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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. FAMILY LAW

1. *California Civil Code section 5125 (d) does not require that separate family businesses be awarded to the operating spouse in a marital dissolution action*

In re Marriage of Kozen, 185 Cal. App. 3d 1258, 230 Cal. Rptr. 304 (2nd Dist. 1986). In *In re Marriage of Kozen*, the husband appealed from the trial court's award of a successful fast food franchise and $105,000 in attorney and accountant fees to his wife in a marital dissolution action. On appeal the Second District affirmed, finding no abuse of discretion by the trial court because California Civil Code section 5125 (d) does not require that separate family businesses be granted to the operating spouse.

James and June Kozen separated in 1981 after a thirteen and one-half year marriage. The marital dissolution proceedings took place in 1984. At that time June worked solely within the home for fifteen years. Her previous experience consisted of six or seven years working as a hairdresser.

Eight years prior to the dissolution action, James entered into a partnership with Leonard Allenstein to operate Burger King franchises in Hollywood and Agoura. In a 1984 buyout agreement between the partners, James received the Hollywood restaurant, which he operated successfully, and Allenstein took the Agoura restaurant. The agreement required James to borrow $227,000 to pay off Allenstein.

At the time of the marital dissolution, community assets consisted of the Hollywood franchise valued at $1,187,000, the Burbank franchise worth $363,150, the family residence in Pacific Palisades, valued at approximately $700,000, and various smaller investments.

The trial court entered an interlocutory judgment in May 1984, awarding the Burbank Burger King to James, dividing the smaller community assets and ordering James to pay June's accountant and attorney fees totalling $105,000.

In September 1984, the trial court entered its final judgment regarding the community assets. The court awarded the

Hollywood restaurant to June because a Burger King representative testified that June was an acceptable franchisee because of the company's management training program. The court required James to fully assume the $227,000 debt acquired in dissolving the Allenstein partnership and awarded him the family home. June was ordered to pay him $96,620 to balance the property distribution.

The court denied James' motion for reconsideration despite the fact that he tendered a $394,000 check to June, believing the court might award the Hollywood restaurant to him and the family home to June. The court also denied James' motion for a new trial. He appealed.

On appeal, James contended that the trial court abused its discretion in: (1) awarding the Hollywood Burger King to June and the $227,000 debt to him; and (2) requiring him to pay June's accountant and attorney fees.

James argued that he should have received the Hollywood Burger King because he had the skills required to run the restaurant and needed the cash flow to service his business debt. He asserted that June had no business experience. James relied on California Civil Code section 4800 (b)(1)[1] which authorizes the trial court to divide assets in any way necessary to obtain an equal division of the community property.

The court of appeal stated that the trial court carefully considered the appropriate distribution of the community assets. The trial court based its conclusions on: (1) June's need for the restaurant income to support the couple's three children; (2) evidence establishing that June could run the restaurant as well as James because he had no special training when he started the franchise; (3) the couple's inability to reach an acceptable cash settlement; and (4) the opportunity for June to support the family without relying on support from James because of the bitterness between the parties.

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1. California Civil Code § 4800 (b)(1) provides: "Where economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property." CAL. CIV. CODE § 4800 (b)(1) (West 1983 & Supp. 1987).

The court further held that the trial court's decision did not constitute an abuse of discretion. The cases upon which James relied to support his contention were not controlling. In *In re Marriage of Burlini*,[2] the court of appeal affirmed an award of a coin laundry business to the husband because he had the special skills required to repair the old laundry equipment without which the company could not survive. In *In re Marriage of Smith*,[3] the court of appeal held that the family custom sign-making business must be awarded to the husband because the business required his technical knowledge and his wife performed only clerical tasks. Based on James' description of his duties in running the Hollywood Burger King, the court found that June could discharge those duties equally as well once she was trained by the franchisor. The trial court found and the record supported the fact that no particular expertise is required to run a Burger King Restaurant franchise.

Furthermore, the court of appeal did not read California Civil Code section 5125(d)[4] as requiring that separate family businesses be awarded to the operating spouse. Section 5125 (d) states that a spouse who operates a business that is community personal property has the sole management and control of that business. In *Goss v. Edwards*,[5] the court of appeal relied on section 5125 (d) to legitimize the wife's voting trust which gave her former husband the right to vote her shares in a company that he had established and operated. Here, the court of appeal did not view the *Goss* interpretation as requiring that family businesses be awarded to the operating spouse. The court of appeal also considered James' argument that he needed the business income to service the Allenstein partnership debt to be without merit. James had sufficient means to pay the debt and actually stated it was proper that he should assume the debt based on the distribution scheme.

The court also found no abuse of discretion in requiring

2. 143 Cal. App. 3d 65, 191 Cal. Rptr. 541 (1983).

3. 79 Cal. App. 3d 725, 145 Cal. Rptr. 205 (1978).

4. California Civil Code § 5125 (d) provides: "A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest." CAL. CIV. CODE § 5125(d) (West 1983 & Supp. 1987).

5. 68 Cal. App. 3d 264, 137 Cal. Rptr. 252 (1977).

James to pay June's accountant and attorney fees. On appeal, James argued that the evidence did not establish that June was unable to pay or that he was better able to pay the fees. James further argued that the fees were unreasonable. The court of appeal quickly dispensed with both arguments. Extensive testimony at trial established that the fees had reached such large proportions due to James' lack of cooperation, dilatory tactics and withdrawal from a settlement. The court of appeal affirmed the fee award to June.

The result in *Kozen* is beneficial to women involved in marital dissolution actions for two reasons. First, the decision recognizes that a husband's support payments are neither the only nor the best way to provide for the wife and children upon dissolution. As here, the wife may be given the opportunity to: (1) support herself out of the community assets; (2) acquire new skills through training; and (3) maintain her independence and dignity without continuing reliance on her husband's support checks. Second, the difficulty so many women have encountered in actually obtaining the monthly support checks is alleviated by allowing the wife to support herself.

Linda S. MacDonald

2. *Time basis is proper method to determine community property interest in stock options during marriage and exercisable after options during marriage and exercisable after separation.*

In re Marriage of Harrison, 179 Cal. App. 3d 1216, 225 Cal. Rptr. 234 (Fourth Dist. 1986). In *In re Marriage of Harrison* the California Court of Appeal upheld the trial court's use of a time-based formula to allocate community and separate property interests in stock options granted during marriage and exercisable after separation.[1] On appeal the court further found that the

1. The community interest was calculated by creating a fraction: The total number of days between the signing or granting of the option agreement and the date of separation was divided by the total number of days from the signing or granting of the option agreement and the day on which each portion of the option became fully vested and not subject to divestment. After reimbursement to the husband for the purchase of the op-

trial court did not abuse its discretion in terminating spousal support. However, the court of appeal concluded that the trial court erred in providing for a stepdown spousal support award and in granting husband full credit for repayment of a preseparation loan.

During the parties five and one half year marriage the husband was granted four options to purchase shares of stock in the company where he was employed. Of these stock options, one was qualified and three were nonqualified.[2] As of the date of husband and wife's separation, the qualified stock option was not fully exercised and the stock purchased under the nonqualified options was not fully vested.[3] At the time of trial, wife did not offer any evidence of the value of the options. However the husband had a certified public accountant testify as to the value of the stock options. In addition there was uncontradicted testimony that the stock options were granted by the employer as "golden handcuffs" to encourage husband to stay with the company. To establish the wife's share of the stock options the trial court used a time formula which apportioned the community interest in the stock options as a direct function of the length of the marriage. The wife appealed the method used by the trial court to determine the community property interest in the stock options.

Relying on *In re Marriage of Hug*,[4] the court of appeal in

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tion and any taxes paid thereon in connection with the exercise of the option, the community property interest was determined by dividing the fraction into the gain on the stock option on the date of exercise.

2. The qualified stock option gave husband the right to buy 2,500 shares of nonforfeitable company stock in 25 percent increments on specified dates. The nonqualified stock options gave the husband the immediate right to purchase 100 percent of the company stock covered by the option. However the stock was subject to forfeiture to the company if the husband was terminated from his job with cause or if he left without company consent. The forfeiture provision lapsed in 20 percent increments beginning two years after the stock was issued.

3. The court of appeal stated that the term "vested" is used in family law cases to define the point in time when retirement benefits are not subject to forfeiture if the employment relationship terminates before retirement. The court of appeal concluded that the husband's rights in the stock purchased under the nonqualified stock options were analogous to vested pension rights because the stock was subject to forfeiture.

4. 154 Cal. App. 3d 780, 201 Cal. Rptr. 676 (First Dist. 1984) (where community property interest in unvested rights of employee fringe benefits is substantially related to the number of years of employment, the time rule is the appropriate method to allocate the parties' respective interests in the benefits at time of dissolution).

Harrison held that the trial court's use of the time rule to establish the parties' respective interests in the stock options was proper. However the *Harrison* court stated that the denominator in the trial court's formula was technically incorrect because it referred to the total number of days from the granting of the option until the option becomes fully vested. Although husband's rights in the stock purchased pursuant to the nonqualified stock options did not vest until the forfeiture provisions lapsed, his rights in the options vested on the day that each was granted. Therefore the denominator would be one and the ratio defining the community property would exceed 100 percent. The court of appeal concluded that since the trial court's intention could be reasonably inferred, the error did not require reversal. The court corrected the formula by deleting the word "option" and inserting "[s]tock received pursuant to the exercise of the option."

The wife argued that the trial court erred in calculating the community property interest in the stock options based on the date the options were granted instead of the date that the husband's employment with the company commenced. In *Hug* the court of appeal found that the proper date to use was the date employment commenced because the circumstances involved in the granting of the stock options indicated that they were granted as compensation for past rather than future services.[5] The court of appeal in *Harrison* concluded that there was no evidence to show that the stock options were used initially to attract husband to the company or that they were issued as deferred compensation for past services. Thus, the court of appeal held that the stock options were granted to husband based on his skill and effort as of the date of granting and therefore there was a logical basis for using that date in the formula.

The wife alleged that the trial court erred in determining the tax liability incurred by her husband as a result of purchasing stock through the option agreements. The court of appeal held that pursuant to Internal Revenue Code section 83[6] the

5. *Id.* at 790, 201 Cal. Rptr. at 683.

6. Internal Revenue Code section 83(a) provides in pertinent part:

> If, in connection with performance of services, property is transferred to any person other than the person for whom such services are performed . . . the amount . . . paid for such

trial court properly valued the stock as of the date the restrictions were removed.

The wife also argued that the trial court erred in awarding her cash rather than a proportionate share of stock. The court of appeal held that the argument was without merit because the wife specifically requested a cash award at trial. Although the court of appeal could have dismissed the wife's appeal of the trial court's disposition of the stock options based on the wife's acceptance of the benefits of the judgment, the court stated that they preferred to reach the merits of the case.

The court of appeal found that the trial court erred in relying on *In re Marriage of Epstein*[7] to allow husband full reimbursement for paying the balance of a preseparation loan. The *Harrison* court concluded that as the stock purchased with the loan proceeds had a community interest, the husband was only entitled to a credit for the amount paid on the community obligation. Based on the time formula the court of appeal in *Harrison* calculated that 55 percent of the stock represented community property and therefore the judgment should be modified to award wife an additional $9,810.

