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Survey: Women and California Law

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SURVEY: WOMEN AND CALIFORNIA LAW

by Victoria Gold* and Diane Whitney**

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

The survey period for cases in this issue is from August 1978 through May 1979. Summaries of legislation enacted up to September 30, 1978 are included in the first issue of the Women's Law Forum.*** Due to the small amount of completed legislative action prior to printing time, no legislative summaries are included in this volume's Survey. A summary of significant legislative action from October 1, 1978 to September 30, 1979 will be included in the Survey of Volume 10, due for publication in the Spring 1980, and in each issue of the Women's Law Forum thereafter.

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I. CRIMINAL LAW
A. RAPE AND OTHER SEX OFFENSES

1. Certification and Sentencing of Mentally Disordered Sex Offenders

*People v. Barnes*, 84 Cal. App. 3d 745, 148 Cal. Rptr. 824 (4th Dist. 1978). After defendant was convicted of involuntary manslaughter, he was examined psychiatrically and declared to be a mentally disordered sex offender (MDSO). He received probation after his sentence was suspended. Two years later when his probation was revoked, he was certified to the psychiatric department of the superior court and found to be an MDSO not amenable to treatment.

The court of appeal reversed the holding that certification as an MDSO must be based on either a conviction of a sex offense requiring registration as an MDSO under Penal Code section 290 or, alternatively, by clear proof that the offense was committed primarily for purposes of sexual arousal or gratification. Welfare and Institutions Code section 6302. Here the conviction for involuntary manslaughter did not satisfy the legal prerequisites for a certification order.

† *People v. Saffell*, 87 Cal. App. 3d 157, 150 Cal. Rptr. 804 (4th Dist. 1978), *hearing granted*, February 1, 1979. The trial court found defendant, charged with rape and sexual perversion, to be a mentally disordered sex offender who was amenable to treatment. Pursuant to Welfare and Institutions Code section 6316.1, defendant was committed to a mental health facility for the upper term for his offenses without time off for good behavior.

The court of appeal, affirming the conviction but reversing the commitment order, found that this sentencing scheme denied equal protection to mentally disordered sex offenders amenable to treatment since it provides harsher penalties for them than for either non-mentally disturbed sex offenders or mentally disturbed sex offenders who are not amenable to treatment.

† Since the California Supreme Court has granted a hearing in this case, the court of appeal opinion is of no force or effect and is no longer an authoritative statement of any principle of law. 5 CAL. JUR. 2d, Appellate Review § 484 (1952), citing Knouse v. Nimocks, 8 Cal. 2d 482, 66 P.2d 438, (1937). Four such cases appear in this Survey for the sole purpose of familiarizing the reader with issues presently pending before the high court.
2. Psychiatric Exam of Victim

People v. Mills, 87 Cal. App. 3d 302, 151 Cal. Rptr. 71 (1st Dist. 1978). In a prosecution for rape, after a jury had been empaneled and sworn, the trial court entered a judgment of dismissal in favor of defendant because the alleged victim had refused to undergo a court ordered psychiatric examination. The court of appeal reversed, holding that the trial court abused its discretion in dismissing the action. The court held that although the trial court has the power to order a psychiatric examination of a victim of a sex crime, the sanctions for refusal to cooperate are limited and do not extend to forcing the victim to submit to an exam by the court’s contempt power. (Ballard v. Superior Court, 64 Cal. 2d 159, 410 P. 2d 838, 49 Cal. Rptr. 302 (1966).) The court also held that the prosecutor acted properly in advising the victim of her right to refuse a psychiatric examination. Finally, the court held that although the jury had been empaneled and sworn before the cause was dismissed, and the defendant placed in jeopardy, since the defendant had consented to the dismissal, a waiver of double jeopardy was implied.

In re Leonard M., 85 Cal. App. 3d 887, 149 Cal. Rptr. 791 (2nd Dist. 1978), hearing denied, January 3, 1979. A sixteen year old boy was made a ward of the juvenile court upon a finding that he had committed a lewd act on a five year old girl. The boy appealed the case primarily on the ground that his defense attorney had inadequately represented him by failing to order a Ballard examination of the victim.

The court of appeal affirmed, holding that there was nothing in the record to suggest that the boy’s attorney had not made a reasoned tactical decision in foregoing the Ballard motion.

3. Rape as Great Bodily Injury/Bodily Harm

People v. Sargent, 86 Cal. App. 3d 148, 150 Cal. Rptr. 113 (4th Dist. 1978), hearing denied, January 18, 1979. Judgments of conviction for forcible rape and first degree burglary were affirmed; however, the judgment that defendant was sane at the time of the offense was reversed because the trial court instructed the jury on the M’Naughten test rather than the American Law Institute test of sanity. The court of appeal further held that the trial court erroneously instructed the jury that forcible rape itself constituted great bodily injury. People v. Caudillo, 21 Cal. 3d 562,
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580 P.2d 274, 146 Cal. Rptr. 859 (1978). But the facts that, as a result of the rape, the victim became pregnant and suffered an abortion, were significant and substantial physical injuries sufficient to demonstrate great bodily injury. The error did not compel reversal because the jury would have found great bodily injury with or without the erroneous instruction.

People v. Lindsay, 84 Cal. App. 3d 851, 149 Cal. Rptr. 47 (2nd Dist. 1978). Defendant was convicted of burglary, oral copulation by force, and forcible rape. The jury found, pursuant to an instruction that commission of forcible rape or oral copulation alone could constitute great bodily injury, that defendant intentionally inflicted great bodily harm during the burglary. The prosecution was allowed to introduce evidence that defendant's blood type was the same as that found on the victim. The court of appeal modified the judgment by striking findings of great bodily injury pursuant to People v. Caudillo, 21 Cal.3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978) and affirmed.

People v. Hawk, 91 Cal. App. 3d 938, 154 Cal. Rptr. 773 (3rd Dist. 1979). A defendant who pleaded guilty to rape by force, violence and threat and admitted inflicting great bodily injury on the victim was sentenced to the upper term of five years for rape and an additional three years for inflicting great bodily injury. Defendant appealed on the grounds that the court had erroneously used the great bodily injury conviction to enhance the sentence for rape.

The court of appeal affirmed, holding that the trial court's finding that the defendant showed "viciousness and callousness," apart from the infliction of great bodily injury, was supported by evidence that, in addition to stabbing the victim, the defendant choked and hit her, had her submit to an act of oral copulation before raping her and kicked her afterwards.

4. Separate Sentencing for Multiple Sex Offenses

People v. Perez, 23 Cal. 3d 545, 591 P.2d 63, 153 Cal. Rptr. 40 (1979). Defendant was convicted of, among other offenses, forcible rape, forcible sodomy, two counts of forcible oral copulation and assault by means of force likely to produce great bodily injury. The trial court sentenced the defendant for rape but stayed execution of the sentences for sodomy and oral copulation on the
grounds that Penal Code section 654 prohibits punishment for more than one violation arising out of a given act.

The California Supreme Court reversed, holding that the applicability of Penal Code section 654 depends upon whether the defendant acted with single or multiple objectives. The trial court’s determination that the defendant’s single objective was to obtain sexual gratification was too broad and violated the statute’s purpose of ensuring that punishment is commensurate with the defendant’s culpability. The court held that punishment for each of the offenses was not precluded by Penal Code section 654 since: 1) none of the offenses was committed as a means of committing any other, 2) none facilitated commission of any other and 3) none was incidental to the commission of any other.

5. Evidence of Rape Victim’s Prior Sexual Experience

People v. Nemie, 87 Cal. App. 3d 926, 151 Cal. Rptr. 32 (3rd Dist. 1978), hearing denied, February 1, 1979. The defendant, who was convicted of forcibly raping a seventeen year old girl, attacked the conviction based on the court’s denial of his request for a hearing to determine whether the victim had enough prior sexual experience to know whether sexual penetration occurred.

The court of appeal found that the trial court properly exercised its discretion under Evidence Code section 352 denying the request. Although the victim’s face was covered during the attack, there was no showing by the defendant that prior sexual experience was necessary in order for a rape victim to know what type of object had penetrated her vagina.

6. Evidence of Minor’s Knowledge of Wrongfulness

In re Tony C., 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978). A juvenile court’s finding that a minor boy should be adjudged a ward of the court as a result of a rape by threat of great bodily injury was challenged on the ground that Penal Code section 26, subdivision (1) requires that a minor under fourteen must be shown to have known that his or her act was wrongful. The California Supreme Court affirmed the order sustaining the petition alleging rape, concluding that the boy recognized that his act was wrongful by his need to resort to threats of deadly force, and that he took his victim to a secluded location and asked, after raping her, if she intended to call the police. Also at issue was
Penal Code section 262 which requires that the physical ability of the accused to accomplish penetration must be proved as an independent fact and beyond a reasonable doubt. Here, the presence of seminal fluid and sperm, which was revealed in a physical examination of the victim shortly after the rape, was held to be sufficient evidence of physical ability.

B. PROSTITUTION

1. Discovery Requests Allowed Where Defendant Alleges Discriminatory Enforcement

   People v. Municipal Court (Street), 89 Cal. App. 3d 739, 153 Cal. Rptr. 69, (1st Dist. 1979). Three woman defendants were charged with violations of various penal code sections relating to prostitution (Penal Code sections 315, 318, and 647 subdivision (b)). They filed a pretrial motion to dismiss and a supplemental motion for discovery alleging denial of equal protection because the charges resulted from intentional, purposeful discriminatory law enforcement. The defendants alleged that their discovery requests would provide information to support their motion to dismiss. Defendants’ declarations alleged, on information and belief, that the district attorney had a policy of enforcing these penal code statutes against women who were allegedly involved in heterosexual prostitution, but not against male homosexuals when the violations occurred in certain commercial establishments. The trial court granted the requests for discovery; however, the prosecution successfully sought a writ of mandate in the superior court directing the municipal court to vacate its order on grounds that the court had exceeded its jurisdiction.

   The court of appeal vacated the superior court’s order and reinstated the municipal court’s order granting discovery. The court held that a defendant may raise a claim of intentional and purposeful discrimination in the enforcement of penal statutes, and that (s)he may obtain a pretrial discovery order requiring the prosecutor to produce information relevant to that claim. Murgia v. Municipal Court, 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975).

   The court, rejecting the prosecution’s contention, held that the defendants had demonstrated a plausible justification for discovery to support their claim of invidious discrimination where they alleged the intentional enforcement against a class of indi-
individuals was based on arbitrary sex classification. The court further held that the discovery requests specifically related to the defense asserted and sought only statistical and other documentary information. Thus the request did not present a circumstance (i.e., privileged information) where criminal discovery should be denied.

