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SURVEY: WOMEN AND CALIFORNIA LAW

This survey of California law, a regular feature of the Women's Law Forum, summarizes recent California Supreme Court and Court of Appeal decisions of special importance to women. A brief analysis of the issues pertinent to women raised in each case is provided.

TABLE OF CONTENTS

I.	CRIMINAL LAW	
A.	RAPE	
	1. <i>Testimony of defendant's psychiatrist in child abuse case held to be privileged despite Child Abuse Reporting Act</i>	787
II.	FAMILY LAW	
A.	COMMUNITY PROPERTY	
	1. <i>Payments arising from "income protection" insurance policy are community property</i>	790
	2. <i>Uniformed Services Former Spouses' Protection Act is retroactive to date of issuance of McCarty decision</i>	792
	3. <i>Term life insurance policy not community property</i>	795
B.	CHILD CUSTODY AND CONTROL	
	1. <i>"Foster home" includes care in home of relative for purpose of parental rights termination action</i>	797
	2. <i>Mediator of child custody or visitation disputes may be cross-examined upon rendering recommendation to court</i>	801
	3. <i>Non-custodial parent may expose children to own religious practices absent clear evidence of harm to children</i>	803

C.	SPOUSAL AND CHILD SUPPORT	
1.	<i>Failure of one spouse to disclose existence of community asset to other spouse is extrinsic fraud for purpose of setting aside final divorce decree</i>	805
2.	<i>Civil Code section 5127.6 construed to apply only to custodial parents receiving AFDC and as so construed, held constitutional</i>	807
D.	HEALTH AND WELFARE	
1.	<i>Probate court lacks jurisdiction to order sterilization of conservatee</i>	810
E.	NON-MARITAL RELATIONSHIPS	
1.	<i>Implied contract between unmarried partners is enforceable despite subsequent marriage.</i>	815
III.	TORT LAW	
A.	WRONGFUL BIRTH ACTIONS	
1.	<i>Privacy rights of institutionalized woman bar her recovery for failure to supervise sexual activity; cause of action for failure to provide birth control and prenatal care upheld</i>	818
B.	INTENTIONAL TORTS	
1.	<i>Cause of action for battery and deceit arising out of misrepresentation of sterility upheld</i>	821
IV.	CIVIL RIGHTS LAW	
A.	SEX DISCRIMINATION	
1.	<i>Use of liquor license revocation to enforce Unruh Civil Rights Act upheld</i>	825
B.	AGE DISCRIMINATION	
1.	<i>Holding in Marina Point v. Wolfson extended to prevent non-profit homeowners' association from discriminating against families with children</i>	829

V. ADMINISTRATIVE LAW

A. NON-MARITAL RELATIONSHIP

1. *Relocation with "non-marital loved one" is not good cause for termination of employment under Unemployment Insurance Code* 833

I. CRIMINAL LAW

A. RAPE

1. *Testimony of defendant's psychiatrist in child abuse case held to be privileged despite Child Abuse Reporting Act.*

People v. Stritzinger, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983). In *People v. Stritzinger*, the court held that testimony of the defendant's psychiatrist obtained pursuant to the Child Abuse Reporting Act¹ was erroneously admitted at trial in violation of the psychotherapist-patient privilege.²

The defendant and his fourteen-year-old stepdaughter, Sarah, sought treatment from a licensed clinical psychologist after the defendant allegedly engaged in various acts of fondling, mutual masturbation, and oral copulation with the child. In the course of her individual therapy, Sarah revealed that she had engaged in sexual activity with the defendant. The therapist reported the conversation to the child welfare agency that same afternoon, and indicated that he was scheduled to meet with the defendant later the same day. Despite expressed reservations about disclosing defendant's confidential communications, the therapist revealed the substance of his session with defendant when requested to do so in a follow-up inquiry by the investigating sheriff's deputy. The therapist was advised by the deputy that the Child Abuse Reporting Act provided an applicable exception to the psychotherapist-patient privilege.³

1. CAL. PENAL CODE § 11165-11174 (Deering Supp. 1984).

2. CAL. EVID. CODE § 1014 (Deering Supp. 1984). The court also held that the mother's testimony concerning the child's emotional difficulties was insufficient to support the trial court's finding that the child was unavailable as a witness and that therefore, the child's preliminary hearing testimony was erroneously admitted into evidence. 34 Cal. 3d 505, 519, 668 P.2d 738, 194 Cal. Rptr. 431, 441 (1983).

3. The applicable exception is codified at CAL. PENAL CODE § 11171(b) (Deering

At trial, the defendant sought to have the therapist's testimony excluded on the basis of the psychotherapist-patient privilege. The court held that Penal Code section 11171(b)⁴ creates an exception to the privilege and ruled the testimony admissible. The defendant was convicted of multiple counts of child molestation; the defendant appealed.

Section 1014 of the California Evidence Code⁵ provides that a patient, whether or not a party to a lawsuit, has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between patient and psychotherapist. However, to encourage the prompt investigation and prosecution of child abuse, the legislature carved out an exception to the statutory physician-patient privileges. Section 11171(b) provides in pertinent part: "Neither the physician-patient privilege nor the psychotherapist-patient privileges applies to information reported pursuant to this article in any court proceeding or administrative hearing."⁶

The psychotherapist-patient privilege is codified in California Evidence Code section 1014.⁷ Section 1014 provides in part: "The patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist. . . ."⁸ As a matter of policy, California courts have broadly construed section 1014 in favor of the patient,⁹ although no prior cases have dealt specifically with the exception provided in section 11171(b). In *In re Lifschutz*,¹⁰ the court, in construing the patient-litigant exception¹¹ to the privilege, recognized the constitutional dimension of the privilege as well as the general need for confidentiality in psychotherapy, but held that the privilege

Supp. 1984).

4. *Id.*

5. CAL. EVID. CODE § 1014 (Deering Supp. 1984).

6. CAL. PENAL CODE § 11171(b) (Deering Supp. 1984).

7. CAL. EVID. CODE § 1014 (Deering Supp. 1984).

8. *Id.*

9. See *Roberts v. Superior Court*, 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973); *Grosslight v. Superior Court*, 72 Cal. App. 3d 502, 140 Cal. Rptr. 278 (1977).

10. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829.

11. CAL. EVID. CODE § 1016 (Deering 1966).

WOMEN'S LAW FORUM

is not absolute and must yield to compelling state interests.¹²

The *Stritzinger* court noted that the clear legislative intent in the enactment of the Child Abuse Reporting Act is to protect children, and further, that this government concern is compelling. Therefore, the court stated that section 11171(b) creates a specific exception to the psychotherapist-patient privilege, but that the exception was erroneously applied under the facts in *Stritzinger*.

The court found that Sarah's communications with the therapist were not privileged, were required to be reported under the Act, and were admissible at trial. It also determined, however, that the second report, that of the defendant's communications, at most only confirmed the therapist's earlier report and was not required to be disclosed under the Child Abuse Reporting Act. The court concluded that it would be inappropriate to apply the subdivision (b) exception to the second report and therefore did not allow admission of the evidence at trial.

The court stated that if the psychiatrist was compelled to go beyond an initial report under such circumstances,

candor and integrity would require the doctor to advise the patient at the outset that he will violate his confidence. . . . Under such circumstances it is impossible to conceive of any meaningful therapy. Ironically, in this case medical help was initially what this distraught family sought as a result of these tragic events.¹³

Justice Kaus concurred with the majority's holding that the testimony was admitted in error, but correctly disagreed with the majority's reasoning. He argued that the majority erroneously based its determination that the second report was optional on the fact that it did not yield any new information. The solution to the conflict between patient's privacy concerns and the 11171(b) exception to the psychotherapist-patient privilege, according to Justice Kaus, is to apply the concept of waiver. Jus-

12. The *Lifschutz* court concluded that Evidence Code section 1016 compels disclosure of only those matters which the patient has chosen to reveal by referring to them in litigation. 2 Cal. 3d at 432, 467 P.2d at 568, 85 Cal. Rptr. at 840.

13. 34 Cal. 3d at 514, 668 P.2d at 744-45, 194 Cal. Rptr. at 437-38.

tice Kaus would prohibit the therapist from testifying to confidential communications from the defendant-patient unless the proponent of the evidence first establishes that the patient, before talking to the therapist, had been made aware of the therapist's statutory duty to testify.

The majority found the excuse of the privilege obviously abhorrent in a voluntary family therapy situation such as *Stritzinger*, involving the admission of the defendant's own incriminating statements. The court, however, paid lip service to the constitutional concerns presented by the psychotherapist-patient privilege rather than offering any rules for proper application of the exception beyond the facts of *Stritzinger*.¹⁴ Justice Kaus' proposed waiver rule seems to be a workable approach to legislation that has placed psychotherapists in a double bind which neither promotes effective therapy nor leads to successful prosecutions in family sexual abuse cases.

II. FAMILY LAW

A. COMMUNITY PROPERTY

1. *Payments arising from "income protection" insurance policy are community property.*

In re Marriage of Donnelly, 142 Cal. App. 3d 135, 190 Cal. Rptr. 756 (1st Dist. 1983). In *In re Marriage of Donnelly*, the court of appeal characterized payments arising from an "income protection" insurance policy as community property to the extent that community funds contributed toward the premiums.

14. Justice Kaus wrote:

It may be unfair to mention it—we have to take our cases as they come along—but something else which bothers me about the majority opinion is that it really does not decide anything except this case. Even if the facts supported the majority's conclusion, Dr. Walker would have been free to testify to defendant's confidences if he had seen defendant before Sarah, or if defendant had related more serious or more frequent sexual misconduct than Sarah.

Id. at 523 n.4, 668 P.2d at 750 n.4, 194 Cal. Rptr. at 444 n.4.

WOMEN'S LAW FORUM

During marriage, the husband took out an "income protection" insurance policy using community earnings to pay the premiums. The policy became payable upon the husband's total disability. Husband sustained job related injuries while still living with his wife but the injuries did not culminate in total disability until after the parties separated. Upon dissolution of the marriage, the wife claimed a community property interest in the policy. The husband argued that the payments were his separate property because they derived from his post-separation disability rather than from pre-separation labor. The trial court rejected the husband's contention and he appealed.

In support of his position, the husband cited *In re Marriage of Jones*¹⁵ and *In re Marriage of Flockhart*.¹⁶ In *Jones*, the California Supreme Court held that disability pay is not a community asset because it is not compensation resulting from past services rendered. Rather, it is compensation for loss of present and future earning capacity and personal anguish resulting from a disabled status. The benefits at issue in *Flockhart* derived from a statute¹⁷ enacted to protect laid off park employees. The *Flockhart* court reasoned that the statutory benefits did not stem from a contractual right in consideration for services previously rendered but, instead, represented present compensation for lost income, and therefore were analogous to disability payments.¹⁸ Thus, the court in *Flockhart* held that the weekly layoff benefits were not community property.

The *Donnelly* court disagreed with the husband and pointed out that in *In re Marriage of Brown*,¹⁹ the California Supreme Court had disapproved *Jones*. In *Jones*, the disability payments came from a fund contributed to by the employee rather than being gratuitous. For this reason, the *Brown* court likened them to pensions which had not yet vested. *Brown* held:

15. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

16. 119 Cal. App. 3d 240, 173 Cal. Rptr. 818 (1981).

17. Redwood Employee Protection Program Act, Pub. L. No. 95-250, 92 Stat. 163 (1978) (tit. I codified as amended at 16 U.S.C. §§ 1a-1, 79b, 79c, 79c-1, 79k-79q (1982) tit. II not codified (1982)).

18. However, it is arguable that the right *did* accrue because of past contributed labor. Legislative creation of a compensation plan does not negate the fact that the right to receive benefits under it would not exist but for past contributed labor, nor does it preclude the plan having been created to induce or compensate for such labor.

19. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

"[P]ension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding."²⁰

The *Donnelly* court pointed out that the "income protection" insurance policy contracted for during the marriage had been privately purchased, its provisions called for the payment of a flat sum over a fixed term, and it was maintained entirely with private funds. In *New York Life Insurance Co. v. Bank of Italy*,²¹ the court held that a life insurance policy, when purchased during marriage and maintained with community earnings, is a community asset and therefore subject to equal division upon marital dissolution. Lkening the income protection policy in *Donnelly* to a life insurance policy, the *Donnelly* court applied the rule stated in *New York Life Insurance Co.* and held the income protection policy to be community property.