The wife claimed that the trial court abused its discretion by refusing to rule on spousal support, in ordering stepdown spousal support, and by terminating jurisdiction over spousal support.[8] Since the record showed that the trial court ordered

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> property, shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture . . . .

I.R.C. § 83(a) (1984).

7. 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165 (1979) (party using his or her separate property after separation to pay preexisting community obligations is entitled to reimbursement).

8. At the order to show cause hearing in October 1979, the trial court ordered the husband to pay spousal support of $800 a month, wife's medical and dental bills, the house payment and various other bills related to the family home. The interlocutory judgment of dissolution continued the $800 monthly support order plus the house payment and medical insurance until August 1981. From August 1981 to May 1982 spousal support was reduced to $400 a month and the house payment. Medical insurance continued from August 1981 until February 1981 at which time the husband only had to pay the wife's insurance in excess of $50 monthly. After May 1982 the trial court awarded $5,000 as an advance of community property for the purpose of assisting the wife. At the

spousal support to be paid to wife at the order to show cause hearing and at the interlocutory judgment of dissolution, the court of appeal concluded that there was no basis to the claim that the trial court refused to rule on spousal support. The court of appeal further held that because there was evidence that the wife was employable, the trial court did not exceed its discretion by terminating jurisdiction over spousal support. Finally the court of appeal found that there was no factual basis to justify a stepdown scheme for spousal support. Accordingly, the court of appeal modified the judgment to award the wife the difference between the original amount of support awarded and the amount that support had been periodically reduced.

This case points to the difficulties that arise upon dissolution when it is necessary to establish the value of employee stock options that are not exercisable or have not vested. In *Harrison* the court of appeal found it to be "inexplicable" that the wife did not offer any evidence as to the value of the options. Although the trial court is bound to dispose of the community assets equitably, the court need not look beyond the evidence presented when determining the value of assets that also have a separate property component. Thus, it appears that it would be in each party's best interest to pursue all possible methods for placing a value on the community assets and to be prepared to present the burdens and benefits of each calculation at trial.

Kate Blackburn Rockas

3. *The state court that issues an initial child custody decree retains exclusive continuing jurisdiction to modify that decree providing that the child or any of the parties remains a resident of that state.*

In re Marriage of Pedowitz, 179 Cal. App. 3d 992, 225 Cal. Rptr. 186 (5th Dist. 1986). The court of appeal in *In re Marriage of Pedowitz* held that there was insufficient evidence to find that the husband had remained a California resident so as to convey

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April 1983 hearing the trial court terminated jurisdiction to award further spousal support.

exclusive continuing jurisdiction over modification of a marital dissolution/child custody decree of the California Superior Court.

Neal and Mindy Pedowitz were married in 1977 and resided in Fresno, California. In 1979 the couple had a child, Aryn. A marital dissolution was obtained two years later in the Superior Court of Fresno and the couple received joint custody of Aryn. Mindy was awarded physical custody. Neal was granted visitation privileges provided he pay all travel expenses for Aryn's visits. Shortly after the dissolution, Mindy and Aryn moved to Florida where they remained residents. Neal was in Florida from June 1982 to May 1983 at which time he stayed with Mindy and Aryn for approximately half of the time. The remainder of the time he lived by himself. The record did not disclose Neal's state of residence in the interim periods.

In December 1984, Neal filed a petition for modification of the marital dissolution decree in the Superior Court of Fresno County. The petition asked the court to require Mindy to pay one-half of the travel expense for an adult to accompany Aryn on the airplane for her visitation periods. After a hearing on the petition for modification the superior court decided that California had exclusive continuing jurisdiction over the matter and ordered the dissolution decree modified in accordance with Neal's prayer. Mindy appealed from that decision.

During the same time period Mindy filed a petition in a Florida court to establish and modify the California decree and to reduce Neal's visitation privileges. The Florida court issued a decree modifying the California decree as prayed for by Mindy. Neal's appeal of the Florida decision is still pending.

Both the California and Florida courts knew that proceedings were pending in the other jurisdiction. Under the requirements of the Uniform Child Custody Jurisdicition Act (UCCJA) when a child custody proceeding is pending in more than one state each state must stay its proceeding and communicate with its sister state in order to determine which state is the more appropriate forum.[1] Neither the California or Florida court stayed

1. CAL. CIV. CODE §§ 5150 - 5174 (West 1983). FLA. §§61.1301 - 61.1348 (Fla. Stat.

its proceeding or communicated with the other court as required. The issue presented for determination was whether California or Florida had properly assumed and exercised jurisdiction over the modification proceedings.

The court of appeal held that the record did not disclose whether Neal had remained a resident of California in order to establish that California had exclusive continuing jurisdiction to modify the California decree. The court reversed and remanded the case for additional evidence regarding Neal's state of residence.

The court of appeal first analyzed California's leading Supreme Court case on the subject, *Kumar v. Superior Court*.[2] The facts of *Kumar* parallel those presented in *Pedowitz*. In *Kumar*, a marriage dissolution was obtained in New York. The wife and child moved to California while the husband remained a resident of New York. The wife later petitioned the California court for modification of provisions of the child custody decree. The trial court denied the husband's motion to dismiss for lack of subject matter jurisdiction. On appeal the California Supreme Court held that deference to another state's continuing jurisdiction ends if and when the child and all parties have moved away. Since the husband was still a resident of New York, that state retained jurisdiction to modify the child custody decree.

The court of appeal then discussed the requirements of the

1983). California Civil Code section 5155 provides in pertinent part:

> (1) A court of this state shall not exercise its jurisdiction under this title if at the time of filing the petition a proceeding concerning the custody of the child was pending in the court of another state exercising jurisdiction substantially in conformity with this title, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.
>
> (3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum . . . .

CAL. CIV. CODE §5155 (West 1983). (Florida Statutes section 61.1314 is virtually identical to the above provisions of the California Civil Code).

2. 32 Cal. 3d 689, 186 Cal. Rptr. 772, 652 P.2d 1003 (1982).

UCCJA. The Act determines when a state court may assume jurisdiction over a child custody proceeding. Its purpose, *inter alia* is to avoid just such jurisdictional competition and conflict as presented in *Pedowitz* by establishing guidelines for the resolution of jurisdictional disputes. As discussed previously neither the California nor Florida courts adhered to the UCCJA requirements.

The court of appeal next examined the Federal Parental Kidnapping Prevention Act (PKPA).[3] Congress intended that the PKPA be applied to all interstate custody disputes. The Federal Act establishes when a state court may and may not modify a child custody determination. In general, the PKPA requires that a child custody decree must be modified in the state that issued the original decree unless the child and all parties are no longer residents of that state.

The UCCJA basically conforms with the PKPA. In deciding which Act controls, the court of appeal in *Pedowitz* was persuaded by out of state authorities that the federal law preempts the UCCJA. Thus the PKPA must be examined first for the resolution of jurisdictional disputes over child custody proceedings. Under the PKPA the jurisdiction of a state court which has made a child custody determination continues as long as that

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3. 28 U.S.C.S. §1738A (Cumm. Supp. 1986).

The Federal Parental Kidnapping Prevention Act provides in pertinent part:

> (a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with provisions of this section by a court of another State.
>
> (c) A child custody determination made by a court of a State is consistent with the provisions of this section only if (2) one of the following conditions is met: (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home within six months before the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State.
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> (d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

28 U.S.C.S. § 1738A (Cumm. Supp. 1986).

state "[r]emains the residence of the child or of any contestant."[4]

The court stated that the *Kumar* rule, the PKPA and the UCCJA all warranted the same conclusion. If Neal had remained a resident of California, the California court would have continuing exclusive jurisdiction over the modification proceedings because California issued the initial decree. Neal failed to produce sufficient evidence to establish that he had returned to California after eleven months in Florida, with the intent to continue his California residency. Neal was unable to establish his continuing relationship with California and thus the California court could not assume jurisdiction over the modification proceedings.

The court of appeal reversed and remanded for the development of evidence regarding Neal's state of residence. Only when the child and all parties have terminated their residency in the state issuing the original decree may another state assume jurisdiction over modification of a child custody decree.

Women who move out of state and whose husbands remain in California after California has issued a child custody decree must seek custody decree modifications in this state. Thus the woman will have to travel to and secure representation in the state which issues the original child custody decree. The intent of the PKPA and the UCCJA is to simplify interstate custody disputes and to avoid competing decisions rendered by courts of sister states. These rules should facilitate changes in custody decrees and prevent unnecessary and duplicative litigation.

Linda S. MacDonald

4. *An award of spousal support may not be based on the parties' pre-marital cohabitation under California Civil Code section 4801(a).*

In re Marriage of Bukaty, 180 Cal. App. 3d 143, 225 Cal. Rptr. 492 (4th Dist. 1986). In *In re Marriage of Bukaty* the

4. *Id.*

court of appeal held that the trial court did not abuse its discretion in setting the wife's support award upon marriage dissolution, without considering twenty-seven years of the parties' cohabitation. The wife failed to bring a separate civil action alleging an express or implied contractual obligation of support based on the parties' many years of cohabitation.

The parties were married in 1942 and divorced in 1954. From 1954 until 1981 they lived together intermittently although the record did not disclose the frequency of their cohabitation during that period. The parties were remarried in 1981, but their second marriage lasted only a year and a half. Husband and wife separated again in 1982 and in 1984 the trial court heard the marriage dissolution and support proceeding. At the time of trial the wife was sixty-four years old. She had been unemployed for four years due to an unidentified physical disability acquired while working for the state as a switchboard operator. The wife's age and disability severely limited her employment opportunities. The evidence at trial disclosed that the wife had savings of $20,000, monthly income of $394, and monthly expenses of $1,135. The husband had assets of $200,000 in trust deeds, monthly income of $3,302 and monthly expenses of $2,225.

The trial court awarded the wife $400 per month spousal support for a period of three years. The wife contended on appeal that the trial court abused its discretion in awarding such a small monthly allowance and in terminating her award payments after three years. The wife argued that in making the award the trial court should have taken into consideration the parties' years of cohabitation.

The court of appeal discussed California Civil Code section 4801(a) which establishes the guidelines for fixing the amount and term of spousal support payments.[1] The trial court must

1. CAL. CIV. CODE § 4801(a) (West 1985 & Supp. 1987). Section 4801(a) states that in making the award for spousal support, the court shall consider all of the following circumstances of the respective parties:

(1) The earning capacity of each spouse . . .

(2) The needs of each party.

(3) The obligations and assets, including the separate property, of each.

(4) The duration of the marriage.

(5) The ability of the supported spouse to engage in gainful employment . . .

consider, *inter alia*, the duration of the marriage and the relative needs and abilities of the parties. Under the terms of California Civil Code section 4801(a) cohabitation is not a consideration in awarding spousal support in a marriage dissolution proceeding.

