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Three Parent Law**

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**The Use of Motions in Family Law**

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## Family Law News

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# MCLE Article: Emerging Issues in Three Parent Law

Denise Treviño

**Check the end of this article for information on how to access 1 hour of Legal Specialization in Family Law and 1 hour of general self-study credits.**

## Three Parent Law

Family Code section 7612(c) is often referred to as the “three parent law.” Technically, the name is a misnomer in that the statute allows the court to find more than two parents without limiting the number of parents a child may have. It was codified into law in January 2014 and states, “In an appropriate action, a court may find that more than two persons . . . are parents if the court finds that recognizing only two parents would be detrimental to the child.” Detriment may be found after a consideration of all the relevant factors, including that the child’s physical and psychological needs are being met by a person who has assumed the parenting role.

In the past, when more than two parents were involved, paternity or parentage focused on the persons who are most likely to commit to the role of a parent. “The courts have repeatedly held, in applying paternity presumptions, [ ] the extant father-child relationship is to be preserved at the cost of biological ties.”<sup>1</sup> That preference continues to be important, allowing the person who not only cares for the child but is also willing to financially support the child to be acknowledged by the court as the child’s legal parent.

## Overview of Parenting Statutes

Although section 7612(c) expanded the number of parents a person could have, it did not change the basic framework as to how a person is legally determined to be a parent. The Uniform Parentage Act (Family Code sections 7600-7730) defines parentage. For women, the natural mother is the person giving birth.<sup>2</sup> For men and non-birthing women, the test is more complicated. If the couple is married, there is a presumption under Family Code section 7640 that the second parent is the child’s parent if the parents were married and living together at the time of conception and the second parent



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is neither impotent nor sterile. The only way to overcome the marriage presumption is for the mother, spouse, presumed parent, or the child to request an order for blood tests through the court within two years of the child’s birth. If the blood tests confirm that someone other than the husband is the presumed father, then there is an opportunity to challenge parentage.

Other than the marriage presumption, there are several ways in which a person can qualify as a presumed parent. One option requires the parents to sign a Voluntary Declaration of Paternity. This is usually signed in the hospital after the child is born. It is witnessed by hospital staff and filed with the Department of Child Support Services. Once it has been filed, it “shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction.”<sup>3</sup>

Three options to qualify as a presumed parent involve marriage or an attempted marriage and contemplate circumstances in which the parents are developing a family unit. The final parentage qualification statute is for parents who have neither married nor attempted to marry. The only way that a person who does not qualify under the other parentage provisions can be determined to be a parent is by receiving the child into his or her home and openly holding the child out as his or her natural child.<sup>4</sup> In most circumstances, for a person to receive a child into his or her home, he or she needs the consent and cooperation of a parent. Thus, if married parents wish to exclude the biological parent from being involved in the child’s life, they can prevent him or her from receiving the child into their home.

## The Road to Three Parent Law: *In Re M.C.*

Family Code section 7612(c) was enacted in response to the juvenile dependency case *In re M.C.*, 195 Cal. App. 4th 197 (2011). *In re M.C.* involved a minor child who was born during a marriage between two women—Melissa V. and Irene V.—but was conceived before the marriage as a result of

a relationship between Melissa and her then boyfriend, Jesus. The child had three alleged parents: the biological mother, the presumed mother by way of being married to the mother, and the presumed father, who promptly committed to the care of the minor child but was prevented from substantial involvement by the biological mother.

On the birth certificate, only Melissa was listed as the parent. At that time, Jesus did not know where Melissa and M.C. lived and did not attempt to contact them through known family members. Although Irene and Melissa eventually broke up, they lived together for the first four weeks of M.C.'s life. After their split, Irene filed for joint legal and physical custody. In June of 2009, Melissa contacted Jesus, who lived in Oklahoma, requesting financial help. He sent her money on a few occasions before Melissa was arrested as an accessory to the attempted murder of Irene and M.C. was taken into protective custody.

