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Survey: Women and California Law

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SURVEY: WOMEN AND CALIFORNIA LAW

This survey of California case law and legislation is a regular feature of the *Women's Law Forum*. The survey summarizes recent California Supreme Court decisions, courts of appeal decisions, and new legislation which are of special importance to women. The focus of the survey is on presenting issues most pertinent to women, rather than on analyzing all issues raised in each case or bill.

The survey period for cases in this issue is March 1, 1981 through February 28, 1982. Summaries of significant legislation enacted between October 1, 1980 and December 31, 1981 are also included.

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I. CRIMINAL LAW

A. Rape and other Sex Offenses

1. *Application of Statutory Rape Laws to Males*

Michael M. v. Superior Court, 101 S. Ct. 1200 (1981), *aff'g* 25 Cal. 3d 608 (1979).

The United States Supreme Court upheld the constitutionality of California's statutory rape statute, Penal Code section 261.5, which prohibits males from engaging in sexual intercourse with females under the age of eighteen who are not their wives. The Court reaffirmed previous holdings that gender-based classifications need only be substantially related to an important government interest to be valid. Using this test, the Court found that California has an interest in preventing the drastic medical and social costs accompanying teenage pregnancy. The statute was found to provide a rational method to equalize the risks and respective costs of pregnancy.

The defendant, charged with violating section 261.5, sought to set aside the information on the ground that the statute constituted unconstitutional gender discrimination. Both the trial court and the court of appeal rejected the argument. The California Supreme Court affirmed, holding this section did not violate equal protection requirements.

The United State Supreme Court agreed with the California courts, but not with their analysis. While California recognizes gender classification as inherently suspect, the United States Supreme Court views sex classification cases as meriting only 'sharper focus.' This approach, first stated in *Craig v. Boren,* 429 U.S. 190 (1976), requires that gender-based legislation be substantially related to an important government interest to be constitutionally valid.

The Court stated that a deterrent for males was necessary to equalize the difference in cost resulting from underage sexual activity between a male, who causes pregnancy, and a teenage female, who bears the risks and responsibilities of pregnancy. Thus, the section operated to put both sexes at parity and achieved the legislative objective of preventing pregnancies that would drastically affect underage females.

Defendant also contended that a gender-neutral statute would deter both sexes and eliminate any sex-based discrimination.

The Court rejected this legislative rewrite, noting that under *Kahn v. Shevin*, 416 U.S. 351 (1974), a legislature is not required to delineate perfectly between the sexes. The court also found a gender-neutral statute would defeat the state's objective since females would be less likely to report offenses if they were to be punished to the same extent as males.

Since the objective of section 261.5 is to prevent pregnancy, the male also argued the statute was overbroad because it prohibited sexual relations with females too young to become pregnant. This argument was rejected as ridiculous because it would inconsistently allow sexual intercourse with young girls, only to punish it when they grew older.

A final argument theorized that the statute wrongly presumed males to be the culpable party. However, the Court noted that the state objective was of overriding importance. The legislature merely sought to achieve its objective through the most successful means.

Justice Stewart, concurring, stressed that classifications according to gender are permissible. He found the distinction obvious: Women, not men, become pregnant. Therefore, legislation attempting to avoid the horrible results of teenage pregnancy by classifying victims and offenders according to sex, is proper and constitutionally valid.

Justice Blackmun, concurring, noted this case presents an acceptable means of prohibiting a minor's sexual activity because the crime occurs before a pregnancy has occurred. While Justice Blackmun would reject a statute restricting a woman's procreative choice, the California penal code does not intrude on such a right. The statute is viewed as a rational means of achieving the state objective of reducing the number of teenage pregnancies.

Justices Brennan, White and Marshall's dissenting opinion agreed that the test used in judging California's statute was

whether the classification is substantially related to an important state objective. However, according to the dissent, the state failed to show the link between the state objective and the legislative goal.

Under *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980), a state cannot meet the constitutional standard unless it proves that a gender-neutral statute would not operate as effectively as a gender-based one. The question, according to the dissent (and vital in proving a substantial relationship between a gender-based statute and its goal), is whether the statute deters females by punishing only males. California did not present evidence indicating that fewer statutory rapes occurred under this statute than would be true with a statute drafted to punish both male and female offenders.

In concluding, the dissent noted that while the Court's majority advanced the prevention of pregnancy as the state's objective, California legislative history told a different story. California's statutory rape laws were premised on the legislator's view that an underage female is legally incapable of consenting to sexual intercourse.

Justice Stevens' separate dissent pointed out the inconsistency in the statute, presuming to specially protect females while allowing them to freely consent to the very activity from which they are protected.

B. LEGISLATION

1. *Statutory Rape*

S.B. 322—Rains

Chapter 29

Statutes of 1981

Statutory Rape Removed From Child Abuse Definition. This legislation removes Penal Code section 261 from the sexual assualt definition of child abuse. Section 261 proscribes sexual intercourse with a female, other than the perpetrator's wife, if she is under eighteen.

2. *Sexual Assault*

S.B. 23—Watson
Chapter 726
Statutes of 1981
Evidence of Rape Victim's Sexual Activity. Under Evidence Code section 782, evidence of a victim's sexual conduct with the defendant is admissible in a rape action for the purpose of attacking the victim's credibility. This legislation extends admittance of such evidence to other sexual crimes under the Penal Code. Evidence Code section 1103, which also allows introduction of a victim's sexual activity under special circumstances, was similarly amended.

A.B. 208—Waters
Chapter 527
Statutes of 1981
Sexual Assualt Advisory Committee. Penal Code section 1386 sets up an advisory committee to aid district attorneys in the prosecution of sexual assault cases. This section amends the makeup of the advisory committee to include one member representing either a city police department, or sheriff's department.

II. FAMILY LAW

A. Community Property

1. *Effect of Dissolution Judgment on Quiet Title Action*

Badillo v. Badillo, 123 Cal. App. 3d 1009, 177 Cal. Rptr. 56 (4th Dist. 1981). The court of appeal held that a quiet title action was properly barred by a default dissolution judgment which divided community property. The court also held a dissolution judgment reversible where distribution of community property was unequal and there was a timely appeal.

The couple purchased a home, taking title as joint tenants. This property was listed as a community asset in the wife's dissolution petition. She obtained a default judgment awarding one-half the equity to each party. The husband's share was deferred until the house was sold, and the wife was awarded use and occupancy in the interim.

Ten years later the wife died intestate, leaving five children

as her heirs at law, and the residence as the bulk of her estate. The husband sued to quiet title, claiming the residence by right of survivorship under joint tenancy. The trial court denied the husband's motion, relying on the final dissolution judgment to estop the husband's action.

The court of appeal affirmed, rejecting the husband's argument that the final dissolution judgment violated Civil Code section 580 by awarding the wife more than was requested in her pleadings. Civil Code section 4800 allows the court to value the community assets and to make a division and distribution in an equitable manner, absent a written agreement or settlement between the parties. Although the distribution was unequal because the husband's share was deferred until the property was sold, his failure to file a timely appeal rendered the judgment final.

2. *Tracing Separate Property Funds*

In re Marriage of Cadematori, 119 Cal. App. 3d 970, 174 Cal. Rptr. 292 (1st Dist. 1981). The court of appeal held that tracing the source of funds used in acquiring property by itself will rebut a community property presumption where title is taken jointly as husband and wife, and that the *Lucas* presumption is not limited to single family dwellings.

The wife appealed a dissolution judgment's determination that a warehouse was the husband's separate property. The commercial warehouse was purchased with funds the husband raised from sale of his separate property during the marriage and with the proceeds of a bank loan. The loan was repaid with rental income from the property; any surplus was deposited in a joint bank account. The deed listed title in names of both the husband and the wife.

Under Civil Code section 5110, property acquired during marriage is presumed to be a community holding. The trial court overcame the presumption by tracing the funds used to purchase the warehouse to the sale of the husband's separate property. The trial court also found the husband intended no gift when title was taken as husband and wife.

The court of appeal reversed and remanded, citing the Cali-

fornia Supreme Court's decision of *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980) in which the community property presumption was distinguished from the situation where there was an express designation of title specifying the form of ownership.

Lucas determined that an express designation of ownership, *e.g.*, taking of title as joint tenants, as in the present case, is inconsistent with an intention to retain a separate property interest. A greater showing of intent, i.e., an express agreement or understanding, is necessary to overcome the strong community presumption. Here, there was no such agreement.

The court of appeal noted that *Lucas* should be applied to any form of conveyance taken in both names, was not limited to joint tenancy, and that the *Lucas* presumption was not limited to single family dwellings.

3. *Employment Benefits Received After Separation*

In re Marriage of Flockhart, 119 Cal. App. 3d 240, 173 Cal. Rptr. 818 (1st Dist. 1981). A husband's "weekly layoff benefits" payment was held by the court of appeal to be separate property where such payment constituted present, rather than deferred compensation, and where the couple had separated prior to receipt of the payment.

The wife appealed that portion of an interlocutory dissolution judgment declaring a weekly layoff benefit to be the husband's separate property. He had lost his job after the couple's separation. The benefit was granted pursuant to the Redwood Employee Protection Program (REEP), which contained provisions to maintain income for employees directly affected by the expansion of the Redwood National Park. The court of appeal affirmed.

In *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), the California Supreme Court ruled that property attributable to community earnings was to be divided equally upon dissolution. The court of appeal distinguished the *Brown* form of community property (deferred compensation based upon the contractual rights of marriage) from a

form of benefit payment resulting from present status. The *Flockhart* court relied on *In re Marriage of McDonald*, 52 Cal. App. 3d 509, 125 Cal. Rptr. 160 (2d Dist. 1975), which found that a worker's compensation award received after separation was a form of benefit based upon present status, therefore separate property. Here, the court determined that the husband's weekly benefits payments were based upon the husband's status as an affected employee under the provisions of the REEP.

4. *Gifts Used to Purchase and Improve Residence*

In re Marriage of Gonzales, 116 Cal. App. 3d 556, 172 Cal. Rptr. 179 (1st Dist. 1981). The court of appeal held that where title in a home is taken by husband and wife as joint tenants, the home is presumed community property unless a different intent is expressed in the instrument granting title, or unless an agreement or understanding of an intent to retain separate property status exists.

The husband and wife purchased a home, taking title as joint tenants. The wife's father contributed $20,000 toward purchase and improvement of the home.

The trial court found insufficient evidence to show the contribution represented gifts to both parties, and found that the joint tenancy was merely a product of financial practices at the time of the purchase. The trial court determined the family dwelling was to be distributed according to community and separate property interests involved.

The parties were treated as tenants in common, the husband receiving 20.7%, and the wife 79.3% of the home's value. The wife was awarded use of the property; sale of the home was ordered upon the eighteenth birthday of the couple's youngest child. In addition, the court reserved jurisdiction to modify the award.

The husband appealed distribution of the family dwelling. The court of appeal reversed the lower court's ruling on the party's respective interests and barred the wife's reimbursement for separate property funds contributed for improvements. The ruling was based on the wife's failure to show any intent to retain a separate property interest as required to rebut the pre-

sumption of Civil Code section 5110, that property held in joint tenancy is community property for dissolution purposes, under *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

5. *Community Presumption of Home Acquired During Marriage*

In re Marriage of Hayden, 124 Cal. App. 3d 72, 177 Cal. Rptr. 183 (4th Dist., 1981). The court of appeal held that absent an agreement to the contrary, a home purchased as community property, with title taken as husband and wife, must be divided equally upon dissolution without regard to the source of funds used for the down payment. A residence acquired during marriage is presumed community property absent an agreement or understanding to the contrary, and tracing the source of funds used to purchase the property is unnecessary and improper, according to the court. In addition, the same rebuttable presumption of community property arises where a separate savings account is changed to a joint account.

The husband and wife each acquired separate property as a result of their Illinois marital dissolution. They remarried four months after final judgment. The husband's title in his separate property was changed to reflect a joint tenancy. The wife sold her property and deposited the money in a separate savings account. When marital problems arose again, she moved to California and transferred her money to a separate account here. The husband soon followed, after selling his home in Illinois.

