Golden Gate University Law Review

Volume 16
Issue 3 *Women's Law Forum*

Article 6

January 1986

Survey: Women and California Law

Linda C. Kramer

T. A. Graudin

Donna Cobe Beekman

Kathy A. Alfieri

SURVEY: WOMEN AND CALIFORNIA LAW

This survey of California law, a regular feature of the Women's Law Forum, summarizes recent California Supreme Court and Court of Appeal decisions of special importance to women. A brief analysis of the issues pertinent to women raised in each case is provided.

TABLE OF CONTENTS

I. FAMILY LAW

A. ANTENUPTIAL AGREEMENTS

1. *Presumption of community property is not affected by a time-limited antenuptial agreement.*

In re Marriage of Grinius, 166 Cal. App. 3d 1179, 212 Cal. Rptr. 803 (4th Dist. 1985). The California Court of Appeal in *In re Marriage of Grinius* reversed the trial court's judgment that restaurant real property was separate property, and directed the court to determine whether the husband should be reimbursed for separate property contributions.

On the date of their marriage, the parties, Joyce and Victor, entered into an antenuptial agreement providing that separate property obtained before marriage be maintained as such for six years. After that, the parties' rights and obligations would be as provided by law. While married, the couple purchased a restaurant with two purchase money loans. One loan, secured by separate and community property, was used for the down payment, remodeling the premises, purchasing equipment and paying both living and business expenses. The other loan was secured by a first deed of trust on the restaurant property. Without Joyce's knowledge, Victor placed title to the restaurant property in his name only.

Upon dissolution of the marriage, Victor relied on the antenuptial agreement[1] to support a separate property claim on the restaurant and to overcome the presumption of community property.[2] He asserted that because he took title in his name only, believing the antenuptial agreement entitled him to do so, he was the sole owner of the restaurant.

The *Grinius* court disagreed with him, reasoning that the agreement was an attempt to maintain the separate character of

---

1. *See* Barker v. Barker, 139 Cal. App. 2d 206, 212 (1956). "Parties contemplating marriage may validly contract as to their property rights, both as to property then owned by them and as to property, including earnings, which may be acquired by them after marriage." *Id.*

2. CAL. CIV. CODE § 5110 (West 1983 & Supp. 1986). "[A]ll real property situated in this state and all personal property wherever situated acquired during the marriage by a married person while domiciled in this state . . . is community property . . . ." *Id.*

certain assets acquired prior to and during the marriage, but was time-limited. The court concluded that such agreements can control,[3] but even if this contract granted Victor such authority, it expired before the dissolution action. Thus the community presumption was retroactively reinstated.

By the terms of the contract, six years after the marriage date, and retroactive to it, the spouses were reinvested with every communal right. The court therefore held that the presumption of community property was not affected by the antenuptial agreement.

Victor also asserted that his separate property funds were used to make substantial payments on both loans and to retire one of them. Citing *In re Marriage of Mix*,[4] he claimed that the purchase money loan payments derived from separate property and since the restaurant property was so acquired, the same separate character was maintained. The court of appeal pointed out that in *See v. See*,[5] the determination of whether property is separate or community was made at the time of acquisition. Since the property here was acquired after the marriage, it was presumed to be community property.[6]

In looking at the character of the credit acquisitions during marriage, the court relied on the "intent of the lender" rule developed in *In re Marriage of Aufmuth*.[7] In *Aufmuth*, the court of appeal decided that the character of such acquisitions was determined by whether the lender relied on the collateral as separate property or as a community asset.

In applying the "intent of the lender" rule, the court said that California courts have consistently employed this rule, but with inconsistent results. The *Grinius* court decided that the

---

3. *See, e.g., In re* Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (parties are bound by the terms of the antenuptial agreement as long as marriage dissolution is not thereby being promoted or encouraged). The validity of such agreements turns on the language within the contract itself.

4. 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975) (separate property can be established by tracing directly to the source of funds used for acquisition of the property in question).

5. 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

6. *See* CAL. CIV. CODE § 5110 (West 1983 & Supp. 1986).

7. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

standard shall be that the acquisition of loan proceeds during marriage are presumptively community property. This presumption may be overcome by showing the lender intended to rely solely upon separate property in offering the loan. Since one of the loans was based upon the community's ability to manage the restaurant and repay the note, and the other was extended in reliance on the already acquired interest in the restaurant, the court did not find evidence of such intent. Thus, it found that the loan funds were a community asset and not separate property.

Although Joyce maintained that reimbursement should be granted solely for Victor's separate property contributions to the restaurant property, the court rejected that premise. Civil Code section 4800.2[8] controlled the separate property issue and required the court to find how much of the total community acquisitions could be traced to Victor's contributions from his separate property. The parties had not presented evidence on the reimbursement issue and since Victor's separate property contribution was so commingled with the community acquisitions, the court of appeal reversed the trial court as to the entire property division.

In an effort to reach a just resolution, the *Grinius* court looked critically at the antenuptial agreement and by upholding its terms, essentially deactivated its effect on acquisitions during the first six years of marriage. In so doing, the court made it all the more important for the parties of such an agreement to be careful in its wording. They will be held to its terms.

In addition, by reaffirming the "intent of the lender" rule

---

8. CAL. CIV. CODE § 4800.2 (West Supp. 1986).

> In the division of community property under this part unless a party has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, the party shall be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source.

Id. This statute applies to actions not yet final on January 1, 1984. It refers to reimbursement of separate property contributions traceable to community property acquisitions including: down payments, payments for property improvements and payments reducing the principal of a loan used to finance any property purchase or improvement. It does not include loan interest payments or any maintenance, insurance or property tax payments. *Id.*

and in utilizing the simple test of lender sole reliance, the court applied a more equitable method of determining the character of loan acquisitions. This is consistent with the underlying policy of California's community property plan—to equally divide all community assets in a marital dissolution.

Linda C. Kramer

2. *An antenuptial agreement that promotes divorce is void as against public policy.*

In re Marriage of Noghrey, 169 Cal. App. 3d 326, 215 Cal. Rptr. 153 (6th Dist. 1985). In *In re Marriage of Noghrey*, the California Court of Appeal reversed the trial court and found an antenuptial agreement to be invalid because it encouraged divorce.

The terms of the antenuptial agreement were written by a guest[9] on the reverse side of a Kethuba[10] immediately preceding the wedding of Farima and Kambiz Noghrey. The terms were: "I, Kambiz Noghrey, agree to settle on Farima Human the house . . . and $500,000 or one-half my assets, whichever is greater, in the event of a divorce . . . ."

Farima testified at the trial that she signed the document because she wanted protection in the event of divorce. In consideration for the agreement she assured Kambiz of her virginity and was medically examined for that purpose. Kambiz testified he was coerced into signing the agreement by Farima's mother who told him there would be no wedding unless he did so. Seven months after the wedding Farima filed for divorce.

Kambiz appealed the trial court's decision upholding the antenuptial agreement. The court of appeal was in accord with

9. The guest happened to be an attorney whom the parties prevailed upon to write the document just as she arrived at the wedding.

10. R. B. WISCHNITZER, 6 THE UNIVERSAL JEWISH ENCYCLOPEDIA (1942). The Kethuba is a marriage document which under Judaism details the rights and responsibilities of the husband to the wife upon divorce. Under Judaic law the husband can divorce the wife at will and therefore the Kethuba was meant to provide economic security for her. On the other hand, by making divorce costly for the husband, the Kethuba discouraged divorce. Should the wife choose to divorce the husband she was subject to either a reduction or complete loss of her rights.

Kambiz that this particular agreement promoted and encouraged divorce and was thereby unenforceable as contrary to California public policy.

The court of appeal pointed out that antenuptial agreements which merely attempt to characterize property acquired after marriage or which seek to maintain the separate property characteristics of property acquired before marriage, are generally binding.[11] However, the *Noghrey* agreement encouraged Farima to seek a divorce because divorce was the only way she would have rights to the money and property. According to its terms, had Kambiz died, the contract would have been nullified and Farima would have received nothing.

In *In re Marriage of Higgason*[12] the California Supreme Court found that agreements which provide for a settlement only in the event of a divorce are against public policy and consequently void. By citing a lengthy list of cases, the *Noghrey* court illustrated that this rule of law has prevailed since California's early history.[13]

Linda C. Kramer

B. Child Custody

1. *The custody rights of an unmarried father who is an unemancipated minor are subordinate to the state's interest in avoiding an environment which is detrimental to the child.*

Michael U. v. Jamie B., 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985). In *Michael U. v. Jamie B.*, the California

---

11. *See In re* Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (parties are bound by the terms of the antenuptial agreement as long as marital dissolution is not thereby promoted or encouraged).

12. 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973).

13. *See, e.g.*, Morgan v. Morgan, 190 Cal. 522, 213 P. 993 (1923) (the policy of the law is not to encourage divorce); Whiting v. Whiting, 62 Cal. App. 157, 216 P. 92 (1923) (courts should not sanction contracts that tend to encourage marital dissolution); Newman v. Freitas, 129 Cal. 283, 61 P. 907 (1900) (an agreement between a husband and wife which is founded upon doing something to facilitate a divorce or to abandon a defense to a divorce is void and illegal); Loveren v. Loveren, 106 Cal. 509, 39 P. 801 (1895) (if the objective of a contract is the dissolution of a marriage contract, or to encourage that result, it is a contract *contra bono mores*).

Supreme Court reversed the Orange County Superior Court decision that awarded temporary custody to the father, an unmarried, unemancipated minor. Four separate opinions were issued from a philosophically fractured court. Justice Broussard stated in the lead opinion that the trial court abused its discretion by holding that custody by the father would not be detrimental to the interests of the infant.

The father (Michael) was sixteen years old at the time of conception, and the mother (Jamie) was twelve. When Jamie informed Michael that she was pregnant, he immediately acknowledged responsibility and expressed a desire to secure custody. Jamie, however, determined that a married couple would be more capable of providing a satisfactory environment for the infant. She subsequently secured an adoptive couple. Michael withheld consent to the adoption and filed a petition to establish paternity under the Uniform Parentage Act (Act).[14] The court awarded Michael temporary custody, but Jamie's appeal restrained Michael from securing physical custody of the infant so as to establish his status as a legal parent with custodial rights.[15]

Justice Broussard acknowledged the court had, in *In re Baby Girl M.*,[16] established the appropriate standard for resolving custody disputes between natural fathers and prospective adoptive parents.The court held in *Baby Girl M.* that Civil Code section 4600 mandated that no adoption could transpire without both parents' consent, unless a court found that awarding custody to one of the parents would be detrimental to the interests of the infant.[17] The court further noted that the standard of "best interests of the child" is applicable to custody questions between parents, but that case law imposes an additional requirement if the custody dispute is between parent and nonparent.[18] In *In re B.G.*, the California Supreme Court held

14. CAL. CIV. CODE §§ 7000-7021 (West 1983 & Supp. 1986).

15. The Uniform Parentage Act set forth the rights of parents in the event one parent proposed adoption of the child. *Id.* § 7017. The Act established a hierarchy of fatherhood in which a "natural" father may be afforded fewer parental rights than a "presumed" father. *Id.* § 7004. The Act also provided several methods for a "natural" father to establish "presumed" status. *Id.* One such method was for Michael to receive the child into his home and to openly assert the child as his natural child. *Id.* § 7004(d)(4).

16. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

17. *See* CAL. CIV. CODE § 4600 (West 1983 & Supp. 1986).

18. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

that an award to a nonparent required a finding that custody by the parent would be "detrimental to the child."[19]

Justice Kaus, in his concurring opinion, expressed dismay at the *Baby Girl M.* decision. Although he stated that the decision in the instant case was "the only result which comports with justice," the decision seemed to be derived from specious logic that "comes close to impinging upon the substantial evidence rule."[20]

Justice Mosk concurred with the *Michael U.* majority and joined in Justice Kaus's concern over the *Baby Girl M.* decision. But he also expressed concern with the limitations of the legal arguments Justice Broussard's employed in *Michael U.* Justice Mosk opined that the court's prior decision established a rule which permitted the "casual inseminator" to thwart an unmarried mother's adoption attempt by merely withholding his consent. Justice Mosk suggested that any legal test that would award custody to a sixteen-year-old youth, who is the biological father and arguably a rapist, clearly established the fallacy of any theory but the traditional one: "when there is an unmarried mother who proposes to place her child for adoption, and a biological but not presumed father [contests], the trial court should only consider the best interests of the child."

Justice Broussard was apparently unwilling to overrule *Baby Girl M.*, and maintained its "detrimental" criterion rather than the traditional "best interests" rule. Justice Broussard asserted that the trial judge failed to utilize the existing case law that provided the procedural analysis to be used in situations like *Michael U.*[21]

Consequently, Justice Broussard stated that the only issue before the court was whether the implied finding at the hearing that custody by Michael would not be detrimental was supported by substantial evidence. The record, to Justice Broussard's satisfaction, established "uncontroverted" evidence that

---

19. *Id.* at 698, 523 P.2d at 257, 114 Cal. Rptr. at 457.

20. 9 WITKIN, CALIFORNIA PROCEDURE, APPEAL § 278, at 289 (3d ed. 1985).

21. *In re* Rose Lynn G., 57 Cal. App. 3d 406, 129 Cal. Rptr. 338 (1976). First, the facts established at the custody hearing must support the decision and second, one party had to request the court to scrutinize the ability of the custody-seeking parent to provide a satisfactory environment for the child. *Id.*

Michael lacked the maturity to care for a child; he had difficulty in school, rebelled against authority, smoked marijuana and had a history of sexual relations with females under the age of consent. The Justice also noted that the infant had been living with the adoptive parents for some time and had established an important bond with them.[22] The court decided that a break in that bond would be detrimental to the infant. Consequently, the majority held that the lower court's decision was not supported by substantial evidence.

Justice Reynoso dissented. He accused the majority of substituting its own judgment for that of the trial court. Justice Reynoso stated that appellate review of a trial court ruling for an alleged lack of substantial evidence "does not permit weighing of evidence or reversal of a judgment in accordance with the preponderance thereof."[23] He further stated that barring prejudicial error, a lower court judgment that appears to be against the weight of the evidence should be affirmed by a reviewing tribunal unless substantial evidence supporting the trial judgment does not exist.[24] The trier of fact, he concluded, was in the best position to establish credibility of the witnesses.[25]

Justice Reynoso also faulted the majority's application of the process established in *Baby Girl M.* The majority in *Michael U.* held that the best interests of the child should be balanced equally with any detriment to the child that might result if the court awards to one of the parents. The proper application of the *Baby Girl M.* rule, according to Justice Reynoso, would have awarded custody to Michael. Under Justice Reynoso's sequential analysis, a court would determine whether custody by the father—in and of itself—would be detrimental to the child. If custody by the father would not be detrimental, a court need not proceed further.[26] He concluded that the reasoning followed by the majority, combined with the lengthy judicial process, effectively penalized Michael U.

---

22. At trial, a child psychiatrist testified that Eric (the infant) had established an emotional attachment to the adoptive parents and would suffer learning and development difficulties if the relationship was severed.

23. 9 WITKIN, *supra* note 20, § 278, at 289.

24. *Id.* § 281, at 292.

25. *Id.* § 279, at 291.

26. *In re* Baby Girl M., 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

In *Michael U.*, the California Supreme Court faced a statement of public policy from the legislature which set out the priorities and methods of awarding custody where an unmarried father contests custody by adoptive parents. The same court that established the guidelines to support that public policy in *Baby Girl M.* is understandably reticient to overrule itself. Equally important, the court wished to avoid projecting inconsistency.

Unfortunately, the court was obliged to deal with a public policy that appeared acceptable at inception but, in light of *Baby Girl M.* and *Michael U.*, hasn't worked. The standard set forth in *Baby Girl M.* and Civil Code section 4600 requiring the contesting party to show "detrimental" impact on the child to avoid custody by a parent embraces too low a threshold for the court to enforce. On the other hand, the traditional doctrine that called for a decision in the best interest of the child, may be too restrictive for the court to reinstate.

The dilemma of how to reconcile two contradictory standards without appearing to vacillate on the emotional issue of child custody caused the court in *Michael U.* to decide the case on procedural grounds. The construct avoided the unsatisfactory result that would ensue from following *Baby Girl M.* (Michael gets custody), and it also avoided the appearance of inconsistency which would be caused by overruling a recent precedent. The court's refusal to overrule *Baby Girl M.* eliminated the opportunity to decisively reestablish the bright line rule of "in the best interests of the child." Instead, the court found that the trial court made a procedural error. Justice Broussard claimed the trial decision necessarily implied that Michael's custody would not be detrimental to the infant. He found that conclusion hard to accept in view of Michael's age and relative immaturity. Yet, as Justice Reynoso pointed out, Michael had taken several major steps to correct his character deficiencies since the custody question arose.[27]

The supreme court's decision in *Michael U.* essentially subsumes all rights of unmarried fathers to the majority of the court's implicit belief that any radical change is detrimental to

27. Michael was interested in establishing a home for the infant with relatives and friends as a support group. He decided to return to school; he took classes at a community college on child-rearing and he made an effort to find employment.

the child. The formula the court employed will effectively terminate an unmarried father's rights as soon as the infant emotionally bonds with anyone the mother has selected for custody. The disharmonious rules promulgated in *Baby Girl M.* and *Michael U.* leave no clear path by which trial judges can uniformly decide cases like these. The resulting confusion at the trial level practically mandates an appeal no matter how and what the trial judge decides.

T.A. Graudin

2. *To terminate parental rights, there must be clear and convincing evidence that severance is the least detrimental alternative to protect the child's welfare.*

In re R.S., 167 Cal. App. 3d 946, 213 Cal. Rptr. 690 (5th Dist. 1985). *In re R.S.* concerned a custody dispute between a mildly retarded mother and a couple who wished to adopt the child. The California Court of Appeal held that before terminating the parental rights of a mildly mentally retarded mother, the court must explore other less drastic alternatives.

Tanya S., the mildly mentally retarded mother, had a five-year-old son, R.S. The trial court applied California Civil Code section 232[28] and declared R.S. free from her custody and control. The court appointed Donald and Debra H., the petitioners, as guardians.

During the first two years of R.S.'s life, Tanya was involved with Central Valley Regional Center (CVRC) which offered a variety of supportive programs. CVRC tested R.S. and concluded he was normal, not developmentally disabled, and was receiving good care and attention. When R.S. was three-years old, he and Tanya lived with Jean Gildez, a woman who exploited and manipulated Tanya. R.S. started preschool but after four months the school insisted that R.S. be withdrawn primarily because he wasn't toilet trained. The teachers also described R.S.

28. CAL. CIV. CODE § 232(a)(6)(West 1982 & Supp. 1986) which provides in pertinent part: "An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when [they] are . . . incapable of supporting or controlling the child . . . because of . . . mental illness . . . ." *Id.*

as developmentally behind students his age and immature.

Gildez convinced Tanya to give R.S. to petitioners. Tanya signed the guardianship papers, however they were incorrectly completed and never filed. Nonetheless the petitioners took R.S. with them to their home in Oregon.

Tanya immediately regretted her decision to release R.S. to the petitioners. She moved out of the home she shared with Gildez and CVRC placed her in a program to help her develop independent living skills. Tanya did well in the program because she believed her success would enable her to properly care for R.S. and get him back. Gildez once again interfered and caused Tanya to drop out of the program.

Donald and Debra H. filed one petition to obtain guardianship of R.S. and a second petition to terminate Tanya's parental rights. The trial court appointed the district attorney to represent R.S. and after a hearing, temporarily placed R.S. in petitioners' custody. Two-and-a-half months later the trial court granted both petitions.

In *In re Carmeleta B.*,[29] the California Supreme Court stated that mentally ill persons are those who are in need of supervision, treatment, care, restraint, or who are dangerous to themselves, to others or to the property of others. The supreme court would not extend this definition of mental illness to facilitate the termination of parental rights, saying the strictness of the definition acted as a safeguard to protect the primacy of the family.

In *In re Angelia P.*,[30] the supreme court held that while the right to parent is a fundamental right it is not absolute and may have to yield to the rights of the child. The supreme court held that a finding to terminate parental rights under Civil Code section 232 must be supported by "*clear and convincing evidence.*"[31] The court further held that in an action to terminate parental rights the trial court must find that course of action to be the least detrimental alternative for the minor.

---

29. 21 Cal. 3d 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978).
30. 28 Cal. 3d 908, 623 P.2d 198, 171 Cal. Rptr. 637 (1981).
31. *Id.* at 919, 623 P.2d at 204, 171 Cal. Rptr. at 643 (emphasis in original).

In *In re David B.*,[32] the court held that Civil Code section 232 was valid and did not deny a parent substantive due process if two conditions were met: 1) the mental illness is settled and will continue for an indefinite period of time regardless of medical treatment and 2) that severance of the parental relationship is the least detrimental alternative available to protect the welfare of the child.

In the instant case, the trial court did not find by clear and convincing evidence that severing the parental relationship was the least detrimental alternative available to protect R.S. Nor did the court establish by clear and convincing evidence that Tanya's mental illness was such that she would not be able to properly care for R.S. in the future. Therefore the court of appeal reversed the order to sever the parental relationship and remanded the case for the trial court to examine further evidence.

The custody order, which was severable from the order terminating Tanya's parental rights, was upheld because the evidence was overwhelming that at the time of the hearing Tanya was unable to take care of R.S. by herself.[33]

The court of appeal has protected the rights of both parent and child by applying a strict standard to sever parental rights, while at the same time allowing temporary custody by nonparents. While the best interests of the child should be the paramount consideration in custody battles, the rights of parents and the preservation of the family should also be important.

Donna Cobe Beekman

---

32. 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979).

