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Survey: Women and California Law

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SURVEY: WOMEN AND CALIFORNIA LAW

This survey of California law, a regular feature of the *Women's Law Forum*, summarizes recent California Supreme Court and Court of Appeal decisions of special importance to women.

TABLE OF CONTENTS

I. CONTRACT LAW

A. Cohabitation Contract

1. *A gay couple's unwritten cohabitation contract is enforceable to the extent it is based on non-sexual services.*

Whorton v. Dillingham, 202 Cal. App. 3d 447, 248 Cal. Rptr. 405 (1988), *review denied. Whorton v. Dillingham* extended the enforceability of an unmarried couple's marriage-like contract in two major respects. First, the *Whorton* court applied the *Marvin*[1] doctrine to a couple of the same sex. Second, it found that the couple's mutual promises of sexual services were severable and thus did not invalidate the remainder of their contract.

Whorton and Dillingham, a gay couple, lived together for seven years under the terms of an oral cohabitation contract. Whorton quit college to work full time as Dillingham's chauffeur, bodyguard, secretary, and business partner. In exchange, Dillingham promised Whorton support for life and a one-half interest in all property they acquired.

The couple also promised to be lovers. They specifically agreed that any portion of the contract found legally unenforceable would be severable.[2]

When Dillingham terminated the relationship, Whorton sued claiming property rights. The trial court sustained Dillingham's demurrer and dismissed the action on the ground the contract was unenforceable as expressly and inseparably based on sexual services.[3] Whorton appealed, and the court of appeal reversed.[4]

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1. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (cohabitation contract found enforceable).

2. *Whorton*, 202 Cal. App. 3d at 450, 248 Cal. Rptr. at 407.

3. *Id.*, 248 Cal. Rptr. at 406.

4. *Id.*

As a gay couple, Whorton and Dillingham had been denied by statute the right to a formal marriage.[5] Nevertheless, the court of appeal did not invalidate their use of a marriage-like contract to confer on each other many of the rights and responsibilities of marriage.

As significant as *Whorton* may be for thousands of gay and lesbian couples, the court relegated its rationale to a succinct footnote: "Dillingham does not assert *Marvin* is inapplicable to same-sex partners, and we see no legal basis to make a distinction."[6]

Prior to *Marvin*, most courts had reasoned that the agreement of any unmarried couple, gay or straight, to share their lives was the same as any other "contract to pay for the performance of sexual services, [which] is, in essence, an agreement for prostitution and unlawful for that reason."[7] The *Marvin* court held that cohabitors are competent to contract and that their contracts are enforceable to the extent they do not " 'rest upon illicit meretricious consideration . . . .' "[8]

Five years after *Marvin*, the court of appeal in *Jones v. Daly*[9] refused to award an interest in his partner's estate to a gay survivor under a cohabitors' agreement.[10] The *Marvin* doctrine did not apply, the court decided, because the agreement did not " 'rest[] upon plaintiff's acting as Daly's traveling companion, housekeeper or cook as distinguished from acting as his lover. The latter service forms an inseparable part of the consideration for the agreement and renders it unenforceable in its entirety.' "[11]

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5. California's marriage law was amended in 1977 to exclude same-sex couples specifically: "Marriage is a personal relation arising out of a civil contract *between a man and a woman* . . . ." CAL. CIV. CODE § 4100 (West 1983) (amendment emphasized).

6. *Whorton*, 202 Cal. App. 3d at 452 n.1, 248 Cal. Rptr. at 408 n.1.

7. *Marvin*, 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.

8. *Whorton*, 202 Cal. App. 3d at 451, 248 Cal. Rptr. at 407 (quoting *Marvin*, 18 Cal. 3d at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825).

9. 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (1981).

10. *Whorton*, 202 Cal. App. 3d at 454-55, 248 Cal. Rptr. at 410.

11. *Id.* at 455, 248 Cal. Rptr. at 410 (quoting *Jones*, 122 Cal. App. at 509, 176 Cal. Rptr. at 134) (emphasis omitted).

The *Whorton* court painstakingly distinguished *Jones*, despite the remarkable similarity of the facts of the two cases. It observed that cohabitation agreements almost invariably contemplate "a mutual sexual relationship."[12] That fact, by itself, could not invalidate such agreements, because *Marvin* had ruled that " 'even if sexual services are part of the contractual consideration, any *severable* portion of the contract supported by independent consideration will still be enforced.' "[13]

Thus, severability of the sexual component of the contract was the key issue in *Whorton*,[14] and three arguments persuaded the *Whorton* court to reach the conclusion that the sexual component was severable. First, Whorton had alleged that the parties to his contract had agreed to the severability of any portion found unenforceable.[15] Jones had not.[16]

Second, although the plaintiffs in both cases had promised to serve as "companion," Whorton had also contracted to provide an itemized list of what the court construed as business services: "chauffeur, bodyguard, secretary, partner and business counselor."[17] Jones' services had been described in his complaint as " 'lover, companion, homemaker, traveling companion, housekeeper and cook,' "[18] summed up by the *Whorton* court as "household duties." The *Whorton* court distinguished Whorton's business services, "those for which monetary compensation ordinarily would be anticipated," from Jones' household or homemaking services, which it considered "normally incident to the state of cohabitation itself."[19]

If the role of "companion" had been classified as a homemaking service, it still should not have tainted the contract. Recalling *Marvin*, the *Whorton* court determined that even promises to serve as homemaker are not necessarily so intertwined with the sexual relationship as to be inseparable. *Marvin* had noted that " '[a] promise to perform homemaking services

12. *Id.* at 451, 248 Cal. Rptr. at 407.
13. *Id.* (quoting *Marvin*, 18 Cal. 3d at 672, 557 P.2d at 114, 134 Cal. Rptr. at 823).
14. *Id.* at 452, 248 Cal. Rptr. at 408.
15. *Id.* at 450, 248 Cal. Rptr. at 407.
16. *Id.* at 455, 248 Cal. Rptr. at 410.
17. *Id.*
18. *Id.* (quoting *Jones*, 122 Cal. App. 3d at 505, 176 Cal. Rptr. at 131).
19. *Id.*

is, of course, a lawful and adequate consideration for a contract . . . .' "[20]

Ultimately, therefore, the distinction between business and homemaking services did not determine the outcome in *Whorton*. In the opinion of this court, no promise made by Whorton except his promise to be Dillingham's lover could have invalidated the couple's contract.

The third severability argument considered by the *Whorton* court rested on an elementary fact of life and rule of contract.[21] A promise to be lovers must be made by both parties, not just one. Moreover, lawful sections of contracts are severable from unlawful sections when " 'the parties' performances can be apportioned in corresponding pairs . . . .' "[22] The court concluded: "[B]y itemizing the mutual promises to engage in sexual activity, Whorton has not precluded the trier of fact from finding those promises are the consideration for each other and independent of the bargained for consideration for Whorton's employment."[23]

Briefly discussed and dismissed by the *Whorton* court were the defendant's claims that the contract was barred by the statute of frauds and the statute of limitations and that it was a labor contract terminable at will.[24] Relying on *Marvin*, the court noted that agreements between nonmarital partners have been expressly upheld, despite the fact they are usually oral, on the theory of promissory estoppel.[25]

As to whether the contract was time-barred, the time begins to run on a *Marvin*-type contract when one party ends the relationship[26] and continues for two years if the claim is based on an

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20. *Id.* at 451, 248 Cal. Rptr. at 407 (quoting *Marvin*, 18 Cal. 3d at 670 n.5, 557 P.2d at 113 n.5, 134 Cal. Rptr. at 822 n.5).

21. *Id.* at 452-54, 248 Cal. Rptr. at 408-10.

22. *Id.* at 452-53, 248 Cal. Rptr. 408 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 183 (1979)).

23. *Id.* at 454, 248 Cal. Rptr. at 410.

24. *Id.* at 456-57, 248 Cal. Rptr. at 410-11.

25. *Id.* at 456, 248 Cal. Rptr. at 410-11.

26. *Id.* (citing Estate of Fincher, 119 Cal. App. 3d 343, 352, 174 Cal. Rptr. 18, 23-24 (1981)).

unwritten contract, three years for fraud, and four years if based on equitable grounds.[27]

A cohabitation contract, the court ruled, is not a contract for employment terminable at will under the Labor Code. Instead, it governs "how two nonmarital partners have agreed to regulate their economic affairs."[28] Either party may terminate the partnership, and the issue for the court is distribution of assets.[29]

Whorton should prove to be a landmark decision not only for lesbian and gay couples denied the right to marry, but also for vast numbers of unmarried heterosexual couples. In the recent case of *Elden v. Sheldon*,[30] the California Supreme Court noted an 800 percent increase in unmarried cohabitation in the census prior to *Marvin* and almost another tripling between 1970 and 1984.[31]

Women especially stand to benefit from courts' increasing willingness to enforce unwritten cohabitation contracts. *Whorton* builds on a foundation laid in 1976 by the California Supreme Court with *Marvin* and by the Oregon Supreme Court with *Latham v. Latham*,[32] both of which upheld women's claims under heterosexual agreements. The *Whorton* court found *Latham* of "particular significance" because, as in *Whorton*, "the sexual aspect of the agreement appeared on the face of the complaint."[33]

The California court in *Marvin* observed that "prior decisions which had denied relief to the homemaking partner . . . rested upon a policy of punishing persons guilty of cohabitation without marriage."[34] The Oregon court in *Latham* reasoned: "The application of the principle that such a contract will not be

27. *Id.* at 456-57, 248 Cal. Rptr. at 411.
28. *Id.* at 457, 248 Cal. Rptr. at 411.
29. *Id.*
30. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).
31. *Id.* at 273 n.3, 758 P.2d at 585 n.3, 250 Cal. Rptr. at 258 n.3.
32. 547 P.2d 144 (Or. 1976).
33. *Whorton*, 202 Cal. App. 3d at 453-54, 248 Cal. Rptr. at 409.
34. *Marvin*, 18 Cal. 3d at 680, 557 P.2d at 119, 134 Cal. Rptr. at 828.

enforced has often resulted in the male keeping the assets accumulated in the relationship and the female being deprived of what she jointly accumulated."[35]

An English commentator recently decried the harm done to women unless cohabitation contracts are enforced: "A woman's place is often still in the home, but if she stays there, she will acquire no interest in it."[36]

The rights of unmarried cohabiting partners are not invariably given the same protection as those of married partners. *Elden*, for example, rejected the claims of the survivor of a heterosexual unmarried couple for negligent infliction of emotional distress and loss of consortium, limiting such recovery to married partners only.[37]

Acknowledging "that society benefits from the stability and structure provided by the institution of marriage,"[38] the dissent insisted: " 'The state's policy in favor of marriage, however, does not imply a corresponding policy *against* nonmarital relationships.' Nor does it imply that the values underlying the state's interest in marriage flourish only within the confines of that institution."[39]

Lesbians and gays are particularly vulnerable, the dissent noted. "Clearly the state's interest in marriage is not advanced by precluding recovery to couples who could not in any case choose marriage. The categorical exclusion of same-sex couples particularly highlights the injustice of an approach that recognizes only those commitments ratified by the state."[40]

Although *Elden* demonstrated the persistent inequality in legal standing between married and unmarried cohabiting

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35. *Latham*, 547 P.2d at 147.

