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Arthur M. Sammis

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Community Property and Family Law

*by Arthur M. Sammis**

Probably the most important development in the field of community property law during the past year was the legislation affecting causes of action and damages for injury to the person. Several cases dealing with integrated property settlements are of importance in clarifying problems relating to support provisions, modification, and enforcement. Developments in the case and statutory law dealing with the parent and child relation have emphasized the continuing trend toward liberality in the legitimation of children. Three major areas in this field have received attention and are worthy of comment. The conclusive presumption of legitimacy set forth

* J.D. 1939, University of California, Hastings College of the Law. Isaias W. Hellman Professor of Law and Dean, University of California, Hastings College of the Law. Member, California State Bar.

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in Evidence Code section 621 has been further strengthened by judicial decision; two new cases and one new statute are of importance in dealing with the problems of legitimation and adoption, and there has been some clarification of the judicial attitude toward artificial insemination and the numerous problems it presents.

Causes of Action and Damages for Injury to the Person

Prior to the enactment of Civil Code section 163.5¹ in 1957, the California cases were uniform in holding the cause of action for personal injuries, if arising during the marriage, to be presumptively community property, and the damages which it produced to have the same character.² The presumption could be overcome by showing an agreement between the spouses controlling the classification of the cause of action,³ or by showing it arose when the property rights of the spouse were within the coverage of section 169 of the Civil Code.⁴ In addition, after acquisition of the cause of action its character could be changed by contract,⁵ and the community classification of the action for damages for personal injury automatically ended on termination of the community by death or by divorce.⁶ The primary difficulty with this concept of the cause of action for personal injuries as community property was its effect in cases involving contributory negligence by one of the spouses. When the injured spouse was the wife, the courts held that the community character of the action permitted the conduct of the husband, to the extent that it was the

1. Cal. Stats. 1957, Ch. 2334, providing: "All damages, special and general, awarded a married person in a civil action for personal injuries, are the separate property of such married person."

2. *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922 (1952); *Zaragosa v. Craven*, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461 (1949).

3. *Perkins v. Sunset Telephone & Telegraph Co.*, 155 Cal. 712, 103 P. 190 (1909).

4. *Christiana v. Rose*, 100 Cal. App. 2d 46, 222 P.2d 891 (1950).

5. There is nothing in *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257 (1954) in conflict with this. See *Perkins v. Sunset Telephone & Telegraph Co.*, 155 Cal. 712, 103 P. 190 (1909) and *Zaragosa v. Craven*, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461 (1949).

6. *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922 (1952); *Washington v. Washington*, 47 Cal.2d 249, 302 P.2d 569 (1956).

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 type of conduct constituting a defense to the cause of action, to be imputed to the wife.⁷

The reason underlying the imputation of the husband's conduct to the wife was the necessity of eliminating the possibility that he would benefit from his own wrongful conduct since he would have a community property interest in the damages recovered. The same rule and the same reason applied where the injured party was the husband and the contributorily negligent spouse the wife, at least after 1927, when the interests of both husband and wife were defined as "present, existing, and equal."⁸ Although the parties could contract between themselves as to the nature of the cause of action, such a contract, when entered into after the cause of action arose, was insufficient to prevent the imputation of contributory negligence where that defense existed.⁹

Coincident with the enactment of Civil Code section 163.5 the legislature in 1957 directed the Law Revision Commission to undertake a study "to determine whether an award of damages made to a married person in a personal injury action should be the separate property of such married person." The report and recommendation of the commission,¹⁰ which resulted in the 1968 legislation, points out quite clearly the undesirable side effects of the provision that damages awarded to a married person for personal injuries are separate property; although the doctrine of imputed contributory negligence based upon the community character of the damages recovered was effectively abrogated, the cure was, in many respects, far more dangerous than the disease. Obviously, the classification of "all damages, special and general," as the separate property of the injured spouse went far beyond the situation involving contributory negligence on the part of the other spouse. Consider the case of the husband who recovers substantial damages against a negligent defendant for injuries

7. Contributory negligence, see *McFadden v. Santa Ana, Orange & Tustin St. Ry. Co.*, 87 Cal. 464, 25 P. 681 (1891), and a long line of cases culminating in *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257 (1954).

8. Cal. Civ. Code § 161a, Stats. 1927, Ch. 265.

9. *Kesler v. Pabst*, 43 Cal.2d 254, 273 P.2d 257 (1954).

10. Cal. L. Rev. Com. Rpts., *Recom. & Stud.* 1966-67, pp. 1389-1402.

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suffered in an accident in which the wife was in no way involved. Substantial medical expenses may have been incurred and compensated for in the award of special damages; if community funds were expended in payment of such expenses the recovery nevertheless remained the separate property of the husband and the community was not entitled to reimbursement. The earning capacity of the husband may have been gravely impaired, not only during the period of hospitalization but also in the future, and this is a major item in the award of general damages. Although the earnings of the husband (and his ability to earn) are a community asset, the damages remained the separate property of the husband and the community had no interest therein. If they are the separate property of the husband, damages received for personal injuries are subject to his unrestricted disposition either by *inter vivos* gift or by way of testamentary act, and if he dies intestate the share of the surviving spouse will not usually exceed one-half and may be reduced to as little as one-third, as contrasted with the right to inherit the whole of the community property. If the husband, recognizing the inequities of the situation, decides to convert his separate property recovery into community property, both state and federal gift tax consequences arise; if he retains the recovery as his separate property it receives less favorable treatment at the time of his death.