33. Tanya also claimed she was denied effective assistance of counsel. Although Tanya's counsel made several omissions, Tanya did not show that but for these omission the result of her case would have been different. Therefore counsel's failure to object to inadmissible hearsay or his failure to assert the attorney-client privilege or his failure to object to the appointment of the district attorney to represent R.S. did not amount to ineffective assistance of counsel. Tanya also claimed her attorney should have requested a determination of her competency. The court of appeal pointed out that showing Tanya was incompetent would have directly hurt her cause by proving she was not capable of rearing R.S.

3. *In an action to terminate parental rights, the court's paramount consideration is providing a loving, stable home for the minor.*

In re Jacqueline G., 165 Cal. App. 3d 582, 211 Cal. Rptr. 827 (1st Dist. 1985). In *In re Jacqueline G.*, the court of appeal held that there was sufficient evidence to support the trial court's termination of the natural father's parental rights, and that this course was in the child's best interest.

The natural father, Manuel G., and the minor, Jacqueline G. (Jackie) appealed from a judgment declaring Jackie free from Manuel's custody and referring her to the Department of Social Services for adoption. Manuel had an extensive criminal record and history of drug involvement. He was unemployed and received supplemental security income for emotional disability.[34] Manuel had not had a home of his own since Jackie's birth. Manuel's probation reports indicated he had always loved Jackie and wanted to be with her, but that he displayed a very limited understanding of Jackie's needs and little, if any, ability to parent effectively. Jackie's natural mother, Sally S., had relinquished the minor for adoption.

A clinical psychologist testified that Jackie felt she was part of the adoptive S. family, derived no pleasure from visits with her natural father, and would like to terminate the visits. The psychologist further indicated that Jackie would feel more secure and stable if she were permanently adopted by the S. family.

Jackie did not argue that she should be placed in Manuel's custody but asserted that the termination of her father's parental rights would free her for adoption, thereby threatening potential inheritance rights in trusts through her natural mother. The trusts had an actuarial value of approximately $75,000, but Jackie's rights in them were extremely remote.[35]

---

34. Manuel's I.Q. was between 90 and 100. He was diagnosed as a paranoid schizophrenic, acute and chronic, severe with symptomatic agitation and depression.

35. Jackie would take only if her mother and grandmother failed to exercise certain "powers of appointment" over the principal of the trusts. Jackie could only take the principal of the largest trust if her mother, then age 31, predeceases her grandmother, then age 67.

Manuel, whose primary goal was to maintain visitation rights with Jackie, contended that the trial court erred in failing to consider a plan for reunification. At the time of the hearing there was no statutory mandate for the court to consider reuniting Jackie and Manuel, but the trial court did take into account Manuel's minimal efforts to establish a home. The court found it must balance all factors which affect the minor's welfare; finances were but one aspect to consider in determining the child's best interests. The minor's immediate need for a childhood untroubled by insecurity and anxiety outweighed the remote possibility of an inheritance. The court found by clear and convincing evidence that Jackie came within the description of the Civil Code section 232[36] and that termination of parental rights was in her best interest.

The main thrust of Jackie's appeal was that the court inadequately considered the less detrimental alternative of guardianship. A guardianship would allow Jackie to continue living with the S. family without terminating Manuel's parental rights and thereby perfectly preserving any potential inheritance. Manuel joined the appeal because guardianship would enable him to continue visitation with Jackie.

The lower court found that Jackie had been in the foster home for more than two years. Manuel had failed and was likely to fail in the future to provide a home for Jackie, to provide care and control for her and to maintain an adequate parental rela-

---

36. CAL. CIV. CODE § 232(a)(7) (West 1982 & Supp. 1986). At the time of the hearing in 1981, Civil Code section 232 provided, in relevant part:

> (a) An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions: (7) Who has been cared for in one or more foster homes, . . . under the supervision of the juvenile court, . . . for two or more consecutive years, providing that the court finds by clear and convincing evidence that return of the child to his parent or parents would be detrimental to the child and that the parent or parents . . . have failed during such period, and are likely to fail in the future, to do the following:
>
> (i) Provide a home for the child;
>
> (ii) Provide care and control for the child; and
>
> (iii) Maintain an adequate parental relationship with the child.

Id.

tionship with her. The court concluded that awarding custody to Manuel would be detrimental to Jackie. The trial court further found that termination of visitation rights and awarding custody to the S. family was the best alternative.

The court of appeal noted that an order referring a minor for adoption is only an interim order, a preliminary step in proceedings that may or may not culminate in a final order for adoption. A court hearing on the petition for adoption must follow this interlocutory order. Thus there would be additional time before a petition of adoption was granted to explore the parameters of Jackie's inheritance rights through Sally S.

Although the best interest of the minor should be the paramount consideration, this weighty concern should not trample the rights of parents. Manuel was seeking to preserve visitation rights and was not seeking custody of Jackie. Therefore the court's focus on Manuel's parenting abilities were off point. Because the alternative of guardianship would have allowed Jackie to live with the S. family as well as allow Manuel to visit with his daughter, the court should have explored it with more care.

Donna Cobe Beekman

4. *In custody disputes between a noncustodial parent and a nonparent, the nonparent shall prevail if it is in the best interests of the child.*

In re Angelica M., 170 Cal. App. 3d 210, 216 Cal. Rptr. 18 (4th Dist. 1985). In *In re Angelica M.*, the court of appeal held that the trial court erred by applying the wrong standard in a custody dispute.

Angelica M., a six-year-old child, appealed from a dispositional order which placed her in the custody of her father.[37] Angelica was in the legal and physical custody of her mother when she was sexually abused by her mother's boyfriend. The mother

37. Placement with the father had several conditions. He had to 1) obtain counseling for Angelica, 2) not use alcohol to excess, 3) not use drugs in Angelica's presence, 4) not allow Angelica in his car if he had been drinking or using drugs, and 5) Angelica was not to be in the presence of two named individuals. According to a social worker's report one of the persons was the father's brother-in-law who had molested Angelica.

subsequently married the boyfriend. Angelica's father had a history of alcohol and marijuana abuse, lacked job stability, had a minimal income and lived with his parents in an overcrowded home. The appeal record also indicated that the father had no consistent contact with Angelica.

Angelica was living temporarily with her maternal grandparents, doing well in school and receiving counseling. Her psychologist strongly recommended continued placement with the maternal grandparents.

The trial court relied on Welfare and Institutions Code section 361(b) which provided in part:

> No dependent child shall be taken from the *physical custody of his or her parents* or guardians unless, upon the hearing, the juvenile court finds clear and convincing evidence of any of the following: . . . danger to the physical health of the minor[,] . . . the parent . . . is unwilling to have physical custody[,] . . . severe emotional damage[,] . . . the minor has been sexually abused . . . .[38]

The court of appeal held the trial court erred because the minor was not in the physical custody of her father; section 361 only applies to taking a child from the physical custody of a parent. The court relied on *In re B. G.*[39] which held that Civil Code section 4600 governs custody disputes between custodial nonparents and noncustodial parents.[40] Under section 4600, an award of custody: 1) must be made in the best interests of the child, 2) there must be an express finding that parental custody would be detrimental to the minor, and 3) the findings must be supported by evidence showing that parental custody would actually harm the child.

The trial court had awarded the father custody because it was unable to find clear and convincing evidence of one of the abuses listed in Welfare and Institutions Code section 361. The trial court thought it was limited to those abuses but the court

38. CAL. WELF. & INST. CODE § 361(b) (West 1984 & Supp. 1986) (emphasis added).
39. *In re* B. G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).
40. CAL. CIV. CODE § 4600 (West 1983 & Supp. 1986).

of appeal held otherwise. While an abuse described in section 361 would satisfy the evidentiary finding of actual harm required by *In re B.G.*, a court has discretion to explore abuses not in the code. According to the court of appeal, the key consideration should be the best interests of the child.

Donna Cobe Beekman

C. Community Property

1. *The doctrine of resulting trust bars one spouse from destroying the other's community property interest in military retirement benefits.*

In re Marriage of Mastropaolo, 166 Cal. App. 3d 953, 213 Cal. Rptr. 26 (4th Dist. 1985). The California Court of Appeal in *In re Marriage of Mastropaolo* affirmed the trial court's judgment awarding the former wife (Henriette) a community property interest in the portion of the husband's (Steven) military disability retirement pension that would have been paid to him as a longevity retirement benefit. The court held that the doctrine of resulting trust[41] barred the husband from destroying the wife's right to her community property share of the longevity retirement benefits.

The parties separated in 1972, after more than nineteen years of marriage. Three months later Steven retired from the Air Force with a 100% disability rating. He could have chosen to receive longevity retirement benefits instead of disability retirement benefits because he had more than twenty years of service. The marriage was dissolved in 1981 and two years later trial en-

---

41. *See* Seabury v. Costello, 209 Cal. App. 2d 640, 645, 26 Cal. Rptr. 248, 251 (1962). "Neither written evidence nor express declaration of trust is required . . . . A resulting trust is implied from facts and circumstances . . . and arises by presumption of law." *Id.* *See also* Black's Law Dictionary 1182 (5th ed. 1979).

> Trust implied in law . . . in which a party, through no actual or constructive fraud, becomes invested with legal title . . . for the benefit of another, although without expressed intent to do so, because of a presumption of such intent arising by operation of law . . . . A "resulting trust" arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that person taking or holding the property should have the beneficial interest therein . . . .

Id.

sured on the property and support issues. The parties stipulated that had Steven elected longevity retirement he would have received $117,825.56 attributable to the marriage period, at the rate of $1,549.71 per month.

The trial court determined that Steven's prospective longevity retirement benefit was community property and awarded Henriette a 43.65% interest.[42] The court granted Steven a 56.35% separate property interest in the optional longevity retirement benefits. The additional retirement benefits he received included those attributable to his disability.

Steven appealed the property judgment. He claimed his military disability retirement was separate property since it was compensation for personal pain and suffering. The court of appeal disagreed and cited the California Supreme Court's decision in *In re Marriage of Stenquist*[43] and this court's decision in *In re Marriage of Mueller*[44] as controlling. Both those decisions held that disability retirement benefits are an employee's separate property, unless he or she could also have qualified for longevity retirement benefits. The courts reasoned that allowing a spouse to turn what would be community property into separate property is inconsistent with the state's community property policy of dividing assets equally.

The *Mastropaolo* court concluded that in circumstances where the military spouse retires before marital dissolution and is then eligible for either longevity or disability retirement benefits, the nonmilitary spouse has a community property interest in those benefits.

Citing *McCarty v. McCarty*[45] Steven asserted that military retirement benefits were subject to federal control only. But the *Mastropaolo* court noted that Congress enacted the Federal Uniformed Services Former Spouse's Protection Act (FUSFSPA)[46] which nullified *McCarty*.

---

42. The 43.65% share excluded time prior to marriage.

43. 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978).

44. 70 Cal. App. 3d 66, 137 Cal. Rptr. 129 (1977).

45. 453 U.S. 210 (1981) (military longevity retirement pensions are subject to federal control only and state courts may not divide them according to state laws upon marital dissolution).