36. Eekelaar, *A Woman's Place—A Conflict Between Law and Social Values*, 1987 CONV. & PROP. LAW. (n.s.) 93, 94.

37. *Elden*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254.

38. *Id.* at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting) (citing *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831).

39. *Id.* (Broussard, J., dissenting) (citation omitted) (emphasis in original) (quoting Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 14, 663 P.2d 904, 913, 192 Cal. Rptr. 135, 143 (1983) (Broussard, J., dissenting)).

40. *Id.* at 282 n.2, 758 P.2d at 592 n.2, 250 Cal. Rptr. at 264 n.2 (Broussard, J., dissenting).

couples, *Whorton* extended the enforceability of cohabitation contracts significantly beyond *Marvin*. *Whorton* has breathed fresh hope into the search for equal protection among all couples who call themselves a family, married or not, gay or straight.

*Mary Ratcliff**

II. CRIMINAL LAW

A. Child Abuse

1. *Felony child abuse is not inherently dangerous to human life and therefore not an appropriate predicate to the application of the felony-murder rule.*

People v. Caffero, 207 Cal. App. 3d 678, 255 Cal. Rptr. 22 (1989), *review denied*. In *People v. Caffero*, the California court of appeal affirmed dismissal of a murder charge against the parents of a seventeen-day-old infant. Although the baby died of infection brought on by severe diaper rash, the court found no evidence that the parents knew their failure to care hygienically for their baby endangered her life. The court held that felony child abuse is not inherently dangerous to human life and therefore not an appropriate predicate to the application of the felony-murder rule.

Christina Caffero was born prematurely on December 17, 1986, and went home from the hospital five days later in the care of her parents, defendants Jay and Tina Caffero. On December 31, after nine days at home, the baby seemed " 'jumpy.' "[1]

Her mother called the hospital emergency room for advice. She was told to call her own doctor or, if the situation was a

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1. *Caffero*, 207 Cal. App. 3d at 681, 255 Cal. Rptr. at 23.

" 'real emergency,' " to bring the baby to the hospital. It was New Year's Eve.[2]

The baby's mother waited until the next day when her mother-in-law could see Christina. The grandmother said the baby had nothing more serious than colic and a " 'diaper rash.' "[3]

Defendants took their baby to the emergency room on January 2 at 10:40 p.m. Observing the baby's "good facial color" and only slightly elevated temperature of 98.9 degrees, the triage nurse decided her condition was " 'non-urgent.' "[4]

At midnight, the nurse looked at Christina again. The baby's skin had become pale, and the nurse noticed sores on her anus and foot and fecal staining on her skin.[5] Christina's temperature had dropped to 93.2 degrees, and her blood pressure was extemely low. Despite intensive treatment, she died hours later of Escherichia coli (E. coli), an overwhelming bacterial infection.[6]

The magistrate held Jay and Tina Caffero for felony child abuse[7] but declined to hold them for murder. The magistrate made no findings of fact.[8]

Four medical doctors testified that the infection had entered Christina's blood stream through a perianal sore. They said such sores, which take several days to develop, are caused by prolonged contact with fecal matter when diapers are not regularly changed.[9]

Two of the doctors, both specialists in pediatric intensive care, regarded Christina's sores as the most severe they had ever

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*, 255 Cal. Rptr. at 23-24.
7. CAL. PENAL CODE § 273a(1) (West 1988). For the relevant parts of the statute, *see infra* text accompanying note 19.
8. *Caffero*, 207 Cal. App. 3d at 682, 255 Cal. Rptr. at 24.
9. *Id.* at 681-82, 685, 255 Cal. Rptr. at 24, 26.

seen, at least for a baby her age.[10] The experts agreed that once E. coli is introduced into the blood stream, it can overwhelm a baby's entire system within a day or two.[11] In Christina's case, her condition became grave a short time after she arrived at the hospital, and she died a few hours later.[12]

Following the magistrate's examination, Christina's parents were charged by the state with both felony child abuse and murder. The court of appeal affirmed the superior court's dismissal of the murder charge because it found no evidence of malice. Defendants had shown neither express malice nor implied malice, "a subjective awareness that their acts or omissions endangered the life of their child."[13]

The felony-murder rule originally made the commission of any felony resulting in unintended death a predicate for murder.[14] Many American jurisdictions have narrowed the rule, and some have abolished it, as has England.[15] California has limited the rule by requiring that the underlying felony be inherently dangerous to human life.[16]

Whether the particular felony is an appropriate predicate to murder is determined by examining the elements of the felony in the abstract, rather than by examining the facts of the case.[17] Furthermore, the statutory definition of the felony must be viewed as a whole. The *Caffero* court ruled, "If the statute may be violated by conduct which does not endanger human life, it is not inherently dangerous to human life."[18]

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10. *Id.* at 685, 255 Cal. Rptr. at 26.

11. *Id.* at 682, 255 Cal. Rptr. at 24.

12. *Id.* at 685, 255 Cal. Rptr. at 26.

13. *Id.* at 684-85, 255 Cal. Rptr. at 25-26.

14. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.5, at 622 (2d ed. 1986).

15. *Id.* § 7.5(h), at 640.

16. *Caffero*, 207 Ca. App. 3d at 682, 255 Cal. Rptr. at 24 (citing People v. Ireland, 70 Cal. 2d 522, 538, 450 P.2d 580, 589, 75 Cal. Rptr. 188, 197 (1969)); *see also* W. LAFAVE & A. SCOTT, *supra* note 14, § 7.5(b), at 623 n.10 ("People v. Washington, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130 (1965) ('The felony-murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony').").

17. *Caffero*, 207 Cal. App. 3d at 683, 255 Cal. Rptr. at 24; *see also* W. LAFAVE & A. SCOTT, *supra* note 14, § 7.5(b), at 624.

18. *Caffero*, 207 Cal. App. 3d at 683, 255 Cal. Rptr. at 25 (citing People v. Burroughs, 35 Cal. 3d 824, 830-31, 678 P.2d 894, 898-99, 201 Cal. Rptr. 319, 323-24 (1984)).

The felony child abuse statute states in relevant part: " 'Any person who, *under circumstances or conditions likely to produce great bodily harm or death*, willfully causes or permits any child to suffer . . . is punishable by imprisonment . . . in the state prison . . . .' "[19]

The court found that the statute may be violated by conduct that is not life threatening. Death and great bodily harm are treated as discrete risks. An injury such as a fractured limb, the court noted, may be deemed "great bodily harm." However, it is unlikely to endanger life, even the life of an infant.[20]

Other courts of appeal have sustained second degree felony-murder convictions on the assumption that violation of the felony child abuse statute is a felony inherently dangerous to human life.[21] The *Caffero* court concluded, however:

> We are not unaware of the shocking incidence of child abuse in our society nor indifferent to the special need of helpless children for the full measure of protection which the law can afford. Nevertheless, . . . we are impelled to the conclusion that felony child abuse is not inherently dangerous to human life within the meaning of the felony-murder rule.[22]

The court next addressed whether the evidence in this case could support the charge of murder, without regard to the felony-murder rule. Murder requires malice aforethought. The Cafferos were charged not with express malice, but with malice that implies an " 'abandoned and malignant heart.' "[23] This kind of murder, unlike felony murder, is not analyzed in the abstract.[24]

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19. *Id.* at 683, 255 Cal. Rptr. at 24 (quoting CAL. PENAL CODE § 273a(1)) (emphasis added by the court).

20. *Id.* at 683-84, 255 Cal. Rptr. at 25 (arguing by analogy to *Burroughs*, 35 Cal. 3d at 831, 678 P.2d at 898, 201 Cal. Rptr. at 323-24).

21. *Id.* at 682, 255 Cal. Rptr. at 24 (citing People v. Shockley, 79 Cal. App. 3d 669, 674-77, 145 Cal. Rptr. 200, 202-03 (1978); People v. Northrop, 132 Cal. App. 3d 1027, 1031-40, 182 Cal. Rptr. 197, 199-204 (1982) (disapproved on other grounds in People v. Smith, 35 Cal. 3d 799, 807-08, 678 P.2d 886, 891-92, 201 Cal. Rptr. 311, 316-17 (1984))).

22. *Id.* at 684, 255 Cal. Rptr. at 25.

23. *Id.*, 255 Cal. Rptr. at 26.

24. W. LAFAVE & A. SCOTT, *supra* note 14, § 7.4(a), at 618-19.

The evidence in a particular case must show that the defendants knew their acts or omissions were endangering life.[25]

Tina Caffero knew something was wrong with her baby. She consulted her mother-in-law and hospital emergency room personnel. "[B]ut the advice she received conveyed no sense of urgency about the need for immediate medical attention."[26]

Hospital personnel's response to her call on New Year's Eve and again two days later as she waited in the emergency room for nearly an hour and a half to have her baby examined demonstrated their assumption that Christina's condition was " 'non-urgent.' "[27] The court concluded:

> It is reasonably inferable that Christina's death was caused by grossly inadequate care at the hands of defendants, specifically their failure to maintain minimally acceptable standards of hygiene and to seek timely medical care for Christina. However, there is no evidence defendants were actually aware their conduct endangered Christina's life. . . .
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> . . . [Therefore,] the evidence will not support the inference defendants acted with conscious or wanton disregard for human life and thus with malice aforethought.[28]

The reported facts do not disclose the age of Christina's parents or whether she was their first child. Nor does the case reveal where or how they lived, their income, or whether they had a family doctor.

