

11-1-1988

Stepparent Responsibility for Child Support in California's Community Property System

Mary-Lynne Fisher

Recommended Citation

Mary-Lynne Fisher, *Stepparent Responsibility for Child Support in California's Community Property System*, 22 Loy. L.A. L. Rev. 73 (1988).

Available at: <https://digitalcommons.lmu.edu/llr/vol22/iss1/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

STEPARENT RESPONSIBILITY FOR CHILD SUPPORT IN CALIFORNIA'S COMMUNITY PROPERTY SYSTEM*

*Mary-Lynne Fisher***

TABLE OF CONTENTS

I.	Introduction	74
II.	Child Support Disputes: Circumstances and Causes	77
III.	Governing Statutes	81
	A. Agnos Child Support Standards Act	81
	B. Liability of Marital Property for Debts	84
	C. Earlier Child Support Statutes	87
IV.	Determination of Support Awards	93
	A. Consideration of Current Spouse's Resources Before Agnos.....	93
	1. Impact of Community Earnings	93
	2. Impact of Separate Property	98
	3. Duty to Work to Support Stepchildren.....	103
	B. Post-Agnos Cases	105
	1. Impact of Obligor-Spouse's New Community Income	105
	2. Impact of Custodial Parent's Earning Capacity and Custodial Stepparent's Earnings	110
	C. Practical Problems	113
	1. Motion to Increase Support Following Noncustodial Parent's Remarriage	113
	2. Effect of Noncustodial Parent's Voluntary Support of Stepchildren	116
	3. Exercising Discretion under Agnos Guidelines	120

* Copyright © 1988 by Mary-Lynne Fisher

** Associate Professor of Law and Clinical Director, Loyola Law School, Los Angeles, California; B.A. 1972, University of California, Los Angeles; J.D. 1976, University of California, Los Angeles, School of Law. The author wishes to thank Leanne J. Fisher, Loyola Law School class of 1988, for her research assistance, David W. Meadows, Loyola Law School class of 1988, for his editorial assistance and Liz Luk and Ruth Palmer for preparing the manuscript.

4.	Motion to Require Sale of Family Home Following Custodial Parent's Remarriage.....	126
V.	Stepparent's Liability for Child Support Debts	130
A.	Issues During the Second Marriage	130
B.	Problems Arising at Termination of Stepparent's Marriage	133
1.	Liability for Arrearages	133
2.	Liability for Future Support	139
3.	Reimbursement Claims	140
VI.	Preparing for Stepparenthood.....	142
A.	Use of Premarital Agreements	142
B.	Comparison with Cohabitation	146
C.	Remaining Tensions	147
VII.	Conclusion.....	148

I. INTRODUCTION

The woman sat in her lawyer's office, seething with indignation, fighting back tears. She had hired him to represent her in her divorce almost five years ago. Now, only a few weeks after she had married for the second time, the woman said she did not know which problem to tell him about first. The day after she and her new husband returned from their honeymoon, her new husband's ex-wife served him with a motion to increase child support. The papers did not claim that his daughters' expenses had increased or that his income had risen, which it had not, but claimed that his ability to pay had increased because he had married a woman with a high-paying job.

As part of the divorce settlement in 1983, the woman had received exclusive occupancy of the home for the benefit of her and her ex-husband's two sons. She thought she and the boys could live there until the younger boy turned eighteen, still seven years away. Yesterday, however, the client's ex-husband telephoned to ask when she was planning to put their home on the market. Her ex-husband said his lawyer had told him her remarriage required her to sell the home and divide the proceeds with him. Just before hanging up, her ex-husband announced that his wife was pregnant and planning to quit work, so she, the client, should not expect any increases in her child support from now on. Who, she wondered, was going to support his new wife's other child? His new wife's ex-husband had not paid a dime of child support in years.

She wanted to scream. She had thought her divorce was the worst crisis she would ever have to endure. Now, without any preparation or

forethought, she found herself in the midst of another, even more confusing and stressful legal entanglement. As both a parent and a stepparent,¹ she found she could not see her dilemma in black and white. She did not think she should have to support her stepdaughters. She sympathized with her new husband's ex-wife, however, because she knew how difficult it was for a single mother to raise two children on only her earnings and a typical child support award. She had always felt her ex-husband did not contribute his fair share in time or money to raising their sons, but she had never expected his new wife to contribute. She had, however, been looking forward to the financial advantages her remarriage would bring her sons. In short, she had been assuming their stepfather would contribute to their support. Instead, it seemed she and her new husband were going to get the short end of both sticks: her new husband would be paying more child support if she kept her high-paying job. However, she could not afford to quit her job because she could not count on increased support from her ex-husband, who would soon be the sole support of his wife, stepchild and a new baby.

The lawyer began by noting his client's questions:

- (1) Could she be forced to contribute to her stepdaughters' support?
- (2) Could her ex-husband require her to sell her home?
- (3) Could her ex-husband limit his support payments to her because his wife was having a baby?
- (4) Could her ex-husband limit his support payments to her because he was now the sole support of his stepchild?

1. As used throughout this article, a stepparent is a person who has married someone who has a child or children by a prior marriage or nonmarital relationship. Unless otherwise specified, the term "stepparent" refers equally to the spouse of the parent with whom the child lives and the spouse of the parent with whom the child does not live. The parent with whom the child lives is called the "custodial parent" and his or her spouse is called the "custodial stepparent." The parent with whom the child does not live or with whom the child lives substantially less than half the time is called the "noncustodial parent" and his or her spouse is called the "noncustodial stepparent." The noncustodial parent is obligated by court order or agreement to pay child support to the custodial parent and is therefore frequently referred to as the "obligor-parent."

Not all commentators have applied the term stepparent to the noncustodial parent's spouse. See Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 38-39 (1984), which defines "step family" as a "household consisting of a married couple and children who are the natural or adopted children of only one spouse." Such a definition would include both parents' new spouses within the term "stepparent" only in joint custody situations. For the purpose of analyzing stepparent support obligations during marriage, this definition is inadequate. The parent's spouse most acutely aware of (usually) her support obligation is the noncustodial parent's spouse who witnesses money regularly flowing from her household to that of her husband's ex-wife.

(5) Was there anything she and her new husband could do to protect themselves from this double onslaught and secure their financial future?

These questions are not easily answered in California despite the fact that the laws determining stepparent responsibility for child support and other incidents of divorce and remarriage are much more specific and detailed than in other states. An attorney advising clients would need to research recently adopted legislation prescribing the apportionment of basic and supplemental child support obligations between parents² and statutes regulating spouses' liability for each other's debts.³ But that would just be the beginning. California has also recently adopted new legislation regarding premarital agreements.⁴ Statutes directing the courts' discretion in the division of community property, such as the family home,⁵ and those dealing with property exempt from enforcement of money judgments⁶ are also pertinent. Finally, an attorney would need to review cases decided prior to the adoption of the new legislation to determine their current force and analyze the few cases decided under the new legislation. After all this study a lawyer might still be unable to answer his or her client's questions with a high degree of certainty, concluding either that the law has not clearly anticipated the client's situation or has deliberately left the decision to the discretion of trial courts.

This Article first describes the circumstances surrounding and the causes underlying continuing child support disputes. Part III sets forth the primary code sections which govern determination of child support obligations where one of the parents has remarried, and those governing the allocation of responsibility for the payments between the parent and his or her new spouse.

Part IV discusses the determination of support awards under existing and prior law and recommends modifications to clarify and strengthen the law. Part V analyzes stepparents' liability for child support during and following the stepparents' marriages. Part V also suggests amendments to resolve inconsistencies in the statutes.