Upon his arrival in California, he deposited approximately $100,000 into the wife's separate account, which was later changed to a joint account. The couple bought a home using the husband's $100,000 from the joint account and $5,000 of the wife's funds. Title was taken in both names, as husband and wife and community property. Dissolution proceedings began three months later.

The trial court found the joint bank account was the wife's separate property, and the home was community property. There was no evidence of an agreement that either spouse would get less than a one-half interest in the home. However, the court

ordered reimbursement of the share each contributed towards the down payment. The husband received $100,000 and the wife, $5,000, based on a finding that the parties had not intended reciprocal gifts. The court of appeal reversed. The nature of the bank account was remanded for further consideration.

Citing *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980), the court of appeal noted that division of community property is to be equal, barring evidence of an agreement or understanding to the contrary. Since the trial court found no agreement, the court's reimbursement scheme was incorrect.

The same principle was applied to the bank account funds. A transfer from separate to joint ownership invoked the rebuttable presumption of a community holding. Since there was no showing in the record of any agreement that the funds were to remain the wife's separate property, the matter was remanded for further investigation.

6. *Award of Community Corporation*

In re Marriage of Lotz, 120 Cal. App. 3d 379, 174 Cal. Rptr. 618 (2d Dist. 1981). Where parties to a marital dissolution own a closely held corporation, determination of the corporation's market value cannot be based on a formula used in valuing a publicly held corporation, according to a decision of the court of appeal for the Second District. The court also held that evidence of a covenant not to compete, regarding a future corporate sale, could be used in valuing corporate goodwill and did not restrict the husband's post-marital conduct.

During their marriage, the parties amassed community property worth $1,200,000. Upon separation, community property consisted primarily of a closely held corporation and the couple's residence. The community's corporate stock was valued at $469,000, and their home was valued at $408,000.

The trial court awarded the residence to the wife and the corporate stock to the husband. A loan from the corporation to the husband was included in the community's valuation.

The trial court increased 1977 pre-tax earnings of $47,969

by $24,000, then multiplied that figure by seven to arrive at a valuation of corporate stock. The total figure of $469,000 constituted the community stock's market value. The multiplier used in the evaluation is commonly used in valuing publicly held corporations. Included in the total worth was corporate goodwill, a figure which included a covenant not to compete, and other corporate assets.

The husband appealed the interlocutory judgment, contending the court incorrectly valued the close corporation, based on *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (1st Dist. 1974), and that the covenant not to compete was improperly considered. He also argued the court abused its discretion in requiring that he purchase his wife's corporate stock against his wishes. The husband maintained the business could continue under joint control, since the nature of the corporation was commercial rather than professional.

The court of appeal reversed and remanded, upholding the trial court's valuation of corporate goodwill, but disapproving its formula for calculating market value. The vast differences between the nature of public and private corporations precluded effective use of the common multiplier.

Civil Code section 4800(b)(1) authorizes an award of any asset to one party to effect an equal division of community property. The court of appeal noted this section gave the trial court considerable discretion under *In re Marriage of Connolly*, 23 Cal. 3d 590, 591 P.2d 911, 153 Cal. Rptr. 432 (1977); and *In re Marriage of Emmett*, 109 Cal. App. 3d 753, 169 Cal. Rptr. 473 (2d Dist. 1980).

The court of appeal remanded the question of stock division, ordering the lower court to inquire into the possibility of the couple's joint corporate control. Economic as well as emotional factors were to be analyzed.

B. Child Custody and Control

1. *Modification of Out-of-State Custody Award*

In re Marriage of Leonard, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1st Dist. 1981). The court of appeal held personal ju-

risdiction over both parents is not required for a binding custody determination under the Uniform Child Custody Jurisdiction Act (UCCJA) (Civil Code sections 5150-5174). The court also held that as long as the non-resident parent has been notified and given an opportunity to be heard, California courts have jurisdiction to modify a foreign child custody decree under section 5163.1. Thus, California courts need not defer jurisdiction to the state where the custody decree originated.

The parties divorced in Georgia. By agreement, the wife obtained custody of their daughter, subject to reasonable visitation by the husband. He moved to California. The child visited him in California and stayed through the school year.

The father sought modification of the Georgia custody order in California. Prior to being personally served in Georgia, the wife kidnapped her daughter, returning to Georgia. The husband retaliated in kind and returned to California.

The wife appeared specially to quash service or to have the action dismissed for lack of jurisdiction. The trial court found that the wife was adequately notified and that the California court should assume jurisdiction pursuant to Civil Code section 5152.1(b) which allows California courts jurisdiction if in the child's best interests, if the child has a significant connection with the state, and if evidence important in determining present or future care is in the state.

The wife's motion for reconsideration was denied as were actions before the appellate and Supreme Court of California. The trial court modified the Georgia custody award by granting custody to the husband, with conditional visitation privileges to the wife. The court of appeal affirmed.

Both parties agreed that the jurisdictional requirements of Civil Code section 5152 were satisfied because the child had been in California for six months prior to commencement of the trial. However, the wife argued that personal jurisdiction was necessary to affect a binding custody modification, citing *May v. Anderson,* 345 U.S. 928 (1953). In *May* the husband filed for divorce in Wisconsin and had the wife personally served in Ohio. She failed to appear at trial. The Wisconsin court granted the

divorce and awarded custody to husband. The wife took the children to Ohio for a visit and refused to return them. The husband sought a writ of habeas corpus in Ohio for the children's return.

The Ohio court stated that the Wisconsin decree should be given full faith and credit and granted the husband's writ. The United States Supreme Court reversed, holding that since the Wisconsin decree had been decided without personal jurisdiction over the wife, full faith recognition was not required.

The court of appeal distinguished *May* by noting that while full faith and credit of the California decision is not required where the wife is not under personal jurisdiction of the court, *May* does not prohibit recognition as a means of comity. The UCCJA provides a network through which states mutually agree to assure that the resolution of a child custody dispute takes place in the state with the closest connection to the child.

2. *Constitutionality of Parental Rights Termination Statute*

In re Paula P., 123 Cal. App. 3d 734, 176 Cal. Rptr. 708 (2d Dist. 1981). The court of appeal held that Civil Code section 232, under which minors may be declared free of parental control upon a showing of cruelty or neglect, is not unconstitutional for vagueness. The terms "cruel" and "neglectful" have simple definitions clarified by the legislature, said the court.

Paula P., born a heroin addict because of her mother's addiction, was removed from her mother's custody one week after birth. The minor was declared a dependent child under Welfare and Institutions Code section 600(a) and 600(d) (currently sections 300(a) and 300(d)). She was initially placed with her paternal grandmother, later in foster care. At no time did her mother visit or provide support. The foster parents, seeking to adopt the child, filed a petition under Civil Code section 232 to declare her free of parental control. The foster parents alleged the mother had abandoned the child at birth, meriting termination of her parental rights.

The trial court awarded custody to the foster parents based

on its finding of cruelty and neglect, concluding that the foster parents were better able to promote the child's best interests. The natural mother appealed.

The court of appeal affirmed, rejecting the natural mother's argument that the terms "cruel" and "neglectful" in section 232 were vague and that the section was therefore unconstitutional. The decision in *In re Sherman M.*, 39 Cal. App. 3d 40, 113 Cal. Rptr. 847 (2d Dist. 1974) found the terms "habit" or "habitual" were not vague because they were simple words with easily accessibly definitions. The court of appeal applied the same reasoning to "cruel" and "neglectful", concluding that neither term was vague.

3. *Child's Right to Compel Parent's Visitation*

Louden v. Olpin, 118 Cal. App. 3d 565, 173 Cal. Rptr. 447 (2d Dist. 1981), *cert. denied*, 102 S. Ct. 601 (1982). The court of appeal held that a child cannot compel visits by her noncustodial parent through a court order.

A child, represented by her mother, brought an action alleging her father had a duty to visit her, but had failed to do so. The child's mother had never married the father; the child lived with her mother and received support from the father as result of a paternity action.

The trial court dismissed for failure to state a cause of action, and independently ordered the file on the action sealed. In affirming the lower court's action, the court of appeal noted that the Uniform Parentage Act (UPA), Civil Code section 7000, does not give a child the right to compel visitation.

The child sought to have the ruling in *Griffith v. Gibson*, 73 Cal. App. 3d 465, 142 Cal. Rptr. 176 (4th Dist. 1977), applied reciprocally to her. The court in *Griffith* had interpreted the UPA as extending visitation rights to a father of a child born out of wedlock, regardless of the current marital status of the parents. The *Louden* court declined such application, because *Griffith* extended the right to fathers, not children.

4. *Prohibiting Children From Living In Condominium Complex*

O'Connor v. Village Green Owners' Association,† 123 Cal. App. 3d 789, 177 Cal. Rptr. 159 (2d Dist. 1981), *hearing granted,* Nov. 27, 1981. A condominium covenant limiting residency to individuals over the age of eighteen was held valid and enforceable by the court of appeal. Such age discrimination is neither prohibited by the California or United States Constitutions and is not unreasonable nor arbitrary, according to the court.

A husband and wife bought the condominium in question and later had a child. When the condominium association notified them of its intent to enforce the covenant, the couple filed this action seeking invalidation of the restriction. The trial court dismissed the complaint without leave to amend.

The court of appeal upheld the covenant, finding no state action involved. Although *Shelley v. Kraemer,* 334 U.S. 1 (1948), held that judicial enforcement of a private covenant constituted state action, there was no specific prohibition in either the United States or California Constitutions against age discrimination, thus there was no constitutional violation.

The court noted that because age was excluded as a protected class in housing statutes, whereas it was included in employment legislation, the legislature must have intended that age was not a protected class in the housing area. Support for this inference was found in the court of appeal decision in *Ritchey v. Villa Nueva Condominium Association,* 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1st Dist. 1978), which involved a similar covenant. The court in *Ritchey* stated that a condominium association had the implied right and authority to regulate activities which would disturb the entire group. Here, the court found that children could provide a disturbance and that regulation of residency on the basis of age to protect the entire group of homeowners was not unreasonable nor arbitrary.

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† Since the California Supreme Court granted a hearing in this case, the court of appeal opinion is of no force or effect and is no longer an authoritative statement of any principle of law. Pince v. Marr, 47 Cal. 2d 159, 301 P.2d 837 (1956); Knouse v. Nimocks, 8 Cal. 2d 482, 66 P.2d 438 (1937). This case appears in this Survey solely to familiarize the reader with issues pending before the high court.

5. *Admissibility of Medical Records to Determine Extent of Visitation Rights*

Simek v. Simek, 117 Cal. App. 3d 169, 172 Cal. Rptr. 564 (1st Dist. 1981). The court of appeal held that disclosure of records, protected by the psychotherapist-patient privilege, may not be compelled to demonstrate a parent suffers from emotional problems which would preclude visitation rights.

Pursuant to a dissolution, the wife was granted custody of her two minor children. A visitation schedule for the husband was never agreed upon. The husband later sought extensive visitation privileges and the wife petitioned for termination of the husband's visitation rights until his emotional status was determined.

The wife subpoenaed her former husband's psychiatric records, alleging he had been treated two years earlier for a mental breakdown, and one year earlier for a suicide attempt.

The trial court denied the husband's motion to quash. The records were sealed and delivered to the court for inspection at the visitation hearing. The court of appeal reversed. Evidence Code section 1014 extends the physician-patient privilege to communications between a patient and psychotherapist.

The wife argued that by seeking extensive visitation rights the husband had tendered his mental condition as an issue, thereby triggering the exception set forth in Evidence Code sections 996 and 1016. However, the court of appeal found this exception can be invoked only where patients have initiated an action in which they voluntarily disclose the information, and cited *Koshman v. Superior Court*, 111 Cal. App. 3d 294, 168 Cal. Rptr. 588 (3d Dist. 1980). The court noted that the privilege is stronger in visitation cases because visitation rights are a matter of natural right to a non-custodial parent. *Feist v. Feist*, 236 Cal. App. 2d 433, 46 Cal. Rptr. 93 (4th Dist. 1965). The court found that a waiver of privilege based upon the husband's assertion of his natural right to visitation was anomalous.

