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Survey: Women and California Law

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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.

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I. CRIMINAL LAW

A. Sex Offenses

1. *Refusal to grant probation to sex offender because of lack of locally available rehabilitation program upheld.*

People v. Lucero, 154 Cal. App. 3d 245, 201 Cal. Rptr. 99 (5th Dist. 1984). The court of appeal in *People v. Lucero* affirmed a trial court's denial of probation to a defendant who had been found guilty of incest and lewd and lascivious acts with his daughter while she was under the age of fourteen.[1] The court held that the trial court's finding did not constitute an abuse of discretion.

The father had been regularly sexually molesting his daughter since she was four years old. The daughter did not tell anyone about the incidents until she was sixteen years old. She testified that she had remained silent because her father had told her that he would kill himself if she told anyone.

The father pleaded guilty to incest[2] and lewd and lascivious acts on a child under the age of fourteen.[3] Conflicting psycholog-

1. CAL. PENAL CODE §§ 285 and 288 (West 1970 & Supp. 1985).
2. CAL. PENAL CODE § 285 (West 1970 & Supp. 1985).
3. CAL. PENAL CODE § 288 (West 1970 & Supp. 1985).

ical evaluations of the father were given at the hearing. He requested probation.

The court of appeal denied the father's request for probation under Penal Code section 1203.066.[4] This section provides that probation will be denied to sex offenders who have engaged in "substantial sexual conduct" with a victim under the age of eleven years or who "occup[y] a position of special trust" in relation to the victim.[5] The section defines "position of special trust" as "occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the victim. Position of authority includes, but is not limited to, the position occupied by a natural parent . . . ."[6]

The defendant first contended that the information did not properly charge him so as to bring him within the probation restrictions of section 1203.066. The court determined that the "substantial sexual conduct" provision was satisfied because the defendant had engaged in fondling, oral copulation and, eventually, sexual intercourse with his daughter before she had reached majority. The court next rejected the father's argument that section 1203.066 required that the prosecution show that he was, in fact, trusted by the victim. The court characterized this reading of the section as "hypertechnical" and held that the only finding needed to satisfy this provision was that the father was the natural father of the victim and that he and the victim resided in the same household.

The father next contended that even if he was correctly charged under section 1203.066, he should still have been granted probation. He based this contention on section 1203.066(c)[7] which provides that section 1203.066(a)(7), (8) and (9) are inapplicable if the trial court makes the following four findings:

> (1) The defendant is the victim's natural parent . . . who has lived in the household. (2) Imprisonment of the defendant is not in the best interest of the child. (3) Rehabilitation of the defendant is

4. CAL. PENAL CODE § 1203.066 (West Supp. 1985).
5. *Id.*
6. *Id.*
7. CAL. PENAL CODE § 1203.066(c) (West Supp. 1985).

> feasible in a recognized treatment program designed to deal with child molestation, and if the defendant is to remain in the household, a program that is specifically designed to deal with molestation within the family. (4) There is no threat of physical harm to the child victim if there is no imprisonment.[8]

The trial court found that there was no locally available recognized treatment center and that there existed a potential for physical harm to the daughter if the father was not imprisoned. The trial court also stated that even if the requirements of 1203.066(c) were met, the facts of this particular case would make probation inappropriate. The court specifically noted the long period of time during which the father carried on his conduct, the exceedingly vulnerable position of his victim and the apparent premeditation of the father's conduct as reasons for denial of probation in this case.

The court of appeal found that the trial court's ruling did not constitute an abuse of discretion. The court emphasized that the focus of such a decision should be on the availability of an effective rehabilitation program and the relative safety of the child.

The court of appeal declined to undertake an evidentiary analysis of the trial court's exercise of discretion. The court may have accorded the trial court a greater degree of discretion because the case involved a sex offense. This is especially apparent regarding the trial court's finding that there was no local program dealing with child molestation. The court of appeal stated that to qualify under section 1203.066, the treatment program must "involve more than the availability of a psychologist or psychiatrist dealing with the problems on an ad-hoc basis."

The court's restrictive construction of the statute on this point may result in the incarceration of offenders when a more constructive alternative is available. However, the trial court found that even if there had been a qualified rehabilitation program, releasing the father in this case may have endangered the daughter. The court of appeal's affirmation of the trial court's

8. *Id.*

denial of probation is justified on this basis alone.

2. *Defense of reasonable mistake not available to defendant charged with lewd or lascivious conduct with a child under the age of fourteen.*

People v. Olsen, 36 Cal. 3d 638, 685 P.2d 52, 205 Cal. Rptr. 492 (1984). The California Supreme Court in *People v. Olsen* refused to allow a defense of reasonable mistake as to age in a case under Penal Code section 288(a) involving lewd or lascivious conduct with a child under the age of fourteen.[9] The court reasoned that Penal Code section 288 was enacted to further the strong policy of protecting young children and that the enactment of Penal Code section 1203.066(a)(3)[10] clearly indicated that the defense of reasonable mistake of age was not to be available. The court determined that recognizing such a defense would render this section meaningless.

The female victim was fourteen years and ten months old at the time of the incident. Because there were guests staying at the family residence, the victim was spending nights in a trailer parked in the driveway. The victim's father discovered the defendant and his codefendant in bed with the victim. The victim testified that defendant had asked to enter the trailer. She stated that she ignored him and went to sleep. She awoke to find the codefendant holding a knife at her throat. Under the threat of the knife, she engaged in sexual intercourse with the defendant.

She also testified that she knew the codefendant "pretty

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9. CAL. PENAL CODE § 288(a) (West 1970 & Supp. 1985) provides:

> Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years.

Id.

10. This subsection provides that probation will not be granted to "[a] person convicted of a violation of Section 288 and who was a stranger to the child victim or made friends with the victim for the purpose of committing an act of violation of Section 288, unless the defendant honestly believed the victim was 14 years old or older." CAL. PENAL CODE § 1203.066(a)(3) (West Supp. 1985).

well" for about a year, had seen him a few days before the incident and that she considered the codefendant her boyfriend. She stated that she was good friends with the defendant and had had sexual relations short of intercourse with both men. Finally, she testified that she had told both defendants that she was over the age of sixteen.

The trial court found both men guilty of violating Penal Code section 288(a).[11] The defendant was sentenced to three years in state prison. He appealed, contending that a good faith reasonable mistake of age constitutes a defense to a section 288 charge.

The text of section 288 does not indicate whether the reasonable mistake defense is applicable to a charge of lewd and lascivious conduct with a minor under the age of fourteen. The court therefore turned to other cases that discussed this defense. In *People v. Vogel*,[12] the California Supreme Court held that a good faith belief that a previous marriage had been terminated was a valid defense to a charge of bigamy. The *Vogel* court noted the legislative declarations in Penal Code section 20,[13] which requires that there be a union of act and intent in every crime and in Penal Code section 26,[14] which provides that ignorance of or mistake of fact disproves criminal intent. Relying on these two sections and *Vogel*, the court in *People v. Hernandez*[15] allowed a reasonable mistake defense in a statutory rape case. The victim in that case was seventeen years, nine months old and had consented to sexual intercourse. The court

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11. CAL. PENAL CODE § 288(a) (West 1970 and Supp. 1985). For relevant statutory language, *see supra* note 9.

12. 46 Cal. 2d 798, 299 P.2d 850 (1956).

13. CAL. PENAL CODE § 20 (West 1970) provides that "[t]o constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."

14. CAL. PENAL CODE § 26 (West 1970 & Supp. 1985) provides:

> All persons are capable of committing crimes except those belonging to the following classes: . . . Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent . . . . Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

Id.

15. 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964).

held the essential element of criminal intent is missing when the person engaging in sexual intercourse with a minor reasonably believes the minor to be over eighteen years of age.

The *Hernandez* court, however, stated that its holding was not intended to extend to cases involving acts with an "infant" female, and that it was not withdrawing from the sound public policy of protecting the sexually naive female.[16] Three post-*Hernandez* court of appeal decisions refused to apply the *Hernandez* rule in cases involving the offense of lewd and lascivious conduct with a child under the age of fourteen. The court in *People v. Tober*[17] rejected the defense in a case involving a ten year old victim. The court noted that a refusal to distinguish between a child and an adult may be characteristic of those who engage in the kind of conduct which falls under section 288, and relied upon the *Hernandez* court's statement that a good faith mistake as to age is untenable when the victim is of "tender years."

The court in *People v. Toliver*[18] distinguished between a violation of section 288, which does not involve consent of any sort, and statutory rape, in which a male who believes in good faith that a female is over eighteen therefore believes that she can consent to sexual intercourse. It noted that the purpose of section 288 was to protect infants and children, and that there was no reason why the age of fourteen should not continue to be the dividing line between a child and a mature person.[19]

The third case, *People v. Gutierrez*,[20] relied on *Tober* and *Toliver* and the public policy considerations upon which those decisions were based, declaring them to be based upon a rationale that is still sound.[21]

The California Supreme Court in *Olsen* found the reasoning of the three court of appeal cases and the dictum in *Hernandez* to be persuasive. The court agreed that section 288 was enacted

16. *Id.* at 536, 393 P.2d at 677, 39 Cal. Rptr. at 365.
17. 241 Cal. App. 2d 66, 50 Cal. Rptr. 228 (1966).
18. 270 Cal. App. 2d 492, 75 Cal. Rptr. 819 (1969).
19. *Id.* at 496, 75 Cal. Rptr. at 822.
20. 80 Cal. App. 3d 829, 145 Cal. Rptr. 823 (1978).
21. *Id.* at 834-35, 145 Cal. Rptr. at 827.

for the purpose of protecting children of tender years. That public policy, the court determined, compels a conclusion that a reasonable mistake of age is not a defense under section 288.

The court found further support for its holding in various legislative provisions. Under Penal Code section 1203.066(a)(3)(A), certain individuals convicted under 288 may be eligible for probation if they "honestly and reasonably believed the victim was 14 years or older." This, plus the fact that no mistake of age was included in section 288, strongly indicates that the legislature did not intend to permit such a defense. If such a defense were recognized, the question of probation would never arise, rendering section 1203.066(a)(3)(A) a nullity. The courts are extremely reluctant to construe statutes in such a way as to render existing provisions unnecessary.[22]

The court also found it significant that children under the age of fourteen are given special protection under other state laws, and cited Penal Code section 271[23] which provides for punishment for desertion of a child under fourteen, and section 271(a),[24] which makes it a crime to abandon or fail to maintain a child under fourteen. The severity of punishment for crimes involving children under fourteen when compared to crimes with persons between fourteen and eighteen was also found to be an indication of the state's special policy of protection for those under fourteen. For example, the maximum punishment for a violation of section 288 is eight years in prison while the maximum penalty for unlawful sexual intercourse is one year in county jail or three years in state prison.

Justice Grodin, in a concurring and dissenting opinion, agreed that the enactment of section 1203.066[25] is persuasive evidence that the legislature did not intend a good faith mistake of age to be a defense to a section 288 offense. Justice Grodin contended, however, that imprisoning a person who acted with a reasonable belief and is guilty of no other offense "smacks of cruel and unusual punishment." He noted that normally a per-

22. City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 52, 648 P.2d 935, 938, 184 Cal. Rptr. 713, 716 (1982).

23. CAL. PENAL CODE § 271 (West 1970 & Supp. 1985).

24. CAL. PENAL CODE § 271(a) (West 1970 & Supp. 1985).

25. CAL. PENAL CODE § 1203.066(a)(3) (West Supp. 1985).

son cannot be convicted of a traditional crime absent a showing of fault and that strict liability crimes are almost always restricted to violations of regulatory laws which carry with them no grave harm to the individual's reputation.

Finally, Justice Grodin stated that the legislature, in section 1203.066, has set a standard for reasonable mistake of age for a section 288 violation. When that standard is reached, it could be stated that "the defendant is acting in a way which is no different from the way our society would expect a reasonable, careful, and law-abiding citizen to act." According to Justice Grodin, imposing criminal sanctions under these circumstances is intolerable.

The California Supreme Court broke with the majority of jurisdictions by holding in *Hernandez* that statutory rape involving victims between the ages of fourteen and eighteen was not a strict liability crime. The *Hernandez* court, however, explicitly refused to extend that policy to sexual acts with children.[26] The court has made it clear that, under section 288, an individual acts at his own peril. A key factor in these cases is the capacity of the woman to consent to engage in sexual activity. There is a conclusive presumption that a victim under the age of fourteen lacks this capacity. Protection is provided for all children under the age of fourteen regardless of the offender's reasonable beliefs. As for the offender, it is sufficient that in cases of genuine and reasonable mistake the legislature has provided for probation under section 1203.66.