Finally, Part VI discusses current California law regarding the va-

2. Agnos Child Support Standards Act of 1984, CAL. CIV. CODE §§ 4720-4732 (West Supp. 1988).

3. CAL. CIV. CODE §§ 5120.110, 5120.150, 5120.210, 5120.320 (West Supp. 1988).

4. Uniform Premarital Agreement Act, CAL. CIV. CODE §§ 5300-5317 (West Supp. 1988).

5. CAL. CIV. CODE § 4800.7 (West 1987).

6. CAL. CIV. PROC. CODE § 695.020 (West Supp. 1988).

lidity and effectiveness of premarital agreements concerning responsibility for support of either spouse's children and compares the situations of spouses with and without premarital agreements to similarly situated cohabitators.

II. CHILD SUPPORT DISPUTES: CIRCUMSTANCES AND CAUSES

Child support disputes between remarried parents typically revolve around a request that child support payments be raised or lowered. The argument is that remarriage, bringing with it additional income from the new spouse, additional dependents, increased living expenses or a custodial parent's return to full-time homemaking, has resulted in changed circumstances,⁷ justifying a change in the award level.

There are two primary causes of continuing child support disputes between remarried parents: (1) abysmally low levels of child support awarded custodial parents at divorce; and (2) the parents' unrealistic desire to recreate the traditional nuclear family in the second marriage.

Extremely low child support awards have been perpetuated by the legal system and are only now being recognized as a significant factor in child support disputes. Support awards to custodial parents at divorce—usually mothers who earn substantially less than their children's father—have historically been grossly inadequate. Awards have failed the test of equity in three major respects. First, the typical award has been inadequate to rear children at a level above the poverty level.⁸ Cost calculations have frequently omitted the cost of child care, resulting in awards that are less than child care costs alone.⁹ Secondly, most awards are structured so that the higher earning noncustodial parent can maintain his¹⁰ pre-divorce standard of living while the custodial mother and chil-

7. Once made, support orders are modifiable only upon a showing of changed circumstances since the original order. CAL. CIV. CODE § 4700(a) (West Supp. 1988).

8. L. WEITZMAN, *THE DIVORCE REVOLUTION 271-72* (1985); R. HASKINS, *ESTIMATES OF NATIONAL CHILD SUPPORT COLLECTIONS POTENTIAL AND THE INCOME SECURITY OF FEMALE-HEADED FAMILIES*, REPORT TO THE OFFICE OF CHILD SUPPORT ENFORCEMENT, BUSH INSTITUTE FOR CHILD AND FAMILY POLICY, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (1985).

9. L. WEITZMAN, *supra* note 8, at 271-72.

10. Male pronouns are used to describe noncustodial, obligor parents. Feminine pronouns are used here and many places throughout this article for the custodial parent in order to recognize and emphasize the demographic reality that most custodial parents are women, and therefore, most noncustodial stepparents are also women. Federal Census data shows that in 1985, 90 percent of children in single parent homes were living with their mothers. A survey of Los Angeles County Superior Court cases in 1985 showed that mothers had sole physical custody in 85 percent of the cases, fathers had sole physical custody in 6 percent of the cases, and the parents shared physical custody in 6 percent of the cases. SENATE TASK FORCE ON

dren's standard of living plummets.¹¹ Finally, most orders have not equitably apportioned the costs of rearing the children. The lower earning custodial mother has been forced to devote a significantly higher percentage of her earnings to her children's needs than has their noncustodial father.¹² In light of these findings, it is not difficult to understand how custodial mothers see remarriage, either their ex-husband's or their own, as an opportunity to improve their children's standard of living. Because the noncustodial father is statistically likely to remarry a few years sooner than the custodial mother,¹³ it is his remarriage that creates the first post-divorce support crisis.

The Agnos Act, enacted by the California state legislature to remedy this situation, requires mandatory minimum support awards.¹⁴ Adequate support awards, which means adequate to support the children at the pre-divorce standard or, if that is impossible, adequate to support all family members at the same standard of living, will reduce the custodial mother's incentive to use the noncustodial father's remarriage to an employed woman as grounds to seek increased support. From the noncustodial father's perspective, having to pay realistic child support will prevent him from deluding himself that he can also support his second wife as a homemaker simply because his co-workers who are still in their first marriages are able to support unemployed wives. Finally, from the perspective of the future stepmother, knowing the amount of income her suitor has left after paying adequate support will allow her to form more realistic expectations of her standard of living if she marries a noncustodial father.

The second cause of continuing child support disputes is the unrealistic desire of each parent, particularly the custodial parent, to recreate the traditional nuclear family in the second marriage. In the case of the custodian's remarriage, this desire leads her or him to promote strong affectional ties between the children and the new spouse. The new family's group activities are emphasized, to the exclusion of the noncustodial parent, often interfering with the other parent's scheduled time with the children. In the case of the non-custodial parent's remarriage, this desire

FAMILY EQUITY, FINAL REPORT, June 1987, VII-1. The laws determining support liability are gender-neutral.

11. L. WEITZMAN, *supra* note 8, at 274-75.

12. L. WEITZMAN, *supra* note 8, at 277-78.

13. VITAL STATISTICS OF THE UNITED STATES 1982, VOL. 3 "MARRIAGE AND DIVORCE," U.S. DEPT. OF HEALTH & HUMAN SERVICES, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS 1-34 (1986).

14. Agnos Child Support Standards Act of 1984, CAL. CIV. CODE §§ 4720-4732 (West Supp. 1988).

often appears in the expectation that the wife will be a full-time homemaker, as was the case during the first marriage. The legal system certainly did not create the second cause, but neither has it done all it might to cure it.

Just as the noncustodial parent's remarriage is likely to create the first post-divorce support crisis, the custodial parent's remarriage is likely to create the second. From a financial point of view, if a custodial mother used her ex-husband's remarriage to gain a substantial increase in support, she can expect turnabout to be considered fairplay. Even if she did not seek an increase when her ex-husband remarried, or if she remarried first, she may experience difficulty collecting support after her remarriage. Studies show that noncustodial fathers often feel justified in decreasing support after the mother's remarriage.¹⁵ But even if the parents avoid problems at the outset of either's remarriage, they may encounter them as a second marriage matures.

Professionals working with stepfamilies have observed custodial mothers' attempts to recreate nuclear families and have described the problems it causes, while failing to appreciate its impact on child support disputes.¹⁶ Although the studies of stepfamilies have focused on remarried custodial mothers, there is no reason to assume that custodial fathers, which include fathers with joint custody, will act differently than custodial mothers. One author betrays an unarticulated bias in favor of a new nuclear family of mother, stepfather, her children and possibly their children.¹⁷ It is this unconscious equation of "family" with "household" that perpetuates the denial of children's ties with noncustodial parents. The pain caused by this denial frequently surfaces in the form of child support disputes.

Other writers have discerned the problem of the disregarded noncustodial parent, recognizing that the spouse of either parent is a stepparent. Not all stepparents, however, welcome this relationship.¹⁸ Those

15. Tropf, *An Exploratory Examination of the Effect of Remarriage on Child Support and Personal Contacts*, 7 J. OF DIVORCE 57, 64, 69 (1984); cf. Wallerstein & Corbin, *Father-Child Relationships After Divorce: Child Support and Education Opportunity*, 20 FAM. L. Q. 109, 115 (1986), which found that fathers' child support diminished when the mothers' economic circumstances improved significantly, although decreases in support were not related directly to either parent's marriage. Stepchildren in the father's new marriage and children born to the new marriage significantly diminished child support to children of the first marriage.

16. Fast & Cain, *The Stepparent Role: Potential for Disturbances in Family Functioning*, 36 AM. J. OF ORTHOPSYCHIATRY 485, 488 (1966). Fast & Cain note this tendency to reproduce the nuclear family and consider it doomed to failure.

17. L. DUBERMAN, *THE RECONSTITUTED FAMILY* 8 (1975).

18. E. VISHER AND J. VISHER, *STEPFAMILIES: A GUIDE TO WORKING WITH STEPPARENTS AND STEPCHILDREN* xviii, 15-16 (1979).

who have studied both stepfathers and stepmothers have found that stepmothers have far less satisfactory relationships with their stepchildren than stepfathers.¹⁹ Stepchildrens' attitudes reflect their elders' feelings: they report less affection for stepmothers than stepfathers.²⁰ Dissatisfaction with relationships can be expected to spill onto child support issues.