The wife argued that the trial court failed to consider the fact that the parties cohabitated in the interim period between their marriages, establishing a relationship of some forty-two years. Wife contended that, considered in justice and equity, this fact rendered the support award inadequate and established an abuse of discretion. The court of appeal stated that the wife's failure to bring a separate civil action alleging an express or implied contractual obligation of support covering the period of cohabitation as found in *Marvin v. Marvin*,[2] precluded consideration of this factor. If the wife had brought such an action it would have been heard in conjunction with the marriage dissolution proceeding. The court determined that its jurisdiction was limited to consideration of the factors enumerated in California Civil Code section 4801(a) for the term of the second marriage only because this was solely a marriage dissolution proceeding.

The wife further argued that the trial court erred in terminating her support after three years. The court of appeal stated that as a general rule, support payments must be permanent if the marriage is considered lengthy. Case authority establishes that a lengthy marriage is one of approximately nine years or more.[3] Under the facts presented this marriage did not qualify

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(6) The age or health of the parties.
(7) The standard of living of the parties.
(8) Any other factors which it deems just and equitable.

Id.

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

> [A]dults who voluntarily live together and engage in sexual relations are nonetheless as competant as any other persons to contract respecting their earnings and property rights. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

18 Cal. 3d 660, 674, 134 Cal. Rptr. 815, 825, 557 P.2d 106, 116 (1976).

3. *See, In re* Marriage of Neal, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1979) (Nine years held to be the term of a lengthy marriage). *In re* Marriage of Vomacka, 36 Cal. 3d 459, 204 Cal. Rptr. 568, 683 P.2d 248 (1984) (Eleven years held to be the term of a lengthy marriage).

as a lengthy marriage so as to prevent termination of support. The wife argued that nevertheless the parties' term of cohabitation was analogous to a lengthy marriage. The court of appeal reiterated that the period of cohabitation could not be considered under the Family Law Act.[4] The Act specifically prescribes the rights and duties of parties arising from the marital relation. If the court were to consider a right to support arising from the period of cohabitation, the purpose of the Family Law Act would be frustrated because the Act covers the marital relation only.

The court of appeal recognized that length of marriage is only one of many factors to be considered in awarding spousal support. Nonetheless the court considered length of marriage a substantial factor because it reflects the commitment of the parties and the stability of the marriage. The wife could have sought further support for the cohabitation period in a *Marvin* type action.

Finally, the wife contended that the support award was inadequate considering her needs and her husband's resources. Again the court found no abuse of the trial court's discretion in setting the wife's support award at $400 per month after consideration of all factors listed in California Civil Code section 4801(a). An abuse of discretion will only be found when an appellate court determines that no judge would have made the same order under the circumstances. Although the court of appeal recognized that the trial court's determination may be unfair to the wife, there was no basis upon which to find that no judge would have reached the same determination. This conclusion evidences just how broad the trial court's discretion is in determining spousal support awards under California Civil Code section 4801(a). The court of appeal thus affirmed the trial court's spousal support award of $400 per month for three years.

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4. The Family Law Act is codified at CAL. CIV. CODE §§4000 - 5004 (West 1986). California Civil Code section 4100 states:

> Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. *Consent alone will not constitute marriage*; it must be followed by the issuance of a license and solemnization as authorized by this code . . . (emphasis supplied).

Id.

In an age where many people cohabitate without benefit of marriage, couples would be well advised to enter into a contract regarding the disposition of earnings and property acquired during the relationship. Women still earn less than men and frequently cannot sustain the standard of living enjoyed during the relationship after it has ended. Furthermore, the older the parties to a cohabitative relationship become, the more difficult it will be for the woman to be self-supporting if the relationship ends. In this case, the wife may still benefit by bringing a civil action to determine what support she may be entitled to on an implied contract theory. In short, parties in a non-marital, cohabitative relationship are only protected by appropriate financial planning in the event the relationship ends.

Linda S. MacDonald

5. *Donor of semen provided directly to a woman for artificial insemination may be declared the legal father of a child so conceived.*

Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (First Dist. 1986). In *Jhordan C. v. Mary K.* the California Court of Appeal affirmed the trial court's holding that the semen donor was the legal father of a child conceived by artificial insemination.[1] The court of appeal concluded that when a donor's semen is not obtained from a licensed physician, the mother is estopped from invoking the nonpaternity provision of California Civil Code section 7005(b).[2] The court of appeal further held that declaring the donor to be the legal father did not violate the mother's constitutional rights of equal protection and privacy.

Mary K. wished to conceive a child by artificial insemination and to raise the child with a close female friend, Victoria.

1. Artificial insemination is the introduction of semen of the husband or of another into the vagina otherwise than through the act of coitus. STEDMAN'S MEDICAL DICTIONARY 714 (5th ed. 1982).

2. California Civil Code section 7005(b) provides: "The donor of semen provided to a licensed physician for use in artificial insemination of another women other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." CAL. CIV. CODE § 7005(b) (West 1983).

Mary and Victoria chose Jhordan C. to donate the semen. Jhordan personally provided Mary with semen and she conceived by artificial insemination. When the child was born, Mary listed Jhordan as the father on the birth certificate and with her permission, Jhordan visited the child monthly. After five months Mary terminated the visits and Jhordan filed an action against her to establish paternity and visitation rights. Victoria joined as a party in the litigation seeking joint legal custody with the mother and visitation rights as a de facto parent of the child. Mary and Victoria appealed the trial court's order finding Jhordan to be the legal father and denying Victoria's status as a de facto parent.

California Civil Code section 7005(b) is derived from the Uniform Parentage Act (UPA).[3] In drafting section 7005(b), the Legislature followed the UPA version verbatim, with one important exception: the word "married" was not used. This omission provided both married and unmarried women with the statutory means to have children without the semen donor being able to assert paternity. Section 7005(b) also gives men the statutory means to donate sperm without the fear of being held the legal father.

The court of appeal stated several reasons for holding that the physician involvement requirement in section 7005(b) is mandatory rather than directive. Health considerations, such as a doctor being able to screen a donor for any communicable or hereditary diseases is one reason. In addition, if there is ever a question regarding the donor's rights and obligations to a child born by artificial insemination, a third person may be able to clarify the original intent of the parties.

Appellants claimed that constitutional principles of equal protection and privacy require that Mary be afforded the protection of section 7005(b). Mary and Victoria argued that as there are paternity statutes preventing a donor from asserting actions against married women, failure to provide the same provisions for unmarried women is a denial of equal protection. The court of appeal concluded that the argument failed because married and unmarried women are not similarly situated for purposes of

3. UNIF. PAR. ACT § 5, 9A U.L.A. 593 (1973) (adopted in California in 1975).

equal protection analysis. Citing *Estate of Cornelieus*,[4] the court of appeal stated that public policy mandates that, to preserve the sanctity of the marital institution, it is necessary to have statutes which presume that the woman's husband is the father and to prohibit assertions of paternity by anyone other than her husband or herself. The court of appeal found that the same considerations do not apply to unmarried women and thus there is not a denial of equal protection.

Mary and Victoria also alleged that finding Jhordan to be the legal father infringed upon their constitutional right to privacy. Based on both parties' conduct the court of appeal concluded that Jhordan was a member of the family unit and therefore declaring him to be the legal father did not violate appellants' right to family autonomy. The court observed that during the pregnancy Jhordan visited Mary and she agreed to his purchasing baby furniture to be kept in his home. In addition, Mary approved of Jhordan starting a trust fund for the child.

Appellants further contended that section 7005(b) infringed upon their constitutional right to procreative choice. The court of appeal reasoned that the argument was without merit because the statute did not impose any restrictions on the right to bear a child.

In support of their claim that Victoria should be declared the child's de facto parent, appellants relied on *Guardianship of Phillip B.*.[5] In *Phillip B.*, the court of appeal found that permanent residency with the child was not required to confer de facto parent status on a couple who cared for a disabled child on weekends while the child spent the remainder of the week in an institution. However the court of appeal in *Jhordan* held that because Victoria's visitation rights had been legally recognized by court order it was not necessary to address the issue of her de facto parent status.

Although appellants were precluded from asserting the non-

4. 35 Cal. 3d 461, 198 Cal. Rptr. 543 (1984) (conclusive presumption of paternity under California Evidence Code section 621, subdivision (a) is not a violation of a child's due process rights).

5. 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (1983).

paternity provision in this case, section 7005(b) has a positive impact on women in general. In enacting section 7005(b) the Legislature has sanctioned the conception and raising of children by women without a legal father. Single and lesbian women benefit in particular because the statute provides them with a legal means to prohibit assertions of paternity. The countervailing arguments against section 7005(b) are that the physician involvement requirement may prevent some women from utilizing the nonpaternity provision because they cannot afford the associated expense or because some doctors may be morally adverse to being a party to the artificial insemination procedure.

Kate Blackburn Rockas

II. CRIMINAL LAW

1. *Conviction for rape with a foreign object upheld because under the terms of California Penal Code section 289 a finger is a foreign object.*

People v. Wilcox, 177 Cal. App. 3d 715, 223 Cal. Rptr. 170 (2d Dist. 1986), modified 178 Cal. App. 3d 682f (1986). In *People v. Wilcox*, the court of appeal affirmed defendant's conviction for rape with a foreign object. The court held that: (1) a finger is a foreign object within the meaning of Penal Code section 289 and (2) the trier of fact is not compelled to accept the opinion of an expert witness.

Wilcox was the ex-husband of victim's roommate. He went to victim's home and engaged her in conversation. Wilcox then partially undressed her despite her resistance. He inserted his finger into her vagina and attempted to sexually assault her further. A knock at victim's door enabled her to take refuge in the bathroom and prevent further attack. Wilcox admitted having inserted his finger in victim's vagina but argued that victim had consented until the interruption. Seeking to have his conviction overturned, Wilcox argued that a finger is not a foreign object within the meaning of Penal Code section 289.

California Penal Code section 289 prohibits:

> The penetration, however slight, of the genital or anal openings of another person, for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument or device when the act is accomplished against the victim's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury. . . .[1]

Subsection (k) states: " '[f]oreign object, substance, instrument or device' shall include any part of the body, except a sexual organ."[2]

Wilcox sought to prove that a finger is a sexual organ in order to take his act out of those proscribed by Penal Code section 289. Wilcox offered the expert opinion of a clinical psychologist specializing in sex therapy who testified that almost every area of the body is a sexual organ, particularly the fingers.

The court rejected this argument because under the explicit language of the statute foreign object includes any part of the body other than a sexual organ. Sexual organs are "reproductive organs."[3] The court adopted "penis" or "phallus" as the definition of a male's sexual organ. Wilcox did not use his penis during the act committed upon victim. In the court's modified opinion[4] issued a month after the original, the court recognized that various bodily organs may be used for sexual purposes but they were not therefore sexual organs.[5]

The 1978 version of Penal Code section 289 specifically excluded body parts from the meaning of foreign object.[6] Under that version Wilcox could not have been convicted of rape with a foreign object. The 1982 Amendment specifically construes body parts as foreign objects. If the meaning of foreign object under the 1978 version were adopted here, the 1982 Amendment would be abrogated. The court reviewed the legislative history of the

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1. CAL. PENAL CODE § 289(a) (West 1970 & Supp. 1987).

2. CAL. PENAL CODE § 289(k) (West 1970 & Supp. 1987).

3. Edwin B. Steen, Dictionary of Biology, at 495 (1971). Alexander B. Spence, PhD. & Elliott B. Mason, PhD., Human Anatomy & Physiology, at 755 (1979).

