

SURVEY: WOMEN AND CALIFORNIA LAW

by Elaine Booras*

This survey of California case law and legislation is a regular feature of the Women's Law Forum. The purpose of the Survey is to summarize all California Supreme Court cases, courts of appeal cases, and legislation enacted in the past year that are of special importance to women. The focus of the Survey is on presenting issues most pertinent to women, rather than on analyzing all issues raised in each case or bill.

The survey period for cases in this issue is from June 1980 through February 1981. Summaries of significant legislation enacted from October 1, 1979 through September 30, 1980 are also included.

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I. CRIMINAL LAW

A. RAPE AND OTHER SEX OFFENSES

1. *Dual Plea not Prejudicial*

People v. Guillebeau, 107 Cal. App. 3d 531, 166 Cal. Rptr. 45 (1st Dist. 1980). Defendant was convicted of raping a woman and murdering her four-month-old daughter. On appeal, he contended the trial court erred by informing the jury of his pleas of not guilty and not guilty by reason of insanity before trial. He later withdrew the insanity plea, but contended the announcement of the dual plea prejudiced the jury against him. He believed that announcement of a dual plea was prejudicial in that the jury would be more likely to convict knowing he could later avoid punishment with a successful insanity defense.

The court of appeal rejected this argument, citing *People v. Leong Fook*, 206 Cal. 64, 273 P. 779 (1928). In *Leong Fook* the court intimated that a fair jury, informed of a dual plea of not guilty and not guilty by reason of insanity would not be influenced in their decision on defendant's guilt by knowledge that defendant might later be found not guilty by reason of insanity.

Procedure for dual pleas is found at Penal Code section 1026. The defendant is first tried as if he had only pled not guilty. If convicted, a separate trial is held on the issue of sanity either before the same jury or a new jury, at the court's discretion. This concept of a "bifurcated" trial was upheld in *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

Defendant also argued he was prejudiced by being forced to drop his insanity plea because of the potential prejudice due to the announcement of the dual pleas. The court failed to find evidence of coercion on the part of the prosecution or the court and concluded that the withdrawal of the insanity plea was a tactical decision, not to be second-guessed by the appellate court. The court found defendant could have reinstated his insanity plea at the conclusion of the trial on a showing of good cause. *In re Kubler*, 53 Cal. App. 3d 799, 126 Cal. Rptr. 25 (1975).

2. *Admissibility of Rape Expert's Testimony*

People v. Clark, 109 Cal. App. 3d 88, 167 Cal. Rptr. 51 (4th Dist. 1980). Testimony of a "rape expert" was challenged on appeal by a man convicted of forcible rape and oral copulation. The court of appeal held the admission of testimony by the police officer, an expert on sexual assault, that conduct of the victim was reasonable, was reversible error.

The court cited *People v. Guthreau*, 102 Cal. App. 3d 436, 162 Cal. Rptr. 376 (1980), which held testimony of a rape expert inadmissible in a criminal prosecution for forcible rape. The court there ruled the test for resistance in a rape case is not whether the victim's resistance was reasonable in an abstract sense, but whether the resistance was sufficient to reasonably manifest the victim's refusal to the defendant. Therefore, the expert's opinion as to the rape victim's resistance was irrelevant.

Whether admission of such an expert's testimony constitutes reversible error was discussed in *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956). *Watson* requires an examination of the entire record in order to determine whether, without the testimony, a result more favorable to defendant would have been reached. The court here ruled it was reasonably probable a result more favorable to defendant would have been reached absent expert testimony because the case was a very close one. The court felt additional testimony could have tipped the balance. When the case had been previously tried without the expert testimony, there had been a mistrial.

3. *Testimony of Suspected Prostitutes in Statutory Rape Action*

† *People v. Dunn*, 107 Cal. App. 3d 138, 165 Cal. Rptr. 574 (1st Dist. 1980). Defendant was charged with statutory rape and pandering. Upon denial of his motion to suppress, he pled guilty to statutory rape. His arrest was based solely on the testimony of two women, given after their arrest for failure to show proper

† The California Supreme Court denied a hearing in this case and ordered the opinion not published Aug. 28, 1980. Under CAL. CT. R. 977 this opinion may not be cited to any court. The case appears in the Survey solely to familiarize the reader with the issues presented.

identification. The two fifteen-year-olds had been stopped on suspicion of prostitution because they looked young, were in an area where prostitution was common, and were unescorted at night. During questioning after arrest, the women admitted working for defendant as prostitutes and stated they had had sexual intercourse with him. Defendant challenged the denial of his motion to suppress on the basis of the illegal detention of the women. The court of appeal accepted his argument and ordered the evidence suppressed.

The court cited *People v. Superior Court (Kiefer)*, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970), which held that police must be able to show specific, articulable facts justifying their suspicion of crime. Relying on this, the court ruled that the officers had no reasonable basis to believe the women were prostitutes. They were not soliciting prostitution, and the area in which they were stopped was near a popular hangout of high school students.

4. *Exemption from Commitment as Mentally Disordered Sex Offender*

People v. Evenson, 103 Cal. App. 3d 659, 163 Cal. Rptr. 210 (1st Dist. 1980). Defendant Evenson appealed from an order committing him to the State Department of Health for placement at a state hospital as a Mentally Disordered Sex Offender (MDSO).

California Welfare and Institution Code section 6300.1 provides an exemption from state hospital commitment to persons being treated by prayer in the practice of the religion of any well-recognized church, provided they do not pose a danger to the health and safety of others. Evenson contended he fell within this exemption because of his prayer therapy at a Baptist church which he had joined after being charged with rape.

Evenson conceded he was an MDSO. Because MDSOs, as defined by Welfare and Institutions Code section 6300, are dangerous to the health and safety of others, the court concluded that "a person dangerous enough to be an MDSO . . . is by the same token too dangerous to qualify for the prayer treatment exemption," and affirmed the lower court decision. *Id.* at 662, 163 Cal. Rptr. at 211.

Evenson had argued that because the section 6300.1 exemption for prayer treatment directly followed section 6300 definition of MDSO in the Welfare and Institutions Code, section 6300.1 should be construed to require a greater degree of dangerousness than that referred to in section 6300.

The court analyzed the legislative history of section 6300.1 and concluded the commitment exemption applies only to mentally retarded persons and juvenile court wards considered to be not dangerous, and that the proximity of section 6300.1 to section 6300 in the Code was inadvertent.

5. *Termination of Treatment as Mentally Disordered Sex Offender*

In re Weston, 104 Cal. App. 3d 297, 163 Cal. Rptr. 696 (2d Dist. 1980). Defendant filed a habeas corpus petition challenging the legality of an order terminating his treatment as a mentally disordered sex offender (MDSO) and sentencing him to state prison. Defendant was committed to a state hospital as an MDSO after pleading guilty to rape by threat of great bodily harm.

The director of the state hospital later submitted to the superior court a letter of intent to place defendant on outpatient treatment status under Welfare and Institutions Code section 6325.1(a). Under section 6325.1(a), the director of the state hospital must believe the patient is no longer dangerous to the health and safety of others and that the patient would benefit from outpatient treatment. The court may either approve or disapprove the announcement of intent.

The court disapproved the proposal for outpatient status, but, rather than returning the defendant to the hospital, sentenced him to state prison.

The Attorney General's argument supporting the order asserted that an action under section 6325.1(a) constitutes an admission that the patient is no longer an MDSO because the hospital director must believe the patient is no longer dangerous to society. An MDSO is defined as one who is dangerous to the health and safety of others.

The appellate court declined to read section 6325.1(a) so broadly, and held that section 6325.1(a) does not deal with termination of MDSO status. It deals with a change in the MDSO's status from inpatient to outpatient, or from patient in one hospital to patient in another.

The court ruled that, under section 6325.1(a), a judge is only authorized (1) to approve the proposal and give outpatient status to the patient, or (2) to disapprove the proposal and send the patient back to the state hospital. The trial court was not authorized to sentence defendant to state prison.

6. *Definition of Sex Offense in Mentally Disordered Sex Offender Proceeding*

People v. Coronado, 104 Cal. App. 3d 491, 163 Cal. Rptr. 746 (4th Dist. 1980). A man was charged with battery and annoying and molesting a child. The man had placed his hands on a twelve-year-old girl's buttocks. Defendant pled guilty to battery, and the other charges were dropped. The municipal court later certified defendant's case to superior court for determination of whether defendant was a mentally disordered sex offender (MDSO). Defendant was found to be an MDSO and committed to the State Department of Health for six weeks.

Defendant appealed the commitment on the ground that the superior court had no jurisdiction to determine whether he was a MDSO, because battery is not a sex offense. Under Welfare and Institutions Code section 6302(a), a sex offense is defined as any offense which can be shown by clear proof to have been committed primarily for purposes of sexual arousal or gratification. According to the appellate court, defendant's probation report provided sufficient evidence that defendant's conduct was motivated by sexual gratification.

Defendant also contended that the municipal court did not comply with Welfare and Institutions Code section 6302(d). This section requires that the municipal court give a statement to the superior court containing their reasons for believing a person is a MDSO. The municipal court in this case used the probation report as its "statement." The appellate court conceded this did not comply to the letter with section 6302(d), but found that the statement fulfilled the statute's purpose by providing notice to

defendant of the nature of the certification.

The dissent urged that the probation report did not provide clear proof of defendant's motivation in touching the girl, and that defendant was never told he could contest statements in the probation report recommending MDSO proceedings.

7. *Tattooing of Female Breast Considered Mayhem*

People v. Page, 104 Cal. App. 3d 569, 163 Cal. Rptr. 839 (1st Dist. 1980). Defendants Page and Appleby were convicted of mayhem for forcibly tattooing a woman's breast and abdomen. Both appealed on different grounds.

Page argued that Penal Code section 203 does not provide notice that tattooing may constitute mayhem. He contends his conviction was a retroactive application of the statute and, as such, a denial of due process. Penal Code section 203 defines mayhem in part as the unlawful, malicious disfiguring of a human being's body.

The court of appeal in *Goodman v. Superior Court*, 84 Cal. App. 3d 621, 148 Cal. Rptr. 799 (1978), held that a five-inch scar on a person's face may constitute mayhem. Page, however, argued that tattooing is qualitatively different from cutting because many people voluntarily have themselves tattooed. The court of appeal rejected his argument because the victim in this case did not consent to the tattooing.

Appleby argued that the torso is not a "member" of the body within the meaning of Penal Code section 203, and that it was therefore not mayhem to tattoo the woman's breast and abdomen. The appellate court held that, while it may be argued that an abdomen is not a member of the body, a breast clearly qualifies as a member of the body. The court cited several dictionary definitions of "member" as authority.

8. *In-Court Identification not Suggestive*

People v. Peggese, 101 Cal. App. 3d 415, 162 Cal. Rptr. 510 (2d Dist. 1980). Defendant appealed from a conviction of rape on three grounds: inadmissibility of evidence, abuse of judicial discretion in refusing a jury's request to view the crime scene,

and a suggestive in-court identification. The defendant sought to suppress a statement made to police before the rape that he was "going to find me a woman." The court of appeal found the statement relevant and properly admitted because the statement suggested Peggese carried out his intention by committing the rape. Even though the statement on its face did not manifest the intent to rape, the inference that Peggese intended to rape was found to be a reasonable one.

