LEXSTAT CAL. FAMILY CODE § 7540

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FAMILY CODE
DIVISION 12. Parent And Child Relationship
PART 2. Presumption Concerning Child Of Marriage and Blood Tests To Determine Paternity
CHAPTER 1. Child of Wife Cohabiting With Husband

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Cal Fam Code § 7540 (2004)

§ 7540. Presumption arising from birth of child during marriage

Except as provided in Section 7541 , the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

HISTORY: Enacted Stats 1992 ch 162 § 10 (AB 2650), operative January 1, 1994 as § 7500. Renumbered by Stats 1993 ch 219 § 161 (AB 1500).

NOTES:
HISTORICAL DERIVATION:
(a) Former CCP § 1826, as enacted 1872.
(b) Former CCP § 1962, as enacted 1872, amended Stats 1945 ch 948 § 3.
(c) Former Ev C § 621, as enacted 1965 ch 299 § 2, amended Stats 1975 ch 1244 § 13, Stats 1980 ch 1310 § 1, Stats 1981 ch 1180 § 1, Stats 1990 ch 543 § 2.

OFFICIAL COMMENT:

LAW REVISION COMMISSION COMMENTS:
1993—Section 7540 continues former Evidence Code Section 621(a) without substantive change.

CROSS REFERENCES:
Presumption of paternity applicable to declarations of paternity signed on or before December 31, 1996: *Fam C § 7576*.

COLLATERAL REFERENCES:
Witkin Summary (9th ed) Parent & Child §§ 403, 408A, 412, 414, 416, 417, 425, 448B, 448D – 448F.
Cal Jur 3d (Rev) Family Law § 246.
Am Jur 2d (Rev) Divorce and Separation §§ 1098 et seq.; Illegitimate Children §§ 9 et seq.; Parent and Child §§ 7 et seq.

LAW REVIEW ARTICLES:
California's conclusive presumption of paternity and the expansion of unwed fathers' rights. *26 Golden Gate LR 337.*
How irrebuttable is the irrebuttable presumption of paternity in *section 621 of the California Evidence Code*? An examination of Michael H. v. Gerald D. and its aftermath in California:*13 J Juvenile L 159.*
Embryo theft: the misappropriation of human eggs at an Irvine fertility clinic has raised a host of new legal concerns for infertile couples using new reproductive technologies. 26 Southwest LR 1133.

Why the policy behind the irrebuttable presumption of paternity will never die. 26 Southwest U LR 359.
Marriage and the Intact Family: The Significance of Michael H. v. Gerald D. 22 Whittier LR 327.

NOTES OF DECISIONS

In an action against a child's mother and her husband to establish plaintiff's parental relationship to the child, the trial court properly refused to apply the paternity presumption of Evid. Code, former § 621 (now *Fam. Code, §§ 7540, 7541*) (child of wife cohabiting with husband presumed to be child of marriage), since to do so would not have furthered the presumption's underlying policies. The mother and her husband had married only for economic advantages and had never had sexual relations, whereas plaintiff had received the child into his home, had lived with him, and had held him out as his own and supported him for nearly two and one–half years. Thus, there was neither a marital union nor a family unit to preserve, with the so–called marriage being one in name only. Any societal concern for the child to have a father was served by avoiding the presumption, since the presumption would have prevented the child from enjoying a parental relationship with the only man he had ever known as a father. And the state's interest in ensuring that the child had a source of child support was furthered by rejecting the presumption and awarding to plaintiff the responsibility he sought to assume. *Comino v Kelley (1994, 4th Dist) 25 Cal App 4th 678, 30 Cal Rptr 2d 728.*

In consolidated actions to determine, in addition to a couple's marital status, the parental rights of a child's biological (surrogate) mother and the couple who had contracted with the biological mother to have her bear the husband's child through artificial insemination, the trial court did not err in determining that the husband and the biological mother were the legal parents of the child. Under *Fam. Code, § 7541*, subd. (a) (question of paternity resolved according to blood tests), genetic parenthood established by blood tests overcomes the presumption under *Fam. Code, § 7540*, that the child of a wife, cohabiting with her husband, is presumed to be a child of the marriage. Also, it was undisputed that the wife was sterile, and *Fam. Code, § 7540*, only applies where the other spouse is not sterile. Although under *Fam. Code, § 7611*, subd. (d), a person who receives a child into the home and openly holds out the child as natural is presumed to be the natural parent, the wife never held the child out as her natural child. With surrogacy there is no need to resort to presumptions. Under the Uniform Parentage Act (*Fam. Code, § 7600*, et seq.), parentage was easily resolved in favor of the biological mother, who did not consent to adoption pursuant to *Fam. Code, § 8814*. *In re Marriage of Moschetta (1994, 4th Dist) 25 Cal App 4th 1218, 30 Cal Rptr 2d 893.*