46. 10 U.S.C. § 1408(c)(1) (1983). In pertinent part:

Steven argued that since FUSFSPA specifically excludes retirement disability pay,[47] Congress intended to preempt state community property law as to the disposition of those benefits. However, the United States Supreme Court in *Hisquierdo v. Hisquierdo*[48] stated that the correct analysis under the supremacy clause is whether Congress specifically enacted preemption of the state law.[49] The *Mastropaolo* court found that since Congress did not intend to preempt state law and no federal interests were threatened, the state court was free to apply state law.

The court of appeal's decision is consistent with the intent of California's community property law, that is, to preserve a spousal interest. At the same time, this decision promotes the congressional intent of FUSFSPA, which is to protect the spouses of service personnel.

Linda C. Kramer

D. Health and Welfare

1. *Income tax refunds should not be deducted from grant checks of aid to families with dependent children.*

Vaessen v. Woods, 35 Cal. 3d 749, 677 P.2d 1183, 200 Cal. Rptr. 893 (1984). In *Vaessen v. Woods*, the court held on a four to three vote that income tax refunds should not be considered income when calculating aid to families with dependent children (AFDC).[50] The California Department of Social Services

---

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Id.

47. 10 U.S.C. § 1408(a)(4) (1983). Disposable retired or retainer pay is defined as: "the total monthly retired or retainer pay to which a member is entitled . . . less amounts which . . . are required by law to be and are deducted from the retired or retainer pay of such member, including . . . amounts waived in order to receive compensation under title 5 or title 38 . . . ." *Id.* § 1408(a)(4)(B).

48. 439 U.S. 572, 581 (1979) (benefits payable under the Railroad Retirement Act of 1974 may not be divided under state community property law).

49. *Id.*

50. AFDC was established by the Social Security Act of 1935. 42 U.S.C. §§ 601-615 (1983 & Supp. 1985). It is jointly funded by the federal government and the states and is

promulgated a regulation which treated income tax refunds as "income"—thereby reducing the grant of aid to AFDC families by the amount of the refund. Families whose aid was cut brought a class action to enjoin the state from enforcing this regulation. Plaintiffs were recipients who had been employed long enough in a given year to accrue some withholdings, but who had not attained self-sufficiency above the minimum standard of need.[51]

Neither Congress nor the California Legislature had defined "resource" or "income." However, the terms do serve as conclusive labels. If a tax refund is labeled income, then the amount of the refund is deducted from a future AFDC grant.[52] But if a tax refund is labeled a resource the recipient may retain the refund without a grant reduction.[53]

The court found three policy reasons why tax refunds should be considered resources. First, families need a steady source of income to meet their basic recurring needs and obtain economic security. Second, treating tax refunds as resources will provide incentive for employment. Reducing future grants brings about an economic hardship which may cause recipients to feel penalized for working and thereby discourage future employment. Third, the cost of the paperwork required to adjust monthly grants would most likely outweigh any fiscal savings the state could expect since the average refund is usually only about $130.

---

administered by the states in a scheme of cooperative federalism. While state participation is elective, federal funding is conditioned on program compliance with the Social Security Act and applicable federal regulations.

51. CAL. WELF. & INST. CODE § 11452 (West Supp. 1986) defines the minimum standard of adequate as $424 per month for a family of two, $526 for a family of three, $625 for a family of four and $1130 for a family of ten or more. *Id.*

52. Two months after a recipient receives his or her income tax refund the department deducts it from the next grant check. Because the normal monthly grant is so small recipients often use the tax refund to pay for daily necessities. The court noted that it is not realistic to assume that recipients can save the refund for needed expenses two months down the road.

53. Current federal law allows a family to retain resources with a combined equity value of less than $1000, plus the home it owns and occupies, plus an automobile with equity value of less than $1,500, plus essential household and personal goods. A state may specify lower limits on resources. 42 U.S.C. § 602(a)(7)(B) (Supp. 1985); 45 C.F.R. § 233.20(a)(i)(B) (1985). California permits recipients to retain the maximum resources permitted by federal law. CAL. WELF. & INST. CODE §§ 11155, 11257 (West 1980 & Supp. 1986).

The court relied on the following federal regulation: "In establishing financial eligibility in the amount of the assistance payment, only such net income as is actually available . . . on a *regular basis* will be considered."[54] The court held that since income tax refunds are usually only given once a year if at all, they are not received on a regular basis and therefore must be a resource. However, prior to this case, Congress deleted the phrase "on a regular basis" from the regulations.[55] While the words "on a regular basis" no longer appeared in the regulations the court held that treating tax refunds as resources furthered the federal policy of insuring that needy children will receive a minimally adequate level of care and support.

The court compared AFDC grants to the federal food stamp program which specified that income tax refunds be treated as resources for the policy reasons discussed previously. The majority found that treating tax refunds as resources rather than income would not, as the state asserted, result in unwarranted windfalls allowing persons with substantial financial resources to remain on welfare. If a family has too many resources, it becomes ineligible for public assistance.[56]

While the majority found that its decision would carry out federal policy, the dissent criticized the court for overstepping its founds. The dissent argued that the court's sole function was to find whether the state regulation conflicted with applicable federal statutes, not whether a different policy (treating tax refunds as resources) was consistent with the federal regulations.

The dissent also argued that an agency needs flexibility when it implements a statutory scheme. If the agency's first attempt at effectuating a statute doesn't work, it should be able to try another method. The dissent found that the effect of the majority's holding is to restrict an agency to its initial approach unless the legislature expressly approves an alternative method.

---

54. Former 45 C.F.R. § 233.90 (a)(1)(1979) (emphasis added).

55. In his dissent, Justice Richardson accused the majority of not considering the intent of Congress when it deleted "on a regular basis" from the statute. Several court decisions had relied on those words in holding that tax refunds were not to be counted as income. Justice Richardson found that despite Congressional action to the contrary, the majority continued to intuit a federal intention to require regularity.

56. *See supra* note 53 for relevant discussion.

The majority was correct in its decision to treat tax refunds as a resource. The regulation offered only minimal savings to the state and clearly would cause hardship to AFDC families who struggle to survive on limited grants. A court has the power to examine a regulation to see if it is rationally related to the ends it is supposed to achieve. However, because the amount of money available for public welfare is not limitless, courts should tred carefully when their decisions reallocate these funds. While the fiscal loss to the state as a result of this decision, if any, is minimal, the distribution of welfare is the responsibility of elected representatives and not courts.

Donna Cobe Beekman

II. CRIMINAL LAW

A. EVIDENCE

1. *A mother's testimony of her young child's out-of-court statement does not violate the hearsay rule or the confrontation clause.*

In re Damon H., 165 Cal. App. 3d 471, 211 Cal. Rptr. 623 (3rd Dist. 1985). The California Court of Appeal in *In re Damon H.* affirmed the juvenile court's finding that a sexual molestation offense was committed against a child as well as affirming that it was proper to admit evidence under the spontaneous declaration exception to the hearsay rule.[57] Furthermore, such an admission did not violate the defendant's constitutional right to confrontation.[58]

The evidence admitted was the testimony of a child sexual molestation victim's mother. She testified that her son, Colby, told her what happened shortly after the offense occurred.

It was stipulated at the jurisdictional hearing that Colby, a two-year, nine-month-old child, was incompetent to testify. His mother testified that Colby went on a bike ride with his four-

57. CAL. EVID. CODE § 1240 (West 1966). "Evidence of a statement is not made inadmissible by the hearsay rule if the statement . . . [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and . . . [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." *Id.*

58. U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

year-old brother in the care of his neighbors, Damon and Vance.[59] Upon returning home Colby was crying and Vance claimed the child had fallen. Colby's mother asked him what had happened and the child denied falling. The child then voluntarily declared his buttocks hurt and that "Damon put his weenie in my butt."

In determining whether Colby's statement was admissible the court found that even if he was too young to testify, Evidence Code section 1240 allowed admission of a spontaneous declaration when there was sufficient evidence to support the reliability of such a statement. The court looked at the similar circumstances in *People v. Orduno*.[60] A three-year-old child was molested in *Orduno* and in response to her mother's questioning she stated what had happened. Because the child was incompetent to testify herself, the mother testified as to the out-of-court statement. The *Orduno* court found the statement to be spontaneous. It also noted that spontaneity is a recognized indicia of reliability that weighs against any violation of the confrontation clause.[61]

Colby made his hearsay declaration within ten minutes of returning home from a forty-minute bike ride. Neither the lapse of time between the relevant event and the statement, nor the fact that it was elicited by his mother's questioning, deprived it of its spontaneous character. The court of appeal was satisfied with the trial court's finding that Colby was in a state of extreme excitement for the entire period of time and was therefore able to remember accurately and communicate what had occurred. The fact that the child's mother offered the testimony did not deprive the statement of its trustworthiness.

The defendant argued that even if Colby's statement met the criteria for a hearsay exception its admission violated his constitutional right to confront his accuser.[62] The court of appeal disagreed by saying the confrontation clause did not confer an absolute right of confrontation, and further, that a California court had never proposed that admitting a spontaneous declara-

59. Damon was fourteen years old and his brother Vance was twelve years old.
60. 80 Cal. App. 3d 738, 145 Cal. Rptr. 806 (1978).
61. *Id.* at 747, 145 Cal. Rptr. at 811.
62. U.S. CONST. amend. VI. *See supra* note 58 for relevant language.

tion is a per se violation of the confrontation clause.[63]

In dealing with the task of reconciling the hearsay exception rule with the confrontation clause, the court relied on *Ohio v. Roberts*[64] and held that if the evidence lies within a well established hearsay exception then it is presumed to be trustworthy. The "statement is admissible only if it bears adequate 'indicia of reliability.' " Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."[65]

To further ensure the reliability of Colby's spontaneous declaration, the court applied the four part test enumerated in the plurality opinion of *Dutton v. Evans*.[66] Colby's explicit and immediate description of the assault was an express assertion of the past event and made it unlikely that it was the result of faulty recollection. Damon's own testimony was independent evidence that Colby was under his care during the bike ride and supported the fact that Colby was able to acquire first-hand knowledge of the events referred to within the statement. As further indicia of the reliability of Colby's statement, the court noted Colby had no experience with sexual conduct prior to this event.

The court's decision to admit the mother's testimony is important because it will typically be a parent to whom a young child victim relates any sexual assault. Since a young child will often be deemed incompetent to testify, this court's findings affect the future admission of hearsay evidence as well as the conviction of child molesters. In applying the criteria enumerated in *Dutton* the court affirmed that a young child's spontaneous declaration is reliable and consequently tips the balance against any

63. Upon objection it would be impossible to exclude every statement made by a declarant not present at trial; for example, dying declarations are admissible. *See* CAL. EVID. CODE § 1242 (West 1966) (dying declarations are admissible).

64. 448 U.S. 56 (1980) (admission of an unavailable witness's preliminary hearing testimony does not violate the defendant's right to confrontation if it bears sufficiently reliable criteria).

65. *Id.* at 66.

66. 400 U.S. 74, 88-89 (1970). The factors to test reliability are: (1) if the hearsay statement included an express assertion of a past event, (2) if independent evidence supported the declarant's personal knowledge of the subject matter of the statement, (3) if there was a substantial possibility of faulty memory on the part of the declarant and (4) if the circumstances under which the statement was made indicate its reliability. *Id.*

constitutional violation of the confrontation clause.