The trial court's refusal to let jurors view the crime scene was justified according to the court of appeal because the decision to allow a jury view is completely within the trial court's discretion and honoring the juror's request would have meant reopening the case.

The court of appeal found the in-court identification not suggestive on the grounds that the exclusionary rule for in-court identifications only applies to procedures used by police; identification in the present case was made by the victim to the hotel manager.

B. MARITAL COMMUNICATIONS PRIVILEGE

1. *Admissibility of Letter Between Inmate Spouses as Evidence*

People v. Rodriguez, 117 Cal. App. 3d 706, 173 Cal. Rptr. 82 (2d Dist. 1981), *hearing denied*, July 1, 1981. On appeal from a murder conviction, an inmate challenged the admissibility of a letter from him to his wife, also an inmate. He argued the letter was protected by the marital privilege for confidential communication between spouses under Evidence Code section 980. The trial court held prison interspousal letters are admissible as evidence where the spouses had no reasonable expectation of privacy.

In this case, the man had signed a written statement authorizing the opening of his mail and he left the letter to his wife unsealed on cell bars for delivery. This led the trial court to believe defendant could not reasonably have expected his letter would remain private. The court of appeal affirmed, relying on *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972). In *North*, the court found prison conversations

between spouses are not generally privileged, because of prison security considerations. Prison security may outweigh the need for privacy between spouses. A privilege does arise, however, where a reasonable expectation of privacy exists. In *North*, the circumstances of the marital conversation warranted finding an expectation of privacy. There, the inmate and his wife had been lulled into believing their conversation in a detective's office was confidential. In the present case, the prison guards gave defendant no indication that his letter would remain private. The court also stated that the rule applying to oral communications between spouses in a prison setting may extend to written communication.

2. *Suppression of Taped Marital Conversation Between Inmate Spouses*

†*Robinson v. Superior Court*, 105 Cal. App. 3d 249, 164 Cal. Rptr. 389 (3d Dist. 1980). Suppression of a taped marital conversation was sought by the husband. The conversation was taped for the purpose of gaining incriminating evidence while the husband and wife, both recently arrested, were alone in a police interview room with the door closed. The court of appeal held the couple had a reasonable expectation of privacy and that police action constituted an unreasonable seizure under the federal and state constitutions.

The court relied on *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972). In *North*, an inmate and his wife were found to have had a reasonable expectation of privacy when left alone in a detective's office with the door closed. Their subsequent taped conversation was suppressed. Surreptitiously taped conversations are suppressible, under *Katz v. United States*, 389 U.S. 347 (1967), if the parties to the conversation had a reasonable expectation of privacy. In *Katz*, the government had taped defendant's words in a public telephone booth.

Under *North*, marital conversations are presumed confidential unless the state can show a compelling interest, such as jail security, in taping the conversation. For example, in *People v.*

†Hearing granted, June 25, 1980.

Hill, 12 Cal. 3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974), the court held that police had a legitimate security interest in taping the conversation of an inmate and his wife in a visiting room. Here the court found no compelling police interest in taping the couple's conversation because the admitted purpose of the taping was to gain incriminating evidence and not to insure jail security. The court also found the closed interview room gave the couple an indicia of privacy. The marital presumption of confidentiality plus the couple's belief that the room was private gave rise to a reasonable expectation of privacy.

C. LEGISLATION

1. *Rape*

S.B. 1440—Wilson

Chapter 880

Statutes of 1980

Polygraph Examinations. Prohibits requirement that the complaining witness in a sex offense case take a polygraph examination before filing an accusatory pleading. This act adds section 637.4 to the Penal Code.

A.B. 3420—Hart

Chapter 409

Statutes of 1980

Punishment. Increases state prison term from 3, 4, or 5 years to 3, 6, or 8 years for the crime of penetration of a genital or anal opening by a foreign object. This act amends section 289 of the Penal Code.

S.B. 862—Robbins

Chapter 917

Statutes of 1980

Counselor-Victim Privilege. Establishes sexual assault counselor-victim privilege for confidential communications made at a rape crisis center; requires counselor to be registered as a sexual assault counselor; requires specified peace officer participation in sexual assault case investigation training. This act amends section 912 of, and adds Article 8.5 (commencing with section 1035) to, Chapter 4 of Division 8 of the Evidence Code; amends section 1598.1 of the Health and Safety Code; and amends section 13516 of, and adds Article 3 (beginning with section 13836) and Article 4 (beginning with section 13837) to, Chapter 1 of Title 6

of Part 4 of the Penal Code, and makes an appropriation therefor.

S.B. 500—Watson

Chapter 16

Statutes of 1980

Psychiatric Examination of Victim. Prohibits trial court from ordering any witness or victim in a sexual assault prosecution to submit to a psychiatric examination for the purpose of assessing credibility. This act adds section 1112 to the Penal Code.

A.B. 2899—Levine

Chapter 587

Statutes of 1980

Elements of Action. Redefines rape as sexual intercourse accomplished against the will by force or fear of immediate and unlawful bodily injury; deletes provision requiring proof of victim resistance. This act amends sections 261, 262, 667.5, 1203.06, 1203.065, 1203.075 and 1203.09 of the Penal Code.

2. *Domestic Violence*

A.B. 1946—Moore

Chapter 538

Statutes of 1980

Domestic Violence Programs. Gives priority to agencies and organizations which administer domestic violence programs in receiving funds collected from marriage license and confidential marriage certificate fees; also provides for alternate funding of such agencies and organizations by a county. This act amends section 18293 of, and adds sections 18306 and 18307 to, the Welfare and Institutions Code, and takes effect immediately as an urgency measure.

II. FAMILY LAW

A. COMMUNITY PROPERTY

1. *Computation of Community Property Interest in Marital Residence*

In re Marriage of Moore, 28 Cal. 3d 366, 618 P.2d 208, 168 Cal. Rptr. 662 (1980). A man appealed from an interlocutory judgment of dissolution, charging error in the computation of the community property interests in the marital home.

The wife made a down payment on the home several months before the marriage and made seven monthly payments. During the marriage, the couple lived in the home and made additional mortgage payments out of community property. After separation, the wife made the mortgage payments from her separate property. The trial court awarded the home to the wife as her separate property, and stated that the rights of the parties were to be determined on an equitable basis. The court of appeal reversed and remanded, holding that the husband's interest in the home was a community, not an equitable, interest. *In re Marriage of Moore*, 104 Cal. App. 3d 145, 163 Cal. Rptr. 431, (1980). The California Supreme Court affirmed.

The dispute arose over computation of the husband's community property interest in the home. The husband argued that the community property interests should be based on the full amount of community property payments toward the home, including interest, taxes, and insurance payments. The trial court ruled that taxes, insurance, and interest payments should not be considered in determining community property interests. The husband had cited *Vieux v. Vieux*, 80 Cal. App. 222, 251 P. 640 (1926), in which the court included interest and tax payments in determining community property interests in the marital home. The Supreme Court found inadvertent error in *Vieux*, but agreed with the rule that a home purchased by a spouse before marriage is community property only to the extent that the purchase price is contributed by the community. The husband was thus entitled to a pro tanto community interest in the home in the ratio that the payments on the purchase price with community funds bore to the payments made with separate funds. *Estate of Neilson*, 57 Cal. 2d 733, 744, 371 P.2d 745, 752, 22 Cal. Rptr. 1, 7 (1962).

2. *Division of Community Property in Kind*

Emmett v. Emmett, 109 Cal. App. 3d 753, 169 Cal. Rptr. 473 (2nd Dist. 1980). A husband appealed an interlocutory judgment of dissolution, contesting the trial court division of community property. He asserted the property should have been divided in kind, one half to each party. The trial court awarded the husband his entire Navy retirement pension and awarded the wife the marital residence. The husband was ordered to pay the wife a monthly sum to equalize the division. He was to pay

\$100 a month for two and a half years and, thereafter, \$200 a month until paid in full.

The husband argued that Civil Code section 4800(a) mandates distribution of property in kind between the parties, with an exception for special economic circumstances. The court of appeal found this contention to be unsupported and held the trial court can exercise its reasonable discretion in distributing community property under Civil Code section 4800. The California Supreme Court, in *Phillipson v. Board of Administration*, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970), stated that dissolution courts are not compelled to divide community property pension rights equally between the parties. *In re Marriage of Freiberg*, 57 Cal. App. 3d 304, 127 Cal. Rptr. 792 (1976), holds that the method of distributing community property is within the discretion of the court, and may vary with the facts in each case.

In addition, the court of appeal found that the distribution of assets in this case was warranted by economic circumstances. Legislative history of the Family Law Act also suggested that the spouse who is given custody of a minor child should be awarded the marital residence as part of that spouse's share of the community property rather than selling the house and dividing the proceeds. Here the wife had been awarded custody of the couple's minor child.

3. *Separate Property Funds Used for Community Residence*

In re Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). Distribution of ownership interest in a house and vehicle were challenged by a husband upon dissolution. The house and motorhome were purchased with a combination of community and separate funds. The trial court deducted the wife's payments for home improvements and then awarded a community property interest in the residence.

The trial court determined the motorhome to be the wife's separate property. The California Supreme Court sustained the decision on the motorhome and remanded the issue of the residence for a determination on whether there was an agreement or understanding between the parties as to the nature of their in-

terest in the house.

Courts of appeal decisions were in conflict regarding determination of separate and community property interests in a single family dwelling acquired during the marriage with both separate and community property funds. *In re Marriage of Bjornestad*, 38 Cal. App. 3d 801, 113 Cal. Rptr. 576 (1974), allowed only reimbursement for separate property contributions to the down payment on the purchase of the residence. *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979), awarded a pro rata apportionment of the equity appreciation between the separate and community property contributions to the purchase price. And *In re Marriage of Trantafello*, 94 Cal. App. 3d 533, 156 Cal. Rptr. 556 (1979), held that a residence was entirely community in nature absent an agreement or understanding between the parties to the contrary. The court resolved the conflict in favor of *Trantafello* and disapproved *Aufmuth* and *Bjornestad* to the extent they were inconsistent.

The court found *Trantafello* consistent with the Civil Code section 164 presumption that a residence acquired during a marriage as a joint tenancy is community property. Civil Code section 5110 presumes all property acquired during the marriage is community property. The court reasoned that because section 164 is more specific, a greater showing was necessary to overcome the presumption than required to overcome section 5110. A section 5110 presumption can be overcome by merely tracing the source of the funds to separate property; to overcome section 164, express agreement or understanding between the spouses is necessary, as in *Trantafello*.

The court reasoned that fairness requires a spouse be notified that his or her spouse expects to be reimbursed or have a separate property interest in property acquired partially by separate funds. Absent such notice, a spouse can presume to have made a gift to the community. The trial court did not discuss the matter of agreement or understanding between the spouses concerning the house and therefore the issue was remanded. However, the court did find an understanding between the parties as to the motorhome. The wife paid for seventy-five percent of the motorhome with her separate property and the husband had agreed to her taking title in her name only.