4. 178 Cal. App. 3d 682f.

5. *Id.*

6. CAL. PENAL CODE § 289 (West 1970). Under the former version of California Penal Code section 289 a foreign object does "not include any parts of the body." *Id.*

1982 Amendment to Penal Code section 289. The Assembly Committee's digest stated that foreign objects include parts of hands or entire fists. Thus, the California Legislature intended to prohibit the forcible penetration of fingers into genital and anal cavities by amending Penal Code section 289 in 1982.

The People did not present expert testimony to refute that many body parts are sexual organs. Wilson contended that his conviction could not stand because his expert's testimony was uncontradicted. The court held that the trier of fact is not compelled to accept the expert's opinion if doubt exists as to the basis of that opinion. The judge or jury are free to analyze the foundation of the expert's opinion and to determine whether or not it is meritorious. Here the trier of fact rejected the conclusion of Wilcox's expert witness.

In upholding defendant's conviction for rape with a foreign object the court of appeal has accomplished two things. First, the court has adhered to the language of the statute and the intent of the legislature. Second, the court has protected women by recognizing that the forcible penetration of genital and anal openings by any means is a serious invasion of individual integrity and ought, in good conscience, to give rise to a prosecutorial right.

Linda S. MacDonald

2. *Under the 1980 amendments to Penal Code section 261 the state does not need to establish that a rape victim resisted the assailant in order to obtain a rape conviction.*

People v. Barnes, 42 Cal. 3d 284, 228 Cal. Rptr. 228, 721 P.2d 110 (1986). In *People v. Barnes*, the California Supreme Court reversed the First District Court of Appeal, which upheld defendant's conviction for rape and false imprisonment. The supreme court held that the court of appeal committed reversible error by relying on the pre-1980 version of Penal Code section 261.[1] Section 261 was amended by the California Legislature in

1. California Penal Code section 261 provided in pertinent part:

1980.[2] Defendant's trial took place in 1982. The 1980 version of section 261 contained no references to the victim's resistance as a necessary element for a rape conviction.

The events in question occurred on the night of May 27, 1982. At approximately 10:00 p.m. defendant Barnes telephoned the victim, Marsha M., and invited her to his home. Marsha and Barnes had been neighbors and acquaintances for four years. Each had been to the other's home once prior to May 27th.

Barnes telephoned Marsha twice more and she finally agreed to go because she wanted to buy a small amount of marijuana from him. She arrived at his home around 1:00 a.m. and Barnes was waiting outside for her. He invited her in to smoke some marijuana and at first Marsha refused, stating that she had to get up early and just wanted to pick up some marijuana. Nonetheless, Barnes persuaded Marsha to accompany him inside. They entered the house through an iron gate at the front door and then down a hall to a staircase leading to a room off of the garage.

After ten or fifteen minutes of talking and smoking marijuana Barnes began to hug Marsha but she pushed him away. Although Marsha told him she just wanted to get the marijuana and leave, he continued his advances. When Marsha left the house Barnes angrily followed her out. When they got to the iron gate Barnes began to scream at Marsha. She asked him to open the iron gate because she didn't know how to open it, but Barnes "reared back" as if he were going to hit her. Marsha became nervous, and the two continued to argue for about twenty minutes. Finally Barnes agreed to open the gate but said that first he had to go back inside the house to put on his shoes. Mar-

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"Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: (2) Where a person resists, but the person's resistance is overcome by force or violence." CAL. PENAL CODE § 261 (West 1970 & Supp. 1987).

2. The amended version of California Penal Code section 261 provides in pertinent part:

> Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: (2) Where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another.

CAL. PENAL CODE § 261 (West Supp. 1987).

sha followed him back into the house.

While putting his shoes on Barnes began to threaten Marsha. He grabbed her by the collar of her sweater and stated that he could pick her up with one hand and throw her out. He began to tell her of his sexual exploits and stated that he could make her do anything he wanted.

Barnes then ordered Marsha to remove her clothes. Marsha refused. He proceeded to make threatening gestures which induced Marsha to comply. They then engaged in sexual intercourse for about an hour and both fell asleep.

At about 4:00 a.m. Marsha woke Barnes and coaxed him into opening the iron gate for her. She went directly home and phoned a hospital. She was examined and tested that day for venereal disease and was told by hospital personnel she could wait several days to report the incident to the police.

Marsha called the police the following day. Her initial hesitation was based on her fear that the police would not believe her. Barnes was later tried for rape and false imprisonment, and convicted.

On appeal, the First District reversed the trial court's conviction. The Court of Appeal applied the pre-1980 version of section 261 which required evidence of the victim's resistance under subdivision 2 as a necessary element for conviction. The *Barnes* court of appeal relied on the interpretation of section 261 (1970) found in *People v. Nash*:[3]

> The offense of rape is committed when the victim resists the act, but her resistance is overcome by force or violence. Although she must resist in fact, an extraordinary resistance is not required. The amount of resistance need only be such as to manifest her refusal to consent to the act.[4]

The court of appeal then reviewed the record for evidence of Marsha's resistance and Barnes' threats. The court deter-

3. 261 Cal. App. 2d 216, 67 Cal. Rptr. 621 (1968).
4. *Id.*, at 224, 67 Cal. Rptr. at 625.

mined that: (1) defendant did not threaten physical violence against Marsha to make her succumb to sexual intercourse; (2) Marsha acquiesed to defendant's demands without protesting; (3) defendant would not have perpetrated the sexual act if Marsha had resisted and; (4) Marsha only claimed to have resisted because she failed to communicate her resistance to defendant. In short, the evidence was insufficient to convict Barnes of rape under the pre-1980 version of Penal Code section 261.

The California Supreme Court granted certiorari in order to elucidate the requirements for a rape conviction under Penal Code section 261 (2) as amended in 1980 by the California Legislature. The supreme court held that the 1980 version of section 261 was controlling because Barnes was tried in 1982. Subdivision 2 of the 1980 version does not require evidence of the victim's resistance or of defendant's threats in order to obtain a conviction for rape.

Barnes contended that the 1980 amendments did not change the substance of section 261 because resistance was never required to obtain a rape conviction. The supreme court rejected this argument stating that a victim's resistance was a critical factor in a prosecution for rape by force or violence. The Court noted that the crime of rape was established by a victim who failed to consent and showed resistance but whose will was overborne by force or violence. Despite Barnes' urging, the Supreme Court stated that although evidence of resistance goes directly to the issue of the victim's consent, when the legislature removed "resists" and "resistance" from section 261 in 1980 they intended to make a substantial change in the code provision.

The supreme court referred to the Legislative Digest and the Assembly Committee on Criminal Justice's analysis of the code's amendment to determine the legislative intent. From these sources the supreme court found that the purpose of the amendment was to abolish the requirement that a rape victim resist her assailant in order to establish the crime. Studies have proven that victims who resist a rapist are twice as likely to be physically injured in the attack. Other studies show that prosecutors are less likely to bring charges against an alleged rapist if the victim has not resisted. Based on this information the supreme court stated that the specific purpose of the 1980 amend-

ments was to eliminate the requirement of resistance in order to obtain a rape conviction. Furthermore, this change has affected the fact finding process in a rape trial. Revisions to jury instructions now reflect that the victim is not required to resist the rapist on a charge of rape by force or violence.[5]

The Supreme Court went on to note that the 1980 amendments wrought significant change on rape laws from a historical perspective. At common law a woman was expected to exhibit "utmost resistance" throughout the attack in order to overcome the presumption of consent. Furthermore a woman's character was put in issue and evidence regarding her chastity was adduced at trial. Prosecutors viewed claims of rape as inherently suspect. Resistance served as an objective indicator of nonconsent while failure to resist implied consent. Thus, resistance corroborated the rape claim.

The Supreme Court mentioned recent studies which show that many women freeze in the face of sexual assault, becoming helpless because they are terror-stricken. Active resistance doubles the chance that a victim will be physically injured during the assault.[6]

Thus, the 1980 amendments to section 261 allow the victim to choose whether or not to resist the assailant and a conviction is not precluded by failure to resist. In sum, the Supreme Court determined that the purposes of the 1980 amendments to section 261 were to eliminate resistance as a prerequisite to a rape conviction and to alleviate the victim's need to substantiate a

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5. California Jury Instruction No. 10.00 provides in pertinent part: "The crime of rape as charged against the defendant in this case is an act of sexual intercourse with a female person not the wife of the perpetrator, without her consent, when she resists and her resistance is overcome by force or violence."
CALJIC No. 10.00 (1979 rev.).
California Jury Instruction No. 10.00 provides in pertinent part:

> In order to prove the commission of the crime of rape by means of force or fear of immediate and unlawful bodily injury, each of the following elements must be proved: 1. That the defendant engaged in an act of intercourse with a person [and] 4a. That the act was accomplished by means of force or fear of immediate and unlawful bodily injury.

CALJIC No. 10.00 (1982 rev.).

6. Symonds, *The Rape Victim, Psychological Patterns of Response*, 36 AM. J. PSYCHOANALYSIS 27, 29-33 (1976). Note, *Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience*, 47 ALB. L. REV. 871 (1983).

forcible rape claim through resistance. The court also stated that according to *People v. Salazar*,[7] it is improper to instruct the jury that it must find that the victim resisted in order to return a guilty verdict or for the court to rely on a lack of resistance to find the evidence insufficient for a rape conviction. Thus, the court of appeal erred in reversing Barnes' conviction using the pre-1980 version of section 261 which contained references to the victim's resistance.

The supreme court went on to analyze whether the application of the amended version of section 261 compelled a reversal of the appellate court decision. According the appropriate deference to the fact-finder, if substantial evidence supports the jury verdict, that decision must stand. Referring to *People v. Thornton*,[8] the court emphasized that the trial judge or jury has exclusive authority to determine the credibility of witnesses and the truth of the matters presented.

Applying the requirements of section 261 as amended, the jury determined that an act of sexual intercourse was accomplished against Marsha's will by means of force, violence or fear of immediate and unlawful bodily injury. In reviewing the facts stated previously, the supreme court held that the evidence presented at trial was sufficient to sustain Barnes' rape conviction. The appellate court's reliance on the pre-1980 version of section 261 was erroneous because the amended version eliminates the need for a rape victim to resist the assailant. The supreme court pointed out however, that according to *People v. Bermudez*,[9] the reviewing court must still look to the assailant's threats and their likelihood to induce fear in the victim when analyzing the sufficiency of the evidence in a rape conviction appeal.

The Supreme Court's decision in *Barnes* serves to clarify the requirements to establish rape by force or violence under

7. 144 Cal. App. 3d 799, 193 Cal. Rptr. 1 (1983).
8. 11 Cal. 3d 738, 114 Cal. Rptr. 467, 523 P.2d 267 (1974).
9. 157 Cal. App. 3d 619, 203 Cal. Rptr. 728 (1984).

Penal Code section 261. Although new ground is not forged, the decision buttresses the provisions of the code and clarifies the reasons for its amendment in 1980.