The custodial parent whose fantasy of a new nuclear family leads him or her to act in a way that disrupts the children's relationship with their other parent and stepparent needs to learn the connection between such conduct and child support disputes. A parent whose visitation plans must constantly take a backseat to the custodial family's outings, who hears his children call her new husband "Daddy" while they call his new wife by her first name, and who finds his children have started using their stepfather's name at school will be sorely tempted to skip child support payments. This is especially true if he has children from his new marriage²¹ or even stepchildren who look on him as "Daddy." A stepparent who feels her stepchildren's mother is encouraging them to mistreat her is unlikely to object when her spouse misses child support payments.

Generally speaking, lawyers are not adequately trained to recognize the psychological stresses remarriage produces in their clients. They have a tendency to diagnose the problems in terms of the legal issues presented. Many family lawyers do make referrals to therapists when they find that legal remedies do not satisfy their clients. Such referrals may come too late or be triggered as much by the lawyer's frustration in dealing with a difficult client as by the recognition that unresolved tensions over parenting roles and different definitions of "family" may be preventing resolution of financial issues.

Lawyers who cannot make their clients see these destructive patterns of behavior should refer them to family counselors. Many such problems could be prevented by premarital mediation with lawyers and therapists before the second marriage takes place.²² If that additional expense seems beyond their clients' means, lawyers can refer them to the Conciliation Court mediators.²³ Although legislation currently limits the jurisdiction of the Conciliation Court to custody and visitation dis-

19. Bowerman & Irish, *Some Relationships of Stepchildren to Their Parents*, in MARRIAGE & FAMILY IN THE MODERN WORLD 580 (1969).

20. *Id.*

21. Wallerstein & Corbin, *supra* note 15.

22. Fisher & McFadden, *Premarital and Remarital Mediation: Complementary Roles for Lawyers and Therapists*, 24 J. FAM. L. 451 (1985-86).

23. CAL. CIV. CODE § 4607 (West Supp. 1988).

putes,²⁴ what looks at first glance like a child support dispute may actually be a parenting dispute in disguise. If necessary, the Conciliation Court's jurisdiction should be expanded to include post-divorce child support disputes.

III. GOVERNING STATUTES

Two recent legislative enactments deal with distinct but intertwined aspects of the issue of stepparent responsibility for child support. The Agnos Act addresses the issue of whose income can or should be considered in determining the amount of child support that a noncustodial parent pays.²⁵ The debt liability legislation controls whose income and property is to be used, voluntarily or involuntarily, to meet child support obligations.²⁶ The debt liability statute explicitly recognizes that income and property that is not legally liable for the support obligation may be considered in determining the amount of that obligation. This position is a logical result of the Agnos Act's linking the support obligation to a parent's circumstances and station in life, but it precludes a simple answer to the stepparent's question whether she or he is obliged to support a spouse's child. While neither statute imposes personal liability for support obligations on a stepparent, both statutes clearly envision the possibility of adverse economic consequences to the stepparent because of her or his spouse's prior obligation.

A. *Agnos Child Support Standards Act*

Reacting to well-documented findings that child support awards to custodial parents were grossly inadequate and lacking in uniformity,²⁷ the legislature passed the Agnos Act, effective July 1, 1985.²⁸ The Act's principal purpose was to create fair and uniform standards for determining child support awards. In its findings and declaration of intent, the legislature recognized that:

A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life. . . . [A] parent's circumstances and station in life are dependent upon a variety of factors, including his or her

24. *Id.*

25. Agnos Child Support Standards Act of 1984, CAL. CIV. CODE §§ 4720-4732 (West Supp. 1988).

26. CAL. CIV. CODE §§ 5120.110, 5120.150, 5120.210, 5120.320 (West Supp. 1988).

27. See generally L. WEITZMAN, *supra* note 8.

28. Agnos Child Support Standards Act of 1984, CAL. CIV. CODE §§ 4720-4732 (West Supp. 1988).

earned and unearned income; earning capacity; assets; and *the income of his or her subsequent spouse or nonmarital partner, to the extent that the obligated parent's basic living expenses are met by the spouse or other person, thus increasing the parent's disposable income and therefore his or her ability to pay more than the mandatory minimum child support award established by this chapter.*²⁹

The Act requires minimum support payments based on a percentage of both parents' combined income.³⁰ Its aim is to ensure that all children receive support at least at the level provided by welfare benefits.³¹ Where the parents' resources are sufficient, courts are urged to make supplemental support awards based on county guidelines. The courts are to follow criteria set forth in "applicable statutes, relevant case law, and state and local guidelines, so long as they are not in conflict with" the Act.³²

In determining parents' ability to pay the minimum child support award, courts are not to consider stepparents' earnings or separate property income.³³ They are directed to consider, however, the total number of children each parent is legally obligated to support.³⁴ The minimum award is intended to cover basic living expenses, including food, shelter, and clothing.³⁵

If either parent requests it, the court is urged to make higher awards to cover "[c]hild care expenses, special education expenses, expenses for special medical, dental, or mental health needs, and expenses related to any other special needs."³⁶ It is in determining the parent's ability to pay

29. CAL. CIV. CODE § 4720(e) (emphasis added). The Act's public policy pronouncement that parents have a responsibility to support their minor children "according to the parent's circumstances and station in life" is merely a codification of the American common law rule of child support, which contrary to the older English rule, requires parents to provide their children with more than the basic necessities of life. H. KRAUSE, *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 822-83, 887 (2d. ed. 1983); Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49, 49-51 (1982). American courts have, at least in theory, asked the proper question in child support proceedings: What amount of his income should this noncustodial parent be required to devote to his children?

30. CAL. CIV. CODE § 4722 (West Supp. 1988).

31. CAL. WELF. & INST. CODE §§ 11452-11453 (West Supp. 1988); CAL. CIV. CODE § 4720(d) (West Supp. 1988).

32. CAL. CIV. CODE §§ 4720(d), 4724(a).

33. *Id.* § 4721(e). "[t]he court shall not include any portion of the earned income and income derived from the separate property of the current spouse or nonmarital partner of either parent." *Id.*

34. *Id.* § 4721(f). "The court shall inquire of each party as to the total number of minor children he or she is legally obligated to support." *Id.*

35. *Id.* § 4723.

36. *Id.*

a supplemental award that the new spouse or non-marital partner's income may be considered.³⁷

Why the legislature decided to allow consideration of a stepparent's resources only in determining supplemental awards is unclear. Prior to the Agnos Act, child support statutes did not divide awards into mandatory and discretionary components. One logical explanation is that the legislature, which was striving to increase child support levels, did not want to dilute parental responsibility by imposing on stepparents a mandatory obligation to contribute to their stepchildren's basic needs. At first glance, one might assume that imposing a mandatory obligation would increase child support payments because more adults would be legally obligated to support the child. In many cases, however, just the opposite would result. Since most stepparents are also parents, their support payments would be divided among more children. Divorced fathers are more likely to remarry than divorced mothers and to remarry sooner than their ex-wives who do remarry.³⁸ Remarried fathers are also more likely to be supporting wives who are caring for children from prior marriages. Allowing fathers to reduce their payments to their own children because they must also support their stepchildren would lower the payments received by children whose mothers had yet to or would never remarry.