4. *Sale of Family Residence*

In re Marriage of Schultz, 105 Cal. App. 3d 846, 164 Cal. Rptr. 653 (2d Dist. 1980). In a dissolution case, the husband appealed the distribution of community property interests in the marital residence. The trial court, based on an adjusted accounting, had ordered the house sold with the assets used to satisfy creditors, the remainder to be divided between the husband and wife with the wife receiving a credit for debts already paid, child support arrearages, a medical bill, and attorney fees. The husband objected to the credit awarded the wife. The court of appeal held that, where community assets exceed liabilities, the trial court had no discretion under Civil Code sections 4800(a) and (b) to adjust the division of community interests.

Sections 4800(a) and 4800(b) mandate the distribution of assets and obligations of the community so that residual assets are awarded equally. The court distinguished *In re Marriage of Eastis*, 47 Cal. App. 3d 459, 120 Cal. Rptr. 861 (1975), which allowed an equitable distribution of community obligations. The court noted that *Eastis* involved a "no assets" situation, whereas here, assets exceeded community liabilities.

5. *Marital Residence Acquired as Gift*

In re Marriage of Camire, 105 Cal. App. 3d 859, 164 Cal. Rptr. 667 (2nd Dist. 1980). An interlocutory judgment of dissolution awarded the wife the marital residence as her separate property. The husband appealed, contending the house was community property. The trial court had ruled the house was a gift to the wife from her brother. Under Civil Code section 5107, property of a wife acquired by gift is considered her separate property. The husband, however, relied on Civil Code section 5110 which presumes that a single family residence acquired by husband and wife as joint tenants is community property.

The wife's brother offered her the home; her husband made arrangements for the brother to grant them the home by quitclaim as joint tenants. The couple then assumed payments on the home but never paid the brother the full value of the home. The court of appeal overlooked the couple's joint tenancy and found sufficient evidence to warrant a finding of a gift to the wife alone.

Affirming the trial court decision, the court noted *Beam v. Bank of America*, 6 Cal. 3d 12, 490 P.2d 257, 98 Cal. Rptr. 137 (1971), which held a trial court determination of community property is binding if supported by sufficient evidence, conflicting evidence, or evidence subject to different inferences. The court found support for a determination the house was a gift, citing testimony of the brother to that effect.

The husband also sought credit for his part of the monthly house payments but the court of appeal rejected this contention as well. The court ruled the couple's monthly payments were fair rental value for the property and that the community was not entitled to reimbursement for rental expenditures.

B. CHILD CUSTODY AND CONTROL

1. *Removal of Child from Parental Custody*

In re Jack H., 106 Cal. App. 3d 257, 165 Cal. Rptr. 646 (4th Dist. 1980). A mother appealed an order terminating her parental rights. The trial court found she had abandoned and neglected her children. The children had been in a foster home since 1972 after being declared "dependent" minors. The mother had visited the children four times a year until 1977 when she began visiting every two weeks. The trial court found these to be merely token visits (the mother asserted the reason for her previously infrequent visits was so as not to upset the children). In addition, the trial court based its decision on the fact that the mother lived with a man who, according to the court, posed a serious threat to the children's well-being.

The mother argued a lack of substantive evidence to support the trial court decision; the court of appeal agreed. Under Civil Code section 232(a)(1), termination of parental rights is authorized upon abandonment of the child. The trial court must find by "clear and convincing" evidence the children were left to the custody of another with intent to abandon. *In re Heidi T.*, 87 Cal. App. 3d 864, 151 Cal. Rptr. 263 (1978). According to section 232(a)(1), intent may be presumed from failure to communicate with the child. The trial court had found the token visits were evidence of failure to communicate. The court of appeal held the trial court wrongfully based its finding on the number of visits the mother had made, rather than on the genuineness of

the mother's effort to communicate under the circumstances. *In re Susan Lynn M.*, 53 Cal. App. 3d 300, 308-09, 125 Cal. Rptr. 707, 711-12 (1976). The court found the quantitative basis of the trial court's finding unsupported by case law.

The court also found the mother's relationship with the man she lived with irrelevant to the determination of abandonment, although it might have been relevant to the issue of the fitness of the mother's home.

Under Civil Code section 232(a)(2), parental custody and control may be terminated on finding a child has been neglected or cruelly treated, named a dependant minor, or out of parental custody for a year. The court found the trial court had improvidently relied on the children's dependency status in adjudging the mother neglectful under Civil Code section 232(a)(2). Neglect is a ground for establishing dependency, but "neglect" under section 232(a)(2) embraces a more narrow definition. The parent-child relationship should be severed only on a finding of extreme neglect. *In re Carmaleta B.*, 21 Cal. 3d 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978). There was no such finding in this case, said the court.

The trial court had also found return of the children to the mother would be detrimental because of her living situation. The court of appeal noted that evidence of "immorality" must be connected causally to a detrimental effect on the children's welfare in order to be adjudged detrimental. The court found the trial court's determination of detriment unsupported by the evidence.

2. *Withdrawal of Consent to Adoption*

Adoption of Jennie Lee, 111 Cal. App. 3d 422, 168 Cal. Rptr. 695 (4th Dist. 1980). Prospective adoptive parents appealed the grant of the natural mother's petition to withdraw consent to adoption. The court of appeal reversed, finding the trial court applied the wrong standard in allowing withdrawal of consent, and remanded the case.

Civil Code section 226(a) governs withdrawal of consent to adoption. It allows withdrawal of consent where reasonable in

view of the circumstances and in the best interests of the child. Although the trial court applied the first clause of section 226 (a), it erroneously applied Civil Code section 4600 in determining the interests of the child. Section 4600 is used to determine parental preference in cases in which the court is asked to award custody to persons other than a parent. In such cases, it must be found that parental custody would be detrimental to the child before the parents can be deprived of custody.

The court of appeal distinguished the situation in which a natural parent consents to adoption from one where custody is at issue. The court found that a parent who has consented to adoption gives up the parental preference otherwise applicable under Civil Code section 4600.

The trial court had found withdrawal of consent would not be detrimental to the child; however, the court failed to find withdrawal would be in the child's best interest. The court of appeal remanded the case for a determination of the second clause of Civil Code section 226(a): *i.e.*, Whether withdrawal of consent would be in the best interest of the child.

3. *Dispute Under the Uniform Child Custody Jurisdiction Act*

In re Marriage of Hopson, 110 Cal. App. 3d 884, 168 Cal. Rptr. 345 (1st Dist. 1980). Jurisdiction over child custody was disputed in this case. The mother appealed the dismissal for lack of jurisdiction of her action to enforce an Arizona custody decree. The court of appeal reversed, finding jurisdiction and acknowledging the validity of the Arizona decree.

The earlier Arizona decree had granted custody of the two children to the mother. The mother and children subsequently moved to California; the father moved to Tennessee. The father petitioned to modify custody in Arizona. While the modification was pending, the father abducted the children and returned to Tennessee, where he initiated custody proceedings. Meanwhile, the Arizona court denied the father's motion for custody.

Despite the Arizona decision, the Tennessee court granted custody to the father, and the California trial court accorded full faith and credit to the Tennessee decision. On appeal, however, the Tennessee decree was found to violate the Uniform Child

Custody Jurisdiction Act (UCCJA), adopted by California in 1973 (Civil Code sections 5150-5174). Although Tennessee has not adopted the UCCJA, the court felt compelled to apply the Act in determining the propriety of Tennessee's exercise of jurisdiction. (Arizona has adopted the UCCJA.)

The UCCJA sets uniform criteria for establishing jurisdiction in custody actions. Civil Code section 5152(1)(b) requires that a child and at least one parent have strong contacts within the state and that there be substantial evidence concerning the child's care and relationships with others for jurisdiction to lie. Jurisdiction must also be in the best interest of the child.

The California court of appeal conceded Tennessee technically had jurisdiction under the UCCJA because the children had lived with their father in Tennessee for three years following the abduction. However, the court found the Tennessee court's action directly conflicted with the spirit of the legislation. As stated in *Ferreira v. Ferreira*, 9 Cal. 3d 824, 829, 512 P.2d 304, 307, 109 Cal. Rptr. 80, 83 (1973), the court of the forum state should refuse to reopen the question of custody of a child whose custody is vested under an existing decree in a nonresident parent. The court also noted the "clean hands doctrine" of the UCCJA in Civil Code section 5157. Under section 5157, a court should refuse jurisdiction to reexamine an out of state custody decree in circumstances of child abduction by a petitioner.

4. *Admissibility of Medical Record as Evidence of Parental Fitness*

Koshman v. Superior Court, 111 Cal. App. 3d 294, 168 Cal. Rptr. 558 (3d Dist. 1980). A mother petitioned for writ of mandate to prevent disclosure of her medical records in a custody action. The non-custodian father sought discovery of the records to determine whether the mother was fit to be awarded custody. The superior court denied the mother's motion to quash the subpoena duces tecum served on the hospital. The court of appeal granted the mother's petition for writ of mandate compelling the superior court to prevent disclosure of the records.

The court of appeal held that where the father, not the mother, had raised the issue of the mother's medical condition,

the mother did not waive her physician-patient privilege. Evidence Code section 996 compels disclosure of medical information only in cases in which the patient's own action requires disclosure. However, the court noted that in a custody dispute there may be circumstances in which the best interests of the child would be disserved by assertion of a privilege by a parent. The court said this should be considered by the legislature as a potential exception to the physician-patient privilege.

5. *Visitation Rights of Step-Parent*

Perry v. Superior Court, 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (5th Dist. 1980). An order granting visitation privileges to a stepfather in a dissolution action was challenged by the natural mother. The court of appeal reversed the order and held that, in dissolution of marriage actions, the trial court lacks jurisdiction to award visitation privileges to a husband who is neither the natural nor adoptive parent of the child of the wife.

The court based its decision on Civil Code section 4351 which expressly limits the jurisdiction of the superior court in a marital dissolution action to minors who are "children of the marriage."

The husband argued he was entitled to visitation rights under Civil Code section 4601. Section 4601 gives a court discretion in granting visitation rights to "any other person having an interest in the welfare of the child." The court, however, construed this section to permit a court to award visitation rights only if the court otherwise has jurisdiction over custody. Here, because the child was not a "child of the marriage," the court could not make any decisions concerning custody or visitation.

6. *Termination of Joint Custody Arrangement*

In re Marriage of Schwartz, 104 Cal. App. 3d 92, 163 Cal. Rptr. 408 (2d Dist. 1980). A divorced mother sought termination of a joint custody arrangement and award of sole custody of her son and daughter. The father sought a ruling permitting his son to live with him during the school year. The trial court ruled in the mother's favor. The appellate court reversed because of the trial court's prejudice against separating the children and because of an error respecting burden of proof.

The custody arrangement had allowed the children, upon request, to stay with their father during the school year if he had a live-in housekeeper or spouse. The arrangement did not provide for a situation where only one child wished to live with the father. The father had remarried and the son wished to live with him.

At the hearing, the trial court judge expressed contempt for joint custody arrangements and announced that "[t]he children will be put together as the end result of this hearing." *Id.* at 94, 163 Cal. Rptr. at 410. The court then urged the parents to unite the children and asked the father whether he wanted custody of both children; he replied that he did. The court then put the burden of proof on the father to show why custody should change even though it was the mother's burden to show why custody should change. The court of appeal found that the error as to burden of proof alone was sufficient to mandate reversal.

7. *Father's Right to Give Child His Surname*

In re Marriage of Schiffman, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980). A mother appealed an interlocutory order changing her child's surname from her birth name to the father's surname. The California Supreme Court decided for the mother and held that the rule giving the father a primary right to have his child bear his surname should be abolished, and the sole consideration should be the child's best interest.