3. *Evidence that a victim is suffering from rape trauma syndrome is not admissible to prove that a rape has occurred.*

People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). In *People v. Bledsoe*, the California Supreme Court held that although expert testimony on the effects of rape may be admitted for a variety of purposes, testimony that a rape victim is suffering from "rape trauma syndrome" is not admissible to prove that a rape has in fact occurred. The court concluded, however, that the admission of the testimony in this case

26. People v. Hernandez, 61 Cal. 2d 529, 536, 393 P.2d 673, 677, 39 Cal. Rptr. 361, 365 (1964).

was not prejudicial. Accordingly, the court upheld the conviction.

Melanie, age fourteen, asked the defendant for a ride home from a party. On the way to her home, the defendant told her that he needed to stop at his home and pick up some money. While inside, the defendant attacked Melanie and threatened to cut her throat if she did not have sexual intercourse with him. Melanie, believing that the defendant was holding a knife, did what the defendant ordered. After engaging in intercourse, the defendant returned Melanie to the party, where she told her friends what had occurred. The defendant was arrested and charged with (1) forcible rape; (2) use of a deadly weapon during the commission of a rape; (3) assault with a deadly weapon; and (4) false imprisonment.

At trial, the prosecution called a rape counselor who had treated Melanie after the incident. The counselor testified, over the objections of defense counsel, that Melanie was suffering from rape trauma syndrome. The counselor further testified that rape trauma syndrome is an umbrella term which describes the behavior of rape victims in 99.9% of all rape cases. In response to a question from the prosecution, the counselor concluded that based on her experience and her work with Melanie, it was obvious that Melanie was suffering from rape trauma syndrome.

The jury found the defendant guilty of forcible rape but determined that he had not used a weapon during the commission of the rape and therefore found him not guilty of assault with a deadly weapon. The jury could not reach a verdict on the false imprisonment charge. The charge was dropped at the request of the prosecution.

Defendant appealed, contending that the court erred in admitting the counselor's testimony on rape trauma syndrome. The defendant maintained that (1) the trial court's action was inconsistent with *People v. Guthreau*[27] and *People v. Clark*,[28] where the admission of certain expert testimony of a rape counselor was held to be in error; and (2) in any event, the testimony

27. 102 Cal. App. 3d 436, 162 Cal. Rptr. 376 (1980).
28. 109 Cal. App. 3d 88, 167 Cal. Rptr. 51 (1980).

should not have been admitted because rape trauma syndrome does not meet the *Frye*[29] standard of reliability to determine the admissibility of new scientific methods of proof.[30]

The California Supreme Court distinguished *Guthreau* and *Clark* from the instant case. In those cases, police counselors testified that the victims' resistance was reasonable. The *Guthreau* and *Clark* courts held that the issue in rape prosecution is not rape in the abstract but whether the resistance was sufficient to reasonably manifest the victim's refusal to consent to the sexual act. The courts in *Guthreau* and *Clark* therefore held that expert opinion that the victim's resistance was reasonable was irrelevant. In *Bledsoe* the rape counselor did not testify concerning the reasonableness of Melanie's resistance but rather about the emotional behavior exhibited by Melanie after the rape which indicated that she was suffering from rape trauma syndrome. Therefore the California Supreme Court held *Guthreau* and *Clark* to be inapposite.

The question of whether evidence of rape trauma syndrome is admissible under the *Frye* standard presented a more difficult issue. The test set out by the court in *Frye* is that in order to admit expert testimony which is deduced from a scientific principle or theory, the principle or theory must be sufficiently established to have gained general acceptance in that particular field of science.[31] In the few cases in which rape trauma syndrome has arisen as an issue, the defendant raised as a defense an aspect of the victim's conduct which shed doubt on the victim's allegations of having been raped.[32] Accordingly, evidence on rape trauma syndrome was allowed to rebut these defenses. The supreme court found that allowing such testimony in these cases serves to inform the jury of findings of professional research on the subject of a victim's reaction to sexual assault.

The court distinguished *Bledsoe* from those cases where the

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29. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

30. *See, e.g.*, People v. Kelly, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

31. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

32. *See, e.g.*, Delia S. v. Torres, 134 Cal. App. 3d 471, 478-79, 184 Cal. Rptr. 787, 792 (1982) (delay in reporting assault); State v. Middleton, 294 Or. 427, 435-37, 657 P.2d 1215, 1219-20 (1983) (inconsistent post-incident statements by fourteen year old incest victim).

evidence was admitted to rebut an inference of the defendant concerning the victim's conduct. In *Bledsoe*, there was no inconsistent evidence regarding the conduct of Melanie. The victim promptly reported the attack, displayed a severe emotional reaction and suffered bruises, all of which supported the fact that she had been raped. The court therefore held that there was no need to introduce the evidence of rape trauma syndrome. The court determined that the prosecutor was introducing the evidence to prove that a rape had, in fact, occurred and that this was improper.

Cases upholding the admissibility of expert testimony concerning the "battered child syndrome" provided an apt analogy. However, the court made an important distinction between rape trauma syndrome and battered child syndrome. The criteria for battered child syndrome was established to further the efforts of authorities to identify and protect children who were abused. Rape trauma syndrome, on the other hand, was designed primarily to serve as a counseling device to aid psychologists in treating the emotional problems of rape victims. The court determined that since rape trauma syndrome was developed for an entirely different purpose than the battered child syndrome, rape trauma syndrome cannot be used in the same manner in court. It therefore held that expert testimony that a woman suffers from rape trauma syndrome is not admissible to prove that the woman was raped.

The court determined, however, that the error in admitting the counselor's testimony in this case was not prejudicial. Melanie told her friends that she had been attacked immediately after being returned to the party. She had several bruises which were not explained by the defense. The court held the remaining evidence to be sufficient corroboration of her testimony that she had been raped. The court concluded that although evidence of the rape counselor should not have been admitted, it did no more than provide the jury with information already at their disposal.

In *Bledsoe*, the supreme court acted cautiously in not allowing evidence of rape trauma syndrome to come into evidence to prove the fact of rape. In doing so, the court sought to protect defendants from testimony which may appear reliable solely be-

cause it is offered by a rape counselor. This approach may be appropriate where, as in this case, the defendant did not put the victim's post-rape conduct at issue and therefore testimony regarding the syndrome may be both extraneous and damaging to the defendant. However, where the victim's post-rape conduct is at issue, expert testimony on rape trauma syndrome is both material and relevant and should be admitted.

B. Felony Child Abuse

1. *Felony child abuse may not serve as the underlying felony to support a conviction of second degree murder under the felony murder theory.*

People v. Smith, 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984). In *People v. Smith*, the California Supreme Court held that felony child abuse cannot serve as the underlying felony to support a conviction of second degree felony murder. The court reasoned that since the acts constituting felony child abuse in this case were an integral part of the homicide, the offense merged into the homicide.

Defendant and her two daughters, Beth and Amy, lived with a man named Foster. Defendant became angry at Amy and began beating her, knocking her to the floor. Foster joined defendant to "assist" her in disciplining Amy. Beth testified that both Foster and defendant repeatedly struck Amy with both their hands and a paddle and also bit her. Eventually, defendant knocked the child backwards. Amy fell, hit her head on the closet door and suffered a severe head injury. Defendant and Foster took Amy to the hospital where she died later the same evening.

The trial court gave a second degree felony murder instruction.[33] The instruction informed the jury that an unlawful killing, whether intentional, unintentional, or accidental is second degree murder if it occurs during the commission of a felony inherently dangerous to human life, and that felony child abuse is such a crime. Defendant contended that on the facts of this case, the crime of felony child abuse was an integral part and included in fact within the homicide, and therefore it merged into

33. CALJIC No. 8.32 (4th ed. 1979).

the homicide under the reasoning of *People v. Ireland*.[34]

In *Ireland*, the California Supreme Court held the felony murder doctrine inapplicable to felonies which are an integral part of and are included in fact within the homicide.[35] The jury in *Ireland* was instructed that it could find the defendant guilty of second degree felony murder if it determined that the homicide occurred in the commission of the underlying felony of assault with a deadly weapon.[36] The supreme court disagreed, holding that the application of the felony murder doctrine should not be extended beyond its rational function since to do so would effectively preclude the jury from considering the issue of intent where a homicide has been committed as a result of a felonious assault, a category which includes the majority of all homicides.

In *People v. Burton*,[37] the California Supreme Court refined the *Ireland* rule by adding the caveat that the felony murder doctrine may nevertheless apply if the underlying offense was committed with an independent felonious purpose. Even if the felony was included in the facts of the homicide and was integral thereto, a further inquiry is required to determine whether the homicide was the result of an independent felonious purpose or a single course of conduct with a single purpose. Therefore, in cases like *Ireland*, where the purpose of the conduct was the very assault which caused the death, the felony murder rule is inapplicable. In a homicide in the course of an armed robbery, for example, there is the independent purpose to acquire money or property belonging to another. In such an instance, the felony murder rule would apply.

Felony child abuse as defined by section 273(a)[38] can occur in a variety of circumstances. The definition is broad and includes both active and passive conduct: child abuse by direct assault and endangering the child by extreme neglect. The princi-

34. 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (the defendant and his wife were experiencing serious marital problems which culminated in defendant shooting and killing his wife).

35. *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr. at 198.

36. *Id.*

37. 6 Cal. 3d 375, 387, 491 P.2d 793, 801, 99 Cal. Rptr. 1, 9 (1971).

38. CAL. PENAL CODE § 273(a)(1) (West 1970 & Supp. 1985).

ples of *Ireland* and *Burton* would bar the use of the felony murder doctrine where the purpose of the child abuse is the very assault which results in the death of the child.[39] In the instant case, the California Supreme Court found that the homicide was the result of child abuse by direct assault. Therefore, the underlying felony was unquestionably an "integral part of and included in fact" of the homicide within the meaning of *Ireland*. The *Smith* court furthermore could conceive of no independent purpose for the conduct. The ostensible purpose of the felony murder rule is to deter negligent or accidental killing that may occur in the course of committing that felony. When someone willfully assaults a child, the court could not see how the felony murder rule would work to deter a person from killing accidentally or negligently in the course of that felony. The court, despite its expressed abhorrence of child abuse, refused to deviate from the *Ireland* rule simply because the victim was a child rather than an adult. Further, the court concluded that the felony murder rule does not serve any deterrent function.

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39. There are several cases in which the second degree felony murder doctrine has withstood an *Ireland* attack. People v. Taylor, 11 Cal. App. 3d 57, 89 Cal. Rptr. 697 (1970) (underlying felony was furnishing narcotics); People v. Calzada, 13 Cal. App. 3d 603, 91 Cal. Rptr. 912 (1970) (underlying felony was driving under the influence of narcotics); People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971) (underlying felony was administering poison); People v. Shockley, 79 Cal. App. 3d 669, 145 Cal. Rptr. 200 (1978) (underlying felony was child abuse by willful cruelty and endangering); People v. Northrop, 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197 (1982) (underlying felony was child abuse by physical beating). Except for *Northrop*, however, none of these decisions involved an underlying felony that had as its principal purpose an assault on the person of the victim.

In *Northrop*, there was evidence that their child's death was caused by organ and bone injuries resulting from the infliction of blunt force. The *Northrop* court declared that there was no bar to application of the felony murder rule because felony child abuse may be committed without either an intent to kill or to inflict great bodily harm, and thus has a felonious design independent of the resulting homicide. *Northrop*, 132 Cal. App. 3d at 1036, 182 Cal. Rptr. at 202. The supreme court in *Smith*, however, held that the *Northrop* court's conclusion that there was an independent purpose does not follow from its premise concerning possible lack of intent. The *Northrop* court relied on People v. Mattison, 4 Cal. 3d 177, 481 P.2d 193, 93 Cal. Rptr. 185 (1971), where the supreme court held that the felony of poisoning did not merge into the resulting homicide. The *Mattison* court held that because the underlying felony was not done with the intent to commit injury which would cause death, it had an independent design. *Id.* at 85, 481 P.2d at 198-99, 93 Cal. Rptr. at 190-91. The independent design in *Mattison*, however, was to furnish a dangerous substance for financial gain. The *Smith* court stated that, by definition, felony child abuse occurs only under circumstances or conditions likely to produce great bodily harm or death. Therefore, the *Smith* court concluded that it is untenable to assert that there is an independent design when the crime of felony child abuse of the assaultive variety is willfully committed. To the extent that *Northrop* is inconsistent with the court's reasoning in *Smith*, it was disapproved.