In a paternity action commenced by a mother, the trial court did not err in applying the conclusive presumption of paternity codified in Evid. Code, former § 621, subd. (a) (now *Fam. Code, § 7540*), which provides that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage, and in granting summary judgment in favor of the putative father. Application of the statute did not violate due process. The action was commenced one month after dissolution proceedings with her husband resulted in an order awarding the mother and her husband joint legal and physical custody of the four–year–old child. Given the absence of any relationship between the child and the putative father and the putative father's lack of interest in creating one, the mother failed to establish that her child had an interest worthy of constitutional protection impaired by application of the conclusive presumption. The presumption also furthered the substantial state interest in preserving the extant familial relationship between the child and the presumed father, who assumed the paternal role in the child's life, living with child and mother until the child was more than three years of age, and who requested that joint custody continue after learning that he was not biologically related to the child. This was so despite the fact that the relationship was in the context of support obligations and visitation rights. Although the presumption was not designed to allow a father to avoid responsibility and is inapplicable when its underlying policies are not furthered, the putative father was not precluded from invoking the presumption as a defense under these facts. *Susan H. v Jack S. (1994, 2nd Dist) 30 Cal App 4th 1435, 37 Cal Rptr 2d 120.*

The conclusive presumption of paternity codified in former Evid. Code, § 621, subd. (a) (now *Fam. Code, § 7540*), which provides that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage, is a rule of substantive law. The statute reflects the ancient principle,[e]stablished even prior to the common law, that when husband and wife are living together as such, the integrity of the family should not be impugned. The husband is deemed responsible for his wife's child if it is conceived while they are cohabiting; he is the legal father and the issue of biological paternity is irrelevant. The rule promotes important social policies, including the preservation of the integrity of the family, the protection of the welfare of children by avoiding the stigma of illegitimacy and keeping them off welfare rolls, and insurance of the stability of titles and inheritance. *Susan H. v Jack S. (1994, 2nd Dist) 30 Cal App 4th 1435, 37 Cal Rptr 2d 120.*

The conclusive presumption of paternity codified in Evid. Code, former § 621, subd. (a) (now *Fam. Code, § 7540*), which provides that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively

presumed to be a child of the marriage, as applied in any given case, may be challenged on due process grounds. Whether the conclusive presumption denies due process by preventing a party from establishing the natural or biological father must be resolved by weighing the competing private and state interests. A balancing test is applied to determine whether its operation denies due process. *Susan H. v Jack S. (1994, 2nd Dist) 30 Cal App 4th 1435, 37 Cal Rptr 2d 120.*

A husband who was cohabiting with his wife at the time her child was conceived, and who failed to request blood testing within two years of the child's birth, was subject to the presumption of paternity (*Fam. Code, § 7540*), despite his due process claim that, since his marriage had been dissolved, the state had no valid interest in requiring that he, rather than another man who had had a sexual relationship with the wife, provide support for the child. The state has an interest in preserving and protecting developed parent–child and sibling relationships that give young children social and emotional strength and stability, despite termination of the mother's marital relationship with the presumed father. Moreover, following the trial court's ruling as to whether the husband was sterile, he took no further steps to obtain a ruling on his due process claim. Thus, he waived his right to assert that the presumption violated his right to due process. The presumption did not, on its face, create disparate treatment between otherwise similarly situated persons. Although impotent or sterile men may not be subject to the presumption, they may still be required to support children they have treated as their own. By estoppel, impotent and sterile men are subjected to paternal responsibility on substantially the same basis employed in applying the presumption to men who are only infertile: the nature and duration of their relationships with their putative children. *In re Marriage of Freeman (1996, 4th Dist) 45 Cal App 4th 1437, 53 Cal Rptr 2d 439.*

A husband who was cohabiting with his wife at the time her child was conceived, and who failed to request blood testing within two years of the child's birth, was subject to the presumption of paternity, notwithstanding his assertion that he was sterile within the meaning of *Fam. Code, § 7540* (child of wife cohabiting with husband who is not impotent or sterile is presumed to be child of marriage). The husband had undergone vasectomy reversal procedures that left him with one–fourth of the live sperm experts agreed was needed to be fertile. The wife was also having unprotected sexual relations with another man during the month she became pregnant. However, the Legislature has made it clear that biology is not the predominant consideration in determining parental responsibility once a child has reached his or her third year of life. Thus, a broad interpretation of the sterility exception would undermine the Legislature's preference for preserving the rights and responsibilities inherent in established parental relationships. Sterility must be defined in the strictest sense. It is limited to cases where, by a preponderance of the evidence, a party can demonstrate that the presumed father could not produce a live sperm count at the time of conception. Accordingly, the husband was not sterile within the meaning of *Fam. Code, § 7540. In re Marriage of Freeman (1996, 4th Dist) 45 Cal App 4th 1437, 53 Cal Rptr 2d 439.*