In this situation, the child, born after her parents had petitioned for dissolution, had been given the mother's birth name. At the dissolution action, the court raised the issue of the child's surname and ordered the name changed to the father's surname. The court based its decision on the common law rule that the father has a legal right to control his child's surname where the child is born in wedlock. Where the child is born out of wedlock, under the common law, the mother has the primary right to name the child.

The common law rule has been followed in several California cases: *In re Trower*, 260 Cal. App. 2d 75, 66 Cal. Rptr. 873 (1968); *In re Worms*, 252 Cal. App. 2d 130, 60 Cal. Rptr. 88 (1967); *Montandon v. Montandon*, 242 Cal. App. 2d 886, 52 Cal.

Rptr. 43 (1966); and *In re Larson*, 81 Cal. App. 258, 183 P.2d 688 (1947). All four cases were expressly disapproved in *Schiffman*.

Recent legislative developments spurred the court's decision. In particular, the court relied on the California Uniform Parentage Act (Stats. 1975, ch. 1244, section 11, at 3196), which eliminated the legal distinction between legitimate and illegitimate children. The California Supreme Court found that, while the Uniform Parentage Act did not expressly overrule the common law distinction, there was a compelling implication to that effect. This proposition was supported in *Donald J. v. Evna M.*, 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978), where the surname of a child born out of wedlock was contested. There, the court of appeal held that the adoption of the Uniform Parentage Act effectively overruled the common law. The California Supreme Court agreed with *Donald J.* and held that the mother has a right to a determination of surname, based on the legal standard of the child's best interest. The court remanded the case for a determination of whether the name change was in the child's best interest.

8. *Non-Custodial Parent's Discussion of Religion with Child*

In re Marriage of Murga, 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (4th Dist. 1980). A mother appealed modification of the child visitation provisions of her decree of dissolution and sought to enjoin her former husband from discussing religion with their child or involving him in his religious activities. The father was moving from California to Florida and sought to modify his visitation rights. The mother argued the father's move did not constitute a change in circumstances warranting modification.

The trial court and the court of appeal disagreed with the mother and found modification appropriate when a non-custodian parent decides to move far enough away that existing visitation rights would be precluded.

The court of appeal also declined to restrain the father from discussing religion with the child. Although the trial court had refused to allow the father to discuss religion with his son over the telephone it had placed no additional restrictions on his dis-

cussions with his son. The mother had asserted the father's imposition of his religious beliefs on their son had alienated the child. The appellate court held, however, that, absent a showing the child would be harmed, a non-custodial parent could not be enjoined from discussing religion with the child or from involving the child in religious activities.

C. SPOUSAL AND CHILD SUPPORT

1. *Enforcement of Spousal and Child Support Obligation*

In re Marriage of Sandy, 113 Cal. App. 3d 724, 169 Cal. Rptr. 747 (3d Dist. 1980). A man appealed denial of his motion to quash an order obtained by his former wife to enforce spousal support. The court of appeal affirmed the trial court decision.

The original decree of dissolution awarded custody of the parties' minor child to the wife and ordered direct payment of the husband's monthly military retirement check as spousal and child support. Although the amount of the check would periodically increase, the entire check was still paid to the wife. In 1974, the check had increased to \$819 a month and the husband sought to reduce his support payments. He made an agreement with the wife to pay \$400 a month. After almost a year under the agreement, the husband stopped payment. The superior court confirmed the husband's obligation to pay \$400 a month from the time he stopped payment. The husband alleged the order was an invalid, retroactive modification of his support obligation.

The court of appeal found the order was, "not a 'modification' of the fundamental support obligation, but merely a proper exercise of the court's equitable discretion regarding its *enforcement* by execution." *Id.* at 728, 169 Cal. Rptr. at 749 (emphasis in original) (footnote omitted). Under *Messenger v. Messenger*, 46 Cal. 2d 619, 297 P.2d 988 (1956), determining whether, and to what extent, the original support order should be enforced is within the equitable discretion of the court.

2. *Modification of Spousal Support*

In re Marriage of Jacobs, 102 Cal. App. 3d 990, 162 Cal. Rptr. 649 (2d Dist. 1980). A woman moved to modify spousal

support. At the time of the interlocutory decree, she had psychiatric and medical problems which precluded her from working. The support provision provided for termination of the husband's support obligation after approximately one and a half years, when the wife's recovery was anticipated. The wife did not recover after the year and a half and she moved to continue support.

The trial court denied the wife's motion on the theory that no "changed circumstances" justified modification; the circumstances under which support was originally granted were the same as in the present action. The court of appeal reversed, finding the failure of the wife's anticipated recovery to be a "changed circumstance" in itself. The court of appeal ordered the trial court to reconsider the wife's motion for modification.

3. *Effect of Order Suspending Child Support*

Moffat v. Moffat, 27 Cal. 3d 645, 612 P.2d 967, 165 Cal. Rptr. 877 (1980). A custodial parent was awarded child support under the Revised Uniform Reciprocal Enforcement of Support Act (RURESA)(Code of Civil Procedure sections 1650-1699), despite a previous court order suspending child support payments while the custodial parent was in contempt of court. The mother had been found in contempt for refusing to permit the father to visit the children. The father appealed the award of child support on several grounds.

His first argument was that the mother's flagrant misconduct in defeating his visitation rights precluded her from seeking support. He next contended that, because the mother was in contempt of court, she could not later seek the aid of court. Finally, he urged that the prior order suspending child support was res judicata on the issue of support under RURESA; the matter of child support had already been fully and finally decided in the contempt proceeding.

The California Supreme Court dismissed the father's first two arguments but accepted the third. The court noted that California Code of Civil Procedure section 1694 expressly disallows the denial of visitation rights as a defense to child support. The rationale is that a child's welfare is of paramount consideration and an aggrieved non-custodial parent is not left remediless.

The court then turned to section 1218 of the Code of Civil Procedure to find the mother was not precluded from seeking judicial relief. Section 1218 exempts child support from the general rule that a party in contempt of court in a dissolution action cannot enforce the terms of the dissolution against the other party. The court acknowledged the denial of child support to the mother was error under Code of Civil Procedure. Nevertheless, the court found, so long as the trial court had jurisdiction over subject matter and parties, the decision was not void. In this case, the trial court had continued jurisdiction over the parents following their dissolution.

The court noted that orders in contempt proceedings are final and unappealable except by extraordinary writ under Code of Civil Procedure sections 1222, and 904.1(a)(2). Therefore, the denial of child support at the contempt proceeding was a final decision which the mother failed to appeal by extraordinary writ and which she could not now attack. Although the mother could seek relief, the court was powerless to grant her request.

4. *Consideration of Length of Marriage in Support Provision*

In re Marriage of Melton, 107 Cal. App. 3d 559, 165 Cal. Rptr. 753 (2d Dist. 1980). Modification of spousal support was appealed by a woman requesting reinstatement of monthly spousal support of \$225. The husband's monthly support obligation had previously been reduced to \$175, but he had never paid any spousal support.

The trial court ordered the husband to pay \$100 a month for a twelve month period only. The wife argued the twelve month limitation indicated a refusal on the part of the court to retain jurisdiction and was therefore an abuse of discretion in light of the couple's twenty-four year marriage. The court of appeal agreed.

The court found the trial court's order was based on speculation that the husband would soon retire and be unable to meet subsequent spousal support obligations. The court cited *In re Marriage of Rosan*, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972), which held a support order can not be based on "speculative expectations." The court noted there was no evidence the

wife would be able to meet her financial needs after the twelve month term was over. Under *In re Marriage of Morrison*, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978), a trial court is prohibited from terminating spousal support after a lengthy marriage absent evidence the supported spouse would be self-supporting. The wife here was partially disabled with only limited employment capabilities. The support modification was reversed.

5. *Supported Spouse's Ability to Work as Standard for Support Award*

In re Marriage of House, 106 Cal. App. 3d 434, 165 Cal. Rptr. 145 (4th Dist. 1980). A husband appealed his dissolution judgment challenging the amount and term of spousal support and the division of community property. The court of appeal affirmed the trial court award to the wife of \$300 a month, less \$1 for every \$2 she earned over \$250 a month. The wife was ordered to furnish an account of her earnings to her husband. The court made no termination date for the support.

The court noted the broad trial court discretion in setting spousal support. Under *In re Marriage of Morrison*, 20 Cal. 3d 437, 454, 573 P.2d 41, 52-53, 143 Cal. Rptr. 139, 150-51 (1978), factors for a trial court to consider in setting spousal support include: 1) duration of the marriage, 2) value of community property, 3) a party's standard of living, and 4) ability of the supported spouse to work. In this case, the wife was fifty-six years old and without job skills. The court found that, in light of the wife's reasonable necessities and monthly expenses, the spousal support order was within the trial court's discretion.

In response to the husband's argument that the spousal support order required a termination date, the court noted that, under *Morrison*, it must be shown the supported spouse can meet his or her future needs before a termination date will be set. There was no evidence in this case that the wife could become financially independent.

As to division of community property, the trial court found the husband's business to be community and not separate property. Although purchased before the marriage by the husband, the wife had contributed to the down payment and had worked

in the business after the marriage. The trial court found the business to have been a joint undertaking. The court of appeal affirmed, noting that income arising from a spouse's efforts and industry is community property.

6. *Challenge to Termination of Support*

In re Marriage of Richmond, 105 Cal. App. 3d 352, 164 Cal. Rptr. 381 (1st Dist. 1980). A husband and wife appealed modification of the support provision of their dissolution judgment. Each contended the superior court abused its discretion. The wife, who was unemployed, challenged the portion of the order which terminated her support as of September 31, 1981, unless she showed good cause to extend support. The husband, also unemployed, challenged the grant of support.

Both parties relied on *In re Marriage of Morrison*, 20 Cal. 3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978). *Morrison* established the state policy that supported spouses who are able to seek employment should do so. Under *Morrison*, a court's reduction or termination of spousal support to encourage a spouse's economic independence is considered a worthy judicial goal. The limitation or termination of support must be reasonable under the circumstances, and not based on speculation of a spouse's future employment. In the present case, the court found the decision to terminate support in 1981 to be reasonable because it merely postponed the determination of the spousal support issue and it allowed the wife an opportunity to show why support should be extended. The court also rejected the husband's appeal, noting the court's wide discretion to modify a support order. The court order had modified downward the spousal support.

7. *Disclosure of Spouse's Tax Returns in Spousal Support Action*

In re Marriage of Sammut, 103 Cal. App. 3d 557, 163 Cal. Rptr. 193 (1st Dist. 1980). The husband appealed from an order increasing his spousal support obligation. The court of appeal rejected his contention that public policy warranted disclosure of his wife's tax returns, because federal and state income tax returns of spouses in a dissolution case are privileged and not discoverable where spousal support is at issue.