The Law Revision Commission recommended a return to the earlier law and the enactment of legislation again making damages received by a married person for personal injuries resulting from the conduct of a third party community property. It recognized certain inherent defects (in addition to the doctrine of imputed contributory negligence) in the pre-1957 law and suggested legislation to deal with them. It proposed further that the original ailment, which produced the drastic cure of Civil Code section 163.5, be dealt with by providing that the negligence of one spouse does not bar recovery by the other unless such concurring negligence would be a defense if the marriage did not exist. (It is difficult to understand why this simple remedy did not occur to the legislators in 1957.)

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The commission's recommendation was accompanied by a draft of the proposed legislation. New measures were proposed: first, an act to amend sections 146, 163.5 and 171a of, and to add sections 164.6, 164.7, and 169.3 to, the Civil Code, relating to married persons, including their community property and tort liability; second, a measure amending section 171c of the Civil Code. The recommendation was accepted and the legislation adopted as a package, with the addition of an amendment to section 168 of the Civil Code making community property personal injury damages subject to the payment of debts contracted by either husband or wife for the necessities of life furnished to them or either of them while living together.¹¹

Effects of the New Legislation

(1) Civil Code section 163.5 has been amended so that personal injury damages paid to a married person are separate property only if they are paid by the other spouse. One of the effects of section 163.5 as previously enacted was to eliminate the doctrine of interspousal immunity for personal torts;¹² the liability of either spouse for personal torts, intentional or negligent, causing injury to the other spouse is preserved by the amendment, and the recovery is separate property of the injured spouse. In all other cases the original rule applies since the character of such damages as community property is determined by section 164 of the Civil Code.

(2) The new Civil Code section 164.6 deals specifically with the imputed contributory negligence problem. The old rule, imputing contributory negligence from one spouse to the other on the theory of the negligent spouse's participation in the recovery as community property, is eliminated by providing directly that the negligence or wrongdoing of the other spouse is not a defense in an action against a third party by the injured spouse except in cases where such negligence or wrongdoing would be a defense if the marriage did not exist.

¹¹ Cal. Stats. 1968, Chs. 457, 458, Cal. Rptr. 97, 376 P.2d 65 (1962); pp. 128-133. Klein v. Klein, 58 Cal.2d 692, 26 Cal.

¹² Self v. Self, 58 Cal.2d 683, 26 Rptr. 102, 376 P.2d 70 (1962).

(3) The new Civil Code section 164.7 deals with the recovery of damages by one spouse for injury suffered through the negligence, or wrongful act or omission to act, of the other spouse and provides that community property may not be used to discharge the liability of the tortfeasor spouse to the other spouse until the separate property of the tortfeasor spouse has been exhausted. The right of the parties to agree to the use of community property in such a case is limited to agreements entered into after the occurrence of the injury, and subsection (c) reserves the right of the tortfeasor spouse to rely on insurance liability policies which he may have even though the premiums thereon may have been paid with community funds.

(4) Subsection (a) of the new Civil Code section 169.3 treats recovery for personal injuries to a married person in the same manner that earnings and accumulations are treated under Civil Code sections 169, 169.1, 169.2 and 175 and makes it clear that such recovery is the separate property of the injured spouse if it is received under the circumstances paralleling those in the other sections. Subdivision (b) provides for a right of reimbursement in the event that the spouse of the injured person has paid expenses incurred by reason of the injury out of either separate property or community property under his management and control.

(5) The amendment to section 171a of the Civil Code clarifies the liability of each of the spouses for injury or damage caused by the other and limits recovery to the separate property of the spouse incurring the liability and to the community property under his or her management and control. The most important effect of this amendment is the clarification of the law relating to liability for torts of the wife.

(6) The amendment to Civil Code section 171c again places under the control and management of the wife damages received as community property by her for personal injuries. The language of the amendment, substituting the phrase "community personal property" for the former word "money," eliminates the uncertainty which previously existed

concerning the nature of earnings and damages not received in cash. It also makes it plain that the wife can control earned wealth originally acquired as "money" and items purchased or earned by such wealth until it ceases to be a separately manageable item of community property. The husband is given a right to use community property received as damages to pay for expenses incurred by reason of the wife's personal injuries, or to reimburse his separate property or the community property under his management and control in the event that it has been necessary for him to advance payment from such sources.

(7) As previously pointed out the amendment to section 168 of the Civil Code provides for the inclusion of community property personal injury damages of the wife and the treatment of such damages in the same manner as earnings insofar as liability for necessities is concerned.