Another possible explanation for the legislature's decision is judicial efficiency. In many lower and lower-middle income families, remarriage does not significantly improve a divorced parent's standard of living because the new spouse's net earnings are barely sufficient to cover his or her own living expenses. This is equally true of the low-earning stepmother and the moderate-earning stepfather who is paying reasonable support to his own children. In such cases the noncustodial parent's entire support obligation can be simply calculated by use of the mandatory minimum formula.³⁹ The resulting payment will probably be higher than the pre-Agnos award. This will satisfy the custodial parent, who will therefore not request a supplemental award. The court will not be required to devote time to deciding the perplexing issue of whether a stepparent's resources are reducing the parent's basic living expenses, which is a threshold finding before the stepparent's resources may be considered.

37. *Id.* § 4720(e).

38. U.S. BUREAU OF CENSUS, NUMBER, TIMING AND DURATION OF MARRIAGES AND DIVORCES IN THE UNITED STATES: JUNE 1975 CURRENT POPULATION REPORTS, SERIES P-20 No. 297 (1976).

39. *See supra* text accompanying note 30.

Whatever the reasons for the legislature's decision, exactly how a court is to consider the stepparent's income, other than by resorting to "applicable statutes, relevant case law, and state and local guidelines"⁴⁰ is not specified. Are the courts, for example, to consider only the income of the noncustodial parent's spouse? If one focuses on the language "ability to pay more than the mandatory minimum child support award,"⁴¹ it would seem that the legislature was focusing primarily on the noncustodial parent and his new partner.⁴² But such a conclusion would be premature. What the Agnos Act clearly does is remove any doubt that courts may consider stepparents' income in determining supplemental child support obligations.

B. *Liability of Marital Property for Debts*

Actually, as of January 1, 1985, six months before the effective date of the Agnos Act, little doubt existed that courts could consider stepparents' income, at least in some circumstances.⁴³ Part of the new legislation clarifying the liability of community property for either spouse's spousal and child support debts specifically disclaimed any intention to limit courts' authority to consider any relevant factors, including stepparents' earnings, in making support awards.⁴⁴

40. CAL. CIV. CODE § 4724(a).

41. *Id.* § 4720(e).

42. One recent decision construed Section 4720(e) to refer only to the noncustodial parent's spouse. *In re Marriage of Bailey*, 198 Cal. App. 3d 505, 509-10, 243 Cal. Rptr. 776, 779 (1988). The court's interpretation was not essential to the holding since only a mandatory minimum award was at issue. The noncustodial mother argued that her ex-husband's current wife's income should have been considered. The court of appeal should have answered that claim solely by reference to Section 4721(e), which specifically excludes either parent's new partner's income in calculating the mandatory minimum award.

43. CAL. CIV. CODE § 199 (repealed 1985).

44. CAL. CIV. CODE § 5120.150(c). "[N]othing in this section limits the matters a court may take into consideration in determining or modifying the amount of a support order, including, but not limited to, the earnings of the spouses of the parties." *Id.* (emphasis added). The code sections defining stepparent liability for child support were based on a recommendation of the California Law Revision Commission. *Recommendation Relating to Liability of Stepparent for Child Support*, 17 CAL. L. REVISION COMM'N REP. 251, 256 (1984) [hereinafter *Recommendations*]. After noting the confusing state of the law, the Commission stated:

The liability of the earnings of a stepparent for a child support obligation of the parent should be dealt with clearly and directly. A child to whom the parent owes an obligation of support should be in at least as good a position as a general creditor. This means that in the case of remarriage of the parent, the child should be permitted to enforce the support obligation not only against the separate property of the parent but also against all community property of the subsequent marriage except the earnings of the stepparent. To permit the child support obligation to be enforced against the earnings of the stepparent is not only unfair to the stepparent but will also impede remarriage of persons with child support obligations. The increased liability of the community created by the remarriage of the parent is sufficient protection for the

The debt liability legislation is significant in several other respects. First, it reversed prior case law classifying spousal and child support obligations as post-marital debts.⁴⁵ A debt for support of a spouse or child that does not arise out of the debtor's current marriage shall be treated as a debt incurred before the marriage, regardless of whether the support order was made or modified before or during the current marriage.⁴⁶ The effect of this reclassification is to insulate the stepparent's earnings from liability for the child support debt. The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage.⁴⁷

Second, the legislation clarified and extended the definition of "earnings" that are protected from the other spouse's premarital creditors. After payment, the earnings remain not liable as long as they are held in a deposit account in which the debtor spouse has no right of withdrawal and are uncommingled with other community property, except property of insignificant amounts.⁴⁸ This means that the stepparent can either consume her earnings or bank them for future needs. Her future earnings cannot be garnished to satisfy a judgment for her husband's unpaid child support.⁴⁹ Once she invests her community property earnings in some other form of nonexempt property, however, these earnings can be used to satisfy her spouse's premarital debts under the general rule that allows premarital creditors to reach the separate property of the debtor spouse and all nonexempt community property except the other spouse's earnings.⁵⁰

Third, the legislation created a right of reimbursement in the new

child. However, the earnings of the stepparent should be taken into account in setting the amount of the child support obligation, in recognition of the fact that the parent's ability to pay may be affected by the earnings of the stepparent.

Id. Prior to making its official recommendation, the Commission rejected an earlier recommendation which stated:

In addition, because a support obligation deserves special treatment, the child or former spouse should also be able to obtain a court order to reach the earnings of the nonobligor spouse where there is no other property reasonably available to satisfy the obligation and to do so appears equitable. This additional liability is consistent with the rule that the earnings of the nonobligor spouse may be taken into account in setting the amount of the support obligation.

Staff Draft No. D-312, Recommendation Relating to Liability of Marital Property for Debts 10 (Dec. 1, 1982). Such an argument is obviously bootstrapping and was correctly abandoned.

45. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

46. CAL. CIV. CODE § 5120.150(a) (West Supp. 1988).

47. *Id.* § 5120.110(b).

48. *Id.*

49. *Id.* § 5120.110(b) and 5120.150(a); *Recommendations, supra* note 44.

50. CAL. CIV. CODE § 5120.110(a) (West Supp. 1988).

community if the debtor parent uses community property, including his or her own earnings, to pay child support obligations at a time when his or her nonexempt separate property income is available.⁵¹ The measure of reimbursement is the value of the property at the time the right arises.⁵² The right must be exercised within three years of the time the stepparent gains actual knowledge of the application of the property to pay the debt or in proceedings for division of the community property at dissolution or death of a spouse, whichever comes first.⁵³ This means that a parent must pay child support obligations first from the income of his or her separate property, if any, in order to conserve the community property for the benefit of the current marriage partners. If he or she fails to do so, the stepparent may bring an action for reimbursement for the benefit of the community.

The first two changes in the liability for debt statute clarify a stepparent's rights when he or she is married to a noncustodial parent who is under a support order. The final change, however, is applicable to all stepparents, whether they are spouses of custodial or noncustodial parents. The language "child support obligations"⁵⁴ is equally applicable to a noncustodial parent who sends a support check each month and a custodial parent who pays her children's expenses. Thus a remarried custodial parent who pays her children's bills from her community earnings while banking her ex-husband's support checks may be in for a shock if her second marriage ends in divorce. She may have chosen to save the support payments towards the children's college expenses. She is not required to support her children past the age of nineteen or high school graduation, whichever comes first.⁵⁵ Many noncustodial parents fail to contribute to their children's college education, despite promises made at the time of the divorce.⁵⁶ Relative to the second marriage, the checks constitute a source of separate property income,⁵⁷ which she is supposed to use for the children's support. If her new husband has not waived his reimbursement rights, she will be required to reimburse the dissolving community up to the amount of separate property income.

Lawyers and judges interpreting both new statutes are faced with the common question: whether the new statutes conflict with and therefore overrule prior case law or whether the statutes are not in direct con-

51. *Id.* § 5120.150(b).

52. *Id.* § 5120.210(b).

53. *Id.* § 5120.210(c).

54. *Id.* § 5120.150(b).

55. *Id.* § 196.5.