The court in *Donnelly* looked past the label of the plan to distinguish between "contributed to" plans, such as pensions and life insurance policies, and gratuitous plans derived solely from the benevolence of the employer. Thus, looking beyond the "disability plan" label, the court based its holding that the plan was community property upon the actual characteristics of the plan and upon a determination that community labor contributed toward its creation and/or maintenance. The court's result is consistent with the community property scheme in California—to divide equally those assets which are derived from the community and therefore belong to the community.

2. *Uniformed Services Former Spouses' Protection Act is retroactive to date of issuance of McCarty decision.*

In re Marriage of Hopkins, 142 Cal. App. 3d 350, 191 Cal. Rptr. 70 (2nd Dist. 1983). The Court of Appeal in *In re Marriage of Hopkins*, upheld a trial court's division of a military pension as community property.

20. *Id.* at 842, 544 P.2d at 562-63, 126 Cal. Rptr. at 634-35.

21. 60 Cal. App. 602, 214 P. 61 (1923).

In a December 1980 dissolution proceeding, the trial court found a husband's military retirement pension to be subject to community property division. The husband appealed. Although the court found the trial court's decision to be an appropriate application of California law as it existed at the time, it analyzed the decision in light of the 1981 case *McCarty v. McCarty*²² and the 1982 enactment of the Uniformed Services Former Spouses' Protection Act (the Act).²³

Prior to *McCarty*, it was well settled in California that military pensions were community assets subject to division in dissolution proceedings. This principle is the *Fithian* doctrine.²⁴ In June 1981, the United States Supreme Court in *McCarty v. McCarty*, overruled the *Fithian* line of cases by holding that congressional goals in creating a federal retirement plan had preempted the field of community classification by state courts and that a community property division of such pay frustrated congressional objectives. In September 1982, Congress enacted the Act. The Act effectively overruled *McCarty* and gave state courts the power to divide military pensions as community property.²⁵ The effect of the Act on California law is to reinstate the *Fithian* doctrine.

On the issue of the retroactivity of the Act, the court first noted that, in at least one other California court of appeal decision, *In re Marriage of Fellers*,²⁶ *McCarty* had been held not to be retroactive to cases final before it was decided. The *Fellers* court had reviewed the ramifications of giving *McCarty* retroactive effect: "[It] would flaunt the rule of res judicata, upset settled property distributions on which parties have planned their lives and unsettle judgments entered as long as 40 years ago."²⁷ *In re Marriage of Hopkins*, on the other hand, was not final when *McCarty* was decided and was still pending appeal on the

22. 453 U.S. 210 (1981).

23. Pub. L. No. 97-252, § 1002(a), 96 Stat. 730 (1982) (to be codified at 10 U.S.C. § 1408).

24. *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974) cert. denied, 419 U.S. 925 (1974).

25. For a more detailed history of *McCarty* and the Act, see *Survey: Women and California Law*, 12 GOLDEN GATE U.L. REV. 763-65 (1982) and *Survey: Women and California Law*, 13 GOLDEN GATE U.L. REV. 744-45 (1983).

26. 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (1981).

27. *Id.* at 257, 178 Cal. Rptr. at 37.

effective date of the Act. The *Hopkins* court stated three factors to be considered in determining retroactivity: "the extent of public reliance upon the former rule; the ability of litigants to foresee the coming change in the law and whether retroactive application of the rule could produce substantial inequitable results."²⁸

The court reasoned that public reliance on the *Fithian* doctrine was extensive because the *Fithian* decision was almost ten years old when *McCarty* was decided, whereas reliance on *McCarty* had been short-lived. Therefore, it held that to extend the retroactivity of the Act would facilitate, rather than frustrate, the well-ordered functions of the law in this area.

The court also pointed out that it had not been apparent that the United States Supreme Court would reverse the California Supreme Court in *McCarty*, since it had denied certiorari to *In re Marriage of Fithian*, which had presented an identical issue.²⁹ Thus, there was no way for an attorney to predict the change *McCarty* presented. The court noted further that the issue had been continually before Congress since 1969, making it reasonable for a litigant to anticipate legislative suppression of *McCarty*.

Finally, the court stated that to refuse to give the Act retroactive effect would produce inequitable results in that some of those entitled to a share of a military pension would not receive it merely because of the existence of a short-lived decision that stands in direct conflict with clear congressional intent. Therefore, the court held the Act to be retroactive to the date of issuance of the *McCarty* decision, thereby fully reinstating pre-*McCarty* law. In so doing, the court brings continuity and stability to an area of the law that previously had been characterized by rapid and conflicting change.

28. 142 Cal. App. 3d at 357, 191 Cal. Rptr. at 75.

29. *Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369 (1974) cert. denied, 419 U.S. 825 (1974).

3. *Term life insurance policy not community property.*

In Re Marriage of Lorenz, 146 Cal. App. 3d 464, 194 Cal. Rptr. 237 (2nd Dist. 1983). In *In Re Marriage of Lorenz*, the court held that a husband's term life insurance policies were not community assets subject to division upon dissolution, since the policies had no monetary value.

In the dissolution proceeding, the trial court determined that the husband's two life insurance policies had no cash value. Both policies were term policies having a face value of \$10,000 each. One policy was a Veterans Administration policy and the other was issued through the husband's employer. The husband was the named insured in both policies. The wife appealed, urging that term insurance policies on the husband's life were a community asset.

Courts have generally recognized the value of whole life insurance as its cash surrender value, and have divided that value when the policy is determined to be community property.³⁰ Prior to *In re Marriage of Lorenz*, however, no California cases had addressed the divisibility of term life insurance policies, which are generally accepted as having no value.³¹

In formulating its holding, the court analyzed and contrasted conflicting California court of appeal cases. In *Biltoft v. Wootten*,³² the court held that the *proceeds* of a term life insurance policy must be apportioned between community property and separate property in the same ratio as the amount paid for the premiums from community earnings bore to the amount from separate property. *Biltoft* involved a contest between the former wife and the daughter-beneficiary of the decedent over the proceeds of the policy acquired during marriage. The marriage had since been dissolved, but the court of appeal based its

30. See, e.g., *In re Marriage of Holmgren*, 60 Cal. App. 3d 869, 130 Cal. Rptr. 440 (1976).

31. Whole life insurance differs from term life insurance both in value and benefits. For instance, term life insurance has no cash surrender value and generally furnishes protection for only a specified or limited period of time. Also, the premium for whole life insurance remains the same throughout the life of the policyholder, whereas the premium for term insurance increases with the age of the insured. BLACK'S LAW DICTIONARY 723-24 (rev. 5th ed. 1979).

32. 96 Cal. App. 3d 58, 157 Cal. Rptr. 581 (1979).

characterization of the policy proceeds on the marital status of the insured at the time the insurance was acquired and on the fact that community funds were used to purchase the policies.

*Todd v. Todd*³³ and *In Re Marriage of Aufmuth*³⁴ established that some property rights, such as education, are intangible and incapable of monetary valuation for division between spouses in divorce proceedings. On the other hand, the *Lorenz* court recognized that some intangibles, such as contingent retirement benefits and non-vested pension rights, have been held to be divisible property under community property statutes.³⁵

The *Lorenz* court cited *Todd* for the proposition that an asset, in order to be divided within the meaning of community property laws, must be "of such a character that a monetary value can be placed upon it."³⁶ The court concluded that the term insurance policies are not convertible into cash, that no monetary value can be placed upon them, and that the assets are therefore not divisible on dissolution of the marriage.

With little discussion, the *Lorenz* court distinguished *Biltoft*, stating: "The proceeds or benefits of the policy of course, have a value. However, until those benefits are payable, the policy is worthless."³⁷ The court therefore concluded that the trial court had properly ruled that the term life insurance policies were not community property subject to division on dissolution of marriage.

The court in *Lorenz* took an analytical approach that fails to recognize or preserve any prospective community interest in term life insurance benefits, or to acknowledge that such benefits may have had their origin in community funds. The distinctions between policy proceeds and the policy itself, and between term and whole life benefits, certainly merit more discussion than the *Lorenz* court afforded them. Indeed, the court managed

33. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

34. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

35. *Lorenz*, 146 Cal. App. 3d at 467, 194 Cal. Rptr. at 239.

36. *Id.*

37. *Id.* at 469, 194 Cal. Rptr. at 239-40.

to avoid any mention of the suggestions made in *Biltoft* for protecting the uninsured spouse's community property interest in term insurance. The *Biltoft* court suggested that courts retain jurisdiction until the policy owner dies or value the community interest in the same manner as other intangible community property rights are valued. Clearly, term insurance is unique. However, it does not follow that the community interest in the proceeds of such a policy should not be protected, when it is clear that the policy will render proceeds at some future point.

B. CHILD CUSTODY AND CONTROL

1. *"Foster home" includes care in home of relative for purpose of parental rights termination action.*

In re Laura F., 33 Cal. 3d 826, 662 P.2d 922, 191 Cal. Rptr. 464 (1983). In *In re Laura F.*, the California Supreme Court held that in a parental rights termination action, "foster home" within the meaning of Civil Code section 232(a)(7),³⁸ includes care in the home of a relative. The court also upheld the trial court's finding that the mother, who contested the action, had not shown that she could provide an adequate home or maintain an adequate relationship with the children.³⁹

Three children were removed from their mother's care after a series of investigations for neglect.⁴⁰ Following dependency

38. CAL. CIV. CODE § 232(a)(7) (Deering 1982 and Supp. 1984). Originally, this section provided for a termination action to be initiated only after a child had been cared for in a foster home for at least two consecutive years. An amendment to section 232(a)(7) reduced the requisite foster home period to one year. In addition, section 232(a)(7) requires that it be shown by clear and convincing evidence that return of the child to the parent would be detrimental to the child *and* that during the required foster care period, the parents have failed or are likely to fail in the future to maintain an adequate parental relationship with the child. Since the *Laura F.* decision, section 232(a)(7) has been amended. The legislature replaced "foster homes" with "out-of-home placement." This change represents legislative approval of that portion of *Laura F.* that included the home of a relative within the meaning of "foster home." CAL. CIV. CODE § 232(a)(7) (Deering Supp. 1984)(amending CAL. CIV. CODE § 232(a)(7) (1983)).

39. The court also upheld the trial court's determination that the mother had been offered adequate opportunities for rehabilitation, a necessary prerequisite to regaining custody; that the appropriate standard of proof in section 232 proceedings is clear and convincing evidence; and that the trial court had not abused its discretion in failing to appoint separate counsel for the children.

40. In her dissenting opinion, Chief Justice Bird pointed out that the mother at first

proceedings,⁴¹ the oldest son was placed with his paternal aunt and uncle and his two younger stepsisters were placed in foster homes with nonrelatives. Three years later, the state initiated proceedings to terminate parental rights.⁴² At this time, the aunt and uncle were willing to adopt the boy but the two sisters had no prospects for adoption. The trial court terminated the mother's custody and control over all three children. On appeal, the mother argued as to the boy that "foster home" within the meaning of section 232(a)(7) does not include care in the home of a relative, and that as to all three children, the evidence did not support the court's decision to terminate her parental rights.

Civil Code section 232 prescribes the conditions which must be met in order for a court to terminate parental custody and control.⁴³ It seeks to provide a mechanism for termination of parental rights where there is a realistic possibility that a child will be adopted thereafter. In particular, subdivision (a)(7) provides that a child must be cared for in a foster home for two or more consecutive years before termination of parental rights may be sought.⁴⁴ The mother argued that the termination proceedings did not comply with the threshold requirement with regard to the boy because he had been living with relatives and not in a foster home during the requisite two year period.

In support of her position, the mother cited *In re Antonio F.*,⁴⁵ a section 232(a)(7) termination action, as "the first [California] case to define 'foster home' as care other than in the home of a parent or relative."⁴⁶ The *Antonio F.* court took its defini-

voluntarily assented to foster care for her children due to emotional and financial difficulties that she was experiencing. Although she was investigated by the Department of Social Services pursuant to accusations of neglect, no formal allegations by the Department were ever made in the original removal of the children from the mother's home. *In re Laura F.*, 33 Cal. 3d 826, 841-42, 662 P.2d 922, 923-24, 191 Cal. Rptr. 464, 474-75 (1983).

41. CAL. WELF. & INST. CODE § 300(a) (Deering Supp. 1984).

42. The proceedings were initiated under CAL. CIV. CODE § 232(a)(7) (Deering 1982 and Supp. 1984).

43. CAL. CIV. CODE § 232 (Deering Supp. 1984).

44. This statutory period has been reduced to one year. CAL. CIV. CODE § 232(a)(7) (Deering Supp. 1984) (amending CAL. CIV. CODE § 232(a)(7) (1982)).