The court of appeal, in refusing to recognize child abuse as a predicate to felony murder, appears to have concluded that

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25. "Malice is implied . . . 'when defendant does an act with a high probability that it will result in death and does it with a base antisocial motive and with a wanton disregard for human life.' " *Caffero*, 207 Cal. App. 3d at 685, 255 Cal. Rptr. at 26 (quoting People v. Watson, 30 Cal. 3d 290, 300, 637 P.2d 279, 285, 179 Cal. Rptr. 43, 49 (1981)).

26. *Id.*

27. *Id.* at 681, 685, 255 Cal. Rptr. at 23, 26.

28. *Id.* at 685-86, 255 Cal. Rptr. at 26.

prison is not the appropriate place for ignorant parents. Although the Cafferos may have been grossly negligent during the twelve days Christina was in their care, the court seems to have decided that their baby's death was punishment enough.

Society does not prepare most young people to be good parents. Perhaps the court was suggesting that education in good parenting and assistance and support for young parents can be provided at a far smaller social and fiscal cost than imprisonment.

*Mary Ratcliff**

B. Domestic Violence

1. *Cohabitant need not have a full quasi-marital relationship for protection from domestic violence under Penal Code section 273.5.*

People v. Holifield, 205 Cal. App. 3d 993, 252 Cal. Rptr. 729 (1988). In *People v. Holifield*, the California court of appeal affirmed a trial court decision convicting Holifield for inflicting corporal injury upon a cohabitant. The court of appeal rejected a rigid interpretation of "cohabitation" and instead opted for a more expansive definition in order to broaden the scope of protection against domestic violence.

Defendant Maxie Joe Holifield shared a small motel room with Mary Andres.[1] Although Andres maintained the residence and paid all the rent, Holifield shared a bed with her and kept some clothes and other personal belongings there.[2] The couple had infrequent sexual relations; however, both agreed that their relationship was not intimate in spite of Andres' strong feelings for Holifield.[3] The couple did not maintain a joint bank account

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* J.D., 1990, Golden Gate University School of Law.

1. *Holifield*, 205 Cal. App. 3d at 995, 252 Cal. Rptr. at 730.
2. *Id.* at 995-96, 252 Cal. Rptr. at 730-31.
3. *Id.* at 996, 252 Cal. Rptr. at 731.

or make any major purchases together. Often, Holifield would shower and change at Andres' and then go out to meet others without her.[4]

From June until August 1986, Holifield stayed at Andres' sporadically. Each time he left, he took his belongings with him.[5] During the middle of August, he returned, and on August 29, Holifield battered and terrorized Andres in the motel room.[6] The trial jury convicted Holifield of inflicting corporal injury on a cohabitant.[7] He appealed, claiming that the statutory definition of cohabitation in section 273.5 of the California Penal Code was void for vagueness, that the jury was improperly instructed, and that there was insufficient evidence to support the jury's finding.[8]

The court began its analysis by affirming the importance of certainty in legislation as a means of ensuring due process.[9] It then delineated two requirements that a statute must meet if the statute is not to be voided for vagueness. First, the statute must be clear enough to provide reasonable notice of the prohibited conduct. The standard applied is that persons of average intelligence should not have to " 'guess' " at the meaning of the statute and " 'differ' " as to its application. Second, the statute must be definite enough to protect against " 'arbitrary and discriminatory' " enforcement and interpretation by police and the judiciary.[10]

The court of appeal then referred to a recent challenge to the validity of Penal Code section 273.5. In *People v. Ballard,* an appellate court reasoned that a statute could not be deemed vague if the language employed accorded with long usage or common law meaning. The *Ballard* court, relying on *Lorenson v. Superior Court,* determined that the term cohabitation had

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4. *Id.*, 252 Cal. Rptr. at 730-31.

5. *Id.*, 252 Cal. Rptr. at 730.

6. *Id.* at 995, 252 Cal. Rptr. at 730.

7. *Id.*

8. *Id.* CAL. PENAL CODE § 273.5(a) (West Supp. 1990) provides in part: "Any person who willfully inflicts . . . upon any person of the opposite sex with whom he or she is cohabiting . . . corporal injury . . . is guilty of a felony . . . ."

9. *Holifield,* 205 Cal. App. 3d at 997, 252 Cal. Rptr. at 731.

10. *Id.* (quoting People v. Superior Court (Caswell), 46 Cal. 3d 381, 389-90, 758 P.2d 1046, 1049, 250 Cal. Rptr. 515, 518 (1988)).

been used for over 100 years in California law and that it had an established common law meaning — to live together.[11]

After briefly surveying other legal interpretations of cohabitation, the *Holifield* court examined the intent behind the statute. It referred again to *Ballard*, which had noted that the purpose of section 273.5 was to expand the scope of an earlier wife beating statute.[12] Thus, the court reasoned that a more expansive interpretation of section 273.5 could afford protection against a broader range of domestic violence, especially with respect to cohabitants.[13]

The court of appeal then articulated its definition of cohabitation. It rejected defendant's rigid interpretation — a relationship in which a man and woman live together and assume marital roles — adopting instead the *Ballard* definition of cohabitation, a " 'significant relationship' " between a male and female living together, but not necessarily in a de facto marriage.[14] However, the court did qualify this definition. It stated that since the purpose behind the statute was to protect against domestic violence, it was necessary for the relationship to include some amorous or sexual intimacy.[15]

Buttressing its decision with a second rationale for construing the statute expansively, the court concluded that in order to preserve judicial consistency and predictability, it was necessary that the court not be forced into the position of determining whether the " 'emotional attachments of the family relationship'

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11. *Id.* at 997-98, 252 Cal. Rptr. at 731-32 (citing with approval People v. Ballard, 203 Cal. App. 3d 311, 318, 249 Cal. Rptr. 806, 808-09 (1988) (quoting Lorenson v. Superior Court, 35 Cal. 2d 49, 60, 216 P. 2d 859, 866 (1950))).

12. *Id.* at 998, 252 Cal. Rptr. at 732 (citing *Ballard*, 203 Cal. App. 3d at 318, 249 Cal Rptr. at 808). The *Ballard* court had compared CAL. PENAL CODE § 273.5 (West Supp. 1990) with CAL. PENAL CODE §§ 13700-13731 (West Supp. 1990), also known as the Law Enforcement Response to Domestic Violence. Both Penal Code sections were created to extend protection against domestic violence to cohabiting couples with significant relationships.

13. *Holifield*, 205 Cal. App. 3d at 998-99, 252 Cal. Rptr. at 732-33.

14. *Id.* at 999, 252 Cal. Rptr. at 732 (citing *Ballard*, 203 Cal. App. 3d at 318-19, 249 Cal. Rptr. at 809).

15. *Id.*, 252 Cal. Rptr. at 733.

existed between the parties.' "[16] The court of appeal then affirmed the validity of section 273.5.[17]

In examining the defendant's second objection, the court of appeal determined that the jury had been properly instructed.[18] The court rejected defendant's contention that giving the jurors a list of factors they " 'may' " consider granted the jurors license to construct their own definition of cohabition. It contended that the enumerated factors given to the jury to decide whether some "permanency of relationship" existed between Holifield and Andres were merely guidelines and that the jury understood this.[19]

Finally, the court of appeal dismissed defendant's assertion of lack of substantial evidence. Since a de facto marriage was not required to qualify as cohabitation, the court concluded that the evidence presented was sufficient for the jury reasonably to find that the couple had cohabited.[20]

Georgine C. Baxter

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16. *Id.* at 999-1000, 252 Cal. Rptr. at 733 (quoting Eldon [sic] v. Sheldon, 46 Cal. 3d 267, 275-76, 758 P.2d 582, 587, 250 Cal. Rptr. 252, 259 (1988)).

17. *Id.* at 1000, 252 Cal. Rtpr. at 734.

18. *Id.* at 1001, 252 Cal. Rptr. at 734. The jury had been given six elements to consider when determining whether Holifield and Andres had cohabited:

> 1. Sexual relations between the parties while sharing the same living quarters.
>
> 2. Sharing of income and expenses.
>
> 3. Joint use or ownership of property.
>
> 4. Whether the parties hold themselves out as husband and wife.
>
> 5. The continuity of the relationship.
>
> 6. The length of the relationship.

Id.

19. *Id.* at 1001-02, 252 Cal. Rtpr. at 734.

20. *Id.*, at 1002, 252 Cal. Rptr. at 734-35.

III. EMPLOYMENT LAW

A. GENDER AND ANCESTRY DISCRIMINATION

1. *Hispanic woman offered salary lower than published range and lower than salary paid to non-Hispanic man who was given the job is found to have filed a "groundless action."*

Gonzales v. MetPath, Inc., 214 Cal. App. 3d 422, 262 Cal. Rptr. 654 (1989). In *Gonzales v. MetPath, Inc.*, MetPath had offered Gonzales, a woman of Mexican-American ancestry, a promotion to the position of operations manager at an annual salary of $15,725.[1] After her counteroffer of $20,000 was rejected, Gonzales declined the offer and MetPath hired a non-Hispanic man to fill the same position at an annual salary of $18,870. MetPath's published salary range for the position was $17,745 to $25,642. Gonzales sued MetPath for discrimination against her on the bases of ancestry and gender.

Affirming the summary judgment granted MetPath by the trial court, the California court of appeal defined "discrimination" to mean "the making of distinctions, i.e., perceiving differences." In the employment context, an employer is not "forbidden to perceive the difference between a good employee and an incompetent one, or between a good employee and a better one."[2] The employment discrimination laws, the court decided, "were never intended to turn the private sector workforce into a new form of civil service," nor to commission the courts to sit as personnel review boards to oversee private business judgments. Employers must have "wide latitude to make independent, good-faith personnel decisions without the threat of a jury second-guessing their business judgments," the court concluded.[3]

The majority scolded Gonzales for filing a

> groundless action [which] sends a clear message: Employers, beware your minority and female employees. . . . [They may] engulf you in protracted litigation . . . even when your business decision is

1. Gonzales had been serving as acting operations manager, and her performance was rated as "excellent." *Gonzales*, 214 Cal. App. 3d at 424, 262 Cal. Rptr. at 655.