56. Wallerstein & Corbin, *supra* note 15, at 110-11.

57. CAL. CIV. CODE § 5107 (West 1983).

flict with the cases and can be harmonized. This question is particularly vexing in interpreting the Agnos Act. It specifically directs courts to follow case law not in conflict with the Act in exercising discretion whether to consider stepparent resources in setting supplemental awards. To resolve cases under the new statutes, lawyers and judges must be familiar with repealed statutes. This will allow them to decide whether the repealed statutes conflict with the current ones and therefore whether cases decided pursuant to those statutes are still good law. It is therefore necessary to examine the repealed statutes and prior case law.

C. *Earlier Child Support Statutes*

Before the adoption of the current statutes described above, stepparent responsibility was even more uncertain than it is now. Civil Code section 209,⁵⁸ originally enacted in 1872, specifically provided that a stepparent was not obligated to support his or her spouse's children unless the stepparent, having accepted the children into the family, acted *in loco parentis*. This statute exempted all stepparents from personal liability for child support except those who, because of a natural parent's death or desertion, established a parent-child relationship.⁵⁹ Civil Code section 199, which became effective January 1, 1975, provided that the obligation of a divorced father or mother to support his or her child from a prior marriage could be satisfied only from the parent's earnings or separate property.⁶⁰ This statute marked the low point in protection for children of remarried parents. It effectively insulated not only the stepparent's earnings, but all community property acquired through either spouse's efforts. In other words, it placed children seeking to enforce child support orders in a weaker position than general creditors who had sold goods or services to the noncustodial parent and who could reach the accumulated community property.

Adding to the uncertainty, case law effectively classified child support obligations as post-marital debts because they became due periodically during the remarriage and were modifiable based on changed

58. CAL. CIV. CODE § 209 (repealed 1980). The community property interest of a natural or adoptive parent in the income of his or her spouse shall be considered unconditionally available for the care and support of any child who resides with the child's natural or adoptive parent who is married to such spouse. The amount arising from such duty to care for and support shall be reduced by the amount of any existing previously court ordered child support obligations of such spouse.

59. CAL. CIV. CODE § 209 (repealed 1980). *See also* Estate of Teddy, 214 Cal. App. 2d 113, 118, 29 Cal. Rptr. 402, 405 (1963).

60. CAL. CIV. CODE § 199 (repealed 1985).

circumstances during the remarriage.⁶¹ Until 1975 all community property of the new marriage was liable for the husband's post-marital debts; since 1975 all community property has been liable for either spouse's post-marital debts.⁶²

Neither section 209 nor 199 addressed the issue of consideration of a stepparent's resources in determining child support awards. While section 209 appeared neutral on the subject, section 199 reflected a view that stepparent resources were not appropriate considerations in deciding support awards. What pre-Agnos statutory support existed for considering stepparent resources was found in Civil Code section 4807, which provides that community property, quasi-community property and separate property may be subjected to the child support obligation.⁶³ But this section, found in the title defining divorcing parents' property rights,⁶⁴ does not unambiguously refer to the community property of a later marriage.

Such lack of explicit direction is hardly surprising considering that, when the statutes were adopted, fewer divorced fathers had custody of their children and fewer married women were in the work force. Thus, fewer men sought child support from remarried ex-wives who were being supported as homemakers by their current husbands and fewer women sought increased child support based on their ex-husbands' new wives' salaries. However, changes in custody patterns and, even more so, changes in married women's work force participation in recent years have substantially increased the number of cases where stepparent income can be expected to figure in the child support calculation.

Stepparent resources first became a troublesome issue in the early 1970's as California attempted to comply with federal requirements for state participation in the Aid to Families with Dependent Children (AFDC) program⁶⁵ without substantially revising its law regarding stepparent responsibility. Through much of its history, the federal AFDC program took the position that in calculating eligibility for benefits, states could consider the earnings of a custodial stepparent only where state law imposed a general support obligation on all stepparents.⁶⁶ State reg-

61. *Weinberg v. Weinberg*, 67 Cal. 2d 557, 563, 432 P.2d 709, 712, 63 Cal. Rptr. 13, 16 (1967); *In re Marriage of Smaltz*, 82 Cal. App. 3d 568, 570, 147 Cal. Rptr. 154, 155 (1978).

62. Prager, *The Persistence of Separate Property Concepts in California's Community Property System 1849-1975*, 24 UCLA L. REV. 1, 64-65 (1976).

63. CAL. CIV. CODE § 4807 (West 1983).

64. CAL. CIV. CODE §§ 4800-4813 (West 1983).

65. Social Security Act §§ 1, 401, 402, 42 U.S.C. §§ 301, 601, 602 (1982).

66. Coverage and Conditions of Eligibility in Financial Assistance Programs, 45 C.F.R. § 233.90(a) (1986).

ulations for determining eligibility had to comply with federal AFDC regulations.⁶⁷ States had two choices: (1) they could enact laws making all stepparents, whether custodial or noncustodial and whether or not the custodial parent was a welfare recipient, personally liable to support their stepchildren, at least during the existence of the marriage; or (2) they could forego consideration of a custodial stepparent's income in determining eligibility for benefits.

Some states passed statutes imposing liability on all stepparents.⁶⁸ However, the states which did not pass appropriate statutes were in a bind. If the states persisted in considering the income of custodial stepparents without proper state legislative authority, they risked the loss of substantial federal benefits. Conversely, if the states failed to consider custodial stepparent income, they were required to expend taxpayers' funds to supplement benefits to a large number of families,⁶⁹ many of whom were not "needy" in the politically acceptable sense.⁷⁰

California attempted to extricate itself from this bind by creative use of its community property laws. In 1971, at a time when California law gave the husband management and control of all community property except the wife's uncommingled earnings,⁷¹ the legislature adopted Civil Code section 5127.5, which provided in relevant part:

The wife's interest in the community property, including the earnings of her husband, is liable for the support of her children to whom the duty of support is owed, provided that for the purposes of this section, prior support liability of the husband plus three hundred dollars (\$300) gross monthly income shall first be excluded in determining the wife's interest in the community property earnings of her husband.⁷²

In *Camp v. Swoap*, welfare recipients successfully challenged regulations implementing this section.⁷³ The State of California argued that section 5127.5 complied with federal guidelines because it afforded a basis for attributing a wife's community interest in her husband's earnings

67. *King v. Smith*, 392 U.S. 309, 316 (1968); *Camp v. Swoap*, 94 Cal. App. 3d 733, 743, 156 Cal. Rptr. 600, 606 (1979).

68. See, e.g., N.H. REV. STAT. ANN. § 546-A:2 (1974); UTAH CODE ANN. § 78-45-4.1 (1987).

69. Approximately 24,000 families were affected by the regulations adopted to implement CAL. CIV. CODE § 5127.5. *Camp*, 94 Cal. App. 3d at 737, 156 Cal. Rptr. at 602.

70. Zumbun, Momboisse & Findley, *Welfare Reform: California Meets the Challenge*, 4 PAC. L.J. 739, 778-79 (1973).

71. Prager, *supra* note 62, at 64-65.

72. CAL. CIV. CODE § 5127.5 (repealed 1985).

73. 94 Cal. App. 3d 733, 747, 156 Cal. Rptr. 600, 609.

to the support of her children by a prior relationship.⁷⁴ The court rejected this argument, construing federal regulations to bar consideration of the wife's community interest in her husband's earnings absent proof that her husband actually made his earnings available to her to support her children.⁷⁵ The state argued in vain that it was a relatively simple matter for a stepfather/husband and his wife to arrange their bank, credit accounts and other resources in such a way as to prevent a finding that the stepfather's earnings were available to his wife for the support of her children.⁷⁶

The *Camp* decision failed to discuss the obvious point that the wife's ownership interest in her husband's community earnings, especially in his accumulated as opposed to prospective earnings, together with the management rights afforded by section 5127.5, formed an independent basis for considering the funds available to the children. Analytically, it was the wife's property, not merely the husband's earnings, that was being considered in determining the children's eligibility. Had the appellate court considered the wife's ownership interest, it might very well have concluded that, in the context of supporting her children, her community rights in her husband's earnings were illusory. She had no practical power to force him to make half his earnings available to her, such as by deposit in a joint bank checking account.⁷⁷ She had no practical power to purchase goods and services on her husband's credit because creditors routinely refused to extend credit to married women without their husbands' signatures.⁷⁸ Doubtless section 5127.5 was intended to provide her with such a power, but in the absence of the equal credit legislation that was enacted a few years later, it was ineffective.⁷⁹ While she had the ostensible power to purchase necessities of life for herself and the children of her current marriage on her husband's credit, this power probably did not extend to her children by a prior relationship.⁸⁰

74. *Id.* at 741, 156 Cal. Rptr. at 605.