The conclusive presumption that the husband is the father of a child conceived during the marriage (*Fam. Code, § 7540*) does not violate the due process rights of biological fathers. The presumption reflects the sanctity traditionally accorded to the relationships that develop within the unitary family. The biological father's private interest in establishing a parent and child relationship is overridden by the substantial state interests in familial stability and the best interest of the child. *Rodney F. v Karen M. (1998, 2nd Dist) 61 Cal App 4th 233, 71 Cal Rptr 2d 399.*

The equal protection clause guarantees equality under the same conditions and among persons similarly situated. The Legislature may make reasonable classifications so long as the classification is not arbitrary, but is based on a difference having a substantial relationship to a legitimate object. Because there is an obvious distinction between a man who has undertaken the obligations of marriage and family and a man whose only connection with the child is biological, the conclusive presumption that the husband is the father of a child conceived during the marriage (*Fam. Code, § 7540*) does not violate the equal protection rights of biological fathers. The state has a legitimate interest in preferring the former over the latter. There is also an obvious distinction between a biological father who has actually established a parent and child relationship, and a man who has not established such a relationship but would like to do so. Only the former are presumed fathers under *Fam. Code, § 7611*, subd. (d). A biological father who has not actually formed a parental relationship with the child does not have sufficient interest to overcome that of the state when the conclusive presumption of paternity applies. *Rodney F. v Karen M. (1998, 2nd Dist) 61 Cal App 4th 233, 71 Cal Rptr 2d 399.*

In a paternity action brought by a man who had an affair with a married woman who conceived a child just as their affair ended, the trial court correctly applied the conclusive presumption of paternity in the woman's husband (*Fam. Code, § 7540*), even though blood tests showed a probability of 99.5 percent that the man was the biological father of the baby. Furthermore, since the purported biological father was not a presumed father as defined in *Fam. Code, § 7611*, the trial court erred when it granted the man's motion for blood tests. The blood tests were not authorized by *Fam. Code, § 7541*, and only blood tests authorized by *Fam. Code, § 7541*, can overcome the conclusive presumption of paternity. When the conclusive presumption of paternity applies under the law, it is irrelevant that the biological father can prove his paternity or even that all parties to the proceedings may concede that plaintiff is the biological father. Even though the baby's mother represented to the purported father that theirs was an exclusive relationship, she was not thereby estopped from

denying his paternity, since the interests of her husband, child, and the state in preserving the integrity of the family were paramount. Moreover, the purported biological father failed to prove that he reasonably relied on the mother's promise to that effect. *Rodney F. v Karen M. (1998, 2nd Dist) 61 Cal App 4th 233, 71 Cal Rptr 2d 399.*

In an action brought by a woman's second husband against her first husband, alleging that he was the natural father of a child born during the first marriage and seeking legal and physical custody of the child, the conclusive presumption of paternity established by *Fam C § 7540* applied to the first husband, and the second husband could not employ the exception to this section to rebut the conclusive presumption. (*Fam C § 7541*.) Although the second husband conceded that the first husband satisfied the conclusive presumption requirements of *Fam C § 7540*, he contended that he had rebutted this presumption through the blood test results he submitted as part of his complaint. However, such blood test results could not override the conclusive presumption of *Fam C § 7540* because the tests were not authorized by *Fam C § 7541*. The tests were neither ordered by the court nor performed by court appointed experts. (*Fam C §§ 7551* and *7552*.) As a result, the tests had no legal significance. Further, the tests were not performed within two years of the child's birth and thus were untimely. Finally, the second husband did not have standing to request blood tests because he was not a presumed father within the meaning of *Fam C § 7611*. *Miller v Miller (1998, 5th Dist) 64 Cal App 4th 111, 74 Cal Rptr 2d 797.*

The trial court in a paternity action erred in applying the conclusive presumption of *Fam C § 7540* based on the facts that the child at issue was conceived while the mother was cohabiting with her husband and that the husband was neither impotent nor sterile, where the man seeking to establish paternity had lived with the child's mother, raised the child as his own for the first year of her life and continued to visit the child after he and the mother broke up. Principles of due process precluded the state from applying substantive rules of paternity law which would have the effect of terminating an existing father–child relationship, particularly where the child was not born into an extant marital union and where the plaintiff developed a substantial parent–child relationship with the child. *Brian C. v Ginger K. (2000, 4th Dist) 77 Cal App 4th 1198, 92 Cal Rptr 2d 294.*