The attempted murder occurred in September of 2009, when Melissa and her boyfriend, Jose, saw Irene. In an attempt to get Irene to drop the custody battle, Jose befriended her on a bus and later stabbed her. Melissa was charged as an accessory to murder. A petition filed in juvenile court alleged that both Melissa and Irene had a history of domestic violence and mentioned Melissa's incarceration.

A report made by the Department of Child and Family Services stated that Irene did not have suitable living conditions. She did not live in her own place, was sleeping on a couch, and there was no refrigerator present. Furthermore, Jose, who had stabbed Irene, was still at large, making her situation a dangerous environment for the baby. Jesus, on the other hand, lived in Oklahoma with his fiancée, had a stable job and environment, and was expecting another child. DCFS recommended that the court find that Jesus was C's presumed father place the child with him. The juvenile court found that M.C. had three presumed parents. On appeal, the Second District remanded the case back to the juvenile court, holding that "(t)he order finding that M.C. has three presumed parents is incomplete." It ordered the juvenile court "to complete its inquiry and weigh the competing parentage presumptions in accordance with the factors articulated in Family Code section 7612, subdivision (b)."<sup>5</sup> Family Code section 7612(c) was enacted as a result of this decision.

### What Does Being a "Parent" Entail?

An inherent safeguard to Family Code section 7612(c) is that most adults understand the difficulty of parentage and are cautious when voluntarily assuming that role. Family Code section 7601(b) defines the parent and child relationship as

"the legal relationship existing between a child by which the law imposes rights, privileges, duties and obligations." With parenting comes the responsibility of support, visitation, engagement, discipline, and care. Although a person who is found to be a presumed parent is providing support and has an existing parent-child relationship, once a person is found to be a presumed parent by the court, that parent is legally required to provide support under a court order.

### Application

In any three-parent parentage case, the court first determines whether or not the person qualifies as a presumed parent under 7611. When more than two parents qualify as presumed parents, then the court must decide whether recognition of only two parents would be detrimental to the child. Detriment does not require a showing of parental unfitness. Rather, it examines whether or not the refusal to legally recognize the person as the child's parent would be detrimental to the child. The court is looking to the stability of having the party in the child's life. While it does not require the child to live with a parent, it does mean that the parent and the child have established a relationship such that it would be detrimental to the child to disrupt that relationship.

### Developing Case Law

Section 7612(c) states that in appropriate cases, a child may have more than two parents. The Legislature envisioned that courts would apply the section in a prudent manner and in rare cases where "a finding that a child has more than two parents is necessary to protect the child from the detriment of being separated from one of his or her parents"<sup>6</sup>

Courts are grappling with the application of the three-parent law. *In re Donovan L*, 244 Cal. App. 4th 1075 (2016) was one of the first cases to deal with the issue. The juvenile court found in *Donovan L*. that the minor child had three parents: his mother, his stepfather, and his biological father. While married to the child's stepfather, M had an intimate relationship with David, the child's biological father. The biological father did not become involved in the child's life until the child was a year old. Although the trial court found that there was no existing bond between the biological father and the child, it held that it would be detrimental to the child not to know his biological father. The Fourth District overruled the trial court, finding that it was not an appropriate case to apply section 7612(c) because there was no finding of detriment to the child if he only had two parents.<sup>7</sup>

The appellate court opined that "detriment to the child" is the same detriment found in Family Code section

3041, which governs custody awards to a nonparent over the objection of a parent. It considers whether an established custody arrangement would be interrupted and whether there would be harm in removing a child from a successful, stable environment. The emphasis is on preserving bonds that have been established and “avoid the ‘disastrous emotional, psychological, and financial consequences for a child, who may be separated from one or two of the parents he or she has always known.’”<sup>8</sup> It is designed to “protect *existing* relationships rather than foster *potential* relationships.”<sup>9</sup>