Webb v. Standard Oil Co., 49 Cal. 2d 509, 319 P.2d 621 (1957), established a privilege against disclosure of income tax returns. There are three exceptions to this privilege: where there is intentional relinquishment of the privilege, *Crest Catering Co. v. Superior Court*, 62 Cal. 2d 274, 398 P.2d 150, 42 Cal. Rptr. 110 (1965); where the existence and content of the tax returns are placed in issue, *Wilson v. Superior Court*, 63 Cal. App. 3d 825, 134 Cal. Rptr. 130 (1976); and where public policy outweighs the benefit of confidentiality, *Miller v. Superior Court*, 71 Cal. App. 3d 145, 139 Cal. Rptr. 521 (1977). In *Miller*, a wife sought enforcement of child support. *Miller* allowed disclosure of the husband's tax returns based on public interest in keeping children from becoming public charges, but expressly limited disclosure of tax returns to proceedings concerning enforcement of child support.

In a recent case concerning child support, the court held that the *Miller* rationale did not apply where the spouse was only seeking modification and not enforcement of child support. *In re Marriage of Brown*, 99 Cal. App. 3d 702, 160 Cal. Rptr. 524 (1979). Consequently, the court in the present case held tax returns are not discoverable where spousal support, rather than child support, is at issue.

8. *Effect of Marital Settlement Agreement on Support Award*

In re Marriage of Aylesworth, 106 Cal. App. 3d 869, 165 Cal. Rptr. 389 (2d Dist. 1980). Modification of a dissolution judgment was challenged by an ex-husband as an abuse of judicial discretion. The former wife cross-appealed, contending spousal support should have been modified along with child support. In response to the wife's order to show cause seeking *inter alia* modification of child and spousal support, the trial court ordered the husband to pay nearly three times the previous amount of child support, but declined to increase spousal support. The court of appeal affirmed.

Before dissolution, the couple entered into a "Marital Settlement Agreement" which provided that, with the exception of child support, the agreement was intended to be final, binding, and nonmodifiable. The wife contended the trial court erred in relying on this agreement because it was not specifically included within the dissolution judgment. The trial court, how-

ever, did make its judgment "pursuant to the Marital Settlement Agreement." The court of appeal found this reliance on the Marital Settlement Agreement inferred an adoption of all the agreement's provisions by the trial court. The court noted that, under Civil Code section 4811(b), spousal support is modifiable unless the parties agree to the contrary, which the court found the couple did in their agreement.

As to child support, the husband argued insufficient evidence to support an increase. The wife based her request for increased child support on a financial declaration prepared by a certified public accountant. The husband argued the declaration did not distinguish between the wife's expenses and the children's expenses, and that the wife thereby failed to carry her burden of proof.

The court of appeal found it had no power to reverse the trial court determination of child support, because there was evidence, albeit contradicted, that an increase in child support was warranted. The evidence was found in the financial declaration as well as in the wife's testimony on the children's increased needs. The court noted that, under *Prim v. Prim*, 46 Cal. 2d 690, 299 P.2d 231 (1956), an appellate court's power to overrule a trial court's determination begins and ends with a determination as to whether the trial court had *any* substantial evidence to support its conclusions.

In passing, the court noted the husband's ability to pay more child support was not an issue, and, under *Singer v. Singer*, 7 Cal. App. 3d 807, 87 Cal. Rptr. 42 (1970), a father's duty to support his children extends beyond furnishing the mere necessities of life if he is able to pay more.

9. *County Right to Reimbursement for Public Assistance Payments*

County of Alameda v. Sampson, 104 Cal. App. 3d 584, 163 Cal. Rptr. 915 (1st Dist. 1980). The county of Alameda sought reimbursement of public assistance and child support from defendant Sampson, who denied being the father of the children in question. The county moved for a partial summary judgment on the issue of paternity, and the motion was granted.

Sampson appealed the summary judgment on the ground that the issue of paternity should have been brought before a jury because there was conflicting evidence of paternity. The prosecution had entered evidence of a dissolution decree naming Sampson as the father of the children, and Sampson had entered an affidavit of his former wife stating Sampson was not the father of her children and that he was sterile. The court of appeal held that Sampson was estopped from presenting evidence that he was not the father of the children since the issue had already been determined in his dissolution action which was a final judgment.

Sampson argued the dissolution decree was void for fraud because his wife had promised he would not have to pay child support, and in reliance on that, he did not contest paternity in the dissolution action. The court of appeal ruled that fraud was no defense to the charges in this case and that Sampson was restricted to an independent action against his former wife.

D. DISSOLUTION PROCEEDINGS

1. *Spouse's Negligence Precludes Fraud Claim*

LeMonz v. Wipson, 113 Cal. App. 3d 136, 169 Cal. Rptr. 664 (2d Dist. 1980). A woman sought to set aside her interlocutory judgment of dissolution on the grounds of extrinsic fraud. The trial court denied her motion, and the court of appeal affirmed. The court of appeal found that the wife failed to establish evidence of extrinsic fraud and failed to pursue diligently equitable relief; she had filed her motion three years after final judgment was entered. In her motion, the wife argued that community assets were misstated and omitted, provisions for her support were grossly inadequate, she was mentally incompetent at the settlement hearing, and she did not have effective assistance of counsel.

The court found the alleged fraud occurred through the wife's own negligence; she had notice, through discovery, that the contested assets would not be in the settlement agreement. Under *In re Marriage of Carletti*, 53 Cal. App. 3d 989, 126 Cal. Rptr. 1 (1975), a party is disqualified from relief where the party has contributed to the fraud or mistake giving rise to the subsequent judgment. As to the spousal support, the court noted the

wife was present at the settlement hearing and had the opportunity to bargain without interference from her husband. Also, the court did not find sufficient evidence to warrant a finding that appellant was mentally incompetent. Finally, as to the charge that her counsel did not vigorously represent her, the court noted appellant had an opportunity to reject the settlement agreement her attorney obtained and to receive a full hearing on the issue. Accordingly, the court held that a party can not assert extrinsic fraud where there has been an opportunity to be heard, fully present the case, and be represented by counsel.

2. *Waiver of Spousal Rights Considered*

In re Marriage of Moore, 113 Cal. App. 3d 22, 169 Cal. Rptr. 619 (4th Dist. 1980). A wife appealed her dissolution of marriage judgment. She charged the trial court with abuse of discretion in finding she waived rights to spousal support, to a community property interest in her husband's military pension, and to attorney fees. The wife signed a separation agreement, prepared by the husband, "waiving" the rights listed above. The couple had been married for seventeen years. During the dissolution action, the wife moved to set aside the agreement citing her inadequate command of English, her misunderstanding of the nature and extent of her rights, and her lack of intent to waive rights. The trial court denied the motion. The court of appeal reversed.

The parties' spousal support provision called for termination of support after two years. The court of appeal ruled that the trial court abused its discretion in refusing to retain support jurisdiction and in finding the wife waived her right to support. The court found no express reference to waiver of support in the agreement, as is necessary for a valid waiver. *City of Ukiah v. Fones*, 64 Cal. 2d 104, 410 P.2d 369, 48 Cal. Rptr. 865 (1966). In *In re Marriage of Morrison*, 20 Cal. 3d 347, 573 P.2d 41, 143 Cal. Rptr. 139 (1978), the California Supreme Court stated that jurisdiction over support should be retained unless it is shown that the party requesting support will be able to meet his or her financial needs. This especially applies where the couple has been married for many years. In this case, the wife was unskilled and unable to support herself and the minor child independently. There was an express reference to waiver of the wife's

interest in the husband's pension in the agreement; however, the court found it was not a knowing, intentional waiver. The court noted that no one ever spoke to the wife concerning the nature and extent of her property interest in the military pension. That factor, along with the disparity between the value of property received by the wife and the husband, led the court to find the wife could not have knowingly relinquished her rights.

3. *Denial of Fair Hearing*

In re Marriage of Park, 27 Cal. 3d 337, 612 P.2d 882, 165 Cal. Rptr. 792 (1980). Alleging denial of a fair hearing, a woman appealed the trial court's refusal to vacate her dissolution judgment. The judgment, giving the husband custody of the two children as well as substantially all community property, was entered in the wife's absence. The wife had been involuntarily deported to Korea a few months after an order to show cause had given her custody and exclusive possession of the family home. The husband knew of the deportation but the wife's counsel did not.

The wife was unable to contact her counsel before deportation and a letter sent to him afterwards was returned unopened. Substitute counsel appeared for the wife at the dissolution hearing because her original counsel had been appointed a court commissioner. (No formal substitution was ever filed and the wife had no notice of the substitution). At the hearing the husband alleged his wife had left him and the children to go to Korea; he did not mention the deportation.

The California Supreme Court held that, due to extrinsic factors, the wife was deprived of a fair adversarial hearing and the trial court abused its discretion by denying her motion to vacate. The court found the husband committed extrinsic fraud by failing to inform the court of the circumstances of his wife's absence. The court cited *Landon v. Landon*, 74 Cal. App. 2d 954, 169 P.2d 980 (1946), a factually similar case, for the rule that concealment of facts, which if revealed could result in postponement of adjudication until the absent party can be heard, constitutes extrinsic fraud. Extrinsic fraud is a ground for setting aside a final judgment. The court rejected the husband's argument that his wife was guilty of inexcusable neglect for failing to notify the court or her counsel of her deportation. The court

found it was reasonable for the wife to assume the husband would inform the court of her deportation.

Also, the court found the trial court erred in recognizing the wife's substituted counsel. The court cited *Wells Fargo & Co. v. City and County of San Francisco*, 25 Cal. 2d 37, 152 P.2d 625 (1944), which held a substituted counsel must have been associated with the counsel of record to be recognized by the trial court. The record in this case did not indicate the new attorney was associated with the case. Because of this error, the trial court had no authority to enter a judgment other than by default. Finally, the court found the new attorney had inadequately represented the wife by offering no evidence, making no attempt to cross-examine the husband, the only witness, and by not consulting with his client.

E. HEALTH AND WELFARE

1. *Recovery of Damages for Wrongful Life*

Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980). In a case of first impression, the court of appeal ruled that a genetically defective child has a cause of action against the medical laboratory which negligently tested her parents for Tay Sachs traits before her birth. The child sought damages for the laboratory's negligence which resulted in her birth, i.e., for "wrongful life." The trial court refused to allow such a cause of action and sustained the laboratory's demurrer without leave to amend. The court of appeal reversed and remanded. In so doing, the court dismissed decisions by other jurisdictions barring recovery to physically impaired children for "wrongful life."

The court surveyed the decisions by other jurisdictions. The most persistent arguments against a "wrongful life" cause of action were articulated in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). There the court barred recovery to a physically impaired child whose mother was not informed of the potentially harmful consequences to her child from her contracting Rubella during pregnancy. Recovery was barred on two grounds: (1) the perceived impossibility of computing damages; and (2) public policy. The New Jersey court felt the calculation of damages based on the difference between life with defects and no life

at all would be impossible. *Gleitman* had also questioned the legality of any abortion which would have been undertaken to prevent the child's life. Seven years later, *Roe v. Wade*, 410 U.S. 113 (1973), cast new light on the argument against a wrongful life cause of action, by holding that a mother has a constitutional right to obtain an abortion during the first trimester of pregnancy.

Later cases recognized the mother's right to information necessary to make a conscious choice whether or not to have a child and, therefore, granted recovery for the "wrongful birth" of a child. Nevertheless, recovery was still denied the injured child. One such case, *Gildiner v. Thomas Jefferson Univ. Hospital*, 451 F. Supp. 692 (E.D. Pa. 1978), is factually similar to the present case. There the court declared, "Tay Sachs disease can be prevented only by accurate genetic testing combined with the right of parents to abort afflicted fetuses within appropriate time limitations. Society has an interest in insuring that genetic testing is properly performed and interpreted." *Id.* at 696.