Decisions under Former Ev C § 621:

1. In General 2. Constitutionality 3. Construction 4. Application 5. Avoidance of Presumption 6. Parties 7. Evidence 8. Criminal Cases

1. In General

When the question is in issue as to whether a child could possibly have been conceived during its mother's cohabitation with her husband, any competent evidence relevant to such question is admissible. *Jackson v Jackson (1967) 67 Cal 2d 245, 60 Cal Rptr 649, 430 P2d 289.*

On a motion to set aside an interlocutory dissolution decree insofar as it determined that the husband was the father of a child conceived while the wife was married to another man, the presumption of *Evid. Code, § 621*, concerning the legitimacy of the issue of a wife cohabiting with her husband had no effect, and the issue of paternity was res judicata, where the issue of the child's paternity never arose during the original marriage dissolution proceeding, and where the underlying facts surrounding the circumstance of the child's birth were never established, with the result that the presumption was not brought into play. *In re Marriage of Guardino (1979, 1st Dist) 95 Cal App 3d 77, 156 Cal Rptr 883.*

In an action by a child's maternal grandparents, who sought to be appointed guardians of the child, the trial court properly rejected the grandparents' challenge to the paternity claims of the purported father, who had stipulated to paternity in prior actions by the county for reimbursement of public assistance expended for support of the child. Although the doctrines of res judicata and collateral estoppel could not properly be invoked against the grandparents as they were not parties or privies in the prior actions, those doctrines are grounded in public policy, and the public policies of retaining parent–child relationships and insuring the finality of paternity judgments should prevail over the doctrines of res judicata and collateral estoppel. Moreover, in view of the relationship between the child and her purported father, the child's best interests would not be served by continuing litigation on the issue of paternity. Further, *Evid. Code, § 621*, and *Civ. Code, § 7010*, subd. (a), codify a strong public policy in the finality of paternity actions. *Guardianship of Claralyn S. (1983, 5th Dist) 148 Cal App 3d 81, 195 Cal Rptr 646.*

The rule that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage (*Evid. Code, § 621*, subd. (a)) is a rule of substantive law. It codifies the principle that when husband and wife are living together as such, the integrity of the family should not be impugned. The husband is deemed responsible for his wife's child if it is conceived while they are cohabiting; he is the legal father and the issue of

biological paternity is irrelevant. The rule promotes important social policies such as preservation of the integrity of the family, protection of the welfare of children by avoiding the stigma of illegitimacy, and insurance of the stability of titles and inheritances. *Estate of Cornelious (1984) 35 Cal 3d 461, 198 Cal Rptr 543, 674 P2d 245.*

The conclusive presumption of *Evid. Code, § 621*, subd. (a) (the issue of a married woman cohabiting with her husband, who is not impotent or sterile, is a child of that marriage) is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned. In addition, the rule protects the innocent child from the social stigma of illegitimacy. *Michael H. v Gerald D. (1987, 2nd Dist) 191 Cal App 3d 995, 236 Cal Rptr 810,* affd *491 US 110, 105 L Ed 2d 91, 109 S Ct 2333.*

Although the presumption contained in *Evid. Code, § 621* (husband cohabiting with mother is presumed to be father of child), is "conclusive," courts may refuse to apply it when its underlying policies are not furthered. The presumption is not designed to protect a putative father from assuming responsibility for a child he fathered. Instead, it is designed to preserve the integrity of the family unit, protect children from the legal and social stigma of illegitimacy, and promote individual rather than state responsibility for child support. However, since the passage of the Uniform Parentage Act and its abolition of any incidents of illegitimacy, the stigma of illegitimacy should not be considered in determining the constitutionality of applying the presumption. *County of Orange v Leslie B. (1993, 4th Dist) 14 Cal App 4th 976, 17 Cal Rptr 2d 797.*

2. Constitutionality

In a prosecution of defendant for willful failure to support his minor son (*Pen. Code, § 270*), the trial court properly upheld the constitutionality of, and applied, the conclusive presumption of paternity found in *Evid. Code, § 621*, providing that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage, where the foundational facts of the presumption were stipulated. While paternity is an essential element of the crime, and proof beyond a reasonable doubt of every element of a criminal charge is constitutionally required, proof of biologic parenthood is not an essential element of proof of guilt under *Pen. Code, § 270*, as the determinant factor is whether the legal relationship of father and child exists. Moreover, there is a rational connection between inception of a child by a woman during marriage during cohabitation with a nonimpotent husband, and the ultimate fact of paternity of that man. *People v Thompson (1979, 4th Dist) 89 Cal App 3d 193, 152 Cal Rptr 478.*