75. *Id.* at 741-42, 156 Cal. Rptr. at 605.

76. *Id.* at 746 n.6, 156 Cal. Rptr. at 604-05 n.6. Under the terms of an injunction issued by the trial court, welfare officials could have found that a stepfather's earnings were available for the support of his wife's children if his earnings were placed in a joint bank account with her, used to provide certain necessities for the stepchildren or subject to liability on a credit account available for his wife's use. *Id.* at 737 n.4, 156 Cal. Rptr. at 602 n.4.

77. See newly enacted CAL. CIV. CODE § 5125.1 (West Supp. 1988), which first established such a right as of July 1, 1987.

78. Prager, *supra* note 62, at 69 n.335.

79. CAL. CIV. CODE § 1812.30 (West 1985); Equal Credit Opportunity Act, 15 U.S.C. § 1691-1691e; Federal Reserve System Regulation, 12 C.F.R. § 202.7 (1987); *cf.* United States v. ITT Consumer Financial Corp., 816 F.2d 487 (9th Cir. 1987).

80. CAL. CIV. CODE §§ 5121, 5132 (West 1983).

Shortly after the appellate court rendered section 5127.5 ineffective, the legislature adopted Civil Code section 5127.6, which provided that a custodial parent's community property interest in his or her spouse's earnings would be considered unconditionally available for the support of that parent's children.⁸¹ At the same time it adopted section 5127.6, the legislature repealed Civil Code section 209.⁸² The *in loco parentis* statute failed to meet federal guidelines as a general support obligation law because it clearly did not apply to noncustodial stepparents and actually applied to only a small portion of custodial stepparents.

Once again, welfare recipients challenged state welfare department regulations implementing the legislation. In *Wood v. Woods*,⁸³ the court of appeal was certain that the determinative legal support obligation it had to focus on was that between the custodial stepparent and the stepchild, rather than on any obligation between the spouses or between the natural parent and his or her child.⁸⁴ While the court found the statutory language difficult to interpret, it concluded that the language imposed either an increased support obligation between parent and child or between spouses, but did not impose a support obligation between stepparents and unadopted stepchildren.⁸⁵ Essentially, the court of appeal decided that section 5127.6 had no impact on determining welfare eligibility because it failed to impose a personal support obligation on stepparents. Despite this failure, the new statute affected family law cases by requiring consideration of the stepparent's income in child support disputes between remarried parents.⁸⁶

Ironically, the welfare recipients' victory was hollow. In a reversal of long-standing policy, Congress adopted the Omnibus Budget Reconciliation Act of 1981.⁸⁷ The Act mandated state consideration of custodial stepparents' income in determining eligibility for AFDC regardless of any state support obligation.⁸⁸ Sections 5127.5 and 5127.6 remained on the books in California, however, and their presence complicated determination of child support obligations in non-welfare cases between remarried parents,⁸⁹ despite judicial protests that attorneys routinely

81. See *supra* text accompanying note 58.

82. CAL. CIV. CODE § 5127.6 (repealed 1985).

83. 133 Cal. App. 3d 954, 184 Cal. Rptr. 471 (1982).

84. *Id.* at 963, 184 Cal. Rptr. at 476.

85. *Id.* at 967, 184 Cal. Rptr. at 478.

86. *Id.* (citing Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 SAN DIEGO L. REV. 143, 204-06 (1981)).

87. Social Security Act § 402(a)(31), 42 U.S.C. § 602 (1982).

88. *Id.*

89. For criticism of former §§ 5127.5 and 5127.6, see Bruch, *Management Powers and*

ignored the sections.⁹⁰

How do the current statutes governing liability for support debts and the determination of support awards differ from their predecessors? First, Civil Code section 5120.150(a), which renders all community property except the stepparent's uncommingled earnings liable for support debts, clearly contradicts repealed Civil Code sections 199 and 5127.5. Section 199 provided that only the parent's earnings and separate property were liable. Section 5127.5 stated that the wife's half-interest in her husband's community earnings was liable, impliedly exempting the stepparent's half of the community property. Thus, in enforcement disputes, the principle issue in the future will be characterizing property of the remarried parent and the stepparent, particularly property purchased with community earnings and titled in some other form, such as joint tenancy.

Just as clearly, Civil Code section 5120.150(a) reinstates the rule of repealed section 209 that stepparents are generally not personally liable to support their stepchildren. Section 209 was repealed in an effort to comply with federal welfare statutes, but its repeal did not reflect a determination that stepparents' separate property should be liable for their stepchildren's support.

But the result is less clear on the issue of determining support awards because such decisions are consigned to the court's discretion. Civil Code section 4700 is essentially consistent with the Agnos Act in directing that awards be set according to the parent's standard of living and allowing consideration of whatever resources contribute to that standard. Repealed section 5127.6, which mandated consideration of the parent's half-interest in the new spouse's community earnings, clearly conflicts with the Agnos Act. In determining whether the new spouse's earnings should be counted, the Act considers whether those earnings reduce the parent's living expenses to be the crucial factor. Section 5127.6 counted earnings regardless of whether they reduced the parent's expenses.

Duties Under California's Community Property Laws: Recommendations for Reform, 34 *HASTINGS L.J.* 227, 256-60 (1982).

90. Gorenfeld, *Department 'J' Sponsors Essay Contest on How to Calculate Child Support When Custodial and/or Noncustodial Parent Remarries and Acquires Step-Children*, 1981 *BAR- RISTERS BULLETIN* 6; Gorenfeld, *Calculations of Child Support When Parents Remarry*, *DAILY J. REP.* No. 82-9 at 3 (May 7, 1982).

IV. DETERMINATION OF SUPPORT AWARDS

A. *Consideration of Current Spouse's Resources Before Agnos*

1. Impact of community earnings

Before their repeal in 1984, Civil Code sections 5127.5 and 5127.6 were construed in three appellate cases involving the support obligations of remarried parents. The courts' decisions were not based solely on the repealed statutes. Therefore, the question remains whether these prior cases are inconsistent with the Agnos Act and have been overruled or whether they are not inconsistent and can serve as useful guides to interpreting the new statute.

*In re Marriage of Brown*⁹¹ and *In re Marriage of Havens*⁹² both involve a custodial father's attempt to secure child support contributions from his homemaker or low-earning ex-wife following the wife's remarriage. In both cases, the father apparently sought a court order based on his ex-wife's new husband's community earnings. *Brown* came before the court on an appeal from an order quashing a subpoena for the stepfather's income tax returns.⁹³ *Havens* came before the court on the father's appeal from the denial of his motion for increased support.⁹⁴ In both cases, the trial courts apparently refused to count the stepfather's earnings in setting the amount the mother was to pay. The decisions made in the cases, however, reveal the analytical difficulty in distinguishing the issues of whose resources are to be considered in setting support levels from what resources are legally liable for such debts.