The only previous California case dealing with wrongful life was *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976), in which the court of appeal denied a child's claim based on damages sustained from an illegitimate birth, following a negligently performed abortion. *Curlender* agreed with the finding in *Stills* that a child whose only "injury was impairment of status"—illegitimacy versus legitimacy—should be denied recovery. The court noted in the present case, however, that the element of palpable injury is present.

The court then considered the present child's cause of action within the context of California tort law. The court found that the laboratory owed a duty to the child to use ordinary care in the administration of its genetic test; that the laboratory breached this duty by incorrectly and inaccurately conducting the test; that, as a result, the child was injured by being born with a defect; therefore, the breach of the laboratory's duty was the proximate cause of the child's injury.

Under *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), all persons are required to exercise ordinary care to prevent injury to others from their conduct. *Dillon*

v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), expanded this principle to require that a duty be established before liability can attach for failure to use due care. As to the laboratory's conduct being the proximate cause of the child's injury, the court noted that the child both existed and suffered due to the laboratory's negligence. Finally, the court reiterated the equitable principle that there should be a remedy for every wrong committed.

In discussing the extent of recovery, the court acknowledged "the right of such child to recover damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition." *Curlender v. Bio-Science Laboratories*, 106 Cal. App. 3d at 831, 165 Cal. Rptr. at 489. This would include costs of care of the child as well as punitive damages where warranted. The notion that life with impairments would have to be measured against non-life was thus dismissed by the court. The case was remanded for a determination of damages.

2. *Recovery of Damages for Wrongful Death*

Truman v. Thomas, 27 Cal. 3d 285, 611 P.2d 902, 165 Cal. Rptr. 308 (1980). Two children charged a physician with wrongful death in failing to perform a pap smear on their mother who died of cervical cancer. A pap smear could have detected the cancer in time to save her life. The children contended that the physician's failure to inform their mother of the risks in forgoing the recommended pap smear constituted a breach of duty.

The plaintiffs had requested an instruction to the jury that failure to disclose all material information to a patient renders a physician liable for any resulting injury "if a reasonably prudent person in the patient's position would not have refused the test if she had been adequately informed of all the significant perils." *Id.* at 290, 611 P.2d at 905, 165 Cal. Rptr. at 311. The trial court refused to instruct the jury that a physician owes such a duty. The jury found for the physician. The California Supreme Court reversed, finding error in the trial court's refusal to give the requested instruction.

The court based its decision on *Cobbs v. Grant*, 8 Cal. 3d

229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972), which defines the scope of a physician's duty to disclose medical information to his or her patients in discussing proposed medical procedures. Under *Cobbs*, a patient must be told not only of the risks inherent in the procedure prescribed, but also the risks of a decision to forgo the treatment. The court applied this reasoning to diagnostic tests such as the pap smear.

The physician asserted that the "duty to disclose" applies only where the patient consents to the recommended procedure, and that patients who reject their doctor's advice bear the burden of inquiring as to consequences of their decision. The court rejected this argument.

F. PENSION AND DISABILITY BENEFITS

1. *Joinder of Pension and Support Actions*

In re Marriage of Davis, 113 Cal. App. 3d 485, 169 Cal. Rptr. 863 (4th Dist. 1980). A husband challenged the modification of his dissolution judgment. The wife sought an increase in child support and a determination of her interest in her husband's military pension in the same action. The pension had not been mentioned in the original pleading or final judgment. The trial court granted the increase in child support and made a determination of the wife's interest in the husband's pension.

The court of appeal found the trial court did not have jurisdiction over the pension rights. According to the court, under *Bodle v. Bodle*, 76 Cal. App. 3d 758, 143 Cal. Rptr. 115 (1978), the non-employee spouse must bring an independent action to determine his or her interest in the employee spouse's pension; the wife could not combine her pension action with a child support action. Under *Henn v. Henn*, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980), where the wife brings an independent action, she is not barred by res judicata or collateral estoppel as long as her pension rights were not in fact adjudicated in the dissolution judgment.

2. *Pension Payable Before Retirement*

In re Marriage of Gillmore, 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981). After dissolution, a wife sought payment of her share of the husband's vested pension interest. The trial

court in the dissolution proceeding divided the couple's community property but reserved judgment on the pension rights until the pension had vested. Subsequently, the court held the pension would become payable on the husband's retirement, not when he was merely eligible for retirement, as the wife had urged. The California Supreme Court reversed, holding that a non-employee spouse may collect his or her share of the employee spouse's vested pension before that spouse retires. The court reasoned it would be unfair for the employee spouse to delay payment of the non-employee spouse's pension interest by deferring retirement.

The court noted that the employee spouse retains the right to (1) change or terminate employment, (2) agree to a modification of the retirement benefits, or (3) elect between alternative benefits. The non-employee spouse, however, would be compensated for any modification impairing his or her interest in the benefits. Thus, the husband in this case could continue to work. However, his wife is entitled to reimbursement for the share of the community property she loses as a result of his decision. The court held payment of the wife's share could come from the husband's separate property (since community property had already been divided) and remanded the case for a determination of a method of distribution.

3. *Rights of Divorced Spouse to Veteran's Education Benefits*

† *In re Marriage of Shea*, 111 Cal. App. 3d 713, 169 Cal. Rptr. 490 (4th Dist. 1980), *rehearing granted*, Nov. 3, 1980. The wife sought to establish the community interest in veteran's education benefits received during marriage. The interlocutory judgment of dissolution stated the benefits were community property. The husband appealed this finding. The court of appeal reversed, finding the trial court's decision unsupported by substantial evidence. The court held that, where the husband's military service occurred entirely before marriage, veteran's education benefits received during marriage were separate property, absent an agreement by the spouses to the contrary (no such agreement existed in this case).

† The Fourth District Court of Appeal granted a rehearing in this case Nov. 3, 1980. Under Cal. Ct. R. 977 this opinion may not be cited to any court. The case appears in the Survey solely to familiarize the reader with the issues presented.

The veteran's educational allowances were declared to be a form of employee benefit. Under *Estate of Ney*, 212 Cal. App. 2d 891, 28 Cal. Rptr. 442 (1963), a fringe benefit entirely earned by an employee before marriage is the separate property of the employee.

The wife argued the husband's education benefits were earned while in school and, because he was a student during the marriage, the benefits were community property. The court, however, found the intent of Congress in establishing education benefits for veterans, under 28 U.S.C. section 1651, was that education benefits flow from and are earned by military service, not subsequent school attendance.

4. *Community Interest in Military Pension*

McCarty v. McCarty, 101 S. Ct. 2728 (1981) (per Blackmun, J.; Burger, C.J., White, Marshall, Powell and Stevens, J.J. joining in the opinion; Rehnquist, J. dissenting, joined by Brennan and Stewart, J.J.). In *McCarty*, The Supreme Court reversed a California court of appeals decision and held that federal law precludes division of military retirement pay as community property. The Court of Appeal for the First District had affirmed a wife's award of a portion of her husband's military retirement pay as quasi-community property in a dissolution action. The California Supreme Court denied hearing.

The United States Supreme Court found that: (1) community property principles as applied to military pay threatened major damage to "clear and substantial federal interests," (2) the Congressional objective of providing for the retired service member and the goal of promoting a youthful military by encouraging retirement of older service members were threatened by division of retirement pay as community property, and (3) the federal military retirement statutes conflicted with the wife's asserted community property rights.

According to the Court, the military retirement system confers no entitlement to retirement pay upon a retired service member's spouse; such pay is the personal entitlement of the retiree.

Justice Rehnquist argued for the dissent that the majority

used the wrong standard in deciding to preempt community property laws. The test for preemption, he said, was announced in *Wetmore v. Markoe*, 196 U.S. 68, 79 (1904)—namely, whether Congress has “positively required by direct enactment” that state law be preempted. Justice Rehnquist found that Congress had not directly addressed the rights of ex-spouses to military retirement pay and so did not preclude the award to an ex-spouse of a portion of military retirement pay as community property.

During the survey period, two California cases considered the community interest in military pensions: *In re Marriage of Milhan*, 29 Cal. 3d 765, 613 P.2d 812, 166 Cal. Rptr. 533 (1980), and *In re Marriage of Smethurst*, 102 Cal. App. 3d 494, 162 Cal. Rptr. 300 (4th Dist. 1980).

In *Marriage of Milhan*, the California Supreme Court rejected the husband’s contention that military pensions, military insurance policies, and disability pay received in lieu of retirement pay could not be part of the community by virtue of the supremacy clause of the United States Constitution (Art. 6, cl. 2). The United States Supreme Court vacated and remanded *Milhan* to California for reconsideration in light of *McCarty*. 49 U.S.L.W. 3978 (July 1981).

In *Marriage of Smethurst*, the trial court sustained the husband’s demurrer without leave to amend because the wife failed to include in the divorce decree a claim to the former husband’s military benefits. The 4th District reversed the trial court’s action as an abuse of discretion because a simple defect could have been cured by amendment. The issue is moot in view of *McCarty*.

5. *Community Interest in Social Security Benefits*

In re Marriage of Cohen, 105 Cal. App. 3d 836, 164 Cal. Rptr. 672 (2d Dist. 1980). In a dissolution action, the wife appealed the trial court finding that she and her husband had no community property. The couple’s liabilities apparently outweighed their community assets. Nevertheless, the wife asserted a community property interest in her husband’s Social Security benefits. The trial court ruled the benefits were the husband’s

separate property and that to rule otherwise would frustrate the intent of the Federal Social Security Act and the supremacy clause of the United States Constitution.

The court of appeal affirmed, relying on congressional intent as discussed in two cases. *In re Marriage of Nizenhoff*, 65 Cal. App. 3d 136, 135 Cal. Rptr. 189 (1976), found that Congress intended to preserve the federal character of the Social Security system in the face of the "variations and idiosyncrasies" of state laws concerning divorce. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the United States Supreme Court analyzed the Railroad Retirement Act and found that Congress intended to preclude claims on retirement benefits based on family obligations, and that to divide railroad retirement benefits as a community asset would contradict congressional objectives. *Cohen* applied the *Hisquierdo* rationale to this case and held that Social Security benefits are not subject to disposition as a community asset. The court also noted the anti-garnishment clause in section 407 of the Social Security Act.

6. *Rights of Divorced Spouse to Division of ERISA Pension*

In re Marriage of Mantor, 104 Cal. App. 3d 981, 164 Cal. Rptr. 121 (2d Dist. 1980). At issue in this dissolution action was whether a state court has jurisdiction to order a private pension plan to pay funds to a non-participant spouse. The trust, which was joined in the action at the wife's request, moved to set aside provisions of the husband's interlocutory dissolution judgment allowing the wife monthly payments from the fund. The trust was governed by provisions of the Employee Retirement Income Security Act (ERISA). Attorneys for the trust argued that ERISA preempted California law.

The court of appeal, in upholding the division, cited *In re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), which established that ERISA does not preempt California community property law, insofar as the law gives a non-participant spouse an interest in the spouse's pension plan, and that California is not prohibited from requiring a pension trust to pay a non-participant spouse. *Campa* noted that requiring a pension plan to send two monthly checks instead of one does not interfere with any congressional objective.