The application of *Evid. Code, § 621* (providing that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage) did not deny due process to a putative father who sought to establish a father and child relationship and secure visitation rights with respect to the child of a formerly married couple. Plaintiff had never lived with the mother and child, nor had he ever supported the child. Moreover, the mother had at all times retained custody of the child, and opposed his action. Furthermore, the husband, although no longer living with the family, opposed the action and continued to assert his fatherhood of the child, which protected the child against the social stigma of being branded the child of an adulterous relationship. Additionally, the statute's application did not violate equal protection. There is no distinction based upon gender, since mothers are also bound by the statute; furthermore, dissimilar treatment was warranted as to the two men, in view of legitimate public policy reasons. *Vincent B. v Joan R. (1981, 2nd Dist) 126 Cal App 3d 619, 179 Cal Rptr 9.*

A woman who was conclusively presumed to be the child of her mother's husband (*Evid. Code, § 621*, subd. (a)) and who was accordingly precluded from proving, in probate proceedings, that the decedent was in fact her biological father was not denied due process of law, since her interest in proving such fact did not outweigh the state's interest in preventing her from rebutting the presumption. The alleged natural father was dead, so there was no possibility of an ongoing relationship. All the woman could hope to gain was a right of inheritance, which was an interest of a lower order. The state's interests, by contrast, were substantial and the policies promoted by the conclusive presumption of legitimacy well-served, given that the woman had been reared and supported by her presumed father, who was named as father on her birth certificate, and that the familial relationship between them was far more palpable than the biological relationship she had with decedent. *Estate of Cornelious (1984) 35 Cal 3d 461, 198 Cal Rptr 543, 674 P2d 245.*

The application of *Evid. Code, § 621* (which provides that the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage), to a child's stepfather, who had been having sexual relations with the child's mother while she was still married to her former husband, and who did not claim paternity at the time of the child's birth or for four years thereafter while the mother and her former husband remained married and continued to live together, did not violate the stepfather's due process rights. The abstract interest the stepfather had in

establishing himself as the child's "legal" father, notwithstanding the established and continuing emotional and financial father–daughter relationship between the child and her mother's former husband, were not as weighty as if the state had attempted to intervene or prevent the establishment of a relationship between the putative father and child. Rather, the stepfather's private interest in establishing a biological relationship in a court of law was overridden by the substantial state interests in familial stability and the welfare of the child. *Michelle W. v Ronald W. (1985) 39 Cal 3d 354, 216 Cal Rptr 748, 703 P2d 88.*

The operation of paternity statutes affording protection to husband and wife from a donor assertion of paternity (*Civ. Code, §§ 7004, 7006*; *Evid. Code, § 621*), does not deny equal protection by failing to provide similar protection to an unmarried woman, since a married woman and an unmarried woman are not similarly situated for purposes of equal protection analysis. In the case of a married woman, the marital relationship invokes a long–recognized social policy of preserving the integrity of the marriage; no such concerns arise where there is no marriage at all. Equal protection is not violated by providing that certain benefits or legal rights arise only out of a marital relationship. *Jhordan C. v Mary K. (1986, 1st Dist) 179 Cal App 3d 386, 224 Cal Rptr 530.*

The state's interest in preserving the integrity of the matrimonial family is so significant that it outweighs most other interests. Thus, in a reverse paternity action by a man seeking to establish that he was the biological father of the daughter of a married woman with whom he had allegedly had an affair, the application of *Evid. Code, § 621* (the issue of a married woman cohabiting with her husband, who is not impotent or sterile, is a child of that marriage), comported with the requirements of due process of law. Plaintiff's private interest in establishing a biologicial relationship in a court of law was overridden by the substantive state interests in familial stability and the welfare of the daughter. *Michael H. v Gerald D. (1987, 2nd Dist) 191 Cal App 3d 995, 236 Cal Rptr 810,* affd *491 US 110, 105 L Ed 2d 91, 109 S Ct 2333.*