C. Spousal and Child Support

1. *Automatic Reduction of Child Support*

Comstock v. Comstock, 116 Cal. App. 3d 481, 172 Cal. Rptr. 148 (5th Dist. 1981). The court of appeal found a court-ordered child support obligation could not be reduced proportionately by the number of children having reached majority or becoming emancipated.

The wife sought unpaid child support based on a dissolution judgment entered in South Dakota and registered in California. The South Dakota decree established monthly child support until the five children came of age. At the time of the hearing, all but one child was emancipated.

The trial court found for the wife but determined that support payments would be reduced proportionately for each child having reached the age of majority.

The court of appeal remanded for modification based on the wife's financial circumstances. The court relied on *Spivey v. Furtado*, 242 Cal. App. 2d 259, 51 Cal. Rptr. 362 (1st Dist. 1966), which held that child support awards should not be reduced proportionately merely because a child has reached majority.

The court of appeal determined the South Dakota decree was modifiable, both in terms of installments past due and payments becoming due, under *Rudd v. Gerker*, 67 S.D. 534, 295 N.W. 491 (1940). The court's authority to modify the South Dakota decree came from *Worthley v. Worthley*, 44 Cal. 2d 465, 283 P.2d 19 (1955), where it was held that a foreign dissolution decree could be the basis of a California judgment for unpaid support. Under *Worthley*, a foreign order could be modified in California courts to the extent it could be modified in the state of original decree.

2. *Constitutionality of Agreement for Entry of Child Support Judgment*

County of Los Angeles v. Superior Court, 123 Cal. App. 3d 988, 177 Cal. Rptr. 70 (2d Dist. 1981). The court of appeal held that *County of Ventura v. Castro*, 93 Cal. App. 3d 462, 156 Cal. Rptr. 66 (2d Dist. 1979), which found Welfare and Institutions

Code section 11476.1 to be unconstitutional, could not be applied retroactively. Section 11476.1 authorized a district attorney to enter into an agreement with a non-custodial parent for the entry of a child support judgment.

The district attorney of Los Angeles County entered agreements with several putative fathers whereby they agreed to pay child support. These agreements were entered as judgments pursuant to Welfare and Institutions Code section 11476.1. In *Castro*, the court of appeal held this section unconstitutional for not providing obligees with notice and an opportunity to be heard in the absence of an informed waiver of their constitutional right. *Castro* expressly declined to address the ruling's retroactivity.

When the putative fathers failed to make payments ordered by the judgments, the district attorney filed contempt charges. The fathers petitioned to vacate the child support judgments, citing *Castro*. Their motion was granted. The district attorney appealed.

The court of appeal ordered the trial court to reinstate the judgments against the fathers. The court held *Castro* did not apply retroactively, citing *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979). In *Salas*, the California Supreme Court allowed indigent defendants in a paternity suit the right to counsel. However, this right applied only to final judgments as of the date of *Salas*. The California Supreme Court stated that the establishment of obligations and familial ties resulting from final judgment on child support necessitated a denial of retroactivity of the *Salas* holding.

The court here also noted the important public interest in protecting finality of judgments and reliance interests of those affected by such judgments. Additionally, it noted an administrative nightmare would result were *Castro* given retroactive application.

3. *Modification of Marital Settlement Agreement*

Fukuzaki v. Superior Court, 120 Cal. App. 3d 454, 174 Cal. Rptr. 536 (3d Dist. 1981). The court of appeal held that Civil Code section 4811, covering modification of child or spousal support, allows the court to retain jurisdiction to modify the terms

of a marital settlement agreement unless the settlement agreement specifically disallows modification.

On separation, husband and wife entered into a settlement agreement providing for spousal support and waiving all other rights of the parties. The agreement appeared to be a final disposition of the parties' rights and obligations and was incorporated into the dissolution judgment. There was never any reference to modification of support.

The wife later sought to modify the support provision. The trial court's jurisdiction was based upon the terms of the settlement agreement. The husband's petition to nullify the modification was granted.

The court of appeal dismissed the husband's petition. Although the couple's agreement was silent as to modification, it did not waive the requirements of Civil Code section 4811(b) which allows modification by court order absent a written agreement to the contrary.

4. *Determination of Age of Majority for Support*

In re Marriage of Golden, 123 Cal. App. 3d 567, 176 Cal. Rptr. 807 (2d Dist. 1981). The court of appeal held that a child's age of majority for support purposes is twenty-one for orders issued prior to March 4, 1972. Civil Code section 25.1 outlines legislative intent concerning use of the term "age of majority." The section notes that after March 4, 1972, the age of majority decreased from twenty-one to eighteen.

An interlocutory decree of dissolution issued November 26, 1971 provided for support of the couple's three children "until the age of majority." The final decree was issued July 19, 1972. The wife petitioned to increase child support. At the time of her motion, the children were all between the ages of 18 and 21. The husband argued his support obligation ended when the youngest child turned eighteen since the final decree had been issued after the change in the age of majority.

The husband theorized that the interlocutory decree merged with the final decree and was therefore superceded. The trial court rejected this argument, determining the applicable age of

majority to be twenty-one. The court of appeal affirmed, holding that the interlocutory decree is a final adjudication on all issues decided unless vacated. Therefore, the date of the interlocutory decree controlled.

5. *Conflict Over Age of Majority For Child Support Purposes*

In re Marriage of Taylor, 122 Cal. App. 3d 209, 175 Cal. Rptr. 716 (2d Dist. 1981). Out-of-state support orders decreeing that accrued installments are not modifiable are entitled to full faith and credit in California courts under the exact terms of the foreign court's order, according to the court of appeal. The court also held that an action seeking enforcement of a support order under provisions of the Uniform Reciprocal Enforcement of Support Act (URESA) does not operate as a waiver of constitutional full faith and credit protections.

The Taylor marriage was dissolved in Missouri. The judgment ordered the husband to support the children until the age of majority. He moved to California, and the wife registered her Missouri judgment in California under provisions of Code of Civil Procedure section 1698.3, the URESA. When the wife moved for a computation of the support arrearage, the husband argued that California's age of majority (18) should be used for computation purposes, instead of Missouri's age of majority (21).

The trial court recognized the Missouri judgment and ordered the husband to continue support payments for two children between the ages of eighteen and twenty-one. The court of appeal affirmed.

The California Supreme Court decision in *Biewend v. Biewend*, 17 Cal. 2d 108, 109 P.2d 701 (1941), was noted by the court of appeal as similar to the case at bar. In *Biewend*, a wife sought enforcement of a Missouri alimony judgment in California. Under California law, alimony would have terminated upon the wife's remarriage. The *Biewend* court held that the Missouri judgment was enforceable under the United States Constitution's full faith and credit clause, provided the accrued installments were not subject to modification by the court of original jurisdiction.

The husband nevertheless sought to limit the wife's URESA remedy by narrowing the judgment's enforcement to the procedures outlined in Code of Civil Procedure section 1670, which defines the husband's duties as those under the state in which the husband was present when support was due. The husband argued his duties thus came under California law and that they extended only until his children reached their eighteenth birthday. The court of appeal found this argument unpersuasive, reasoning that section 1670 is an extension, not a restriction of support duties.

6. *Modification of Support Based Upon Current Circumstances*

In re Marriage of Thomas, 120 Cal. App. 3d 33, 173 Cal. Rptr. 844 (4th Dist. 1981). Where a couple stipulated to child support, without detailing their financial circumstances, the court of appeal allowed modification without showing a change in circumstances.

The wife was awarded custody of three minor children in an interlocutory dissolution judgment, and her husband was ordered to pay child support. Their financial status was not presented to the court.

The husband's request for modification of child support was granted. The wife appealed, arguing her husband failed to prove a change in circumstances justifying modification.

The court of appeal affirmed the modification. Under *Moore v. Moore,* 274 Cal. App. 2d 698, 79 Cal. Rptr. 293 (2d Dist. 1969), modification does not require a change in circumstances; it can be based on current financial circumstances. Absent evidence of financial circumstances at dissolution, evidence of current circumstances assessing child support payments was proper, according to the court.

The court noted that such modifications can be avoided by showing relevant facts on which the original order was based.

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7. *Automatic Wage Assignment Upon Default of Support Payments*

LeClaire v. LeClaire, 118 Cal. App. 3d 931, 173 Cal. Rptr. 740 (2d Dist. 1981). The court of appeal held that when child support payments are two months in arrears in a twenty-four month period, the trial court must allow a wage assignment under Civil Code section 4701(b).

The husband was $900 in arrears in child support which included nonpayment for at least two of the previous twenty-four months. The wife filed a motion for wage assignment. The husband responded with a declaration stating his inability to pay and his opposition to the assignment on the grounds that it might adversely affect his employment. The wife's motion for assignment was denied by the trial court without giving any reasons.

The court of appeal reversed and remanded based on its interpretation of Civil Code section 4701, which sets out statutory requirements for wage assignments. Section 4701 provides for assignments which "may" be ordered in subdivision (a), and in subdivision (b), authorizes mandatory assignments when certain conditions are met. Mandatory assignments are provided to insure timely payments to children and to provide for swift access to the courts with a minimum of procedure, under *In re Marriage of DeMore,* 93 Cal. App. 3d 785, 155 Cal. Rptr. 899 (1st Dist. 1979).

Civil Code section 4701(b) mandates wage assignment where child support was ordered by the court and where the parent so ordered is in arrears in payment in an amount equal to two months payment within a twenty-four month period preceding the submission of a petition for assignment.

8. *Enforcement of Spousal Support Judgment*

Liebow v. Superior Court, 120 Cal. App. 3d 573, 175 Cal. Rptr. 26 (4th Dist. 1981). The court of appeal held that an Ohio money judgment for unpaid spousal support registered in California was enforceable under the Sister State and Foreign Money Judgment Act (SSFMJ), Code of Civil Procedure section 1710.10, rather than under the Revised Uniform Reciprocal En-

forcement of Support Act of 1968 (RURESA).

A marital settlement agreement entered into in Ohio by husband and wife provided for the wife's support. The wife obtained a final money judgment in Ohio for the $6,025 in arrears. Following the husband's move to California, the wife registered her money judgment in accordance with Code of Civil Procedure section 1710.10 (SSFMJ). Registration under this section gave the Ohio judgment the same effect and enforceability as a California money judgment.

The husband's motion to stay execution was granted. The court reasoned enforcement of the Ohio judgment was only proper under RURESA. The wife petitioned for an alternative writ.

The court of appeal directed the trial court to vacate its order staying enforcement and to grant the wife's motion for reconsideration. The court then ordered denial of the husband's motion for a protective order preventing levy of the money judgment.

Initially, the court noted the husband incorrectly challenged enforcement of the judgment in California. Under Code of Civil Procedure section 1710.40, a spouse can move to vacate an order but cannot file an ex parte application for stay of execution as the husband did. The result, however, was unaffected and enforcement was nullified. For purposes of analysis, the court of appeal assumed the wife's judgment had been vacated.

Code of Civil Procedure section 1710(c) defines an SSFMJ judgment as that part of any judgment requiring payment of money; it does not include support orders as defined in section 1653(k). That section defines support orders as judgments in favor of an obligee whether temporary, final, subject to modification, revocation or remission. The court of appeal found the wife's Ohio money judgment was a final, liquidated judgment not subject to modification which was therefore enforceable under SSFMJ.

The court read the phrase "or subject to modification" in section 1653(k) to effectively and legally mean "and subject to

modification." In addition, the court found that United States Constitution Article IV, section 1, required the California legislature to give full faith and credit to the wife's judgment since she had reduced the unpaid support obligation to a money judgment.