2. Sufficiency of Evidence for Conviction of Pandering

People v. White, 89 Cal. App. 3d 143, 152 Cal. Rptr. 312 (2nd Dist. 1979). Defendant was convicted under Penal Code section 266i for procuring a place in a house of prostitution for a sixteen year old girl. On appeal the defendant charged that he was denied due process since the prosecution did not rely on any specific act of prostitution to constitute violation of the statute.

The court of appeal upheld the conviction, noting first that the offense was completed by the defendant's act of procuring a place for the girl and second that there was sufficient evidence based on her testimony that: 1) he had advised her she would be engaging in various sexual acts and told her what to charge and 2) that she engaged in over one thousand sexual acts during the four or five months that she worked for him.

C. HOMICIDE

1. Relevance of Husband's Prior Threats to Wife's Claim of Self Defense

People v. Bush, 84 Cal. App. 3d 294, 148 Cal. Rptr. 430 (1st Dist. 1978). Defendant stabbed her husband during the course of an assault by him against her and was charged with murder under Penal Code section 187. Upon completion of evidence, the trial court granted the defendant's motion to dismiss first and second degree murder charges whereupon the jury convicted the defendant of involuntary manslaughter under Penal Code section 192, subdivision (2).

Because there was uncontradicted evidence that in the course of two prior beatings the victim had threatened to kill his wife, the court of appeal found prejudicial error in the trial court's refusal to give requested instructions to the jury that one who has been so threatened may take quicker and stronger measures to protect herself during an assault than one who has not received such threats. In addition, the admission of evidence that the de-
defendant knew she was the beneficiary of her husband's life insurance policy was found to be reversible error. In view of the fact that the trial court granted a dismissal of first and second degree murder charges, eliminating the question of malice aforethought as a matter of law, the court of appeal considered that testimony concerning the insurance policy could only confuse the jurors and thus should have been excluded under Evidence Code section 352.

2. Failure to Charge in Commitment Order

*People v. Superior Ct. (Grilli)*, 84 Cal. App. 3d 506, 148 Cal. Rptr. 740 (1st Dist. 1978), hearing denied, October 25, 1978. A defendant, charged with attempted murder, rape by force and threat, oral copulation and false imprisonment was granted a motion to dismiss the attempted murder charge because this charge was not named in the commitment order at the preliminary hearing. The court of appeal issued a unit of mandate setting aside the order since the preliminary hearing evidence showed that the attempted murder charge was based on probable cause. Thus, despite the failure to name the charge in the commitment order, the trial court exceeded its jurisdiction in dismissing the charge.

Also at issue in the case was the defendant's motion to dismiss allegations of great bodily harm as to each of the counts charged. Once again the trial court granted the motion and the appellate court reversed, holding that since Penal Code section 12022.7 does not define a separate offense but merely provides for an additional three-year sentence where great bodily injury is inflicted during the commission of the felony charged, it cannot be subject to a motion for dismissal under Penal Code section 995.

II. FAMILY LAW

A. Wrongful Death and Negligence Actions

1. Elements of Emotional Distress for Death of Fetus

*Austin v. Regents of University of California*, 89 Cal. App. 3d 354, 152 Cal. Rptr. 420 (2nd Dist. 1979). A husband, brought an action against the Regents of the University of California and a doctor for injuries suffered as a result of the death of his wife during delivery of their child, and the subsequent death of the unborn child. The trial court entered summary judgment for de-
fendants on the cause of action for emotional distress resulting from the death of the child. The court also dismissed the causes of action for wrongful death of the child and for breach of defendant's alleged contract to perform delivery of the fetus.

The court of appeal, in a 2-1 decision, reversed the judgment as to the cause of action for emotional distress holding that the husband had stated a triable cause of action by sufficiently pleading the three required elements of *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). Plaintiff alleged that he learned of the death by his own observation of the cessation of life in the fetus and that his shock was caused by the sensory and contemporaneous realization of the death. The other two required elements (presence at the scene and close relationship to the victim) were not disputed. The Court of Appeal unanimously affirmed the dismissals of the causes of action for wrongful death and breach of contract and the striking of punitive damages against the University of California pursuant to Government Code section 818.

The dissent, relying on *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), stated that *Justus* imposes a fourth factor for a cause of action for emotional harm in witnessing an accident: that plaintiff must be an involuntary witness and is denied recovery if he is a voluntary witness to the accident. The dissent assumed that plaintiff was voluntarily in the delivery room.

2. **Plaintiff's Inability to Identify the Manufacturer of DES**


† Since the California Supreme Court has granted a hearing in this case, the court of appeal opinion is of no force or effect and is no longer an authoritative statement of any principle of law. 5 CAL. JUR. 2d, *Appellate Review* § 434 (1952), *citing* Knouse v. Nimocks, 8 Cal. 2d 482, 66 P.2d 428, (1937). Four such cases appear in this Survey for the sole purpose of familiarizing the reader with issues presently pending before the high court.

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plaintiffs to develop precancerous and cancerous tumors and lesions. Plaintiffs alleged that there existed a common and mutually agreed-upon formula for the drug, that the various brands of DES were marketed by defendants as being fungible and interchangeable with all other brands of the drug and that there was a pharmaceutical practice of filling prescriptions of DES with a brand other than that prescribed.

The trial court sustained demurrers and dismissed the actions on the ground that no specific manufacturer was named as the party responsible for plaintiffs' injuries. The court of appeal reversed holding that it was unnecessary to identify the specific manufacturer where plaintiffs alleged sufficient facts to satisfy pleading requirements in order to hold defendants jointly liable on a concerted action theory and/or to shift the burden to defendants on an alternative liability theory. Also, the court held that the applicable statute of limitations is Code of Civil Procedure section 340 subdivision 3 providing for one year from the time the plaintiff discovers or reasonably should have discovered, that she has been damaged by defendant's product.

_McCreery v. Eli Lilly & Co._, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (3rd Dist. 1978), modified on denial of rehearing, 88 Cal. App. 3d 767. Plaintiff brought an action for negligence and for strict liability against one of 142 manufacturers of the drug, diethylstilbestrol (DES) for a cervical cell disorder which she alleged was attributable to her mother's use of DES to prevent miscarriage during pregnancy in 1953. Plaintiff alleged that the drug had been negligently tested, manufactured, and marketed and that it had been defective, falsely labeled, and that the risks of the drug had been misrepresented. The plaintiff was unable to identify the specific pharmaceutical compound or the specific manufacturer of DES taken by her mother. The trial court granted summary judgment for defendant.

The court of appeal affirmed, holding that under either negligence or strict liability, plaintiff has the burden of proving the identity of the tortfeasor. For the first time on appeal plaintiff asserted a theory that all manufacturers of DES are jointly and severally liable because each acted in concert with the other. Since plaintiff failed to plead concert of action at the trial level, the case was distinguishable from the factually similar case of _Sindell v. Abbott Laboratories_, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138, _hearing granted_, Dec. 13, 1978.
Finally, the court held that strict liability will not be imposed on a manufacturer of new or experimental drugs when unfortunate consequences occur if the drug has been properly prepared and proper warning is given, and if the potential social gains justify its use despite recognized medical risks.

3. **Governmental Immunity for Parole Determinations**

*Martinez v. State of California*, 85 Cal. App. 3d 430, 149 Cal. Rptr. 519 (4th Dist. 1978). Plaintiff brought a suit against the state and certain correctional employees for the wrongful death of his daughter who was murdered by a mentally disordered sex offender on parole. The suit, which alleged negligence in the release of the prisoner, was dismissed when defendants demurred on the grounds of governmental immunity.

The court of appeal affirmed the decision based on Government Code section 845.8 which provides that public entities and employees are not liable for any injury resulting from a parole determination or caused by an escaped prisoner, arrested person or person resisting arrest. The court noted that this immunity does not apply to ministerial acts in carrying out the decision to release a prisoner but since the complaint did not allege any negligence occurring after the decision the complaint had been properly dismissed.

4. **Loss of Consortium Due to Husband’s Paralysis**

*Rodriquez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (2nd Dist. 1978), modified 88 Cal. App. 3d 767c, hearing denied, March 29, 1979. A minor issue in this personal injury action was whether or not a wife should be awarded five-hundred thousand dollars for loss of consortium when her twenty-two year old husband was rendered paraplegic by a job related accident. The court of appeal upheld the trial court’s finding that the award was proper, noting that loss of consortium includes loss of love, companionship, affection, and sexual relations as well as loss of support or services.

B. **Inheritance Determinations**

1. **Community Property Interest in Partnership**

complaint for declaratory relief seeking a declaration that the devisees of decedent’s wife had no claim against decedent’s estate because they failed to file a timely money claim as creditors in probate proceedings pursuant to Probate Code sections 707 and 732. The decedent husband had used community property to enter a partnership. Following his wife’s death, her community property interest in the partnership (one-half of husband’s one-half interest) went to the devisees under her will, and thereafter at all times the husband paid the devisees their share of profits and proceeds, e.g., one-fourth interest in the partnership. The trial court ordered the executor to account for and pay over to the devisees one-fourth interest in the partnership upon liquidation and winding up.

The court of appeal affirmed, holding that the devisees of a wife’s community property interest in her husband’s partnership held a present, existing interest in the partnership that entitled them to share in its income and surplus, and did not have a general creditor’s claim against the estate. The court found that Corporations Code section 15025, which clarifies the character of a partnership, does not characterize the nature of the partnership interest as between husband and wife, which may still be community property despite the statute. Therefore, the court ruled that the devisees having a present existing interest in the partnership need not present a creditor’s money claim under Probate Code section 707 and were entitled to claim as owners of one-half of the husband’s partnership interest.

2. Actions Authorized Against Surviving Spouse Under Probate Code Section 205

Spurr v. Spurr, 88 Cal. App. 3d 614, 151 Cal. Rptr. 813 (4th Dist. 1979). Under a divorce decree, a father was required to maintain a $15,000 life insurance policy in favor of his daughter. After his death, the daughter sought to recover the $15,000 from her father’s second wife on the theory of constructive trust. The daughter alleged that her father did not maintain the life insurance in his second wife’s favor, and that his wife had received the money as a beneficiary. The trial court granted summary judgment for defendant because the plaintiff failed to establish the elements of a constructive trust.

The court of appeal reversed, holding that the complaint stated a cause of action under Probate Code section 205 which
authorizes an action against the surviving spouse, in lieu of an action against the estate, where the deceased spouse's assets have not been subjected to formal probate administration. Thus, the plaintiff did not have to establish the elements of a constructive trust: reliance on a mistaken legal theory did not justify entry of judgment against her. The court further held that since defendant, in her declaration in support of her motion for summary judgment, did not establish any defense to an action pursuant to Probate Code section 205, there remained triable issues of fact.