45. 78 Cal. App. 3d 440, 144 Cal. Rptr. 466 (1978).

46. *Laura F.*, 33 Cal. 3d at 830, 662 P.2d at 924, 191 Cal. Rptr. at 466 (1983) quoting

tion from a relevant section of the Welfare and Institutions Code⁴⁷ which excluded children living with relatives from its definition of "foster home."⁴⁸ The United States Supreme Court discredited the *Antonio F.* definition in *Miller v. Youakin*.⁴⁹ In *Miller*, the Court held that it is unreasonable to differentiate between children who are equally neglected and abused because of the status of their court-appointed substitute parent.⁵⁰ The California Legislature subsequently repealed the Welfare and Institutions Code to reflect the ruling of the Court.⁵¹ Therefore, the *Laura F.* court rejected the *Antonio F.* definition, stating that not only was it based on an incorrect construction of the Code, but that it also precluded the immediate adoptability of children who had been placed with relatives during the statutory two year period and, as such, was inconsistent with the purpose of Civil Code section 232.

In addition to requiring a child to have resided in a foster home for at least two years prior to commencement of a termination action, section 232(a)(7) mandates a showing that a parent failed during that two year period, and is likely to fail in the future, to provide the child with an adequate parental relationship. In *In re Carmaleta B.*,⁵² the California Supreme Court interpreted this portion of section (a)(7) as requiring courts to balance the child's interest in secure parenting against the joint interests of both parent and child in preserving the family bond. The *Carmaleta B.* court held that this balancing test, along with an evaluation of parental progress during the two year period in which the children are away, represents an appropriate measure of future ability to parent successfully.

Having repeated this criterion, the *Laura F.* court instead focused on the mother's past record as a parent prior to the two

In re Antonio F., 78 Cal. App. 3d at 453, 144 Cal. Rptr. at 474 (1978)).

47. CAL. WELF. & INST. CODE § 11251 (Deering 1979) (repealed 1980).

48. Section 11251 specifically excluded children living with relatives from its definition of "foster home" because, under a related federal aid program, foster children who were on the Aid to Families With Dependent Children Program (AFDC) were allowed greater benefits than non-foster children on AFDC. Therefore, to exclude the home of a relative from its definition of "foster home" effectively saved the state money. *Id.*

49. 440 U.S. 125 (1979).

50. *Id.* at 145.

51. CAL. WELF. & INST. CODE § 11251 (Deering 1979) (repealed 1980).

52. 21 Cal. 3d at 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978).

year separation period. Holding that the evidence was sufficient to support the termination order as to all three children, the *Laura F.* court stated that the mother's past record was the only accurate indication of her ability to be a good parent in the future. This decision does not represent an application of the *Carmaleta B.* court's balancing test, nor does it take into consideration any progress the mother might have made during the two year rehabilitation period. This approach renders the statutory rehabilitation period meaningless. A balancing approach, along with a focus on future parenting ability, seems to foster the child's best interest. This is because it provides more opportunity for a parent to show that he or she has in fact improved his or her ability to provide a nurturing atmosphere for the child. Whenever family ties can be preserved without threatening the child's well being it is preferable for all concerned.

Three justices dissented from that portion of the majority opinion which found it appropriate to terminate the mother's parental rights as to her two daughters. The dissent stated that such action was contradictory to the legislative purpose in enacting Civil Code section 232 which is "to serve the welfare and best interest of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from his or her life."⁵³ The dissent pointed out that while the boy had clear and immediate prospects for adoption, the two girls had no such opportunities. Also, the fact that the girls suffered from physical and developmental disabilities made their prospects for future adoption very bleak. Therefore, the dissent found that it was not in the daughters' best interests to sever the maternal relationship when no better relationship with which to replace it was in existence *and* continuing the relationship was not detrimental to the girls' well-being.

In the absence of a showing that the mother had abused, neglected, or molested her children, it is not clear what past parenting record the court relied on in determining that the mother had no future ability to be an adequate parent. The court's decision seems to indicate that when a child is placed in

53. 33 Cal. 3d at 845, 662 P.2d at 935, 191 Cal. Rptr. at 477 (1983).

a foster home, this is prima facie evidence of past bad parenting. In addition, *Laura F.* represents a total disregard for the *Carmaleta* balancing test and seems to focus solely on past parental behavior as evidenced by a need for foster care.

2. *Mediator of child custody or visitation disputes may be cross-examined upon rendering recommendation to court.*

McLaughlin v. Superior Ct., 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (1st Dist. 1983). In *McLaughlin v. Superior Ct.*, the court held that a mediator of child custody and visitation disputes in a marriage dissolution proceeding could not render a recommendation to a court unless a protective order was issued which guaranteed the parties the right to cross-examine the mediator concerning the recommendation. The court concluded that a policy which allowed a court to receive a recommendation from a mediator, but denied the parties the right to cross-examine the mediator, was a denial of due process and therefore unconstitutional.

The couple in *McLaughlin* married in 1969 and agreed to dissolve their marriage in 1982. When a dispute arose regarding the custody of the parties' children, the dispute was referred for mediation, pursuant to California Civil Code section 4607(a).⁵⁴ The husband moved for a protective order. He contended that the mediation should proceed, but requested that if no agreement was reached, the mediator should be prohibited from making a recommendation to the court unless the husband was guaranteed the right to cross-examine the mediator. The trial court denied the motion on the ground that the protective order requested would violate a policy adopted by the court pursuant to Civil Code section 4607(e), which states in relevant part: "The mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the . . . children."⁵⁵

The trial court had adopted a local policy which required

54. CAL. CIV. CODE § 4607(a) (Deering Supp. 1984). Section 4607(a) states "[w]here it appears . . . [that] . . . the custody or visitation of . . . children . . . [is] contested . . . the matter shall be set for mediation"

55. CAL. CIV. CODE § 4607(e) (Deering Supp. 1984).

that a mediator make a recommendation to the court if the parties fail to agree on issues of child custody or visitation. The policy also required that the mediator not state his or her reasons for the recommendation. In accordance with its own policy, the trial court denied the parties the right to cross-examine the mediator on the ground that the reasons had not even been disclosed to the court. According to the trial court, these requirements are consistent with Civil Code section 4607(c) which states that the mediation proceedings "shall be confidential."⁵⁶

The court of appeal recognized that section 4607(e) does not require or authorize cross-examination of the mediator by the parties. However, the court concluded that a policy which permits a court to receive a significant recommendation on contested issues but denies the parties the right to cross-examine cannot constitutionally be upheld. In coming to this conclusion, the court of appeal cited *Fewel v. Fewel*,⁵⁷ where the court held it reversible error if an investigator did not appear like any other witness and testify subject to the rules of evidence and the right of cross-examination. The court of appeal also relied on *Long v. Long*,⁵⁸ a case with facts similar to those in *McLaughlin*, which cited *Fewel* as authority for the proposition that it is a denial of due process to deny a litigant the right to cross-examine a witness who testifies against him or her.

The court in *McLaughlin* found these holdings applicable and therefore construed the permissive language of Civil Code section 4607(e) in a manner consistent with the due process requirements discussed in *Fewel* and *Long*. The court held that a mediator may not make a recommendation to a court in the absence of a protective order guaranteeing the right to cross-examine the mediator, unless the right has been waived.

By upholding the right to cross-examine the mediator, the decision is constitutionally sound because it guarantees the parties due process in courts which choose to receive recommenda-

56. CAL. CIV. CODE § 4607(c) (Deering Supp. 1984).

57. 23 Cal. 2d 431, 144 P.2d 592 (1943).

58. 251. Cal. App. 2d 732, 736, 59 Cal. Rptr. 790 (1967).

tions from mediators.

However, if cross-examination of a mediator is mandated under due process, it follows that a mediator cannot make a recommendation to a court without in effect agreeing to violate the confidentiality requirement of Civil Code section 4607(c). A mediation proceeding can only work when both parties are assured that the mediator will not later turn against them. If a mediator wishes to preserve the confidentiality of the mediation proceedings, he/she must refuse to make a recommendation to the court. This may result in a decision which is not in the child's best interest. The mediator, a skilled professional, is caught in a double bind because he/she can no longer recommend what he/she feels is best for the child without violating the trust and integrity that is the basis of the mediation proceeding.

3. *Non-custodial parent may expose children to own religious practices absent clear evidence of harm to children.*

In re Mentry, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1st Dist. 1983). In *In re Mentry*, the court of appeal reversed a trial court ruling enjoining a non-custodial parent from exposing his children to his religious practices during their visits with him. The court ruled that the injunction could not be upheld absent a clear affirmative showing of harm or likelihood of harm to the children.

The mother and custodial parent sought to enjoin the non-custodial father from exposing their children to any religious views not sanctioned by the mother. Although both parents had been of the same faith during the marriage, the mother had since changed her religious views. The mother contended that exposing the children to two conflicting religious doctrines would confuse them and ultimately harm them. The trial court agreed, granted the restraining order, and the father appealed.

The father based his argument on the fact that there was no harm to the children. He cited *In re Murga*⁵⁹ in which a divorced mother asserted that "as the custodial parent, she [had]

59. 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (1980).

an absolute right to direct the child's religious upbringing."⁶⁰ The *Murga* court, however, held that "a court will not enjoin the non-custodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed."⁶¹ However, the *Murga* court, deciding the case on its facts, failed to state a test for when such a showing of harm has been made.

Quoting the Massachusetts case *Felton v. Felton*,⁶² the *Mentry* court stated, "harm to the child from conflicting religious instructions or practices . . . should not be simply assumed or surmised; it must be demonstrated in detail."⁶³ In *Mentry*, the evidence of harm consisted of testimony by the mother that one child was having social adjustment problems, and testimony by a court conciliator predicting future harm to the children. Rejecting the evidence as "manifestly insufficient," the court pointed out that the mother had failed to establish a correlation between the children's social adjustment problems and the father's religious practices. The court characterized the conciliator's testimony as "speculative" in light of the fact that he had never interviewed the children.

The *Mentry* court, while reaffirming the *Murga* rule, did not articulate any guidelines for when a showing of likelihood of harm has been made. While it is clear that a showing of actual harm will satisfy the rule, it is not so clear how close to actual harm one must come before the court will be inclined to intervene. It seems that the court requires a showing of likelihood of harm that approaches that end of the spectrum closest to actual harm before it is likely to intrude into the privacy of the family.⁶⁴

60. *Id.* at 504, 163 Cal. Rptr. at 81.

61. *Id.* at 505, 163 Cal. Rptr. at 82.

62. 418 N.E. 2d 606 (1981).

63. 142 Cal. App. 3d at 265, 190 Cal. Rptr. at 846 (1983).

64. The *Mentry* court articulated policy considerations that it finds implicit in the *Murga* rule. One consideration is a judicial disinclination to intervene in the family home absent compelling reasons. The court also favors an approach that seeks to preserve parental autonomy and family harmony. The *Mentry* court stated that these policies are to be particularly stressed in litigation surrounding marital dissolution. The reason for this emphasis is a desire to maintain whatever family ties are left after the breakdown of the

C. SPOUSAL AND CHILD SUPPORT

1. *Failure of one spouse to disclose existence of community asset to other spouse is extrinsic fraud for purpose of setting aside final divorce decree.*

In re Marriage of Modnick, 33 Cal.3d 897, 663 P.2d 187, 191 Cal. Rptr. 629 (1983). In *In re Marriage of Modnick*, the California Supreme Court held that the failure of one spouse to disclose the existence of a community asset to the other constitutes extrinsic fraud. Because such fraudulent conduct deprived the complaining spouse of the full opportunity to present her case, the court found that she was entitled to equitable relief and set aside the property and spousal support provisions of a final divorce decree.⁶⁵

The couple obtained an interlocutory judgment of marital dissolution which awarded the wife spousal support and divided community assets. Thereafter, it was revealed that the husband had concealed funds belonging to the community.⁶⁶ The husband agreed to resolve the dispute with the wife over the newly exposed assets privately. He then requested and obtained a final judgment which bound the parties to the interlocutory provisions. Relying on their agreement, the wife attempted to negotiate a fair settlement with the husband. Failing in her attempt, the wife moved to have the interlocutory and final decrees set aside alleging fraud. The trial court denied her motion and she appealed.

In *Orlando v. Orlando*,⁶⁷ during property settlement proceedings, a husband not only failed to disclose the existence of community assets, but also took deliberate steps to conceal

family unit as a single entity.