Evid. Code, § 621 (the issue of a married woman cohabiting with her husband, who is not impotent or sterile, is a child of that marriage), does not purport to determine factually the biological paternity of a child, nor do the actions of judges create or sever genetic bonds. Further, the state has an interest in preserving and protecting the developed parent–child and sibling relationships that give young children social and emotional strength and stability. Thus, in a reverse paternity action by a man seeking to establish that he was the biological father of the daughter of a married woman with whom he had allegedly had an affair, in which action the daughter cross–complained to establish a legal or de facto/psychological parent–child relationship with plaintiff or with the husband of the married woman, the daughter was not denied due process by application of § 621 to her claim. *Michael H. v Gerald D. (1987, 2nd Dist) 191 Cal App 3d 995, 236 Cal Rptr 810,* affd *491 US 110, 105 L Ed 2d 91, 109 S Ct 2333.*

A state statute (*Ev C § 621*) providing that (1) a child of a married woman cohabiting with her husband is presumed to be a child of the marriage where the husband is not impotent or sterile, and (2) the presumption may be rebutted by blood tests, but only if a motion for such tests is made, within 2 years from the date of the child's birth, by (a) the wife, if the natural father has filed an affidavit acknowledging paternity, or (b) the husband, will be held by the United States Supreme Court not to violate the due process clause of the Federal Constitution's Fourteenth Amendment insofar as the statute is applied to deny a man the opportunity to obtain—absent a timely motion for blood tests—a judicial determination that he is a child's biological father and to obtain visitation rights, where (1) four Justices of the Supreme Court are of the view that the statute does not infringe on any protected liberty interest of the putative father, because the power of a natural father to assert parental rights over a child born into a woman's existing marriage with another man is not so deeply embedded within society's traditions as to be a fundamental right qualifying as a liberty interest, and (2) a fifth Justice is of the view that the state's statutory scheme, as applied in the case at hand, is consistent with due process, because (a) it provides that reasonable visitation rights may be granted to any person, other than a parent, having an interest in the child's welfare, (b) it gives a trial court the authority both to hear a plea for visitation rights by a natural father, as a person having such an interest, and to grant him such rights if the child's best interests so warrant, (c) a trial court found not only that the conclusive presumption was applicable in the case at hand but also that it was not in the best interests of the child in question that the putative father have visitation rights, and (d) therefore, under the circumstances, the putative father in question was given a fair opportunity to show that he was the child's natural father and that the child's interests would be served by granting him visitation rights. *Michael H. v Gerald D. (1989) 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333.*

3. Construction

The so–called conclusive presumption in *Ev Code, § 621* (formerly Code Civ Proc § 1962 subd 5), providing that, notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is "conclusively presumed" to be legitimate, is really not a presumption but rather a rule of substantive law. *Jackson v*

Jackson (1967) 67 Cal 2d 245, 60 Cal Rptr 649, 430 P2d 289.

The presumption contained in *Code Civ Proc, § 1962*, subd 5 (now *Evid Code, § 621*), that the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate, is a conclusive presumption and, as such, constitutes a substantive rule of law. *Hess v Whitsitt (1967, 2nd Dist) 257 Cal App 2d 552, 65 Cal Rptr 45.*

Cohabiting means living together ostensibly as man and wife; to cohabit is simply to live or dwell together, to have the same habitation, so that where one lives and dwells, there does the other live and dwell also. *S. D. W. v Holden (1969, 1st Dist) 275 Cal App 2d 313, 80 Cal Rptr 269.*

As used in *Evid Code, § 621* (presumption of legitimacy), "cohabiting" means living together as husband and wife. *Keaton v Keaton (1970, 1st Dist) 7 Cal App 3d 214, 86 Cal Rptr 562.*

"Cohabiting" has the settled meaning of living together as husband and wife, and, absent impotency of the husband, where a child is conceived during such cohabitation, by whatever male seed, a conclusive presumption that the child is legitimate, and the husband its father, attaches; the husband is the legal father even though biologically the fact may be otherwise (*Evid Code, § 621*). *Louis v Louis (1970, 1st Dist) 7 Cal App 3d 851, 86 Cal Rptr 834.*

4. Application

In an action involving the paternity of a child, the trial court erred in failing to apply the conclusive presumption of legitimacy of *Evid Code, § 621*, where there was no evidence that the husband was impotent, and where the court found that the child was conceived well within a period of cohabitation of the spouses stipulated to by the parties; although blood tests and other evidence were admissible on the issue whether conception did in fact occur during cohabitation of the spouses, when the trial court found that conception did so occur, the statutory presumption of legitimacy attached. *Keaton v Keaton (1970, 1st Dist) 7 Cal App 3d 214, 86 Cal Rptr 562.*