Under section 261 rape victims no longer need to physically resist their attacker in order to prove they have in fact been raped. Thus, they need not take their lives into their own hands and risk being maimed or killed. Futhermore, feelings of guilt for not resisting are lessened because the victim's resistance is not in issue at trial. The fact that a rape victim experiences fear, even unreasonable fear, is sufficient to establish the crime of rape under section 261.

Linda S. MacDonald

3. *Multiple rapes committed on the same victim at different locations may not be separate occasions for the purpose of imposing consecutive sentences.*

People v. Craft, 41 Cal. 3d 554, 224 Cal. Rptr. 626, 715 P.2d 585 (1986). In *People v. Craft* the California Supreme Court held that the phrase "separate occasions" as used in Penal Code section 667.6(d),[1] which imposes mandatory consecutive sentences for certain sex crimes, applies only to offenses against the same victim when the perpetrator temporarily lost or abandoned the opportunity to continue his attack. The court found that defendant never lost or abandoned the opportunity to rape the victim and therefore, full, separate, and consecutive sentencing under section 667.6(d) could not be imposed. The court further held that sentencing could not be upheld under Penal Code section 667.6(c),[2] which gives the court discretionary power to

1. California Penal Code section 667.6 (d) provides in pertinent part:

> A full, separate, and consecutive term shall be served for each violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or fear of immediate and unlawful bodily injury . . . if the crimes involve separate victims or involve the same victim on separate occasions.

CAL. PENAL CODE § 667.6(d) (West 1970 & Supp. 1987).

2. California Penal Code section 667.6(c) provides in pertinent part:

order consecutive terms for some sex crimes, because the trial court did not state the reasons nor the authority for imposing consecutive sentences.

Defendant first raped the victim in a drive-in restaurant parking lot. Defendant then ordered the victim into the back seat of her car. Defendant drove the victim's car for about one hour, then stopped and raped her again. Defendant resumed driving and continued for approximately ninety minutes, stopping once in the interim to lock the victim in the trunk of the car and once for an unknown reason. At the end of this time period, he stopped and raped the victim a third time. At trial defendant was convicted of three counts of rape[3] and sentenced to three full, separate, and consecutive terms.

On appeal, defendant argued that his sentence could not stand if the trial court sentenced him under either subdivision (c) or subdivision (d) of section 667.6. Relying on *People v. Smith*,[4] the *Craft* court agreed that if defendant was sentenced under subdivision (c) it was error because the trial court failed to state the reasons or authority for imposing consecutive sentences. The court stated that the question of whether defendant's sentence under subdivision (d) was proper turned on whether the rapes occurred on separate occasions.

In *People v. Davis*[5] the California Supreme Court stated

> In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or fear of immediate and unlawful bodily injury . . . whether or not the crimes were committed during a single transaction.

CAL. PENAL CODE § 667.6(c) (West 1970 & Supp. 1987).

3. California Penal Code section 261(2) defines rape as "[a]n act of sexual intercourse, accomplished with a female not the wife of the perpetrator . . . where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another." CAL. PENAL CODE § 261(2) (West 1986 & Supp. 1987).

4. 155 Cal. App. 3d 539, 202 Cal. Rptr. 259 (First Dist. 1984) (when the court sentences under subdivision (c) of section 667.6 it must state the reason for imposing consecutive sentences and for sentencing under this provision rather than under Penal Code section 1170.1(a)).

5. 29 Cal. 3d 814, 176 Cal. Rptr. 521, 633 P.2d 186 (1981) (where the statute is

that when interpreting ambiguous provisions of a statute the court "[s]hould ascertain the intent of the Legislature so as to effectuate the purpose of the law."[6] In *People v. Black*,[7] the California Supreme Court held that when determining legislative intent, the court should look to the words used in the statute apply their ordinary and generally accepted meaning. The supreme court in *Black* also stated that a court should consider the context of the entire statute when construing the meaning of one section.

The court in *Craft* relied on these principles of statutory construction to determine the meaning of "separate occasions" as used in section 667.6(d). Examining the language in the section, the court found that "occasion" was subject to several interpretations. Defined narrowly, "occasion" means "[a] particular time at which something takes place"; defined broadly, it means "a period of time in which an opportunity of some kind exists."[8]

To clarify the ambiguity as to which definition of "occasion" should be applied to subdivision (d), the court looked at section 667.6 in its entirety to establish the Legislature's intent in enacting the statute. The court found that since subdivision (c) gives the court the discretion to impose consecutive sentences for multiple sex offenses while subdivision (d) mandates consecutive sentences, the Legislature intended to punish some offenders more harshly than others. The court concluded that the Legislature used the words "separate occasions" in subdivision (d) to single out those sex offenders who deserve an automatic imposition of consecutive terms.

In order to establish the situations in which the court must

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unclear as to whether minors are exempt from the sentence of life imprisonment without the possibility of parole the court should ascertain the intent of the Legislature when construing the ambiguity).

6. *Id.* at 828, 176 Cal. Rptr. at 529, 633 P.2d at 194.

7. 32 Cal. 3d 1, 184 Cal. Rptr. 454, 648 P.2d 104 (1982) (when determining whether the Legislature intended the word "minor" as used in the second sentence of Welfare and Institutions Code section 707.2 to refer to the time when the crime was committed or the time of sentencing, the court should look at the words themselves and keep in mind the purpose of the statute).

8. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1560 (3d ed. 1961).

impose consecutive sentences on a multiple sex offender the *Craft* court found that "occasions" must be construed narrowly to mean a period of time in which an opportunity exists. Since each offense committed by a multiple sex offender occurs at a distinct point in time, the court concluded that if the statutory phrase was defined broadly it would be very difficult to distinguish offenders who merely assault someone several times on a single occasion from one who commits crimes against a single victim on separate occasions. Therefore the court held that subdivision (d) only applied to offenses against the same victim when the perpetrator lost or abandoned the opportunity to continue his attack.

Under the narrow interpretation of "separate occasion" the California Supreme Court held that although defendant raped the victim three times in three different locations, the offenses all constituted a single occasion because defendant never lost or abandoned his opportunity to rape the victim. Thus, the court concluded that defendant could not be sentenced to full, separate, and consecutive sentences under subdivision (d).

Based upon their conclusion that sentencing could not stand under either subdivision (c) or subdivision (d) the California Supreme Court remanded the case to the trial court for resentencing. The court held that since their holding only related to sentencing and would not require any retrials it would have a full retroactive effect. The court further suggested that when trial judges impose sentences under subdivision (d) they should also state the sentence they would have imposed under (c) and provide a statement of reasons for such sentencing. The court concluded that this would prevent needless appeals where the trial court arguably misconstrued the offenses as occurring on separate occasions but would have had the discretion to impose the same sentence under subdivision (c).

As a result of the narrow definition applied by the court to the words "separate occasions" as used in section 667.7 (d) it will be very difficult for prosecutors to plead and prove that full, separate, and consecutive terms should be automatically imposed against a defendant. This is especially true for multiple rape convictions where the prosecutor must prove as an element of the crime that the victim did not consent to any of the acts of

sexual intercourse with the defendant. At the same time, in order to impose mandatory consecutive sentences for multiple rapes, the prosecutor must show that between each act of sexual intercourse the defendant did in fact lose or abandon his opportunity to rape the victim. It is difficult to imagine a situation where a prosecutor would succeed in showing that the victim did not consent to any of the rapes while proving that the defendant lost or abandoned his opportunity to rape the victim. The two concepts are inconsistent with each other. Thus, it is not likely that persons convicted of multiple rapes against the same victim will be subject to consecutive sentences unless the trial court chooses to impose such sentences under its discretionary authority.

Kate Blackburn Rockas

III. CIVIL RIGHTS LAW

1. *Male-only membership policy is arbitrary sex discrimination in violation of the Unruh Civil Rights Act.*

Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 219 Cal. Rptr. 150 (1985). In *Isbister v. Boys' Club of Santa Cruz, Inc.*, the California Supreme Court affirmed the trial court's finding that the male-only membership policy of the Boys' Club of Santa Cruz, Inc. (Boys' Club) violated the Unruh Civil Rights Act (Unruh Act).[1] The court found that the Legislature intended the Unruh Act to govern places of public accommodation and because the Boys' Club fell within this category, it was within the scope of the Unruh Act. The court also held that admitting girls to the Boys' Club would not contravene the purpose of the organization because there was no evidence that any of the programs or facilities were unsuitable for use by girls. In addition, the court stated that there was no proof that female membership would cause serious or permanent danger to the Boys'

1. California Civil Code section 51 provides in pertinent part: "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1982).

Club's funding sources or with its relationship with the national organization. The court specifically limited the holding to the instant case based on the particular nature and function of the Boys' Club. The court further stated that its findings did not preclude the legislature from amending the Unruh Act to allow the Boys' Club to maintain its male-only membership policy.

The Boys' Club of Santa Cruz is a private, nonprofit organization which is affiliated with the Boys' Club of America, a congressionally chartered organization.[2] Approximately half of the funding for the Boys' Club of Santa Cruz comes from a gift in trust donated by John T. and Ruth M. Mallery. The trial court found that the Mallery Trust was not restricted to use for boys. The remaining funds come from the United Way, local fund raisers and private donations.

For an annual membership fee of $3.25, boys between the ages of eight and eighteen may use the Boys' Club's recreational facilities which include a gymnasium, an indoor swimming pool, craft and game areas, and a snack bar. There is not another facility in the area that offers the same range of recreational activities at a comparable cost for either boys or girls. In 1977 several girls were denied membership in the Boys' Club solely on the basis of their sex. The girls brought an action against the Boys' Club seeking an injunction and declaratory relief. The trial court found that the Boys' Club's membership policy violated the Unruh Act and permanently enjoined the organization from denying membership or access to its facilities to girls. Defendant appealed.

In 1897 California adopted its first statute prohibiting arbitrary discrimination in places of public accommodation or amusement.[3] Since the statute specifically listed certain facilities falling within its scope, lower appellate courts relied on the prin-

2. United States Code Annotated section 691 provides in part: "The following persons . . . and their successors, are created and declared to be a body corporate of the District of Columbia, where its legal domicile shall be, by the name of the Boys' Clubs of America . . . ." 36 U.S.C.A. § 691 (West 1968).

3. The Act of March 13, 1897, ch. 108, s 1, 1897 Cal. Stat. 137, (repealed 1959) provides that: "All citizens within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating rinks, and all other places of public accommodation . . . ." *Id.*

ciple of *ejusdem generis*[4] to limit the reach of the law.[5] In response to a concern that the courts were construing the 1897 statute amendments too strictly, the Legislature enacted the Unruh Act in 1959.

The *Isbister* court relied on several California Supreme Court decisions in defining the scope of the Unruh Act. In *O'Connor v. Village Green Owners Assn.*,[6] the supreme court held that the Legislature intended the phrase "business establishment of every kind whatsoever" to encompass all of the places specifically enumerated in the original drafting of the Unruh Act.[7] The supreme court in *Burks v. Poppy Construction Co.*,[8] stated that "business establishment" also included those facilities subject to the original 1897 statute, i.e., places of public accommodation or amusement. The *Isbister* court further found that other jurisdictions with statutes similar to California's equal access laws have used the term "public accommodation" to cover organizations like the Boys' Club.[9]

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4. BLACK'S LAW DICTIONARY 464 (3d ed. 1961) provides:

> In the construction of laws, wills and other instruments, the "ejusdem generis rule" is that where general words follow an enumeration of persons or things . . . such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically enumerated.