65. The court also held that the wife's claim was not barred by laches because she had been reasonably diligent in seeking relief and her delay resulted in little, if any, prejudice to the husband. In addition, the court found that the wife had failed to establish that she and her husband had reconciled during the interlocutory period.

66. The concealment was exposed during an investigation into the husband's finances by the Internal Revenue Service. The investigation revealed unreported savings accounts, some of which contained monies earned by the husband during the marriage. Furthermore, the court pointed out that the husband, in an effort to conceal the accounts, had transferred ownership of them to two relatives.

67. 243 Cal. App. 2d 248, 52 Cal. Rptr. 142 (1966).

them. The court allowed the final judgment of divorce to be reopened stating: "[a] party may attack a judgment on the ground of extrinsic fraud when the conduct of the other party has deprived him of an opportunity to present his claim or defense or to obtain a fair adversary hearing."⁶⁸

In *Kulchar v. Kulchar*,⁶⁹ the supreme court reaffirmed the position taken by the *Orlando* court, gave examples of situations which constitute extrinsic fraud, and distinguished them from those situations which constitute intrinsic fraud. Where there has been a false promise of a compromise or where one party has been kept in ignorance of the acts of the other, such circumstances give rise to a claim of extrinsic fraud, and entitle the wronged party to a new and fair hearing.⁷⁰ However, relief is denied where the fraud is intrinsic; that is, where a party could have and should have guarded against fraud at the prior hearing.⁷¹ In cases of extrinsic fraud, the duty of full disclosure arises out of the fiduciary relationship which exists between husband and wife.⁷² The *Modnick* court indicated that fiduciary responsibilities inherent in the spousal relationship are ongoing and terminate only when the court has divided the community property and the marriage is dissolved.

In *Modnick*, the husband violated his fiduciary duty to the wife. He did so by failing to disclose and deliberately attempting to hide community assets from her. The wife had no knowledge of, nor did she have reason to have knowledge of, the hidden assets. Therefore, the *Modnick* court held such actions by the husband to be extrinsic fraud, the presence of which prevented the wife from receiving her equitable share of the community assets and a fair assessment of her spousal support rights. Thus, the court upheld the wife's motion to vacate the interlocutory and final judgment of dissolution. In so doing, the *Modnick* court followed established California precedent. Moreover, the court's decision is consistent with the underlying policy of the

68. *Id.* at 251, 52 Cal. Rptr. at 145.

69. 1 Cal. 3d 467, 462 P.2d 17, 82 Cal. Rptr. 489 (1969).

70. *Id.* at 471, 462 P.2d at 19, 82 Cal. Rptr. at 491.

71. *Id.* at 472, 462 P.2d at 20, 82 Cal. Rptr. at 492.

72. *Id.* at 474, 462 P.2d at 21, 82 Cal. Rptr. at 493.

California community property scheme; that is, to divide equally *all* community assets when a marriage is dissolved and to award spousal support according to need and honest ability to pay.

2. *Civil Code section 5127.6 construed to apply only to custodial parents receiving AFDC and as so construed, held constitutional.*

In re Marriage of Shupe, 139 Cal. App. 3d 1026, 189 Cal. Rptr. 288 (4th Dist. 1983). In *In re Marriage of Shupe*, the court addressed the constitutionality of California Civil Code section 5127.6, which creates a presumption that the income of a custodial parent's spouse is available for the support of the custodial parent's child. The court construed section 5127.6 to apply only to custodial families who have applied for or are receiving AFDC benefits and as so construed, upheld its constitutionality.

Upon dissolution, a wife was awarded custody of the parties' child and her husband was ordered to pay child support. Years later, she filed an action for increased support payments based on the increased age of their child and on inflation. In the meantime, wife had remarried and she and her new husband had entered into an agreement to hold their earnings as separate rather than as community property. At the hearing on increasing his support payments, husband sought to have wife's new husband's income records entered into evidence. She objected on the ground that under their agreement, her new husband's income was his separate property and not available for the child's support. Husband contended that Civil Code section 5127.6⁷³ created a presumption that all income which, in absence of a contract between wife and her husband would be community property, was available to support the child. The trial court refused to admit the evidence and ordered an increase in support. Husband appealed.

California Civil Code section 5127.6⁷⁴ reads in part: "the community property interest of a natural or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any child who resides

73. CAL. CIV. CODE § 5127.6 (Deering Supp. 1984).

74. *Id.*

with the child's natural or adoptive parent who is married to such spouse." That section was enacted as part of the Welfare Reform Act of 1979⁷⁵ for the purpose of presuming the availability of stepparent income in determining eligibility for AFDC benefits.⁷⁶ However, section 5127.6 was not limited to AFDC families because a federal regulation required that, in order for it to create a presumption of the availability of stepparent income in AFDC determinations, the section must impose a duty on all stepparents generally to support their stepchildren.⁷⁷

Husband in *Shupe* contended that section 5127.6 invalidated wife's contract with her new husband insofar as the contract removed the new husband's income from availability for supporting the child. Wife contended that such an interpretation violated her right to equal protection of the laws because it guaranteed the availability of the custodial parent's community property while Civil Code section 199⁷⁸ immunizes the community property in the non-custodial parent. Civil Code section 199 provides that under the Civil Code, Title 2, Chapter 1,⁷⁹ the obligations of parents to support their children may be satisfied only from the parents' total earnings, assets acquired therefrom, or separate property. In *In re Marriage of Brown*,⁸⁰ the court held that section 199 did not conflict with or supersede Civil Code sections in other chapters which subjected community property to liability for child support⁸¹ and subjected a wife's

75. 1979 Cal. Stat. 4561.

76. SEN. COMM. ON HEALTH AND WELFARE. Staff Analysis of Assembly Bill No. 381 (1979).

77. 45 C.F.R. § 233-90 (1983).

The duty of stepparents to make their income available for the support of nonadopted stepchildren has been subject to judicial review: CAL. CIV. CODE § 5127.6 has been held *not* to accomplish its goal of imposing such a duty on all stepparents. *Wood v. Woods*, 133 Cal. App. 3d 954, 184 Cal. Rptr. 471 (1982). However, by federal statute, states are now mandated to include stepparent income in AFDC eligibility determinations. 42 U.S.C. § 602(a)(31)(1983).

78. CAL. CIV. CODE § 199 (Deering Supp. 1984).

79. *Id.* "[I]ncluding but not limited to §§ 196 and 206 . . ." (Deering Supp. 1984).

80. *In Re Marriage of Brown*, 99 Cal. App. 3d 702, 160 Cal. Rptr. 524 (1979).

81. CAL. CIV. CODE § 4807 (Deering 1972). Section 4807 reads: "[t]he community property, the quasi-community property and the separate property may be subjected to the support, maintenance, and education of the children in such proportions as the court deems just."

interest in the community property of her marriage to liability for child support.⁸² Therefore, the court rejected wife's equal protection argument.

However, the *Shupe* court held that section 5127.6, as construed by husband violated wife's equal protection in another way. The court could find no rational basis for distinguishing between custodial and non-custodial parents generally for purposes of presuming availability of their community property interests.⁸³ Thus, if construed to apply to all custodial parents, the statute could not be upheld.

Instead of invalidating the statute, however, the court construed it to apply only to custodial parents who had applied for or were receiving AFDC. The court held that, as so construed, section 5127.6 had a rational relationship with the legitimate government interest of facilitating the administration of government funds. Under section 5127.6, the state would be saved the inconvenience and expense of monitoring the incomes of non-custodial families, and could deal only with those families directly receiving the AFDC funds. Thus, the court held that section 5127.6 did not violate equal protection as so construed. The court upheld the judgment below awarding increased support payments because the wife was not an AFDC recipient or applicant.

The court in *Shupe*, by narrowly construing section 5127.6, effectively avoided the question whether that section invalidates a pre-marital agreement between a child's parent and stepparent to keep their incomes as separate property. That question seems to be moot, however, in light of the new federal statute⁸⁴ which requires inclusion of stepparent income in AFDC determinations. Thus, such an agreement between an AFDC parent and his or her spouse would presumably be invalid insofar as it lim-

82. CAL. CIV. CODE § 5127.5 (Deering 1972). Section 5127.5 reads in pertinent part: "The wife's interest in the community property, including the earnings of her husband, is liable for the support of her children. . . ."

83. The court relied on Civil Code section 196, CAL. CIV. CODE § 196 (Deering 1984), which imposes equal responsibility on each parent for supporting their child, and Civil Code section 246, CAL. CIV. CODE § 246 (Deering Supp. 1984), which it held to require consideration of a parent's community property interest in his or her spouse's income in determining child support obligations.

84. 42 U.S.C. § 602 (a)(31)(1983).

ited availability of the stepparent's income to support the child.

D. HEALTH AND WELFARE

1. *Probate court lacks jurisdiction to order sterilization of conservatee.*

Conservatorship of Valerie N., 152 Cal. App. 3d 224, 199 Cal. Rptr. 478 (1st Dist. 1983). In *Conservatorship of Valerie N.*, the court of appeal followed *Guardianship of Kemp*⁸⁵ and *Guardianship of Tulley*⁸⁶ and held that a probate court lacks both statutory authorization and equity jurisdiction to order sterilization of any person who is under probate conservatorship. The court also held constitutional Probate Code section 2356(d),⁸⁷ effective January 1, 1981, which prohibits sterilization of conservatees under probate jurisdiction.

The natural mother and stepfather of a severely retarded 25 year old woman petitioned the superior court, sitting in probate, for appointment as her conservators and for authorization to have her sterilized. The probate court granted the petitioner's appointment as co-conservators of their daughter's person but denied their application for authority to have her sterilized. The court relied upon Probate Code section 2356(d) in its order denying petitioners' application although that statute was not yet effective. Petitioners appealed, challenging the constitutionality of the statute.

Probate Code section 2356(d) provides that "[n]o ward or conservatee may be sterilized under the provisions of this division."⁸⁸ This statute was not operative at any time during the probate court proceedings nor at the time of the order denying the petitioners' application. Therefore, the constitutional issues raised on appeal were moot.⁸⁹ The court of appeal affirmed the

85. 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

86. 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978).

87. CAL. PROB. CODE § 2356(d) (Deering 1981).

88. *Id.*

89. However, the court discussed the constitutional issues despite their mootness in

probate court's order on the basis of *Kemp* and *Tulley*.

Both *Kemp* and *Tulley* presented issues identical to that in the present case. The *Kemp* court noted that a probate court has exclusive jurisdiction in guardianship proceedings, and once a guardian is appointed, the court maintains jurisdiction over the guardian and the administration of the ward's affairs. The court pointed out that California superior courts exercise probate jurisdiction under constitutional authorization, but that a probate court's powers and procedures are limited and defined by statute. The *Kemp* court found no statute which conferred upon the probate court the authority to order involuntary sterilization on conservatees under its administration, nor was there any case law in California to support that extension of its authority.

In *Tulley*, the guardian of a mentally incompetent ward argued on appeal that the superior court proceeded as a court of general jurisdiction and therefore possessed "inherent and unfettered equity power to serve and promote the interest and welfare of the incompetent" including authorizing sterilization "which was manifestly in the best interest of the ward."⁹⁰ The court rejected this argument on the basis of *Kemp* and further reasoned that sterilization "irreversibly denies a human being the fundamental right to bear and beget a child."⁹¹ Accordingly, the court followed established precedent in holding that power to grant such an extreme remedy may not be inferred from general principles of equity jurisdiction derived at common law, but must come from specific legislative authorization.⁹²

The court in *Valerie N.* followed *Kemp* and *Tulley* and rejected the petitioner's contentions that probate courts have jurisdiction to order an involuntary sterilization. The court also reached the constitutionality of Probate Code section 2356(d) even though that issue was moot in the present case. The court noted that it was appropriate to "resolve a moot point if it in-

the instant case.

90. 83 Cal. App. 3d at 704, 146 Cal. Rptr. at 270.

91. *Id.* at 701, 146 Cal. Rptr. at 268.

92. See *Sparkman v. McFarlin*, 552 F.2d 172, 175 (7th Cir. 1977) *rev'd on other grounds*, 435 U.S. 349 (1978); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671, 674 (S.D. Ohio 1971).

volves 'an issue of continuing public interest that is likely to recur in other cases' " and when such resolution would be "likely to affect the future rights of the parties before [the court]."⁹³

Petitioners' appeal challenged the statute's constitutionality on three grounds: 1) the statute denies a conservatee's right to privacy; 2) the statute denies due process of law; and 3) the statute denies equal protection of the laws. The parents argued that Probate Code section 2356(d) denied their mentally incompetent daughter the fundamental right to choose whether or not to bear a child, which is a right of privacy guaranteed under the United States and California Constitutions, and protected by due process of law. Only a compelling state interest may limit the exercise of that right.