2. *Id.* at 426, 262 Cal. Rptr. at 657.

3. *Id.* at 428, 262 Cal. Rptr. at 658.

> to promote a minority woman from the secretarial ranks to a managerial position — a decision you might never have imagined would provoke her to condemn and sue you. Minority and female workers are therefore a potential danger to your business; try to avoid hiring them.[4]

Justice Morio Fukuto concurred in the judgment, but he believed, unlike the majority, that Gonzales had made a prima facie case of unlawful discrimination. Nevertheless, he decided summary judgment was justified because, he said, MetPath had presented a satisfactory reason for offering a higher salary to the non-Hispanic male, and Gonzales had not sufficiently undermined MetPath's position.[5]

*Ann Chia**

IV. FAMILY LAW

A. Child Support

1. *Child support should permit the child's lifestyle to comport with the supporting parent's when that parent's wealth greatly exceeds the wealth of the custodial parent.*

In re Marriage of Catalano, 204 Cal. App 3d 543, 251 Cal. Rptr. 370 (1988). In *Marriage of Catalano*, the California court of appeal reaffirmed its commitment to safeguarding the rights of the innocent victims of divorce: children.

The *Catalano* court determined that the trial court had abused its discretion in modifying a previous child support award when it increased the amount to only $1,100 per month.

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4. *Id.*
5. *Id.* at 428-29, 262 Cal. Rptr. at 658-59.
* J.D., 1990, Golden Gate University School of Law.

The court of appeal reversed and directed the trial court to increase the order to $2,000 per month, the amount pleaded by the wife. In rendering its decision, the court cited the marked escalation of the husband's income as the material change in circumstances warranting the increment.

In 1983, after six years of marriage, Conni and Patrick Catalano were divorced. The court ordered that Conni, who was awarded custody of their only child, Jannik, receive $1,750 per month in spousal support and $475 per month in child support. At the time of dissolution, Conni's income ranged from $25,000 to $30,000, and Patrick's was approximately $50,000.[1]

In 1985, Conni sought modification of the support orders due to her lack of employment. The Catalanos agreed on a spousal support increase from $1,750 per month to $2,625. The modification order stipulated that Conni waived her right to further spousal support after December 1986.[2]

In December 1986, Conni filed the instant motion requesting a monthly child support increase from $475 to $2,000.[3] At the time she filed Conni was working only part time, while Patrick's income had increased almost eight-fold.[4] The trial court raised the amount of child support to $1,110 per month and awarded Conni attorney fees and costs.[5] Both Conni and Patrick appealed the decision.[6]

The general rule regarding modification of a child support order requires the moving party to establish that a material

1. *Catalano*, 204 Cal. App. 3d at 547, 251 Cal. Rptr. at 372.

2. *Id.*

3. *Id.*

4. *Id.* at 547-48, 251 Cal. Rptr. at 372-73. Patrick Catalano's income increased from $50,000 in 1983 to $395,000 in 1984 according to tax returns.

5. *Id.* at 548, 251 Cal. Rptr. at 373.

6. *Id.* at 546-48, 251 Cal. Rptr. at 372-73. Whereas Conni maintained that the child support increase was too low, Patrick maintained that the awards of child support and attorney fees were excessive. He also contended that Conni's petition to modify the child support agreement was an attempt to restore the spousal support to which she had waived her right previously. In addition, Patrick asserted that the child support modification was ordered without evidence of a material change in circumstances.

change of circumstances has occurred.[7] " '*[A]nything* that affects the financial status of *either* party' " may constitute a material change of circumstances.[8]

However, as Patrick asserted in his argument, improved financial status alone is not sufficient to warrant a modification. The supported party must demonstrate (1) the inadequacy of the prior award or (2) an increase in his or her need. The need must remain unmet.[9]

An exception to the general rule exits. The court may imply a material change of circumstances to promote the welfare of the child unless the prior stipulation was an " 'agreed statement of facts on which the portion of the decree relating to custody, maintenance and education of the children [was] based . . . .' "[10] The court of appeal concurred with the trial court that, in the instant case, Jannik's needs were not being met and that it was in his best interest to imply a material change of circumstances.[11]

The court of appeal reiterated the law's refusal to tolerate an agreement between the parents which contracted away the rights of the child.[12] It asserted that if the supporting parent's economic position greatly exceeds that of the custodial parent, then the child's lifestyle should reflect that of the more economically comfortable parent.[13] Relying on a line of well-established cases, the court also stated that the law will recognize the child's

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7. *Id.* at 548-49, 251 Cal. Rptr. at 373.

8. *Id.* at 549, 251 Cal. Rptr. at 373 (quoting In re Marriage of Hoffmeister (Hoffmeister I), 161 Cal. App. 3d 1163, 1173, 208 Cal. Rptr. 345, 351 (1984)). The *Catalano* court cautioned that *Hoffmeister* involved spousal support, not child support, but found it analogous.

9. *Id.* Patrick Catalano raised another issue which the court of appeal dismissed. Relying on In re Marriage of Hoffmeister (Hoffmeister II), 191 Cal. App. 3d 351, 363, 236 Cal. Rptr. 543, 550 (1987), he contended that, at the time of the modification, there had to be a nexus between the supported spouse's needs and the standard of living enjoyed while married, not the standard of living of the supporting spouse at the time of the modification hearing. The court of appeal deemed this argument applicable only in spousal support modification cases, not in child support modification. *Catalano*, 204 Cal. App. 3d at 549, 251 Cal. Rptr. at 373.

10. *Id.* at 549-50, 251 Cal. Rptr. at 374 (quoting Singer v. Singer, 7 Cal. App. 3d 807, 812-13, 87 Cal. Rptr 42, 45 (1970)).

11. *Id.* at 551, 251 Cal. Rptr. at 375.

12. *Id.* at 552, 251 Cal. Rptr. at 375.

13. *Id.*, 251 Cal. Rptr. at 375-76.

right to receive more than the bare necessities.[14] Whether or not the increased support elevates the supported spouse's standard of living is not the relevant consideration.[15]

The court of appeal then reviewed the trial court's decision regarding the amount of the support modification. In doing so, it confronted the issue of whether or not the amount prayed for by Conni was "unjustifiably inflated by about $900 . . . ."[16] It also addressed whether or not the trial court had abused its discretion in "impliedly finding that the husband's concededly high standard of living and ability to pay did not overcome any inflation of the claimed expenses."[17]

After studying the financial records submitted by Conni, the court of appeal determined that her child support needs exceeded the $2,000 pleaded amount.[18] The court then addressed Patrick's challenges to the support and concluded that the monthly award should only have been reduced by $150.[19]

Patrick further asserted that Conni should have been working fulltime. However, the court found the monitary advantage of working fulltime would be offset by the additional expenses of childcare and the decrease in time spent with Jannik.[20]

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14. *Id.* The court cited *Singer*, 7 Cal. App. 3d at 813, 87 Cal. Rptr. at 45; In re Marriage of Hanchett, 199 Cal. App. 3d 937, 943, 245 Cal. Rptr. 255, 258 (1988); White v. Marciano, 190 Cal. App. 3d 1026, 1034, 235 Cal. Rptr. 779, 782 (1987).

15. *Id.*, 251 Cal. Rptr. at 376 (citing White v. Marciano, 190 Cal. App. 3d 1026, 1034, 235 Cal. Rptr. 779, 783 (1987)).

16. *Id.* at 553, 251 Cal. Rptr. at 376.

17. *Id.* The trial court determines the amount of support. This figure cannot be altered on appeal without a clear showing of abuse of discretion, i.e., that no judge could reasonably have ordered that amount of support, given the circumstances.

18. *Id.* at 553-56, 251 Cal. Rptr. at 376-78.

19. *Id.* at 553-55, 251 Cal. Rptr. at 376-78. Patrick challenged the allocation of $100 per month for therapy. He contended that the 1983 decree provided that further counseling was subject to the approval of the court-appointed therapist who determined that, at the time of the divorce, therapy was unnecessary. Patrick also questioned investments made by Conni since their divorce. The court's calculations concluded with only a $50 per month reduction.

20. *Id.* at 554, 251 Cal. Rptr. at 377.

The court of appeal found that the trial court had erred in failing to determine that Patrick's extensive wealth counterbalanced any inflation in Conni's need.[21] After comparing and contrasting the disparity of lifestyles between the parents and asserting that the law favors the child in divorce proceedings, the court of appeal concluded that only the full $2,000 amount would be "tolerable."[22]

The *Catalano* court demonstrated a sensitivity to the plight of many women and children in divorce. It recognized that women and children are often the economic victims of a divorce and that this economic suffering can continue for years after the dissolution of the marriage.

The court of appeal's decision also serves notice to the supporting parent, alerting him to the fact that if his economic situation dramatically improves, the court will enforce the child's right to a comporting lifestyle.

Georgine C. Baxter

2. *Child support obligation continues until child completes twelfth grade or attains the age of nineteen.*

Politzer v. Himmelsbach, 212 Cal. App. 3d 295, 260 Cal. Rptr. 450 (1989). In *Politzer v. Himmelsbach*, Politzer, relying on a 1977 court order, refused to continue to pay child support when his son reached majority. However, his son was still attending high school when Politzer ceased making the payments.

California Civil Code section 196(a) provides that "[t]he father and mother of a child have an equal responsibility to support and educate their child . . . ."[1] Section 196.5, enacted in 1985, states that this duty "shall continue as to any unmarried

21. *Id.* at 555, 251 Cal. Rptr. at 378.
22. *Id.* at 556, 251 Cal. Rptr. at 378.