9. *Jurisdiction Over Non-Resident Parent in Support Action*

McGlothen v. Superior Court, 121 Cal. App. 3d 106, 175 Cal. Rptr. 129 (1st Dist. 1981), *modified, rehearing denied*, 121 Cal. App. 3d 970b (1981). The court of appeal affirmed jurisdiction over a non-resident and ordered spousal support where the non-resident's abandonment of his wife and child burdened the California welfare system. The court found the defendant had sufficient connections with California to allow jurisdiction.

The husband was employed by the Chicago Cubs baseball team. He closed the couple's joint checking and savings account and refused to support his wife and two sons. After moving to California, the wife was forced to obtain welfare. She petitioned the court for child and spousal support from her husband.

As a non-resident, the husband appeared specially to object to the court's jurisdiction. His motion to quash for lack of jurisdiction was denied. The husband petitioned for an alternative writ of mandate. The court of appeal denied the peremptory writ and discharged the alternative writ.

Code of Civil Procedure section 410.10 authorizes California courts to exercise jurisdiction on any basis not inconsistent with the constitutions of California or the United States. The standard measure of proper jurisdiction is reasonableness, considering the relationship of a non-resident with the state under *Kulko v. Superior Court*, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *reversed on other grounds*, 463 U.S. 84 (1978); *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

The court of appeal found the facts similar to those of *In re Marriage of Lontos*, 89 Cal. App. 3d 61, 152 Cal. Rptr. 271 (4th Dist. 1979). There, the husband abandoned his wife and child in New Mexico forcing them to move in with relatives in California

and obtain welfare. The *Lontos* court found that the husband compelled the wife's move, and that he benefitted by having the state take on his financial duties. By exercising in personam jurisdiction over the husband, the court was able to enter a judgement for child and spousal support.

The *McGlothen* court found that the husband in this case had also caused the state to take on his financial responsibilities. Applying *Lontos*, the court concluded that its exercise of personal jurisdiction over the husband was appropriate and did not offend the traditional notions of fair play and substantial justice required by *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

10. *Parent's Custodial Care of Children's Assets*

Newman v. Newman, 123 Cal. App. 3d 618, 176 Cal. Rptr. 723 (2d Dist. 1981). The court of appeal held that the parents' duty to support minor children is different from their role as custodians. The court held that under Civil Code section 1158(b), a father could not use stock dividend payments belonging to his minor children, and over which he was custodian, to pay support obligations.

A dissolution decree ordered the father to pay monthly child support and the two minor children's medical and dental bills. The interlocutory decree also made him holder and custodian of stock certificates issued in his name for the health, education and welfare of the children.

The wife sought payment from the father for medical bills and child support plus an accounting of dividends received on the stocks, and transfer of certificates to her control. The father had kept no records of the dividends, which he used to help pay support.

The trial court found the father's use of the stock dividends was within the meaning of the interlocutory decree and therefore proper.

The court of appeal reversed, disagreeing with the trial court's interpretation of the interlocutory decree. The matter was remanded for redetermination under Civil Code section

1158(b). Section 1158(b) states that a custodian shall expend for a minor's benefit, so much of the custodial property as necessary, with or without regard to the duty of himself or any other person to support the minor. The court of appeal found the trial court's interpretation of the interlocutory decree directly violated the custodial duty imposed in section 1158(b).

D. Dissolution Proceedings

1. *Untimely Request for Attorney's Fees*

In re Marriage of Kasper,† 117 Cal. App. 3d 118, 172 Cal. Rptr. 449 (5th Dist. 1981). The court of appeal held that a motion for attorney fees and costs on appeal in connection with a dissolution proceeding was untimely because it was made after judgment on appeal was final.

The wife filed a memorandum of costs on appeal two days after remittitur of the court of appeal decision regarding her dissolution was filed with the county. The wife's declaration supporting her motion was made twelve days after filing the memo. She was awarded attorney's fees.

The court of appeal reversed, based on the legislative intent of Civil Code section 4370(a) which provides that a court may order payment of court costs and attorney fees in a dissolution proceeding. The court found no reference in this section to fees after a proceeding is no longer pending. *Bruce v. Bruce,* 160 Cal. 28, 116 P. 66 (1911), defined pendency as the time from commencement of a dissolution action until final determination upon appeal, or until time for appeal has passed. Here, the court found the wife's motion for attorney's fees was untimely because it was made after judgment on the husband's appeal was final.

2. *Exclusion From Family Residence*

In re Marriage of Parker, 118 Cal. App. 3d 291, 173 Cal. Rptr. 356 (2d Dist. 1981), *modified,* 119 Cal. App. 3d 448a (1981). The court of appeal held that sole and exclusive use of a

† The California Supreme Court denied hearing this case and ordered the opinion not published May 27, 1981. Under Cal. Ct. R. 977 this opinion may not be cited to any court. The case appears in the Survey solely to familiarize the reader with the issues presented.

family residence could not be granted prior to dissolution unless the excluded spouse had assaulted or threatened to assault the other spouse and physical or emotional harm to someone in the household would otherwise result.

The husband appealed an order during a dissolution proceeding excluding him from his family residence. The trial court had awarded the wife temporary physical custody of the children allowing her sole and exclusive use of the couple's home as custodial parent. The court issued the order pursuant to Civil Code section 5102 which allows temporary exclusion of either party to a dissolution proceeding from the family residence.

The court of appeal reversed. At the time of the order, dwelling exclusions were authorized merely upon showing physical or emotional harm would otherwise result. However, Civil Code section 5102 was amended to allow the court to grant exclusive use of the family residence to a party in a dissolution proceeding only after a showing of physical assault or threat of assault. Where there is a substantial change made in a code section, such as here, current law controls under the holding of *White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

3. *Award of Business Name on Dissolution*

In re Marriage of Shelton, 118 Cal. App. 3d 811, 173 Cal. Rptr. 629 (3d Dist. 1981). The court of appeal held, *inter alia*, that the issue of whether award of a business name in a dissolution action constitutes unfair competition is a question of fact. Since nothing in the record on review supported a conclusion of unfair competition, the husband's motion for modification of a dissolution award was properly denied.

During their marriage, the couple established the Shelton Realty Company. Upon dissolution, the trial court awarded the business to the husband, subject to the right of the wife to use the name Fran Shelton Realty in any new real estate business.

The husband filed a motion requesting modification of this award. He sought to deny his wife use of the name awarded or any other name similar to Shelton Realty. The trial court denied

his motion.

The court of appeal noted that the likelihood of confusion between trade names is a question of fact under the holding of *Visser v. Macres,* 214 Cal. App. 2d 249, 29 Cal. Rptr. 367 (4th Dist. 1963).

The court also reasoned that the relief sought by the husband could be obtained under a proceeding brought under Business and Professions Code section 14330. That section provides injunctive relief for likely injury to business reputation, notwithstanding the absence of competition between parties or the absence of confusion as to the source of goods and services.

The court of appeal also held that a car bought by the husband with money accumulated through gambling, was community property. Where the husband's contribution towards the winnings was minimal and the community's contribution substantial, the entire winnings would be considered community property.

One year after the couples' separation, but prior to the interlocutory dissolution judgment, the husband withdrew $500 from the community's bank account and sold community personal property for $9,500. Using the community's $10,000 as a stake, he won $22,000 at the Nevada gaming tables, then bought a $32,000 Ferrari automobile with his winnings and the community's $10,000.

The trial court held that the $32,000 used to buy the Ferrari was community property and that the wife was entitled to $16,000 of the asset. The court of appeal affirmed, citing *Kershman v. Kershman,* 192 Cal. App. 2d 18, 13 Cal. Rptr. 288 (2d Dist. 1961). In *Kershman,* the court held that proceeds were separate where the community property portion in the commingled funds was minimal compared to the separate property portion. The court of appeal applied this rule, slightly reversed: The husband's contribution to the gambling winnings were minimal — consisting solely of luck, while the community provided $10,000 — a substantial amount.

4. *Death of Spouse During Dissolution Proceedings*

Kinsler v. Superior Court, 121 Cal. App. 3d 808, 175 Cal. Rptr. 564 (2d Dist. 1981). The court of appeal held that the death of spouse after a final dissolution judgment does not deprive a trial court of jurisdiction over remaining issues in a dissolution proceeding.

During the dissolution proceeding, the trial court entered several minute orders concerning the use and disposition of property and awarded temporary spousal support to the wife. A final judgment was entered, with the trial court reserving jurisdiction to determine separate property and distribute community property. The husband died six days after final judgment.

The trial court order ended the action and vacated all orders regarding spousal support, possession of real estate and restraining orders made as of the husband's death. The trial court reasoned that the husband's death deprived it of jurisdiction to determine issues remaining undecided at final judgment based on its interpretation of *In re Marriage of Shayman*, 35 Cal. App. 3d 648, 111 Cal. Rptr. 11 (1st Dist. 1973). In *Shayman*, the husband died prior to final judgment but after the court made its findings and conclusions and entered an interlocutory judgment.

In reviewing *Shayman*, the court of appeal noted that death of a party to a dissolution proceeding normally ends the action and deprives the court of jurisdiction to decide further issues. However, because the *Shayman* court had made certain findings prior to the husband's death, jurisdiction continued to implement orders necessary to carrying out those findings.

The court of appeal issued a peremptory writ of mandate ordering the superior court to vacate its order, substitute in the husband's estate and determine issues over which jurisdiction had been reserved.

5. *Discovery of Spouse's Employment Records*

Rifkind v. Superior Court, 123 Cal. App. 3d 1045, 177 Cal. Rptr. 82 (2d Dist. 1981). Records of corporate employees' earnings were held nondiscoverable in a marital dissolution proceeding. The court of appeal held that a balancing test, weighing the

party's need for the information against the non-party's constitutional right to privacy, must be used before discovery is ordered. Discovery should not be compelled where records sought are not relevant to the issues in a marital dissolution, according to the court.

In addition, the court held that in order to facilitate truthful income tax returns, income tax records are also nondiscoverable.

In *Rifkind,* the wife sought certain documents from her husband during their dissolution action. He had been president of a corporate law firm. Financial reports of the law firm through 1979 had been produced prior to this action; 1980 reports were promised. The husband was willing to produce records of his earnings, pensions and obligations, but objected to production of income tax returns from the law corporation and three partnerships, as well as records relating to the financial earnings of other shareholders. The superior court ordered production of the documents. The husband appealed.

The court of appeal ordered the superior court to vacate its order. It held that the under the rule of *Webb v. Standard Oil,* 49 Cal. 2d 509, 319 P.2d 621 (1957), production of income tax returns may not be compelled through coercion for the benefit of a private litigant, and that the rule applies despite the husband's control over corporate tax returns as president of the corporation.

The wife's request for documents concerning compensation and profit sharing plans of other corporate employees was denied as irrelevant.

6. *Change of Venue Improperly Denied*

Silva v. Superior Court, 119 Cal. App. 3d 301, 173 Cal. Rptr. 832 (2d Dist. 1981). The court of appeal held that a superior court abused its discretion in denying change of venue in a dissolution proceeding where denial was not supported by substantial evidence. Code of Civil Procedure section 397 allows change of venue when several factors are met, among them, when the convenience of witnesses and justice will be served; and—specifically in dissolution proceedings—when the ends of

justice will be promoted.

The wife petitioned for dissolution in Los Angeles, her residence. The husband moved for a change of venue to San Mateo County stating that he had custody of the couple's six children, that he worked in San Mateo, and that the home the couple owned was in San Mateo. He alleged a trial in Los Angeles would be an extreme hardship on his children and himself.

The husband's motion was denied despite the fact it was unopposed by the wife. On review, the court of appeal ordered a change of venue to San Mateo County.

The wife appealed, alleging that under Code of Civil Procedure section 397(3) and *Flanagan v. Flanagan,* 175 Cal. App. 2d 641, 346 P.2d 418 (2d Dist. 1959), a motion for change of venue must contain the names of witnesses inconvenienced, a statement on the relevance of their testimony and an explanation of the alleged inconvenience.

The court stated that *Flanagan* did not require affidavits and that other requirements of section 397 had been met. It was evident from his declaration that child custody was an issue. Since the children were likely witnesses, the inconvenience of traveling to Los Angeles County and missing school established the witnesses' inconvenience. There was no question that the children's testimony was relevant to the custody issue according to the court.