The court rejected both the right to privacy and due process arguments on the same grounds. It reasoned that a competent person's right to choose *voluntary* sterilization could not be equated with the compelled sterilization of a mentally incompetent person. The court found that the state has a compelling interest in protecting mentally incompetent persons from the abuses of forced sterilization. The parent's inconvenience in caring for their child and their fears of an undesirable pregnancy were inadequate justification for such an extreme and irreversible remedy. Thus, the court found that the statute was necessary to the permissible legislative goal of protecting an incompetent person's right to procreate.

The court also rejected petitioners' equal protection argument. The petitioners argued that the statute unreasonably deprives incompetent persons of the right to choose sterilization on the same terms afforded to competent persons. The court found that the statute's differentiation between competent and incompetent persons was not an unreasonable classification. The statute distinguishes between these two groups on the basis of whether the person knowingly chooses sterilization with full understanding of the finality of its consequences. The respondent

93. 143 Cal. App. 3d at 674, 191 Cal. Rptr. at 287. The court did not explain how these requirements were met in this case.

in this case was afflicted with Down's Syndrome and had an IQ of 30. The court found that the respondent was not capable of knowing and voluntary consent to a sterilization procedure, and the statute prohibits anyone from exercising that consent for her. Because the statute protects the fundamental right of an incompetent person to bear children, the court held that it withstands strict scrutiny and does not violate equal protection.

In a lengthy dissent, Associate Justice Sims disagreed with the majority's conclusions both as to the court's jurisdiction to authorize sterilization and as to the constitutionality of section 3256(d). The dissent cited *Committee to Defend Reproductive Rights v. Myers*,⁹⁴ which struck down Budget Act provisions which limited Medi-Cal funding for abortions. The *Myers* Court stated, "[w]hen the state finances the costs of childbirth, but not the termination of pregnancy, it realistically forces an indigent pregnant woman to choose childbirth, even though she has the constitutional right to refuse to do so."⁹⁵ Analogizing to *Myers*, the dissent reasoned that the majority's opinion denied the "incompetent a forum in which to determine whether [her] mental and physical health and best interests [would] be served by sterilization. . . ."⁹⁶ thus forcing her into a choice either to withdraw from association with men or bear the risk of pregnancy.⁹⁷ Essentially, the dissent concluded that the court could not avoid making a choice for the incompetent person, and that the result of the majority's approach was to make an automatic choice in favor of bearing children.

Instead of attempting to protect her right not to have such a choice made for her, the dissent would hold that an incompetent woman has a constitutional right "to have 'freedom of choice' exercised on her . . . behalf through substituted judg-

94. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

95. *Id.* at 285, 625 P.2d at 799, 172 Cal. Rptr. at 886.

96. 152 Cal. App. 3d at 241, 199 Cal. Rptr. at 489.

97. The dissent also relied on authority from other jurisdictions which equates the right to sterilization with the right to abortion. *See, In re A.W.*, 637 P.2d 366 (Colo. 1981); *Ruby v. Massey*, 452 F. Supp. 361 (Conn. 1978). In addition, it relied on *In re Brady*, 426 A.2d 467, 473-75 (N.J. 1981), which held that: "The right to choose among procreation, sterilization and other methods of contraception is an important privacy right of all individuals. . . . Where an incompetent person lacks the mental capacity to make that choice, a court should ensure the exercise of that right on behalf of the incompetent in a manner that reflects his or her best interests." 426 A.2d at 475.

ment of a court of record predicated upon the best interests of [her] mental and physical health. . . ."⁹⁸ The dissent would, however, grant sterilization authorization only after both a full judicial hearing with notice to relatives and interested parties, and a comprehensive medical, psychological, and social evaluation of the incompetent person. Further, it would only authorize sterilization where the following facts were established by clear and convincing evidence: 1) that the conservatee was legally incompetent to make the sterilization decision herself; 2) that she had not expressly objected to the operation; 3) that she was incapable of understanding the nature of the proceedings; 4) that she was incapable of understanding the nature of the sexual function, reproduction, and sterilization; 5) that her incapacity is likely to be permanent; 6) that she is capable of reproduction; 7) that she is permanently incapable of parenting a child, even with reasonable assistance; 8) that the avoidance of pregnancy or procreation is necessary for her mental or physical health and well being; 9) that less intensive and permanent contraceptive methods are unworkable, inapplicable, or contraindicated; 10) that the proposed operation is the least restrictive alternative; and 11) that the operation will not be harmful.

In keeping with its approach to the jurisdictional question, the dissent would also hold Probate Code section 2356(d) unconstitutional insofar as it denies "an unreasoning mentally retarded incompetent the right to have a substituted choice made on her behalf. . . ."⁹⁹

Formerly, Welfare and Institutions Code section 7254¹⁰⁰ permitted forced sterilization upon persons institutionalized in state hospitals under carefully prescribed statutory limitations. The California legislature repealed this statute simultaneously with enacting Probate Code section 2356(d).¹⁰¹ These two ac-

98. 152 Cal. App. 3d at 245, 199 Cal. Rptr. at 492.

99. *Id.* at 254, 199 Cal. Rptr. at 498-99.

100. CAL. WELF. & INST. CODE § 7254 (Deering 1979), *repealed by* Act of Sept. 18, 1979, ch. 730, § 156.5, 1979 Cal. Stat. 2540.

101. Stats. 1979, ch. 726, § 3.01 codified at CAL. PROB. CODE § 2356(d). The Law Revision Commission's commentary to that statute notes that section 2356(d) is consistent with the holdings in *Kemp* and *Tulley*. 15 CALIF. L. REV. COM. REP. 451, 700, (1980).

tions by the legislature demonstrate the state's recognition of the potential abuses of involuntary sterilization, even when the procedure is statutorily controlled, and indicate the legislature's unwillingness to sanction and participate in the forced sterilization of mentally retarded people. The strong opinion and dissent in *Valerie N.* accentuate the ethical dilemmas which arise when society attempts to protect the fundamental rights of people it has determined are unable to exercise these rights for themselves.

E. NON-MARITAL RELATIONSHIPS

1. *Implied contract between unmarried partners is enforceable despite subsequent marriage.*

Watkins v. Watkins, 143 Cal. App. 3d 651, 192 Cal. Rptr. 54 (3rd Dist. 1983). The court of appeal in *Watkins v. Watkins* held that an implied contract between unmarried partners is enforceable despite their subsequent marriage to each other. In addition, the court held that the rule prohibiting a married couple from contracting with respect to domestic services is inapplicable to contracts entered into while the parties are in a nonmarital relationship.

A man and a woman lived together for six years in a non-marital relationship, during which the woman was the homemaker. Thereafter, the parties married. One year later the man petitioned for a marital dissolution and the woman filed a separate action for breach of implied contract. The trial court upheld the woman's cause of action and awarded her damages. On appeal, the man maintained that as a matter of law, the woman lost her right to enforce the contract when they entered into a legal marriage.

In *Marvin v. Marvin*,¹⁰² the California Supreme Court upheld a non-marital partner's cause of action for breach of implied contract. It held that "[i]n the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied con-

102. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

tract . . . between the parties."¹⁰³ Two policy considerations justified the result in *Marvin*: 1) a desire to fulfill the reasonable expectations of the parties to a non-marital relationship;¹⁰⁴ and 2) a desire to achieve an equitable distribution of the property acquired between the parties during the relationship.¹⁰⁵

To extinguish automatically the wife's contract rights upon marriage, reasoned the *Watkins* court, would be incompatible with the goals of *Marvin*. The *Watkins* court, following *Marvin*, stated that homemaker services are not without value; therefore, to deprive the woman of her right to assert her claim would nullify her contribution to the partnership.¹⁰⁶ Therefore, the *Watkins* court found an implied contract existed between the parties during their six year relationship preceding marriage. In addition, those rights were determined to be *earned* rights and as such were not extinguishable despite a subsequent marriage.

The husband argued that postmarital enforcement of the contract was in derogation of the marital relationship. The *Watkins* court rejected his contention and stated that failing to preserve such rights would in fact discourage marriage because those who acquire them will fear forfeiture if they marry.

The court then discussed and distinguished two cases which held certain contracts between married people to be invalid. In *Estate of Sonnickson*,¹⁰⁷ a man and a woman entered into a written contract while unmarried and not in contemplation of marriage. Under the terms of the agreement, the woman was to serve as companion to and homemaker for the man for the rest of his life in return for a portion of his real and personal property when he died. In addition, the woman agreed to give up her profession in order to devote herself full time to her commit-

103. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.

104. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

105. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830.

106. The *Watkins* court pointed out that during the six years that the unmarried parties lived together, the woman acted as homemaker, cook, nurse, and confidant to the man. In addition, she assisted with the rearing of *his* children.

107. 23 Cal. App. 2d 475, 73 P.2d 643, (1937).

ment under the contract.¹⁰⁸ The couple later married. Upon the man's death, the woman sought to enforce the written contract. The *Sonnicksen* court refused to uphold the premarital contract and stated that "[w]hen the parties subsequently entered into a contract of marriage and became husband and wife, one of the implied terms of the contract of marriage was that [she] would perform without compensation the services covered by [the] written agreement."¹⁰⁹

In *Brooks v. Brooks*,¹¹⁰ in consideration for marriage and support during the marriage, a woman agreed to provide nursing and housekeeping services for a man. *Brooks* held the contract to be void stating the rule "that a married woman cannot contract with her husband with respect to domestic services which are incidental to her marital status, since such contracts are against public policy."¹¹¹

The *Watkins* court stated that "[i]n both *Sonnicksen* and *Brooks*, the applicable contracts explicitly provided that the woman necessarily had to provide services *during* the marriage in order to receive the consideration contemplated by the contracts."¹¹² The *Watkins* court distinguished *Sonnicksen* and *Brooks* by holding that the contract in the instant case was unrelated to the marital relationship. The woman sought only to enforce rights she had gained *prior* to the marriage. She made no contract claim for domestic services rendered for any period of time inclusive of the marriage. Therefore, the court held that no public policy was compromised and upheld the woman's right to enforce the contract.

The *Watkins* court upheld the right to imply a contract between a man and a woman who live together unmarried, as established in *Marvin*. In addition, the validity of such a contract survives marriage. The *Watkins* holding is consistent with pub-

108. Prior to and at the time the parties entered into the contract, the woman had been engaging in professional nursing work. *Id.* at 476, 73 P.2d at 644.

109. *Sonnicksen*, 23 Cal. App. 2d at 479, 73 P.2d at 645.

110. 48 Cal. App. 2d 347, 119 P.2d 970 (1941).

111. *Id.* at 350, 119 P.2d at 972.

112. 143 Cal. App. 3d at 654, 192 Cal. Rptr. at 56. In *Sonnicksen*, although the contract was premarital, the wife would receive consideration under the contract only after providing care and companionship for the remainder of the husband's life, a period necessarily including any marriage. 23 Cal. App. 2d at 476, 73 P.2d at 644.

lic policies favoring marriage and the equitable distribution of property in that it prevents those who would breach *Marvin* contracts by abusing the privilege of marriage from doing so.

III. TORT LAW

A. WRONGFUL BIRTH ACTIONS

1. *Privacy rights of institutionalized woman bar her recovery for failure to supervise sexual activity; cause of action for failure to provide birth control and pre-natal care upheld.*

Foy v. Greenblott, 141 Cal. App. 3d 1, 190 Cal. Rptr. 84 (1st Dist. 1983). In *Foy v. Greenblott*, the court of appeal allowed an institutionalized, incompetent woman to sue medical care providers for the wrongful birth of her child. However, although the court permitted plaintiff to pursue her cause of action, it severely curtailed her chances of recovery by limiting the scope of the duty owed to her by her doctors and by charging her with a heavy burden of proof. The court imposed these constraints out of a concern for plaintiff's constitutional and statutory rights of privacy and reproductive freedom.¹¹³

Plaintiff Virgie Foy, a conservatee, was a patient in a private, locked, mental facility. Although she had a history of "irresponsible sexual behavior,"¹¹⁴ her contact with males was unsupervised and she was given no contraceptive counseling,

113. The court also allowed her action for failure to provide prenatal care. However, the court denied her son's cause of action for "wrongful life" in accordance with prior California decisions which preclude recovery to an unimpaired child. See *Turpin v. Sorhini*, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982); *Stills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976). The action by mother and son for "deprivation of a normal parent-child relationship" was denied on the grounds that loss of parental/filial consortium is not actionable, especially where it never existed in the first place. See *Borer v. American Airlines, Inc.*, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); *Baxter v. Superior Court*, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977). Finally, defendant County of Santa Clara, public guardian, was found to be immune under the California Tort Claims Act, CAL. GOV'T CODE § 854.8(a)(2) (Deering 1982).