On a motion to set aside a final decree of divorce, the trial court erred in refusing to apply the conclusive legitimacy presumption of *Evid Code, § 621*, to a child born to the wife after entry of the final decree, where, following the interlocutory decree the parties "cohabited" and "lived together," where the child was born 286 days after final separation, and where there was no issue of the husband's impotence. During the period following the interlocutory decree in which the parties lived together, they were husband and wife cohabiting with each other, and the statute was applicable to issue conceived during that period. *Louis v Louis (1970, 1st Dist) 7 Cal App 3d 851, 86 Cal Rptr 834.*

In a paternity action in which defendant refused to respond to requests for admissions that would give rise to conclusive presumption (*Evid. Code, § 620*) that defendant's wife's child was a child of the marriage (*Evid. Code, § 621*), on the ground of his privilege against self–incrimination, defendant could not constitutionally be required to respond to the requests for admissions in the absence of a tender of use immunity for past failure to support the child. *Pen. Code, § 270e*, provides for admissibility of a final establishment of paternity in "any prosecution" pursuant to that section, and it thus did not appear from a consideration of all the circumstances that defendant's answer to the requested admissions could not possibly have a tendency to incriminate him. However, defendant had no right to use immunity with respect to criminal prosecution for possible future failure to support. While the privilege of self–incrimination applies in some cases to prospective acts, the hazards of incrimination must be substantial and real, and not attenuated. *Smith v Superior Court of Monterey County (1980, 1st Dist) 110 Cal App 3d 422, 168 Cal Rptr 24.*

To invoke the presumption of paternity set forth in *Evid. Code, § 621* (husband cohabiting with mother is presumed to be father of child), a husband and wife must be cohabiting when the child is conceived. *County of Orange v Leslie B. (1993, 4th Dist) 14 Cal App 4th 976, 17 Cal Rptr 2d 797.*

In a paternity proceeding in which each of two men claimed to be the legal father of a minor child, the trial court erred in finding applicable the presumption of Evid. Code, former § 621 (now *Fam. Code, § 7540*) (child of wife cohabiting with husband conclusively presumed to be child of marriage). The mother of the child was married to the biological father, was cohabiting with the other man, was having a sexual relationship with each of them, and became pregnant during a weekend with the husband. A married couple must be cohabiting to trigger the conclusive presumption. Cohabitation has acquired a peculiar and appropriate meaning through its use in defining common law marriages. The settled meaning of cohabitation is living together as husband and wife. In this case, the evidence showed that the husband and wife were not cohabiting within the meaning of the statute. The wife was living with the other man, not the husband at the time that the child was conceived and born. Cohabitation implies more than a stolen weekend, or a sexual encounter; it is living together in a marital household, sharing day to day life. *Steven W. v Matthew S. (1995, 1st Dist) 33 Cal App 4th 1108, 39 Cal Rptr 2d 535.*

5. Avoidance of Presumption

A husband is entitled to avoid the operation of the "conclusive presumption" of legitimacy (*Ev Code, § 621,* formerly Code Civ Proc, § 1962 subd 5) by proof that, although there was cohabitation, it was impossible that the child was conceived during that period. *Jackson v Jackson (1967) 67 Cal 2d 245, 60 Cal Rptr 649, 430 P2d 289.*

The conclusive presumption established by *Code Civ Proc, § 1962* (now *Evid Code, § 621*), providing that the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate, is not subject to an exception of racial difference. *Hess v Whitsitt (1967, 2nd Dist) 257 Cal App 2d 552, 65 Cal Rptr 45.*

Evid. Code, § 621 (the issue of a married woman cohabiting with her husband, who is not impotent or sterile, is a child of that marriage), does not deny a presumed legitimate child the opportunity enjoyed by mothers and presumed fathers to rebut the presumption of legitimacy established by the statute. *Michael H. v Gerald D. (1987, 2nd Dist) 191 Cal App 3d 995, 236 Cal Rptr 810,* affd *491 US 110, 105 L Ed 2d 91, 109 S Ct 2333.*

6. Parties

A putative father who sought to establish a father and child relationship and secure visitation rights with respect to the child of a formerly married couple was not entitled to a determination that he was the child's biological father, as distinguished from legal father, in light of *Evid. Code, § 621* (providing that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage). In enacting the conclusive presumption, the Legislature must have intended that only one man can be adjudicated a child's father. Moreover, the putative father was not entitled to visitation rights, although *Civ. Code, § 4601,* gives discretion to grant visitation rights to "any other person having an interest in the welfare of the child." Under the circumstances, court–ordered visitation would be detrimental to the best interests of the child. *Vincent B. v Joan R. (1981, 2nd Dist) 126 Cal App 3d 619, 179 Cal Rptr 9.*