3. Effect of Spouse-Beneficiary's Untimely Death on Inheritance Tax Question

_Estate of Logan_, 84 Cal. App. 3d 717, 148 Cal. Rptr. 819 (2nd Dist. 1978). The trial court decided that no inheritance tax was owed on the portion of decedent's estate which he had put in trust for the benefit of his wife. The wife had died while the estate was still in administration, but before the trust had been established or before the wife's power of appointment was exercised. The court of appeal reversed, holding that the transfer of the general power of appointment created an immediate interest in the wife at the time of her husband's death and although she did not have the opportunity to exercise this power before her death, the estate was not exempt from inheritance taxes.

4. Severance of Joint Tenancy by Property Settlement Agreement

_Estate of Asvitt_, 92 Cal. App. 3d 348, 154 Cal. Rptr. 713 (1st Dist. 1979). At issue was whether a joint tenancy deed between a decedent and his former wife had been severed by a property settlement agreement which provided that the family home would be sold either when the former wife remarried, the youngest child reached majority or at any time the parties mutually agreed. The trial court found that the joint tenancy had been severed and that the decedent's interest in the home should, therefore, pass to an unrelated person who was the sole beneficiary named in his will.

The court of appeal affirmed, holding that interference with the right of survivorship, one of the four essential unities of a joint tenancy, severs the joint tenancy. The court further held that agreements to sever are effective and the intervening death of one of the parties before the agreement is performed does not defeat the severance.

Women's Law Forum
C. Community Property

1. Community Interest in Retirement Benefits And Pension Plans

Johns v. Retirement Fund Trust, 85 Cal. App. 3d 511, 149 Cal. Rptr. 551 (4th Dist. 1978). In a dissolution proceeding, the trial court ordered the husband’s retirement fund trust to pay directly to the wife her one-half interest in the retirement payments. The retirement fund refused, claiming under federal preemption it was required to pay the benefit solely to the husband and the wife was required to collect from him. The record indicated the benefits were 100 percent community property, listed in the husband’s name and were entirely vested.

The fund, not the husband, appealed. The court of appeal affirmed, holding that the federal Employee Retirement Income Security Act (ERISA) does not preempt California law as applied here in matrimonial matters. The court also held that the spendthrift features of ERISA were not applicable to the wife, since she was an owner, not a creditor.

In re Marriage of Campa, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1st Dist. 1979), modification of opinion on denial of rehearing, 93 Cal. App. 3d 474a, hearing denied, April 12, 1979. Three cases, consolidated on appeal, were brought in connection with marriage dissolution proceedings when non-employee spouses (wives) sought orders directing the employee spouses’ pension fund to pay the community property share of benefits directly to each of them. In one action, judgment was entered dismissing the fund; in the other two actions the fund was ordered to pay a specified portion directly to the non-employee spouses.

The court of appeal reversed the judgment dismissing the fund with directions to enter judgment in favor of the non-employee spouse. The other judgments were affirmed. The court rejected the fund’s contention that the federal Employee Retirement Income Security Act (ERISA) preempted state law. The court held that although the purpose of ERISA was to assure that pension rights were “real” and to protect those rights from state interference, Congress did not intend to preclude the states from effectuating a fair division of community property pension benefits between former spouses. The court noted that the integrity of the fund remains unaffected by the division of assets in a dissolution proceeding. The court further held that there was no
requirement here to exhaust administrative remedies by application to the fund’s trustees since their decision was certain to be adverse. Finally, the court held that the ERISA restriction on assignment or alienation of pension benefits does not prohibit division of community property benefits between an employee and his former spouse who is an owner, not a creditor.

In re Marriage of Johnston, 85 Cal. App. 3d 900, 149 Cal. Rptr. 798 (2nd Dist. 1978). The administrators of a husband’s pension plans were joined as parties in a dissolution proceeding. They contended that they were not required to pay pension benefits directly to a non-employee spouse because the Employee Retirement Income Security Act (ERISA), which they claimed preempted California’s community property laws, forbade any such assignment of benefits. The trial court ordered that the benefits be paid directly to the wife but also authorized a deduction of five dollars per month for administrative costs.

The court of appeal affirmed that part of the judgment which ordered direct payment to the spouse holding that Congress did not intend to preempt state domestic relations laws and that a spouse’s claim to her share of community property, including pension plans, does not involve an assignment but is merely an assertion of an ownership right. The court reversed that part of the judgment which allowed a deduction for administrative costs on the grounds that no excess administrative costs had been demonstrated.

In re Marriage of Kasper, 83 Cal. App. 3d 388, 147 Cal. Rptr. 821 (2nd Dist. 1978) hearing denied, Sept. 27, 1978. A husband appealed the trial court’s decision in a dissolution proceeding that: 1) he could keep the full interest in his retirement fund while his wife kept the family home; and 2) that he must also pay attorney fees and costs. The court of appeal affirmed, holding that the trial court properly used the present value of the stream of payments over the husband’s life expectancy in calculating the community property interest in the retirement plan. Also, it was within the trial court’s discretion to give the entire interest in the retirement fund to the husband while awarding other assets of equal value to the wife. The costs and attorney fees award was held proper since there was a considerable disparity in the income of the two spouses and the wife, who was caring for an emotionally disturbed daughter, was expected to have higher living costs.

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In re Marriage of Borges, 83 Cal. App. 3d 771, 148 Cal. Rptr. 118 (1st Dist. 1978) hearing denied, Oct. 25, 1978. In an interlocutory judgment of dissolution, the settlement agreement incorporated into the judgment provided for the division of any assets which were later determined to be community property. At the time of the judgment the husband’s retirement benefits from private employment were not taken into account due to a mistaken belief that he had no vested rights in them. Two years later the wife, having discovered this error, obtained an order to show cause why the husband should not have to pay half the value of the retirement benefit over to her. At the hearing, the wife’s counsel, rather than seeking the remedy of enforcement provided for in the agreement, instead asked for a modification of the dissolution decree which would treat the retirement benefits as a community asset. The trial court denied the modification.

The court of appeal affirmed, holding that it was not error for the trial court to deny modification since no basis for modification was shown to exist and agreed with the trial court that, in asking for modification, the wife had impliedly abandoned the existing remedy of enforcement. The court refused to rule on the husband’s contention that any interest the wife might have in the retirement plan was extinguished upon her death noting that, although this rule is applied to public retirement plans, its applicability to a private plan would have to be determined by the trial court after careful analysis of both the plan and the circumstances of the parties.

2. Social Security Benefits Characterized as Community Property

† In re Marriage of Hillerman, 88 Cal. App. 3d 372, 151 Cal. Rptr. 764 (4th Dist. 1979), hearing granted, April 12, 1979 and cause retransferred to court of appeal for reconsideration in light of Hisquierdo v. Hisquierdo, ___ U.S. ___, 99 S. Ct. 802, 59 L.Ed. 2d 1 (1979). In a dissolution proceeding, the trial court found that the husband’s social security benefits were not community property and that no community interest existed in the benefits despite the stipulation of the parties that during their marriage the husband’s contributions to the social security sys-

† Since the California Supreme Court has granted a hearing in this case, the court of appeal opinion is of no force or effect and is no longer an authoritative statement of any principle of law. 5 CAL. JUR. 2d, Appellate Review § 434 (1952), citing Knouse v. Nimocks, 8 Cal. 2d 482, 66 P.2d 438, (1937). For such cases appear in this Survey for the sole purpose of familiarizing the reader with issues presently pending before the high court.
tem were made with community funds. Accordingly, the trial court did not retain jurisdiction to divide the benefits. The trial court based its decision upon the authority of In re Marriage of Kelley, 64 Cal. App. 3d 82, 134 Cal. Rptr. 259 (2nd Dist. 1976), which rejected the argument that social security benefits are a divisible community asset.

The court of appeal reversed, holding that the trial court should have reserved jurisdiction for the purpose of dividing the husband’s social security benefits. The court held that neither state nor federal law barred recognition of a community interest in social security benefits. When contributions of community funds or labors have qualified a married person for benefits, a community property interest in those benefits exists at the time of the dissolution of marriage. The court noted the difficulties in tracing benefits to the contributed community assets as well as the difficulty in the valuation of the benefits. Nonetheless, the court held that Congress, by enacting the Social Security Act, did not intend to interfere with a state court’s jurisdiction over distribution of marital property at dissolution of marriage. The court of appeal ordered the opinion unpublished.

3. Military Pension Rights

In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978). When a retired serviceman may elect to receive either a disability pension or a retirement pension, only the excess disability rights are properly the husband’s separate property. In a divorce proceeding the balance of pension rights acquired during the marriage replace ordinary “retirement” pay and thus are classed as a community asset. In a six to one decision, the California Supreme Court (Clark dissenting) affirmed this division of marital property; otherwise a serviceman could defeat the community interest in his right to a pension by his unilateral election. The court reversed the judgment to the extent that the trial court limited its jurisdiction to modify spousal support to twenty-four months. The high court held this to be an abuse of discretion because the record indicated a twenty-five year marriage and there was no evidence concerning future earnings or employment opportunities for either husband or wife, which would support any assertion that the wife would attain economic self-sufficiency within that twenty-four-month period.

Sangiolo v. Sangiolo, 87 Cal. App. 3d 511, 151 Cal. Rptr. 27

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Though both parties in a dissolution proceeding were aware of the husband's vested military retirement benefits, no reference was made to them because of legal uncertainty as to whether they were considered community property. The original petition noted that there was additional community property, the exact nature of which was unknown and asked for leave to amend when its nature was ascertained. Six and one-half years later the wife filed an action for partition and an accounting and the trial court sustained the husband's demurrer on the grounds of the statute of limitations, laches and res judicata. The court of appeal reversed holding that: 1) no statute of limitations applies to an action for a partition and an accounting; 2) since the court had not been made aware of the retirement benefits they could not divide them and thus res judicata did not apply; and 3) laches was not grounds for sustaining a demurrer since it was unclear when the wife learned of her community interest in these benefits and there was no suggestion that the delay was prejudicial to the husband.

Gorman v. Gorman, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 (4th Dist. 1979), hearing denied, May 10, 1979. A former wife brought separate actions against her former husband for division of the community interest in his military retirement benefits and against her attorney for failure to assert that interest during the dissolution proceedings. The trial court awarded the wife her community interest in the retirement plan and assessed only nominal damages of one dollar against the attorney on the grounds that the loss occasioned by his negligence was completely offset by the judgment against the husband.