In *Smith*, the California Supreme Court refused to allow active and willful felony child abuse to serve as the underlying felony to a second degree felony murder instruction. The decision stems from the court's unwillingness to extend the felony murder rule which allows a murder conviction without considering the intent or malice of the defendant. Despite the court's dislike of the felony murder rule, it has long recognized the need to retain the doctrine for use in certain situations where strong countervailing policies so dictate. In this case, where the countervailing policy of protecting children from assaultive child abuse is so compelling, the court should have reexamined the possible deterrent effects of the rule instead of concluding that there will be no deterrence simply because assaultive child abuse involves a willful act.

C. Child Stealing

1. *Parent not guilty of child stealing where reconciliation cancels an interlocutory custody decree.*

People v. Howard, 36 Cal. 3d 852, 686 P.2d 644, 206 Cal. Rptr. 124 (1984). In *People v. Howard*, the California Supreme Court held that a parent was not guilty of child stealing[40] where a reconciliation effectively canceled an interlocutory custody decree. The cancellation of the interlocutory decree meant that the state had failed to establish the existence of a child custody order, one of the essential elements of the crime of child stealing. The court therefore ruled that the trial court's failure to instruct the jury concerning reconciliation constituted reversible error.

In *Howard*, the parties obtained an interlocutory judgment of dissolution in July 1978 whereby the wife received custody of the couple's two children. Defendant was awarded visitation rights. After one month, defendant moved back into the family home and the couple resumed marital relations. After two years, defendant went to Colorado to care for his father. The wife concluded that this signaled the couple's final breakup and signed a request for a final judgment of dissolution. Defendant believed that his wife was not properly caring for the children and re-

40. CAL. PENAL CODE § 278.5 (West Supp. 1985), *added by* 1976 Cal. Stat. ch. 1399, § 11, *amended by* 1983 Cal. Stat. ch. 990, § 4, *further amended by* 1984 Cal. Stat. ch. 1207, § 3. Defendant was convicted of violating the 1976 version of section 278.5. Therefore, subsequent references to this section will be to the 1976 version.

turned to California in August 1980. He took the children after promising the babysitter that he would return in two hours. He in fact moved the children to Colorado. He refused to allow the children to telephone their mother.

Defendant was charged with and convicted of child stealing.[41] He appealed on two grounds. First, he contended that the trial court erred in failing to instruct the jury on reconciliation. Second, he argued that the trial court erred in failing to instruct the jury concerning good faith mistake. The California Supreme Court determined that defendant's first contention was meritorious and therefore did not address the second ground for appeal.

In order to obtain a conviction under Penal Code section 278.5, the prosecution must establish the existence of a valid child custody order.[42] The California Supreme Court found no cases which addressed the question of whether a reconciliation by a husband and wife cancels a child custody order granted as part of an interlocutory decree of dissolution. The court did, however, find that cases in the area of spousal support provided significant guidance. These cases have held that reconciliation and resumption of marital relations cancel an interlocutory order.[43]

In *In re Marriage of Modnick*,[44] the California Supreme Court held that when a husband and wife reconcile following an interlocutory decree, the right to a final decree is extinguished and the couple is entitled to the restoration of all marital rights and obligations. The *Modnick* court also held that in determining whether a reconciliation has occurred, the court need only examine the intent of the parties to permanently reunite as hus-

41. CAL. PENAL CODE § 278.5 (West Supp. 1985).

42. Section 278.5(a) provides that "[e]very person who in violation of the physical custody provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished . . . ." CAL. PENAL CODE § 278.5(a) (West. Supp. 1985).

43. *See, e.g.*, Harrold v. Harrold, 100 Cal. App. 2d 601, 609, 224 P.2d 66, 70-71 (1950); Tompkins v. Tompkins, 202 Cal. App. 2d 55, 59-63, 20 Cal. Rptr. 530, 532-35 (1962); Purdy v. Purdy, 138 Cal. App. 2d 402, 405, 291 P.2d 1005, 1007 (1956); Morgan v. Morgan, 106 Cal. App. 2d 189, 192, 234 P.2d 782, 784 (1951); Peters v. Peters, 16 Cal. App. 2d 383, 386-87, 60 P.2d 313, 315 (1936).

44. 33 Cal. 3d 897, 911, 663 P.2d 187, 195, 191 Cal. Rptr. 629, 637 (1983).

band and wife.[45] This intent must be clearly proved by the party asserting that a reconciliation has occurred.[46]

In *Howard*, the California Supreme Court determined that there was a reconciliation as a matter of law. After obtaining the interlocutory order, the couple lived together for two years and held themselves out as husband and wife. They engaged in marital acts such as signing a joint rental agreement, maintaining a joint checking account and sharing the responsibility for raising their children. During the trial, the wife testified that she had earlier failed to tell the truth when, at the time she signed the request for a final judgment of dissolution, she stated that she and her husband were not reconciled. Finally, neither the husband nor the wife took steps to enforce the interlocutory decree.

Applying the *Modnick* test, the court determined that the couple had an unequivocal and unconditional intention to reunite as husband and wife. Since the couple had reunited before a final decree was entered, the court concluded that the interlocutory decree was canceled. Absent the required child custody order, the court reversed the conviction.

Chief Justice Bird, who wrote for the majority, also wrote a concurring opinion in which she addressed the defendant's second defense. The Chief Justice asserted that an honest, good faith albeit mistaken belief that there has been a reconciliation constitutes a defense to violation of Penal Code section 278.5. Relying on the legislative history of that section and the rules of statutory construction, she determined that the statute contained a specific intent element. For a "noncustodial parent" to be convicted under this section, it must be proved that he or she had the specific intent to deprive the legal custodian of his or her right of custody pursuant to a custody order, judgment or decree. Therefore, the Chief Justice reasoned, even if the child custody agreement in *Howard* was still in effect, the husband's good faith belief that the order was invalid would constitute a valid defense, requiring reversal of the trial court verdict.

Justice Mosk, dissenting, disagreed with the majority's in-

45. *Id.* at 912 n.14, 663 P.2d at 196 n.14, 191 Cal. Rptr. at 638 n.14.
46. *Id.* at 911, 663 P.2d at 196, 191 Cal. Rptr. at 638.

terpretation of both the facts and the applicable law. He disputed the majority's determination that there had been a reconciliation as a matter of law. He would have held that at most there was an attempted reconciliation which fell short of being successful. He persuasively argued that the husband's behavior in lying to the babysitter, moving the children to Colorado and not allowing the children to telephone their mother was inconsistent with a good faith belief in the invalidity of the child custody order. Justice Mosk argued that the husband violated the spirit of the statute by resorting to the type of self-help measure the statute was intended to prevent. However, this argument only addresses Chief Justice Bird's concurring opinion, since the majority based its holding on its determination that the interlocutory decree was invalid. Therefore, while Justice Mosk's argument was persuasive, it was not relevant to the majority's holding in the case.

II. Family Law

A. Community Property

1. *Wife entitled to that portion of the husband's disability which represents her share of community property interest in his retirement benefits.*

In re Marriage of Justice, 157 Cal. App. 3d 82, 204 Cal. Rptr. 6 (2nd Dist. 1984). In *In re Marriage of Justice*, the court of appeal affirmed a trial court order that the wife be paid that portion of the husband's disability pension which represented her share of the community property interest in his retirement benefits. The court followed the rule established by the California Supreme Court in *In re Marriage of Stenquist*[47] that only the excess of a disability pension over the amount of regular retirement benefits was separate property; the remaining amount in effect replaced ordinary retirement pay and was a community asset.

The husband was a police officer who retired on a disability pension two months before his twenty-year retirement date. The disability was based on an injury received eight years earlier. Under a prior dissolution agreement, the wife was to receive payments of her share of the husband's retirement benefits upon

47. 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).

the arrival of his twenty-year retirement date, regardless of whether he retired. Upon reaching the retirement date, however, the husband refused to pay, contending that he was receiving disability rather than a retirement pension.

The wife obtained an order from the trial court directing the husband to pay her her share of the retirement funds. The husband appealed, relying on the holding in *In re Marriage of Jones*.[48] In *Jones*, the California Supreme Court held that disability benefits are separate property when the right to a service pension has not vested at the time that a disability retirement is taken.[49] The court in *Justice*, citing *Stenquist*, pointed out that the holding in *Jones* was overturned a year later in *In re Marriage of Brown*.[50] *Brown* held that both vested and nonvested pension rights arising from employment during marriage were community property assets.[51]

Stenquist involved a serviceman who elected to take a disability pension rather than a service pension, and then claimed that the entire disability pension was his separate property under the reasoning of *Jones*. The California Supreme Court rejected that claim on two grounds. First, the court stated that permitting the election of a disability pension which operated to defeat a community property interest in a longevity pension would violate the principle that one spouse cannot invoke a condition wholly within his or her control which results in the loss of community interest of the other spouse.[52] Second, the court held that only that portion of a disability pension in excess of an ordinary retirement pension is property allocated to the disability itself, where the primary purpose of the disability payments is to compensate for the loss of earnings due to premature retirement.[53]

Since the husband in *Justice* had not accumulated the number of years required to enable him to choose between a disabil-

48. 13 Cal. 3d 457, 531 P.2d 420, 119 Cal. Rptr. 108 (1975).

49. A vested pension is one not forfeited by termination of employment. *In re* Marriage of Brown, 15 Cal. 3d 838, 842, 544 P.2d 561, 563, 126 Cal. Rptr. 633, 635 (1976).

50. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

51. *Id.* at 851-52, 544 P.2d at 569-70, 126 Cal. Rptr. at 641-42.

52. *Stenquist*, 21 Cal. 3d at 786-87, 582 P.2d at 101, 148 Cal. Rptr. at 14.

53. *Id.*

ity or a service pension, the court determined that the second factor in *Stenquist* was applicable and looked to the primary purpose of the benefits rather than the label placed on the benefits. In this case, the police department based both service pensions and disability pensions on a "normal pension base." No police officer could receive both a disability and service pension. Therefore in *Justice* disability benefits were largely intended to replace retirement benefits.

California courts, recognizing that pension benefits are becoming an increasingly significant part of employee compensation, are following a course markedly different than that suggested by *Jones* just ten years ago. *Jones* had held that a community property interest in a nonvested retirement pension was an expectancy, not a property interest. The change of law over the past decade demonstrates that courts now recognize that characterizing a disability pension as separate property under the circumstances present in *Justice* impairs a community interest of the spouse which is deserving of judicial protection. As the time for retirement draws near, the pension may be the most important asset of the marriage. Disability retirements, even though taken before service retirement benefits have vested, represent in large part service retirement payments. The courts now recognize that to deprive one spouse of a share in that property would result in an inequitable division of the marital community property.

2. *Separate property of a spouse which is converted to joint tenancy during the marriage or is used to acquire joint tenancy property during marriage is presumed to be community property.*

In re Marriage of Neal, 153 Cal. App. 3d 117, 200 Cal. Rptr. 341 (1st Dist. 1984); *In re Marriage of Anderson*, 154 Cal. App. 3d 572, 201 Cal. Rptr. 498 (1st Dist. 1984). Several courts of appeal decisions have interpreted recently enacted Civil Code sections 4800.1[54] and 4800.2.[55] In *In re Marriage of Neal*, the court held that a residence owned as separate property by a putative spouse prior to marriage is presumed to be community property when, during marriage, she placed title to the property in joint

54. CAL. CIV. CODE § 4800.1 (West Supp. 1985).
55. CAL. CIV. CODE § 4800.2 (West Supp. 1985).

tenancy with her husband. In *In re Marriage of Anderson*, the court likewise held that the section 4800.1 presumption arises upon the conveyance of title to both spouses as joint tenants during marriage notwithstanding that the property may have been owned by one spouse before marriage. The *Anderson* court further held that the husband was entitled to reimbursement for his separate property contribution under Civil Code section 4800.2.

In *Neal*, a house owned by the wife prior to marriage was transferred to joint tenancy with her husband. This change in title was required by a lender as a prerequisite to a refinancing arrangement. The wife claimed that she and her husband orally agreed that the house would remain her separate property. The trial court determined the house to be separate property pursuant to the oral agreement. The husband appealed.