In each case, the father's argument essentially was that since section

91. 99 Cal. App. 3d 702, 160 Cal. Rptr. 524 (1979). Mrs. Brown was married first to Gary Brown and later to Paul Brown. Sometime after her divorce from Gary, he obtained custody of their three children and sought child support from his ex-wife, who by then had married Paul. *Id.* at 704-05, 160 Cal. Rptr. at 525. Mrs. Brown was either a homemaker or earned relatively little money, because Gary felt the need to bolster his case by seeking to depose Paul and examine his post-marriage tax returns. *Id.* See also Note, *Domestic Relations - Stepparent is Liable for Support of Spouse's Children From Prior Marriage but Tax Returns Are Not Discoverable in Determining Extent of Liability - In re Marriage of Brown*, 21 SANTA CLARA L. REV. 865 (1981).

92. 125 Cal. App. 3d 1012, 178 Cal. Rptr. 477 (1981). Sometime after the divorce, custody of one of the two children was transferred from mother to father. The father's support obligation was reduced by one-quarter at a time when he earned more than four times his ex-wife's income. Shortly thereafter, each of the Havens remarried and the father moved to modify the child support award. *Id.* at 1012, 1013-14, 178 Cal. Rptr. at 477-78. The court noted that each new community had approximately the same income but did not mention whether either new spouse had any additional child support obligations. *Id.* at 1014, 178 Cal. Rptr. at 477.

93. *Brown*, 99 Cal. App. 3d at 704, 160 Cal. Rptr. at 524.

94. *Havens*, 125 Cal. App. 3d at 1012, 178 Cal. Rptr. at 477.

5127.5 rendered the wife's half of the community property of the new marriage liable for her child support obligations, that amount should be considered in determining her ability to pay. Both appellate courts accepted the argument and affirmed that section 5127.5 intended that all property of the wife, including her community interest in the income of her new husband, be available to discharge her support obligation.⁹⁵ Although the courts used the language of debt liability,⁹⁶ they were actually deciding the issue of resource availability and allocation in determining awards. The implication of *Havens* is that failure to consider resources within a parent's control that are liable for the debt is reversible error.

Brown specifically rejected the stepfather's contention that Civil Code section 199⁹⁷ insulated his earnings from consideration.⁹⁸ Section 199 provided that the obligation of a divorced father or mother to support his or her child could be satisfied only from the parent's earnings and separate property. Faced with a direct conflict between sections 199 and 5127.5, the court effectively interpreted section 199 out of the Code by emphasizing language limiting it to child support actions "under this chapter."⁹⁹ Henceforth, child support actions needed only to be based on a different code section, such as Civil Code section 4700,¹⁰⁰ to negate whatever protection the legislature had intended to give stepparents' earnings under section 199.¹⁰¹

Did the court really need to interpret section 199 into oblivion? The issue before the court was whether the noncustodial stepfather's community earnings could be considered in determining his wife's child support payments. The stepfather essentially argued that since his earnings were not liable for the payments, it was improper to consider them. The court could have refuted his argument by pointing out that he was confusing the issues of availability and liability. Additionally, the court could have said that no statutory limit existed on what resources a trial court could

95. *Brown*, 99 Cal. App. 3d at 705-07, 160 Cal. Rptr. at 525-26; *Havens*, 125 Cal. App. 3d at 1015, 178 Cal. Rptr. at 479.

96. *Brown*, 99 Cal. App. 3d at 705, 160 Cal. Rptr. at 525; *Havens*, 125 Cal. App. 3d at 1015, 178 Cal. Rptr. at 479.

97. CAL. CIV. CODE § 199 (repealed 1985).

98. *Brown*, 99 Cal. App. 3d at 706-07, 160 Cal. Rptr. at 526.

99. *Id.*

100. CAL. CIV. CODE § 4700 (West Supp. 1988).

101. Section 199's impact had already been considerably blunted by an Attorney General's Opinion holding that the statute unconstitutionally discriminated against legitimate children by limiting their sources of support to their parent's earnings and separate property while imposing no similar restriction on the sources of support for nonmarital children. 59 Op. Att'y Gen. 15 (Cal. 1976).

consider, even though section 199 placed a limit on what resources could be taken involuntarily to pay the debt. Under such a rule the trial court could consider the homemaker's community interest in setting an award.

Just when it seemed clear that half the community property should be considered in setting child support awards, the *Havens* court muddied the waters by stating, without further explanation, that "in apportioning the amount of support, the court shall take into consideration the respective earnings or earning capacities of the parents as required by Civil Code section 196."¹⁰² Whether the court meant that one parent could be required to pay more child support because his earnings were higher, even though the new couples' community incomes were similar, remained uncertain.

Brown and *Havens* are interesting for what authorities they do not cite in assessing remarried parents' child support obligations. Neither case cited *Weinberg v. Weinberg*,¹⁰³ in which the California Supreme Court had held several years earlier that child support obligations were post-marital debts for which the entire community property of the obligor-husband's new marriage was liable. The community's liability was based on the husband's management of the entire community property except his wife's uncommingled earnings.¹⁰⁴ The manner in which the courts would have treated the child support obligation of a non-earning wife without separate property prior to the 1975 equal management legislation is uncertain,¹⁰⁵ but that problem need not have troubled the *Brown* court. Both *Brown* and *Havens* arose after 1975, yet neither court cited the equal management legislation, Civil Code section 5125,¹⁰⁶ which became effective January 1, 1975. That section accorded husbands and wives equal management rights, with few exceptions, regardless of which spouse had earned the community property. Combined with *Weinberg*,

102. *Havens*, 125 Cal. App. 3d at 1015, 178 Cal. Rptr. at 479.

103. 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13.

104. *Id.* at 563-64, 432 P.2d at 712, 63 Cal. Rptr. at 16.

105. See Reppy, *supra* note 79. The courts could have relied on Civil Code section 196, which authorizes basing child support awards on "earnings or earning capacity." CAL. CIV. CODE § 196 (West 1982). The noncustodial mother would then have been faced with the choice of obtaining employment or asking her new husband to pay her obligation from funds under his management.

106. CAL. CIV. CODE § 5125 (West Supp. 1988). Prior to the enactment of the equal management legislation, merely classifying the obligation as the wife's post-marital debt would have been insufficient to expose the community property, which was under the husband's management. During this period the wife's tort or contract creditors were often unsuccessful in arguing that the wife had acted as the husband's agent, thereby rendering the community property liable. See generally W. REPPY & W. DEFUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 370-71 (1975). But the wife hardly could have acted as the second husband's agent in incurring support liability for the children of her prior marriage.

section 5125 would have provided persuasive authority that the entire community property of the wife's new marriage, not merely the one-half interest referred to in sections 5127.5 and 5127.6, should be considered in determining her child support obligation. One may plausibly argue that property not liable for the debt should be considered in determining the amount, because the property is contributed to the parent's support and reduces the amount of income the parent must spend on his or her needs. To assert, however, that property liable for the debt should not be considered in determining the amount is not a plausible argument.

*In re Marriage of Escamilla*¹⁰⁷ focused on other parts of sections 5127.5 and 5127.6, specifically those provisions dealing with the noncustodial father's support obligation. The trial court had granted the mother exclusive occupancy of the family home, partly as her share of the community property division and partly in lieu of child support, which the four minor children's father was currently unable to pay. The decree also provided that the home be sold and the father given his share of the proceeds six months after the mother's remarriage.¹⁰⁸ The mother objected to this last condition, arguing that it had no relation to the children's need for support. The court of appeal agreed and reversed the trial court's decision.¹⁰⁹ The noncustodial father attempted to rely on sections 5127.5 and 5127.6, claiming that upon her remarriage, his ex-wife's community interest in her new husband's earnings would be available for the children's support and his proportionate share would thus be less. Language in each section led the court to reject the father's arguments. Section 5127.5 provided that it did not lessen the noncustodial father's support obligations¹¹⁰ and section 5127.6 specifically stated that any support provided by a custodial stepparent would not affect a noncustodial parent's support obligation.¹¹¹ Thus, *Escamilla* stood for the proposition that the custodial parent's remarriage, and consequent community benefits, did not reduce the noncustodial parent's obligation to support his children according to his means.