(8) Certainly the greatest innovation embodied in the 1968 legislation is the special provision contained in the amendment to Civil Code section 146, concerning the division of property received as personal injury damages on divorce or separate maintenance. Up to this point the statutory "package" merely reinstates the concept of damages for personal injuries as community in character, eliminates the rule imputing contributory negligence based solely on the nature of the recovery, and makes certain corrective changes dealing with the management of such recovery. As previously mentioned, in most cases the primary item of general damages is the impaired earning capacity or loss of earnings of the injured spouse. Obviously, if a divorce action is brought shortly after the damages are recovered and they are treated as regular community property and apportioned between the parties, a substantial portion of the award may represent the loss of earnings which would be received after the judgment of divorce or separate maintenance. The section as it now stands provides that without regard to the ground on which the decree is rendered or to which party the divorce or separate maintenance is granted, community property personal injury damages shall be assigned to the party who suf-

ferred the injuries unless the court, after taking into consideration the economic needs of each party, the time that has elapsed since the recovery of the damages, and all other facts of the case, determines that the interests of justice require another disposition. If the court so decides, it may assign the community property personal injury damages to the parties in such proportions as the court deems just under the facts of the particular case. This creates a completely new form of community property to be dealt with at the time of divorce or the granting of a decree of separate maintenance, and sets up a very different rule for its award than is applicable in the case of the normal community property or quasi-community property. While this may raise a constitutional problem, it would seem that the unique nature of such property, having as its source the compensation for injuries to one of the spouses, is sufficient to sustain its separate classification.

Summary. The new legislation dealing with recovery for personal injuries returned the status of such recovery to that of community property, eliminated the doctrine of imputed contributory negligence to the extent that the doctrine has been predicated solely upon the community character of the damages recovered, clarified the right of management and control of property so received and its liability for debts of the parties, and created a separate category for the treatment of such property upon divorce or separate maintenance.

The changes were badly needed and apparently have solved the problems existing before 1957 as well as those created by the enactment of Civil Code section 163.5 without creating any serious difficulties. This does not mean that the problems of the past have vanished; with the exception of the amendments to sections 168 and 171c of the Civil Code (which amendments apply only to "community property personal injury damages") all the provisions of the new legislation are subject to the savings clause which provides that: "(t)his act does not confer or impair any right or defense arising out of any death or injury to personal property occurring prior to the effective date of this act." Damages received for personal injuries during the past eleven years are, to the

extent that their character has not been changed by co-mingling with community property or by agreement, the separate property of the spouse who received them. Further, causes of action which arose before the effective date of the new legislation, but which have not yet been tried or settled, will result in the acquisition by the injured party of an award which is his or her separate property. Having once opened Pandora's box, the evils which were released are not returned to confinement merely by closing the lid.

Integrated Property Settlements—Support Provisions; Modifications and Enforcement

The background of the law pertaining to integrated property settlement agreements, the modification and enforcement of support provisions contained in such agreements, and the 1967 amendments to Civil Code section 139 have been previously discussed.¹³ No cases under the 1967 law have as yet reached the point of decision in the appellate courts, but several recent cases under the old law deserve attention.

In *Hecht v. Hecht*¹⁴ and in *Tremayne v. Striepeke*,¹⁵ the court was concerned with the question of whether the provisions contained in an integrated property settlement agreement were "support" provisions within the meaning of Civil Code section 139. In both cases the agreements were entered into during the period covered by the 1961 amendment to Civil Code section 139, providing for the modification of provisions for support of the spouse contained in an integrated property settlement agreement where there were minor children of the parties.

The agreement in *Hecht* was executed as of April 24, 1963, and the agreement in *Tremayne* was executed on December 21, 1961; in both cases there were minor children. In *Hecht* the parties were unable to consummate a property settlement during the pendency of the divorce action. They entered

¹³. See *Cal Law Trends and Developments 1967*, pages 113-117.

¹⁴. 259 Cal. App.2d 1, 67 Cal. Rptr. 293 (1968).

¹⁵. 262 Cal. App.2d 107, 68 Cal. Rptr. 470 (1968).

into a stipulation for support of the children, of the wife, and otherwise effecting but not completing a disposition of their property rights. Thereafter, an interlocutory decree of divorce was granted to the wife which, among other things, reserved to the court for its determination the issues of alimony, child support, and division of community property. Final judgment of divorce was entered on August 31, 1962. The wife remarried in September, 1962, and the husband remarried in October of that year. A property settlement agreement was finally executed April 24, 1963, and this settlement was incorporated *in haec verba* into an order of the court dated June 28, 1963. The agreement (and the court order) provided for "alimony payments," and stated that such payments should not be modifiable by either party or the court, that they should terminate only upon expiration of 121 months from May 1, 1963, or upon the death of the wife, and that they should not terminate upon the death of the husband or upon remarriage of the wife. Further provision was made for the payments to constitute a charge against the estate of the husband if he pre-deceased his former wife within the 121-month period. The agreement was expressly stated to be an integrated one, and both parties conceded that it was one in fact.