Balancing considerations of the wife's economic situation against the husband's costs of moving his family to Los Angeles for trial, the court concluded that changing venue to San Mateo County supported the ends of justice.

7. *Discoverability of Spouse's Business Records*

Smith v. Superior Court, 118 Cal. App. 3d 136, 173 Cal. Rptr. 145 (1st Dist. 1981). The court of appeal held that names of a husband's psychiatric patients were privileged from discovery in a dissolution proceeding. The wife sought disclosure of the names to determine the community's financial status.

The husband, a psychiatrist, sought a writ of mandate to

restrain his wife from enforcing a discovery order requiring him to produce the names, addresses and telephone numbers of current and former patients. The wife's request stemmed from a challenge of the husband's financial records produced during a dissolution proceeding. The husband's records consisted solely of income tax returns and bank deposit slips. The wife was in possession of the husband's appointment book and contended that the book evidenced a higher yearly income.

The trial court denied the husband's motion finding no psychotherapist-patient privilege in the information the husband was compelled to disclose and noting the insubstantial nature of the records already produced.

The court of appeal issued a peremptory writ of prohibition, restraining enforcement of the discovery order. The court noted that Evidence Code section 1014 gave the husband the privilege to refuse disclosure of confidential communications. The California Supreme Court in *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) implied that identity of an individual undergoing psychotherapy was included in the section 1014 privilege. The court of appeal found persuasive the reasoning of *City of Alhambra v. Superior Court*, 110 Cal. App. 3d 513, 168 Cal. Rptr. 49 (1980), in which a policeman was not compelled to disclose psychiatric treatment. The court there ruled that a broad privilege should be given to psychiatrists and their patients, due to the sensitive nature of the privacy interests involved.

E. Health and Welfare

1. *Ability of Department of Health to Regulate Sterilizations*

California Medical Ass'n v. Lackner, 124 Cal. App. 3d 28, 177 Cal. Rptr. 188 (3d Dist. 1981). The court of appeal held that the Department of Health Services has power, under the combined authority of Health and Safety Code sections 1275, 1276 and 1294, to regulate operations such as sterilizations. Health and Safety Code section 1275 gives the Department the power to adopt, amend or repeal reasonable rules to implement hospital care regulation. Section 1276 regulates standards of adequacy, safety and sanitation. The Department may suspend or revoke a

license where a violation is found, under section 1294.

The court further held that the power to regulate sterilization procedures, stemming from these sections, is consistent with the legislative intent of section 1258. Section 1258 prohibits sterilizations based upon nonmedical qualifications, except with informed consent.

The California Medical Association (CMA) argued that the Department of Health Services was authorized only to supervise hospital activities within areas covered in section 1276, such as buildings, safety and sanitation, and that the power to regulate the doctor-patient relationship was not expressly given by statute.

The trial court upheld the regulations affecting informed consent. The court of appeal affirmed.

The court discussed the general powers sections 1276 and 1294 which enable the Department of Health Services to adopt rules and suspend violators, and concluded that the section 1258 regulations requiring informed consent, as detailed in Title 22, would be given weight by virtue of the Department's authority under these sections.

CMA argued that the Department overstepped its jurisdiction in regulating physicians' conduct; such regulation should be left to the Board of Medical Quality Assurance. However, the court found no conflict between the two departments, since any violation of Title 22 is to be reported only to the Medical Board and the Department of Health Services will not take independent disciplinary action.

Further, the court rejected CMA's suggestion that informed consent rules were unnecessary because of the availability of tort actions. The court stressed there is nothing wrong with the Department seeking to prevent a wrong from occuring in the first place.

2. *Unconstitutionality of Restriction on Medi-Cal Abortion Funding*

Committee to Defend Reproductive Rights v. Myers, 29 Cal.

3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981). The California Supreme Court held unconstitutional provisions of the Budget Acts. The court found that a restriction on a medical service was inconsistent with Medi-Cal's stated purpose of providing medical service to the needy, that funding restrictions impaired a woman's right to procreative choice by effectively limiting access to abortions, and that funding cutbacks were not the least restrictive means of furthering any state interest in childbirth. For an extensive review of this case, see Note, *Committee to Defend Reproductive Rights v. Myers: Procreative Choice Guaranteed for All Women, supra,* page 691.

3. *DES Mother's Disclosure of Personal Medical History in Daughter's Suit*

Jones v. Superior Court, 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1st Dist. 1981). The court of appeal held that a diethylstilbestrol (DES) mother could not refuse to disclose her medical history in a suit by her daughter against DES manufacturers. The mother's partial disclosure of a significant portion of her personal medical history operated to waive the physician-patient privilege of Evidence Code section 994.

In a companion case, the court held that a DES daughter was compelled to seek information from her mother to completely answer interrogatories. The mother-daughter spirit of cooperation existing in the suit justified the order.

Two women brought suit against pharmaceutical companies for breach of warranties, strict product liability, negligence and enterprise liability under *Sindell v. Abbott Laboratories,* 26 Cal. 3d 558, 607 P.2d 924, 163 Cal. Rptr. 132 (1980). Their mothers had taken DES manufactured by the companies prior to the births of the plaintiffs. The two cases were consolidated.

The pharmaceutical company moved to compel one mother to disclose her medical history both prior and subsequent to the birth of her daughter. The mother responded by agreeing to disclose names of the medical staff who had treated her prior to her daughter's birth, but refusing to disclose any additional information under the physician-patient privilege.

The trial court ordered her to respond to questions pertain-

ing to the time period prior to the birth, and her medical history subsequent to the birth. The court of appeal affirmed.

Under Evidence Code section 994, a patient has a privilege to refuse disclosure of confidential communications with a doctor. However, this privilege is waived when the patient discloses a significant part of the communications, under Evidence Code section 912. The mother's revelation of a significant portion of her medical history in offering names of physicians and hospitals acted as a waiver.

The court also concluded the mother's constitutional right to privacy regarding disclosure of medical information was not absolute but must be balanced against compelling state interests, such as a defendant's right to discover relevant information. The court of appeal concluded that the order compelling answers did not force the mother to answer all questions concerning her medical history, but only the few requested.

In the companion case, *Benny v. Superior Court,* 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1st Dist. 1981), the court cited *Chodos v. Superior Court,* 215 Cal. App. 2d 318, 30 Cal. Rptr. 303 (2d Dist. 1963), which stated that a party without knowledge can be compelled to investigate facts when sources of information are apparently available. Since it appeared from the record the mother was supporting her daughter's suit, the trial court's order compelling the daughter to ask her mother for information necessary to answer interrogatories was not an abuse of discretion.

F. Pensions and disability Benefits

1. *Lawyer's Failure to Include Pension As Community Asset*

Davis v. Damrell, 119 Cal. App. 3d 883, 174 Cal. Rptr. 257 (1st Dist. 1981). The court of appeal refused to hold a lawyer liable for failure to include a military pension as a community asset in a dissolution proceeding because the law concerning military pensions changed after the proceeding. The court held failure of the lawyer to anticipate reversal of the law was not malpractice.

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In 1970, the lawyer represented the wife in a dissolution proceeding. Although the husband had a vested interest in a military pension, the lawyer advised the wife that the pension was not community property. The pension was not included in the settlement.

In 1974, the California Supreme Court determined in *In re Marriage of Fithian,* 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied,* 419 U.S. 825 (1974), that a vested retirement benefit, such as the husband's military pension, was subject to community division upon dissolution. Subsequently, the wife brought an action charging her lawyer with malpractice for failing to advise her that the community pension area was unsettled.

The trial court granted summary judgment for the lawyer. The wife's appeal was denied. The concept of community interest in vested pensions had shifted dramatically in a short period of time. The court found the lawyer's advice was based upon a thorough knowledge of case law at the time of the dissolution proceeding. The court rejected the wife's contention that the lawyer should have given her the option of claiming the pension as part of the community's assets and pursuing the matter on appeal.

The court of appeal concluded that an attorney's duty does not extend to advising clients on all conceivable alternatives of action regardless of futility.

2. *Distribution of Pension After Dissolution Judgment*

Giovannoni v. Giovannoni, 122 Cal. App. 3d 666, 176 Cal. Rptr. 154 (1st Dist. 1981). Where the distribution of a pension as a community asset in a dissolution proceeding has not been adjudicated or approved by the court, the court of appeal held that a later action for distribution is not barred by res judicata.

The couple stipulated to distribution of community property. This agreement was approved by the court as fair and equitable. A pension the husband was to receive from his employer was mentioned in the stipulation, but, as understood by both parties, the pension had no value since there was no vested interest at the time of the dissolution proceeding. The wife's attor-

ney advised her that neither she nor her husband had an interest in the pension.

Three years after the decision, the husband retired and began receiving his pension. It was discovered that the pension had been fully vested at the time of dissolution. Based on *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), the husband's pension was community property and subject to division. The wife filed suit seeking her community interest in the pension.

The wife contended that under *Henn v. Henn*, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980), res judicata did not bar her suit for distribution. In *Henn*, a court had issued an interlocutory and final decree without mention of a vested pension. The Supreme Court of California held that res judicata did not apply since the issue of the pension had not been before the court. However, the trial court rejected this argument and dismissed her suit.

The court of appeal reversed and remanded on a finding that there had been no adjudication of the parties' rights to the husband's pension. The husband attempted to distinguish *Henn*, arguing that the pension was before the court because it was mentioned in the stipulation agreement; whereas in *Henn*, there was no mention of the asset. The court rejected this distinction, citing the decision in *Miller v. Miller*, 117 Cal. App. 3d 366, 172 Cal. Rptr. 745 (4th dist. 1981). In *Miller*, a similar argument was rejected where a military pension was mentioned in a stipulation agreement, but was not litigated as an issue in the distribution process. In this situation, the pension was withdrawn from the court's consideration because the parties believed it had no value and was not litigated in the dissolution proceeding. The court found *Henn* controlling, and the wife was therefore free to pursue her share of the pension, not being barred by res judicata.

3. *Applicability of* McCarty

In re Marriage of Jacanin, 124 Cal. App. 3d 67, 177 Cal. Rptr. 186 (4th Dist. 1981). The court of appeal held that California's community property laws governing distribution of a mili-

tary pension in a dissolution proceeding are preempted by federal legislation under application of the United States Supreme Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981).

An interlocutory dissolution judgment gave the wife a share of her husband's Navy retirement pension in addition to custody and spousal support provisions.

On appeal, the court disallowed the wife's community interest share in her husband's pension. Despite Congress' failure to expressly state its intention that federal laws preempt state community property laws governing military pensions, *McCarty* was interpreted by the court as warranting preemption of state policy concerning division of military pensions upon dissolution.

4. *Right to Pension Benefits Resulting From Redeposit of Funds*

In re Marriage of Lucero, 118 Cal. App. 3d 836, 173 Cal. Rptr. 680 (4th Dist. 1981). The court of appeal held that a wife's community interest in her husband's pension extended to the full amount of benefits after redeposit of employee contributions. The court reasoned that since the wife was willing to pay a pro-rata share of her husband's separate property redeposit, she was entitled to share in the resulting increased benefits.

The couple married in 1947 and divorced in 1955. They cohabited until their remarriage in 1956, finally separating in 1976. The husband worked for the Federal government periodically during the marriage and accumulated thirty years and one month of credit towards his employee contribution fund pension. He withdrew $9,373 from this fund in 1966. To receive the maximum benefit upon retirement he redeposited that amount after separation, using his separate funds.

The trial court determined that: (1) neither party was entitled to spousal support; (2) the community interest in the husband's benefit equalled the ratio of time of employment during the second marriage to total time of employment, or 68 percent; (3) the community's 68 percent interest extended only to benefits the husband would have received absent redeposit of the amount withdrawn from the fund; (4) the community's interest in the wife's retirement benefit would be determined using the

same formula employed to calculate the community's interest in the husband's fund; and (5) jurisdiction was reserved over distribution of the wife's pension once it fell due.