In *Anderson*, a house owned by the husband prior to marriage was transferred to joint tenancy with his wife. This change was required by a lender as a prerequisite to a home equity loan. At trial, the husband testified that he had no idea that he was giving his wife a one-half interest in the house. The trial court determined that the house was community property based on the husband's conveyance during the home equity loan transaction and ordered the husband to pay the wife a one-half share of the value of the house. The husband appealed.

In *In re Marriage of Lucas*,[56] the California Supreme Court distinguished the "common law" presumption arising out of the form of title from the general presumption set forth in Civil Code section 5110[57] that property acquired during marriage is community property. The statutory presumption could be rebutted by tracing the source of funds that were used to acquire the property to separate property. The common law presumption could not be rebutted in this fashion; it required an understanding or agreement, either written or oral, between the parties to rebut the presumption.[58] The *Lucas* court also held that absent an agreement to the contrary, the parties' contribution from separate funds toward the acquisition of community property was

56. 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).
57. CAL. CIV. CODE § 5110 (West 1983).
58. *Lucas*, 27 Cal. 3d at 814-15, 614 P.2d at 288, 166 Cal. Rptr. at 857.

considered a gift to the community.[59]

The legislature responded to the *Lucas* decision by enacting California Civil code sections 4800.1 and 4800.2.[60] Section 4800.1 superseded the "common law" presumption of title concerning property acquired during marriage in joint tenancy. It also expanded section 5110, which had created a presumption that a single family residence acquired by a couple in joint tenancy during marriage was presumed to be community property. Section 4800.1 created the presumption that *all* property acquired in joint tenancy during marriage is community property. Unlike the rule set out in *Lucas*, section 4800.1 requires a writing to rebut the presumption.

Section 4800.2, unlike section 4800.1, applies to all community property, not just property held in joint tenancy. Absent a written waiver, section 4800.2 requires that a party be reimbursed for contributions to the acquisition of property to the extent the party can trace the contributions to a separate property source. This section overrules *Lucas*, insofar as it failed to recognize the parties' separate contribution to the acquisition of community property absent an oral or written agreement.[61]

The California Legislature stated that the new provisions would apply to proceedings commenced before the date of enactment on January 1, 1984 to the extent that the division of property was not yet final.[62] *Neal* and *Anderson* both applied the statute retroactively without addressing whether retroactive application was proper.[63]

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59. *Id.* at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858.

60. Stats. 1983, ch. 342 § 4, 1983 Cal. Adv. Legis. Serv. 36 (West) (codified at CAL. CIV. CODE § 4800.1 (West Supp. 1985)); stats. 1983, ch. 342 § 2, 1983 Cal. Adv. Legis. Serv. 36 (West) (codified at CAL. CIV. CODE § 4800.2 (West Supp. 1985)).

61. *Lucas*, 27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 585.

62. Stats. 1983, ch. 342 § 4, 1983 Cal. Adv. Legis. Serv. 36 (West) (codified at CAL. CIV. CODE § 4800.1 (West Supp. 1985)).

63. The two courts that did address the issue of retroactivity reached opposite results. In *In re* Marriage of Martinez, 156 Cal. App. 3d 20, 28-29, 202 Cal. Rptr. 646, 652 (1984), the court held that although the normal rule was not to apply a statute retroactively, where the intent of the legislature was clear, retroactive application was warranted. It further held that section 4800.1 did not violate due process because retroactive application of the statute did not interfere with vested rights; it merely shifted the evidentiary burden of proof where a joint tenancy deed was involved. *Id.* at 30, 202 Cal. Rptr. at 653.

Cf. In re Marriage of Milse, 159 Cal. App. 3d 471 (1984), *hg. granted*, November 21,

In *Neal*, the court reasoned that absent legislative intent to the contrary, the language of section 4800.1 could be construed not to apply to separate property which is placed (rather than acquired) in joint tenancy with the other spouse during marriage. Direct evidence of legislative intent, however, appears in the reports of the senate committee which considered Assembly Bill 26.[64] The report states that section 4800.1 governs property acquired before the marriage when the title is taken in joint tenancy during the marriage. The *Neal* court held, therefore, that the change in title from separate property to joint tenancy during the marriage established a presumption which could be rebutted only by a writing expressing a contrary intent. No such writing was present in *Neal*.

In *Anderson*, the court similarly reasoned that the legislative purpose of section 4800.1 was to expand the family law court's jurisdiction over assets that spouses frequently hold in joint tenancy, thereby allowing a sensible disposition of all marital property.

The court further held that the new statute's purpose was to avoid the inequities of *Lucas*,[65] where the presumption of a gift to the community often required the equal division of property taken in joint tenancy, despite a showing that one spouse contributed a substantial portion from his or her separate property. The court therefore concluded that the husband was entitled to reimbursement for his separate property contribution under Civil Code section 4800.2 and remanded the case to the trial court with instructions to determine the value of the award. The award should be based on the value of the property at the time of its conversion to joint tenancy.

The *Neal* court was highly critical of the legislature's enactment of section 4800.1. The harsh result of this case was characterized by the court as a "trap for the unwary" where different

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1984 (L.A. 32004), where the court held that retroactive application of section 4800.1 would be an unconstitutional deprivation of a vested property right without due process of law. The court reasoned that the wife made an oral agreement preserving her separate property interest in reliance on *Lucas*. As a result, the wife's interest in the property became vested at the time of the agreement.

64. 83 Sen. J. 4865-66 (1983).

65. *Lucas*, 27 Cal. 3d at 816, 614 P.2d at 289, 166 Cal. Rptr. at 858.

allocations of property are made based solely on the form of title by which the property was taken. However, the court merely abdicated its role in remedying the injustice by concluding that since the inequity was created by statute, the cure should also come from the legislature. The *Neal* court could have reached a more just and equitable result by addressing the due process issue and refusing to apply the statute retroactively. The *Anderson* court, on the other hand, applied section 4800.1 expansively without criticizing the legislature's judgment in enacting the statute. Both courts mitigated the harshness of section 4800.1, however, by reimbursing the spouse for the value of the property at the time of the transfer to joint tenancy rather than the lower value at the time of marriage.

3. *A debt owed to a spouse as part of a property settlement agreement can be discharged in bankruptcy if it arises out of a division of community property unrelated to alimony, support or maintenance.*

In re Marriage of Williams, 157 Cal. App. 3d 1215, 203 Cal. Rptr. 909 (5th Dist. 1984). In *In re Marriage of Williams*, the court of appeal held that a former wife's debt to her ex-husband as part of a property settlement was dischargeable in bankruptcy since it was unrelated to alimony, support or maintenance. Therefore, the court reasoned, the trial court's decision to allow the husband an offset against monies he owed his ex-wife frustrated the purpose of the federal bankruptcy laws and the United States Constitution.

During the dissolution hearing, the trial court, in order to equalize the division of community property and community debts, ordered the wife to execute and deliver to the husband a promissory note in the amount of $3,048.99 as well as certain other personal property. The court determined that thirty-six percent of her husband's retirement income was community property, of which the wife's share was $81.49 per month. Also under the dissolution decree, the husband was ordered to pay $9,426.37 and the wife $3,864.59 of community debts.

The wife subsequently filed a petition in bankruptcy in which the husband was named as a creditor. This operated to discharge all of her debts, including the debt owed to her hus-

band. The husband did not appear in the bankruptcy proceeding to object to wife's discharge of these debts or to try to offset the amount of wife's indebtedness. Soon afterwards, the creditors of the community filed law suits to satisfy their debts against the husband alone.

The husband made no monthly payments out of his retirement income to his wife on the ground that the wife had failed to comply with her obligation to deliver the note and the property. Wife obtained a writ of execution and levied on husband's savings account for the arrearages of $3,895.00 in the monthly payments due her. The husband filed a notice of motion to quash the writ and to vacate the levy.

The trial court granted the husband the right to offset the wife's indebtedness to him as well as any amounts he was required to pay creditors which the wife had been ordered to pay under the dissolution order. The trial court therefore quashed the writ and vacated the levy.

Although California Civil Code section 4380[66] and California Code of Civil Procedure section 128[67] give any court the inherent power to make all necessary orders to enforce or give effect to their judgments, this power is limited by the power given to the federal courts in adjudicating bankruptcy. It is established in both California[68] and federal law[69] that while alimony judgments or judgments in the nature of alimony, maintenance, and support are not affected by a discharge in bankruptcy, settlements of property rights are so affected. In this case, the court of appeal specifically stated that the $3,048.99 debt owed the husband, which the wife subsequently discharged in the bankruptcy proceeding, was necessary for the equalization of the community property and was unrelated to alimony, support or maintenance. Therefore, the debt was property discharged in bankruptcy.

The court of appeal further stated that the husband should have pursued his rights against his former wife before the bankruptcy court since the bankruptcy court had exclusive jurisdic-

66. CAL. CIV. CODE § 4380 (West 1983).
67. CAL. CIV. PROC. CODE § 128 (West 1982).
68. Smalley v. Smalley, 176 Cal. App. 2d 374, 375, 1 Cal. Rptr. 440, 442 (1959).
69. Stout v. Prussel, 691 F.2d 859, 860 (9th Cir. 1982).

tion to determine the dischargeability of the bankruptcy debt.[70] Section 523(a) of the Bankruptcy Act[71] allows a creditor to exempt from dischargeable debts those debts which were incurred because of fraud. However, the creditor must request that the determination of fraud be made. If he fails to act, the debt will be discharged. In this case, the trial court found that the wife was guilty of fraud both in the dissolution action and in the bankruptcy proceeding, where she concealed assets from the court. However, since the husband did not appear at the bankruptcy proceeding to raise these issues, the bankruptcy court had no choice but to discharge the debts.

The court of appeal stated that the concept of equitable setoff is well established in the state of California.[72] However, sections 524[73] and 553[74] of the Bankruptcy Act were interpreted by the court as prohibiting a state court proceeding from reviving a debt already discharged in bankruptcy. The court of appeal held therefore that the lower court erred in granting husband's motion to quash the execution and vacate the levy.

The court next addressed the question of whether the trial court could modify the property settlement agreement to take

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70. *In re* Houtman, 568 F.2d 859, 860 (9th Cir. 1982).

71. 11 U.S.C. § 523(a) (1982).

72. 3 B. WITKIN, CALIFORNIA PROCEDURE 2552-53 (2d ed. 1971).

73. 11 U.S.C. § 524 (1982).

> A discharge in a case under this title (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under Section 727, 944, 1141, or 1328 of this title, whether or not discharge of such debt is waived; (2) operates as an injunction against commencement of continuation of an action, the debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived . . . .

Id.

74. 11 U.S.C. § 553 (1982).

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that (1) the claim of such creditor against the debtor is disallowed other than under section 502(b)(3) of this title . . . .

Id.

into consideration the wife's discharge of her creditor's debts in bankruptcy. There were two conflicting policies involved: (1) the policy of the bankruptcy court to provide a new opportunity in life for persons, free from all outstanding debts, and (2) the policy of the family law court to require the bankrupt to pay all outstanding community debts.[75]

Civil Code section 4812 was amended in 1977[76] to allow a court to consider a discharge in bankruptcy when awarding future support. The legislative history of the bill explicitly states that it was intended to go as far as federal law would permit in reinstating debts owed to spouses.[77] This, according to the court, demonstrated that the legislature wanted to redress the inequity of allowing a spouse, who has an obligation to share community debts, to discharge those debts in bankruptcy. However, it also showed, according to the court, that the legislature was aware of the supremacy of the federal bankruptcy laws and the limits this placed on the legislature to effect a remedy. The court concluded that there was nothing in the statute itself or in the legislative history that indicated that the legislature believed that it could modify the final property settlement itself notwithstanding the inequities which otherwise result.

It was clear to the court in this case that the periodic payment of $81.49 due to the wife was not for alimony. The decree which provided for spousal support terminated in 1978. It was specifically determined that thirty-six percent of the husband's retirement fund was community property; the fact that the payments were being made monthly did not change them into alimony or support payments. Since the monthly payment could not be characterized as alimony, support or maintenance, neither could it be modified under California Civil Code section 4812 and the rationale of *In re Marriage of Clements*.[78] Accordingly, the court of appeal ruled that the trial court could not

75. *In re* Marriage of Clements, 134 Cal. App. 3d 737, 743-44, 184 Cal. Rptr. 756, 759 (1982).