The court of appeal affirmed the judgment against the husband noting that the doctrine of res judicata did not bar the action since the issue of military retirement benefits was not addressed or adjudged in the earlier dissolution proceeding. But since there was no certainty that the wife could enforce the judgment against her ex-husband, the court of appeal modified the judgment against the attorney holding the attorney liable in the same amount as the former husband, and awarded, costs, with credit for any amount the former husband actually paid as a result of the judgment. The court also distinguished the recent U.S. Supreme Court case, Hisquierdo v. Hisquierdo, ___ U.S. ___, 99 S. Ct. 802, 59 L. Ed.2d 1 (1979).

assert a claim for her community property interest in her husband's military retirement benefits at the time of dissolution proceedings. She later filed suit to claim that interest. The trial court sustaining the husband's demurrer, and following *Kelley v. Kelley*, 73 Cal. App. 3d 672, 141 Cal. Rptr. 33 (4th Dist. 1977), held that the doctrine of res judicata barred the wife from asserting such claim. The court of appeal reversed following the holding in *Lewis v. Superior Court*, 77 Cal. App. 3d 844, 144 Cal. Rptr. 1 (3rd Dist. 1978) that res judicata does not apply. The Court noted that these earlier appellate decisions were irreconcilable on the issue raised, and recommended that the husband in the instant case seek review in the Supreme Court.

*Fenn v. Harris*, 91 Cal. App. 3d 772, 154 Cal. Rptr. 21 (4th Dist. 1979). Eight years after dissolution proceedings in which the community property had been divided, a woman brought an action to partition her former husband's vested, matured military pension and his unvested state retirement benefits. The trial court granted summary judgment to the husband on the grounds of res judicata.

The court of appeal reversed based on the facts that 1) the property settlement agreement which had been incorporated into the dissolution judgment expressly provided that community property rights not mentioned in the agreement could be dealt with later and 2) at the time of the agreement it had not been legally determined that the benefits in question were community property, as was later decided *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

4. Husband's Fiduciary Duty

*In re Marriage of Connolly*, 23 Cal. 3d 590, 591 P.2d 911, 153 Cal. Rptr. 423 (1979). The trial court denied a wife's motion to reopen the interlocutory and final judgments of dissolution of her marriage pursuant to Code of Civil Procedure section 473. This section allows for relief from a judgment made against a party through mistake or excusable neglect when there is proof of fraud. The parties had substantial community interest in a corporation of which the husband was a director. The wife based her claim of fraud on the fact that, upon valuation of their stock at dissolution, her husband failed to advise her that a public sale which would greatly increase the value of the stock was planned.

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The court of appeal upheld the trial court’s determination that the husband had not breached any fiduciary duty as a director since: 1) the public offering of the stock had been published in newspapers; 2) a cursory examination of the stock’s background by the wife or her attorney would have revealed the information; and 3) the husband testified that he had, in fact, mentioned the proposed sale to his wife. As to any separate fiduciary duty arising from the marital relationship, the court of appeal sustained the trial court’s finding that the relationship had clearly become adversarial upon filing for dissolution, thus ending any fiduciary obligation which might otherwise have existed.

5. Valuation of Community Property in Bifurcated Proceeding

In re Marriage of Walters, 91 Cal. App. 3d 535, 154 Cal. Rptr. 180 (4th Dist. 1979). In a bifurcated dissolution proceeding the trial court: 1) valued the community residence at fifty thousand dollars, its value at the time of the independent proceeding for the division of community property, and 2) ordered the parties to sell the home and divide the proceeds equally. At the time of the proceedings to dissolve the marriage two years earlier, the house was worth approximately twenty-six thousand dollars and the wife and child had since lived in the residence and made all the payments on the house.

The court of appeal affirmed the trial court’s determination that: 1) the property should be valued at the time of trial on the division of property rather than at the earlier dissolution proceeding pursuant to Civil Code § 4800(a); and 2) since the increased value of the house had resulted from inflation and market fluctuation as opposed to any personal efforts, both parties should share equally in the profits.

6. Tenancy In Common As Alternative to Promissory Note

In re Marriage of Herrmann, 84 Cal. App. 3d 361, 148 Cal. Rptr. 550 (2nd Dist. 1978). The trial court, in a dissolution proceeding, awarded the family residence to the wife for the benefit of the minor child in her custody and, in order to equalize the community property distribution, ordered the wife to give the husband a promissory note for one-half the market value of the house minus the outstanding encumbrance. The note was to yield seven percent (7%) simple interest annually and was to be paid upon sale of the property, at such time as certain enumerated contingencies occurred.
While the court of appeal upheld the right of the trial court to award the family residence to the custodial parent as a form of child support, it found as reversible error the lower court's contention that the promissory note equalized the distribution of property. Responding to evidence that the note, if sold, would have to be discounted by forty percent (40%) of fifty percent (50%) due to all its contingencies, the court determined that a more just alternative would be to place the property in a tenancy in common with each spouse retaining an undivided one-half interest until such time as the property was sold.

7. Distribution of Out of State Property

† In re Marriage of Fink, 92 Cal. App. 3d 270, 155 Cal. Rptr. 47 (2nd Dist. 1979), hearing granted, July 12, 1979. In a dissolution proceeding the parties held real property in Florida which exceeded the value of all other community assets. The trial court awarded certain of the Florida real property to the husband and the remainder to the wife and also awarded the couple's personal residence in California to the wife. The trial court later granted the husband's motion for new trial.

The court of appeal affirmed the grant of a new trial and found error in the trial court's division of the property. While it would have been permissible to divide up the property in this manner had the out of state assets been equal to or less than the other community property assets, since the out of state assets exceeded the value of other community property, Civil Code section 4800 required an equal, in-kind distribution of the out of state interests. The trial court should, therefore, have ordered the husband to convey a one-half interest in all the Florida property to his wife. In addition, the court of appeal found that the husband should have been awarded an equal share in the California residence since there were no circumstances (such as minor children living in the home) to warrant an exception to the equal division requirement.

† Since the California Supreme Court has granted a hearing in this case, the court of appeal opinion is of no force or effect and is no longer an authoritative statement of any principle of law. 5 Cal. Jur. 2d, Appellate Review § 434 (1952), citing Knouse v. Nimocks, 8 Cal. 2d 482, 66 P.2d 438, (1937). Four such cases appear in this Survey for the sole purpose of familiarizing the reader with issues presently pending before the high court.

Women's Law Forum
D. Child Custody and Control

1. Standard of Proof for Termination of or Interference with Parental Rights

In re Terry D., 83 Cal. App. 3d 890, 148 Cal. Rptr. 221 (3rd Dist. 1978). Civil Code section 232 subdivision (a)(2) provides that a child may be declared free from parental control and custody when the child has been cruelly treated or neglected. Civil Code section 232 subdivision (a)(7) provides for termination of parental rights after foster care for two or more consecutive years, if the court finds beyond a reasonable doubt that return of the child to the parents would be detrimental and that the parents had failed in the past and were likely to fail in the future to maintain an adequate relationship with the child.

In a proceeding to declare six children free from parental control pursuant to Civil Code section 232, the trial court found by a preponderance of the evidence that all the children had been neglected within the meaning of section 232 subdivision (a)(2). The court of appeal reversed and ordered the trial court to reconsider its findings using a standard of “clear and convincing” proof. The court held on the basis of recent California decisions, that when severance of parental custody is at issue, the higher standard is required. In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974); In re Christopher B., 82 Cal. App. 3d 608, 147 Cal. Rptr. 390 (3rd Dist. 1978).

The court further held that there is no denial of equal protection to have different standards of proof for sections 232(a)(2) and 232(a)(7). The former section involves a single and simple finding of cruel treatment whereas the latter involves findings of detriment to the child, plus findings of past and likely future failings of the parent(s) to a) provide a home, b) provide care and control, and c) maintain an adequate parental relationship. To require a more stringent standard of proof for more serious and complex findings is rationally related to the legislative purpose in making such a classification and therefore constitutionally sound.

Finally, the court held that to satisfy the requirement of 232 subdivision (a)(7) concerning past parental failings, it is proper to consider conduct during the time before a child is placed in a foster home as well as conduct during the two or more years after such placement.
In re Lynna B., 92 Cal. App. 3d 682, 155 Cal. Rptr. 256 (1st Dist. 1979), hearing denied, July 19, 1979. In an action brought under Civil Code section 232 subdivision (a)(7) the trial court granted the petition of foster parents to declare a six year old girl free from the custody and control of her natural parents. Evidence showed that, at the mother’s suggestion, the child had been placed with petitioners shortly after birth and the mother had maintained only minimal contact with the child thereafter. Although the mother could provide a house for the child, the trial court found that the child had never been in the house and had “put down deep roots” with the foster parents.

The court of appeal affirmed, holding that there was sufficient evidence, including testimony by psychiatrists and social service practitioners, that returning the child to her mother would be detrimental. The court also held that the failure of the trial court to consider less severe alternatives, such as child protective services, did not deprive the court of jurisdiction to grant the petition. There was evidence to support implied findings that such services were considered, but rejected since efforts at reunification were likely to be unproductive.

In re Phillip B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1st Dist. 1979); modified on denial of rehearing, 93 Cal. App. 3d 1010e, hearing denied, July 19, 1979. The juvenile probation department filed a petition under Welfare and Institution Code section 300, subdivision (b) alleging that a twelve year old boy was not being provided with the necessities of life because his parents refused to consent to cardiac surgery for a congenital defect. The court dismissed the petition because medical testimony indicated a higher-than-average risk of post-operative complications since the boy also suffered from Down’s Syndrome.

The court of appeal concurred holding that, although the state has a right to protect children, there must be clear and convincing evidence that the child is not being provided with the necessities of life before the state can substitute its judgment about medical care for that of the parents. The court enumerated the relevant factors. In this case, the court found that there was substantial evidence to support the trial court’s dismissal in view of the risk to the child in having surgery.

Women’s Law Forum
2. Termination of Parental Custody Due to Mother’s Mental Disability

In re Heidi T., 87 Cal. App. 3d 864, 151 Cal. Rptr. 263 (1st Dist. 1978). Pursuant to Civil Code section 232 (a)(6), two minor wards of the court, ages eleven and twelve years old, were declared to be free of parental custody and control and referred to the Department of Social Services for adoptive placement. The minors had lived for ten years with foster parents who wished to adopt them. The trial court found that as a result of the mother’s mental disability, it would be detrimental to return custody of the children to her.

The court of appeal affirmed, holding that the appropriate standard of proof was “clear and convincing evidence” and that even though the record was silent as to which standard was employed, on review the court found substantial evidence to support the trial court’s conclusions. The court further held that testimony of two psychiatrists constituted sufficient evidence to support the finding that the mother’s continuing mental illness rendered her incapable of providing support for the children. The court also held that the statutory test under Civil Code section 232(a)(6) sanctioning termination of parental custody was not unconstitutionally vague. Finally, the court found that the trial court complied with the statutory mandate to consider less drastic means prior to terminating the parent-child relationship.