114. The opinion fails to define "irresponsible sexual behavior." Thus it is unclear whether plaintiff did not understand the nature of the activity, was incapable of controlling her actions, did not comprehend possible consequences, or simply did not conform to a societal norm in her behavior.

medication, or devices. Her pregnancy was not diagnosed until two weeks before delivery and she received no prenatal care. The terms of her conservatorship precluded plaintiff from making any medical decisions. Plaintiff sued, *inter alia*, on a theory of wrongful birth and the trial court sustained defendants' demurrer. Plaintiff appealed.

Under current California case law, unwanted pregnancy and birth is actionable if plaintiff can show that the wrongful birth was the proximate result of medical malpractice. This case is distinguished from other wrongful birth cases,¹¹⁵ because due to her mental condition plaintiff did not and could not actively seek to prevent or terminate her pregnancy. Plaintiff urged that the scope of duty owed her by defendants included better supervision of her private activities; contraceptive counseling and medication; a timely diagnosis of pregnancy; and an opportunity to abort.

Plaintiff theorized that as an incompetent female she should under no circumstances have been allowed to bear a child. She further argued that the scope of defendants' duty to her included the prevention of such an occurrence. The U.S. Supreme Court, however, has held that a woman has a fundamental right of privacy in matters of reproductive choice.¹¹⁶ Furthermore, mental patients and conservatees in this state enjoy "the same legal rights . . . guaranteed all other persons . . ."¹¹⁷ The California Probate Code specifically prohibits sterilization of mentally incompetent persons.¹¹⁸ Only when a patient's life was in danger has a California court set aside this prohibition.¹¹⁹ Because plaintiff made no claim of medical necessity for sterilization and because reproductive freedom is accorded the highest constitutional protection, the court rejected plaintiff's claim that

115. See *Custodio v. Bauer*, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967) (negligently performed tubal ligation); *Sills v. Gratton*, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (unsuccessful abortion).

116. *Roe v. Wade*, 410 U.S. 113 (1973).

117. CAL. WELF. & INST. CODE § 5325.1 (Deering Supp. 1984). See also CAL. WELF. & INST. CODE § 5327 (Deering 1979).

118. "No ward or conservatee shall be sterilized under the provisions of this division." CAL. PROB. CODE § 2356(d) (Deering 1981). See also *supra* notes 85-101 and accompanying text.

119. *Maxon v. Superior Court*, 135 Cal. App. 3d 626, 185 Cal. Rptr. 516 (1982) (hysterectomy of conservatee authorized on a showing that without the procedure she stood an 80% chance of developing cancer).

defendants had an absolute duty to prevent the birth of her child.

Similarly, the court held that defendants were not negligent in failing to supervise plaintiff's access to males. The degree of supervision which would have been required to ensure that plaintiff did not conceive would have countermanded California's express policy that institutionalized persons be cared for in the least restrictive environment possible and that interference with patient's privacy and social interaction be kept to the feasible minimum.¹²⁰ The court reasoned: (a) that voluntary sexual activity could not be regarded as "an objective harm which the patient must be spared";¹²¹ and (b) that such potential tort liability would discourage hospitals from giving patients more than minimal freedom.

The court held that concern for patients' constitutional and statutory rights did not dictate dismissal of plaintiff's remaining theories. Defendants' failure to provide her with contraceptives potentially violated the same right of reproductive choice that the court sought to protect in dismissing plaintiff's other claims. Furthermore, defendants' failure timely to diagnose plaintiff's pregnancy deprived her of both the choice to abort and of necessary prenatal care.¹²²

However, in order to prevail in her claim, the court held that plaintiff must prove that had contraceptive methods been available she would have used them *and* they would have been effective. In light of plaintiff's mental condition, it is unlikely that she could have profited from counseling or used contraceptive methods which would have required her active participation. Other methods, such as IUD or contraceptive pills, medical risks notwithstanding, would have required consent by her conservator. It is unlikely that plaintiff's conservator would have been willing to second-guess a patient's reproductive choice.

120. CAL. WELF. & INST. CODE § 5325.1(a), (b), (g), § 5358(a), (c) (Deering Supp. 1984).

121. 141 Cal. App. 3d at 11, 190 Cal. Rptr. at 91.

122. The court held that even if plaintiff cannot prevail in her action for wrongful birth, she may still recover for negligent deprivation of prenatal care.

Even if plaintiff managed to surmount this difficulty, there would still remain the burden of proving the effectiveness of her chosen contraceptive method.

Alternatively, plaintiff must prove that had she been given the choice to abort, she would have done so. Since plaintiff was incapable of consent,¹²³ she must prove that her conservator/guardian would have sought and been able to obtain a court order authorizing the procedure.¹²⁴ Because plaintiff's pregnancy was non-life threatening it is very unlikely that her conservator would have been able to persuade a court to order an abortion. If, however, plaintiff were able to meet the burden of proof required by the court she should be able to recover both general and special damages for wrongful birth.

The court was rightfully solicitous of the possibilities of infringing on mental patients' constitutional and statutory rights. In protecting plaintiff's rights of privacy, patient autonomy, and reproductive choice, however, the court may have denied the possibility of recovery to a plaintiff who suffered a legally cognizable wrong. The court also failed to provide any guidance for medical care providers as to how best to safeguard the health and interests of institutionalized women of childbearing age.

B. INTENTIONAL TORTS

1. *Cause of action for battery and deceit arising out of misrepresentation of sterility upheld.*

Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1st Dist. 1983), (hearing denied) (Sept. 29, 1983). In *Barbara A. v. John G.*, the court addressed the question of whether or not a woman has a valid cause of action against a man with whom, because of his representation of sterility, she consents to have intercourse. The court held that the man's conduct was ac-

123. According to the terms of her conservatorship, plaintiff lacked the capacity to consent.

124. The court cites *Maxon v. Superior Court*, 135 Cal. App. 3d at 626, 185 Cal. Rptr. at 516, as an example of the extraordinary showing which would be required to obtain such an order. *Maxon*, however, concerned an order for sterilization where the patient's life was in danger, not therapeutic abortion for an incompetent.

tionable in tort and that the woman's complaint stated facts sufficient to sustain actions for battery and deceit. Because of a preexisting attorney-client relationship between the parties, the woman also claimed that the man had breached his fiduciary duty toward her, as her attorney, because he did not act in good faith for her benefit with respect to their personal relationship. The court refused to hold the man to a professional fiduciary standard in his personal relationship with the woman as a matter of law. Instead, the court imposed the burden on the woman to show that the parties had not been dealing as equal adults in their personal relationship.

Prior to engaging in sexual intercourse, the woman asked her male partner to use a condom. She told him that she would not engage in intercourse with him at the risk of pregnancy. In response to her request, the man stated, "I can't possibly get anyone pregnant." The woman interpreted the man's statement as a representation of sterility and therefore consented to intercourse. Subsequently, she developed an ectopic pregnancy¹²⁵ which resulted in the loss of a fallopian tube and possible sterility.¹²⁶ The woman brought an action against the man alleging battery¹²⁷ and misrepresentation (deceit).¹²⁸ In sustaining the

125. Ectopic pregnancy is a general medical term used to refer to any implantation of a fertilized ovum occurring outside of the uterine cavity. Although the location of an ectopic pregnancy may vary, its most common site, as in the instant case, is the fallopian tube. Ectopic pregnancy is a medical emergency which may lead to severe hemorrhage and death unless diagnosed promptly. "Once the diagnosis is made, operative treatment is indicated." *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* E-8 (C.L. Thomas, M.D., M.P.H. ed. 12th ed. 4th printing 1973).

126. Although the woman's pleadings alleged that she was sterile, she only claimed loss of one fallopian tube. Normally, one cannot be considered medically sterile unless both tubes are either lost or irreparably damaged. The court stated that the discrepancy was an issue for the trier of fact and did not deprive the woman of her cause of action.

127. In the battery action, the woman contended that although she had consented to the intentional touching, her consent was vitiated in two ways: first, the resulting impregnation exceeded the scope of her consent and second, the consent had been fraudulently induced.

128. Civil Code section 1709 sanctions an action for fraudulent deceit, *CAL. CIV. CODE* § 1709 (Deering 1971), and Civil Code section 1710 defines deceit. *CAL. CIV. CODE* § 1710 (Deering 1971). The essential elements of a deceit action are: 1) a false representation made by a defendant who; 2) had knowledge or belief that the representation was false or had no reasonable basis for believing it to be true; and 3) the false representation was made with the intent to induce the plaintiff to alter his or her position in reliance on

man's motion for judgment on the pleadings, the trial court held that the woman's complaint failed to state a cause of action. The woman appealed.

On appeal, the man argued that the woman's allegations were tantamount to an action for seduction. Civil Code section 43.5¹²⁹ prohibits a cause of action for seduction in California. *Davis v. Stroud*¹³⁰ involved a seduction action that was filed a few days before the enactment of section 43.5. In *Davis*, the court stated, "[s]eduction imports the idea of illicit intercourse accomplished by the use of arts, persuasions, or wiles to overcome the resistance of a female who is not disposed of her own volition to step aside from the paths of virtue."¹³¹ Nothing in the *Barbara A.* complaint alleged inducement to intercourse against the woman's free will. In fact, she admitted that her consent was freely given. The essence of her complaint was that her consent was induced by a false representation, *not* because of any undue influence which prohibited her from exercising free will. The court held that the woman's cause of action had no substantive relationship to an action for seduction and therefore, section 43.5 was inapplicable.

In *Stephen K. v. Roni L.*,¹³² a woman allegedly misrepresented to a man that she was taking oral contraceptives. In reliance on her representation, the man engaged in sexual intercourse with her. The woman became pregnant and a child, unwanted by the man, was born. The woman brought a paternity action against the man. Admitting paternity, the man filed a cross complaint alleging fraud, negligent misrepresentation, and negligence.¹³³

The court in *Stephen K.* held that the man did not state a cause of action. It held that "as a matter of public policy the practice of birth control, if any, engaged in by two partners in a

the misrepresentation; 4) the plaintiff justifiably relief upon the representation; and 5) suffered damage as a result of his or her reliance.

129. CAL. CIV. CODE § 43.5 (Deering 1971).

130. 52 Cal. App. 2d 308, 126 P.2d 409 (1942) (cited in P.2d as *Briggs v. Stroud*).

131. *Id.* at 317, 126 P.2d at 414.

132. 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

133. He further alleged that as a proximate result of the woman's tortious conduct, he had suffered emotional distress secondary to a legal obligation to support an unwanted child. *Id.* at 642, Cal. Rptr. at 619.

consensual sexual relationship is best left to the individuals involved, free from any government interference."¹³⁴ Although the man in that case had allegedly been intentionally deceived, the *Stephen K.* court held that the privacy interests involved outweighed his interest in being compensated for the intentional wrong.

The *Barbara A.* court pointed out that although a fundamental right to privacy does exist in matters relating to marriage, family, and sex, the right is not absolute. The court stated that there are instances in which the individual's privacy interests are outweighed by compelling government concerns. Particularly, the court pointed out that in cases of spousal rape and paternity disputes, the parties cannot insulate themselves from judicial inquiry into their private sexual affairs. Therefore, the *Barbara A.* court held that the man could not preclude the woman's cause of action by asserting a privacy interest because his privacy interest was substantially outweighed by the policy in favor of compensating individuals for injuries sustained as a result of intentional tortious conduct.

Because of its approach to the privacy issue, the *Barbara A.* decision appears to be in direct conflict with that in *Stephen K.* However, the *Barbara A.* court agreed with the outcome in *Stephen K.* but on different grounds. The court predicated its approval of *Stephen K.* on the promotion of the child's best interest, rather than on privacy grounds, because *Stephen K.* was, in essence, a wrongful birth action against a parent based on deceit.¹³⁵ The *Barbara A.* court reasoned that to allow a natural parent to recover for the "wrongful birth" of his or her own child would both decrease the availability of funds for the support of the child and possibly damage the child emotionally.¹³⁶

134. *Id.* at 645, 164 Cal. Rptr. at 621.