76. CAL. CIV. CODE § 4812 (West 1983) provides that "[i]n the event obligations for property settlement to a spouse or support of a spouse are discharged in bankruptcy, the court may make all proper orders for the support of such spouse, as th court may deem just . . . ." *Id.*

77. Legal Affairs Department of the Governor's Office Enrolled Bill Report for Assembly Bill No. 1269 (August 11, 1977).

78. 134 Cal. App. 3d 737, 743-46, 184 Cal. Rptr. 756, 759-61 (1982).

offset a community debt owed by wife to husband against monthly payments owed to the wife in satisfaction of her community interest in her husband's retirement income.

In conclusion, the court of appeal held that a wife's debt to her husband, which arose out of the division of community property unrelated to alimony, support or maintenance, was dischargeable in bankruptcy. The court determined that allowing the trial court to offset the wife's discharged indebtedness against payments owed the wife by her husband, would violate the purpose of the Federal Bankruptcy Act. The court also held that the California law which permitted a modification of alimony and support payments did not apply to this case since the payment due to the wife was her share of her husband's retirement fund, which was determined to be community property.

B. Decedent's Estates

1. *Putative spouse entitled to succeed to share of decedent's separate property.*

Estate of Leslie, 37 Cal. 3d 186, 689 P.2d 133, 207 Cal. Rptr. 561 (1984). In *Estate of Leslie*, the California Supreme Court held that a surviving putative spouse is entitled to succeed to a share of the decedent's separate property. The court, in reaching this decision, relied upon previous court of appeal decisions holding that a surviving putative spouse is entitled to a share of the decedent's quasi-marital property.[79] The court also examined other cases where courts have accorded surviving putative spouses the same rights as surviving legal spouses. The court concluded that it would lend to anomalous and unjust results to accord surviving putative spouses the same rights as legal spouses in some situations and not to accord a surviving putative spouse a share of the decedent's separate property.

Appellant and decedent were married in Tijuana, Mexico. Since the marriage was never recorded as required by Mexican law, the marriage was not valid under Civil Code section 4104.[80]

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79. Quasi-marital property is property acquired during a putative marriage which would have been community property if acquired during a valid marriage. CAL. CIV. CODE § 4452 (West 1983); Estate of Vargas, 36 Cal. App. 3d 714, 717, 111 Cal. Rptr. 779, 780 (1974).

80. CAL. CIV. CODE § 4104 (West 1983) provides that "[a]ll marriages contracted

Decedent died intestate. Respondent, a son from a previous marriage, filed a petition for letters of administration, challenging appellant's right to succeed to any of his deceased mother's separate property. The trial court recognized the existence of a putative marriage[81] between appellant and decedent, but concluded that appellant was not entitled to any of decedent's separate property. He appealed.

Court of appeal decisions have consistently held that a putative spouse is entitled to succeed to quasi-marital property.[82] These decisions also strongly suggested that putative spouses are entitled to a share of their decedent's separate property. In *Estate of Krone*,[83] the court of appeal awarded all of the community estate to a putative spouse and held that the surviving spouse was entitled to the same share as she would have been as a legal spouse. *Krone* has been read to recognize a putative spouse as the equivalent of a legal spouse for purposes of succession.[84] In other analogous contexts, courts of appeal have afforded surviving putative spouses the same rights as surviving legal spouses.[85]

The California Supreme Court concluded that principles of fairness mandate that putative spouses be allowed to succeed to a share of their decedent's separate property. In this case, the court held that at least one partner held a good faith belief in

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without this state, which would be valid by the laws of the jurisdiction in which the same were contracted, are valid in this state." *Id.*

81. CAL. CIV. CODE § 4452 (West 1983) states that "[w]henever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare such party or parties to have the status of a putative spouse . . . ." *Id.*

82. *See, e.g.*, Estate of Krone, 83 Cal. App. 2d 766, 769-70, 189 P.2d 741, 743 (1948); Estate of Goldberg, 203 Cal. App. 2d 402, 412, 21 Cal. Rptr. 626, 632 (1962).

83. 83 Cal. App. 2d at 769-70, 189 P.2d at 743.

84. Kunakoff v. Woods, 166 Cal. App. 2d 59, 65-66, 332 P.2d 773, 777 (1958).

85. *See, e.g., Kunakoff*, 166 Cal. App. at 67-68 (surviving putative spouse held to be an heir for the purposes of Code of Civil Procedure section 337 and therefore entitled to bring an action for wrongful death); Adduddell v. Board of Administration, 8 Cal. App. 3d 243, 249, 87 Cal. Rptr. 268, 271 (1970) (surviving putative spouse held to be a surviving spouse for the purposes of Government Code section 21364 and therefore entitled to receive special death benefits under the Public Employees' Retirement Law); Brennfleck v. Workmen's Comp. App. Bd., 3 Cal. App. 3d 666, 672, 84 Cal. Rptr. 50, 53 (1979) (surviving putative spouse held to be a surviving widow for purposes of a former version of Labor Code section 4702 and was therefore entitled to receive workers' compensation death benefits).

the validity of the union. Also, the couple held themselves out to the community at large as legally married. They lived together for nearly nine years, and acted for all purposes as husband and wife. The court concluded that to deny the surviving putative spouse a share in his wife's separate property while allowing him to succeed to quasi-marital property made little sense and led to an unjust result.

The court noted one court of appeal case on point where the court reached a contrary result.[86] In *Estate of Levie*, the court awarded the putative spouse all of the quasi-marital property but denied her any share of the separate property. In the lower court, respondent herein relied upon the three reasons given by the *Levie* court in support of its holding. First, the court of appeal found no California precedent suggesting that a putative spouse is entitled to succeed to an interest in the decedent's separate property. Second, it found that the equities which dictated that quasi-marital property be passed on to a surviving putative spouse did not exist with regard to separate property; in contrast to quasi-marital property, the combined efforts of the putative spouses did not contribute to the acquisition of separate property. Third, the court of appeal concluded that giving a surviving putative spouse an interest in decedent's separate property ignored the existing statutory scheme.[87]

The California Supreme Court overruled *Levie*. It found the court of appeal's reasoning to be wrong and predicted that it would lead to absurd results. First, as noted herein, the supreme court cited numerous opinions in support of the proposition that a putative spouse is entitled to succeed to a share of a decedent's separate property. Second, although it is true that the combined efforts of putative spouses do not contribute to the acquisition of separate property, the same is true for legally married couples. Third, according a surviving putative spouse a share in the decedent's separate property is consistent with the statutory scheme. The court reasoned that the rights of a surviving spouse to a decedent's separate property are statutorily created. To acknowledge the same rights on behalf of a putative spouse merely recognizes that a good faith belief in the marriage

86. Estate of Levie, 50 Cal. App. 3d 572, 576-77, 123 Cal. Rptr. 445, 447 (1975).
87. *Id.* at 577, 123 Cal. Rptr. at 447.

should put the surviving putative spouse in the same position as a surviving legal spouse.

C. Child Custody and Control

1. *Trial court must find that award of custody of a child to its natural father would be detrimental to the child before it may terminate natural father's custody rights.*

In re Baby Girl M., 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984). In *In re Baby Girl M.*, the California Supreme Court held that in a hearing conducted pursuant to Civil Code section 7017(d)[88] to terminate a natural father's[89] rights prior to

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88. CAL. CIV. CODE § 7017(d) (West 1983) provides that:

> If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the [adoption] proceeding . . . . If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father . . . , then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child.

Id.

89. A *natural* father is a man who is found to be a child's biological father, but who has not met the conditions of California Civil Code section 7004 and is therefore not deemed the child's *presumed* father. This section provides that:

> A man is presumed to be the natural father of a child if he meets the conditions set forth . . . in any of the following subdivisions: (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court. (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and (i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or (ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the ter-

the adoption of the child, a determination that award of custody of the child to its natural father would be detrimental to the child pursuant to Civil Code section 4600[90] must be made in order to terminate the natural father's custody rights.

The father and Baby Girl M.'s mother dated for a few months in 1980. Neither knew she was pregnant when the relationship ended. The child was born July 18, 1981, and was placed in a foster home three days later. The father never knew of the pregnancy. He was informed of the birth on August 1, 1981.

The father contacted the Department of Social Welfare, and on August 5 requested that his daughter be placed with the family then providing day care for his sons. The same day, the mother formally relinquished the child for adoption, and rejected the father's placement request, stating that she did not want the child to be placed with any family that the natural parents knew.

A section 7017 petition to terminate the father's parental rights was filed August 10. The father at that point arranged to see the child, and on August 17, requested custody. However, Baby Girl M. was placed with the prospective adoptive parents on August 24.

At the section 7017(d) hearing, the court found that the father was Baby Girl M.'s biological father, and that he would be

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> mination of cohabitation. (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and (i) With his consent, he is named as the child's father on the child's birth certificate, or (ii) He is obligated to support the child under a written voluntary promise or by court order. (4) He receives the child into his home and openly holds out the child as his natural child.

CAL. CIV. CODE § 7004 (West 1983).

90. CAL. CIV. CODE § 4600(c) (West Supp. 1985) provides that:

> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.

Id.

able to provide a loving home for the child. The court nevertheless found that it was in the best interests of the child that she remain with her adoptive parents.

The California Supreme Court held that the appropriate standard to be used in determining the custodial rights of natural fathers in a section 7017(d) hearing is the "detriment standard" established in section 4600.[91] The court based this conclusion on its analysis of statutory and decisional authority, recent legislative history, and public policy.

According to the court, section 4600 sets forth a mandate that custody of a child in a dissolution proceeding may not be awarded to nonparents without the consent of both parents or a finding that it would be detrimental to the child to award custody to a parent. In *In re B.G.*,[92] in an analysis of the legislative history of section 4600, the California Supreme Court held that that section applies to *any* proceeding in which the custody of a minor child is at issue. The court stated that since *In re B.G.* was decided prior to the enactment of section 7017, the legislature was aware that *In re B.G.* had extended the section 4600 standard to proceedings outside the Family Law Act. Therefore, if it had intended that the section 4600 standard not apply in section 7017(d) hearings, it would have specifically said so.

The court acknowledged that the legislature did pass Assembly Bill 649, which was vetoed by the governor because of financial provisions it contained. That bill had expressly declared that the provisions of section 4600 would not apply to an alleged natural father seeking custody in a section 7017(d) hearing.[93] However, when it was reintroduced as Assembly Bill 1782,[94] the author agreed to delete that language from the bill. Thus, the court concluded, the legislature declined an opportunity to disapprove of the application of the section 4600 standard to 7017 hearings.

The court also determined that this decision was consistent

91. *Id.*
92. 11 Cal. 3d 679, 695, 523 P.2d 244, 255, 114 Cal. Rptr. 444, 445 (1974).
93. A.B. 649 § 6(h) (1983).
94. A.B. 1782 (1983).

with public policy as expressed by the Uniform Parentage Act[95] and other relevant California Civil Code sections. California Civil Code section 197[96] establishes that both mothers and presumed fathers must give consent before an adoption can proceed, unless their parental rights have been terminated under a section 232[97] or section 224[98] hearing. Each parent is equally entitled to the child's custody. If the father is a natural rather than a presumed father,[99] the mother alone is entitled to custody. Only when the natural mother gives the child up for adoption are a natural father's rights considered. Pursuant to section 7017(d), he must be notified, and his custodial rights must be determined before the child may be adopted.

The legislature, through this scheme, differentiates between the veto powers given unwed mothers, presumed fathers and natural fathers. The court determined that application of the detriment standard in a 7017(d) hearing will not defeat this policy. The court disapproved of the language in *W.E.J. v. Superior Court*,[100] in which the court of appeal rejected the detriment standard in such hearings on the ground that its use would be an *automatic* veto by the father over the adoption. The California Supreme Court stated that such a veto will never arise, since the court may always determine that it would be detrimental to the child for the father to gain custody. In such cases, the veto power will never be exercised; the natural father's consent to the adoption will not be required and the adoption will proceed.

The California Supreme Court concluded that the state scheme under section 7017(d) satisfies the federal due process requirements of notice and an opportunity to be heard.