In re David B., 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (5th Dist. 1979). A child was forever freed from the custody and control of his mother pursuant to Civil Code section 232 subdivision (a)(6) which allows for termination of the parental relationship where the parent is mentally ill and will remain so as testified to by two physicians.

The court of appeal affirmed, holding that Civil Code section 232 subdivision (a)(6) does not violate substantive due process provided that 1) the mental illness is settled and will, in the opinion of two physicians, continue indefinitely regardless of medical treatment, 2) the parent is given an opportunity to challenge any reports upon which the decision to terminate the relationship is based, and 3) the severance of the relationship is found to be the least detrimental alternative available for the welfare of the child.
3. **Grounds for Setting Aside an Adoption**

   *Adoption of Jason R.*, 88 Cal. App. 3d 11, 151 Cal. Rptr. 501 (2nd Dist. 1979). A stepfather moved to set aside his previous stepparent adoption on the ground that the adoption had been fraudulently induced by the natural mother’s misrepresentation as to her willingness to bear his children. Prior to the instant action, the stepfather had successfully sought an annulment of the marriage based on extrinsic fraud. The trial court denied the motion, without considering the best interests of the child, on the ground that the stepfather had failed to sustain his burden on the issue of fraud.

   The court of appeal reversed and remanded for a hearing on the issue of the best interests of the child holding that this alone could constitute sufficient grounds for setting aside an adoption. The court further held that the prior determination of fraud in the inducement of marriage in the annulment proceedings was a different issue than the fraud alleged here and hence the doctrine of collateral estoppel was inapplicable. Finally, the court held that although annulment has the effect of rendering the marriage void *ab initio*, and “relates back,” the decree will not be applied to invalidate the stepparent and stepson relationship created by a stepparent adoption.

4. **Joint Custody**

   *In re Marriage of Neal*, 92 Cal. App. 3d 834, 155 Cal. Rptr. 157 (1st Dist. 1979). In a marriage dissolution proceeding, the trial court awarded physical custody of the two minor children to the mother and joint legal custody to both parents. The husband, who was ordered to pay child support, could claim the children as dependants for tax purposes. In addition, the court awarded spousal support to terminate on a specific date without reserving jurisdiction over the matter.

   The court of appeal affirmed that part of the judgment allowing the father to claim the children as tax dependants but modified the other provisions of the order. In view of bitter disputes between the parents over custody and visitation rights, the court held that it was not in the best interests of the children to award joint legal custody. Since the wife had health problems which made her future ability to support herself questionable, the court of appeal held that it was error for the trial court to relinquish jurisdiction over the issue of spousal support.

Women’s Law Forum
5. Child Custody Disputes Involving More Than One State

*In re Marriage of Kern*, 87 Cal. App. 3d 402, 150 Cal. Rptr. 860 (1st Dist. 1978). In a California dissolution proceeding, each parent was awarded custody of one child; the father took custody of their son and the mother took custody of their daughter. After the father and son moved to Rhode Island, the son returned to California for a visit with his mother. The mother then brought an action to convert her visitation rights into permanent custody. The father brought a parallel action in Rhode Island. The California court refused to transfer the case to Rhode Island and awarded permanent custody of the son to the mother. Thereafter, the Rhode Island Court reached the opposite result.

On appeal by the father, the court of appeal reversed holding that the California court should have stayed the proceedings to permit final adjudication of the custody issue in Rhode Island since there was no showing that the child's health or safety would be jeopardized if he were returned to his father. *Ferreira v. Ferreira*, 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973); see Civil Code sections 5150 et seq. (West Cum. Supp. 1979). The court also held that although the California court had jurisdiction in the matter, the trial court abused its discretion in modifying custody where it did not make a finding that a change in custody was in the best interests of the child and the court did not consider all available evidence in making its determination.

*In re Marriage of Steiner*, 89 Cal. App. 3d 363, 152 Cal. Rptr. 612 (4th Dist. 1979). A child custody decree originally issued in California was modified at a Colorado hearing after the mother and child had been living in Colorado for eight months. The father in California petitioned for a modification of the Colorado decree but the trial court dismissed the petition for lack of jurisdiction. The court of appeals affirmed, holding that Civil Code section 5152, which gives jurisdiction to the child's home state or state with a significant relationship to the child—now Colorado—prevails over the conflicting continuing jurisdiction provisions of Code of Civil Procedure 410.50 and Civil Code section 4600.

6. Validity of Foreign Ex Parte Custody Orders

*Miller v. Superior Court*, 22 Cal. 3d 923, 587 P.2d 723, 151 Cal. Rptr. 6 (1978). A divorced woman who moved with her chil-
dren from Australia to the United States, without notice to either her former husband or the Australian Court which granted her custody, was found in violation of the Australian custody decree by the Los Angeles Superior Court. She was ordered to comply with an Australian ex parte restraining order requiring that she deliver custody to the husband. The wife appealed the decision to the California Supreme Court claiming she had not been given reasonable notice and opportunity to be heard at the Australian proceeding.

The high court found that several unsuccessful attempts to locate the wife had been made, notice of the hearing had been given to her solicitors in Australia, a showing of irreparable harm to the children had been made to the court, the orders contemplated only a temporary change of custody and the wife, learning of the hearing within a month, had made no subsequent efforts to reopen the Australian proceedings. As a result, the court held that the wife had not been denied reasonable notice and that the Australian orders were therefore valid and enforceable.

_Neal v. Superior Court_, 84 Cal. App. 3d 847, 148 Cal. Rptr. 841 (2nd Dist. 1978). A couple whose child was born in California moved to Arkansas where they were divorced. Custody of the child was awarded to the father by stipulation. However, the wife violated this order and moved back to California with the child, claiming that the child suffered serious allergies in Arkansas. The trial court granted the mother's petition for temporary custody where upon the father petitioned for writ of mandate to vacate this order. Relying on Civil Code section 5152, the court of appeal found that in order for a California Court to have jurisdiction, the child must have some significant connection with California. The bringing of the child to California was insufficient. In vacating the order granting custody to the mother, the court noted that the legislative intent in enacting Civil Code Sec. 5152 was precisely to discourage parents from violating custody orders by removing the child to another state.

_In re Marriage of Ben-Yehoshua_, 91 Cal. App. 3d 259, 154 Cal. Rptr. 80 (5th Dist. 1979). Two weeks after she and her children moved to California from Israel, a wife filed an action for dissolution of marriage and child custody. The husband accepted service of process when he came to California temporarily but then returned to Israel and took the three children with him. The Women's Law Forum
California trial court granted the dissolution to the wife, awarded her custody of the children, ordered the husband to pay child support, costs and attorney's fees and also ordered the division of some property in Israel.

The court of appeals reversed that part of the judgment granting the wife custody and ordering the husband to pay child support. The court held that personal jurisdiction over the parties had been confused with subject matter jurisdiction over the custody issue. Since Civil Code sections 5150-5174 give subject matter jurisdiction over custody matters to the home state or state with a significant relationship to the child, Israel, where the children had lived all their lives, was the proper place for custody determinations.

_In re Marriage of West_, 92 Cal. App. 3d 120, 154 Cal. Rptr. 667 (4th Dist. 1979), hearing denied, July 19, 1979. Plaintiff and his wife were divorced in England. After plaintiff moved to California, his wife sought and was granted upward modification of the support decree in England. Plaintiff denied receiving notice of the hearing and, at a California court trial where his divorce was established as a California judgment, the trial court terminated spousal support and reduced child support.

The court of appeal affirmed, holding that the plaintiff had not been given adequate notice of the British modification hearing either under California Code of Civil Procedure 1013, which requires proof of service, or under British law which requires either acknowledgment by the party or inquiry by the Registrar. It was not an abuse of discretion for the trial court to terminate spousal support since the husband had supported his wife for fifteen years following a four year marriage and the child of the marriage was almost grown.

7. Effect of Prior Finding of Nonpaternity

_Ruddock v. Ohls_, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (5th Dist. 1979). Defendant moved to strike a complaint to establish paternity brought on behalf of a minor child. Defendant claimed that the issue had been fully litigated in an Oregon divorce proceeding and a finding of nonpaternity had been made. The trial court granted the motion, finding that, although the child had not been joined as a party in the divorce action, the mother had represented the child's interests.
The court of appeal reversed, holding that there was no showing that the independent rights of the child had been represented in the divorce action and that, in the absence of joinder, such rights should not be foreclosed by res judicata or collateral estoppel based on a judgment between the mother and alleged father.

8. Adoption Without Consent of Noncustodial Parent

*Adoption of Murray*, 86 Cal. App. 3d 222, 150 Cal. Rptr. 58 (4th Dist. 1978). The court of appeal upheld the trial court's finding that Civil Code section 224 only allows for the adoption of a child without the consent of the noncustodial parent if the noncustodial parent has both failed to support and failed to communicate with the child for a period of one year. Failure to perform only one of these duties is insufficient grounds for denying a natural parent the right to object to an adoption.

9. Testimony of Dependent Children Out of Presence of Parent

*In re Stanley F.*, 86 Cal. App. 3d 568, 152 Cal. Rptr. 5 (2nd Dist. 1978). A mother's petition for rehearing of a disposition proceeding that ordered her two children to remain under the supervision of the Department of Public Social Services was denied by the Superior Court. The children had been declared dependent children in 1973, and they were placed in foster homes where they had remained since that time.

The court of appeal affirmed the disposition order and denied the petition for rehearing holding that the referee did not abuse his discretion when he excluded the other parties while one child testified in chambers concerning whether he wished to live with natural parents or foster parents. It was not improper since counsel for all parties was present, the testimony was transcribed by a reporter and the mother's attorney had the opportunity to discuss with the mother the testimony given in chambers.

The court further held that the disposition order was supported by substantial evidence when three physicians were of the opinion that the mother was not capable of caring for her children, the mother was uncooperative in obtaining treatment, the children were doing better in foster homes than with their natural parents, and past efforts to reunite the family had failed.

Women's Law Forum
E. Spousal and Child Support

1. Evidence of Parent’s Living Situation in Action to Modify Child Support

In re Marriage of Fuller, 89 Cal. App. 3d 405, 152 Cal. Rptr. 467 (5th Dist. 1979). A father who was on medical retirement following a stroke moved to reduce his child support obligation to his three children of a former marriage. Over the father’s objection, the trial court admitted evidence that the father was living with a woman and her child by a previous marriage, and that the couple had an arrangement for sharing living expenses. Evidence of the woman’s income and property was admitted, but the trial court excluded as irrelevant evidence of the expenses and obligations of the woman. The father’s motion to modify child support was denied.