*Martinez v. Vaziri*, 246 Cal. App. 4th 373 (2016), defined the parentage of a man who held himself out as his niece’s father. The child’s biological father was incarcerated, had abandoned the mother during the pregnancy and was the petitioner’s step-brother. The petitioner had been in a long-term relationship with the child’s mother; knowing that he was not her father, he was determined to raise her as his own. During the first six months of her life, he lived with the mother taking turns caring for the child. Although he moved out of the home, he continued to see the child two to three nights per week. Most people believed he was her father. The mother testified that the child knew her uncle as a “father in the emotional sense” and that it would be detrimental if that were taken from her. The trial court found that the father qualified as a presumed parent. It held, however, that “recognizing only two parents . . . would not be detrimental to [the] child” and reasoned that “there would be no harm from ‘removing the child from a stable placement,’” since the uncle had already moved out of the family home.<sup>10</sup>

On appeal, the petitioner argued that the court should consider the fact that the minor child’s biological father was unlikely to be present if something happened to the mother. The Sixth District reversed and held that the “critical distinction is not the living situation but whether a parent-child relationship has been established,”<sup>11</sup> remanded the case, and instructed the court to evaluate all relevant factors. It said that “(i)n the dependency context, even a man ‘with no biological connection to the child, no marital connection to the mother, and no way to satisfy the statutory presumption of paternity may nevertheless be deemed a presumed father’ if he can prove ‘an existing familiar relationship with the child,’ a bond the ties of which ‘should not be lightly dissolved.’”<sup>12</sup>

*In re Alexander P.*, 4 Cal. App. 5th 475 (2016), involved three men alleging to be the father of Alexander. Donald, the stepfather, had been in the child’s life for twenty months. Joel was the Alexander’s biological father, and he had initially rejected fatherhood. The third alleged father was Michael.

He had lived with the mother during the first year of the baby’s life. When the child turned one, Joel became involved in the child’s life and maintained weekly visits with him. Donald, while living with the mother, assumed daily parental responsibilities.

Although the main issue in this case was whether the juvenile dependency court was bound by the family court’s decision that both Michael and Donald were presumed parents, the case also discussed the decision to recognize Donald as Alexander’s presumed father. Michael argued that Donald, as a stepparent, should be required to go through the adoption requirements of Family Code section 9000 et seq. rather than be declared a third parent. The First District upheld the finding that Donald was the presumed father, but remanded to determine Michael and Joel’s parentage and any potential detriment to the child if a third presumed parent was removed from his life.

*In re M.Z.*, 5 Cal. App. 5th 53 (2016), was a juvenile dependency case involving several children. The two older children were the subjects of an action by Anthony R. to be declared their third parent. The juvenile court found that he played a limited role in the children’s lives and that they occasionally called him “dad.” However, it found no evidence that the children would suffer detriment if the relationship between he and the children were disrupted because he did not seem to have an established relationship with the children. On appeal, the Fourth District upheld the trial court’s holding that he failed to meet his burden to establish his parentage claim, which was necessary before seeking third-parent status.

In *In re M.R.*, 7 Cal. App. 5th 886 (2017), the court held that the minor child, Ro.R. had two presumed fathers. No biological tests had been conducted but each man believed that he was the child’s biological father. R.R., who lived with Ro.R. for the first three years of his life, was incarcerated. S.H., the second father, had spent significant amounts of time with Ro.R. since birth. Although both R.R. and the mother claimed that S.H. was a close family friend, testimony showed that S.H. spent significant time with the child. The testimony also showed that Ro.R. saw S.H. as his father and wanted to live with him. The Fourth District affirmed the trial court’s orders holding that both R.R. and S.H. were Ro.R.’s noncustodial presumed fathers.

The determination as to which person the third parentage analysis will be applied is not entirely clear. In *In re L.L.* No. D071661, slip op. (Fourth District, Aug. 3, 2017), the child’s biological father, B.S., who had previously obtained a visitation and custody order, was held to be the third parent.