The court, in deciding that this was not a provision for "support" within the meaning of Civil Code section 139, pointed out that alimony or support provisions for a wife were not usually made in a settlement executed after the wife has remarried. After discussing the general rules pertaining to alimony and support payments as arising primarily from the marital relationship, and after pointing out that one of the inherent characteristics of alimony is that it is paid during a period in which a divorced wife remains unmarried and that payment thereof ordinarily terminates on the death of either spouse, the court went on to state the well-settled rule that when installment payments have been made an integrated part of a settlement, although such payments may have been designated as alimony or support payments, they are nevertheless not alimony to the extent that they represent a division of the community property itself,

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or constitute an inseparable part of the considerations of the property settlement. The court then held that the payments, provided to be paid under the terms of the agreement and under the decree, were a contribution to division of property rather than a substitute for marital support and that they were therefore outside the scope of Civil Code section 139 as amended.

The court in the *Tremayne* case relied heavily upon *Hecht*. In the latter case the parties had entered into a property settlement agreement prior to divorce which contained provisions for support of the children, a division of the community property and support of the wife. By virtue of the provisions for support of the wife the husband committed himself to make payments of \$200 monthly (in two installments) which, as the agreement expressly provided, "shall continue during the joint lives of husband and wife and until wife shall remarry, or they shall cease on the death of husband or on the death or remarriage of wife." The interlocutory decree adopted these provisions and the final decree made binding any and all provisions in the interlocutory judgment. More than four months after the entry of the final decree the parties entered into a supplement to the original agreement which provided that the payment of alimony should terminate 10 years and 30 days after the execution of the supplement, and that the supplement as well as the original statement be deemed integrated and non-modifiable except by written agreement of the parties or upon order of the court. One month later the court made its order modifying the interlocutory and final decrees and ordered the husband to pay the specified support sums for the period stated in the supplement. Thereafter the wife remarried and the husband ceased making support payments. The court concluded that these payments were not "support" payments within the meaning of Civil Code section 139.

That there is a fundamental distinction between installment payments, made directly as a part of the property division, and provisions for support contained in an integrated property settlement agreement, which constitute an integral part

of the consideration for the property settlement as a whole, does not appear to have occurred to the court in *Hecht*. Obviously, if the obligation is of the first kind there is no integrated agreement; the contract simply relates to the division of property and nothing more. Language in the *Tremayne* decision indicates that the court may have really regarded the purported support provisions as payments to be made as part of a non-integrated agreement for division of property, despite the express language stating the agreement to be an integrated one. The court discusses the case of *Hilton v. McNitt*,¹⁶ with particular reference to the second decision in that case,¹⁷ holding that an ambiguous provision relating to payments for "support" was in fact a payment in lieu of property. If the provisions in *Hecht* and in *Tremayne* were ambiguous the decisions would be justifiable. But it is difficult to ascertain whether the courts in both cases were simply unaware of the nature of an integrated property settlement agreement or decided to narrow the application of Civil Code section 139 despite the express language of the statute.

Another example of judicial gymnastics appears in *Garrett v. Garrett*.¹⁸ The case also points up an adage well known to the legal profession: "Never act as your own attorney unless you want a fool for a client." The combination of the two has resulted in a decision completely sound in its ultimate result but absolutely weird in the path that was followed to reach the decision, both by the court and by the unfortunate defendant, who was also a respected member of the bar. The problems inherent in the case were enhanced by the counsel for plaintiff wife who ultimately testified that he had advised the court at the divorce hearing that the parties had entered into a property settlement agreement but did not give the agreement to the court to inspect because he wished the court to retain jurisdiction to enforce by contempt the support provisions.

The facts of the case are simple and the conduct of the

16. 49 Cal.2d 79, 315 P.2d 1 (1957).

18. 258 Cal. App.2d 407, 65 Cal.

17. 200 Cal. App.2d 879, 19 Cal.

Rptr. 580 (1968).

Rptr. 688 (1962).

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parties in relation thereto might also be characterized by the same term. They entered into an agreement which (as the court properly found) was clearly integrated. The agreement contained a provision for payment of support for the children and for the support of the wife until her death or remarriage. The interlocutory decree of divorce contained precisely the same provisions as did the property settlement agreement concerning child custody, child support, and support for the plaintiff wife, except that the agreement characterized the latter payments as "support and maintenance" whereas the decree called for "alimony and support." The defendant agreed to permit the matter to go by default and did not appear at the trial. The final judgment of divorce entered in 1955 incorporated the provisions of the interlocutory decree by reference, and in April of 1964 the court ordered the former husband to show cause why he should not be adjudged guilty of contempt for non-compliance with the alimony and child support provisions of the interlocutory decree and the final decree of divorce. The court did not hold him in contempt but ordered payment of substantial arrearages, attorneys' fees and nominal costs.