1. CAL. CIV. CODE § 196(a) (West Supp. 1990).

child who has attained the age of 18, is a full-time high school student, and resides with a parent, until such time as he or she completes the 12th grade or attains the age of 19, whichever first occurs."[2]

The court observed that section 196.5 has little utility for intact families and as a practical matter, child support for a section 196.5 child is at issue only in the context of a separation or dissolution proceeding.[3] The court stated that section 196.5 is self-operative in that so long as the condition exists, the obligation for child support continues.[4] The fact that section 196.5 technically modified the terms of a prior order in Politzer's case did not make it inapplicable, because child support orders can be modified or revoked at any time.[5]

*Ann Chia**

B. Community Property

1. *Where concealment of community asset is claimed, court may consider evidence of the actual date of separation, irrespective of dates in agreement or petition.*

In re Marriage of Umphrey, 218 Cal. App. 3d 647, 267 Cal. Rptr. 218 (1990). In *In re Marriage of Umphrey*, a property settlement agreement executed by the parties recited the parties' separation date as "September, 1979." Husband did not disclose the acquisition of a lease of residential property on September 17, 1979, in the settlement agreement. The property was later subleased, netting an income of $250 per month. Wife moved to set aside the agreement, claiming that the separation date was in June 1980.[1]

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2. *Id.* § 196.5 (West Supp. 1990).
3. *Politzer*, 212 Cal. App. 3d at 299, 260 Cal. Rptr. at 452.
4. *Id.*
5. *Id.* at 299-300, 260 Cal. Rptr. at 452.

* J.D., 1990, Golden Gate University School of Law.

1. *Umphrey*, 218 Cal. App. 3d at 654, 267 Cal. Rptr. at 220.

The California court of appeal held that in a motion in equity to set aside an uncontested judgment of dissolution, "the party seeking to uphold the marital agreement may offer evidence proving a date of separation different from that recited in the settlement agreement in order to rebut an accusation of concealment of a community property asset."[2] There is no jurisdictional or equitable bar to the court's consideration of evidence bearing on the actual date of separation, irrespective of the recitations in the agreement or the petition.[3]

*Ann Chia**

2. *Court may order reimbursement to community for payment after separation of child support arrearage incurred before this marriage.*

In re Marriage of Williams, 213 Cal. App. 3d 1239, 262 Cal. Rptr. 317 (1989). In *In re Marriage of Williams*, the California court of appeal concluded that the legislature enacted California Civil Code section 4800(e)[1] with intent to create a limited exception to the general rule against reimbursement to the community for debts paid during marriage.[2] This exception is based on the post-separation status of the parties, and section 4800(e) expressly covers debts paid after separation but before trial without reference to the subject matter of the debt.[3]

The court held that premarital child support debts are within the purview of section 4800(e) and ordered reimbursement to the community for money expended after separation

2. *Id.* at 652, 267 Cal. Rptr. at 219.
3. *Id.* at 659, 267 Cal. Rptr. at 223.
* J.D., 1990, Golden Gate University School of Law.

1. "[T]he court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but prior to trial." CAL. CIV. CODE § 4800(e) (West Supp. 1990).
2. *Williams*, 213 Cal. App. 3d at 1245, 262 Cal. Rptr. at 321.
3. *Id.* at 1246, 262 Cal. Rptr. at 322.

and before trial to satisfy the husband's child support arrearage incurred prior to the marriage.[4]

*Ann Chia**

C. CUSTODY

1. *Natural father's biological relationship alone does not entitle him to custody when mother relinquishes child for adoption.*

Adoption of Kelsey S., 218 Cal. App. 3d 130, 266 Cal. Rptr. 760 (1990). In *Adoption of Kelsey S.*, the California court of appeal concluded that "a natural father's biological relationship to his child, standing alone, does not entitle him to an absolute right to that child's custody absent a showing of detriment."[1] The doctrine of constructive receipt[2] cannot be used to establish a natural father as a presumed father whose consent may then be required if the child's natural mother decides to relinquish the child for adoption.[3]

A best interests determination is "a constitutionally appropriate substantive standard in a California Civil Code section 7017(d)(2) custody dispute between a natural father and a

4. *Id.*

* J.D., 1990, Golden Gate University School of Law.

1. *Kelsey S.*, 218 Cal. App. 3d at 139, 266 Cal. Rptr. at 766.

2. One of the conditions set forth in California Civil Code section 7004 by which a father qualifies as a presumed father is that "he receives the child into his home and openly holds out the child as his natural child." CAL. CIV. CODE § 7004(a)(4) (West Supp. 1990).

3. *See id.* § 224 (West 1982).

child's prospective adoptive parents."[4] California Civil Code section 7017(d)(2) asks a court to determine, by a preponderance of the evidence, whether terminating the parental rights of a natural father who has not had a custodial relationship to his child is in the best interests of that child.[5]

*Ann Chia**

2. *Speculation over whether the mother will enter a relationship cannot be the basis for removal of custody.*

In re Steve W., 217 Cal. App. 3d 10, 265 Cal. Rptr. 650 (1990). In *In re Steve W.*, the California court of appeal stated that speculation over whether a mother would enter a relationship which might threaten her child's well-being cannot be the basis for removing the physical custody of the child from the parent.[1] The decision to remove must be based on substantial evidence, and evidence that no less drastic alternatives could be successfully implemented to sufficiently protect the child's well-being should also be presented.[2]

*Ann Chia**

4. *Kelsey S.*, 218 Cal. App. 3d at 139, 266 Cal. Rptr. at 766.

5. *Id.* at 140, 266 Cal. Rptr. at 766.

* J.D., 1990, Golden Gate University School of Law.

1. *Steve W.*, 217 Cal. App. 3d at 22, 265 Cal. Rptr. at 657.

2. *Id.* at 23, 265 Cal. Rptr. at 658.

* J.D., 1990, Golden Gate University School of Law.

D. PATERNITY

1. *California's statutory presumption of husband's paternity is unconstitutional where husband and wife do not wish to raise wife's child together.*

In re Melissa G., 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989). In *In re Melissa G.*, the California court of appeal reversed the juvenile court's order of paternity of Fermin, the ex-husband of Melissa's mother, as to Melissa, who was born eight days before the separation of her mother and Fermin. The court held that the application of California Evidence Code section 621[1] is unconstitutional in an instance in which the statute's classification does not serve the interests it was designed to protect.[2]

Melissa's natural father, Felix,[3] who had lived with Melissa for the four years since her birth, has a significant interest in a paternal relationship with Melissa, the court found. It also considered the fact that her presumed father, Fermin, is a stranger to her and that her most important psychological relationship is to a younger sister who is also Felix's natural child but to whom, under the statute, Melissa is presumed biologically unrelated.[4]

The court distinguished the recent opinion of the U.S. Supreme Court in *Michael H. v. Gerald D.*,[5] which upheld California's conclusive paternity presumption against constitutional attack.[6] The court of appeal observed that Justice Scalia, writing

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1. California Evidence Code section 621(a) provides that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." However, husband may raise a notice of motion for blood tests not later than two years from the child's date of birth under subdivision (c). CAL. EVID. CODE § 621 (West Supp. 1990).

2. *Melissa G.*, 213 Cal. App. 3d at 1089, 261 Cal. Rptr. at 898.

3. Melissa's mother married Felix after she and Fermin separated. Results of a blood test established a 99.1% probability that Felix was Melissa's father. *Id.* at 1084, 261 Cal. Rptr. at 895.

4. *Melissa G.*, 213 Cal. App. 3d at 1089, 261 Cal. Rptr. at 898.

5. 109 S. Ct. 2333 (1989).

6. In his dissent to the five to four decision, Justice Brennan described a further opinion shared by a majority of the Court: " 'Five Members of the Court refuse to foreclose "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabiting with another man at the time of the child's conception and birth." ' " *Melissa G.*, 213 Cal. App. 3d at 1088, 261 Cal. Rptr. at 897 (quoting *Michael H.*, 109 S. Ct. at 2349 (Brennan, J., dissenting, quoting Stevens, J., concurring)).

for the plurality, had "explicitly left open the possibility" that the natural father may have a constitutionally protected interest in a relationship with his child where the husband and wife do not wish to raise the child jointly.[7]

Justice Scalia had found in the California statute the expression of a " 'categorical preference' " for preserving the marital union extant at a child's birth.[8] In Melissa's case, however, the court of appeal concluded that preference did not apply, as the union between her mother and then-husband Fermin had long since been dissolved.[9]

*Ann Chia**

E. Putative Marriage

1. *A putative spouse is a "surviving spouse" under the Probate Code and as such is entitled to the one-half interest of an omitted spouse.*

Estate of Sax, 214 Cal. App. 3d 1300, 263 Cal. Rptr. 190 (1989). In *Estate of Sax*, the California court of appeal held that a surviving putative spouse is a "surviving spouse" within California Probate Code section 6560.[1] This section provides that "if a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive . . . (a) the one-half of the community property that belongs to the testator . . . [and] (b) the one-half of the quasi-community property that belongs to the testator . . . ."[2]

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7. *Id.*
8. *Id.* at 1089, 261 Cal. Rptr. at 898.
9. *Id.* at 1088-89, 261 Cal. Rptr. at 897-98.
* J.D., 1990, Golden Gate University School of Law.

1. *Sax*, 214 Cal. App. 3d at 1306, 263 Cal. Rptr. at 193.
2. Cal. Prob. Code § 6560 (West Supp. 1990).

In this case of first impression, the dispute was between Sax's first and second wives. Because he had married his second wife the same day his judgment of divorce from his first wife was filed, but one day before it was entered in the judgment book, his second wife was technically only a putative spouse. The first wife presented a will that predated the invalid second marriage and named her as sole beneficiary.[3]

Nevertheless, the court ruled that Sax's interest in the property acquired during that second marriage belonged to the putative spouse. The phrase "spouse who married the testator" in section 6560 did not preclude her from the definition of "omitted spouse."[4]

*Ann Chia**

2. *A woman's belief that her marriage conforms to the precepts of her faith is insufficient to confer on her the status of putative spouse.*

In re Marriage of Vryonis, 202 Cal. App. 3d 712, 248 Cal. Rptr. 807 (1988). The *Vryonis* court denied putative spouse status to an Iranian woman whose marriage conformed to the precepts of her religious faith. The court ruled that an honestly held belief in the validity of one's marriage is not enough to establish putative marriage. The belief must have been in good faith and therefore objectively reasonable. Further, the belief must have been that the marriage conformed to California law.

Fereshteh and Speros Vryonis worked together at UCLA's Center for Near Eastern Studies, where Fereshteh was a visiting professor and Speros the director and a teacher. Fereshteh, an Iranian citizen, belonged to the Shiah Moslem Twelve Imams religious sect and was involved in the local Islamic community.