7. Evidence

In an action for a determination that defendant was the father of a child born during the mother's marriage to another man, and that defendant was liable for the child's support, the trial court erred in admitting evidence of non–intercourse between the mother and her husband during the relevant period and evidence of a blood test purporting to show that the husband was not the father of the child, where the husband and wife were admittedly living together at the time of conception, and particularly where there was evidence that the husband and wife had intercourse up to about three months before the conception of the child and that after its birth the husband told defendant that he "didn't think" the child was his; under the presumption of legitimacy of the issue of a wife cohabiting with her husband who is not impotent (*Evid Code, § 621*), it is not the burden of a third party in a paternity suit to supply evidence of the "non–impotency" of the husband. *S. D. W. v Holden (1969, 1st Dist) 275 Cal App 2d 313, 80 Cal Rptr 269.*

In an action for the dissolution of a marriage, it was reversible error to exclude medical testimony to the effect that the husband was sterile at the time of conception and thus, without considering such proffered evidence and determining its credibility and weight, to apply the conclusive presumption (*Evid Code, § 621*) that the issue of a wife cohabiting with a husband who is not impotent is legitimate, and on the basis of such presumption, to decree the husband to be the father of a child born to the wife prior to the action and to order him to pay child support. *In re Marriage of Groner (1972, 2nd Dist) 23 Cal App 3d 115, 99 Cal Rptr 765.*

In an action by a putative father who sought to establish a father and child relationship and secure visitation rights with respect to the child of a formerly married couple, the trial court properly granted summary judgment for the couple on the basis of *Evid. Code, § 621* (providing that the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage). The couple were clearly husband and wife at the time of conception, and cohabitation at that time was shown by the fact they lived together as husband and wife in the same habitation. Accordingly, evidence of lack of sexual relations was irrelevant. Furthermore there was no evidence that the husband was sterile or impotent. *Vincent B. v Joan R. (1981, 2nd Dist) 126 Cal App 3d 619, 179 Cal Rptr 9.*

In an action by a county to establish defendant's paternity of a child whose mother was receiving public assistance, the trial court erred in determining that another man was conclusively presumed to be the child's father, even though the other man was married to and cohabiting with the mother at the time of the child's birth. To invoke the *Evid. Code, § 621,* presumption of paternity, a husband and wife must be cohabiting when a child is conceived. Although the evidence showed

that the mother and the other man were married at the time of the child's birth, they were not cohabiting when the child was conceived. The Legislature did not draft or amend the statute to require cohabitation at the time of conception, but the Legislature is presumed to have been aware of and acquiesced in previous judicial constructions requiring cohabitation at conception. Inasmuch as the evidence showed that the mother was five months pregnant when she met the other man, the *Evid. Code, § 621*, presumption was inapplicable. *City and County of San Francisco v Strahlendorf (1992, 1st Dist) 7 Cal App 4th 1911, 9 Cal Rptr 2d 817.*

8. Criminal Cases

The conclusive presumption that the issue of a wife cohabiting with her husband, who is not impotent, is legitimate, (*Evid. Code, § 621*), applies to criminal prosecutions. Although public opinion regarding illegitimacy may have changed, the Legislature did not see fit to make any changes in the law when it incorporated the presumption into *Evid. Code, § 621*, without providing that the presumption was to apply to civil proceedings only. *People v Russell (1971, 5th Dist) 22 Cal App 3d 330, 99 Cal Rptr 277.*

The conclusive presumption that the issue of a wife cohabiting with her husband, who is not impotent, is legitimate (*Evid. Code, § 621*), applies to a criminal prosecution for incest (*Pen. Code, § 285*). Therefore, in the prosecution of an uncle for incest with his niece, in which the evidence was conflicting as to whether the defendant was himself an illegitimate child and therefore as to whether defendant was "in fact" merely the niece's half–uncle, the jury was properly foreclosed from making such "factual" determination by an instruction requiring it, instead, to determine whether defendant's mother and her husband were cohabiting at the time of the defendant's conception, and, if so, requiring it in effect to find, in view of the husband's undisputed potency at that time, that defendant was the niece's uncle by the full blood as a matter of law, in accordance with the conclusive presumption of legitimacy. *People v Russell (1971, 5th Dist) 22 Cal App 3d 330, 99 Cal Rptr 277.*

The presumption contained in *Evid. Code, § 621*, providing that the issue of a wife cohabiting with her husband who is not impotent or sterile is conclusively presumed to be a child of the marriage, is applicable to a criminal prosecutions for failure to support a minor child. *People v Thompson (1979, 4th Dist) 89 Cal App 3d 193, 152 Cal Rptr 478.*