The United States Supreme Court has not directly addressed the question of whether a natural father's parental rights require a finding of detriment rather than the less stringent best interests standard. The California Supreme Court cited with approval a recent law review article in which the au-

95. CAL. CIV. CODE §§ 7000-7021 (West 1983 & Supp. 1985).
96. CAL. CIV. CODE § 197 (West 1982).
97. CAL. CIV. CODE § 232 (West 1982).
98. CAL. CIV. CODE § 224 (West 1982).
99. *See supra* note 90.
100. 100 Cal. App. 3d 303, 309-12, 160 Cal. Rptr. 862, 866-68 (1979).

thor proposed that in regard to the constitutional rights of unwed fathers, a state "may not deny biological parents the opportunity to establish a protected custodial relationship."[101] Unless a father voluntarily fails to pursue custody, or the child's stepfather voluntarily assumes custody, the natural father's attempt to gain custody must, in the absence of his unfitness, prevail over others seeking custody. Therefore, the court stated, the detriment standard is met where the father chooses not to seek custody; the question never arises when there is a stepfather who assumes custody of the child.

The court recognized that in the case before it, nearly three years had passed since the original 7017(d) hearing, during which Baby Girl M. had resided with her adoptive parents. Therefore, the court reasoned, the trial court might make a finding of detriment to the child which, at the time of the original hearing, would have been unsupportable. The court directed the trial court on remand to consider these circumstances when making its determination.

Justice Mosk, joined by Justice Kaus, issued a strong dissent. He first noted serious omissions in the facts set out by the majority. For instance, the father on two occasions indicated to the Social Welfare Department that he did not desire custody. Further, the mother had agreed to an adoption only if the child were placed in a stable, two parent home. Justice Mosk contended that the majority's holding will result in a situation in which many single mothers attempting to place their children in a stable, two parent home will refuse to relinquish custody rather than risk the chance of the child being placed with a man who became the child's father through a casual liaison.

Justice Mosk also found a serious flaw in the legal reasoning of the majority opinion. He pointed out that the majority simply ignored the provision of section 7017(d) which provides that "if the court finds that the man is a presumed father, his consent to adopt is required; whereas if he is not a presumed father, only the mother's consent shall be required for the adoption of the child."

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101. Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson (1984)*, 45 OHIO ST. L.J. 313 (1984).

Justice Mosk also argued that the clear intention of the legislature was to differentiate between the rights of presumed and natural fathers. He pointed out that the trial court must make a determination during the section 7017 proceeding whether a father is presumed or natural; the question of whether the father's consent to adoption is necessary rests entirely on whether the father is one or the other. This legislative direction that the natural father's consent is not required is tantamount to saying that the court need not find detriment in order to free the child for adoption. Otherwise, there would be no difference between the presumed and natural father's custodial rights.

Justice Mosk found additional support for his position in the legislative history of Senate Bill 347,[102] which contains the Uniform Parentage Act. An analysis by the Assembly Judiciary Committee[103] clearly stated that the bill sought to abrogate any rights whatsoever unless the father is a presumed father. Otherwise, the mother alone can consent to the child's adoption. While a natural father must be given notice of an adoption proceeding, and has the right to seek custody, there are absolutely no standards under which the court would be required to grant him custody.

Further, Justice Mosk did not believe that the legislative history after the veto of Assembly Bill 649 indicated that the legislature did not intend to deprive natural fathers of the parental preference of section 4600; the legislature's intention was made clear when it enacted Assembly Bill 649.[104] The fact that an author of a later bill chose to remove the provision is not indicative of legislative intent as a whole.

Justice Mosk found the cases cited in support of the majority's opinion inapplicable. He contended that the cases cited by the majority either involved vastly different factual situations, or were decided prior to the passage of the Uniform Parentage

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102. S.B. 347 § 7023(d), *as amended* May 20, 1975, required that a natural father be found unfit before the court could dispense with the requirement that he consent to adoption. The bill was later amended to provide that the only mother's consent is necessary when the father is not classified "presumed." S.B. 347 § 7023(d), *as amended* Aug. 12, 1975.

103. Assembly Judiciary Committee of Senate Bill No. 347, 1975 Assem. File Analysis, microfiche ed.

104. *See supra* text accompanying note 93.

Act.

Finally, Justice Mosk addressed the factor of psychological harm to a child who has been with adoptive parents all his or her life. Justice Mosk argued that the majority did not give this emotional factor sufficient consideration, and that it should have instructed the trial court to give substantial weight to that element.

The majority opinion in this case was written by Justice Sonenshine, on assignment to the California Supreme Court from the Fourth District Court of Appeal. In a court of appeal case, *Michael U. v. Jamie B.*,[105] Judge Sonenshine wrote an opinion in which the court awarded custody of a newborn child to the sixteen-year-old natural father rather than to the prospective adoptive parents. The court of appeal did not find dispositive the facts that the father was sixteen; the mother twelve; that the father smoked marijuana and had been dropped back at school; and that an expert witness testified that the child had developed a strong bond with the adoptive family and would suffer from the separation. Rather, the court stated that such considerations do not necessarily mean that the father, while imperfect, would be an unfit parent.[106] Neither was the question of age dispositive; just as a minor girl may be a parent, so may a minor boy.

The court of appeal avoided the issue raised by the mother in *In re Michael U.* that the decision to give custody to the father had been mistakenly based on the section 4600 standard.[107] The court of appeal allowed the decision to stand, first because the trial court had not made a statement of decision, and also because appellant "cannot complain if a *higher* standard than necessary was employed to determine whether the father should be granted custody of the child."[108] Misreading the provisions of the statute, the court determined that the detriment standard is used in awarding custody to nonparents, but is irrelevant when

105. 160 Cal. App. 3d 193, 206 Cal. Rptr. 323 (1984), *hg. granted* Dec. 3, 1984 (L.A. 32014).

106. *Id.* at 201, 206 Cal. Rptr. at 328.

107. CAL. CIV. CODE § 4600(c) (West Supp. 1985). For relevant statutory language, see *supra* note 90.

108. 160 Cal. App. 3d 193, 199, 206 Cal. Rptr. 323, 327 (1984).

custody is awarded to the natural father himself. The court stated that the result in this case is not that the child was removed from an environment in which he was doing well, but that he was removed from an environment in which he did not belong. The court of appeal concluded that preadoption placement should not take place until a father's parental rights are terminated.[109]

The *In re Michael U.* decision awarded custody of a child to his natural father with no articulated reason and with no discussion of the critical provision of section 7017 that only the mother's consent to adoption is necessary when the father is not deemed "presumed." The court disregarded as academic whether the section 4600 detriment standard is applicable when custody is awarded to a natural father.

In re Baby Girl M. continued the faulty reasoning. As Justice Mosk clearly explained in his dissent, both the language of section 7017 and legislative history show that the legislature's intent was to deny natural fathers such preemptive rights. The legislature may now respond to the ruling of *In re Baby Girl M.* by passing a measure which will protect the decision of the mother in those situations where the father lacks the type of relationship essential to be considered a "presumed father."

2. *Discontinuation of visitation is in best interest of child where child has been sexually molested by father.*

In re Cheryl H., 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (2nd Dist. 1984). The court of appeal in *In re Cheryl H.* held that there was substantial admissible evidence to support the jurisdictional finding that Cheryl was a dependent of the court and the dispositional finding that the child's continued contact with her father was not in her best interest. The court held this despite ruling the psychiatrist's opinion testimony that the father had sexually abused the child inadmissible hearsay. Finally, the court held that the trial court had properly applied the preponderance of the evidence standard at both the jurisdictional and dispositional phases of the dependency hearing.

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109. *Id.* at 201, 206 Cal. Rptr. at 328.

A petition was filed by the Department of Social Services seeking to bring Cheryl H. within the jurisdiction of the juvenile court. The petition alleged that Mr. H. (Cheryl's father) sexually molested Cheryl and that Cheryl was suffering from three hymenal tears in her vagina in addition to other injuries. The lower court sustained the allegations in the petition. In the jurisdictional phase of the dependency hearing, the trial court declared Cheryl H. a dependent of the juvenile court under Welfare and Institutions Code section 300(a) and (d).[110] In the dispositional phase, the court allowed Cheryl to remain in her mother's home on the conditions that her father not be allowed to visit Cheryl and that he begin therapy. Cheryl's father appealed, contending that (1) the trial court erred by applying the preponderance of the evidence standard of proof; (2) the judgement was supported only on the basis of inadmissible hearsay evidence; and (3) the evidence was insufficient to support the judgment.

The court appointed psychiatrist, Dr. Powell, had offered opinion testimony that Cheryl had been sexually abused. The court of appeal held this to be a proper subject for expert testimony. Evidence Code section 801(a)[111] allows an expert to testify in the form of an opinion if the opinion concerns a subject sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. The court determined that Dr. Powell's education and training had prepared her to draw inferences and make a diagnosis from observing Cheryl's behavior during play-therapy sessions. The trial court ruled that a lay person would have difficulty interpreting this data without Dr. Powell's assistance. This testimony was therefore ruled admissible.

The court of appeal, however, ruled that the doctor's opinion that Cheryl's father was the person who had sexually abused Cheryl went far beyond the proper scope of expert witness testimony. Dr. Powell's opinion concerning the identity of the abuser was necessarily based on the assumption that merely by examin-

110. CAL. WELF. & INST. CODE § 300(a) and (d) (West 1984). This statute allows the juvenile court to adjudge a minor to be a dependent child of the court if (a) the minor has no parent capable of exercising proper care or control over her or (d) if the home is unfit due to "neglect, cruelty, depravity, or physical abuse" of the child by a parent or guardian. *Id.*

111. CAL. EVID. CODE § 801(a) (West 1966).

ing a patient, a doctor can make a valid diagnosis and draw valid conclusions as to the conduct of a third person, in this case Cheryl's father. The court of appeal reasoned that an expert is no better equipped than a lay person to make such inferences. The trier of fact is not assisted by hearing the expert's opinion and, accordingly, the court determined such testimony to be inadmissible.

Furthermore, California does not currently have a statutory hearsay exception for out-of-court statements by victims of child abuse.[112] Accordingly, Cheryl's out-of-court statement made during play therapy was inadmissible hearsay. The Evidence Code[113] allows opinion testimony concerning the credibility of hearsay declarants only when the hearsay statement has been independently admitted under a specific exception to the hearsay rule. Since there was no specific hearsay exception applicable, the court of appeal held that it was improper to admit Dr. Powell's opinion testimony concerning the credibility of Cheryl's hearsay statement.

According to the court of appeal, most of the conduct and statements made by Cheryl about which Dr. Powell testified would have been independently admissible. The court characterized Cheryl's conduct during play therapy as nonassertive conduct not intended as a substitute for oral or written verbal expression under Evidence Code section 225[114] and therefore not hearsay under Evidence Code section 1200.[115] Cheryl's conduct

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112. The Washington Legislature has enacted a special hearsay exception for very young victims of child abuse which allows into evidence a statement made by a child under the age of ten describing any act of sexual abuse performed with or on the child. If the child is unavailable as a witness, the statement can still be admitted into evidence if there is corroborative evidence of the act. 1982 Wash. Legis. Serv. ch. 129 § 2 (West). *See also generally* Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437 (1985). Here, the court of appeal was reluctant to establish such an exception on its own and concluded that the task was better left to the California Legislature which could then establish appropriate safeguards to protect the rights of both the child victim and the accused adult abuser.

113. CAL. EVID. CODE §§ 780(e) and 1100 (West 1966).

114. CAL. EVID. CODE § 225 (West 1966) which provides that "[s]tatement means (a) oral or written verbal expression or (b) nonverbal conduct of a person *intended* by him as a substitute for oral or written verbal expression." *Id.* (emphasis added). Because Cheryl had no such intent, her conduct does not fall within the prohibition of the hearsay rule.

115. CAL. EVID. CODE § 1200(a) (West 1966). This section provides that hearsay evidence is "evidence of a statement that was made other than by a witness while testifying

during play therapy, which consisted of holding the female doll close to her while rejecting the male doll, orally copulating a male doll, putting a male doll on top of a female doll, and recoiling at the mention of her father, was determined by the court to be relevant to prove that Cheryl was molested, as well as supplying the basis for Dr. Powell's opinion to the same effect. Although Cheryl's out-of-court declarations that her father had molested her were inadmissible hearsay as to the truth of the statements, the court ruled that they constituted non-hearsay evidence on the issue of Cheryl's state of mind and were relevant in determining whether continued involvement by the father with Cheryl was desirable.

The court of appeal, relying on Welfare and Institutions Code section 355, held that at the jurisdictional phase of a dependency hearing, the appropriate standard of proof is preponderance of the evidence.[116] However, the court ruled that neither this section nor section 300[117] applied to the dispositional phase of the hearing. The court reasoned that the appropriate standard of proof for the dispositional phase depends on the particular disposition ordered by the court. Welfare and Institutions Code section 361(b)[118] requires a clear and convincing quantum of proof only when a child is ordered removed from the custody of her or his parents.