On appeal, the court confirmed the integrated nature of the agreement and also held that there was no merger of the property settlement agreement into the judgment of divorce. In view of the fact that the trial judge had not even seen the agreement, that it was not incorporated into the decree expressly or by reference, and that the decree did not purport to order performance of the terms of the agreement, the finding as to lack of merger is not only logical but indisputable. In discussing the jurisdiction of the court to determine arrearages, reference is made to *Bradley v. Superior Court*,¹⁹ where it was held that contempt is not available as a remedy to enforce either the wife or child support provisions of an integrated property settlement agreement incorporated in the divorce decree. Since the trial court in this case had not imposed contempt, the relevance of the statement is somewhat

¹⁹. 48 Cal.2d 509, 310 P.2d 634 (1957).

dubious. But even more amazing is the statement which follows it, to wit: “(t)he principle of the *Bradley* case is not restricted to situations where the property settlement agreement has been merged or incorporated into the decree of divorce, but applies where the issue of the validity of the agreement has been previously presented to the divorce court.” If the decree of the court has not been substituted for the agreement of the parties by way of merger it is somewhat difficult to determine where the *Bradley* principle comes into play. Subsequent language of the court in discussing the general rules relating to the effect of judicial approval as rendering the validity of the agreement *res judicata* is not particularly helpful, although clearly correct. Nor does the further discussion of the obvious fact that the trial court was not empowered to modify or reject, without the consent or acquiescence of the husband, the provisions for the support of the wife contained in the integrated agreement shed much light on the problem. However, at this point the defendant comes to the rescue of the court and of the case; unfortunately, his assistance was of benefit to everyone but himself. On the face of the decree, over the signature of the defendant husband, appeared the following statement: “Agreed to and approved both as to form and contents.” As pointed out by the court, this statement was apparently signed prior to the divorce hearing, and it was clear that the defendant intended that the support provisions be adopted by the court notwithstanding the provisions of the integrated property settlement agreement. Accordingly, such payments were no longer an integral part of the adjustment of property rights but were severable, and the order of the court was not based upon an integrated property settlement agreement whose provisions were inseparably related to the provisions for division of property. For those who enjoy Alfred Hitchcock’s stories, this decision is recommended for late evening reading.

In the case of *Davis v. Davis*²⁰ the supreme court was confronted with the question, as a matter of first impression,

²⁰. 68 Cal.2d 290, 66 Cal. Rptr. 14, 437 P.2d 502 (1968).

whether after the remarriage to each other of divorced parents either may enforce against the other an order for child support made in a prior divorce proceeding. The peripatetic nature of the husband's employment created problems; at the time of the first divorce no order was made for support of the children as the defendant had been served outside of California by publication; subsequently, pursuant to the stipulation of the parties, an order for child support was made. Thereafter the parties remarried each other and several months later again separated. Plaintiff wife instituted a second divorce action in California but, since the defendant was then employed in the oil fields in Iran, he was again served by publication and again the divorce decree did not provide support payments for the children. Upon his return to California the parties again stipulated that a court order could be made for child support, and a second order was duly made. The defendant complied with this order. The mother then sought to collect child support payments for some 36 months between the separation that followed the remarriage and the second support order and relied upon the support order entered in the first divorce action.

Could she recover? No. If the parties again intermarry child custody and support orders as between themselves are thereupon terminated, as is the jurisdiction of the court to enforce such orders. This is true whether or not the parents subsequently divorce again. The incidence of remarriage of divorced couples is low enough in itself, but when there is added to it the time lag here involved it seems doubtful that many cases will require the application of the rule laid down in *Davis*.

May a person ordered to make support payments be held in contempt when he does not make them because he does not have the ability to make the payment in full but is capable of paying a lesser amount? Yes, said the supreme court, in *Lyon v. Superior Court*,¹ sustaining the lower court and reversing the district court of appeal. The reason? After

1. 68 Cal.2d 446, 67 Cal. Rptr. 265, 439 P.2d 1 (1968). For further dis-

cussion of this case, see YORK, REMEDIES, in this volume.

considering the cases cited by the defendant, the court states: “. . . nothing in any of those cases is authority for the proposition that a court may not render a contempt adjudication for failure to make support payments in a specific amount, even though smaller than those ordered, if the party did not have the ability to pay in full the amount ordered.”

If carried to its logical extreme the reasoning in this case practically eliminates the defense of inability in contempt proceedings. In a society which is both affluent and oriented in the direction of social welfare, it would be very difficult to find a father who would not be able to pay *something*. Must a father, faced with adversity and completely unable to pay the full amount required by the support order, be faced with the additional problem of second-guessing a court as to the amount he is “able” to pay?

Civil Code section 139.7 provides: “An order for payment of an allowance for the support of one of the parties pursuant to Section 139 shall terminate at the end of the period specified in the order and shall not be extended unless the court in its original order retains jurisdiction.”

What is the meaning of “original order”? The only logical answer is that given by the court in *Maben v. Superior Court*.² In its original order the trial court ordered the defendant to pay the plaintiff \$600 per month as alimony and this was subsequently reduced to \$485 per month. Thereafter, on the defendant’s order to show cause, the court modified the prior support order as follows: “Defendant is ordered to pay to plaintiff for her support and maintenance for 12 months \$250 a month commencing January 1, 1966, and continuing for 11 months thereafter at which time alimony shall terminate.” The husband fully complied with the provisions of this order. All orders were silent as to continuing jurisdiction to modify. On January 13, 1967 (after full compliance by the defendant husband with the last order of the court ordering payment for support and maintenance for 12 months) the wife obtained an order requiring defendant to

². 255 Cal. App.2d 708, 63 Cal. Rptr. 439 (1967).

show cause why he should not be required to pay \$600 per month as alimony in the future. The husband moved to dismiss on the grounds that the court no longer had any jurisdiction to grant the relief sought.