135. However, both *Barbara A.* and *Stephen K.* distinguished the actionable "wrongful birth" cases. The court in *Barbara A.* stated that "[t]he actions have uniformly been instituted by parents against health professionals for negligence causing the birth of a child or the birth of an impaired child." *Barbara A.*, 145 Cal. App. 3d at 379 n.8, 193 Cal. Rptr. at 429; *see also* *Stephen K.*, 105 Cal. App. 3d at 643-44, 164 Cal. Rptr. at 619-20 for a similar analysis.

136. The court reasoned that such a cause of action would be strong evidence of parental rejection.

The court held that this result would be contrary to public policy and to a statutory duty imposed on both parents to support their child.¹³⁷ Because the damages in *Barbara A.* stemmed from personal physical injury to the woman, rather than from the birth of a child, the court found that the policy considerations involved in *Stephen K.* were not applicable, and that a cause of action was stated.

The *Barbara A.* court seems to be saying that when a child is involved, an intraparental tort claim for battery or deceit will be barred as against public policy, notwithstanding the underlying merits of the cause of action. The *Stephen K.* court was confronted with a factual situation which afforded ample opportunity for the court to articulate clearly a rule barring intraparental tort claims where the damages alleged flow from the existence of an unwanted child. Yet, the *Stephen K.* court chose instead to focus on the privacy issue.

The *Barbara A.* court has exposed the *Stephen K.* court's reluctance to confront the real issue before it. It has done so by stating that privacy rights are not absolute and must bow when stronger policy interests are compromised. It seems that where a child's best interest is at stake, tort claims between the parents will not be allowed. However, where there is no child to protect, there is no policy which justifies the denial of a valid tort action.

IV. CIVIL RIGHTS LAW

A. SEX DISCRIMINATION

1. *Use of liquor license revocation to enforce Unruh Civil Rights Act upheld.*

Easebe Enterprises, Inc. v. Rice, 141 Cal. App. 3d 981, 190 Cal. Rptr. 678 (1983). In *Easebe Enterprises, Inc. v. Rice*, the court of appeal upheld the revocation of a liquor license issued to a business enterprise practicing gender-based discrimination against male patrons. The court, in addition to finding that suffi-

137. Civil Code section 196a states in relevant part: "[t]he father as well as the mother of a child must give him support and education suitable to his circumstances." CAL. CIV. CODE 196a (Deering Supp. 1984).

cient evidence existed for the action, rejected arguments that the discrimination was appropriate or justified under the circumstances. The decision reinforces a statutory scheme mandating use of California's administrative bodies to eliminate discrimination in business establishments.

Responding to complaints that Chippendale's, a nightclub featuring "male exotic dancers," refused to admit men during performances, the California Department of Alcoholic Beverage Control investigated, confirmed the allegations, and revoked the club's liquor license. The Alcoholic Beverage Control Appeals Board upheld the revocation.¹³⁸ The court initially denied review of the Board's decision but the California Supreme Court, after granting a hearing, retransferred the case to it.

The Unruh Civil Rights Act¹³⁹ guarantees equal access to business establishments for all persons, regardless of sex, race, color, religion, ancestry, or national origin. Long considered a powerful statement of public policy, the Act has frequently been the basis for judicial elimination of various forms of discrimination.¹⁴⁰ The California Legislature enacted Business and Professions Code section 125.6¹⁴¹ as another means of eliminating discrimination. Any person accepting a license under the Business and Professions Code is subject to disciplinary action under section 125.6 for discrimination based on race, color, sex, religion, ancestry, physical handicap, marital status, or national origin.

In reviewing the Department's decision, the *Easebe* court's inquiry was limited to the question of whether there was substantial evidence to support the revocation.¹⁴² After examining

138. *Easebee [sic] Enterprises, Inc.*, No. AB-4958, slip op. (1982).

139. CAL. CIV. CODE § 51 (Deering Supp. 1984).

140. *See, e.g., Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982) (landlord's "no children" policy violated Unruh Act); *In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) (kinds of discrimination specified in Act serve only as illustrative, rather than restrictive, indicia of the bases of discrimination condemned); *Hubert v. Williams*, 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (1982) (landlords may not refuse to rent to homosexuals because of sexual preference).

141. CAL. BUS. & PROF. CODE § 125.6 (Deering Supp. 1983).

142. CAL. BUS. & PROF. CODE § 23090.2 (Deering Supp. 1983). *See also Kirby v. Alcoholic Beverage Control Appeals Bd.*, 7 Cal. 3d 433, 436, 498 P.2d 1105, 1107, 102 Cal.

the testimony given at the administrative hearings, it found the evidence adequate to sustain a finding of sex discrimination.

The court then reviewed the sources of the Department's authority to revoke a liquor license. It found that the California constitution granted to the Department unique power to administer licenses in accord with the state's public policy.¹⁴³ It determined that the public policy to be enforced was the Unruh Act's ban on gender-based discrimination.

The court also held the revocation action to be a valid exercise of the Department's powers under provisions of the Business and Professions Code. The Department had issued Chippendale's a liquor license as a "public premises" under section 23039 of the Business and Professions Code.¹⁴⁴ The court held that Chippendale's violated section 125.6 by discriminating in performing its licensed activity and was subject to disciplinary action.

The importance of judicial support for a license revocation made under section 125.6 cannot be underestimated. The court could have based its support for the revocation action solely upon the special powers of the Department as found in the state constitution, but such a decision would have no significance for other departments with licensing powers granted in the Business and Professions Code. While damages and injunctive relief are available through the courts for violations of the Unruh Act under Civil Code section 52,¹⁴⁵ this decision demonstrates judicial approval of an alternative method of stopping sex discrimination through the economic power of licensing bodies.

Chippendale's offered three arguments in support of its discriminatory practices. It proposed that the practice was neces-

Rptr. 857, 859 (1972) (review of decision limited to whether findings are supported by substantial evidence).

143. "The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare" CAL. CONST. art. 20, § 22.

144. "[P]remises maintained and operated for the selling and serving of alcoholic beverages to the public for consumption on the premises" CAL. BUS. & PROF. CODE § 23039 (Deering Supp. 1964).

145. CAL. CIV. CODE § 52 (Deering Supp. 1984).

sary to protect the rights of its male dancers to engage in a constitutionally protected form of communication. The court held that withdrawing the privilege of selling alcoholic beverages did not preclude the continuation of the "communication" and so did not violate the First Amendment.

Chippendale's also argued that the discriminatory policy was necessary for its economic survival since women customers would not attend performances if men were admitted. The court rejected this second argument, holding that the public policy of nondiscrimination must be enforced despite the possible detrimental effect to the business enterprise involved.¹⁴⁶

Finally, the court examined Chippendale's claim that its practices benefited women who had, as a group, been victims of past discrimination. While recognizing that the rationale of benign discrimination had been accepted for certain governmental practices,¹⁴⁷ the court adopted the Department's determination that public policy was better served by equal access for all persons.¹⁴⁸ The court went on to state in dictum, however, that if it had been the trier of fact it might have found the argument of benign motivation persuasive. If administrative bodies were capable of such decisions, their powers would be greatly expanded. Not only could a department find a licensee guilty of discrimination, it could determine the action to be benignly inspired as a matter of fact and so permissible despite the Unruh Act or sec-

146. See also *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 740, 640 P.2d 115, 126, 180 Cal. Rptr. 496, 508 (1982) (entrepreneurs cannot pursue a broad status-based exclusionary policy).

147. The court specifically noted: *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (upholding California law for statutory rape which punishes only males); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding regulation permitting female naval officers to remain in Navy a longer period before facing mandatory discharge for want of promotion than male officers); and *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding statute granting widows, but not widowers, a property tax exemption).

148. Among the Department's special findings was an unusual explanation of the balance involved: "In arguendo, on the one hand the determination as to whether the community is better served by a policy which provides a female audience an uninhibited environment in which to openly or boisterously express itself; and on the other hand a policy which provides to all persons, both males and females, unqualified access to public places. The latter is the fulcrum of an ordered society!" Quoted in *Easebee* [sic], No. AB-4958, slip op. at 4.

tion 125.6.

In approving the revocation action, the court enforced the legislative policy that gender-based discrimination is not to be tolerated in business establishments. The decision is significant because it supports the disciplinary powers granted administrative bodies to enforce this policy. While the Unruh Act has been an important resource for combatting discrimination in the courts, Californians may now find that use of licensing bodies will prove an equally effective method to eliminate discrimination. Further, the dictum that these bodies may even approve benign discrimination would, if followed, expand their power to an unprecedented degree.

B. AGE DISCRIMINATION

1. *Holding in Marina Point v. Wolfson extended to prevent non-profit homeowners' association from discriminating against families with children.*

O'Connor v. Village Green Owners Association, 33 Cal.3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983). In *O'Connor v. Village Green Owners Association*, the Supreme Court extended the holding in *Marina Point Ltd. v. Wolfson*¹⁴⁹ to find that a restriction in the covenants, conditions and restrictions of a condominium development limiting residency to persons age eighteen and over is prohibited by the Unruh Civil Rights Act.¹⁵⁰ It held that the non-profit homeowners association set up by the developer which, in addition to maintenance duties, enforced the conditions, covenants and restrictions, was a "business establishment" within the meaning of the Act and that such finding was consistent with the legislature's intent to use the term "business establishment" in the broadest sense possible.

Plaintiffs, a married couple and owners of a unit in The Village Green, had a child four years after moving into their condominium. The association gave them notice that the presence of their son violated the age restrictive covenant and that he would have to vacate the premises. The couple filed suit to have the

149. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

150. CAL. CIV. CODE § 51 (Deering Supp. 1984).

age restriction declared invalid and to enjoin its enforcement. The trial court sustained defendant association's demurrer without leave to amend. When plaintiffs appealed, defendants filed for and were granted an injunction against plaintiffs' continued residency in the condominium. Plaintiffs appealed.

The Unruh Civil Rights Act states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."¹⁵¹ Although age discrimination is not specifically prohibited, the court had previously held in *In re Cox* that the Act's legislative history indicates that the specifically enumerated forms of discrimination were meant to be "illustrative rather than exhaustive."¹⁵²

In 1982 this court addressed discrimination against children in housing in *Marina Point Ltd. v. Wolfson*.¹⁵³ The circumstances in *Marina Point* differed from those here in one major respect. Plaintiffs in *Marina Point* were tenants in the building; here plaintiffs were owners of a unit in the development. In *Marina Point*, defendants were landlords of rental apartments, whereas here defendant was the condominium owners association. The court in *Marina Point* reasoned that blanket exclusion of a class of individuals on the basis of a generalized prediction that the class as a whole is more likely to become a nuisance than some other class was arbitrary and was prohibited by the Unruh Act.¹⁵⁴ The court found that no compelling interest justified such discrimination.

Since *Marina Point* was dispositive of the age discrimination issue, the *O'Connor* court found the determinative issue here to be whether the Association was a "business establishment" within the meaning of the act. The defendants in

151. *Id.*

152. *In re Cox*, 3 Cal. 3d 205, 212, 474 P.2d 992, 995, 90 Cal. Rptr. 24, 27 (1970).

153. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

154. *Id.* at 739, 640 P.2d at 125, 180 Cal. Rptr. at 507.

O'Connor contended that it was a private, non-profit organization, whose members were the individual condominium owners, loosely organized as a maintenance body and as such not a "business establishment" covered by the Act. The *O'Connor* court disagreed.

In *Burks v. Poppy Construction*,¹⁵⁵ the court examined the scope of the language "business establishment of every kind whatsoever." The court concluded that a real estate developer of housing tracts operated a business establishment within the meaning of the Act, and therefore was prohibited from discriminating on the basis of race when selling his homes. The court in *Burks* reasoned that the statute's lack of specification of particular kinds of enterprises left "no doubt that the term 'business establishments' was used in the broadest sense reasonably possible."¹⁵⁶ Furthermore, the *Burk* court noted that the original version of the bill made specific references to types of businesses intended to be covered. These original references included private or public groups, organizations, and associations. The court reasoned that the deletion of specific references in the bill's final version and the substitution of the phrase "of every kind whatsoever" broadened the scope of the term "business establishments," and therefore is indicative of a legislative intent to include, as formerly specified, private and public groups or organizations that might reasonably be found to constitute a business.