Linda C. Kramer

B. SENTENCING

1. *Before a defendant is sentenced to consecutive terms for multiple counts of oral copulation, a jury must specifically find he used force or threats.*

People v. Riffey, 171 Cal. App. 3d 419, 217 Cal. Rptr. 319 (3rd Dist. 1985). In *People v. Riffey*, the California Court of Appeal held that in order to implement Penal Code section 667.6(c),[67] which imposes full consecutive sentences for certain sex crimes, the jury must find that a defendant's conduct falls within its express provisions. Further, the court held that the jury must be instructed to specifically and positively declare which elements of the sex crimes defendant committed. If the jury determines defendant used threats or fear, it must also decide whether the degree of threat or fear rose to the level of great bodily harm.

Defendant was convicted of kidnapping,[68] assault with a deadly weapon,[69] two counts of forcible rape,[70] and three counts of forcible oral copulation.[71] He was sentenced to a prison term of forty-five years. The trial court's sentence included the imposition of separate, consecutive prison terms for each of defendant's three oral copulation convictions. The trial court cited section 667.6 (c) as authority for ordering consecutive terms.

Defendant's central challenge to the validity of his sentence was predicated on the ground that the trial court improperly resorted to section 667.6 (c) as authority for the consecutive terms it imposed. Defendant argued that there is a difference between the statutory definition of oral copulation,[72] upon which the jury

---

67. CAL. PENAL CODE § 667.6(c) (West Supp. 1986) which states, in pertinent part: "[A] full, separate, and consecutive term may be imposed for each violation . . . of committing . . . oral copulation by force . . . or fear of immediate and unlawful bodily injury." *Id.*

68. CAL. PENAL CODE § 207 (West 1970 & Supp. 1986).

69. CAL. PENAL CODE § 245(a) (West 1970 & Supp. 1986).

70. CAL. PENAL CODE § 261(2) (West 1970 & Supp. 1986).

71. CAL. PENAL CODE § 288a(c) (West 1970 & Supp. 1986).

72. *Id.* Section 288a(c) provides that a person found guilty of oral copulation in conjunction with "force, violence, duress, menace, or fear of immediate and unlawful bodily

based its verdict, and the language of section 667.6(c),[73] upon which the trial court based its sentence.

The court of appeal agreed with defendant and held that there was a basic difference between the definition of oral copulation in Penal Code section 288a and section 667.6(c). The court stated that under the section 288a(c), the degree of threat required for a conviction is based on a subjective standard. The victim need only fear bodily injury. However, for sentence enhancement under section 667.6(c), the degree of threat required for a conviction is based upon a more rigorous objective standard.

The court concluded that the consecutive sentencing allowed under section 667.6(c) could not be invoked since it was unclear from the jury's general verdict whether it had determined that defendant's act of forcible copulation was accomplished by force or threat. Moreover, if it were by threat, there existed the further uncertainty of the *degree* of threat. Thus, the court declared that absent a specific finding by the jury of a threat that reached the level of great bodily injury, the trial court could not impose full consecutive sentences pursuant to section 667.6(c).

Kathy A. Alfieri

C. Sex Offenses

1. *A woman raped by a former lover is entitled to benefits under the Victims of Violent Crimes Act regardless of whether criminal prosecution occurs.*

Anne B. v. State Board of Control, 165 Cal. App. 3d 279, 209 Cal. Rptr. 83 (1st Dist. 1984). In *Anne B. v. State Board of Control*, appellant Anne B. brought an action to compel the State Board of Control (Board) to grant her claim for benefits under the Victims of Violent Crimes Act.[74] The Board had denied her claim of $4,140 for psychological rehabilitation

---

injury on the victim or another person . . . shall be punished by imprisonment . . . ." *Id.*

73. Cal. Penal Code § 667.6(c) (West Supp. 1986).

74. Cal. Gov't Code § 13959 (West 1980 & Supp. 1986).

necessitated by a violent rape perpetrated by a former lover. The Board rejected her claim because of her on-off relationship with the alleged rapist and because the district attorney had declined to prosecute the matter, primarily due to that relationship.

The Board determined that Anne B. had not met the Act's requirement of proof of a violent crime because the district attorney had declined to file charges against the alleged assailant.[75] The Board was swayed neither by a police report that pointed to specific medical evidence of trauma suffered by Anne B., nor by a letter from her therapist that indicated his belief in the victim's traumatic injuries.

In addition to these facts, uncontested testimony at trial showed that an employee of the Contra Costa Victim/Witness Assistance Program (Program) approached Anne B. and that the employee and the Program were authorized by statute to counsel victims of crimes and to assist them in preparing and presenting claims under the Act.[76] Additional testimony indicated that Anne B. also relied upon assurances of the availability of state funds to cover the costs of therapy. Both the Program employee and the therapist who subsequently treated her offered those warranties and assurances. The *Anne B.* court held that appellant justifiably relied upon the representations of the Program employee who assured her of compensation for the psychotherapy.

The court of appeal held, contrary to the trial court, that the intent of the Victim of Violent Crimes Act is to assist a victim's rehabilitation[77] and that denial of benefits must be based upon narrowly construed grounds.[78] The court further held that

---

75. *See* CAL. GOV'T CODE § 13960(c) (West 1980 & Supp. 1986) which defines a crime of violence as "a crime or public offense . . . which results in injury to a resident of this state . . . ." *Id.*

76. CAL. PENAL CODE § 13835(e) (West 1982 & Supp. 1986) states the legislative intent of the Witness/Victim Assistance Act insofar as "a large number of victims . . . are unaware of . . . their rights . . . ." *Id.*

77. CAL. GOV'T CODE § 13959 (West 1980 & Supp. 1986) which states: "It is in the public interest to indemnify and assist in the rehabilitation of suffer a pecuniary loss which they are unable to recoup without suffering serious financial hardship." *Id.*

78. CAL. GOV'T CODE § 13964 (West Supp. 1986). This section of the Act was added after the Anne B. assault, but before the case came before the court of appeal. The justices noted that although legislation is rarely meant to be retroactively applied, when

the Board, not the district attorney, decides whether a violent act occurred.

The court found repugnant the Board's argument that Anne B.'s on-off relationship with her attacker implicated her as a participant in the events leading to the assault. The court renounced this as a thinly disguised version of "she asked for it." The court found the relationship to be irrelevant as to legitimizing or diminishing the impact upon the victim of forced sexual intercourse. The court went on to state that while a district attorney may have to weigh the relationship's impact upon a jury which may retain an outmoded way of thinking about rape, the State of California would not be a party to outdated sexual mores.[79]

Generally a court extends considerable support to the decision of an administrative body such as the Board. However, a court may issue a writ of mandamus when a party alleges that the administrative body prejudicially abused its discretion.[80] In *Anne B.*, the appellant argued that the Board's decision was not "supported by substantial evidence in light of the whole record" as required by California Code of Civil Procedure.[81] The court agreed. The court concluded that the evidence—the police report and the therapist's statement—in conjunction with the wording of the Act's provisions, definitions and intent, clearly pointed to the appellant as a victim of a violent crime.

The *Anne B.* decision demonstrates the court's interest in vigorously and assidiously enforcing the legislative intent of the

---

the purpose of the legislation is solely to impart a clearer understanding of the intent behind earlier legislation, retroactive application is warranted.

Subdivision (d) states that "[n]o application shall be denied solely because no criminal complaint has been filed, unless the complaint has not been filed for one of the reasons stated in subdivision (b) and (c)." *Id.* § 13964(d).

Subdivision (b) permits denial if the applicant's involvement in the events leading up to the crime is of a questionable nature. *Id.* § 13964(b).

Subdivision (c) permits denial of the application if (1) applicant willingly participated in the crime or (2) the applicant failed to cooperate with the law enforcement agency investigating the crime. *Id.* § 13964(c).

79. *See, e.g.*, CAL. PENAL CODE § 273.5(a) (West Supp. 1986) which states in pertinent part that "[a]ny person who willfully inflicts upon his or her spouse, or . . . upon any person resulting in a traumatic condition, is guilty of a felony . . . ." *Id.*

80. CAL. CIV. PROC. CODE § 1094.5 (West 1982 & Supp. 1986).

81. CAL. CIV. PROC. CODE § 1094.5(c) (West 1982 & Supp. 1986).

Victim of Violent Crimes Act. The purpose of the legislation is to compensate the victim of a violent act, rather than be an adjunct or facilitator to the state's quest for conviction of the assailant. With compensation as a focus of the Victim of Violent Crimes Act, the often pivotal issue of the victim/attacker relationship in a criminal prosecution context, is irrelevant in the civil matter of determining benefits for the victim. The court of appeal has made a strong attempt to update the thinking of its administrative counterparts.

T.A. Graudin

2. *A child molester may not exploit a technicality in order to avoid registering as a sex offender.*

People v. Tate, 164 Cal. App. 3d 133, 210 Cal. Rptr. 117 (5th Dist. 1985). The California Court of Appeal held in *People v. Tate* that the state has a strong policy of requiring anyone who molests or annoys children to register as a sex offender. Thus the trial court erred in not requiring such registration.

The victim was the seven-year-old daughter of Tate's girl friend. The child told a social worker that Tate sexually molested her for several months and finally had sexual intercourse with her. She reiterated these events during cross examination in a preliminary hearing. Tate denied the allegations and the child later disaffirmed the acts in a taped statement. In addition there was disagreement among doctors as to whether the child was in fact molested. Because of the conflicting testimony the district attorney accepted Tate's plea bargain of nolo contendere to violating Penal Code section 647a.[82]

At the time of this offense the California Penal Code had an express requirement that anyone convicted of violating subdivision 1 of section 647a must register as a sex offender.[83] That requirement was enacted in 1947 and applied to certain sections,

82. CAL. PENAL CODE § 647a (West 1970 & Supp. 1986). In pertinent part: "Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable . . . by a fine . . . or by imprisonment . . . or by both . . . ." *Id.*

83. CAL. PENAL CODE § 290 (West 1970). In pertinent part: "Any person who . . . has been or is . . . convicted in the State of California shall . . . register [as a sex offender] with the chief of police of the city in which he resides or the sheriff of the county if he resides in an unincorporated area." *Id.*

including section 647a, which then consisted of two subdivisions. Subdivision 1 pertained to the annoyance or molestation of children and subdivision 2 concerned loitering near schools and public places where children are present.

A discrepancy occurred when the legislature subsequently modified section 647 by deleting subdivision 2. The 1986 version of the statute had no subdivision 1, yet the registration requirement of section 290 still referred to subdivision 1. The legislature had neglected to conform section 290 with the new section 647a.

Tate argued that because section 647a had no subdivision 1 when he committed the offense it was unclear whether the Legislature intended to have the registration requirement apply to section 647a. The court concluded his argument had no merit and that the legislature's failure to bring the two statutes in conformity with one another was a mere oversight. A court cannot allow a legislative act to be proclaimed invalid because of uncertainty when the statute can be clarified by simply correcting the inadvertent error.[84]

People v. Mills[85] was controlling for this court. The defendant in *Mills* was required to register as a sex offender upon conviction for lewd and lascivious conduct on a seven-year-old child. The court in *Mills* concluded that when someone attempts sexual penetration of a minor it was not shocking or unusual to require registration as a sex offender.