The court of appeal affirmed holding that there was no abuse of discretion in admitting evidence of the combined income and assets of the father and his nonmarital partner. All factors relating to a person’s living situation may be properly considered; the existence and not the source of money or services available is the relevant factor. Since the income of the nonmarital partner is being used to reduce the expenses of the father, it in turn affects his ability to pay child support. There was substantial evidence to support the trial court’s conclusion that the pooling of interests resulted in a lessening of expenses on the part of the father. Finally, the expenses of the nonmarital partner were irrelevant and properly excluded.

2. No Right to Jury Trial in Action to Fix Amount of Child Support

Reynolds v. Reynolds, 86 Cal. App. 3d 732, 150 Cal. Rptr. 423 (1st Dist. 1978). Petitioner appeals in propria persona from an order to pay $100 child support pursuant to the provisions of the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), contending that he was denied his constitutional right to a jury trial. The issue in the case was whether defendant had an obligation to pay child support, and, if so, the amount; paternity was not at issue.

The court of appeal affirmed holding that fixing the amount of support, under Civil Code section 4700 subd. (a), is a proceed-
ing equitable in nature (Kyne v. Kyne, 38 Cal. App. 2d 122, 133, 100 P.2d 806, 812 (1940)) and that a jury trial is not available in actions in equity. The court further held that petitioner was not denied his fifth amendment privilege against self-incrimination when the judge ordered him to testify since it applies only to criminal actions.

3. Pendente Lite Awards May be Ordered in Child Support Actions

   City and County of San Francisco v. Superior Court (Posada, Mack and Pressley), 86 Cal. App. 3d 87, 150 Cal. Rptr. 45 (1st Dist. 1978). In three separate paternity actions by the City and County of San Francisco, as assignee of its AFDC welfare recipients, against the putative fathers, the trial court, without evidentiary hearing for a preliminary determination of paternity, denied plaintiff’s motion for orders requiring the putative fathers to pay child support, attorney fees and costs pendente lite.

   The court of appeal issued a peremptory writ of mandate directing the superior court to set aside its orders and upon motion by petitioner to reconsider the propriety of issuing such pendente lite awards. The court held that Civil Code section 196a, which provides for bringing a civil suit to enforce child support against a mother or father on behalf of a child, will be governed by the same provisions as apply in dissolution actions. In dissolution proceedings, Civil Code section 4357 specifically grants the trial court the power to require pendente lite payments of child support, attorney fees and costs. Therefore Civil Code section 4357 shall be applicable in civil suits to enforce child support payments pendente lite. The court also held that the fact that the pendente lite award primarily benefits the city and county instead of the custodial parent was of no significance.

4. Paternity In Issue

   Bartlett v. Superior Court (County of Santa Barbara), 86 Cal. App. 3d 72, 150 Cal. Rptr. 25 (2nd Dist. 1978). In an action by the County of Santa Barbara to seek reimbursement for welfare funds used to support a minor child from the alleged father, a nonresident of California, the superior court denied defendant’s motion to quash service of summons. The court of appeal granted a writ of mandate setting aside the superior court’s order and quashed service. The court held that \textit{in personam} jurisdiction
could not be validly predicated upon the mother's claim that the defendant caused the pregnancy and paid certain expenses in connection with the pregnancy when the defendant denied paternity. The mother seeking to collect child support must first prove the disputed fact of paternity in a court having jurisdiction over the defendant.

The court further held that Florida's practice of not applying its uniform reciprocal support act to cases in which paternity was in issue did not require the alleged father to defend in California.

_In re Marriage of Johnson_, 88 Cal. App. 3d 848, 152 Cal. Rptr. 121 (2nd Dist. 1979). In a dissolution of marriage proceeding the trial court denied child support to the wife based on the fact that the husband was not the child's natural father. The court of appeal reversed, holding that the husband was estopped from asserting the child's illegitimacy since, from the time of the child's birth and for the six years of the marriage, the husband, by his conduct, impliedly represented to the child that he was his father and intended for the child to accept and act on this representation.

_People v. Thompson_, 89 Cal. App. 3d 193, 152 Cal. Rptr. 478 (4th Dist. 1979). During a prosecution for failure to support his minor son under Penal Code section 270, defendant attempted to introduce evidence casting doubt on his biological paternity. The trial court sustained the People's objection under Evidence Code section 621 which provides that a child born of a woman cohabiting with her husband is conclusively presumed to be a child of the marriage unless the husband is impotent or sterile.

The court of appeal affirmed, holding that, while paternity is an essential element of the crime charged and every element of a criminal charge must be proved beyond a reasonable doubt, proof of biological parenthood is not necessary since the determining factor under Penal Code section 270 is whether the legal relationship of father and child exists.

5. **Commencement of the Obligation**

_In re Marriage of Pearce_, 84 Cal. App. 3d 221, 148 Cal. Rptr. 509 (1st Dist. 1978). In marriage dissolution proceedings, a husband's obligation for child support commenced as of the time the trial court pronounced the order for support in open court, and
not when the court subsequently signed and filed its formal order. The court of appeal affirming the trial court order reasoned that since an order for spousal support is operative from the moment of pronouncement, a child's right to support should be afforded the same disposition. Further, the court held the wife’s request for attorney’s fees in connection with this appeal should be addressed to the trial court.

6. Continuing Jurisdiction to Modify Support Obligations and Reimbursement For Separate Property Expenditures

In re Marriage of Epstein, 24 Cal. 3d 76, 592 P.2d 1165, 154 Cal. Rptr. 413 (1979), modified, 24 Cal. 3d 501a. In a divorce proceeding, the court resolved issues of reimbursement of separate property expenditures and continuing jurisdiction to modify support awards. In this marriage of eighteen years, the wife had not been employed since before the marriage and lacked the ability to provide for her financial needs in the future. Under these circumstances, the trial court abused its discretion by terminating its jurisdiction at the same time as the termination of support payments.

The court held inapplicable the rule of See v. See, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966) which makes a party who uses separate property for community purposes ineligible for reimbursement absent express agreement. In this case since the expenditure of separate property was post-separation, reimbursement for expenses to maintain the family residence could be awarded unless the expenditures were in discharge of a support obligation. The court remanded for a trial court finding as to whether the expenditure fell within this exception. Additionally, the court held that the community was entitled to reimbursement for community funds used to pay the husband’s tax liability for his separate income.

Finally, the court instructed the trial court to consider, upon remand, the capital gains tax liability which would be incurred upon sale of the family residence, since the sale was a direct result of the court’s community property division.

Gammell v. Gammell, 90 Cal. App. 3d 90, 153 Cal. Rptr. 169 (2nd Dist. 1979). A husband applied to the court to modify an interlocutory decree as to spousal support on the grounds that his ability to pay had decreased as a result of retirement and his
wife’s need had decreased due to her part-time job and the appreciation of her property. The court denied relief on the grounds that: 1) the wife adequately demonstrated that she still needed the support originally ordered and 2) the husband’s second wife’s contribution of her income and assets made up for income lost through retirement.

The court of appeals affirmed, holding that the trial court properly considered the financial benefits accompanying the husband’s second marriage in determining his continuing ability to pay support.

7. **Collection Remedies After Remarriage: Scope of Judicial Inquiry**

   *In re Marriage of Barnes*, 83 Cal. App. 3d 143, 147, Cal. Rptr.710 (1st Dist. 1978). Probate Code section 205 provides that a surviving spouse is personally liable for the debts of his or her deceased spouse which are chargeable against their community property. The decedent’s former wife invoked that statute to collect unpaid spousal support due her under the dissolution judgment. She obtained a writ of execution on the judgment and levied on the community property of the decedent and his second wife. The writ was issued by a clerk without exercise of judicial discretion. The trial court ordered the writ quashed on the ground that the former wife was required to proceed in a separate action. The court of appeal affirmed, holding that the writ should not have been issued without judicial inquiry into the extent of personal liability of the second wife. However, the court disapproved the lower court’s ruling that a separate action was required, and instead held that such inquiry could be conducted on the former wife’s application for the writ of execution in the dissolution proceeding.

8. **Reasonableness of Spousal Support Award**

   *In re Marriage of Winick*, 89 Cal. App. 3d 525, 152 Cal. Rptr. 635 (2nd Dist. 1979). In a proceeding dissolving a twenty-six year marriage, the trial court ordered the husband to pay one hundred dollars per month spousal support for six months and one dollar per month thereafter. The court based its decision on the fact that: 1) the wife would also have five-hundred and eighty-four dollars a month investment income while the husband would have four-hundred and seven dollars per month; 2) the wife’s
earning capacity was improving while the husband's was declin­
ing; 3) the husband was also paying one-hundred and fifty dollars 
child support per month for each of two children; and 4) the 
seventeen thousand dollar yearly income of the wife and two chil­
dren would be more than two-thirds of what the family income 
was prior to dissolution.

The court of appeal found that the trial court did not abuse 
it discretion in making this award though the case was remanded 
to determine whether or not the judgment conformed with the 
stipulation between the parties.

9. Effect of Husband's Overpayment on Future Claim

In re Marriage of Peet, 84 Cal. App. 3d 974, 149 Cal. Rptr. 
108 (4th Dist. 1978). A divorced husband who paid court-ordered 
child support for twelve years, including an overpayment of 
$1205, ceased making payments when his wife moved to another 
state with their son. Three years later, after the son joined the 
military, the wife attempted to collect the unpaid support of 
$1485. Although the purpose of the husband's overpayments was 
unclear, the trial court found that he should be given credit for 
them. In an attempt to consider "the equitable factor," the court 
noted since the wife had not attempted to collect this unpaid 
support earlier, the child had not been harmed financially. The 
court of appeal affirmed and ordered the husband to pay only the 
difference between his overpayment and the unpaid support.

10. Duty to Reimburse for State Aid After Illegally Removed 
From Custody

Richards v. Gibson, 90 Cal. App. 3d 877, 153 Cal. Rptr. 561 
(1st Dist. 1979). After a Utah divorce decree gave the mother 
custody of two minor children, the father moved to California. He 
was later joined by the children who were sent to live with him 
by the wife who was having problems with her second marriage. 
The father obtained a decree awarding him custody but shortly 
thereafter the wife refused to return the children to him following 
a holiday visit in Utah. Despite numerous efforts by the husband, 
the wife kept the children in Utah and began receiving public 
assistance to support them.