3. *Id.* at 1302, 263 Cal. Rptr. at 191.
4. *Id.* at 1303, 263 Cal. Rptr. at 192.
* J.D., 1990, Golden Gate University School of Law.

Speros was a member of the Greek Orthodox Church but did not practice his religion.[1]

Although they had seen each other occasionally at the Center since 1979, they did not begin dating until February and March of 1982. Dating without marriage or a commitment, however, was contrary to Fereshteh's religious beliefs. Consequently she married Speros on March 17, 1982, in a Moslem ceremony known as a Muta marriage, a ceremony she believed created a valid and binding marriage. Speros assured her it did.[2]

Many of the indicia usually present in an American marriage were missing from the Vryonis marriage. At Speros' insistence, they maintained separate residences. Only for three months did Fereshteh have a key to Speros' house. They merged neither their incomes nor property. Claiming single status, they filed separate tax returns.[3]

Speros required Fereshteh to keep their marriage a secret. In 1982 they spent only twenty-two nights together, fewer in 1983, and none in 1984. Speros dated other women. In July of 1984, he told Fereshteh he planned to marry someone else; and in September he did so.[4]

As soon as she learned of Speros' plans, Fereshteh ended the secrecy and began to tell people that she and Speros were married. On October 15, 1984, she petitioned for dissolution.[5]

Speros' motion to quash on the basis that a marriage did not exist was denied. Superior Court Judge Barbara Jean Johnson found that Fereshteh, having no knowledge of California marriage laws, had justifiably relied on Speros' assertions that they were husband and wife.[6]

Finding, however, that Speros "did not intend" to consent to the marriage or to its validity, and because the marriage was

1. *Vryonis*, 202 Cal. App. 3d at 715, 248 Cal. Rptr. at 808-09.
2. *Id.*, 248 Cal. Rptr. at 809.
3. *Id.* at 715-16, 248 Cal. Rptr. at 809.
4. *Id.*
5. *Id.*, 248 Cal. Rptr. 809-10.
6. *Id.* at 716, 248 Cal. Rptr. 810.

not recorded, the trial court granted Fereshteh the status of a putative spouse.[7] On Speros' appeal, which was treated as a peremptory writ of mandate,[8] the court of appeal directed the trial court to vacate its judgment.[9]

Presiding Justice Joan Dempsey Klein wrote the appeal court's painstaking anaysis. She looked first to the definition of marriage in California Civil Code section 4100 as " 'a personal relation arising out of a civil contract' " to which consent is necessary but not sufficient; a marriage must also be licensed.[10]

"Where the marriage is invalid due to some legal infirmity, an innocent party nevertheless may be entitled to relief under the long recognized protections of the putative marriage doctrine," the court observed.[11] As codified at Civil Code section 4452, the rights of a putative spouse can be conferred only where the marriage was statutorily void or voidable.[12]

The *Vryonis* court, however, relied on *In re Marriage of Monti*,[13] which extended the protection of the putative marriage doctrine to innocent parties who believe they were validly married. The marriage need not be technically void or voidable, but merely legally infirm.[14] The "purported marriage" of Fereshteh and Speros, the court found, was "plainly defective" and thus was not disqualified as putative on that ground.[15]

An analysis of the belief an innocent party must have to earn the status of putative spouse is the essence of the *Vryonis* court's analysis. Fereshteh's belief must have been honest, in good faith and, above all, objectively reasonable.[16] To have been reasonable, the belief must have been that the marriage conformed to California law.[17]

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7. *Id.*
8. *Id.* at 714, 248 Cal. Rptr. at 809.
9. *Id.* at 724, 248 Cal. Rptr. at 815.
10. *Id.* at 717, 248 Cal. Rptr. at 810 (quoting CAL. CIV. CODE § 4100 (West 1983)).
11. *Id.*, 248 Cal. Rptr. at 811.
12. CAL. CIV. CODE § 4452 (West Supp. 1989).
13. 135 Cal. App. 3d 50, 185 Cal. Rptr. 72 (1982).
14. *Vryonis*, 202 Cal. App. 3d at 719, 248 Cal. Rptr. at 812.
15. *Id.*
16. *Id.* at 720-22, 248 Cal. Rptr. 812-14.
17. *Id.* at 722-23, 248 Cal. Rptr. at 814-15.

Fereshteh's belief, the court concluded, was not objectively reasonable. She was ignorant of California law and made no diligent attempt to comply with it, she did not act like an American married woman, and she should not have relied on Speros' assurances that they were properly married.[18] For the *Vryonis* court, her belief that her marriage was valid according to the law of her religion was not enough to make her a putative spouse.[19]

In interpreting California's putative marriage law in light of Moslem marriage law, the court in this case giveth and then taketh away. In effect it adds some wording to Civil Code § 4452 and subtracts other wording.

First the court ignores the wording that an innocent party may have putative spouse status only if her marriage was technically void or voidable.[20] Then it reads into the statute wording utterly absent, that in Fereshteh's case at least, a putative spouse must have obtained a marriage license.[21]

The court's conclusion that from the indicia of her marriage Fereshteh had no reason to believe it was valid deserves another look. Setting aside the likelihood that the indicia of Iranian marriages may be different from those of the usual American marriage, even a California marriage may have many of the attributes listed by the court.

A wife in California may or may not live with her husband, take his name, or support or be supported by him. A husband may, without being considered very unusual, date other women and, while assuring his wife their marriage is valid, insist she keep it a secret. Such indicia may suggest an unhappy marriage, but not necessarily an illusory one.

The putative marriage doctrine, as codified in California, simply demands a good faith belief in a valid marriage. The *Vryonis* court interpreted the doctrine to mean one must believe

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18. *Id.* at 721-22, 248 Cal. Rptr. at 813-14.

19. *Id.* at 723, 248 Cal. Rptr. at 815.

20. *Id.* at 718-19, 248 Cal. Rptr. at 811-12.

21. The statute, in pertinent part, reads: "Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was valid, the court shall declare the party or parties to have the status of a putative spouse . . . ." CAL. CIV. CODE § 4452 (West Supp. 1989).

that one has entered a marriage which is valid under California law. A good faith belief that one's marriage is valid under Moslem law is not enough.[22]

Fereshteh came from a country where the line between church and state is drawn differently from the American way. The trial court, implicitly recognizing that marriage law and custom are unlikely to be the same in Iran and California, gave her the protection of putative spouse status.

The court of appeal ruled, however, that because she "made no colorable attempt at compliance [with California law], Fereshteh could not believe reasonably a valid California marriage came into being. Fereshteh's ignorance of the law does not compel a contrary conclusion."[23]

*Mary Ratcliff**

F. Spousal Support

1. *Spousal support may not be terminated without evidence of spouse's ability to support herself.*

In re Marriage of Gavron, 203 Cal. App. 3d 705, 250 Cal. Rptr. 148 (1988). *Marriage of Gavron* imposed on the trial courts the responsibility of encouraging spouses in divorce proceedings to achieve self sufficiency. However, the court of appeal reversed a modification of a spousal support order and held that since no material change in the wife's ability to support herself

22. *Vryonis*, 202 Cal. App. 3d at 723, 248 Cal. Rptr. at 815. Not mentioned by the *Vryonis* court is California Civil Code § 4215. That statute validates marriages not solemnized by members of the clergy or judiciary if the marriage conforms to a religious denomination's "peculiar mode of entering the marriage relation." Such a marriage, however, must be "declared" by a filing with the county recorder. Cal. Civ. Code § 4215 (West 1983).

23. *Vryonis*, 202 Cal. App. 3d at 721, 248 Cal. Rptr. at 813.

* J.D., 1990, Golden Gate University School of Law.

had been shown, the trial court's termination of spousal support payments constituted an abuse of its discretion.[1]

Bernard and Mildred Gavron were married approximately twenty-five years before separating and ultimately dissolving their marriage.[2] Early in their marriage, Mildred had worked for a few years to enhance the earning potential of her husband. Primarily, though, she had devoted her life to her family.[3] After the divorce, Mildred worked sporadically at low-paying jobs but quit each because of health problems.[4]

Although Mildred had assets — her house, some investments, and $40,000 in the bank — her primary source of income was her spousal support.[5] Mildred lived with and supported her mother who nominally contributed to food purchases.[6]

At dissolution, the trial court ordered Bernard to make monthly spousal support payments of $1,100 until further court notice.[7] Two years later, in 1981, the trial court denied Bernard's request for reduction and eventual cessation of spousal support.[8]

In 1986, Bernard again requested modification of the spousal support order, petitioning for termination of support.[9] Bernard contended that his expenses exceeded his income in spite of a finding that his income had increased and his expenses had decreased.[10] In March of 1987, the trial court ordered the cessation of support as of August 1987, reasoning that Mildred's failure to become gainfully employed or to make herself employable shifted the burden to her to evince need for financial support.[11]

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1. *Gavron*, 203 Cal. App. 3d at 707, 250 Cal. Rptr. at 150.
2. *Id.*
3. *Id.* at 708, 712, 250 Cal. Rptr at 150, 153.
4. *Id.* at 708-09, 250 Cal. Rptr. at 150-51. Mildred Gavron suffered form tumors on her feet, shoulder problems, and arthritis. These medical difficulties impaired her mobility, and thus limited her work capability.
5. *Id.* at 709, 250 Cal. Rptr. at 151.
6. *Id.*, 250 Cal. Rptr. at 150. Mildred's age was 57. Her mother was 87. *Id.* at 707-08, 250 Cal. Rptr. at 150.
7. *Id.* at 707, 250 Cal. Rptr. at 150.
8. *Id.* at 707-08, 250 Cal. Rptr. at 150.
9. *Id.* at 708, 250 Cal. Rptr. at 150.
10. *Id.* at 709, 250 Cal. Rptr. at 151.
11. *Id.* at 708, 710, 250 Cal. Rptr. at 150, 151.