The court of appeal explained that one who is convicted under 647a is motivated by an unnatural and abnormal sexual interest of children.[86] The objective of section 647a is to protect children from sex offenders and to facilitate the segregation and apprehension of such criminals. Since this statute did not prescribe a penalty out of proportion to the offense, the *Tate* court chose not to interfere with a matter it felt to be within the legis-

84. "For example, if a supplemental or amendatory statute refers to a section of the original act by number, and the section referred to is not in harmony with the legislative purpose whereas only one other section is, the reference will be treated as being to the other section." 58 CAL. JUR. 3D *Statutes* § 113 (1980).

85. 81 Cal. App. 3d 171, 146 Cal. Rptr. 411 (1978).

86. *See* People v. Pallares, 112 Cal. App. 2d Supp 895, 900, 246 P. 2d 173 (1952).

lative province.

The court was correct in observing that children require society's utmost protection. This decision upheld the legislative purpose of guaranteeing that known child molesters be available for constant police observation.

T.A. Graudin

III. ADMINISTRATIVE LAW

A. EDUCATION

1. *The rule denying reimbursement to parents who unilaterally place their handicapped child in a private educational facility is subject to exception in cases of bad faith.*

In re John K., 170 Cal. App. 3d 783, 216 Cal. Rptr. 557 (1st Dist. 1985). In *In re John K.*, the California Court of Appeal held that the well-established rule denying reimbursement to parents who unilaterally place a handicapped child in a private educational facility is subject to exception. The exception applies where a school district has acted in bad faith by flagrantly failing to comply with the procedural requirements enumerated in the Education of the Handicapped Act (Act).[87] This exception entitles the parents to reimbursement. The court further held that the parents were entitled to attorney's fees. California law authorizes such fees where a public entity's conduct is arbitrary or capricious.[88]

John K. was classified as learning disabled and educationally handicapped at an early age. In 1976, an Individual Education Program (IEP) was established for him and he progressed fairly well. In 1977, John K. was placed in a public high school where he developed chronic patterns of truancy and severe behavioral problems. The school district was fully aware of John K.'s severe behavioral disorders for more than two years, but it took no remedial measures. Between October 1978 and April

87. 20 U.S.C. §§ 1400-1461 (1978 & Supp. 1985).

88. CAL. GOV'T CODE § 800 (West 1980) provides in pertinent part that "where the award, finding or other determination of such proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his official capacity, the complainant . . . may collect reasonable attorney's fees . . . ." *Id.*

1979, John K. spent considerable time in juvenile hall and residential facilities. During this time the school district neither reassessed John K.'s placement nor developed an appropriate IEP for him. John K.'s parents then placed him in a private residential facility.

Plaintiffs, John K.'s parents, contended that fiscal responsibility for John K.'s residential placement rested with the school district. Plaintiffs based their contention on the well-settled legal principle that if private placement is needed in order to provide a handicapped child with an appropriate education, it shall be provided at no cost to the child's parents.[89]

Defendant school district acknowledged its duty to pay for appropriate, agreed-upon placement of a handicapped child. However, it asserted that unilateral placement by John K.'s parents, which was not done pursuant to an IEP, negated any claim for reimbursement of private educational costs.

Defendant's assertion was based upon the "stay put" requirement[90] of the Act which states that the student must remain in her present educational placement during the pendency of any proceeding conducted under the Act. Violation of the "stay put" requirement imposes the cost of the private education upon the parents.[91]

Plaintiffs contended that the "stay put" provision was ineffectual when John K. was placed at the private facility (PCS) because neither a hearing nor a due process proceeding was pending. Plaintiffs further argued that only formal initiation of due process hearing procedures triggered the "stay put" requirement, and since there was no formal initiation the provision was inapplicable. However, the court agreed with the defendants and found that the "stay put" requirement was applicable during the

89. 34 C.F.R. § 300.302 (1985).

90. 20 U.S.C. § 1415 (e)(3) (1978). The "stay put" requirement directs that, "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ." *Id.*

91. 34 C.F.R. § 300.403 (1985) provides: "If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility." *Id.*

pendency of any proceeding pursuant to the Act, not only the due process hearing provisions.[92]

Section 1415(b)(1) of the Act also enumerates parental pre-hearing rights such as records examination and participation in placement decisions.[93] When John was placed at PCS by his parents, proceedings detailed in section 1415 were pending because he had an existing IEP and a public school placement. The court rejected plaintiffs' formal initiation argument by stating that if such a rule was adopted, the statute's objective, which is to maintain the status quo during placement disputes, would be unfairly compromised. Thus, despite the fact that neither a formal complaint nor a due process hearing had begun, the court found that the "stay put" requirement in the Act was in effect when John was unilaterally placed at PCS.

The court noted however, that the "stay put" requirement need not be construed as an absolute bar to all retroactive tuition payments. It held that justice may compel the sanction of self-help in certain factual situations where all other avenues have been exhausted. The court listed factors such as the efficacy of the existing IEP and the reasonableness of the parties' actions as considerations that need to be taken in to account.

In assessing whether the sanction of self-help was compelled in this case, the court stated that John's placement in public school had become entirely and obviously inappropriate as evidenced by his truancy patterns and troublemaking activities. Further, the school district was fully aware of John's severe behavioral disorders for more than two full years and it did not respond to his clear need for a placement change. During this period, the school district failed to reassess John's placement and failed to devise an appropriate IEP for him. This failure to reassess John's placement clearly violated the Act, which requires annual review of IEPs.[94] The court felt that under these

92. 20 U.S.C. § 1415 (b)(3),(c),(d),(e) (1978). The court noted that the "stay put" requirement according to statute is applicable, during the pendency of any proceedings conducted pursuant to this section. The court also noted that this section enumerates not only due process hearing provisions but also pre-hearing rights of parents such as, right to examination of records, notice of placement change and participation in their child's placement decisions.

93. *Id.* § 1415 (b)(1).

94. 34 C.F.R. § 300.343 (1985).

exceptional circumstances, justice compelled the sanction of self-help considering the inefficacy of the existing IEP and the unreasonableness of defendant's inaction. The court asserted that defendant's bad faith, as evidenced by its inaction, coupled with plainly inappropriate placement, justified unilateral placement by John K's parents.

The dissent argued that because the school district conducted numerous consultations with John's parents, it did not act in bad faith. The dissent did not disagree with the majority's inception of equitable considerations.

The court awarded the parents attorney's fees under California law[95] which authorizes such fees when a public entity has conducted itself in an arbitrary or capricious manner. The court held that the school district's failure to reassess John's IEP and its general inaction in the face of an entirely inappropriate placement, constituted arbitrary and capricious action because its conduct was unsupported by a fair or substantial reason.

In re John K. carves out a somewhat subjective exception to the "stay put" requirement of the Education of the Handicapped Act. Although reimbursement to John's parents was clearly warranted in light of the exigencies of this particular case, due process hearings were available to John's parents to challenge his placement, yet these were not used.

Kathy A. Alfieri

B. Sexual Harassment

1. *A four year delay in filing sexual harassment charges against a state university professor was held unreasonable and prejudicial.*

Brown v. State Personnel Board, 166 Cal. App. 3d 1151, 213 Cal. Rptr. 53 (3rd Dist. 1985). In *Brown v. State Personnel Board*, the court of appeal reversed the State Personnel Board's (Board) decision to dismiss appellant Brown for sexually harassing female students. The court of appeal ordered him reinstated as a tenured professor at California State University at Sacra-

95. *See supra* note 88 for relevant language.

mento (CSUS).

In 1981 the Board charged Brown with unprofessional conduct and with failure to perform the duties of his office.[96] Charges included five separate instances of alleged misconduct which the Board termed "a series and pattern of sexual harassment of female students."[97]

At the outset of the hearing the Board determined that two charges of immoral conduct were baseless. Two of the remaining three charges involved incidents which allegedly occurred in 1975. Brown moved to dismiss these two charges on the basis of either the statute of limitations or the equitable doctrine of laches. Brown argued that California Government Code section 19635[98] which established a three year statute of limitations on harassment charges against a state employee precluded any complaint.[99]

The *Brown* court rejected the argument on the basis that the statute of limitations in the government code did not apply to violations of the education code. But the court determined that section 19635, while not directly applicable in Brown's situation, nevertheless indicated "a legislative policy that a delay of three years is inherently unreasonable in the prosecution of a disciplinary action."

The court combined that conclusion with Brown's alternate argument that the doctrine of laches controlled.[100] The court acknowledged that the doctrine of laches had been applied to

---

96. CAL. EDUC. CODE § 89535(b), (f) (West 1978 & Supp. 1986) states that "[a]ny permanent or probationary employee may be dismissed . . . for the following causes: . . . [u]nprofessional conduct . . . [or] . . . [f]ailure or refusal to perform the normal and reasonable duties of the position." *Id.*

97. The alleged incidents were similar. Brown would allegedly comment on the student's attractiveness, indicate an interest in having sex with her, and then attempt to embrace and/or kiss the student. The usual locale of these alleged incidents was Brown's office on campus.

98. CAL. GOV'T CODE § 19635 (West 1980) states that "[n]o punitive action shall be valid against any state employee for any cause for discipline based on any civil service law of this State, unless notice of such punitive action is served within three years after the cause for discipline . . . first arose . . . ." *Id.*

99. *Id.*

100. 7 WITKIN, SUMMARY OF CALIFORNIA LAW 5239-40 (8th ed. 1974). Laches is the equitable equivalent to the statute of limitations, insofar as it is bars equitable relief in civil actions. *Id.*

quasi-adjudicative proceedings where defendant moved to dismiss charges on the grounds that the action had not been diligently pursued.[101] Brown had moved to dismiss the 1975 charges at the board hearing, arguing that a lapse of four years from the time the events allegedly occurred to the time charges were filed was itself proof that CSUS and the Board had failed to "diligently proceed." The Board rejected the motion and the court reversed.

The court relied upon uncontested evidence that CSUS had knowledge of the 1975 incidents before Brown was granted tenure in 1976. The female students involved in these alleged incidents were apparently reluctant to formally complain. Their inaction, combined with CSUS policies that required a written complaint prior to the commencement of any disciplinary procedure, effectively halted any action against Brown. The court noted that the reticence of the students "may be of interest in the exercise of deciding to prosecute or not prosecute," but that a charge of sexual harassment did not concern the rights of the student but rather the duty of CSUS to deter misconduct with punishment.

The court posited that any unreasonable delay in the disciplinary process caused by deference to an alleged victim's reluctance to testify effectively and unfairly lets the employee "twist slowly in the wind." Although CSUS had a "practice" not to act without a written complaint, the *Brown* court said, "[A] self-imposed constraint is no more justification because it is delineated a practice than it if is discretion."