Id.

5. The lower appellate courts relied on the principle of *ejusdem generis* to hold that only those facilities specifically enumerated in the 1897 statute and subsequent amendments could not arbitrarily discriminate. *See, e.g.*, Reed v. Hollywood Professional School, 169 Cal. App. 2d Supp. 887, 890, 338 P.2d 633 (1959)(private school not covered); Long v. Mountain View Cemetary Assn., 130 Cal. App. 2d 328, 329, 278 P.2d 945 (1955)(private cemetary not covered).

6. 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427 (1983)(condominium owners association is a business establishment under the Unruh Act and cannot arbitrarily discriminate against buyers on the basis of age).

7. The original version of the bill extended its antidiscriminatory provisions to "all public or private groups, organizations, associations, business establishments, schools, and public facilities . . . ." Cal. A.B. 594 (1959).

8. 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P.2d 313 (1962)(construction company engaged in the business of selling tract homes operated a business establishment within the scope of the Unruh Act).

9. As an example the court pointed to New Jersey's Law Against Discrimination which bars sexual bias in "places of public accommodation"; these places are defined to include "places of amusement." In National Org. for W., Essex Ch. v. Little L. Base., Inc., 127 N.J.Super 522, 318 A.2d 33 (1974), the New Jersey Courts held that a local Little League was a place of amusement covered by the antidiscrimination statute.

Relying on these principles, the court in *Isbister* held that the Boys' Club is a place of public accommodation or amusement and therefore a business establishment within the scope of the Unruh Act. In reaching this conclusion the court stated that because the Boys' Club's primary function was to offer recreational facilities to boys, it clearly qualified as a place of amusement. In addition, the court found that the Boys' Club was unquestionably public because it opened its doors to all boys of the requisite age. Finally, the court concluded that the members' lack of control over the organization's affairs and the nominal membership fee were characteristic of a public accommodation.

The Boys' Club, its amici and Justice Mosk in his dissent contended that the term "business establishment" only applied to commercial or profit seeking ventures. Since the Boys' Club does not collect substantial fees nor does it have any economic function, the Boys' Club and Justice Mosk concluded that the organization was not a business establishment and therefore not governed by the Unruh Act. In support of their argument they relied on a statement made in *Burks* that defined business as a "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain."[10]

The *Isbister* court rejected this argument. The court stated that when the *Burks'* definition of business was viewed in its entirety, its meaning became clear and provided no support for the Boys' Club's view. Secondly, in *O'Connor*, the supreme court held that a nonprofit organization could indeed come within the scope of the Unruh Act and thus profit seeking is not the sole criteria for determining whether an organization is a business establishment. Also, the *Isbister* court found that since the Unruh Act governed places of public accommodation or amusement, additional attributes were not necessary to conclude that the Boys' Club was a business.

The Boys' Club and its amici also argued that since nonprofit groups were specifically excluded from California statutes

10. 57 Cal. 2d at 468, 20 Cal. Rptr. at 612, 370 P.2d at 316 (1962). The entire sentence reads: "The word 'business' embraces everything about which one can be employed, and it is often synonymous with calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." *Id.*

banning discrimination in housing and employment,[11] the Legislature demonstrated an intent to apply a strictly commercial meaning to the phrase "business establishment" as used in the Unruh Act. Relying on a statement made in *Marina Point, Ltd. v. Wolfson*[12] that the Fair Employment and Housing Act specifically provided that nothing in the statute shall be construed as limiting or restricting the application of the Unruh Act, the court in *Isbister* held that the Boys' Club's claim was without merit.[13]

The Boys' Club further contended that forcing them to admit female members would infringe upon the current male member's rights of association as guaranteed by the state and federal constitutions. In *Roberts v. United States Jaycees*,[14] the United States Supreme Court held that a Minnesota statute prohibiting sex-segregated membership policies by the Jaycees did not violate First Amendment associational rights. Due to the Jaycees' character as a large, socially unselective membership institution, the court in *Roberts* concluded that the organization was beyond the constitutional protection of intimate association. As to the Jaycees' rights of expressive association, the *Roberts* court stated that the statute in question was not aimed at protected speech, but rather at satisfying a compelling state interest — redressing historical discrimination against women — and therefore there was no interference with constitutional rights. Finding that the same reasoning applied to the instant case, the *Isbister* court concluded that admitting female members to the Boys' Club would not violate any male member's rights guaranteed by the federal constitution.

Although the California Constitution affords greater expressive and associational rights in some cases than its federal coun-

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11. California Government Code section 12926b(c) provides that the "[phrase] '[e]mployer' does not include a religious association or corporation not organized for private profit." CAL. GOV'T CODE § 12926(c) (West 1980 & Supp. 1987). Section 12927(d) of the California Government Code states that the "[term] '[h]ousing accommodation' shall not include any accommodations operated by a . . . charitable association or corporation not organized or operated for private profit . . . ." CAL. GOV'T CODE § 12927(d) (West 1980).

12. 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 (1982) (landlord's no-children policy violated the Unruh Act).

13. *Id.* at 731, n.5, 180 Cal. Rptr. 502, n.5, 640 P.2d at 121, n.5.

14. 104 S.Ct. 3244 (1984).

terpart, the *Isbister* court found that given the state's sensitivity to sexual discrimination, there was no basis to find that a statutory requirement of equal access to the Boys' Club would offend constitutional rights.

Plaintiffs asserted that the Legislature intended those types of discrimination specifically set forth in the Unruh Act be deemed unreasonable per se. In *In re Cox*,[15] the California Supreme Court held that the list was illustrative rather than dispositive. Relying on additional arguments made in *Marina* that when amending the Unruh Act in 1974 to add a specific reference to sexual discrimination the Legislature did not intend to give it any special status, the court in *Isbister* reaffirmed the *Cox* holding and dismissed plaintiffs' argument.

In *Marina* the supreme court left open the possibility that the Unruh Act might not apply to discrimination of an entire class if there was a showing of a need for specialized facilities. For example, the *Marina* court stated that the unique physical and psychological needs of the elderly might justify a housing facility reserved solely for their use. Since the Boys' Club failed to show that the organization fulfilled any special needs of males that females did not have, the *Isbister* court concluded that the Boys' Club did not fall within the *Marina* exception.

The Boys' Club contended that its primary function was to combat delinquency among the male youth population of Santa Cruz. Although they conceded that delinquency also affects females, the Boys' Club argued that it had an absolute right to choose to only focus on the needs of boys. However, the court found that because there are no other recreational facilities available to girls in the area, the effect of denying membership to girls may create a greater delinquency problem than the one the Boys' Club was trying to alleviate.

The Boys' Club further claimed that since the national organization's purpose is "[t]o promote the health, social, educational, vocational, and character development of boys . . .,"[16] prohibiting the Boys' Club's male-only membership policy vio-

15. 3 Cal. 3d 205, 90 Cal. Rptr. 24, 474 P.2d 992 (1970).
16. 36 U.S.C.A. § 693 (West 1968).

lated the supremacy clause of the federal constitution. The *Isbister* court stated that in *Perez v. Campbell*[17] the United States Supreme Court held that state remedial legislation is preempted only if it "[s]tands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and the congressional intent to preempt must be "unambiguous".[18] Looking to the language of the charter itself, which gives the Boys' Club the power "to adopt, amend, and alter a constitution and bylaws not inconsistent with the laws of the United States or any State in which the corporation is to operate . . . ," the court found that the reference to boys was merely a passive recognition of the Boys' Club's then traditional character.[19] Thus, the court concluded that Congress did not intend the phrase "boys" to be interpreted as having a preemptive purpose.

The court also rejected the Boys' Club's argument that they should be allowed to deny access to girls because the organization had traditionally served only boys. The *Isbister* court found that there was evidence that a number of other Boys' Clubs affiliated with the Boys' Club of America, including some in California, have admitted girls with no ill effects.

Finally, the Boys' Club suggested that its funding would be jeopardized if its membership policies were changed. Based on the trial court's finding that the Mallery Trust was unrestricted with respect to gender, the court in *Isbister* concluded that the Boys' Club's primary source of funding would not be endangered. In addition, the court stated that there was no evidence to indicate that admitting girls would not produce new sources of revenue for the organization.

In concluding, Justice Grodin stated that the findings of the majority were compelled by the Legislature's broad anti-discrimination policy. However, the court expressly limited the holding to the instant case and stated that their findings did not preclude the Legislature from amending the Unruh Act to allow the

17. 402 U.S. 637 (1971) (a provision in Ariz. Rev. Stat. s 28-1163(B) which provides that a discharge in bankruptcy shall not relieve the judgment debtor from any of the requirements in said statute, is in direct conflict with section 17 of the Bankruptcy Act and is thus unconstitutional as violative of the supremacy clause).

18. *Id.* at 649-650.

19. 35 U.S.C.A. § 694(5)(West 1968).

Boys' Club to maintain its male-only membership policy.

Chief Justice Bird wrote a concurring opinion for the primary purpose of reproducing passages of the dissenting opinion written by Justice Poche in the California Court of Appeal. Chief Justice Bird stated that Justice Poche's opinion was important because he pointed out that a finding that the Boys' Club was not governed by the Unruh Act could mean that services from nonprofit organizations such as the Salvation Army lunch lines might be restricted on the basis of race, sex, religion or any other arbitrary classification.[20]

In his dissent, Justice Mosk was highly critical of the majority's finding that the Legislature intended the Unruh Act to be all-encompassing. Justice Mosk contended that if the Legislature had wanted the Unruh Act to apply to nonprofit and charitable organizations such as the Boys' Club, it would not have used the word "business" in the statute.

Justice Mosk also faulted the majority's reliance on *Roberts*. He concluded that the United States Supreme Court in *Roberts* held that the Jaycees were subject to state-imposed sex restrictions because of the organization's commercial nature. As the Boys' Club is not engaged in commercial activity, Justice Mosk found that the instant case was distinguishable from *Roberts* and thus, the club should not be subject to interference by the State.

In his dissent, Justice Kaus[21] conceded that facilities such as the Boys' Club are covered by the Unruh Act but he concluded that the majority erred in holding that the exclusion of

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20. In his opinion Justice Poche made the poignant observation that:

> The trial court understood the clear meaning of the Unruh Act Civil Rights Act: community services regardless of their source are to be provided in accordance with the legislative mandate of equal treatment for all. Perhaps the violation would have been clearer if the Boys' Club of Santa Cruz had discriminated on the basis of race, not sex. But that lack of clarity is not the fault of the language of the statute. Instead, the difficulty is the long and well ingrained tradition of women's dependency which even today causes statutory recognition of the equality of women to have an unreal ring to it.

21. Justice Kaus is a retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

girls was unreasonable and arbitrary. Justice Kaus stated that if one of the Boys' Club's goals is to control juvenile delinquency and if most serious delinquents are in fact boys, then the Boys' Club had demonstrated a compelling need to maintain single sex facilities. Justice Kaus argued that the fact that there were not any other comparable facilities for girls was irrelevant to the legal issue before the court.