The court of appeal modified the judgment, allowing the wife to elect to participate in the husband's increased retirement benefits upon paying a pro-rata share of the redeposit. In addition, the husband was required to pay the wife her share of payments which were received by him before trial, with future payments disbursed directly to the wife. The judgment also adjusted the amount of the wife's employment time attributable to the community's vested interest in her retirement pension.

The trial court's decision to deny the wife's participation in the husband's increased benefits was viewed by the court of appeal as giving the husband sole control over whether to redeposit and what funds to use, in effect, treating the pension as the husband's separate property.

In *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), the California Supreme Court determined that the community owns all pension rights attributable to employment during marriage. Therefore, under *Brown*, the trial court was incorrect because the spouses had equal rights both in determining whether to redeposit, as well as in sharing in the increased benefits.

The court of appeal also considered *In re Marriage of Stenquist*, 21 Cal. 3d 779, 582 P.2d 96, 148 Cal. Rptr. 9 (1978), in determining the community's interest in the redeposit of funds. In *Stenquist*, the California Supreme Court held that because the spousal duty of fair dealing did not end with dissolution, a spouse could not destroy a community interest by invoking a condition solely within his or her control. Therefore, the husband could not preclude his wife's participation in the increased benefits through an independent decision to use separate funds to redeposit.

The wife contended the trial court erred in failing to recognize a community interest in pension rights acquired during the couple's first marriage. The court of appeal noted that *Brown* was not fully retroactive and did not apply to the first marriage.

The court of appeal also noted the wife's argument that the period of cohabitation with her husband entitled her to an additional share in the pension benefits could only be heard in a civil contracts action under the ruling of *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

5. McCarty *Not Applicable to Pension Stipulation*

In re Marriage of Mahone, 123 Cal. App. 3d 17, 176 Cal. Rptr. 274 (2d Dist. 1981). Despite the United States Supreme Court's ruling that community property laws concerning distribution of military pensions are preempted by federal law, the court of appeal held that a military pension may be treated as a community interest where parties to a dissolution have so stipulated before the change in law. The parties married while the husband was in the Air Force. Although he left the military five years after their marriage, he qualified for a military pension. (The record does not specify his total years of service.) At the time of this action, he was receiving $1,811 a month from the pension.

Under *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, *cert. denied*, 419 U.S. 825, *reh'g denied*, 419 U.S. 1060 (1974) the husband's military pension was a community asset at the time of dissolution. He argued that under *McCarty v. McCarty*, 453 U.S. 210 (1981) his military pension was exempt from distribution. The court rejected this argument and bound the husband to his stipulation at the time of dissolution, three years before *McCarty*. The military pension was governed by the law as of the date of the stipulation, therefore, the military pension was a community holding.

In his dissent, Appellate Court Judge Stephens stressed that, because a military pension is not community property according to *McCarty*, the parties were not bound to their previous stipulation.

6. *Retroactivity of* McCarty

In re Marriage of Sheldon, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (4th Dist.), *modified*, 125 Cal. App. 3d 415f (1981). The Court of Appeal for the Fourth District also limited the retroactivity of the United States Supreme Court's decision in *Mc-*

Carty v. McCarty, 453 U.S. 210 (1981). *McCarty* held that federal law preempted community property law governing distribution of military pensions. The court determined that *McCarty* will control: where a case is not final on appeal, only after the military spouse has raised the issue on appeal, or where the court was initially requested to reserve jurisdiction over the military pension.

In its interlocutory decree of dissolution, the court awarded the residence to the wife, and the husband's military pension to the husband. The difference in value was waived by the wife. The husband appealed, arguing he should have received a one-half interest in the combined value of the assets and did not contest the designation of the military pension as a community asset.

The court of appeal affirmed the trial court's award, in an unpublished opinion filed June 8, 1981. On June 26, 1981, the *McCarty* decision was announced. Subsequently, the husband petitioned for rehearing, arguing that *McCarty* should be applied retroactively. The court of appeal affirmed the dissolution award, denying *McCarty's* application to the husband's case.

Chevron Oil Company v. Hudson, 404 U.S. 97 (1971) established three factors to be used in settling retroactivity issues: (1) whether the decision to be applied established a new principle, or was an issue of first impression; (2) whether the purpose of the decision mandates retroactive application; and (3) whether retroactive application will result in hardship or injustice.

In analyzing *McCarty*, the court noted that the issue in *McCarty* was essentially one of first impression. *Chevron* presented a similar situation. There, the United States Supreme Court ruled that its decision should not be retroactive because it overruled previous decisions. The *McCarty* decision represented a dramatic reversal of a long line of California cases holding that military pensions are community property. Therefore, under the first *Chevron* factor, McCarty would not be retroactive.

The stated purpose of Congress in preempting community property laws governing military pensions were twofold according to *McCarty:* (1) to provide for retired military personnel and

(2) that military pensions serve as inducements for enlistment or reenlistment. In discussing the second factor of the retroactivity test (whether the purpose of the decision mandates retroactive application) the court noted that neither congressional purpose would be furthered by full retroactivity of *McCarty*. Only a small number of military spouses, those divorced but not yet retired, would benefit from an extension of *McCarty*. Similarly, retroactivity would not induce further enlistments, according to the court. Therefore, non-retroactive application would result in minimal harm to both stated federal purposes.

Concerning the third factor, (whether a retroactive application would result in hardship or injustice) the court emphasized the potential harm that would result if parties were free to relitigate on the basis of *McCarty*. For example, a spouse might not be able to repay the military spouse for benefits received or all plans made in expectation of pension benefits would be destroyed. The court stressed the need for finality in marital dissolution proceedings.

Although the husband argued *McCarty* should be applied in his case since his appeal was filed prior to the United States Supreme Court's decision, the court of appeal noted that issues not raised in opening briefs are waived. The husband failed to include a federal preemption issue during the trial and in the briefs for petition of rehearing.

7. *Constitutionality of Remarriage Clause in Pension Legislation*

McCourtney v. Cory, 123 Cal. App. 3d 431, 176 Cal. Rptr. 639 (2d Dist. 1981). California Government Code section 75070, which gives the surviving spouse of a judge, eligible under the Judges' Retirement Law, an allowance until death or remarriage, was found constitutional by the court of appeal. Although other Government Code sections provide allowances for surviving spouses despite remarriage, the remarriage clause of section 75070 endured equal protection and due process scrutiny. The court also found section 75070 does not interfere with the right to marry.

The wives of several deceased judges had challenged the constitutionality of Government Code section 75070. Under the

section, they received one-half of their deceased husband's former pay but the allowance was terminable on death or remarriage. The section was challenged on equal protection and due process grounds because other classes of surviving government spouses received allowances despite remarriage. In addition, the wives argued the section had a chilling effect on their exercise of the constitutional right to marry.

The trial court issued a declaratory judgment ordering the Controller of the State of California to pay the wives allowances until their death. The court of appeal reversed.

The court found that termination of the allowance upon remarriage did not interfere with the wives' right to marry because there was no direct barrier to marriage. *Califano v. Jobst,* 434 U.S. 47 (1977), was found directly on point. In *Califano,* a Social Security Act provision giving benefits to children of deceased wage earners made it more desirable for a child to marry a fellow beneficiary. A child's benefits terminated at marriage unless marriage was to another beneficiary. The Supreme Court found this statute constitutional. While its effect was to make some individuals preferrable over others, it was not an attempt to interfere with the decision to marry. The effect of section 75070 was similar with regard to the wives' decision to marry; this statute did not directly or substantially interfere with their decision.

The wives' second challenge was based on equal protection grounds. Government Code section 75093, another provision of the Judges' Retirement Law, applying to spouses of judges who died in office, gave an allowance without the remarriage limitation. Similarly, section 75033.5 provided a retirement plan for judges which would give their surviving spouses an allowance for life. The court of appeal noted, however, that since the fundamental right to marry was not involved, the section only had to meet rational basis scrutiny under *Williamson v. Lee Optical,* 348 U.S. 483 (1955). The court found the difference in remarriage limitations between sections 75070 and 75093 could have been based on the legislature's perception of differing needs of surviving spouses. This was found to be a reasonable basis for distinction between the two classes.

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8. *Suit For Distribution of Military Pension Not Barred*

Miller v. Miller, 117 Cal. App. 3d 366, 172 Cal. Rptr. 745 (4th Dist. 1981). Where distribution of a community property military pension has not been adjudicated, the court of appeal held that a subsequent suit for partition is not precluded by res judicata.

The husband retired after seventeen years of military service and began receiving his vested pension. When the couple separated, they entered into a property agreement which mentioned but did not distribute the pension. This agreement was incorporated into the interlocutory dissolution judgment. The issue of whether the pension was distributable as community property was not raised at trial.

The wife filed an action seeking partition of the pension in accordance with community property laws. The trial court's decision was controlled by *Kelley v. Kelley*, 73 Cal. App. 3d 672, 141 Cal. Rptr. 33 (4th Dist. 1977), and a nonsuit was granted. The court barred the wife's suit because the parties knew the pension was community property at the time of the dissolution proceeding and could have raised the issue at that trial.

The court of appeal overruled the trial court finding, noting that the decision of *Henn v. Henn*, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980) was not available at the time of the trial. *Henn* overruled the *Kelley* application of res judicata. According to *Henn*, future litigation of community property interests is not precluded unless the issues were subjected to the court's adjudication, or an agreement between the parties as to distribution was made.

Although the parties had mentioned the pension in their stipulation agreement, the court found this was not equivalent to litigation on the issue of distribution and thus was not subject to a res judicata bar.

9. *Exemption of Pension From Writ of Execution*

Roosevelt v. Roosevelt, 117 Cal. App. 3d 397, 172 Cal. Rptr. 641 (2d Dist. 1981). The court of appeal held that where spousal support had not been ordered, a pension was exempt from exe-

cution under Code of Civil Procedure section 690.18. The court found that exemption statutes are to be construed liberally, and exceptions to the statutes are to be read narrowly.

Prior to dissolution, the husband and wife had agreed on spousal support. The parties obtained an interlocutory judgment in which the agreement was approved, but not merged with the final judgment. The final judgment contained no express provisions regarding spousal payments.

The wife brought an action for breach of contract and for an accounting of support due under the agreement. She won a money judgment from the trial court and obtained a writ of execution which was levied upon her husband's civil service pension. The husband appealed the denial of this claim for an exemption from the writ under Code of Civil Procedure section 690.18.

The court of appeal reversed and remanded. The court of appeal determined that the principal objective of the exemption statutes was to provide support and welfare for the debtor's benefit.

The court found no exception to the exemption statute applicable where, as here, a judgment for payment of spousal support was not subject to modification by the court. The wife's judgment was based upon a settlement agreement not subject to modifications; the dissolution judgment itself did not provide for spousal payments.

G. Inheritance Determinations

1. *Claim To Estate Based Upon Premarriage Cohabitation Agreement*

Estate of Fincher, 119 Cal. App. 3d 343, 174 Cal. Rptr. 18 (2d Dist. 1981). The court of appeal upheld a probate court's jurisdiction over a *Marvin* agreement along with a Probate Code claim. The court also determined the statute of limitations on a *Marvin* agreement accrues once the relationship on which the contract is based has ended.

Prior to marriage, decedent had lived with plaintiff periodi-

cally for seven years. This relationship was interrupted but later renewed. They eventually married.

Decedent intentionally omitted his wife from his will, leaving her insurance benefits instead. The wife claimed a portion of the estate, alleging that decedent's will had been fraudulently obtained and that her combined status as surviving spouse and *Marvin* partner entitled her to one-half decedent's estate.

A jury found the will had not been fraudulently induced and that seven years of the couple's cohabitation was based on an implied *Marvin* agreement. One year of cohabitation, between renewal of their relationship and marriage, was also determined to have been grounded on a *Marvin* relationship.

At a special hearing, the probate court found that the two year statute of limitations on the implied *Marvin* agreement accrued once the parties' first relationship ended, barring enforcement of the implied contract. The court also found the wife had a community property interest in decedent's estate, commencing at marriage, and a partnership interest, equivalent to a community interest, from renewal of the couple's relationship until marriage. The wife's appeal of the trial court's bar of her implied *Marvin* agreement was denied.