Upon denial of the defendant's motion and upon setting of the order to show cause, the husband filed his petition for writ of prohibition. The appellate court looked to the digest of the bill by which section 139.7 was adopted which read, ". . . . termination of alimony payments. Adds section 139.7, Civ. C. Provides that alimony payments shall terminate as provided in the order for support of the party unless that order provides for their extension." The legislative intent is clear and, as applied to the instant case, the statutory language referred to the last order made by the court for limited alimony. Obviously the court had jurisdiction to modify the earlier orders which provided for payments for an indefinite period of time; it did not retain any jurisdiction to modify the last order after the expiration of the time limited therein for payment. As the court phrased it, ". . . . the legislature intended to provide that the obligation of one party to pay for the support of the other party pursuant to section 139 shall terminate at the end of the period specified in the latest order and shall not be extended unless the court in *that* order expressly retains jurisdiction."

Paternity and the Conclusive Presumption of Legitimacy

At common law, a child born to a married woman was legitimate unless there was evidence to show that the husband was:

1. Incompetent. 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother. 3. Entirely absent, at the period during which the child must, in the course of nature, have been begotten. 4. Only present under circumstances as afford clear and satisfactory proof that there was no sexual intercourse.³

³ Hargrave v. Hargrave, 9 Beaver 552, 50 Eng. Rpt. at 458 (1846).

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California Evidence Code, section 621⁴ provides: "Notwithstanding all other provisions of law, the issue of a wife, cohabitating with her husband, who is not impotent, is conclusively presumed to be legitimate."

The California statute includes the first two common-law tenets, though "incompetent" has been changed to "impotent" and the "cohabitating" is used to incorporate the second.

A number of cases, beginning with *Estate of McNamara*,⁵ follow the third common-law tenet to create an exception to the statute. In *McNamara* a wife deserted her husband and lived continuously thereafter with another man. 304 days after her change of partners she gave birth to a son whom nobody, including the court, regarded as her husband's child. *McNamara* stated the rule: ". . . the conclusive presumption must be limited to cases where the husband has had intercourse with the wife during the normal period of conception."⁶ Therefore, as at common law, the conclusive presumption does not apply unless conception occurs during cohabitation.

The common-law rule of the conclusive presumption of legitimacy has been followed without exception. The statute, modified by the *McNamara* doctrine, has also been followed, although two apparent judicial exceptions exist. A medically sterile husband escaped the conclusive presumption of the paternity of his wife's child in *Hughes v. Hughes*⁷ by a process of reasoning which essentially equated sterility with impotency.⁸ The 1967 case of *Jackson v. Jackson*⁹ opens one avenue leading to possible avoidance of the conclusive presumption, based on blood test evidence, despite previous legis-

4. Cal. Stats. 1965, Ch. 299. Formerly Cal. Code of Civ. Pro. § 1962, subd. (5).

5. 181 Cal. 82, 183 P. 552, 7 A.L.R. 313 (1919).

6. 181 Cal. at 95, 183 P. at 557, 7 A.L.R. at 322.

7. 125 Cal. App.2d 781, 271 P.2d 172 (1954).

8. When the statute was enacted, medical operations to produce sterility were virtually unknown, the concept hardly recognized. The common law "incompetent" simply meant lack of ability to procreate. The Hughes case follows the common law.

9. 67 Cal.2d 245, 60 Cal. Rptr. 649, 430 P.2d 289 (1967).

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 lative action,¹⁰ and an affirming judicial decision,¹¹ which refused to alter the statute to include results of blood tests. In *Jackson*, the husband was permitted to introduce blood tests indicating his non-paternity of the child *only* in order to introduce further evidence to place himself within the *McNamara* rule.¹² The *Jackson* case creates an exception to the statute only if the husband can account for all his wife's time.

Neither the common law nor the statute relieves the husband of the effect of the conclusive presumption if his wife has intercourse with another man and conception occurs during marital cohabitation. That the husband may not be the biological father is totally immaterial. This was made clear in the first case¹³ to apply the statute and is dramatically illustrated in the recent case of *Hess v. Whitsett*.¹⁴ In this case, it was clear that Luther Whitsett, a Negro, was the natural father of Kathy Hess, a child described by the court as having "chocolate colored skin." The child's mother, a Caucasian, admitted having intercourse with Whitsett over a two-month period during which time she was cohabitating with her husband, also a Caucasian. Regardless of these facts, the statute clearly applied: the husband was neither impotent, absent,

10. Cal. Evid. Code §§ 890–896, formerly Cal. Code of Civ. Pro. §§ 1980.1–1980.7, is the California version of the Uniform Act on Blood Tests to Determine Paternity. When the statute was enacted, the legislature specifically *excluded* section 5 of the Uniform Act which provides: "The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child."