The case stands for the proposition that once a parent qualifies as a presumed parent, that parent does not fall in and out of presumed parent status. He or she can, however, lose the advantage as a presumed parent if someone else qualifies as the presumed parent. In addition, he or she may be relegated to the position of the third parent.

In *L.L.*, B.S. had qualified for custody and visitation in an earlier family law proceeding and the courts seemed to disregard the importance of that determination. Apparently, at one time, B.S. was not a third parent but was one of two parents because he was awarded joint legal custody and visitation of the minor child before the enactment of the Three Parent Law. Although T.L. was listed on the child's birth certificate and was the only parent she had ever known, B.S. was her biological father and was awarded visitation. However, B.S. had not seen L.L. for some time because of his incarceration and the evidence showed that B.S. and L.L. did not have an existing parent-child relationship. The court thus found that B.S. was a presumed father, that it would not be detrimental to L.L. if a third parent for her was added, and added B.S. as a third parent.

However, if B.S. had custody and visitation orders under previous law his parentage was already established. As such, the third parent law should not be applied to him, but to T.L. If T.L. was the third parent, then his parentage should have easily been established. The Fourth District reversed the order finding B.S. to be the third parent and remanded the case to "make factual findings as to the claims of T.S. and B.S., as L.L.'s presumed father, and weigh their competing claims as required by section 7612, subdivision (b)."<sup>13</sup>

### **Custody and Visitation**

Once the court finds that a child has more than two parents, it must determine other parenting rights and obligations such as custody, visitation, and child support. Custody and visitation are based on the best interest of the minor child. Family Code section 3040(d). The statute requires the court to address the need "for continuity and stability by preserving established patterns of care and emotional bonds." It also states that not all parents must share legal or physical custody if it is not in the child's best interest. With few guidelines, it is possible that all of the declared parents would have custody and some right of visitation.

This law requires discernment when it comes to custody and visitation issues. Theoretically, if it is in the child's best interest, the presumed parent who is not a biological parent could have a substantial amount of custody. Adding extra parents removes precious time the biological parent has with

the minor child. The parents' living arrangement may affect visitation. If two parents reconcile, then each parent could each get a third of custody so that the parents who are together would get two-thirds custody and the third parent would get a third of the custody, meaning they could override decisions that affect legal custody. If none of the parents are together, the minor child could move between several homes, have several school alternatives, and several sets of rules.

### **Child Support**

Child support is equally complicated for three or more parents. Generally, the court must decide who pays what to whom based on guideline formula. Family Code section 4052.5(a) makes the guideline formula applicable to children with more than three parents. The need to make it consistent with federal regulations requires a formula, but subsection (b) allows the presumptively correct formula to be rebutted if the application of the formula would be unjust or inappropriate. Family Code section 4057(b)(5)(D) also states that the guideline formula is a rebuttable presumption and can be avoided when application would be unjust or inappropriate due to special circumstances, such as when the child has more than two parents. The court is required to modify the formula in a manner that is just and appropriate based upon the income and amount of time spent with the child by each parent.

There are several scenarios for support. If there are three parents but two of them are a couple, the court must allocate child support. It would need to determine whether it should combine the couple's income as one income and factor child support as if there were only two people or if it should treat each parent as a separate individual ordering parents one and three to pay parent two. If parent two is a stay-at-home parent, perhaps raising other kids from the relationship between parents one and two, the court must determine if that should be a factor in parent three's child support obligation to parent two.

### **Constitutional Rights**

It is not clear whether a biological father would gain constitutional rights under a three-parent system. If the mother is married, the biological father will have standing to bring a parentage action if he was part of the child's life. The United States Supreme Court has held that there are no constitutional due process rights for a biological parent who does not immediately assert his or her parentage rights. However, those rights were considered under a two-parent legal system. It is unclear if more due process rights would be afforded a biological parent when more than two parents are allowed.