A change of circumstances "includes all factors affecting need and ability to pay."[12] The court of appeal discussed the trial court's discretionary limits in defining a change of circumstances, relying on *In re Marriage of Norvall* for the premise that modification of a spousal support order requires that " 'the moving party must show a material change of circumstances since the time of the prior order.' "[13] Citing *Edwards v. Edwards*,[14] the court determined that "change of circumstances" required more than a mere passage of time.[15]

The court deemed the two cases cited by Mr. Gavron inapposite and decided that the burden of demonstrating continued need should not have shifted to the wife.[16] It distinguished *In re Marriage of Sheridan*[17] because there the trial court had expressly told the wife that she was expected to achieve self sufficiency. Her failure to comply with the court's expectation had constituted a change of circumstances.[18]

The court dismissed *In re Marriage of Pekar*[19] as inapplicable. The wife in *Pekar*, unlike Mildred Gavron, had been employed at the time of the original support order. Consequently, unless she could sustain the burden of demonstrating her need for continued support, termination of the support after five years was deemed just.[20]

California Civil Code section 4801(a) empowers the court to award whatever spousal support the court deems "just and reasonable."[21] In utilizing the broad discretion afforded by the statute, the court of appeal's decision evinced its sensitivity to the

12. *Id.* at 710, 250 Cal. Rptr. at 151 (citing *In re* Marriage of Morrison, 20 Cal. 3d 437, 454, 573 P. 2d 41, 53, 143 Cal. Rptr. 139, 151 (1978)).

13. *Id.* (quoting *In re* Marriage of Norvall, 192 Cal. App. 3d 1047, 1060, 237 Cal. Rptr 770, 778 (1987)).

14. 52 Cal. App. 3d 12, 124 Cal. Rptr. 742 (1975).

15. *Gavron*, 203 Cal. App. 3d at 710, 250 Cal. Rptr. at 151 (citing *Edwards*, 52 Cal. App. 3d at 15, 124 Cal. Rptr. at 744).

16. *Id.* at 710-11, 250 Cal. Rptr. at 152.

17. 140 Cal. App. 3d 742, 189 Cal. Rptr. 622 (1983).

18. *Gavron*, 203 Cal. App. 3d at 710, 250 Cal. Rptr. at 152 (citing *Sheridan*, 140 Cal. App. 3d at 748, 189 Cal. Rptr. at 625.)

19. 173 Cal. App. 3d 367, 218 Cal. Rptr. 823 (1985).

20. *Gavron*, 203 Cal. App. 3d at 710, 250 Cal. Rptr. at 152 (citing *Pekar*, 173 Cal. App. 3d at 371-72, 218 Cal. Rptr. at 826-27.)

21. CAL. CIV. CODE § 4801(a) (West Supp. 1990).

plight of women caught in the trauma of divorce. It recognized that many women in lengthy marriages never develop marketable skills; they devote themselves instead to the duties of wife and mother. The court realized that a carefully embroidered remedy must be fashioned when dealing with such delicate situations. In essence, the court asserted that it must function as a monitor in order to protect the interests of both parties and society as a whole.

Yet, the protection afforded the supported party is not blind, as the court frowned on the cultivation of continued dependency. The court recognized the importance of assisting supported spouses in becoming self sufficient. In order to facilitate this, the court of appeal charged trial courts with the role of delimiting the term of support and with pronouncing its expectation that the supported party strive to achieve self sufficiency.

The court outlined methods for creating awareness of its expectations. For example, the court may explicitly state its expectations at the time of the original order;[22] it may require that the supported party be examined by a vocational training consultant; or the parties may reach an agreement as to the supported spouse's ability to obtain future employment or continue current employment.[23] In any case, the court cautioned against taxing the supported spouse with unrealistic projections for achieving self sufficiency.[24]

Georgine C. Baxter

22. *Gavron*, 203 Cal. App. 3d at 712, 250 Cal. Rptr. at 153.
23. *Id.*
24. *Id.* at 712-13, 150 Cal. Rptr. at 153.

V. PROFESSIONAL RESPONSIBILITY

A. DISCIPLINE

1. *Lawyer is disbarred for taking bar examination for husband.*

In re Lamb, 49 Cal. 3d 239, 260 Cal. Rptr. 856 (1989). In *In re Lamb*, Laura Beth Lamb was disbarred for taking the California bar examination for her husband.[1] The California Supreme Court, in adopting the state bar court's recommendation, held: " 'Only . . . the most compelling mitigating circumstances' " could prevent disbarment because of the public danger inherent in bar exam cheating and the criminal dishonesty and moral turpitude involved.[2]

The fact that Lamb was seven months pregnant and suffering from chronic diabetes as well as the emotional stress from a rapidly deteriorating marriage[3] was not compelling enough, according to the court. Bad faith, dishonesty or concealment, and significant harm to the public or to the administration of justice constituted aggravating circumstances.[4]

The supreme court accepted the state bar's suggestion that if an attorney's criminal breach of professional standards is morally serious and dangerous, only the most overwhelming evidence of mitigation could prevent disbarment in the public interest.[5] If extreme emotional difficulties or physical disabilities at the time of the misconduct serve as mitigating circumstances, then the member subject to discipline must first establish by

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1. Despite her pregnancy, illness, and stress, Lamb placed ninth out of the 7,688 taking the bar in July 1985. *Lamb*, 49 Cal. 3d at 243 n.2, 260 Cal. Rptr. at 857 n.2; Carlsen, *Lawyer Disbarred for Taking Bar Exam for Her Husband*, San Francisco Chron., Aug. 8, 1989, at 1, col. 3.

2. *Lamb*, 49 Cal. 3d at 242, 260 Cal. Rptr. at 856 (citing STANDARDS FOR ATTORNEY SANCTIONS FOR PROFESSIONAL MISCONDUCT § 3.2 (Cal. State Bar 1986)).

3. In his dissent, Justice Marcus Kaufman recounted the stresses Lamb was suffering. The complications of her pregnancy included acetone levels, high blood pressure and protein deficiency that threatened the lives of herself and her baby. Her physician had recommended abortion, which she refused. In addition, her husband had become violent, pushing and shaking her, smashing furniture, and threatening to kill her and the baby if she did not take the examination for him. Lamb was hospitalized in intensive care immediately after the exam and delivered her daughter 10 days later. *Id.* at 250-53, 260 Cal. Rptr. at 862-64 (Kaufman, J., dissenting).

4. *Id.* at 245, 260 Cal. Rptr. at 859.

5. *Id.* at 246, 260 Cal. Rptr. at 859.

clear and convincing evidence that he or she has completely recovered and been rehabilitated.[6]

*Ann Chia**

IV. TORT LAW

A. Negligent Infliction of Emotional Distress

1. *Wife states no cause of action for negligent infliction of emotional distress or loss of consortium arising out of the allegedly wrongful termination of husband's employment.*

Anderson v. Northrop Corp., 203 Cal. App. 3d 772, 250 Cal. Rptr. 189 (1988). In *Anderson v. Northrop Corp.* the court of appeal narrowed the field of foreseeable plaintiffs permitted to proceed to trial on the tort of negligent infliction of emotional distress. While acknowledging the distress a wife may suffer when her husband is unlawfully discharged, the court denied Pauline Anderson the opportunity to prove her husband's employer liable to her for negligent infliction of emotional distress. In addition, the court upheld dismissal of the wife's claim to compensation for loss of consortium on the ground she failed to plead a sufficiently substantial and long lasting disruption of her marital relationship.

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6. *Id.* Justice Kaufman, however, concluded that Lamb had "not only clearly and convincingly, but beyond question" done everything possible to eliminate the stresses that led to her misconduct — she had ended her marriage, controlled her diabetes, and voluntarily committed to long-term therapy — and should be disciplined with probation and suspension rather than disbarment.

He reported cases in which the supreme court had suspended but not disbarred other attorneys whose mitigating circumstances were less compelling and whose misconduct was as egregious. One attorney had solicited someone to kill a former client who had initimidated and harrassed him; others dealt and smuggled drugs; and still others suborned perjury, submitted false evidence, abandoned clients, obtained loans through misrepresentation, and lied during disciplinary proceedings. *Id.* at 253-56, 260 Cal. Rptr. at 864-66 (Kaufman, J., dissenting).

* J.D., 1990, Golden Gate University School of Law.

Pauline and Roger Anderson moved to Saudi Arabia in 1977, when Roger Anderson was assigned by Northrop Corporation to work there as a technical language instructor and supervisor.[1] "Pauline changed not only her residence but her entire way of life," the court observed.[2]

Northrop had provided information to both the Andersons to prepare them for the " 'culture shock' " of their resettlement.[3] Recognizing the traumatic nature of such a move, the court described Saudi Arabia as "a foreign country in every sense of the word."[4]

Despite the difficulties, Pauline Anderson adjusted successfully to life in her new home. The distress that gave rise to this complaint was prompted not by the resettlement, but by the sudden end to her new way of life.

During seven and one-half years the Andersons had grown accustomed to Saudi Arabian culture. But " 'when [Northrop] suddenly, without just cause, terminated [Roger], [their] security, future, and lifestyle collapsed. [They] were now unemployed in a foreign mid-east country, without any prospects of future employment.' "[5]

Pauline Anderson alleged that Northrop should reasonably have foreseen her anxiety and was legally liable for her distress. She also claimed that Northrop was responsible for her loss of consortium resulting from her husband's distress.[6]

The tort of negligent infliction of emotional distress was first described two decades ago by the California Supreme Court in *Dillon v. Legg*.[7] In *Anderson*, the court of appeal applied the two major analyses that have evolved since *Dillon* and determined that the claim failed both tests.

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1. *Anderson*, 203 Cal. App. 3d at 774, 250 Cal. Rptr. at 190-91.
2. *Id.* at 776, 250 Cal. Rptr. at 192.
3. *Id.* at 774, 250 Cal. Rptr. at 191.
4. *Id.* at 776, 250 Cal. Rptr. at 192.
5. *Id.* at 775, 250 Cal. Rptr. at 191 (brackets in opinion).
6. *Id.* at 774-75, 250 Cal. Rptr. at 191.
7. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), *construed in* Ochoa v. Superior Court, 39 Cal. 3d 159, 166, 703 P.2d 1, 5, 216 Cal. Rptr. 661, 665 (1985).