The court of appeal noted that the wife's claim under Probate Code section 1080 would be incorrect if her only basis was a *Marvin*-type relationship. As surviving spouse, however, the wife was an heir under section 1080 and could rightfully assert a claim to community property.

In *Estate of Baglione*, 65 Cal. 2d 192, 417 P.2d 683, 53 Cal. Rptr. 139 (1966), the California Supreme Court determined that a probate court having jurisdiction over one aspect of a claim could hear any ancillary matter such as the wife's *Marvin* claim.

The wife argued that under Code of Civil Procedure section 339, subdivision (1), her claim accrued at decedent's death. The court disagreed, noting that the end of the couple's seven year relationship effectively triggered commencement of any action the wife had to the community property.

2. *Revocation of Prenuptial Will*

Estate of Green, 120 Cal. App. 3d 589, 174 Cal. Rptr. 654 (1st Dist. 1981). The court of appeal held that a will made prior to marriage was revoked as to a surviving spouse, where it either failed to provide for a future spouse, or failed to specifically disinherit a future spouse or heir.

Decedent made his will prior to marriage, naming his sister as primary beneficiary. After marriage, he failed to change his will, and died four months later.

The surviving spouse petitioned to determine her entitlement to the estate under Probate Code section 70. Section 70 would revoke decedent's will where the surviving spouse could show: (1) it was made prior to marriage; (2) the surviving spouse was not provided for in a marriage contract; (3) decedent's will did not provide for the surviving spouse; or (4) the surviving spouse was mentioned in a way showing intent not to provide for her.

The trial court revoked the will under section 70. Decedent's sister's motions for reconsideration and a new trial were denied.

In affirming, the court of appeal noted that section 70 represents a policy to resist disinheriting a surviving spouse where a will made prior to marriage contains no provision for the survivor. The court of appeal noted that decedent's will failed to clearly manifest an intent to disinherit an after-married surviving spouse, as it must in order to forestall application of section 70.

3. *Support Allowance From Estate After Estrangement*

Estate of Kalal, 121 Cal. App. 3d 841, 175 Cal. Rptr. 582 (1st Dist. 1981). A surviving spouse's right to an allowance during settlement of the deceased spouse's estate, as provided in Probate Code section 680, is not absolute, according to the court of appeal. The section 680 allowance is conditioned upon the survivor's right to support at the time of the spouse's death.

The court found that a family allowance petition, based on

a stipulation agreement by parties to a dissolution, was incorrectly denied because the stipulation did not conform with the requirements of Civil Code section 5131. Under section 5131, an agreement to live apart without mutual support is grounds to deny an allowance.

The court also held that facts indicating spouses are living apart independently does not constitute waiver of the support right. However, while a spouse's financial condition cannot be used to deny a family allowance, it can be a factor in determining necessity.

Upon initiating dissolution proceedings, the wife petitioned to force her husband to vacate their home. The parties stipulated to certain issues, not pertinent here, and agreed that the restraining order and order to vacate would operate temporarily. The agreement did not address spousal support. The wife died prior to final determination of the dissolution proceeding.

Following the temporary order but prior to the wife's death, the couple lived apart, did not support each other, and were not in contact with each other. When the wife died, the husband returned home and petitioned for a family allowance which the probate court summarily denied. He appealed, contending the court abused its discretion.

The court of appeal reversed and remanded to consider the husband's financial circumstances in determining whether an allowance was necessary.

The court cited *Estate of Fawcett*, 232 Cal. App. 2d 770, 43 Cal. Rptr. 160 (1st Dist. 1965) as establishing that a family allowance is conditioned upon the surviving spouse's right to support at the time of decedent's death. *Fawcett* was also important in determining whether the husband was properly denied an allowance under Civil Code section 5131. Civil Code section 5131 states that one spouse need not support the other when the couple is living apart by agreement, unless support is stipulated in the agreement. In *Fawcett*, an order of temporary support expiring prior to the husband's death was not equivalent to an agreement to live apart, triggering the 5131 exemption.

In *Fawcett*, initiation of dissolution proceedings did not operate as an agreement to live apart. Here, the couple signed a stipulation agreement, had not separated prior to the show cause hearing and the order to vacate was only temporary.

4. *Stepped-up Tax Basis of Surviving Spouse*

Mel v. Franchise Tax Board, 119 Cal. App. 3d 898, 174 Cal. Rptr. 269 (1st Dist. 1981), *hearing denied*, Sept. 16, 1981. The court of appeal held that Revenue and Tax Code section 18045(e), in its 1966-1975 version, allowed for an acquired property stepped-up tax basis only where a surviving spouse could show decedent's gross estate was subject to inheritance taxation. With the stepped-up tax basis a taxpayer can use the market value of community assets, as of deceased's death, in computing personal income tax.

After decedent died, all community property was admitted to probate, including the surviving spouse's one-half share. The inheritance tax appraiser valued the community property at over five million dollars and assessed inheritance taxes. Following her husband's death and will administration, the wife sold portions of her community property share. In calculating personal income tax, she used the market value of the assets as of her husband's death as a tax basis.

The Franchise Tax Board disapproved the stepped-up tax basis and assessed additional income. The wife protested, but died before the hearing. Her executors brought this action.

The controversy centered on interpretation of Revenue and Tax Code section 18045(e), which allows a section 18044 tax base, "if at least one-half of the whole of the community interest in such property was includable in determining the value of the Decedent's gross estate under chapter 3 of the California Inheritance Tax Law." The trial court determined the stepped-up tax basis was proper under section 18045(e) since one-half of the total community interest had been included in decedent's gross estate.

On appeal, the Franchise Tax Board contended that section 18045(e), in light of federal income statutes, indicated that use

of the stepped-up tax basis was improper. The court of appeal reversed the trial court's ruling.

Both parties agreed section 18045(e) was intended to bring California into conformity with federal income tax law. Under federal law, a taxpayer is not entitled to a stepped-up tax basis unless at least one-half of the community property was subject to federal estate taxation under *Collins v. United States*, 318 F. Supp. 382 (C.D. Cal. 1970), *aff'd per curiam*, 448 F.2d 787 (9th Cir. 1971). To insure uniformity, stepped-up basis cannot be used unless decedent's gross estate was subject to inheritance tax.

H. Paternity Actions

1. *Cannot Compel Answers to Interrogatories Where Response Would Incriminate*

Gonzales v. Superior Court, 117 Cal. App. 3d 57, 178 Cal. Rptr. 358 (4th Dist. 1981). The court of appeal held that putative fathers may be required to answer interrogatories in a paternity action, subject to immunity from use of the answers in a criminal prosecution.

The Orange County district attorney brought suit on behalf of recipients of Aid to Families with Dependent Children (AFDC), to establish paternity and obtain support orders. Suit was authorized under Welfare and Institutions Code section 11350, which allows the county to sue for recovery of payments made under the provisions of AFDC, where a parent is found to be either gainfully employed or reasonably able to assist in support of the recipient.

The interrogatories in question required that the alleged fathers give information regarding their financial status and sexual relations with the mothers. The trial court ruled that answers could be used in actions under Penal Code section 270. Section 270 provides that a father of a minor child who willfully fails to provide remedial care for his child is guilty of a misdemeanor. The district attorney moved to compel answers under Code of Civil Procedure section 2034, which provides sanctions for refusal to answer interrogatories.

A claim of privilege against self-incrimination may be raised under the fifth amendment by the fathers in any civil or criminal proceedings, including discovery, under *Kastigar v. United States*, 406 U.S. 44 (1972); *Zonver v. Superior Court*, 270 Cal. App. 2d 613, 76 Cal. Rptr. 10 (2d Dist. 1969). Further, Evidence Code section 940 provides a privilege against disclosure of any matter that may tend to incriminate.

Issuance of a protective order granting the fathers immunity from use of compelled answers in a criminal proceeding arises under Code of Civil Procedure section 2019, and was confirmed in *People v. Superior Court*, 53 Cal. App. 3d 996, 126 Cal. Rptr. 597 (2d Dist. 1975).

I. MERETRICIOUS RELATIONSHIPS

1. *Cohabitatant's Agreement Based Upon Sexual Relationship*

Jones v. Daly, 122 Cal. App. 3d 500, 176 Cal. Rptr. 130 (2d Dist. 1981). An action to recover one-half of decedent's estate based on a cohabitation agreement was dismissed without leave to amend by the court of appeal. The court held the agreement could not form the basis of a claim on decedent's estate because it contained express terms indicating that sexual services were an inseparable part of the consideration for the agreement and was therefore illegal.

Two males lived together, holding themselves out as married, for two years prior to decedent's death. According to petitioner's complaint, he quit work to live with decedent, providing him with services as a lover, companion, homemaker and cook. Petitioner and decedent had orally agreed that earnings and property accumulated during their time together would be shared equally. During their cohabitation, the couple accumulated assets worth two million dollars.

After decedent's death, petitioner filed a creditor's claim in probate for one-half the estate. The executors denied petitioner's claim under *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), arguing that the agreement was unenforceable because the complaint alleged that petitioner's sexual services were an express and inseparable part of the

agreement.

The trial court sustained the executor's demurrer without leave to amend. The court of appeal affirmed.

Under *Marvin,* cohabiting adults may contract regarding distribution of their earnings and property rights, provided that sex is not the sole or express consideration. Any portion of the contract that is severable from the sexual consideration is enforceable.

The court of appeal noted that petitioner's complaint contained on its face language indicating that the contract could not be considered apart from the sexual acts involved in the relationship and that petitioner's role as lover was of primary importance.

2. *Award For Economic Rehabilitation Rejected*

Marvin v. Marvin, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (2d Dist. 1981). The court of appeal held an award for economic rehabilitation was incorrect where not framed as an issue in the pleadings. Furthermore, although such an award is available where necessary to protect the parties' expectations, no evidence was presented to support the award on either legal or equitable grounds.

Lee and Michelle Marvin cohabited for five years; the relationship ending at his insistence. In the landmark decision, *Marvin v. Marvin,* 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the California Supreme Court held that an equitable remedy could be shaped to protect the parties' legitimate expectations, and remanded. The trial court determined there was never any agreement to combine income or share property equally. In addition, Lee had never agreed to support Michelle beyond their relationship, and the couple never decided she should forego her career to care for him. The trial court found that Michelle had not been damaged as a result of her relationship and had in fact benefitted, economically and socially. Despite finding no support obligation and no unjust enrichment, the trial court ordered payment of $104,000 in economic rehabilitation.

The award represented the court's belief that, equitably, the woman was entitled to assistance allowing her to resume her career. The award was calculated by taking her highest previous weekly salary as a singer, and multiplying this amount to cover a two year period — the time estimated for rehabilitation. On review, the appellate court found the pleadings only asked for monthly support and maintenance; there was no request for the support awarded. Because the award was not within the issues framed by the pleadings, the court determined that the trial court's special findings were to be disregarded. The award was found to be without factual basis and was deleted.

The court of appeal noted that under *Rosenburg v. Lawrence,* 10 Cal. 2d 590, 75 P.2d 1082 (1938), a substantive right cannot be created in equity without some underlying obligation. The court concluded an award was not warranted absent a showing of expectation or obligation. Since the trial court found neither factor, the award was withdrawn.

J. LEGISLATION

1. *Marriage and Dissolution*

A.B. 233 — Deddeh
Chapter 326
Statutes of 1981
Innocent Spouse Protected From Tax Liability. This legislation operates to protect an innocent spouse where the tax return of a couple contains either an omission or incorrect deduction attributable to one spouse. Under this amended version of Revenue and Taxation Code section 18402.9, if a spouse can establish that he or she had no knowledge of a mistake from which the other spouse will benefit, the innocent spouse is not liable for back taxes, penalties or interest. The issue of knowledge depends upon the question of whether the innocent spouse had reason to know of the other spouse's mistake. Only those tax years which are not subject to res judicata and the statute of limitations are affected by this legislation.

