental liberty interest in the care, custody, and control of their children.²⁷⁸

To address the issues resulting from the current application of California's Third Parent Law, courts could find that the statute is unconstitutional as a violation of the Fourteenth Amendment. However, the better alternative would be to adjust the detriment standard and to apply a presumption against adding third parents when a fit legal parent objects.²⁷⁹ Courts should find that the same standard applies for alleged presumed mothers and presumed fathers, regardless of their sexual orientation.²⁸⁰

Alternatively, the California Legislature should change the language of section 7612 subdivision (c) so that courts must presume it is not in the child's best interest to add a third parent when one or more fit

²⁷³ See *supra* Part II.

²⁷⁴ See *supra* Part II.A.

²⁷⁵ See *supra* Part II.B.

²⁷⁶ See *supra* Part II.C.

²⁷⁷ See *Michael H. v. Gerald D.*, 491 U.S. 110, 120-22 (1989).

²⁷⁸ See *supra* Part I.A.

²⁷⁹ See *supra* Part II.A.

²⁸⁰ See *supra* Part II.A.

parents object.²⁸¹ The California Legislature should also change section 7612 subdivision (c)'s detriment standard so that it uses a clear and convincing evidence standard and considers multiple factors to determine detriment.²⁸² To address the inequality in the application of section 7611 subdivision (d), the California Legislature should amend the provision so that courts do not discriminate based on gender or sexual orientation.²⁸³

On its face and as applied by the courts in recent cases, California Family Code section 7612(c) raises serious constitutional dilemmas.²⁸⁴ However the courts or the California Legislature could easily resolve these issues.²⁸⁵ This Note takes issue with section 7612 subdivision (c) that allows courts to add a third parent without regard for the existing legal parents' preference. Although changing family dynamics supports legislative efforts that allow courts to recognize a variety of family structures,²⁸⁶ California's Third Parent Law should go back to the legislative floor.

²⁸¹ See *supra* Part II.B.

²⁸² See *supra* Part II.B.

²⁸³ See *supra* Part II.B.

²⁸⁴ See *supra* Part I.

²⁸⁵ See *supra* Part II.

²⁸⁶ See S.B. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013).