In an action under the Uniform Reciprocal Enforcement of 
Support Act (Code of Civil Procedure section 1650 et seq.) the

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trial court ordered the father to reimburse the state of Utah for the welfare payments. The court of appeal reversed, holding that Civil Code section 207 makes a parent liable for necessities provided to his child by a third person only if he is neglectful in providing such necessities to the child himself. The court held that the father should not be liable in this case because: 1) the father had been awarded custody before the welfare funds were expended; 2) the welfare payments were necessary only because the wife illegally kept the children in Utah without means to support them; 3) the husband made every effort to bring the children back to California where he could provide them with food and shelter; and 4) there was no showing the father knew of the welfare payments.

F. Health and Welfare Issues

1. Psychotherapist-Patient Privilege

_Huelter v. Superior Court of Santa Clara County_, 87 Cal. App. 3d 544, 151 Cal. Rptr. 138 (1st Dist. 1978). In a dissolution proceeding, the trial court granted husband’s motion ordering production of all medical records in possession of all physicians who had treated his wife during their thirteen-year marriage. Wife had raised the issue of her physical health which allegedly prevented her from working, but she denied any disability based on mental condition. Since her internist had in his possession records of her psychiatrist, wife objected to the order on the ground that compliance with it violated her psychotherapist-patient privilege.

The Court of Appeal issued a preemptory writ of mandate compelling the trial court to set aside its order. The court held that the wife raised only the issue of physical health and not mental health, and that the husband failed to make any showing, beyond mere speculation, that there might be any connection between his wife’s psychiatric treatment and her ability to work. Thus, the order permitted the husband to obtain records in violation of the privilege protecting such communications. The mere exchange of records between her physician and psychotherapist in the normal course of medical treatment did not constitute a waiver of the psychotherapist-patient privilege.

2. Involuntary Sterilization

_Guardianship of Tulley_, 83 Cal. App. 3d 698, 146 Cal. Rptr.
hearing denied, Oct. 4, 1978. The Court of Appeal affirmed a lower court order denying a petition brought by a guardian for the involuntary sterilization of a severely mentally retarded woman. The court held that the only statutory authority for ordering a person to be sterilized requires the person be committed or admitted to a state hospital for the mentally disordered or retarded. Welfare and Institutions Code section 7254. The woman was not so committed. Thus, absent a specific statutory provision, the court was without authority despite its belief that in this case sterilization was justified medically and socially, and was in the best interests of the woman.

The court further held that the refusal to grant the petition did not violate the woman's constitutional right to privacy. On the contrary, where fundamental rights are involved, as in this case, the state is mandated to provide adequate procedural safeguards to avoid potential abuses.

3. Fraudulently Obtaining AFDC For Non-existent Children

People v. Davis, 85 Cal. App. 3d 916, 149 Cal. Rptr. 777 (2nd Dist. 1978). Defendant appealed from a conviction of fraudulently obtaining aid from the county for non-existent children in violation of Welfare and Institutions Code section 11483. The court of appeal affirmed the conviction holding that section 11483 covers false representations to obtain aid for a non-existent child as well as such representations for an existing child not entitled to such aid.

The court also held that evidence in the form of a letter from the county sent one month before prosecution informing the defendant that she had been overpaid and requesting that she contact a welfare investigator to discuss a plan to make restitution, satisfied the statutory requirement that the government seek restitution as a condition precedent to prosecution for welfare fraud. People v. McGee, 19 Cal. 3d 948, 969 n.10, 568 P.2d 382, 393 n.10, 140 Cal. Rptr. 657, 668 n.10 (1977).

4. No Reduction For Loan After Wrongful Denial of AFDC

Burch v. Prod, 90 Cal. App. 3d 987, 153 Cal. Rptr. 751 (4th Dist. 1979). An applicant who was wrongfully denied Aid to Families With Dependant Children was given the retroactive aid by administrative decision but a reduction was made for a loan she
took out to cover expenses during the period following the wrongful denial. The trial court denied the plaintiffs petition for writ of mandate. The court of appeal reversed and directed the trial court to order the payments to be made without reduction, holding that a loan obtained under such circumstances cannot be considered income for the purposes of reducing the aid.

5. Physician’s Liability for Injury Caused by Intrauterine Device

_Tresemer v. Barke_, 86 Cal. App. 3d 656, 150 Cal. Rptr. 384 (2nd Dist. 1978). A woman brought suit for willful misconduct and medical malpractice against a physician for injuries she allegedly sustained as a result of the insertion of a Dalkon Shield intrauterine device three and one-half years earlier. The trial court granted the physician’s motion for summary judgment on the grounds that: 1) the statute of limitations had run, 2) the action was without merit and 3) the plaintiff had presented no triable issues of fact.

The court of appeal reversed noting that both Code of Civil Procedure section 340.5, which governs medical negligence claims, and Code of Civil Procedure section 340, subdivision 3, which governs personal injury actions based on willful misconduct, contemplate that the limitation periods begin to run when the plaintiff discovers or should have discovered the injury. Therefore, although the device was inserted in 1972, plaintiff’s claim that she did not discover the cause of her injury until 1975 should not be summarily dismissed.

The court of appeal held that the defendant’s pleadings showed that at the time of the insertion, the Dalkon Shield was one of the most popular and acceptable intrauterine devices on the market and thus were sufficient to negate any charges of willful misconduct or medical negligence. However, summary judgment was improper since the defendant had a duty to warn the plaintiff when he subsequently learned of the dangers associated with usage of the device, and therefore plaintiff had stated a cause of action for common negligence and malpractice.

G. DISSOLUTION PROCEEDINGS

1. Determination of Division of Community Assets

_In re Marriage of Afmuth_, 89 Cal. App. 3d 446, 152 Cal. Rptr.
In a dissolution proceeding, the trial court entered an interlocutory judgment dissolving the marriage, determined the division of community assets, awarded spousal and child support, and also awarded the wife $3500 in attorney's fees. The wife appealed and the husband cross-appealed from certain provisions of the judgment.

The court of appeal affirmed. The court held that the down payment on the parties' residence which was at the time of purchase made from wife's separate property continued to be her separate property. However, the remainder of the purchase price, obtained by a loan, was paid from community funds. The amounts of separate and community funds were ascertainable and the trial court properly computed the division of interests on a pro rata basis. The court further held that $1,000 per month in spousal support was not inadequate, and that the trial court did not abuse its discretion in failing to order automatic termination of spousal support at the end of some reasonable period of time. The court rejected claims that it was error to: 1) exclude evidence regarding the value of husband's legal education as a community asset; 2) to exclude good will as a valuation factor of the husband's interest in the law firm; and 3) to award attorney's fees.

In re Marriage of Barnert, 85 Cal. App. 3d 413, 149 Cal. Rptr. 616 (2nd Dist. 1978). In a dissolution proceeding, the trial court awarded the husband's medical practice to him and the family home to the wife. On appeal by the husband, the court remanded the case for redetermination of the community property division and a reevaluation of the medical practice. The court instructed the trial court to consider the date of separation and the application of the Van Camp-Pereira formula in reverse to determine the value of the medical practice. In so doing, the court reaffirmed the holding of In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (2nd Dist. 1975), which made any portion of the value of the business attributable to the earnings of the working spouse while separated, his separate property.

2. Bifurcation of Dissolution Judgment From Litigation of Property and Support Rights

In re Marriage of Lusk, 86 Cal. App. 3d 228, 150 Cal. Rptr. 63 (4th Dist. 1978). In a dissolution proceeding, the husband moved to bifurcate the trial and for entry of judgment of dissolu-
tion prior to litigation of support and property rights. The wife contended that the court would lose jurisdiction over the support and property issues under this procedure and that it would prejudice her community property rights and lead to adverse tax consequences. The trial court entered an interlocutory judgment of dissolution expressly reserving jurisdiction over the property and support issues.

The court of appeal affirmed holding that the trial court was authorized by the Family Law Act (Civil Code section 4000 et. seq.), augmented by the Judicial Council rules, not only to bifurcate the trial, but to enter a separate interlocutory judgment of dissolution before other issues had been litigated. The court further held that the wife’s community property rights would not be prejudiced by the judgment of dissolution entered before the property and support rights were litigated and that any adverse tax consequences were purely speculative.

Finally, the court held that, even if the wife’s contentions were correct, the husband would be estopped from asserting any lack of jurisdiction on the part of the court to make subsequent orders for support, property division, attorney fees and any other necessary orders.

3. Wife’s Acquisition of Husband’s Privileged Documents

_Cooke v. Superior Court_, 83 Cal. App. 3d 582, 147 Cal. Rptr. 915 (2d Dist. 1978) _hearing denied_, Oct. 12, 1978. During the pendency of a marriage dissolution, certain documents which the husband intended to share only with his attorney, business associates and family were secretly copied by a servant and given to the wife who turned them over to her attorney. Finding the documents to be privileged and confidential, the trial court ordered them to be delivered to the husband’s attorney. However, the court denied the husband’s motion that the wife’s attorney be disqualified from the case. The court of appeal upheld the court’s determination that the wife’s attorney should not be disqualified but modified the lower court’s order concerning disposal of the documents. In the court’s view, delivery of the documents to the husband’s attorney went beyond what was necessary to protect the husband’s privilege. Instead, the wife was ordered to deliver the documents to the clerk of the court where they would be under seal and available if any of them were privileged.
4. Reasonableness of Attorney's Fees

*In re Marriage of Cueva*, 86 Cal. App. 3d 290, 149 Cal. Rptr. 918 (4th Dist. 1978). At a default hearing in a marriage dissolution, the trial court awarded the wife's attorney sixteen thousand dollars in fees bringing the total award of attorney's fees to twenty-one thousand dollars. The court accepted the wife's argument that this fee was justified because: 1) the length of the marriage had been twenty-two and one half years; 2) there had been considerable difficulty with discovery; and 3) the award was less than three percent of the value of the estate which amounted to one million dollars.

The court of appeal ruled that, although determinations as to the propriety of attorney's fees in dissolution proceedings are within the discretion of the trial court, there were insufficient grounds for an award of twenty-one thousand dollars. Factors besides the size of the estate which must be taken into account include the nature and difficulty of the litigation, the skill required, the attention given to the case, the attorney's learning, age and experience, the time involved and the scope of the responsibilities undertaken.

H. PATERNITY ACTIONS

1. Indigent's Right to Counsel in State's Paternity Suits

*Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979). In two separate paternity actions, one prosecuted by the district attorney in the name of the mother who was on welfare and the other prosecuted by the district attorney as guardian of ad litem for the minor child, defendants claimed to be indigent and requested appointed counsel. The trial court refused and in each case the defendant was found to be the father and ordered to pay child support.