A.B. 1580 — Herger
Chapter 327
Statutes of 1981
Gifts to Commissioner of Civil Marriages. Under Penal Code

section 70.5, it is a misdemeanor for a commissioner of civil marriages to accept money or gifts for performing a marriage, other than the amount set as a fee. This law amends the section to allow a commissioner to accept money on weekends and holidays.

S.B. 1199 — Marks
Chapter 715
Statutes of 1981
Changes in Family Law Act. Civil Code section 4370 was amended to allow a court to order any party to a dissolution proceeding, except a governmental entity, to pay the costs of the suit and attorney fees. Further, the new language indicates that the court may award a sum, subject to modification, even after appeal is final.

Civil Code section 4800.6, which had required an attorney to give notice to the parties that both spouses would be responsible to creditors despite the court's distribution of a claim to one spouse, was repealed and replaced with legislation incorporating the same notice into the interlocutory decree of dissolution, or the final judgment of separation.

An amended version of section 4811 of the Civil Code added subdivision (d). Section (d) applies to agreements in which parties provide for child and spousal support, but fails to indicate specific amounts for each. The total support amount will not be categorized by the courts, but will be known as 'family support.'

2. *Child Custody*

A.B. 344 — Thruman
Chapter 810
Statutes of 1981
Investigation Required to Terminate Parental Rights. A juvenile probation officer is required to investigate the home life of a minor involved in a Civil Code section 232 parental termination suit. The amended version of section 232 requires that the officer's report contain: (1) a statement explaining the action; (2) a statement addressing the minor's feelings about the action; (3) a report on the minor's relationship with the parents; (4) a statement that the minor has been informed of his or her right to attend the termination hearing; and (5) based on the minor's

age, any exception to these requirements.

The amendment to section 234 lowers the age at which a minor is forced to appear before the court in a parental termination proceeding. This section reduces the age from twelve to ten.

In addition, an amendment to Civil Code section 237.5 gives the court authority to appoint counsel for both parents and children, regardless of their ability to pay. However, a court cannot appoint the same counsel for both parties.

3. *Child Support*

A.B. 84 — McAlister
Chapter 528
Statutes of 1981
Limitation on Pension Exemption. This section further limits the pensions exceptions from the execution of child support orders. The legislature substituted the phrase "judgment or order for" in place of "court ordered" in section 690.18 of the Code of Civil Procedure, section 22005 of the Education Code and Government Code section 21201, thus providing procedure through which support orders are more readily enforced.

4. *Spousal Support*

S.B. 1019 — Greene
Chapter 927
Statutes of 1981
Consideration of Medical Insurance in Support Award. Section 4706 was added to the Civil Code to allow a judge to consider medical insurance coverage in an action for spousal support. Section 1149, added to the Welfare and Institutions Code, allows for medical insurance information where child support is ordered. Under these sections, the supporting party must fill out a state medical insurance form at a judge's request.

A.B. 2135 — Konnyu
Chapter 514
Statutes of 1981
Factors in Awarding Spousal Support. Civil Code section 4801 was amended to require court consideration of several factors in determining the amount of spousal support to be awarded in a

dissolution proceeding. Among the new factors are: the amount of time the supported spouse will need to be trained or educated in order to be employed; the age of the parties; and the parties accustomed standard of living. Upon motion and a showing of good cause, the court may also order a spouse to undergo examination by a vocational training consultant (VTC). A VTC is an individual trained with a specialized knowledge in the area of career formulation and planning.

5. *Pregnancy*

A.B. 267 — McAlister
Statutes of 1981
Regulation of Wrongful Life Cause of Action. In response to *Curlender v. Bio-Science Laboratories,* 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (2d Dist. 1980), where a genetically damaged child's cause of action for wrongful life was created, the legislature added section 43.6 to the Civil Code. Section 43.6 prohibits a suit by a child against his or her parents on the grounds that conception should not have taken place or that the child should not have been born. Also, under this section a third party may not assert as a defense or reason to reduce any damage award that a child should have been aborted by his or her parents.

6. *Paternity*

A.B. 123 — Stirling
Chapter 266
Statutes of 1981
Admissibility of HLA Blood Tests. This bill amends section 895 of the Evidence Code. Human leococyte antigen (HLA) tests will be used to prove paternity if experts disagree over the question of paternity, or if blood tests show a probability that the male is the father. The issue will then be submitted to the court, including evidence based on HLA tests. Previously, this section allowed for submission upon all the evidence only, excluding the results of the HLA test.

A.B. 207 — Stirling
Chapter 1180
Statutes of 1981
Use of Blood Tests to Rebut Paternity Presumption. Evidence Code section 621 conclusively presumes a child born while hus-

band and wife are cohabitating to be the husband's where the husband is not sterile or impotent. This section was amended to allow the mother to rebut this presumption by moving for blood tests within two years of the child's birth if the child's biological father has filed an affidavit acknowledging paternity.

III. TORT LAW

A. Emotional Distress

1. *Recovery For Death of Fetus*

Johnson v. Superior Court, 123 Cal. App. 3d 1002, 177 Cal. Rptr. 63 (2d Dist. 1981). A mother who had sensorily experienced the death of her stillborn fetus could claim emotional distress along with personal injury, according to the court of appeal. The court found that a stillbirth can foreseeably cause emotional injury which would be compensated as part of a mother's medical malpractice claim.

The woman was in labor for twenty-four hours. The attending physician refused to perform a Caesarean, despite the woman's request. The fetus died in the womb.

An action was filed pleading two causes of action: Medical malpractice, and negligent infliction of emotional distress, based upon the fetus' death. A demurrer to the latter cause of action was sustained without leave to amend. The woman appealed.

The court of appeal ordered the trial court to allow the woman to amend her first cause of action for personal injuries to include damages for negligent infliction of emotional distress. The ruling was based on an application of *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), in which the California Supreme Court established a cause of action for emotional distress for a parent witnessing the tortious death of his or her child.

In *Dillon*, the court stated there were several essential elements to a cause of action for negligent infliction of emotional distress: (1) the plaintiff and the victim must be closely related; (2) the plaintiff must be present at the scene of the accident; and (3) the shock to the plaintiff must result from the plaintiff's sensory perception of the injury to the victim. The court of ap-

peal noted that the woman sensorily felt the death of her child and that despite the fetal nature of the child, the woman had a relationship which met the *Dillon* requirement.

The court emphasized the presence of a relationship between the mother and fetus in this case, and the foreseeability that emotional distress will result if the fetus' death is caused by medical malpractice.

B. Duty to Protect From Rape

1. *Landlord's Duty to Protect Tenants Found Where Danger Foreseeable*

Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1st Dist. 1981). Landlords who, despite notice of past criminal activity on their premises, failed to take preventive measures to protect tenants from repeated crimes were held liable for injuries resulting from a rape. The court of appeal held that a landlord has a duty to protect tenants from danger where circumstances make criminal activity likely, and that rape is foreseeable in some instances.

The tenant lived in a building located in a high crime area. The building lobby was accessible only to tenants, but due to a defective front door lock, non-residents could enter. On two prior occasions tenants had been mugged in the building. The victim had personally notified the landlord of unsafe conditions one month before her attack. Despite acknowledging the problem, the landlord failed to take preventative measures. The tenant was raped and robbed in the building's lobby.

The trial court sustained the landlord's demurrer without leave to amend. The court of appeal reversed, applying *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1st Dist. 1977), which held that while common law principles hold a landlord free of a duty to protect tenants, such a duty arises where the landlord has notice of criminal activities taking place upon the property.

Here, the landlords had substantial notice of criminal activity on their property, yet failed to repair door locks and lighting. The court found that the danger of rape, in particular, was fore-

seeable despite the fact the two previous incidents had been robberies. The court noted that rape, like robbery, is a form of assault, and that the landlords had notice of assaults. In addition, the court pointed out that foreseeability does not require identical events, other jurisdictions have held a landlord liable for a first time criminal attack.

2. *Duty of Landlord to Protect Tenant From Rape Not Found*

7735 Hollywood Blvd. Venture v. Superior Court, 116 Cal. App. 3d 901, 172 Cal. Rptr. 528 (2d Dist. 1981), *hearing denied*, July 13, 1981. The court of appeal dismissed a rape victim's cause of action for negligence against her landlord. The landlord's duty to protect the woman against criminal assault was not established. Absent notice of past crimes on the premises, or reason to anticipate crime, a landlord has no duty to protect tenants from harm, said the court.

A woman was raped in her apartment. She sued the landlord, alleging that because the landlord knew a rapist was operating in the general area, his failure to provide adequate lighting to protect tenants against rape was negligence. The trial court had overruled a demurrer. The court of appeal reversed, ordering the trial court to vacate its ruling.

The court of appeal noted that the woman's complaint failed to indicate a crime had previously occured on the property, detail the specific areas where the rapes had occured or support her claim that the landlord had notice of rapes in the area. Under *Totten v. More Oakland Residential Housing, Inc.*, 63 Cal. App. 3d 538, 134 Cal. Rptr. 29 (1976), a landlord is not an insurer of his or her property.

3. *Landlord Not Liable For Tenant's Rape*

Riley v. Marcus, 125 Cal. App. 3d 103, 177 Cal. Rptr. 827 (2d Dist. 1981). The court of appeal held that a landlord is not liable for injuries to a tenant resulting from inadequate protection of the premises absent notice of previous criminal activities on the property, or reason to anticipate such activities.

A woman was raped in her apartment by an intruder who

gained entry because of inadequate security. Louvered windows adjacent to her door made his entry possible. The area around the tenant's apartment was totally dark after 1:30 a.m.

The tenant sued the landlords for negligence, alleging their failure to keep the apartment complex safe resulted in her rape. The tenant appealed the landlord's grant of summary judgment.

In *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977), the court of appeal held that a landlord with notice of previous crimes on the property had an affirmative duty either to warn tenants, or provide necessary security where such incidents were likely to reoccur.

This same duty was found to exist in *Kwaitkowski v. Superior Trading Co.*, 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1st Dist. 1981), based upon similar facts. However, in *7735 Hollywood Boulevard Venture v. Superior Court*, 116 Cal. App. 3d 901, 172 Cal. Rptr. 528 (2d Dist. 1981), *hearing denied*, July 13, 1981, the court found a landlord had no duty to protect tenants.

In this case, there was no evidence of recent or similar crimes on the property. The tenant argued, however, that the landlord had attempted to provide security but had done an inadequate job. Because the landlord had made a representation of safety by providing locks and lights, the tenant argued liability existed for a failure to protect the tenant from attack. However, the court found that locks and lights are not representations of safety.

4. *Rape of Female Security Guard Not Foreseeable*

Wingard v. Safeway Stores, Inc., 123 Cal. App. 3d 37, 176 Cal. Rptr. 320 (3d Dist. 1982). The court of appeal held that an owner/contractor does not have a duty to protect a female security guard from sexual assault. Because no similar criminal assaults had occured on the property, the owner could not have reasonably foreseen this particular type of injury.

Wingard was employed by an agency that had contracted with the owner to protect a warehouse from theft. While on duty in the guardhouse, she was attacked by an intruder and raped. There had been no previous history of violent crimes committed

on the property, only some thefts.

The woman sued the owner and contractor alleging negligence in their failure to secure the premises against intruders. The victim's employer had written the owner asking that the guardhouse be moved.

The trial court dismissed the victim's action and granted summary judgment based upon the absence of a duty on the part of the owner and an extension of the fireman's rule. The fireman's rule prohibits recovery under the theory that a firefighter or police officer voluntarily confronts danger and is compensated accordingly through his or her salary.

The court of appeal affirmed but declined to extend the fireman's rule to security guards. Under *Jamison v. Mark C. Bloome*, 112 Cal. App. 3d 570, 169 Cal. Rptr. 399 (2d Dist. 1980), absence of a prior history of specific criminal activities on the premises precluded a landlord's liability for failure to anticipate that a security guard would be raped, where the only previous criminal activity had been theft.

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Women's Law Forum