The court in *O'Connor* followed *Burk* and found that The Village Green Owner's Association was a business establishment because its overall function was to "protect and enhance the project's economic value," and it functioned very much like a business in performing its multiple duties.

Defendant also contended that it had fewer effective remedies since it could not use the summary procedure of unlawful detainer available to landlords to remedy nuisances caused by disruptive or mischievous children. The court found this argument unpersuasive. It reasoned that the association could adopt department regulations and sufficiently rely on its normal proce-

155. 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

156. *Id.* at 468, 370 P.2d at 316, 20 Cal. Rptr. at 612.

dures to enforce them as it would in enforcing other use and conduct regulations.

The *Marina Point* court recognized a strong social interest in prohibiting discrimination against children in housing. The court stated: "[a] society that sanctions wholesale discrimination against its children in obtaining housing engages in suspect activity."¹⁵⁷ In refusing to sanction the discrimination in the instant case by private, non-profit organizations, the *O'Connor* court has correctly interpreted the objective of the Unruh Act¹⁵⁸ which is to prohibit all forms of arbitrary discrimination by "business establishments engaged in the sale or rental of real property."¹⁵⁹

Justice Broussard concurred in the court's opinion but also made an additional argument for prohibition of any discrimination in housing based on California Civil Code section 53.¹⁶⁰ He found section 53 to be more to the point since its language specifically prohibits discrimination in the "conveyance, encumbrance, leasing or mortgaging of real property." Section 53 lists the same prohibited discriminations as section 51 and makes any such discriminatory use of real property void regardless of whether or not it is done by a business establishment.

Justice Mosk dissented for two reasons. First, he argued that including age in the scope of prohibited discriminations was creating legislation "in an area in which the legislature has deliberately refused to [act]."¹⁶¹ Second, he contended that characterizing the homeowners association as a business was an unreasonable extension of the statute.

The legislature, however, has for good reason not included age in the enumerated prohibitions. The statute's language is too broad for it. If age were included, it would not be unreasonable to conclude that children of any age could demand to be

157. 30 Cal. 3d at 744, 640 P.2d at 129, 180 Cal. Rptr. at 511.

158. Unruh Act, Cal. Civ. Code § 51 (Deering Supp. 1984).

159. 58 Op. Att'y Gen. 608 (1975).

160. CAL. CIV. CODE (Deering Supp. 1984).

161. 33 Cal. 3d at 801, 662 P.2d at 434, 191 Cal. Rptr. at 327.

served alcohol in saloons and restaurants, or could demand admission to adult theatre houses. Additionally, if homeowners' associations were not construed as "business establishments," they would hypothetically be allowed to discriminate against future buyers on whatever basis contained within their conditions, covenants and restrictions, including sex, race or national origin, and there is no reasonable justification for such an exemption from the Unruh Act's requirements.

V. ADMINISTRATIVE LAW

A. NONMARITAL RELATIONSHIPS

1. *Relocation with "nonmarital loved one" is not good cause for termination of employment under Unemployment Insurance Code.*

Norman v. Unemployment Insurance Appeals Board, 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983), (rehearing denied) (June 6, 1983). In *Norman v. Unemployment Insurance Appeals Board*, the California Supreme Court addressed the question whether voluntary termination of employment in order to relocate with a "nonmarital loved one"¹⁶² constitutes "good cause" within the meaning of California Unemployment Insurance Code section 1256.¹⁶³ In a four to three decision, the court held that termination under such circumstances does not fall within the purview of "good cause" under section 1256 unless the claimant establishes that marriage is imminent.¹⁶⁴

162. The court uses the term "nonmarital loved one" even though the facts in the instant case specifically refer to a girlfriend/boyfriend relationship. One may speculate that the court intentionally chose this term to cover all types of relationships, including those that have no possibility of becoming marital.

163. Section 1256 provides in pertinent part: "An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause. . . ." CAL. UNEMP. INS. CODE § 1256 (Deering 1971).

164. The court stated that "good cause" is also shown where a claimant establishes that the move is precipitated by a marriage-related obligation or that actual presence in the new location is necessary to implement marriage-related plans. 34 Cal. 3d at 9, 663 P.2d at 909, 192 Cal. Rptr. at 139.

In response to the trial court decision in *Norman*, the California Legislature amended section 1256. The amendment expressly affords a spouse "good cause" when he or she voluntarily terminates employment to relocate with his or her spouse. CAL. UNEMP. INS. CODE § 1256 (Deering Supp. 1984).

The *Norman* court also stated that its decision did not violate the claimant's consti-

834 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 14:785]

A woman quit her employment in order to relocate to another state with her boyfriend,¹⁶⁵ with whom she had been living for three years. She subsequently filed a claim for unemployment compensation benefits with the California Employment Development Department. The Department determined that no "good cause" existed for the termination and denied her claim. The determination was reaffirmed both on administrative appeal and on appeal to the Unemployment Insurance Appeals Board. Claimant then brought suit in superior court.¹⁶⁶ The trial court held that "good cause" had been established and awarded benefits.¹⁶⁷ The Unemployment Insurance Appeals Board and the Department joined in appealing the trial court decision.

Section 1256 allows a claimant to collect benefits despite the voluntary nature of employment termination, provided "good cause" is established. In 1980, new regulations were promulgated by the Unemployment Insurance Appeals Board.¹⁶⁸ As noted by the dissent, the regulations in effect create a presumption in favor of a person about to become married. Specifically, the new regulations describe circumstances under which "good cause" is established for a voluntary quit: "Such circumstances are considered 'good cause' if the claimant's obligation is of a real, substantial, and compelling nature . . . and the claimant's reason for leaving work is due to a legal or moral obligation related to, inter alia, the existing or prospective marital status of the claim-

tutional rights of privacy and freedom of association. The court refused to characterize the nature of claimant's relationship with her boyfriend as one akin to a marital relationship. Therefore, the court determined that no fundamental privacy right had been denied her. Claimant was not denied the right to relocate with her boyfriend. Therefore, the court found that no violation of the right to associate freely had occurred. The court stated that the fact that she had been denied benefits because of her actions did not infringe her right to free association.

165. Claimant testified that she became engaged to be married four months after terminating her employment and that a marriage date was set for four months after the date of engagement.

166. Suit was brought in superior court by petition for a writ of mandate. CAL. CIV. PROC. CODE § 1094.5 (Deering 1973).

167. While recognizing that "good cause" is an issue of law as established in *Perales v. Department of Human Resources Dev.*, 32 Cal. App. 3d 332, 336, 108 Cal. Rptr. 167, 170 (1973), the trial court stated: "[T]he absence of any marital relationship [does] not, as a matter of law, preclude an award of unemployment compensation benefits." *Norman*, 34 Cal. 3d at 4, 663 P.2d at 906, 192 Cal. Rptr. at 136.

168. CAL. ADMIN. CODE tit. 22, R. 1256-1-1256-43 (1980).

WOMEN'S LAW FORUM

ant.¹⁶⁹ The *Norman* court, while not bound by the 1980 regulations, relied on them for guidance as to the legislative purpose in enacting section 1256, particularly its intended construction of “good cause.”¹⁷⁰

The *Norman* court also considered another administrative regulation, California Administrative Code section 1256-12, which expressly states that marriage or imminence of marriage may constitute “good cause” for the purposes of section 1256.¹⁷¹ Coupling the language of the proposed regulation with that of section 1256-12, the court deduced that section 1256 should be interpreted to facilitate the overriding legislative scheme, that is, a scheme which prefers the establishment and maintenance of marital relationships. The *Norman* court concluded that any judicial determination of “good cause” must be consistent with that policy. Finally, the court pointed out that requiring a showing of marriage or imminence thereof alleviates many of the proof problems associated with a case by case analysis of the “good cause” worthiness of any given relationship. Alleviation of proof problems in order to facilitate administrative convenience has been recognized as a legitimate government interest. However, that interest must be balanced against the risk of depriving individuals of important, perhaps even essential, means of support.¹⁷²

The claimant in *Norman* argued that her nonmarital relationship was the equivalent of a marriage for purposes of determining “good cause.” In *Marvin v. Marvin*,¹⁷³ the California Supreme Court held that a nonmarried partner in a relationship has a valid cause of action against her partner where the complaining partner can show that an express or implied agreement exists between them and that a breach of that agreement has

169. *Norman*, 34 Cal. 3d at 8, 663 P.2d at 909, 192 Cal. Rptr. at 139 (quoting CAL. ADMIN. CODE, tit. 22, R. 1256-9 (1980)).

170. Because the regulations are published by the administrative agency and not the legislature, they are not direct evidence of legislative intent. However, they are given great weight in the court’s determination of legislative intent. *Judson Steel Corp. v. Workers’ Comp. Appeals Bd.*, 22 Cal. 3d 658, 668, 586 P.2d 564, 570, 150 Cal. Rptr. 250, 256 (1978).

171. CAL. ADMIN. CODE, tit. 22, R. 1256-12 (1980).

172. *Reed v. Reed*, 404 U.S. 71, 76 (1971). See also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

173. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

occurred. Citing several cases which limit the application of *Marvin*,¹⁷⁴ the *Norman* court stated that *Marvin* applies only to a contractual or quasi-contractual agreement regarding the property rights as to each party when the relationship terminates. In dicta, the *Marvin* court stated: "The structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution."¹⁷⁵ Therefore, stated the court in *Norman*, it is left for the legislature to determine whether all *Marvin*-like relationships should be generally afforded the extensive statutory protections given to legal marriages. In the absence of such legislation, the *Norman* court refused to characterize the relationship in the instant case as one deserving *Marvin* protection.

In *Department of Industrial Relations v. Workers' Comp. Appeals Bd.*,¹⁷⁶ the court of appeal held that a nonmarital partner is entitled to death benefits consistent with Labor Code section 3503.¹⁷⁷ Section 3503 provides in relevant part: "No person is a dependent of any deceased employee unless in good faith a member of the family or household of the employee" Claimant in the instant case argued that *Department of Industrial Relations* is applicable to her case insofar as it allowed a nonmarital partner to collect benefits under a statute which, like section 1256, did not expressly limit those benefits to married persons.

Distinguishing *Department of Industrial Relations*, the *Norman* court pointed out that the unmarried partner in *Department of Industrial Relations* was expressly provided for under section 3503 because section 3503 requires only a showing of good faith family participation and some dependency on the deceased employee. Therefore, the *Norman* court concluded that

174. See generally *In re Cummings*, 30 Cal. 3d 870, 640 P.2d 1101, 180 Cal. Rptr. 826 (1982) (prohibiting nonmarital partner from overnight visitations with an inmate). *People v. Delph*, 94 Cal. App. 3d 411, 156 Cal. Rptr. 442 (1979) (refusal to extend the marital communications privilege to nonmarital partners); *Garcia v. Douglas Aircraft Co.*, 133 Cal. App. 3d 890, 184 Cal. Rptr. 390 (1982) (Surviving nonmarital partner prohibited from bringing wrongful death action on behalf of deceased partner).

175. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

176. 94 Cal. App. 3d 72, 156 Cal. Rptr. 183 (1979).

177. CAL. LAB. CODE § 3503 (Deering Supp. 1984).

Department of Industrial Relations was inapposite and pointed out that claimant's right to collect was not expressly granted under section 1256. However, as pointed out by the dissent, section 1256 no more excludes unmarried persons than does section 3505. Section 1256 simply states that "good cause" must be shown for leaving employment, and the related regulations only create a presumption of "good cause" where marriage or imminent marriage are present. The majority's analysis denies claimant any opportunity to prove good cause even without taking advantage of the presumption. The *Norman* court has effectively precluded all those who have close and ongoing nonmarital relationships from being able to establish "good cause" for voluntarily terminating employment to relocate with a significant other, except where marriage is "imminent." The court cited public policy favoring marriage as its rationale; however, it is not clear that the policy would be undermined by allowing unmarried parties with no marital plans to prove "good cause." To deny them the right to attempt such proof is to *penalize* them for their nonmarital relationship by taking away a right which is available to others under section 1256. As pointed out by the dissent, the trial court did *not* apply the presumption which the regulations afford married individuals. Instead, it made a legal finding that claimant had established "good cause." The Supreme Court's decision in *Norman* denies claimant the right to establish "good cause" under section 1256, even without benefit of the presumption. If *Norman* stands for the proposition that nonmarital couples whose marriage is not imminent have no chance of establishing "good cause," presumptions aside, then the court has rendered the legislatively created opportunity to establish "good cause" virtually meaningless in many situations in which parties need to relocate in order to be near someone for whom they love and care.

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