If organizations such as the Boys' Club are allowed to discriminate on the basis of sex, then there is no reason why other private organizations which are open to the public cannot arbitrarily discriminate on the basis of sex, race or religion. To prevent this from happening the California Supreme Court in *Isbister* has made it clear that "business establishment" will be broadly construed by the courts unless the Legislature takes steps to amend the Unruh Act to prevent such broad application. Given the Legislature's demonstrated goal of eradicating arbitrary discrimination, it is not likely that the Legislature will interfere with the court's liberal construction of the Unruh Act.

Kate Blackburn Rockas

2. *Male-only membership policy of Rotary clubs is arbitrary sexual discrimination in violation of the Unruh Civil Rights Act.*

Rotary Club of Duarte v. Board of Directors of Rotary International, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (2nd Dist. 1986). In *Rotary Club of Duarte v. Board of Directors of Rotary International*, the California Court of Appeal reversed the trial court's holding that Rotary International and local Rotary clubs were private organizations outside the scope of the Unruh Civil Rights Act,[1] which prohibits arbitrary discrimination by business establishments. The court of appeal concluded that the international organization and the local clubs were businesses

1. California Civil Code section 51 provides in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1982).

within the meaning of the statute and therfore the male-only membership policy of Rotary International was arbitrary sexual discrimination prohibited by law.

The constitution and bylaws of Rotary International (International), a nonprofit corporate association of local clubs, limits membership in Rotary clubs to men. Local club membership is restricted to a certain number of men from each type of business or profession within the community.

To meet membership growth goals, the local Rotary Club of Duarte (Duarte) admitted three women members in 1977. International consequently revoked Duarte's charter and terminated the local club's membership with the international organization. Duarte and two of the women members brought an action for injunctive and declaratory relief against the Board of Directors of International, the trial court found for the defendant.

In *Isbister v. Boys' Club of Santa Cruz, Inc.*,[2] the California Supreme Court held that the Unruh Civil Rights Act (Unruh Act) did not govern "truly private" relationships. The *Isbister* court defined truly private relationships as those that are "continuous, personal, and social [and which] take place more or less outside public view."[3] Since International is a worldwide organization with more than 19,800 member clubs and a membership turnover rate as high as 20 percent, the court of appeal concluded that Rotarian membership could not be considered truly private.

The California Supreme Court in *O'Conner v. Village Green Owners Assn.*[4] stated that the California Legislature intended the phrase "business establishment" to be construed as broadly as reasonably possible. In *O'Conner*, the court held that a nonprofit homeowners' association which rendered business services was a business establishment within the Unruh Act.

Relying on the legal principles confirmed in *Curran v. Mount Diablo Council of the Boy Scouts*[5] and *Isbister*[6] the

2. 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212 (1985).
3. *Id.* at 84, fn. 14, 219 Cal. Rptr. at 158, fn. 14, 707 P.2d at 220, fn. 14.
4. 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427 (1983).
5. 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1984) (Boy Scouts' organization exhibits

court of appeal concluded that International's complex organizational structure and vast number of employees were characteristic of a business establishment within the meaning of the Unruh Act. Based on testimony that local club members obtained both commercial advantages and business benefits from their Rotarian membership, the court of appeal found that Duarte was also a business under the Unruh Act. As such, both organizations may not discriminate on the basis of sex.

Defendant contended that a court ruling forcing International to accept women members in California is prohibited because the judgment would negatively impact upon the organization worldwide. The court of appeal found that there was no validity to the argument. Regardless, the court of appeal held that acts of sex discrimination in violation of the Unruh Act would not be tolerated.

Defendant also argued that the Unruh Act unconstitutionally infringes on International's right to freedom of intimate and expressive association. Noting that this constitution right is generally afforded to highly personal relationships, the court of appeal concluded that the Rotarian policy of encouraging a widely diverse membership body precluded the organization from qualifying for such constitutional protection. The court added that if the Unruh Act infringed upon the organization's right to freedom of expressive association, the interference would be justified by the State's compelling interest in abolishing sex discrimination by businesses.

The court of appeal found that the trial court erred in concluding that because International is incorporated in Illinois, plaintiffs had to show why the validity of the organization's membership policy should not be tested under Illinois law. The court of appeal stated that neither the full faith and credit clause of the Federal Constitution nor the principle of interstate comity prevented a California court from enforcing the Unruh Act against a corporation operating in California.

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sufficient business attributes to be classified as a business establishment within the scope of the Unruh Act).

6. *Isbister*, 40 Cal. 3d at 81, 219 Cal. Rptr. at 152, 707 P.2d at 217 (Boys' Club of Santa Cruz is a business under the Unruh Act).

The court of appeal further held that the trial court abused its discretion in denying plaintiffs relief based on the unclean hands theory. The trial court held that since Duarte had admitted women in violation of International's membership policy the plaintiffs had unclean hands and were precluded from seeking injunctive relief. The court of appeal concluded that to deny plaintiffs relief under this theory would be contrary to public policy and therefore the unclean hands doctrine was not applicable to the instant case.

The court of appeal held that plaintiffs were entitled to injunctive relief and damages. In *Koire v. Metro Car Wash*,[7] the California Supreme Court found that in enacting the Unruh Act, the Legislature established a policy that arbitrary sex discrimination by businesses is per se injurious and that minimum statutory damages shall be awarded for every violation of the Unruh Act as provided for under California Civil Code section 52.[8] The *Koire* court further held that injunctive relief is an additional remedy available to aggrieved parties under the Unruh Act.

The *Rotary* court's decision reconfirms the public policy mandate of California that men and women are to be treated equally. To further support the abolition of sex discrimination it appears that California courts are willing to liberally construe the term "business establishment" and to find that an organization comes within the Unruh Act. The Leglislature's and court's firm stance against sex discrimination is paramount in eroding the male-only policies of many clubs and organization.

Kate Blackburn Rockas

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7. 40 Cal. 3d 24, 219 Cal. Rptr. 133, 707 P.2d 195 (1985).

8. California Civil Code section 52(a) provides in pertinent part:

> [W]hoever makes any discrimination, distinction or restriction on account of sex . . . contrary to the provisions of section 51 or 51.5, is liable for each and every offense for the actual damages, and such amount as may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damange but in no case less than two hundred fifty dollars ($250) . . . ."

CAL. CIV. CODE § 52(a) (West 1982).

IV. TORT LAW

1. *The state is not liable for the sexual assault of a traveler at a highway rest stop when there is no causal connection between the claimed dangerous condition and the harm incurred on the premises.*

Constance B. v. State, 178 Cal. App. 3d 200, 223 Cal. Rptr. 645 (3rd Dist. 1986). In *Constance B. v. State*, the California Court of Appeal affirmed the trial court's grant of summary judgment. The court held that the facts presented were insufficient to establish a cause of action for personal injury resulting from a dangerous condition of property. Further, it declined to hold the state liable for personal injuries incurred on state-owned property.

While traveling late at night on Interstate 5, plaintiff stopped at the Dunnigan rest area to use the restroom.[1] The rest stop is a state-owned facility located in a grove of eucalyptus trees. Plaintiff parked her car in the lot and walked the fifteen yards to the restroom building. As she approached the building she saw her assailant standing at the northeast corner staring at her. Another woman exited the building as plaintiff entered. When plaintiff emerged from the first stall her assailant was in the women's restroom. The assailant viciously attacked and beat her, and sexually assaulted her. Another motorist heard plaintiff's screams, witnessed the assailant leave the restroom and noted the license plate number of his car as he drove away. The assailant was subsequently convicted of rape and sentenced to state prison.

Plaintiff brought this civil action against the state, alleging that due to the dangerous condition of the rest stop the state was liable for the injuries she suffered as a result of the assault. California Civil Code section 830(a) defines a dangerous condition of property as: "[a] condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant)

1. The Dunnigan rest area was built in 1967 or 1968. The State Department of Architecture designed the facility. The south half of the building is the men's restroom and the north half is the women's restroom. The entrance to the women's restroom is located at the northwest corner of the building. There are no lights between the parking lot and the building but the outside walls of the facility are well lit.

risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."[2]

Liability of a public entity is established by statute. Under California Government Code section 835[3] a public entity may be held liable for injury caused by a dangerous condition of its property if a plaintiff can establish that the condition was the proximate cause of his or her injuries. Here, plaintiff needed to establish that the physical condition of the Dunnigan rest stop was the proximate cause of her sexual assault and that an assault of this nature was foreseeable.

Plaintiff offered the declaration of a security consultant that said the following factors created a dangerous condition of the property: 1) the restroom was too far from the parking lot to provide adequate surveillance by other users; 2) the restroom side entrances blocked the visibility of other users; 3) the location of the bulletin board near the men's restroom distracted attention from the women's restroom; 4) the placement of the facility five feet below grade surrounded by trees obscured a clear view of the building; and 5) the placement of the lights and trees cast heavy shadows at night. Despite this testimony, the court of appeal stated that the material facts presented during the summary judgment proceedings did not evidence a dangerous condition of property at the rest stop.

Nonetheless, in support of this contention, plaintiff relied

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2. CAL. GOV'T CODE § 830(a) (West 1980).

3. California Government Code § 835 provides:

> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that that property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) The public entity had actual or constructive notice of the dangerous condition under section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

CAL. GOV'T CODE § 835 (West 1980).

on *Peterson v. San Francisco Community College District.*[4] In *Peterson,* California Supreme Court held that the defendant public entity was liable to an injured plaintiff for harm occasioned by untrimmed foliage next to a parking lot stairway. The foliage provided a hiding place for criminal assailants. The causal connection between the attack and the harm was established by the defendant having occasioned the harm.

The plaintiff also cited *Isaacs v. Huntington Memorial Hospital,*[5] which established the rule regarding a landlord's duty of care to prevent assaults on tenants. In *Isaacs,* the California Supreme Court stated that the duty of care arises from the special relationship that exists between a landlord and an invitee.[6] The duty to exercise a higher degree of care than reasonable care is contingent upon whether the landlord could reasonably anticipate that criminal conduct would occur on the premises.

Further, past incidents of criminal conduct on the property are relevant. Here, plaintiff produced evidence that two daytime thefts had occurred at the Dunnigan rest stop but assaults similar to that perpetrated upon plaintiff had not occurred.

The state argued that absent previous similar incidents, the conduct of plaintiff's assailant was unforeseeable. Therefore, de-

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4. 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193 (1984).
5. 38 Cal. 3d 112, 211 Cal. Rptr. 356, 695 P.2d 653 (1985).
6. According to the Second Restatement of Torts section 332:

> (1) An invitee is either a public invitee or a business visitor.
>
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
>
> Comment a. Invitees are limited to those persons who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception.

RESTATEMENT (SECOND) OF TORTS § 332 (1965).

The Second Restatement of Torts section 341A states:

> A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.

RESTATEMENT (SECOND) OF TORTS § 341A (1965).

fendant was not under a duty to protect against such conduct.