In addition to showing unreasonable delay, a defendant invoking the doctrine of laches must show prejudice to his case directly attributable to the delay.[102] The appellate court found, contrary to the Board and trial court, that Brown was

101. Steen v. City of Los Angeles, 31 Cal. 2d 542, 190 P.2d 937 (1948). A municipal employee discharged for cause was reinstated by the California Supreme Court. The court reasoned that the delay of an administrative hearing beyond the time limit set by city charter was prejudicial to Steen as a matter of law. *Id.*

102. Conti v. Board of Commissioners, 1 Cal. 3d. 351, 461 P.2d 617, 82 Cal. Rptr. 337 (1969). Conti had been criminally charged with bookmaking. His employer discharged him when it learned of the charges. The court held that the extreme delay (more than three years between discharge and the case being heard by the appellate court) in resolving the validity of the discharge prejudiced Conti's ability to defend himself. *Id.*

prejudiced by the unreasonable delay because he had removed himself from alternative tenure-track employment opportunities from 1975 to 1981. The court reasoned that Brown was prejudiced by his reliance on the continuation of his tenured position.

The *Brown* court determined that the doctrine of laches defeated all but one of the charges. The remaining charge, stemming from a 1979 incident, could not by itself sustain the CSUS complaint alleging "a series and a pattern of sexual harrassment." The court stated that Brown did not need to defend against each individual count in the complaint, but only needed to refute a sufficient number to invalidate the "series and pattern" charge against him.

The decision of the *Brown* court illustrates the extent an appellate court can arbitrarily alter the weight of evidence presented at trial in order to negate the lower court decision. The court placed great reliance on the similarity of purpose between the laches doctrine and the statute of limitations to thwart an injustice worked by a dimming of memories. But evidence presented both at the Board hearing and at trial indicated the witnesses' memories were not dimmed by the passage of time. The court avoided discussing the apparent contradiction.

The court concluded that Brown was prejudiced by his foregoing alternate employment opportunities. However, if CSUS had been prompt in handling the matter, Brown would have had those four years to seek employment—with the stigma of discharge for sexual harassment. The latter seems more prejudicial.

The reticence of the court to sustain a charge of sexual harassment should be sufficient notice to the legislature to amend the laches/statute of limitations parameters. A "reasonable delay under the circumstances" approach may provide a more equitable solution than an absolute maximum period applicable in all instances.

T.A. Graudin

IV. CIVIL RIGHTS LAW

A. EQUAL PROTECTION

1. *Black women are a cognizable group for the purpose of showing discriminatory use of peremptory challenges in jury selection.*

People v. Motton, 39 Cal. 3d 596, 704 P.2d 176, 217 Cal. Rptr. 416 (1985). In *People v. Motton*, the California Supreme Court reversed the trial court's ruling that defense counsel did not meet each of the requirements enunciated in *People v. Wheeler*[103] for a prima facie showing of discriminatory exclusion. The trial court also failed to order the prosecutor to justify his challenges. The supreme court further held that black women are a cognizable group and that the prosecutor used a disproportionate number of challenges to exclude black women from the jury.

During jury selection for defendant's second degree murder trial, defense counsel objected strenuously that the prosecutor was exercising his peremptory challenges to exclude black women from the jury, and subsequently objected that the prosecutor was excluding blacks generally. The voir dire judge rejected counsel's argument and denied his *Wheeler* objection. Defendant renewed his objection at trial but the trial judge overruled it on the ground that voir dire judge had previously denied it.

Defendant contended on appeal that the trial court had committed reversible error per se in ruling that defendant had not presented a prima facie showing of discriminatory exclusion. The California Supreme Court found that defendant's contention placed in issue the three elements of a prima facie case of group bias: adequacy of the record, exclusion of a cognizable group, and the strong likelihood that persons were challenged

103. 22 Cal. 3d 258, 503 P. 2d 748, 148 Cal. Rptr. 890 (1978). The *Wheeler* court recognized the inherent danger of peremptory challenges being used to violate defendant's right to a representative jury. The *Wheeler* court stated that in order to challenge the use of peremptories to remove jurors on the sole ground of group bias, objecting counsel must set forth a prima facie showing of discrimination. Opposing counsel must then justify her challenges. *Id.*

because of their membership in the group.[104]

The court held the record in this case to be sufficient to establish a prima facie showing of discriminatory exclusion. The record stated that by the time jury selection was completed, seven out of thirteen of the prosecutor's challenges had been directed against blacks, five of them were black women. This left no blacks on the jury as finally selected.

The court stated that several different factors and considerations came into play when assessing whether or not a group is "cognizable." There must be factors which define and limit the group, such as race and/or gender. There must also be a common denominator in the group which promotes a basic similarity in attitudes, ideas or experiences. The court stated that black women share a common perspective arising from their life experiences which is a direct result of the concurrence of racial and sexual discrimination. Therefore, the court held that black women are members of a cognizable group within *Wheeler* requirements.[105]

The *Wheeler* court suggested several methods of supporting a prima facie showing of group bias.[106] However, the *Motton* court applied only one of the *Wheeler* methods in analyzing whether the jurors were challenges because of their membership in a cognizable group. The court adopted the strict numbers approach to this question, stating that the moving party should show that either her opponent has struck most or all of the members of a cognizable group, or has used a disproportionate number of challenges against the group. In *Motton*, the prosecutor directed seven of thirteen challenges to remove black jurors. That high number persuaded the court that the prosecutor had used a disproportionate number of challenges to exclude all

104. *Id.* at 258-80, 583 P.2d at 748-64, 148 Cal. Rptr. at 890-905.

105. *Id.* at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

106. *Id. Wheeler* suggested three methods of analyzing whether those challenged were excluded because of their membership in a cognizable group: (1) moving party to show that the only thing the challenged jurors have in common is group membership; (2) moving party to show that the challenging party failed to engage jurors in more than a perfunctory voir dire—which would show challenging party's previous plan to exclude those jurors; (3) moving party to show that defendant is a member of the challenged group and the victim is a member of the group to which a majority of the chosen jurors belong. *Id.*

blacks from the jury.

Although this decision purports to be an extension of the *Wheeler* rationale, on closer inspection it is simply an outline of a model application of the *Wheeler* elements for a prima facie showing of group bias. The court's painstakingly careful analysis and its scolding tone throughout the opinion when addressing the voir dire judge's mistakes were evidence of this intent. *Motton* may be seen as a blueprint for voir dire which clarifies the proper application of *Wheeler*.

Kathy A. Alfieri

2. *Penal Code section 273.5 prohibiting corporal abuse of spouses or cohabiting partners does not violate the equal protection clause of the California Constitution.*

People v. Gutierrez, 171 Cal. App. 3d 944, 217 Cal. Rptr. 616 (2nd Dist. 1985). In *People v. Gutierrez*, the California Court of Appeal held that Penal Code section 273.5,[107] which imposes a criminal penalty for the willful and unlawful infliction of corporal injury by one spouse upon the other, resulting in a traumatic condition, does not violate the equal protection clause of the California Constitution.[108]

Defendant was convicted by a jury under section 273.5 for severely beating his wife. His sentence was enhanced because of prior convictions.[109]

Defendant contended on appeal that section 273.5 denied him equal protection of the law because it discriminated unfairly against married and cohabitating partners. Defendant based his assertion on the fact that the statute applies to only married and meretricious cohabitating relationships as its class of potential offenders, excluding divorcees and separated meretricious part-

107. CAL. PENAL CODE § 273.5 (West Supp. 1986). The court further held that cohabitation is not an element of the offense, the jury instructions defining traumatic condition is valid, and the trial court properly sustained defendant's prior convictions.

108. CAL. CONST. art. 1, § 7. "A person may not be . . . denied equal protection of the laws." *Id.*

109. CAL. PENAL CODE § 667 (West 1970 & Supp. 1986). "Any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive . . . a [sentence] enhancement . . . ." *Id.*

ners. Defendant concluded that since persons in the excluded categories who engage in spousal violence cannot be found guilty of a section 273.5 violation, the statute violated the equal protection clause.[110]

The court agreed with defendant's assessment of the statute. However, the court held that classification by intimacy of relationship is a valid exercise of legislative judgment based on the inherent special circumstances of domestic violence. The court noted that the overwhelming amount of spousal beating occurs in the home, usually late at night, with only the family unit present, after the consumption of alcohol, and always out of police presence. The court reasoned that since married and cohabitating partners are both members of the high risk category for domestic violence, the legislature's classification was constitutionally valid.

Kathy A. Alfieri

V. TORTS

A. Products Liability

1. *Plaintiff, barred by the statute of limitations on a defective product action, may proceed with suit by alleging that the manufacturer's fraud was a percipient cause of the injury.*

Snow v. A.H. Robins Co., 165 Cal. App. 3d 120, 211 Cal. Rptr. 271 (3rd Dist. 1985). In *Snow v. A.H. Robins Co.*, the court of appeal vacated a summary judgment by the trial court which held that all of the plaintiff's (Snow) causes of action against defendant A.H. Robins Co. (Robins) were barred by the statute of limitations. The court of appeal determined that Robins' alleged misrepresentation to Snow regarding the Dalkon Shield's inadequacy as a contraceptive device constituted a triable allegation of fraud, thereby precluding a summary judgment for defendant.

In 1973 Snow selected the Dalkon Shield as her birth control method. She had been informed by her physician that the shield was as effective as birth control pills in preventing preg-

110. Cal. Const. art. 1, § 7.

nancy. Nevertheless, seventeen months later she underwent a therapeutic abortion.

In 1981 Snow watched a "60 Minutes"[111] program that delineated the shortcomings of the Dalkon Shield, particularly the manufacturer's concealment of adverse side-effects and the device's higher-than-advertised pregnancy rates. Snow instituted her suit just under one year after viewing the program.

The general rule on personal injury actions provides for a one year statute of limitation[112] which begins to run at the time of injury, even if the victim is unaware of the injury or the tortfeasor's identity.[113] The trial court concluded that Snow's action against Robins was time-barred.

The appellate court noted that *Warrington v. Charles Pfizer Co.*[114] began a trend toward a rule providing that the statute of limitations accrues when the plaintiff becomes aware of facts relevant to establishing the cause of action and an identifiable tortfeasor.[115] In applying the rule, the trial court first inquires into the plaintiff's diligence in discovering relevant facts and then determines whether to suspend (or toll) the statutory time limits.[116] The *Snow* court expanded *Warrington* by removing the plaintiff's burden of diligence when there is sufficient evidence to show that the defendant concealed facts which the plaintiff needed to state a claim.[117]

---

111. A CBS television program that features investigative reports.

112. CAL. CIV. PROC. CODE § 340(3) (West 1982 & Supp. 1986).

113. 3 WITKIN, CALIFORNIA PROCEDURE, ACTIONS §§ 351-352, at 380-81 (3d ed. 1985). "The cause of action ordinarily *accrues* when . . . the wrongful act is done and *the obligation or liability arises* . . . ." *Id.* § 351, at 380 (emphasis in original). "And the general rule is that the statute will begin to run though the plaintiff is ignorant of his cause of action or the identity of the wrongdoer." *Id.* § 352, at 381.