The trust also challenged a provision of the dissolution judgment which gave the wife the remainder of her husband's pension on his death. The court of appeal noted that the rules of the trust allow a named beneficiary to receive pension payments in the event of the participant's death. The court found that the husband, by agreeing to the dissolution provision had in essence named his former wife as beneficiary to his pension.

7. *Retroactivity of Case Establishing Community Interest in Non-Vested Pension*

Shaver v. Shaver, 107 Cal. App. 3d 788, 165 Cal. Rptr. 672 (2d Dist. 1980). The ex-wife of a pension recipient sought a declaration of her rights to the retirement benefits. The Los Angeles Board of Pension Commissioners demurred on the ground the trial court did not reserve jurisdiction to divide the pension rights at a later date. The husband also demurred, alleging the wife failed to show the pension rights were vested before the dissolution. Both demurrers were sustained without leave to amend. The court of appeal affirmed.

At the time of the dissolution in 1967, non-vested pension rights were not subject to division as community property, under *French v. French*, 17 Cal. 2d 775, 112 P.2d 235 (1941). *French* was overruled in *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). *Brown*, however, did not accord full retroactivity to the decision to permit a non-employed spouse to assert an interest in non-vested pension rights when the property rights have already been finally adjudicated, unless the court reserved jurisdiction to divide the pension rights.

The property rights in this case were adjudged final and the dissolution judgment did not reserve jurisdiction to divide the pension rights. The husband's pension rights had not vested at the time of the dissolution under the definition of "vested" in *Brown*, i.e., "a pension right which survives the discharge or voluntary termination of the employee." 15 Cal. 3d at 850-51, 126 Cal. Rptr. at 640-41, 554 P.2d at 568-69.

G. INHERITANCE DETERMINATIONS

1. *Cohabiting Partners Tax Status*

Estate of Edgett, 111 Cal. App. 3d 230, 168 Cal. Rptr. 686 (4th Dist. 1980). A former wife appealed the overruling of her objection to the admission of a report of an inheritance tax referee. The woman had been married to decedent for forty-three years. They divorced, later reconciled, but never remarried. Decedent's will left the entire estate to her. The inheritance tax referee treated the woman as a class C transferee (unrelated person under Revenue & Taxation Code section 13307).

The woman asserted she was entitled to class A status because she enjoyed a spousal-like relationship with decedent. The court of appeal rejected the former wife's argument and affirmed the trial court decision. The court refused to equate the couple's relationship with a lawful marriage. The court noted that the Family Law Act, which provides for division of community property, does not extend to a non-marital relationship, that the marital communication privilege only extends to persons in a valid marriage, and that California has statutorily abolished the doctrine of common law marriage. In light of these factors, the court declined to challenge legislative intent to extend protection to a legally unrecognized relationship.

2. *Imposition of Tax on Pension*

Estate of Allen, 108 Cal. App. 3d 614, 166 Cal. Rptr. 653 (1st Dist. 1980). The State Comptroller sought to impose an inheritance tax on one half of a pension as community property. The superior court had refused to list the pension as community property saying the wife's interest in her husband's pension terminated at her death. The comptroller appealed. The court of appeal affirmed the decision and held that imposition of a tax on the pension would be improper in light of California's terminable interest rule.

Two cases, *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972); and *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963), establish the terminable interest rule. Under the rule, pension rights are perceived as a unique type of community property which terminate on a spouse's death. In *Waite*, the court held a wife could not

devise her community property share of her husband's pension. *Waite* held a non-employee spouse's community interest in a pension lasts only for the life of the non-employee spouse. Under *Benson*, a non-employee spouse's pension interest terminates at the death of *either* spouse. There, a deceased's divorced wife unsuccessfully asserted a community property interest in his pension.

The comptroller had argued the terminable interest rule conflicted with the principle of spousal equality enunciated in *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), and that it was essentially unfair. The court disagreed, noting the purpose of pensions is to provide subsistence for an employee and his or her spouse and, because pensions are meant to be shared by only the spouses, it would be appropriate and fair for the benefits to continue to sustain the surviving spouse.

The comptroller also urged that, under Probate Code section 201, private pensions are subject to testamentary disposition as community property and that *Waite* was an exception as it involved a public pension. Section 201 provides that one half of the community property is subject to the testamentary disposition between public and private pensions regarding community property and held that pensions in general are excepted by section 201 because they are a unique form of community property.

3. *Right of Step-Children to Step-Parent's Estate*

Estate of Davis, 107 Cal. App. 3d 93, 165 Cal. Rptr. 543 (4th Dist. 1980). Unadopted stepchildren sought a share of their intestate stepfather's estate in a proceeding to determine heirship. The trial court denied a motion for summary judgment brought by the step-children and granted judgment on the pleadings of Davis' natural children. The court of appeal strictly interpreted the rule in Probate Code section 222 that unadopted children are not considered issue and rejected the step-children's argument they had been equitably adopted by their step-father.

4. *Decedent's Termination of Joint Tenancy*

Riddle v. Harmon, 102 Cal. App. 3d 524, 162 Cal. Rptr. 530

(1st Dist. 1980). A widower brought suit against his wife's estate to quiet title to property owned by him and his wife as joint tenants. The wife had sought to terminate the joint tenancy by conveying her interest to herself as tenant-in-common and disposing of her share by will.

The trial court followed precedent set by *Clark v. Carter*, 265 Cal. App. 2d 291, 70 Cal. Rptr. 923 (1968), and ruled the decedent had no legal right to convey her interest to a third party to extinguish the joint tenancy. The court of appeal reversed the trial court, relying on the common sense approach embodied in Civil Code section 683, stating, "a joint tenant should be able to accomplish directly what he or she could otherwise achieve indirectly by use of elaborate legal fictions." 102 Cal. App. 3d at 530, 162 Cal. Rptr. at 534. The court held that a joint tenant may unilaterally sever a joint tenancy. California's Civil Code section 683 has led the way toward the elimination of a third party "straw man" in the creation of joint tenancies.

H. PATERNITY ACTIONS

1. *Effect of Settlement Between Mother and Putative Father*

Ernest P. v. Superior Court, 111 Cal. App. 3d 234, 168 Cal. Rptr. 438 (4th Dist. 1980). A putative father sought a writ of mandate compelling the superior court to grant summary judgment in a paternity and support action instituted by a minor child. The putative father argued the child's claim was barred by a previous settlement between himself and the mother pursuant to Probate Code section 1431. The court of appeal concluded that the child was not bound by the settlement because he had not been a party to the action which led to the settlement. The action was instituted by the minor's mother against the putative father under section 1431, but the child was never named as a party.

Civil Code section 1431 allows a minor, through his or her parent, to claim damages against a third party and gives the parent a right to compromise, subject to court approval. The court of appeal distinguished a claim for damages from a claim of paternity. The court noted that, in asserting a paternity claim, the child's only claim for damages against the alleged father is contingent on first establishing paternity.

The court also noted that, under the Uniform Parentage Act (Civil Code sections 7000-7020), a child is an indispensable party in a paternity action. Because the child was not made a party to the mother's claim, the court had previously had no jurisdiction to determine paternity, and therefore, the child was not barred from instituting a subsequent paternity action on his own behalf.

2. *Admissibility of Welfare Records Pertaining to Paternity*

County of Nevada v. Kinicki, 106 Cal. App. 3d 357, 165 Cal. Rptr. 57 (3d Dist. 1980). A man appealed a judgment naming him the father of a child whose mother was receiving Aid to Families with Dependent Children (AFDC). The county sought reimbursement of AFDC payments. The trial court bifurcated the issues of paternity and reimbursement. This appeal dealt only with the issue of paternity. The man charged the trial court with committing prejudicial error by refusing to permit production of Nevada County welfare records pertaining to the identification of the father. The court of appeal found prejudicial error in the trial court's order and ruled that the welfare records were not privileged as the county had urged.

Under Welfare and Institutions Code section 10850(a), AFDC records are generally confidential except when used in a civil proceeding conducted in connection with the administration of the AFDC program. The court of appeal found the paternity proceeding here was sufficiently connected with administration of the AFDC program because a finding of paternity would subject the named father to liability for AFDC payments. Therefore, the welfare records were not privileged. The court also found that AFDC laws contemplated usage of welfare records in paternity cases such as the present one.

The county also had argued non-disclosure was in the public interest. Evidence Code section 1040(b)(2) allows non-disclosure of evidence where the necessity for confidentiality outweighs the necessity for disclosure. The court found that the public interest in this case was in favor of disclosure. The court reasoned that, because disclosure is permitted by statute, there is no public interest in non-disclosure. The court found the denial of disclosure prejudiced Kinicki's defense and constituted

reversible error.

3. *Cross-Complaint of Misrepresentation on Use of Birth Control Method*

Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (2d Dist. 1980). A husband charged his wife with fraud, negligent misrepresentation, and misrepresentation in a cross-complaint to her paternity suit. The husband admitted paternity but alleged his wife had falsely represented that she was using birth control pills and, in reliance on that representation he had engaged in sexual intercourse with her, resulting in the birth of a child. The trial court upheld the wife's demurrer to the cross-complaint; the court of appeal affirmed.

The court held that, as between consenting sexual partners, one partner may not hold the other liable in tort for the birth of a child where one partner relied on the other's false representation that contraceptive measures had been taken. The court reasoned that judicial supervision of promises made by consenting adults as to the circumstances of their sexual conduct would constitute an unreasonable invasion of privacy.

The court recognized this as a case of first impression. Although other cases have attached tortious liability for the birth of a child, the court distinguished them from the present case as primarily involving medical malpractice. For example, *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), held a physician liable for the failure to properly sterilize a woman who later became pregnant. The court held the present cause of action was of such a highly intimate nature that no standard of conduct should be defined. In passing, the court also noted that no good reason appeared why the husband could not have taken precautionary measures.

I. MERETRICIOUS RELATIONSHIPS

1. *Contract Between Cohabiting Partners*

Feldman v. Nassi, 111 Cal. App. 3d 881, 169 Cal. Rptr. 9 (2d Dist. 1980). A woman appealed dismissal of her complaint. The man with whom she had been living allegedly breached an express oral contract and an implied-in-fact contract. According to the woman, he had agreed to support her for life and share all

his property equally with her. He also agreed to marry her as soon as he divorced his wife, from whom he was separated. In exchange, the woman agreed to give up her job, keep house, and care for him. The man allegedly breached the contract when he refused to obtain the promised dissolution, moved away from, and refused to support the plaintiff. He argued the alleged agreement violated public policy by promoting divorce and impaired the community property rights of his wife. The court of appeal reversed and held the complaint stated a cause of action.

Adults who live together and engage in sexual relations may contract respecting their earnings and property rights, according to *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), and *Glickman v. Collins*, 13 Cal. 3d 852, 533 P.2d 204, 120 Cal. Rptr. 76 (1975). A contract such as this would not violate public policy by encouraging divorce where the relationship between the husband and wife had irreparably broken down. In the present case, whether the marriage between the man and his wife had irreparably broken down was a question of fact for the jury.

Whether the alleged contract terms impaired the wife's community property rights was also a question of fact for the jury. Under Civil Code section 5118, the earnings and accumulations of a spouse living separate and apart from the other spouse are the separate property of the spouse. The facts in this case did not establish whether the man was legally separated from his wife.