11. *Kusior v. Silver*, 54 Cal.2d 603, 7 Cal. Rptr. 129, 354 P.2d 657 (1960).

12. This he did by showing that the couple cohabitated less than four days, that they were together continuously during that time, and therefore, as

shown by the blood tests, conception could not possibly have occurred during cohabitation.

13. In *Estate of Mills*, 137 Cal. 298, 70 P. 91 (1902), Diana and Roland Chatham cohabitated, i.e., lived together as husband and wife within the same household, and as a "normal" family, with one exception. After 1862, Roland never had intercourse with his wife; she never had intercourse with anyone but the family boarder, Robert Mills, whose bed and bedroom she shared. Nevertheless, the two children born after 1862 were held to be legitimate children of the husband, and denied any share of the Mills estate.

14. 257 Cal. App.2d 552, 65 Cal. Rptr. 45 (1967).

nor practicing abstinence; therefore he was Kathy's legal father and she his legitimate daughter.

A major problem confronting the court in *Hess* was the statement in *McNamara* that the conclusive presumption was subject to a "racial difference" exception.¹⁵ The court, pointing out that the language was dictum, concluded, "The doctrine of *stare decisis* does not apply to dictum . . . (and) . . . there is no sound basis for the judicial creation of a racial difference exception."¹⁶

The effect of the conclusive presumption is to make it impossible to show that a child who is conceived by a married woman while the latter is cohabitating with her husband is illegitimate. Evidence Code section 621, modified only by judicial acceptance of the limitations contained in the common-law rule on which it is based, has been once again reinforced.

Legitimation and Adoption

The ease with which legitimation of an illegitimate child can be accomplished by adoption¹⁷ is emphasized by the recent case of *Estate of Maxey*.¹⁸ Bill Maxey and Nettie Hunt met in 1935, and their son, Harry, was born a year

15. 181 Cal. at 96, 183 P. at 557-558, 7 A.L.R. at 323: "There is one class of cases where it is recognized, in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance white, and it appears that the wife has had intercourse with a man of another race, as for instance a Negro, and the child is of mixed blood. (Citations.) The reason why the conclusive presumption is not applied in such instances is that the element of indeterminability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual

fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable."

16. 257 Cal. App.2d at 556, 65 Cal. Rptr. at 48.

17. Cal. Civ. Code § 230: **Adoption of illegitimate child.** The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth.

18. 257 Cal. App.2d 391, 64 Cal. Rptr. 837 (1967).

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later. Nettie refused to marry Bill, but listed his name on the birth certificate. It was not clear when Harry took the Maxey name, but Bill acknowledged the child as his own in Oklahoma and later in California after the parties had married others and had moved to this state. Bill visited Harry about every six months for several years, once asked that Harry be permitted to spend the summer at the Maxey home (permission was refused), and on another occasion addressed Harry as “son.” Upon Bill’s death the court ruled that Harry was entitled to letters of administration in preference to Bill’s former “wife,” his brothers or sisters, or the public administrator because he was a legitimate child within the meaning of Civil Code section 230.

Perhaps there was further contact between father and son, perhaps Bill Maxey contributed to Harry’s support, perhaps he made more than the token efforts toward Harry’s upbringing apparent from the opinion. Probably not. Nevertheless, Harry was a legitimate child, fully entitled to all rights thereof.

Problems in the area of adoption received attention from both the legislature and the courts in 1968. Subsection (b) was added to Civil Code section 222, providing: “If the court is satisfied that the adoption of a child by a stepparent is in the best interest of the parties and is in the public interest, it may approve such an adoption without regard to the ages of the child and such adoptive stepparent.”¹⁹

Literally construed, this section could result in children of earlier marriages being adopted by subsequent spouses younger than the children!

Civil Code section 232.5²⁰ was added in 1965 to liberalize existing custody rules granting preferential treatment to natural parents over third parties. In the first case to consider this section, *Adoption of Neal*,¹ the child had been left with an aunt and uncle for several years. The natural father had failed to communicate with the child for over six months

19. Cal. Stats. 1968, Ch. 568, p. 365.

20. Section 232.5: Cal. Stats. 1965, Ch. 1064. “The provisions of this chapter shall be liberally construed to serve

and protect the interests and welfare of the child.”

1. 265 Cal. App.2d —, 71 Cal. Rptr. 300 (1968).

and had made only token payments toward his support. In reversing the decision of the lower court denying the petition of the aunt and uncle in an abandonment proceeding to have the child declared free of parental custody, the appellate court pointed out that upon a new hearing of the petition the provisions of Civil Code section 232.5 must be liberally applied. The rule prior to the adoption of that section limiting the inquiry solely to whether the child had been abandoned within the meaning of section 701 of the Welfare and Institutions Code [the predecessor of Civil Code section 232] is no longer law, and the making of a wise selection between the natural parent and a third party is now a duty imposed upon the court.