In this case, the juvenile court ordered that Cheryl remain with her mother. Therefore, the court of appeal found no compelling reason to require application of a more stringent standard of proof. Proof by a preponderance of the evidence, according to the court, served best to protect the interests of the child

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at the hearing and that is offered to prove the truth of the matter stated." *Id.*

116. CAL. WELF. & INST. CODE § 355 (West 1984) provides in pertinent part that "proof by a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 300." *Id.*

117. CAL. WELF. & INST. CODE § 300 (West 1984). Subsection (d) of this section provides in pertinent part that:

> [a]ny person under the age of 18 years who comes within . . . the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court: . . . [w]hose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents . . . .

Id.

118. CAL. WELF. & INST. CODE § 361(b) (West 1984 & Supp. 1985).

and struck an acceptable balance between a safe home for the child, the interests of the parents in retaining their parental rights and the interests of the state to protect the child from parental abuses. The court of appeal concluded that in this case the trial court correctly determined that its decision to sever the father's parental rights until his rehabilitation was complete was supported by a preponderance of the evidence.

3. *Application of the term "convicted" as found in the Civil Code is limited to instances where there has been a final judgment.*

In re Sonia G., 158 Cal. App. 3d 18, 204 Cal. Rptr. 498 (5th Dist. 1984). The court of appeal in *In re Sonia G.* held that the trial court correctly limited the term "convicted" as used in Civil Code section 232(a)(4)[119] to instances where there has been a final judgment. The court of appeal therefore refused to sever the parental relationship based on this section of the statute. The court of appeal concluded, however, that the parental relationship was properly severed under section 232 (a)(1)[120] and (a)(2).[121]

D. is the daughter of Diane R., and Stanley R. Sonia is the Daughter of Diane R. and her former husband. These minors

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119. *See infra* note 122.

120. CAL. CIV. CODE § 232(a)(1) (West 1982) provides:

> [A]n action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions: (1) The child has been left without provision for the child's identification by his or her parent or parents or by others or has been left by both of his or her parents or his or her sole parent in the care and custody of another for a period of six months or by one parent in the care and custody of the other parent for a period of one year without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.

Id.

121. CAL. CIV. CODE § 232(a)(2) (West 1982 & Supp. 1985) provides that:

> [A child] who has been neglected or cruelly treated by either or both parents, if the child has been a dependent child of the juvenile court under any subdivision of Section 300 of the Welfare and Institutions Code and the parent or parents have been deprived of the child's custody for one year prior to the filing of a petition pursuant to this section.

Id.

were taken into custody by the Kern County Welfare Department (Department) after they reported that they had been sexually abused by Stanley. The Department sought a severance of the parental relationship on the basis of section 232(a)(4).[122] The trial court refused to grant the severance since Stanley's conviction for child abuse under Penal Code section 288a(c)[123] was on appeal and therefore not final.

The California Supreme Court has held that while an appeal is pending, a lower court judgment of guilty is suspended. As long as there is a legal possibility of setting aside the lower court judgment, that judgment is not final.[124]

The court of appeal balanced the legislative policy in favor of a quick resolution of a child's future to provide stability and security of an adoptive home against the policy of viewing an involuntary termination of the parent-child relationship by the state as a drastic remedy to be applied only in extreme situations. The court of appeal held that the trial court correctly applied the clear and convincing standard to the proceeding to determine whether to sever the parental relationship. A judgment which is not yet final because there is a possibility of its being overturned on appeal does not satisfy this clear and convincing test. Therefore, the parental relationship cannot be permanently severed under California Civil Code section 232(a)(4).

The court of appeal determined, however, that the parental relationship could be severed under subsections (a)(1) and (a)(2). These subsections permit the severing of a parental relationship where it is determined that the children have been abandoned or neglected. The court recognized the risks of delaying the final disposition of cases such as these until the appeal process has been completed. The court concluded, however, that in most cases in which a felony conviction for child abuse is being appealed, the facts will warrant the child being declared free

122. This subsection provides that an action may be brought to free a minor child from the control and custody of his or her parent or parents if that "parent or parents are convicted of a felony, if the facts of the crime of which the parent or parents were convicted are of a nature as to prove the unfitness of the parent or parents to have the future custody and control of the child." CAL. CIV. CODE § 232(a)(4) (West 1982 & Supp. 1985).

123. CAL. PENAL CODE § 288a(c) (West Supp. 1985).

124. Stephens v. Toomey, 51 Cal. 2d 864, 869, 338 P.2d 182, 184-85 (1959).

from parental custody based on another subsection of section 232.

III. EMPLOYMENT LAW

A. Employment Discrimination

1. *Gender is not a bona fide occupational qualification for a position as a cook in a men's jail.*

County of Alameda v. Fair Employment and Housing Commission, 153 Cal. App. 3d 499, 200 Cal. Rptr. 381 (1st Dist. 1984). In *County of Alameda v. Fair Employment and Housing Commission* the court of appeal applied the Fair Employment and Housing Act[125] to a case of race and sex discrimination and held that a black woman who had been denied employment had made a prima facie case of race discrimination. The court also held that the gender based practice of hiring only male cooks for employment in the men's jail facility was not justified as a bona fide occupational qualification.

Plaintiff, a black woman, applied for a cook's position with the Alameda County Sheriff's Department. She had achieved the highest score on the written examination, had twenty years of cooking experience, and had placed first on the eligibility list.[126] The white woman hired by the county was clearly less qualified; she had placed second on the eligibility list and had thirteen years less cooking experience. It was the first time in nine years that a job applicant with the highest test score was not hired by the Alameda County Sheriff's Department. The trial court denied the county's petition to compel the Fair Employment and Housing Commission (Commission) to reverse its decision that the county had wrongfully denied employment to plaintiff. The county appealed.

The court of appeal first examined the issue of racial discrimination. It looked for guidance to cases decided under Title VII of the 1964 Civil Rights Act.[127] Although the wording of the Fair Employment and Housing Act and Title VII of the Federal

125. CAL. GOV'T CODE § 12940(a) (West 1980 & Supp. 1985).

126. Plaintiff testified that during her interview the county's food service manager told her that he would hire her over the other applicants, but that the final decision was not his.

127. 42 U.S.C. § 2000e(2)(c) (1982).

Civil Rights Act differ slightly, the antidiscriminatory goals and public policy objectives behind both laws are similar.[128] It is an unlawful employment practice for an employer to refuse to hire a person because of such person's color, race, sex, national origin, or religion.[129] For a plaintiff to establish a prima facie case of racial discrimination under either federal or state law she must show (1) that she belongs to a racial minority; (2) that she applied for and was qualified for the job; (3) that she was denied employment; and (4) that after the denial the position remained open and the employer continued to seek applicants with similar qualifications. The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the rejection. Finally, the unsuccessful applicant is given the opportunity to show that the employer's proffered reasons are merely a pretext to conceal its discriminatory intent.[130]

The court in this case held that the plaintiff established a prima facie case of racial discrimination. The facts easily satisfied the requisite elements: the plaintiff was black and female; she applied with the county and was well qualified for the job as cook; she was not hired; and the county continued to interview prospective employees for the position.

The county argued that the white woman's experience as a cook for high school students qualified her for the job as a cook for prison inmates. It also defended its choice to hire her on the ground that she appeared to be a minority since she had black facial characteristics. The court rejected the county's reasons for not hiring the plaintiff, and found that the facts of the case amply supported the Commission's findings that the county's reasons were a mere pretext for its discriminatory hiring practices.

The court next examined the issue of sex discrimination. The county argued that it was justified in rejecting the plaintiff for a position in the men's jail faciliaty since Sheriff's Department policy allowed only male cooks to work in the men's jail

128. *See* Price v. Civil Service Commission, 26 Cal. 3d 257, 271, 276, 604 P.2d 1365, 1373, 1376, 161 Cal. Rptr. 475, 483-84, 487 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329-30, 171 Cal. Rptr. 917, 927 (1981), *citing with approval* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-07 (1973).

129. 42 U.S.C. § 2000e(2)(a)(1) (1982).

130. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-04 (1973).

facility. The county reasoned that gender is a bona fide occupational qualification because the presence of a female cook would violate the inmate's right to privacy and would threaten security.

A gender-based classification is permitted only if it is a bona fide occupational qualification necessary to the normal operation of the place of employment.[131] In *Dothard v. Rawlinson*,[132] a leading United States Supreme Court case on gender-based classification, the Court held that in situations where a woman would have extensive physical or isolated contact with the inmates, she may properly be excluded from working as a prison guard.[133] In *Long v. State Personnel Board*,[134] a California court of appeal upheld a lower court's denial of employment as a prison chaplain to a woman applicant. The *Long* court reasoned that the extensive isolated contact between the chaplain and the inmates might result in a sexual attack upon the female employee.[135]

The court in *Alameda* noted that *Dothard* has been limited to the particular setting in which there is a very high risk of harm to female employees.[136] The *Alameda* court compared the factual setting in *Dothard* to the case at hand. The cook's position in the men's facility did not require a threatening proximity to the inmates. In contrast, a guard works inside dormitories which house large groups of inmates.

The court next rejected the county's argument that the male prisoner's privacy interests would be violated by the presence of a woman. The court followed *Smith v. Fairman*,[137] a federal court of appeals case, which held that government agencies, except in extreme circumstances, must make suitable accommodations where the privacy interests of the prison population conflict with the applicant's right to obtain a job. The court reasoned that female attorneys, psychologists, and others visited

131. 42 U.S.C. § 2000e2(e) (1982).
132. 433 U.S. 321 (1971).
133. *Id.* at 336.
134. 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1974).
135. *Id.* at 1016-18, 116 Cal. Rptr. at 573-75.
136. Smith v. Fairman, 678 F.2d 52, 54 (7th Cir. 1982).
137. *Id.* at 55.

the jail without prisoners suffering any significant loss of privacy. Additionally, the court determined that the structure of the jail insured that the inmate's privacy would not be affected, and, in any event, if a woman cook's presence posed a threat to inmate privacy then structural modifications could easily be made.

The court of appeal upheld a Fair Employment and Housing Commission's decision that a black woman had suffered race and sex discrimination by the County of Alameda. In doing so, the court made it clear that gender is a bona fide occupational qualification for employment in men's prisons only when the position would subject the woman to a high risk of harm.

B. Unemployment Insurance

1. *Employee who accompanies "non-marital partner" voluntarily leaves work with good cause within the meaning of the statute governing eligibility for unemployment insurance benefits.*

MacGregor v. Unemployment Ins. Appeals Bd., 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984). In *MacGregor v. Unemployment Ins. Appeals Bd.*, the California Supreme Court held that a worker who left her job to accompany her "non-marital partner" to another state in order to maintain the familial relationship they had established with their child, voluntarily left work with good cause within the meaning of the statute governing eligibility for unemployment insurance benefits.[138] The court determined that the absence of a marital relationship is not a bar to the recovery of unemployment benefits when other compelling circumstances are established. The court stated that the preservation of the family unit is sufficient to establish the compelling circumstances necessary to constitute good cause under the statute.

Plaintiff lived with her non-marital partner for two years during which they had one child. Due to his father's bad health, the plaintiff's non-marital partner decided to move the family to New York. Plaintiff quit her job to stay with her family. The California Development Department (Department) determined

138. CAL. UNEMP. INS. CODE § 1256 (West 1972).

that she had quit voluntarily without good cause and was therefore ineligible for benefits. This decision was upheld on appeal both by an administrative law judge in New York and by the California Unemployment Insurance Appeals Board (Board). The superior court, pursuant to a writ of mandate sought by plaintiff, reversed and the Board appealed.

Under Unemployment Insurance Code section 1256,[139] an individual is ineligible for unemployment compensation if he or she left work voluntarily without good cause. The California Supreme Court in *Norman v. Unemployment Ins. Appeals Bd.*[140] held that the claimant who left her place of employment in order to preserve her relationship with a man she planned to marry did not establish good cause within the meaning of the statute.[141] The *Norman* court, however, indicated that its decision did not necessarily preclude the possibility of finding sufficiently compelling circumstances to constitute good cause in a non-marital relationship.[142] The *Norman* court even foresaw the situation which arose in *MacGregor* and stated that where there were children present in a non-marital relationship, good cause might be shown.[143]

In this case, the California Supreme Court concluded that the existence of a legal marriage is not the exclusive means of showing good cause based on compelling family circumstances. The Board and the administrative law judge had rested their decisions solely on the lack of a legally recognized marriage and dismissed even the possibility that any other relationship could establish good cause based upon compelling family circumstances. The supreme court, however, upheld the trial court's finding that the plaintiff had indeed established a family unit which consisted of herself, her partner and their child, and that the decision to move to New York was made to preserve the family unit.