2. *Overnight Visitors of Opposite Sex Denied to Custodial Parent*

In re Marriage of Wellman, 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1st Dist. 1980). A mother appealed a provision of her dissolution decree which denied her the right to overnight male visitors. The court of appeal held that the order was "so intrusive upon the privacy and associational interests of the mother and so lacking in evidentiary support in terms of interests of the children that it could not be sustained" *Id.* at 999, 164 Cal. Rptr. at 151. The issue of the mother's sexual relations and the effect on her children was initiated by the trial court following the husband's questioning of the wife's relation with another man.

The husband was seeking a reduction in spousal support due to the mother's alleged cohabitation. Custody was not at issue in the dissolution. In determining the validity of the dissolution order, however, the appellate court felt compelled to discuss custody.

The court held that it is error for a trial court to consider the sexual proclivity of a parent in a custody case where there is no compelling evidence that the parent's conduct has a significant bearing on the welfare of the children. The court cited *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967). *Nadler* involved a homosexual mother seeking custody of her child.

Because there was no evidence in the present case of the effect of the mother's sexual activity on the welfare of her children, the court refused to intrude on the mother's constitutional rights of privacy and association.

J. LEGISLATION

1. *Marriage and Dissolution*

A.B. 2088—Naylor

Chapter 1188

Statutes of 1980

Wills; Property Settlement Agreements. Provides that where a property settlement agreement has been executed by parties to a dissolution or nullity proceeding, the former spouse will be considered to have predeceased the testator unless the will or a codicil expressly provides otherwise; requires notice of this provision in final judgments of dissolution or in declarations of nullity of marriage. This act adds section 4352 to the Civil Code, and adds section 80 to the Probate Code.

A.B. 2117—McAlister

Chapter 123

Statutes of 1980

Rights of Married Women. Repeals provision whereby a woman may become a sole trader, *i.e.*, authorized to carry on a business in her own name and on her own account. The provision was enacted at a time when the husband had complete management and control over the community property. This act repeals Title

12 (beginning with section 1811) of Part 3 of the Code of Civil Procedure.

A.B. 2277—Hannigan

Chapter 627

Statutes of 1980

Summary Dissolution. Revises requirements for summary dissolution of marriage, increasing the limits for length of marriage from two to five years, the amount of unpaid debts from \$2000 to \$3000, and the amount of separate property assets from \$5000 to \$10,000. This act amends sections 45550 and 45555 of the Civil Code.

A.B. 2211—Young

Chapter 973

Statutes of 1980

Health Insurance. Prohibits insurance policies or plans from excluding coverage of services of licensed marriage, family, and child counselors upon a physician or surgeon referral. This act amends section 1373 of the Health and Safety Code and amends sections 10176, 10177, and 11512.8 of the Insurance Code.

S.B. 1933—Mills

Chapter 234

Statutes of 1980

Amended Petition. Specifies method of notice necessary where petition or responsive pleading in dissolution action is amended by a spouse to comply with residency requirements. Previous law required notice be given according to the rules of the Judicial Council, regardless of whether the parties had appeared in court. This rule would now be limited to situations where appearances have been made. Where no appearance has been made, notice may be given by mail, or by personal service. This act amends section 4530 of the Civil Code; and amends section 397.5 of the Code of Civil Procedure.

S.B. 1351—Berman

Chapter 1341

Statutes of 1980

Obligation of Parents; Assignment of Wages. Provides that the father and mother have an equal responsibility to support and educate the minor children, taking into consideration respective earnings or earning capacity; also, revises procedure by which custodial parent petitions for assignment of wages of non-custo-

dial parent for child support. This act amends sections 15432 and 15438.5 of, and adds section 15454 to, the Government Code; amends section 436.8 of the Health and Safety Code; adds section 6029.1 to the Penal Code; and adds section 167.5 to the Welfare and Institutions Code, relating to county facilities, and makes an appropriation therefore.

S.B. 1995—M. Garcia

Chapter 237

Statutes of 1980

Enforcement of Child Support. Non-custodial parent's duty to provide child support is not affected by custodial parent's refusal to give custody or visitation rights to non-custodial parent. This act adds section 4382 to the Civil Code.

S.B. 1698—Wilson

Chapter 367

Statutes of 1980

Affidavits in Lieu of Testimony. Revises existing provisions which allow the use of affidavit by a party to a dissolution proceeding in lieu of testimony; specifies form of the affidavit and makes other technical changes. This act amends section 4511 of the Civil Code, and amends section 585 of the Code of Civil Procedure.

S.B. 961—Sieroty

Chapter 48

Statutes of 1980

Conciliation Court. Establishes Family Conciliation Court Law, providing uniform provisions for employment of personnel and making jurisdictional changes. Previous law required each superior court to exercise jurisdiction as a conciliation court and to set forth its own provisions for appointment of personnel.

2. *Community Property*

A.B. 3370—Egeland

Chapter 329

Statutes of 1980

Notice of Liability. Requires attorney of party to dissolution or legal separation to give written notice to his or her client of possible liability if the spouse to whom a contract has been assigned defaults. This act adds section 4800.6 to the Civil Code.

3. *Child Custody*

A.B. 3070—Egeland

Chapter 1229

Statutes of 1980

Termination of Parental Rights. Specifies that a declaration that minor is free from parental custody and control terminates all parental rights and responsibilities for child; makes other technical changes regarding foster care. This act amends sections 224m and 224s of, and adds section 232.6 to, the Civil Code; and amends section 11212 of, and adds Article 13.5 (beginning with section 396) to, Chapter 2 of Part 1 of Division 2 of, the Welfare and Institutions Code, and makes an appropriation therefore.

A.B. 2529—Naylor

Chapter 1311

Statutes of 1980

Family Protection. Provides family reunification services for the purpose of preventing a minor child from being removed from the home; changes standard of proof for conditions warranting removal of a minor child from parental custody. This act amends sections 303, 303.5, 361.5, 366.3, 366.5, 16525, and 16527 of the Welfare and Institutions Code and amends section 28 of Chapter 977 of the Statutes of 1976, and takes effect immediately as an urgency measure.

A.B. 3311—McVittie

Chapter 863

Statutes of 1980

Preference of Issue for Trial. Grants preference to cases involving contested child custody over other civil cases for trial dates; requires separate trial for all contested issues of custody in cases with more than one contested issue. This act adds section 4600.6 to the Civil Code.

4. *Child Support*

A.B. 2982—Young

Chapter 511

Statutes of 1980

Cost-of-living Adjustments in Welfare. Provides for annual cost-of-living increases in Aid to Families with Dependent Children, to be adjusted by the Commission on State Finance. This

act adds section 13887.5 to the Government Code; amends and repeals various section of the Welfare and Institutions Code, and repeals section 6.4 of Chapter 348 of the Statutes of 1976.

A.B. 3138—Harris

Chapter 1207

Statutes of 1980

Aid to Families With Dependent Children (AFDC). Allows the custodial parent of a child receiving assistance under AFDC to be informed, upon request, of the amount of child support the absent parent is paying the county. This act adds section 11476.2 to the Welfare and Institutions Code.

A.B. 2115—McAlister

Chapter 682

Statutes of 1980

Agreements for Judgment. Provides procedural safeguards for the due process rights of notice and hearing of the non-custodial parent. This act amends section 11476.1 of the Welfare and Institutions Code.

5. *Spousal Support*

A.B. 145—McAlister

Chapter 173

Statutes of 1980

Pensions Subject to Process. Eliminates certain prohibitions against execution of judgment, garnishment, attachment, or assignment of certain public and private pensions and retirement plans to ensure payment of spousal or child support; this act amends section 4701 of the Civil Code; amends section 690.18 of the Code of Civil Procedure; amends section 22005 of the Education Code; and amends section 21201 of the Government Code, relating to remedies, effective immediately as an urgency measure.

A.B. 3050—Moorhead

Chapter 866

Statutes of 1980

Assignment of Wages. Authorizes court order enforcing spousal support through the assignment of wages to the person to whom support is owing. Previously, spousal support orders were only enforceable through execution or contempt proceedings. This act adds sections 4801.6 and 4801.7 to the Civil Code.

6. *Pregnancy*

S.B. 1392—Watson

Chapter 776

Statutes of 1980

Diethylstilbestrol (DES) Program. Establishes program for the education, identification, and screening of persons exposed to DES while pregnant or prenatally. This act adds section 1367.8 to, and adds Article 3.7 (beginning with section 349) to Chapter 2 of Part 1 of Division 1 of the Health and Safety Code; and adds sections 10119.7 and 11512.18 to the Insurance Code.

7. *Women's Health*

S.B. 1893—Roberti

Chapter 916

Statutes of 1980

Breast Cancer. Provides that failure of physician and surgeon to inform patient in writing of the advantages, disadvantages, risks, and descriptions of different methods of treatment for breast cancer constitutes a ground for discipline for unprofessional conduct. This act adds section 1704.5 to the Health and Safety Code.

8. *Paternity*

A.B. 1981—Stirling

Chapter 1310

Statutes of 1980

Blood Tests. Provides that blood tests performed under the Uniform Act on Blood Tests to Determine Paternity which disclose that the husband is not the father of the wife's child are conclusive on the issue of paternity of the husband, notwithstanding the presumption of the Evidence Code that children born while the wife and husband are cohabitating are children of the marriage. This act amends section 621 of the Evidence Code and takes effect immediately as an urgency measure.

III. LABOR LAW

A. EMPLOYMENT DISCRIMINATION

1. *Constitutionality of Statute Giving Male Employees Preferred Status*

Fenske v. Public Employee Retirement System, 103 Cal. App. 3d 590, 163 Cal. Rptr. 182 (5th Dist. 1980). The court of appeal declared unconstitutional a statute giving male employees preferred status over their female counterparts. A disabled female police dispatcher sought job reclassification as a "local safety member" with the Public Employee's Retirement System (PERS). Local safety members are defined under California Government Code section 200.19 as all local police officers and fire fighters. She had been classified as a "local miscellaneous member." When her request for reclassification was denied by PERS Administration Board on grounds that she was not a police officer, she sought review through a writ of mandate.

Disabled "miscellaneous members" of PERS receive one third of their final salary as retirement pay, while safety members receive one half. Under Government Code section 200.19, male police dispatchers had an absolute statutory right to elect to be classified as local police officers, while their female counterparts were required to obtain permission from the local department for such an election.

Finding no justification for this distinction, the court extended the option to elect retirement classification to female dispatchers. The original 1947 version of section 200.19 did not permit any female dispatchers to be classified as local police officers. Amendments in 1972, 1973, and 1974 had given female dispatchers the opportunity, but not the right, to be classified as police officers.

B. LEGISLATION

1. *Employment Discrimination*

A.B. 3186—Moore

Chapter 1303

Statutes of 1980

Discrimination in Franchising. Amends law prohibiting discrimination on the basis of race, color, religion, ancestry, or national

origin in the granting of franchises to include prohibition against discrimination on the basis of sex. This act adds section 51.8 to the Civil Code.

A.B. 290—M. Waters

Chapter 619

Statutes of 1980

Sterilization. Makes it unlawful for an employer to require any employee to be sterilized as a condition of employment. This act adds section 12945.5 to the Government Code.

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