114. Warrington v. Charles Pfizer Co., 274 Cal. App. 2d 564, 80 Cal. Rptr. 130 (1969).

115. *Id.* at 569-70, 80 Cal. Rptr. at 135. The court permitted plaintiff a rule of discovery that was limited by a one year statute of limitations accruing from the date of discovery or from the date when plaintiff should have discovered the tortious injury by exercise of reasonable diligence. *Id.*

116. *Id.*

117. CAL. CIV. PROC. CODE § 338(4) (West 1982 & Supp. 1986) provides a three year statute of limitations in "[a]n action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggreived party, of the facts constituting fraud or mistake." *Id.*

Robins contended that Snow's injuries (an unwanted pregnancy and an abortion) were readily apparent and neither insidious nor permanent in nature, and therefore did not implicate the discovery-of-facts rule. Consequently, Robins argued that Snow had one year from the date of the abortion to file her action alleging Robins' negligence. The court of appeal agreed. However, the court determined that Snow's alternate claim alleging that her injuries were proximately caused by Robins' fraudulent concealment of both the shield's pregnancy rates and its safety constituted a separate cause of action seeking redress for a separate wrong.

The court applied both "but for" and "substantial factor" tests for causation.[118] The court decided that under either analysis Snow's injuries would not have occurred without the use of the Dalkon Shield. The court further held that "but for" the alleged misrepresentations by Robins, the device would not have been used by Snow. The court concluded that the actionable wrong was the fraudulent concealment and misrepresentation by Robins, not Snow's unwanted pregnancy or abortion. Moreover, the court reasoned that the inducement to use the Shield was a consequence of the wrong rather than the wrong itself.

Consequently, the court held that Snow's cause of action accrued when she learned of the misrepresented pregnancy rates from "60 Minutes." Because the alleged fraudulent concealment by Robins prevented Snow from suspecting the incipient cause of her injuries, the court held she was exempt from *Warrington's* requirement to diligently discover a cause of action. The court concluded that Snow was entitled to the three year statute of limitations for fraud, commencing from the date of the "60 Minutes" program, and that she filed well within that time

---

118. 4 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 622, at 2903 (8th ed. 1974) states in pertinent part:

> [I]t is necessary to show that the defendant's negligence contributed in some way to the plaintiff's injury, so that "but for" the defendant's negligence the injury would not have been sustained . . . . The "but for" rule has traditionally been applied to determine cause in fact . . . . [T]he term *substantial factor [is used]* . . . to denote the fact that defendant's conduct has such effect in producing the harm as to lead reasonable men to regard it as a cause . . . in the popular sense, in which there . . . [is] . . . the idea of *responsibility.*

Id. (emphasis added).

frame.

The *Snow* court established a separate legal theory by which a plaintiff may recover damages in a personal injury action involving a drug or intracorporeal device where the plaintiff can allege that defendant's fraud caused the physical injury. The plaintiff can plead fraud as the wrong and the actual injury as a result of the wrong, and thereby gain considerable latitude in stating a cause of action which would otherwise be time-barred. The applicable statute of limitations increases the filing period from one year to three years, from the time of discovery of the fraud.

The court in *Snow* has taken a significant step toward providing the individual plaintiff equal footing in court with a large pharmaceutical corporation allegedly responsible for causing thousands of women to suffer.

T.A. Graudin

2. *The statute of limitations in DES cases does not begin to run until plaintiff knows or should know all the elements of the cause of action.*

Kensinger v. Abbott Laboratories, 171 Cal. App. 3d 376, 217 Cal. Rptr. 313 (1st Dist. 1985). In *Kensinger v. Abbott Laboratories*, the California Court of Appeal reversed the trial court's decision of summary judgment. Defendant Abbott Laboratories had moved for summary judgment on the theory that plaintiff Kensinger's action was barred by the statute of limitations. The court of appeal observed that Abbott Laboratories had introduced no evidence showing that as a matter of law Kensinger should have been aware of a basis for suit more than one year prior to filing the present cause of action.

In deciding whether to grant the defendant's motion for summary judgment, the court limited its task to finding whether a triable issue of fact remained to be adjudicated. The court relied on the usual rule to resolve any doubt as to the propriety of summary judgment against the moving party.[119] The court noted

119. Sevilla v. Stearns-Roger, Inc., 101 Cal. App. 3d 608, 161 Cal. Rptr. 700 (1980) (in denying Stearns-Roger's motion for summary judgment, the court held that the stat-

that this rule was particularly relevant because of Kensinger's "profound injury and her blamelessness in lack of knowledge of its causation."

Kensinger was born in January, 1959. Her mother ingested DES[120] while pregnant which resulted in Kensinger's exposure *in utero*. The manufacturers removed DES from the market in 1971 because they learned that prenatal exposure to this drug was associated with adenocarcinoma.[121] When Kensinger was fifteen years old she was diagnosed as having vaginal and cervical clear cell adenocarcinoma and subsequently underwent surgery and radiation treatment.

In 1980 Kensinger filed a complaint against numerous pharmaceutical companies. She did so after discovering through a newspaper article that she had a right to sue without identifying the particular manufacturer of the specific DES ingested by her mother. The key causes of action were negligence, strict products liability, breach of implied warranty, breadth of express warranty and fraud. The complaint alleged that the defendants manufactured, distributed and sold DES, thereby causing Kensinger's injuries.

The court observed that the usual statute of limitation in personal injury actions is one year.[122] The parties agreed that the "rule of discovery"[123] controlled and the only dispute focused upon the accrual date under this rule. Relying on *G.D. Searle & Co. v. Superior Court*,[124] the court of appeal noted that where the victim was clearly unaware of the cause of injury and

---

ute of limitations in products liability actions begins to run from the date of injury rather than from the date the product was purchased).

120. PHYSICIAN'S DESK REFERENCE 1142 (39th ed. 1985). "Diethylstilbestrol [DES] is a . . . synthetic estrogenic substance capable of producing all the pharmacologic and therapeutic responses attributed to natural estrogens." *Id.* DES was prescribed for the prevention of miscarriages or spontaneous abortions.

121. THE AMERICAN HERITAGE DICTIONARY 15 (W. Morris ed. 1976). An adenocarcinoma is "[a] malignant tumor originating in glandular tissue." *Id.*

122. CAL. CIV. PROC. CODE § 340(3) (West 1982 & Supp. 1986) provides that "[w]ithin one year . . . an action for . . . injury to . . . one caused by the wrongful act or neglect of another . . . ." *Id.*

123. Leaf v. City of San Mateo, 104 Cal. App. 3d, 398, 407, 163 Cal. Rptr. 711, 716 (1980) (the period of limitation begins to accrue only when the plaintiff actually discovers or by exercising reasonable diligence should have discovered both injury and its cause).

124. 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

where the pathology occurred with imperceptable trauma, the limitations period was delayed.

Kensinger contended that the period of limitation did not begin to accrue until 1980 when she was both fully cognizant of the defendant's tortious conduct[125] and had discovered her right to sue under *Sindell v. Abbott Laboratories*.[126] Abbott Laboratories argued that Kensinger's 1980 suit was time-barred because she had known the cause of her injuries since 1977.[127]

In applying the rule of discovery the court struggled with the question of whether Kensinger's discovery of the cause of action was reasonably delayed. The court recognized that the statute of limitations commences with the appearance of a recognizable event and not with the belated discovery of a legal theory. However, the distinction between legal theories and operative facts is not always clear, particularly with drug product liability cases. The court concluded that even if a plaintiff is aware of an injury and its cause, he or she may not know a particular defendant committed any wrong and in such an instance litigation may be premature.

Call v. Kezirian[128] controlled for the *Kensinger* court. In *Call*, the parents knew that their child was born with Down's syndrome, but did not know until much later that the condition was due to the physician negligently forgetting to tell them about amniocentesis.[129] The *Call* court decided that whether the plaintiffs should have known of the defendant's negligence was a question of fact and not of law. The defendant failed to conclusively establish that the parents were put on notice of defendant's negligence upon the birth of their child. The accrual period was therefore extended.

---

125. Plaintiff asserted defendant "fail[ed] to adequately test the effects of DES upon the offspring of those subjects to whom the drug was administered, and fail[ed] to warn of the known risks of DES."

126. 26 Cal. 3d 588, 607 P. 2d 924, 163 Cal. Rptr. 132 (1980) (defendant drug manufacturer has the burden of negating and apportioning damages in DES cases through market share liability).

127. In 1977, an attorney advised Kensinger's father that Kensinger could not bring a successful suit for her injuries.

128. 135 Cal. App. 3d 189, 195 Cal. Rptr. 103 (1982).

129. STEDMAN'S MEDICAL DICTIONARY 53 (5th ed. 1982). "Amniocentesis is the transabdominal aspiration of fluid from the amniotic sac." *Id.* It is a diagnostic test used to discover fetal abnormalities. *Id.*

Applying *Call*, the *Kensinger* court held that "[k]nowledge of the occurrence and origin of harm cannot necessarily be equated with knowledge of the factual basis for a legal remedy." The court decided it would be unfair to bar a suit when the plaintiff did not know her legal rights had been violated. Whether Kensinger's ignorance was reasonable under the circumstances was a question of fact.

Persuaded by the reasoning of *Anthony v. Abbott Laboratories*,[130] the court of appeal said that the limitation period begins to accrue only when a plaintiff knows or should have known of a drug manufacturer's wrongdoing. The twelve plaintiff women in *Anthony* knew their physical injuries were the result of DES exposure but did not know of the defendant's wrongful conduct until later.

Abbott Laboratories in *Kensinger* argued that if the accrual period was delayed until the plaintiff knew of the drug manufacturer's wrongdoing, then the statute of limitation would be negated. The court responded that it had adopted an objective test because the plaintiff still must use reasonable diligence to discover that the defendant committed an actionable wrong.

The court of appeal was sensitive to the difficulties a plaintiff has in establishing exact time periods for drug-related injuries. This decision lends further credence to *Sindell* and demonstrates California's commitment to hold drug manufacturers

---

130. 490 A.2d 43, 46 (R.I. 1985). court reasoned that

> in a drug product-liability action where the manifestation of an injury, the cause of that injury, and the person's knowledge of the wrongdoing by the manufacturer occur at different points in time, the running of the statute of limitations would begin when the person discovers, or with reasonable diligence should have discovered, the wrongful conduct of the manufacturer."

Id.

liable for their defective products and negligence.

Linda C. Kramer

Contributing writers:

*Linda C. Kramer**
*T.A. Graudin***
*Donna Cobe Beekman****
*Kathy A. Alfieri*****

---

* Golden Gate University School of Law, Class of 1987.
** Golden Gate University School of Law, Class of 1987.
*** Golden Gate University School of Law, Class of 1987.
**** Golden Gate University School of Law, Class of 1987.

SURVEY OF CALIFORNIA LAW
TABLE OF CASES NOTED AND SUMMARIZED

I. CALIFORNIA SUPREME COURT

II. CALIFORNIA COURT OF APPEAL