The supreme court also rejected the Board's policy argument for not recognizing good cause based on compelling family

139. *Id.*
140. 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983).
141. *Id.* at 9, 663 P.2d at 909, 192 Cal. Rptr. at 139.
142. *Id.* at 10, 663 P.2d at 910, 192 Cal. Rptr. at 140.
143. *Id.*

circumstances in non-marital family couples. The Board maintained that its rule was consistent with the public policy of favoring marriage and of affording special benefits and protections to that institution. The supreme court pointed out that the policy of maintaining secure and stable relationships between parents and children is an equally strong policy consideration. This policy is codified in Civil Code section 7002[144] and in the conciliation statutes relied upon by the Board,[145] in which the legislature explicitly recognized that the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

The aspect of the court's decision which is the most troublesome is the apparent narrowness of its application. The court's decision strikes a balance between countervailing policies, where the importance of the family unit rivals even that of the marriage institution. There are other situations, however, such as gay and unwed couples without children, where compelling circumstances might warrant an award of unemployment compensation when one partner leaves work in order to remain with the other. The enlightened and reality-based reasoning which guided the *MacGregor* decision has yet to be applied to such non-traditional families.

C. Wrongful Discharge

1. *Woman wrongfully discharged for dating employee of her employer's competitor.*

Rulon-Miller v. IBM Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1st Dist. 1984). In *Rulon-Miller*, the court of appeal upheld a judgment for compensatory and punitive damages on claims of wrongful discharge and intentional infliction of emotional distress. The court upheld the award of punitive damages on the grounds that statements made when the plaintiff was discharged implied that she could not act or think for herself, and

144. CAL. CIV. CODE § 7002 (West 1983) provides that "[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents." *Id.*

145. CAL. CIV. PROC. CODE § 1730 (West 1982) provides that "[t]he purposes of this chapter are to protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony, and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies." *Id.*

that the management was acting in her best interests. The court of appeal found that such statements tended to humiliate and degrade the plaintiff, and emphasized her powerlessness to assert her rights as an employee, which the court determined to be one of the most debilitating kinds of oppression.

The plaintiff had worked her way up from sales to management at IBM. She had consistently received awards and the highest possible performance ratings for her work. One week before her discharge, she had received a $4,000 merit raise.

The plaintiff was dating a man who had previously worked for IBM, but had left to work for a competitor. It was widely known at IBM that he and the plaintiff were dating. No one had raised the issue of the relationship when the plaintiff was promoted to management.

One week after receiving her merit raise, plaintiff was told that her relationship constituted a "conflict of interest" and that she had to end the relationship or lose her job. She was given a few days to a week to think it over. However, the next day she was told that the decision had been made for her. When the plaintiff objected, she was dismissed.

The court of appeal upheld the plaintiff's claim of wrongful discharge on the ground that existing IBM policies guaranteed the plaintiff the right to privacy in her personal life. The court determined that company action contrary to those policies constituted a violation of the plaintiff's employment contract rights.

The court noted that the common law rule that an employment contract of indefinite duration is generally terminable at will by either party, as codified in Labor Code section 2922,[146] was modified by the California Supreme Court's recognition of the implied covenant of good faith and fair dealing inherent in such contracts.[147] In this case, the employee's right to be dealt with fairly was "at least the right of an employee to the benefit of the rules and regulations adopted for his or her protection." Those IBM rules specifically stated that an employee's private

146. CAL. LAB. CODE § 2922 (West 1971 & Supp. 1985).

147. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 178, 610 P.2d 1330, 1336-37, 164 Cal. Rptr. 839, 846 (1980).

life was of no concern to the company unless it interfered with his or her job performance, the performance of others, or affected the reputation of the company in a major way. The IBM rules also indicated that a charge of "conflict of interest" could be based only on moonlighting or solicitation of clients, not on romantic relationships.

The court of appeal also rejected the defendant's contention that the jury had been inadequately instructed on the standard to be used in determining whether IBM had acted in good faith in discharging Rulon-Miller. The trial court gave the jury seven factors to take into consideration including: (1) whether the employee was discharged for legitimate business and employment reasons; (2) whether the employee was discharged on a pretext; (3) whether the employee was engaged in a sensitive or confidential management position; (4) whether the employee had a conflict of interest; (5) whether the employee's relationship endangered the employer's legitimate business interests; (6) whether the employer infringed upon the employee's personal privacy; and (7) whether the employee was discriminated against because of the employee's sex.

Finally, the court of appeal upheld the award of punitive damages for intentional infliction of emotional distress. That the plaintiff's manager's conduct could be termed "extreme, outrageous, and atrocious" was confirmed by examination of the circumstances surrounding the employer's invasion of the plaintiff's privacy. The court found a decided element of deception, since the manager had pretended that the plaintiff's relationship was something new. In addition, the manager acted in flagrant disregard of company policy. The court found this conduct to be unfair, but not atrocious. What made the conduct subject to punitive damages was the manner in which the manager brought these elements together by his statement that he was making the decision for the plaintiff. The court called the implications of this statement "richly ambiguous," perhaps meaning that the manager believed that the plaintiff could not act or think for herself, or that the manager was acting in her best interest.

The court determined that the combination of statements and conduct tended to humiliate and degrade the plaintiff. The court stated that denial of rights which were guaranteed under

company policies and granted to all other employees degraded her as a person. By denying the plaintiff the right to choose between work and her relationship, the manager intended to emphasize her powerlessness to assert her employment rights. The court called such powerlessness "one of the most debilitating kinds of human oppression." Such conduct on the part of the manager amply supported the punitive damages award.

The language of the court in this case is potentially valuable to women plaintiffs who seek punitive damages in a wrongful discharge suit. The actions which the court describes as extreme and outrageous in this case—emphasizing the plaintiff's powerlessness and inability to make a decision—can often be ascribed to traditional attitudes of male management toward female employees.

IV. Constitutional Law

A. Equal Protection

1. *A difference in rights accorded to mothers and nonpresumed fathers does not violate the equal protection clause of the California or United States Constitutions.*

People v. Carrillo, 162 Cal. App. 3d 585, 208 Cal. Rptr. 684 (1st Dist. 1984). In *People v. Carrillo*, the court of appeal held that the difference in the rights granted to mothers and nonpresumed fathers by Civil Code section 197[148] does not infringe upon a father's right to equal protection of the laws under the California or United States Constitutions. Therefore, the court concluded, there is no constitutional reason for not prosecuting a father for child stealing under California Penal Code section 278.[149]

Alexandra M. believed that appellant Victor Carrillo was

148. Cal. Civ. Code § 197 (West 1982) provides in pertinent part: "The mother of an unmarried child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor . . . ." *Id.*

149. Cal. Penal Code § 278 (West Supp. 1985) provides that: "Every person, not having a right of custody, who maliciously takes, detains, conceals, or entices away, any minor child with intent to detain or conceal that child from a person, guardian, or public agency having the lawful charge of the child shall be punished . . . ." *Id.*

the father of her child and initiated an action to name him as the father. After informing Victor that she was pregnant and thought him to be the child's father, Alexandra did not hear from him until the child was six months old, the day Victor took a court ordered blood test. The test showed a 99.94 likelihood that Victor was the father of the child. Around the time of the blood test, Victor and his wife Margaret took the child from her mother. Alexandra did not see her child until six months later.

The trial court found that Victor was not a "presumed father" under Civil Code section 7004[150] and therefore Victor had no right to custody under Civil Code section 197.[151] Consequently the court of appeal held that Victor could be prosecuted for child stealing under Penal Code section 278.[152] Victor appealed contending that Penal Code section 278 as applied to him in this case was unconstitutional.

California Civil Code section 197 provides that absent a court order, both the natural mother and the man presumed to be the natural father of a child pursuant to Civil Code section 7004 are entitled to the custody, services and earnings of an unmarried minor. Penal Code section 278 makes it a crime for a person "not having the right of custody" of a child to take, entice away, detain or conceal the child from his or her parent or a person with lawful custody.[153]

The court of appeal noted that section 197 operates to deny a nonpresumed father custody rights in the child which are granted to the mother. Whether this deprivation violates the equal protection clause depends upon whether the mother and alleged natural father are similarly situated with respect to the child.[154] Those statutes which limit the rights of the natural fa-

150. CAL. CIV. CODE § 7004 (West 1983). For relevant statutory language, see *supra* note 89.

151. CAL. CIV. CODE § 197 (West 1982). For relevant statutory language, see *supra* note 148.

152. CAL. PENAL CODE § 278 (West Supp. 1985). For relevant statutory language, see *supra* note 149.

153. *Cf.* Wilborn v. Superior Court, 51 Cal. 2d 828, 830, 337 P.2d 65, 66 (1959), in which the California Supreme Court held that in the absence of a custody order, a parent with the right of custody does not commit child stealing by taking exclusive possession of the child.

154. Lehr v. Robinson, 103 S. Ct. 2985 (1983); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979).

ther vis-à-vis those of the mother regardless of whether he had established significant custodial, personal or financial relationships with the child, have been found unconstitutional, while statutes which made such a distinction have been upheld.[155]

California cases considering Civil Code section 197 in the context of adoption[156] have generally held that the statutory scheme satisfies both California and federal constitutions since it allows an alleged natural father to attempt to establish the existence of a relationship pursuant to Civil Code section 7006[157] and an opportunity to qualify as a presumed father under section 7004. Here, the court observed that the statutes at issue do not create irrebuttable presumptions or make it impossible for a nonpresumed natural father to obtain custody rights in his child. The court referred to recent court of appeal decisions[158] which have held that a nonpresumed natural father is still entitled to the benefit of the parental preference doctrine unless countervailing policy interests prevail.

The court in *Carrillo* found sufficient countervailing policy reasons not to protect the natural father's interest. The father was not challenging the constitutionality of sections 197 of the

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155. *Compare* Lehr v. Robinson, 103 S. Ct. 2985 (1983) *and* Quilloin v. Walcott, 434 U.S. 246 (1978) *with* Caban v. Mohammed, 441 U.S. 380 (1979).

156. *See, e.g., In re* Tricia M., 74 Cal. App. 3d 125, 132-35, 141 Cal. Rptr. 554, 558-61 (1977); Adoption of Rebecca B., 68 Cal. App. 3d 193, 198, 137 Cal. Rptr. 100, 103 (1977).

157. CAL. CIV. CODE § 7006 (West 1983) provides in pertinent part:

> An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by . . . a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

Id.

158. *In re* Baby Girl M., 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984) and Adoption of Baby Boy D., 159 Cal. App. 3d 8, 205 Cal. Rptr. 361 (1984) have both held that due process and equal protection of the laws demand that a natural father's rights not be terminated nor custody of his child awarded to a nonparent except upon a finding that award of custody to the natural father would be detrimental to the child. *See supra* text accompanying notes 89-109 for further discussion of the rights of nonpresumed natural fathers.

Civil Code and 278 of the Penal Code in order to obtain legal custody of his child. He was making his claim as a defense to a criminal conviction of child stealing. It was, therefore, solely in his own interest as opposed to that of his daughter's that he made his constitutional claim. Victor had never followed any of the procedures provided by statute to establish paternity or provide any assistance, financial or otherwise, to mother or child.

The court of appeal concluded that due to the patently different nature of their respective relationships to their child, the natural mother and the nonpresumed natural father were not similarly situated. The mother provided and would continue to provide all the care for the child, while the father went so far as to deny paternity until the court ordered him to submit to a blood test. Due to appellant's failure to establish any paternal relationship with the child, the court of appeal held that the difference in rights accorded to mothers and nonpresumed fathers under the Civil Code did not violate Victor's constitutional rights as applied in this case. Therefore the court found no reason that Victor should not have been prosecuted under Penal Code section 287.

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SURVEY OF CALIFORNIA LAW
TABLE OF CASES NOTED AND SUMMARIZED

I. CALIFORNIA SUPREME COURT

II. CALIFORNIA COURT OF APPEAL