Artificial Insemination

Artificial insemination is the medical process which enables a couple, otherwise unable to have children, to achieve pregnancy by means of a surgical injection of the wife with semen obtained from a third party donor. This procedure has caused complicated legal problems until recently.

In the first case to raise the issue, the courts were so startled and hostile to the new concept that they called it "adultery." Unanswerable questions resulted. If it was adultery by the woman—the donee—would it not also be adultery on the part of the donor? If so, when? If at the time of the donation, what if the semen was never used? If at the time of injection, and the donor had died (semen so collected is often frozen for use at a later date) the donee would not only be guilty of adultery but also necrophilia. Perhaps the doctor, rather than the donor, should be the adulterer? If the doctor were a woman, the result would be a child conceived by two females. Absolve both the donor and the doctor from adulterous guilt? Then the woman would commit unilateral adultery, or if she injected the semen herself, self-adultery!

By the time the matter had reached the appellate court level, no reference was made to "adultery," but the decisions (all from an intermediate New York appellate court) were confused and conflicting. Allowing the husband visitation

rights, one case² held the child conceived by artificial insemination not illegitimate because “. . . . the child has been potentially adopted or semi-adopted.”³ A later case⁴ found the child “not the legitimate issue of the husband”⁵ but nevertheless ordered him to support the child because his consent in writing to the artificial insemination constituted an implied contract to do so.

People v. Sorenson,⁶ a unanimous decision by the California supreme court, is the first logical and comprehensive judicial comment on the matter. When Lois and Folmer Sorenson were divorced, Lois declared she wanted no support award for their son, Christopher, who was conceived by artificial insemination to which Folmer had consented in writing. The court ordered no support payments but retained jurisdiction in the matter. When Lois later became too ill to work, she applied to the Sonoma County Welfare Department, which provided assistance but requested Folmer to contribute to Christopher’s support. He refused and was convicted of willful failure to provide for a minor child in violation of California Penal Code section 270. In affirming that decision, Justice McComb, writing for the court, reasoned that: “(If) a husband who, unable to accomplish his objective of creating a child by using his own semen, purchases semen from a donor and uses it to inseminate his wife . . . proof of paternity has been established beyond a reasonable doubt.”⁷

Since the only issue before the court in *Sorenson* was the matter of child support, no determination was made on legitimacy, but the court left no doubt that it would rule in favor of legitimacy when the opportunity arises.

The legislature took only a few weeks following *Sorenson* to add to Civil Code section 196b:⁸ “The husband of a woman

2. Strnad v. Strnad, 190 Misc 786, 78 N.Y.S.2d 390 (1948).

3. 190 Misc. at 787, 78 N.Y.S.2d at 391.

4. Gursky v. Gursky, 39 Misc.2d 1083, 242 N.Y.S.2d 406 (1963).

5. 39 Misc.2d at 1088, 242 N.Y.S.2d at 411.

6. 68 Cal.2d 280, 66 Cal. Rptr. 7, 437 P.2d 495 (1968). For further discussion of this case, see Collings, CRIMINAL LAW AND PROCEDURE, in this volume.

7. 68 Cal.2d at 286, 66 Cal. Rptr. at 12, 437 P.2d at 500.

8. Cal. Stats. 1968, Ch. 235, p. 5.

who bears a child as a result of artificial insemination shall be liable for support of the child in the same manner as if he were the natural father, if he consented in writing to the artificial insemination.”

Additional legislation is necessary because courts cannot formulate details and regulations concerning a medical technique which is constantly growing more popular. A suggested model might be similar to a 1967 Oklahoma statute,⁹ the only comprehensive legislation passed to date. Combining regulations well established by the medical profession with existing adoption laws, the Oklahoma statute specifically makes the child conceived by artificial insemination the legitimate child of the husband consenting to the use of the process. The husband, the wife, and the physician must all sign the documents, and they must be approved by “the judge having jurisdiction over adoption of children.” (The last phrase makes it clear that payment of legal fees will be required of couples wishing to use the technique.)

Hopefully, similar legislation can be enacted in California to end such legal confusion and conflict over artificial insemination.

9. Oklahoma Statutes Annotated, Title 10 §§ 551-553:

§ 551. Authorization

The technique of heterologous artificial insemination may be performed in this State by persons duly authorized to practice medicine at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purpose of conceiving a child or children. Laws 1967, c. 305, § 1.

§ 552. Status of child

Any child or children born as the result thereof shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of such technique. Laws 1967, c. 305, § 2.

§ 553. Persons authorized—Consent

No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this State, and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique. The said consent shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, and the judge having jurisdiction over adoption of children, and an original thereof shall be filed under the same rules as adoption papers. The written consent so filed shall not be open to the general public, and the information contained therein may be released only to the persons executing such consent, or to persons having a legitimate interest therein as evidenced by a specific court order. Laws 1967, c. 305, § 3.

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nation as still remains after *Sorenson*. Until it is, *Sorenson* has at least served to clarify two previously unanswered problems: the identity of the father of a child conceived by artificial insemination, and his resulting financial responsibility for the child.

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