## Is This Good Law?

There are circumstances in which it would be beneficial for some children to have more than two parents. However, in *In re M.C.*, it was unclear whether or not Jesus would have qualified as the child's presumed parent. Arguably, he qualified as a *Kelsey S.* father<sup>14</sup>, because the child's mother prevented him from seeing her. *Kelsey S.* fathers, however, were usually required to do everything possible to establish parentage. The record is clear that Jesus did not either try to keep in contact with the mother through family members or file court action.

*In re M.C.* seems to be more about trying to keep the minor child with a "fit" parent rather than a third parent. Statutes enacted to rectify a particular problem may not be a good resolution to other situations. In *In re M.C.*, the court could have allowed the child to live with a relative rather than place her in the foster care system. It is unlikely that under prior law, if M.C. had at least one "fit" parent, Jesus would have had a chance to be a parent even though he seemed willing to take responsibility for her.

There are a myriad of circumstances in which this third parent law could apply. Its full application is unclear in different scenarios such as those involving stepparents, boyfriends, girlfriends, adoptions, polygamists, and grandparents. It is feasible that in the proper context, all of these situations may produce qualified third parents. Before the enactment of section 7612(c) there were other laws to deal with these types of situations. For example, a stepparent could be declared a *de facto* parent and granted custody and visitation. Guardianships could be established. Placement of children who are dependents of the state could be placed with relatives.

## The Effect on Children

There are many unsettled issues arising from in this statute. The law has not specifically declared the maximum number of parents a child can have. Although ideally the courts would rarely hold that someone is a third parent, carried to an extreme a child can have numerous parents. In many familial situations, the biological parents get divorced, remarried, and stepparents enter the picture. If the child calls the stepparent "dad" or "mom," the stepparent could qualify as the third parent especially if the other presumed parent is absent. If both sets of parents and stepparents divorce, the court may need to consider whether it would be detrimental to the minor child to remove the stepparents from the child's life.

Attorneys should advise parents that a close relationship between an adult and child, where the parent is claiming the

child as his or her own and the child sees the adult as a parent, could result in the finding of a parent-child relationship between that adult and the child. This type of relationship occurs often when the minor child is an infant or toddler and there is a significant other in the parent's life. If the intent is to create the parent-child relationship so that the courts can find a presumed parentage relationship, then the alleged parent should continue the relationship. However, if that is not the intent, the non-biological parent may obtain rights and obligations that no one intended. If there is no intent to become a third parent, clients should be advised about the implications of continuing the relationship. This area of law is evolving, and it remains to be seen how these issues will play out in the future.



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## Endnotes

- 1 *In re Nicholas H.*, 28 Cal. 4th 56, 75 (2002).
- 2 CAL. FAM. CODE § 7650(b).
- 3 CAL. FAM. CODE § 7573.
- 4 CAL. FAM. CODE § 7611(d).
- 5 Previously, it was possible that more than two people would qualify as presumed parents under the UPA. However, "if two or more presumptions arise under Family Code § 7610 or Family Code § 7611 that conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls." CAL. FAM. CODE § 7612(b). Section 7612(e) provides a similar provision regarding conflicts between the presumption established by a voluntary declaration of paternity and Family Code section 7611. If two persons could qualify as a second parent, the court would determine which of the two, based upon policy and logic, should qualify as the second parent.
- 6 S.B. 274 Stats. 2013, ch. 564, § 1(a), (d) (2013).
- 7 *In re Donovan L.*, 244 Cal. App. 4th at 1087.
- 8 *In re Donovan L.*, 244 Cal. App. 4th at 1089 (quoting Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 274 (2013-2014 Reg. Sess.)).
- 9 *In re Donovan L.*, 244 Cal. App. 4th at 1091.
- 10 *Id.* at 381.
- 11 *Martinez*, 246 Cal. App. 4th at 385.
- 12 *Id.* (quoting *In re D.M.*, 210 Cal.App.4th 541, 554 (2012)).
- 13 *In re L.L.* No. D071661, slip op. at 22.
- 14 *Adoption of Kelsey S.*, 1 Cal. 4th 816 (1992).