First the court applied the *Dillon* "bystander" analysis. In *Dillon*, a little girl had been killed by a car as she crossed the street. Her mother and sister had been watching nearby.[8]

Under the old zone-of-danger rule, the court could have justified recovery to the sister but not to the mother "merely because of a happenstance that the sister was some few yards closer to the accident."[9]

The *Dillon* court rejected the assertion that, because the mother was a bystander outside the zone of danger, defendant bore her no duty of care. The concept of duty, the court explained, "is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards."[10]

Refusing to "deny recovery upon a legitimate claim because other fraudulent ones may be urged,"[11] the *Dillon* court reached back to "the general rules of tort law"[12] and identified foreseeability as the touchstone of its analysis.[13] The court held that the issue of foreseeability should be determined on a case-by-case basis[14] by evaluating the degree of physical, temporal, and family relational proximity of the victim to the plaintiff bystander.[15]

Even assuming Pauline Anderson's distress at her husband's discharge was foreseeable, the *Anderson* court found that she had failed to establish a sufficient nexus with Northrop's liability.[16] The court acknowledged that, following *Dillon*, foreseeability is "the critical determinant of duty."[17] However, the court found support for denying Anderson's claim in the decision of

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8. *Dillon*, 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

9. *Id.* at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75.

10. *Id.* at 734, 441 P.2d at 916, 69 Cal. Rptr. at 76.

11. *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77 (emphasis deleted).

12. *Id.* at 746, 441 P.2d at 924, 69 Cal. Rptr. at 84.

13. "The touchstone of our analysis in *Dillon* was foreseeability." Ochoa v. Superior Court, 39 Cal. 3d 159, 166, 703 P.2d 1, 5, 216 Cal. Rptr. 661, 665 (1985).

14. *Dillon*, 68 Cal. 2d at 740, 441 P.2d at 920, 69 Cal. Rptr. at 80.

15. *Id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81.

16. *Anderson*, 203 Cal. App. 3d at 777, 250 Cal. Rptr. at 192-93.

17. *Id.* at 776, 250 Cal. Rptr. at 192 (citing *Dillon*, 68 Cal. 2d at 739-40, 441 P.2d at 919-20, 69 Cal. Rptr. at 79-80).

another California court of appeal, *Andalon v. Superior Court*,[18] which determined that " 'foreseeability, without more, provides . . . an unworkable delineation of the extent of a tortfeasor's liability.' "[19] The essential link missing from Pauline Anderson's complaint, the court concluded, was a showing that Northrop owed her a duty.[20]

Next the court applied the "direct victim" analysis of *Molien v. Kaiser Foundation Hospitals*[21] to the Anderson case. In 1980 *Molien* extended the protection of the tort of negligent infliction of emotional distress to a new class of plaintiffs. There the California Supreme Court permitted a husband to recover as a direct victim of the misdiagnosis of venereal disease in his wife, even though he was not in close enough physical or temporal proximity to the misdiagnosis to recover under the *Dillon* "bystander" analysis.[22]

The *Anderson* court rejected Pauline Anderson's claim that she had been a direct victim of Northrop's tortious conduct.[23] Despite the foreseeability that she would be harmed, the court concluded that the harm was not "directed" toward her[24] because she "was neither in privity of [the employment contract between Northrop and her husband] nor its intended beneficiary . . . ."[25]

Cases from other California courts of appeal cited by the *Anderson* court suggest its analysis may be unnecessarily rigid. The third district, for example, in *Newton v. Kaiser Foundation Hospitals*,[26] found that a "duty of care may arise from contract even though there would otherwise be none."[27]

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18. 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984).

19. *Anderson*, 203 Cal. App. 3d at 776, 250 Cal. Rptr. at 192 (quoting *Andalon*, 162 Cal. App. 3d at 610, 208 Cal. Rptr. at 905).

20. *Id.* at 778, 250 Cal. Rptr. at 193.

21. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

22. *Id.* at 923, 616 P.2d at 816, 167 Cal. Rptr. at 834.

23. *Anderson*, 203 Cal. App. 3d at 780, 250 Cal. Rptr. at 194.

24. *Id.* at 777, 250 Cal. Rptr. at 193.

25. *Id.* at 778, 250 Cal. Rptr. at 193.

26. 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986).

27. *Id.* at 392, 228 Cal. Rptr. at 894 (citing Eads v. Marks, 39 Cal. 2d 807, 810, 249 P.2d 257, 260 (1952) (in bank)).

The *Newton* court relied on its previous decision in *Andalon*.[28] That decision was based in turn on the California Supreme Court's ruling in *Biakanja v. Irving*[29] that the duty of care for tortious breach of a contract extended to third party beneficiaries.[30]

In both *Newton* and *Andalon*, the primary parties to the contracts were a mother and her medical caregiver. The father in each case, because of the marital relationship, was the third party beneficiary.[31]

Under this contractual direct victim theory, the contract defines both the duty and the parties to whom the duty is foreseeably owed. Marital partners of the primary parties to the contract are viewed as third party beneficiaries and are themselves entitled to recover as direct victims.[32]

The *Anderson* court might have used this analysis to permit Pauline Anderson to proceed to trial. Like the fathers in *Newton* and *Andalon*, Anderson based her claim on the tortious breach of a contract to which her marital partner was a primary party and she was a beneficiary.

The fact that the contract in this case was for employment rather than medical care suggests another theory that might have been raised. Because California is a community property state, half the earnings of each spouse belongs to the other.[33] If Roger Anderson's employment contract could have been considered a marital asset belonging also to his wife, she should have had standing to sue for tortious breach of that contract.

The court raised, then dismissed, a provocative recovery theory. Northrop might have been liable to Pauline Anderson when it provided assistance to her at the time of the Andersons'

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28. *Id.* at 391-92, 228 Cal. Rptr. at 893.

29. 49 Cal. 2d 647, 320 P.2d 16 (1958).

30. *Newton*, 184 Cal. App. 3d at 391, 228 Cal. Rptr. at 893. A third party beneficiary is a person for whose benefit a contractual promise is made, but who is not a party to the contract. BLACK'S LAW DICTIONARY 1327 (5th ed. 1979).

31. *Newton*, 184 Cal. App. 3d at 391-92, 228 Cal. Rptr. at 893-94.

32. *Id.*

33. BLACK'S LAW DICTIONARY 254 (5th ed. 1979).

original transfer to Saudi Arabia.[34] The provision of relocation assistance "to the nonemployee spouse who may necessarily be included in that process" might have established a duty of care.[35] Because the facts alleged no breach at the time of transfer, however, the court found no need to address the question.[36]

Nor was the court concerned with whether a duty of care continued. The opinion is silent, for example, as to whether Northrup deliberately selected married over single employees for transfer to Saudi Arabia.[37] The company might have speculated that the companionship of a spouse during a long foreign assignment would contribute to the employee's stability and productivity.

In rejecting Pauline Anderson's cause of action for loss of consortium, the court compared the descriptive words in her pleadings with those in *Rodriguez v. Bethlehem Steel Corp.*[38] Anderson complained that she had " 'suffered a loss of society, companionship and support' " from her husband,[39] who had " 'become mentally upset, distressed and aggravated . . . .' "[40] The wife in *Rodriguez* complained that her husband could " 'no longer be a companion and [was] no longer capable of giving love, affection, society, comfort and sexual relations to [her] . . . .' "[41]

To recover, according to the *Anderson* court, Pauline Anderson would have had to prove that her husband's distress had been disabling.[42] Roger Anderson had suffered neither a physical injury nor had he claimed negligent or intentional infliction of emotional distress in his own complaint against Northrop.[43] Therefore, the court reasoned, the Andersons had

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34. *Anderson*, 203 Cal. App. 3d at 777 n.1, 250 Cal. Rptr. at 193 n.1.

35. *Id.*

36. *Id.*

37. *But cf. id.* at 774, 250 Cal. Rptr. at 191 (Northrop "did not require, request, encourage, or otherwise directly involve [Pauline] in her husband's transfer.")

38. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

39. *Anderson*, 203 Cal. App. 3d at 780, 250 Cal. Rptr. at 194.

40. *Id.*, 250 Cal. Rptr. at 195.

41. *Id.* at 781, 250 Cal. Rptr. at 195.

42. *Id.*

43. *Id.* at 780, 250 Cal. Rptr. at 195.

failed to raise the inference of a substantial and long lasting impairment in their conjugal relationship.[44]

The *Anderson* court recited the rule that a complaint will withstand a demurrer if relief can be justified on any grounds.[45] Ironically, the wording of Pauline Anderson's complaint differed little from the wording in *Rodriguez*, which the *Anderson* court used as a model. Nevertheless, the court denied Anderson the opportunity to amend her complaint to comply with its opinion.[46]

Anderson is remarkable in that the plaintiff's distress arose from the loss of a marital partner's long-term employment. Most other California cases of negligent infliction of emotional distress involve a loved one's injury, disease, or death.[47]

Accustomed to cases of physical loss, the *Anderson* court apparently failed to appreciate the emotional impact the wrongful loss of a married couple's livelihood can cause. The court ignored as well the special vulnerability of a woman stranded in a foreign land where few employment opportunities may have been available to women.

In accepting employment in Saudi Arabia, the Andersons gave up the economic independence they probably had previously enjoyed. Pauline Anderson became dependent on her husband for support, and he in turn depended on Northrop for employment.

The Andersons' dearth of options made more compelling their search for legal redress. Regrettably, the court of appeal

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44. *Id.* at 780-81, 250 Cal. Rptr. at 195.

45. *Id.* at 775, 250 Cal. Rptr. at 191.

46. *Id.* at 780-81, 250 Cal. Rptr. at 194-95.

47. *E.g.*, Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (death); Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (death); Newton v. Kaiser Found. Hosps., 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986) (injury); Kossel v. Superior Court, 186 Cal. App. 3d 1060, 231 Cal. Rptr. 183 (1986) (disease and death); Goodwin v. Reilley, 176 Cal. App. 3d 86, 221 Cal. Rptr. 374 (1985) (injury); Andalon v. Superior Court, 162 Cal. App. 3d 600, 208 Cal. Rptr. 899 (1984) (injury); Sesma v. Cueto, 129 Cal. App. 3d 108, 181 Cal. Rptr. 12 (1982) (injury); Johnson v. Superior Court, 123 Cal. App. 3d 1002, 177 Cal. Rptr. 63 (1981) (injury); *see also* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (misdiagnosis of disease).

found no grounds for making new tort law in the extraordinary perils of Pauline.

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