The California Supreme Court reversed both judgments and ordered the trial court to appoint counsel if the defendants could prove their indigency. The court held that counsel must be appointed for indigent defendants in all paternity suits in which the state is a party or appears on behalf of the mother or child.

2. Blood Tests Excluded in Establishing Paternity

*Dodd v. Henkel*, 84 Cal. App. 3d 604, 148 Cal. Rptr. 780 (1st Dist. 1978). In an action to establish paternity and support for a...
child born out of wedlock, the court of appeal affirmed the trial
court's exclusion of evidence of defendant's blood type offered to
show that statistically he could be the putative father. The appel­
late court held that evidence merely reflecting that defendant was
included within the blood type group (15% of the population)
consistent with paternity lacked probative value and, in any
event, was likely to be unduly prejudicial. The court noted that
the Legislature in enacting the Uniform Act on Blood Tests to
Determine Paternity intended that blood-test evidence was ad­
missible only for the purpose of excluding possible paternity.

3. Admissibility of Human Leucocyte Antigen (HLA) Test To
Establish Paternity

*Cramer v. Morrison,* 88 Cal. App. 3d 873, 153 Cal. Rptr. 865
(4th Dist. 1979). In a paternity suit brought by the District Attor­
ney, the jury verdict was in favor of defendant and judgment was
entered decreeing defendant not the father of the child. The trial
judge had granted defendant's motion *in limine* to exclude results
of a human leucocyte antigen (HLA) test taken on blood samples
of the mother, father and child.

The court of appeal reversed, holding that California law
does not preclude use of HLA test results to prove paternity. The
test is based on tissue typing of white blood cells and results in
far higher probabilities of paternity than those yielded by any of
the red blood cell grouping tests.

The court also held that the trial judge erred in ruling that
the prejudicial effect of the statistical results of the test would
outweigh their probative value. The 98.3% probability that defen­
dant was the father of the child rested on objective data and
statistical theory based on scientific research and experiment.
Moreover, absent a statutory mandate excluding highly probative
scientific evidence on the issue of paternity, policy considerations
for protecting children from stigma of illegitimacy and enforcing
parental responsibility to child support argue for broad inclusion
of such evidence.

Finally, the court held that the defendant was precluded
from raising for the first time on appeal the issue that plaintiff
failed to adduce sufficient evidence that HLA tests were accepted
in the relevant scientific community as proof of paternity. The
question of test reliability and its general acceptance in the com-
munity presents a mixed question of law and fact and the court declined to resolve the issue on appeal.

*County of Fresno v. Superior Court (Williams)*, 92 Cal. App. 3d 133, 154 Cal. Rptr. 660 (5th Dist. 1979), hearing denied, June 27, 1979. In a paternity suit brought by Fresno County, the parties stipulated to an extended factor blood test which indicated that there was a forty-seven percent probability that the defendant was the child’s father. The county then sought more sophisticated human leucocyte antigen (HLA) testing, but the defendant opposed the motion and the trial court denied it. The county then sought a writ of mandate directing the trial court to order the testing.

The court of appeal issued the writ, rejecting the defendant’s argument that the forty-seven percent probability factor had legally excluded him as the natural father. The court held that, under Evidence Code section 893, the trial court in a civil paternity suit has no discretion to deny the HLA test where extended factor blood testing has already taken place and the defendant was not excluded by it. The moving party need not show good cause since the existence of the more precise test is sufficient good cause in itself.

4. *Prepayment of Blood Test Expenses for Indigent Prohibited*

*Michael B. v. Superior Court (County of Stanislaus)*, 86 Cal. App. 3d 1006, 150 Cal. Rptr. 586 (5th Dist. 1978). The district attorney brought a paternity action on behalf of a mother and child receiving public assistance against an indigent defendant. Defendant’s motion for blood tests under Evidence Code section 892 was granted by the trial court. The court also ordered the district attorney to arrange for tests for the mother, child and another man and ordered defendant’s counsel to arrange defendant’s test. The defendant and the other man were ordered to share the costs of the blood tests.

On petition by defendant, the court of appeal issued a writ of mandate ordering the superior court to appoint an expert to conduct the blood tests pursuant to Evidence Code section 893, to fix the expert’s compensation and to order the county to pay initially, subject to being later taxable to the parties as costs in the action. (Evidence Code section 894.) The court held that since Evidence Code sections 892 et seq. authorize prepayment by the

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county for blood tests, it is error to require prepayment by an indigent defendant.

5. Limited Inquiry Into Mother's Sexual Involvement

*Fults v. Superior Court*, 88 Cal. App. 3d 899, 152 Cal. Rptr. 210 (1st Dist. 1979). In response to objections by the plaintiff in a paternity suit, the trial court limited interrogatories concerning her sexual relationships to a period of one year prior to and one year after the likely date of conception. Arguing that such inquiry should cover a period no more than three months before or three months after conception, the plaintiff petitioned the court of appeal on grounds that any broader inquiry was irrelevant and invaded her right of privacy.

The court of appeals issued a writ of mandate directing the trial court to vacate its discovery order with regard to any inquiries beyond the possible period of conception. The court noted that, while the broader inquiry could not be said to be irrelevant, absent some affirmative showing that it was likely to uncover material information, the mother's right of privacy outweighed its utility.

III. LABOR LAW

A. Workers' Compensation

1. Compensation Recoverable by Minor Child When Spouse Elected Special Benefits

*Department of Corrections v. Workers' Compensation Appeals Board*, 23 Cal. 3d 197, 589 P.2d 853, 152 Cal. Rptr. 345 (1979). The widow of a correctional officer filed a workers' compensation claim for “special death benefits” under Government Code section 21363 (Public Employees Retirement System). The deceased's minor daughter also filed a claim for death benefits under the Workers' Compensation law. Labor Code section 4701 et seq. Since the widow elected to claim “special death benefits” which are payable only to surviving spouses, the workers' compensation judge ruled that the child was precluded from claiming benefits by Labor Code section 4707. The Workers' Compensation Appeals Board (WCAB), on reconsideration, awarded a death benefit to the child on the theory that Labor Code section 4707 could be construed to allow the child to receive at least the amount she would have received if the award was made under the Labor Code.
The California Supreme Court, after finding the WCAB’s interpretation of section 4707 unreasonable, annulled the award to the daughter and remanded for a determination of whether there was good cause for granting an award under Labor Code section 4704. The court held that after the widow elected to claim special death benefits the clear language of section 4707 precluded an award to the child. Nevertheless, under Labor Code section 4704, the WCAB had discretion in awarding death benefits. The court noted that it is improper to read these statutes narrowly to strip death benefits from a minor child who also happens to be the dependent of a public employee. Rather, Labor Code section 4704 is properly construed liberally to authorize payments to dependents denied death benefits under Labor Code section 4707 and Government Code section 21364 if “good cause” is shown.

2. Employee Shot By Husband On Her Job Entitled to Workers’ Compensation

Murphy v. Workers’ Compensation Appeals Board, 86 Cal. App. 3d 996, 150 Cal. Rptr. 561 (5th Dist. 1978). The court of appeal annulled the decision of the Workers Compensation Appeals Board that an employee whose husband shot her at her place of employment was not entitled to compensation. At issue in the case was whether the shooting arose out of the petitioner’s employment. The court of appeal found the requisite connection between the employment and the injury, based primarily on the facts that the husband (1) greatly resented his wife’s employment, (2) had threatened to kill her repeatedly in the presence of her supervisors who nevertheless refused to grant her a transfer, and (3) had made a specific threat to her employer the night before the shooting which the employer failed to communicate to petitioner.

3. Workers’ Compensation Not Exclusive Remedy for Intentional Torts of Employer’s Agents

Meyer v. Graphic Arts International Union, 88 Cal. App. 3d 176, 151 Cal. Rptr. 597, modified, 88 Cal. App. 3d 767f (2nd Dist. 1979). In an employee’s action against her union and certain of its agents and officers for assault, battery, false imprisonment and rape, the plaintiff alleged that the employees responsible for these acts were her employer’s agents and had acted within the scope of their agency. The trial court sustained the employer’s demurrer without leave to amend in the belief that the plaintiff’s
exclusive remedy lay with the Workers' Compensation Appeals Board.

The court of appeal reversed, holding that an employer can be held liable in a civil action for assaults committed by his or her agent. Since the complaint contained an allegation of actual agency it was held to be sufficient to withstand a general demurrer.

B. **Employment Discrimination**

1. **Removal of Wife From Planning Commission Due to Husband's Election to City Council**

   *Kimura v. Roberts,* 89 Cal. App. 3d 871, 152 Cal. Rptr. 569 (3rd Dist. 1979) *hearing denied,* May 24, 1979. The trial court ordered a city council to reinstate the plaintiff to her position on the city planning commission from which she was removed when her husband was elected to the city council.

   The court of appeal reversed, holding that a planning commissioner serves at the pleasure of the appointing power and may be terminated for any constitutional reason. Since decisions of the planning commission are subject to review by the city council, the court held that there would or could be actual bias or conflict of interest or the appearance of it. The court further noted that, contrary to the trial court's interpretation, the reason for plaintiff's removal from her position was her husband's election to city council and not her exercise of her constitutional right to marry her husband.

2. **Civil Service Affirmative Action**

   *Dawn v. State Personnel Board,* 91 Cal. App. 3d 588, 154 Cal. Rptr. 186 (3rd Dist. 1979), *hearing denied,* June 8, 1979. The court of appeal upheld the trial court's denial of a petition for mandate by a civil service parole agent. The plaintiff was seeking review of the State Parole Board's affirmation of a woman's job promotion to which plaintiff allegedly should have been appointed. The court held that the evidence indicated that both the male plaintiff and the woman were equally qualified for the promotion and that under those circumstances it was permissible to choose the woman in an effort to further the goals of affirmative action.
C. Legislation

1. Agency Use of Public Funds to Promote ERA

Miller v. Miller, 87 Cal. App. 3d 762, 151 Cal. Rptr. 197 (3rd Dist. 1978). At issue in this case was what, if any, limitations should be placed on the California Commission on the Status of Women in their spending of public funds to promote ratification of the Equal Rights Amendment. The position of the plaintiffs was that, absent explicit legislative authorization, public agencies are forbidden to use public monies in promoting a partisan position in an election campaign. The trial court granted summary judgment to the defendants on the grounds that plaintiffs had not made an adequate showing that the Commission was involved in impermissible electoral activities as opposed to permissible legislative lobbying.

The court of appeals disagreed, holding that what distinguishes lobbying from electoral activities is the audience to which the activities are addressed. Here, plaintiffs made an adequate showing that the Commission was involved in election campaigning. Since there was no explicit statutory authorization for the commission to urge the public to support any legislative or constitutional measures, public funds could not be spent in any such pursuit.