The Court of Appeal did not agree that assaults at highway rest stops were unforeseeable. It recognized that rest stops are open twenty-four hours a day and that all types of people, including criminals, utilize the highways. It was therefore predictable that criminals may commit crimes while traveling. The court stated that the security of innocent travelers was a responsibility of the appropriate state authorities. Nonetheless, in order to recover, plaintiff was required to prove that a causal relationship existed between the alleged dangerous condition and the kind of injury incurred.

By granting the state's motion for summary judgment, however, the trial and appellate courts decided as a matter of law that the material facts show a lack of causality. The court of appeal reviewed a variety of cases to find the appropriate standard to permit the court to take the issues of breach of duty and causality from the jury.[7] The court is entitled to take the matter from the jury when the evidence would not warrant it reaching a verdict.[8] Furthermore, to permit the jury to find that a condition is dangerous requires sufficient evidence to establish a substantial, as opposed to a possible, risk of injury.[9] The court of appeal also stated that the harm incurred must be of a kind that can be caused by the claimed dangerous condition in order to establish liability. The five conditions plaintiff tendered as the cause of her sexual assault were then examined.

First, plaintiff argued that the restroom building was too far from the parking lot to provide adequate surveillance by other users. The court of appeal determined that no reasonable trier of fact could decide that the state's failure to remedy the distance between the lot and the restrooms constituted a breach of the duty of care. Thus the fifteen yard distance between the two did not amount to a dangerous condition of the property.

Plaintiff next argued that the side entrances to the

7. *See* Starr v. Mooslin, 14 Cal. App. 3d 988, 92 Cal. Rptr. 583 (1971); Pfeifer v. County of San Joaquin, 67 Cal. 2d 177, 60 Cal. Rptr. 493, 430 P.2d 51 (1967); Barrett v. City of Claremont, 41 Cal. 2d 70, 256 P.2d 977 (1953).

8. Wilkerson v. McCarthy, 336 U.S. 53, 65 (1948).

9. CAL. GOV'T CODE § 830.2 Law Revision Commission Comment (West 1980).

restrooms blocked the visibility of other users and therefore provided an opportunity for assailants to enter the building unnoticed. The court rejected this argument by characterizing side entrances as a latent condition that a reasonable landlord would not perceive as creating a substantial risk of injury. The court of appeal distinguished *Peterson*[10] noting that the side doors had not been used previously as part of an assailant's *modus operandi.*

Third, the court found the location of the bulletin board and the fact that the facility was five feet below grade insubstantial factors and could not reasonably be found to increase the risk of criminal activity. Hence, neither constituted a dangerous condition of the property.

Finally, the court of appeal considered whether the placement of the lights and trees which allegedly cast heavy shadows was a proximate cause of plaintiff's injuries. Plaintiff argued that the shadows allowed an assailant to conceal himself and to enter the women's restroom unobserved. The court of appeal rejected this argument as unreasonable speculation, construing it as a theory of mood lighting. The court of appeal reasoned that if liability were predicated on the affect of the quantity of light on an assailant's psychological propensity to commit crime, then proprietors would become the insurers of public safety. As a matter of policy, the court of appeal was unwilling to impose liability on innocent landowners on that basis. In short, the court of appeal held that the lighting at the Dunnigan rest stop was not a proximate cause of the sexual assault on plaintiff.

In a concurring and dissenting opinion, Justice Sims pointed out that the state did not adequately deal with plaintiff's contention regarding inadequate lighting in its motion for summary judgment. He felt the court overstepped its boundaries by resolving this issue in favor of the state, considering the state's failure to address it in its moving papers.

The state relied on the *Peterson*[11] holding that there must be prior similar incidents to establish liability. After the grant of

10. 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193 (1984).
11. *Id.*

summary judgment in *Constance B.*, however, the California Supreme Court reviewed *Peterson* and determined that prior similar incidents were only one element of foreseeability and not determinative for the imposition of liability. Moreover, in both *Peterson*[12] and *Isaacs*,[13] the California Supreme Court decided that inadequate lighting could constitute a dangerous condition of property. According to Justice Sims, these decisions abrogate the trial court's ruling that the state is not liable as a matter of law for inadequate lighting.

The trial court relied on the account of the incident found in plaintiff's police report. Plaintiff stated that she saw her assailant staring at her as she approached the restroom. From this, the trial court inferred that the assailant was standing in the light, or conversely, not concealed in shadow. Therefore, the trial court concluded that the adequacy of light at the Dunnigan rest stop was not subject to reasonable dispute. Justice Sims considered this determination erroneous because plaintiff provided evidence that the rest stop lighting failed to meet nationally recognized standards and the state failed to address this contention. The fact that plaintiff saw her assailant prior to the attack did not in itself resolve the issue of whether the Dunnigan rest stop was in a dangerous condition due to inadequate lighting. Summary judgment is only appropriate when there is no issue of material fact to be tried. Nonetheless the trial court summarily decided the lighting issue and deprived plaintiff of her opportunity to present the case to a jury.

It is difficult to determine why the trial and appellate courts were so anxious to dispense with this case. Summary judgment is a drastic remedy and essentially deprives a plaintiff of his or her day in court. This decision will likely affect recovery in tort for assaults that occur in state parks and recreation areas as well as highway rest stops. The state is California's largest landowner. If recovery were allowed here, a potentially massive increase in tort litigation arising from dangerous conditions of state-owned property could result. It seems that the court was not willing to expose the state to that much liability.

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12. 36 Cal. 3d at 812, 205 Cal. Rptr. at 849, 685 P.2d at 1200.
13. 38 Cal. 3d at 130, 211 Cal. Rptr. at 365, 695 P.2d at 662.

In addition, the court may have viewed plaintiff's lighting theory as too speculative to warrant extended consideration. If the placement of buildings, benches, sidewalks and lamp posts on on state-owned property could be legally challenged, then every walking, jogging, bicycle and other accident would create potential state liability. Regardless of the court's true motivations, the implications of this decision are potentially far reaching.

Linda S. MacDonald

2. *Independent injuries resulting from the same negligent act constitute separate causes of action in medical malpractice claims.*

Zambrano v. Dorough, 179 Cal. App. 3d 169, 224 Cal. Rptr. 323 (Fourth Dist. 1986). In *Zambrano v. Dorough* the California Court of Appeal held that the statute of limitations did not bar Linda Zambrano (Linda) and her husband, Arthur Zambrano (Arthur) from filing a claim of medical malpractice arising out of a doctor's erroneous diagnosis made more than a year before.[1] The court of appeal found that plaintiffs' claims were for injuries independent from those incurred at the time of defendant's misdiagnosis and therefore constituted a separate cause of action falling within the prescribed time period for filing claims.

Linda first saw Milford Dorough, M.D., as a patient in January 1977, five days after she had a copper seven I.U.D.[2] removed in a hospital emergency room because she was experienc-

1. California Code of Civil Procedure section 340.5 provides in part:

> In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for commencement of action shall be three years after the date of injury or one year after the date of injury or one year after the plaintiff discovers, or through reasonable diligence should have discovered, the injury, whichever occurs first.

CAL. CIV. PROC. CODE § 340.5 (West 1982).

2. STEDMAN'S MEDICAL DICTIONARY 386 (5th ed. 1982) (intrauterine devices (IUD) are pieces of plastic or metal of various shapes (*e.g.*, coil, loop, bow inserted into the uterous to exert a contraceptive effect)).

ing abdominal pain and vaginal bleeding. Dr. Dorough diagnosed Linda's continuted pain as stemming from a miscarriage of an undetected pregnancy. Dr. Dorough admitted Linda into Hoag Hospital where he performed a dilation and curettage.[3] Two weeks after Linda was discharged from the hospital, she returned to Dr. Dorough's office complaining of severe abdominal and rectal pain, and he rehospitalized her. This time she was admitted to the University of California at Irvine Medical Center because she had no insurance coverage. He performed exploratory surgery during which he discovered a ruptured ectopic pregnancy.[4] Several days after the surgery, Dr. Dorough told Linda's mother that he had initially misdiagnosed Linda's condition.

In May 1979 Terrel Bond, M.D., informed Linda that she needed a complete hysterectomy. At that time Dr. Bond indicated to Linda that there was possibly a connection between the ruptured ectopic pregnancy and the condition requiring the hysterectomy. Linda testified that until she spoke with Dr. Bond she was not aware that Dr. Dorough's misdiagnosis could be related to her reproductive system problems. Two weeks after meeting with Dr. Bond Linda filed a complaint against Dr. Dorough and Hoag Hospital for medical malpractice seeking general and punitive damages. Linda's husband also filed a claim against the defendants for loss of consortium. The trial court dismissed plaintiffs' claims on the grounds that the one year statute of limitations attached in January 1977 and therefore the parties were barred from filing a complaint in August 1979.

The court of appeal found that the applicable statute of limitations was California Code of Civil Procedure section 340.5 which provides that a medical malpractice action shall be commenced one year after the plaintiff learns of or should have learned of the injury. The court of appeal stated that the word injury as used in section 340.5 referred to the damaging effect of the wrongful act and not the act itself. As a result of Dr. Dorough's misdiagnosis and his alleged subsequent refusal to treat Linda as a patient, the plaintiffs suffered emotional dis-

3. *Id.* at 397 (dilation of the cervix and curettement of the endometrium).

4. *Id.* at 1133 (a ruptured ectopic pregnancy occurs when an impregnated ovum develops outside the cavity of the uterus).

tress. Since a complete hysterectomy would permanently deprive Linda of her reproductive capacity, the court of appeal concluded that this was a loss significanctly different than the earlier transitory damages and therefore consitituted a separate injury.

The traditional view prohibits splitting a cause of action in medical malpractice claims. As articulated in *Sonbergh v. MacQuarrie*,[5] the general rule is that all damages resulting from an injury constitute a single cause of action. However in *Martinez-Ferrer v. Richardson-Merrell*,[6] the court of appeal departed from the *Sonbergh* rule and held that the independent injuries plaintiff suffered as a result of taking a particular medication comprised several causes of action. The court of appeal in *Martinez-Ferrer* concluded that to deny plaintiff access to the courts for failure to comply with the statute of limitations would be a miscarriage of justice.

Relying on *Martinez-Ferrer*, the court of appeal in *Zambrano* held that Linda's injuries constituted two separate causes of action. Therefore, since the plaintiffs filed their complaint against defendants two months after learning of Linda's need for a hysterectomy the statute of limitations had been met.

The *Zambrano* holding is important because the court of appeal clarified the subtle distinction between splitting a cause of action and establishing separate causes of action. This is significant in medical malpractice claims where injuries sometimes do not manifest themselves until after the statute of limitations for filing a complaint has run. It appears that California courts

5. 112 Cal. App. 2d 771, 247 P.2d 133 (Second Dist. 1952) (a cause of action in tort arises when the wrongful act is committed and ignorance of the existence of the injuries will not prevent the running of the statute of limitations).

6. 105 Cal. App. 3d 316, 164 Cal. Rptr. 591 (Second Dist. 1980) (the statute of limitations did not bar an action against the manufacturer of a particular medication where plaintiff developed cataracts sixteen years after taking the medication).

are not willing to deny a plaintiff his or her day in court when to do so would result in a miscarriage of justice.

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