Each of the three cases provided valuable guidance on an important point. *Brown* authorized trial courts to consider a noncustodial steppar-

107. 127 Cal. App. 3d 963, 179 Cal. Rptr. 842 (1982).

108. *Id.* at 967-68, 179 Cal. Rptr. at 844.

109. *Id.* at 971, 179 Cal. Rptr. at 846.

110. CAL. CIV. CODE § 5127.5 (repealed 1985) ("A natural father is not relieved of any legal obligation to support his children by the liability imposed by this section . . .") *Id.*

111. CAL. CIV. CODE § 5127.6 (repealed 1985) ("[A]ny contribution for care and support provided by a spouse who is not a natural or adoptive parent of the child shall not be considered a change in circumstances that would affect a court ordered support obligation of a natural or adoptive parent of that child.") *Id.*

ent's community earnings in determining child support awards, at least where the stepparent's earnings were greater than the parent's.¹¹² *Havens* maintained that child support could be determined by the parent's earning capacity, although without explaining how that principle should be harmonized with the principle of equal community property ownership.¹¹³ Finally, *Escamilla* established the welfare sections as swords, but not shields, in enforcing child support obligations: the community property principle of equal ownership could be invoked to increase a child support award where the noncustodial parent had little or no earnings, but could not be used to reduce a child support award below what the noncustodial parent would otherwise pay.¹¹⁴

Although the policy these cases represent may not have been clearly articulated, it is essentially sound and is consistent with the current statutes. Children, whose standard of living undoubtedly dropped as a result of their parents' divorce, might benefit from a parent's remarriage, but they were not to suffer further economic deprivation because of remarriage. For example, if their noncustodial mother remarried and became a homemaker, her community interest in her new husband's earnings could be considered in determining her support obligation. The opposite result would have forced the court to do one of two things. The court could have determined support on the basis of the mother's separate property, which in most cases would have yielded a meager order. Alternatively, the court could have based the award on her earning capacity, which would have embroiled the court in issues such as whether she had quit her job to escape her support obligation and whether the presence of children in the new marriage excused her from outside employment. But, if the children's noncustodial father married a homemaker, the court could look at his earning capacity, rather than simply his half interest in the community property, and maintain his support obligation undiminished. A contrary result would have served to further widen the gap between the standards of living in an unremarried mother's and a remarried father's homes. Finally, if their custodial mother remarried, their noncustodial father could not use her community interest in her new husband's earnings to reduce his monthly obligation. This result not only reaffirmed the principle that every parent must support his children according to his ability, but in many cases it probably gave the custodial

112. *In re Marriage of Brown*, 99 Cal. App. 3d 702, 706-07, 160 Cal. Rptr. 524, 526 (1979).

113. *In re Marriage of Havens*, 125 Cal. App. 3d 1012, 1015, 178 Cal. Rptr. 477, 479 (1981).

114. *In re Marriage of Escamilla*, 127 Cal. App. 3d 963, 970, 179 Cal. Rptr. 842, 846 (1982).

mother the option of leaving the work force to spend more time raising her children.

But these cases, viable as they are, are all based on the assumption that a married person's earnings are community property. California, however, has always recognized the right of married persons to contract out of the community property system and retain their earnings as their separate property. The cases discussed next consider the issue of whether a stepparent's separate property should be considered in determining support awards.

2. Impact of separate property

In *In re Marriage of Shupe*,¹¹⁵ the court of appeal considered the application of section 5127.6 to a case involving affluent couples; one of these couples had exercised their right to opt out of the community property system by agreeing that each spouse's earnings were that spouse's separate property. The custodial mother sought an increase in child support seven years after the divorce and after each parent had remarried. Both parents' incomes had increased substantially since their divorce, but the father earned more than the mother. When the father sought to introduce evidence of the stepfather's income, the mother objected on the ground that their separate property agreement made her husband's income irrelevant.¹¹⁶

The father claimed that the words "unconditionally available" in section 5127.6 meant that all money that would have been community property but for a separate property agreement must be considered in determining child support obligations. The court of appeal examined the section's legislative history and subsequent judicial treatment. The court concluded that the provision was intended to apply to welfare recipients, but that this was not stated clearly because a clear statement would have violated federal regulations, thus rendering the statute ineffective in reducing the state's welfare rolls.¹¹⁷ Both parents, the court noted, had an equal duty to support their children. All of the parents' assets, including the community income of their subsequent spouses, were to be considered in determining child support obligations.¹¹⁸ The court therefore interpreted the statute to apply only to determinations of welfare eligibility

115. 139 Cal. App. 3d 1026, 189 Cal. Rptr. 288 (1983).

116. *Id.* at 1031, 189 Cal. Rptr. at 290.

117. *Id.* at 1033, 189 Cal. Rptr. at 291-92. In responding to the mother's equal protection challenge, the court found that § 5127.6 would unconstitutionally discriminate against custodial parents if the statute conclusively presumed that they, but not their ex-spouses, had a community interest in their new spouses' incomes. *Id.* at 1034-35, 189 Cal. Rptr. at 292-93.

118. *Id.*

and not to apportioning support obligations between parents.¹¹⁹ The court concluded that the trial court had not erred in disregarding the stepfather's separate income and granting the mother a small increase based on the father's increased income.

In its pragmatic analysis of section 5127.6, the court of appeal failed to consider another portion of the section that it could have relied on to affirm the trial court's decision. The court's emphasis on the proper interpretation of section 5127.6 also concealed the inconsistency between its holding and the holdings in two earlier cases discussed below which considered a second wife's and a female cohabitor's separate property in modifying the ex-husband's and male cohabitor's support obligations.

The simplest route to affirming the *Shupe* trial court's modest increase in child support would have been that taken the prior year in *In re Marriage of Escamilla*.¹²⁰ In *Escamilla*, the appellate court relied on that portion of section 5127.6 which provided that a stepparent's contribution to his stepchild's support could not be considered a change in circumstances that would affect the court ordered support obligation of the non-custodial parent.¹²¹ The father had been paying a little more than ten percent of his net monthly income as child support. The trial court increased the amount to almost sixteen percent, which was still below some courts' published guidelines.¹²² Therefore, whether the stepfather's earnings were community or separate property was irrelevant. According to section 5127.6, the very statute on which the father relied, the stepfather's contributions could not be used to reduce his own obligation. As the *Shupe* court indeed noted, a "[h]usband cannot avoid his duty to contribute a reasonable amount to the support of his child on grounds that the child's mother could provide for their child's entire support if provided with no alternative."¹²³ No parent can argue, absent hardship situations, that the other parent's greater resources allows him or her to provide for all of the child's needs. Because the child is entitled to be supported according to both parents' abilities, the greater their combined resources, the greater the child's "needs."¹²⁴

The practical result of *Shupe* appeared to be that premarital agreements making earnings separate property would insulate a stepparent's

119. *Id.* at 1035, 189 Cal. Rptr. at 293.

120. *In re Marriage of Escamilla*, 127 Cal. App. 3d 963, 179 Cal. Rptr. 842 (1982).

121. *Id.* at 970-71, 179 Cal. Rptr. at 846-47.

122. See generally Norton, *Explaining and Comparing the California Child Support Schedules*, 4 CAL. FAM. L. MONTHLY 1, 7-8 (1987).

123. *Shupe*, 139 Cal. App. 3d at 1036, 189 Cal. Rptr. at 294; cf. *Mattos v. Correia*, 274 Cal. App. 2d 413, 421-22, 79 Cal. Rptr. 229, 235 (1969).

124. C. MARKEY, CALIFORNIA FAMILY PRACTICE AND PROCEDURE § 2023.10 (1985).

income from consideration in determining the amount of child support awards as well as insulate stepparent's income from liability for child support awards.¹²⁵ Such a result could lead to far lower support awards where a noncustodial parent with no or low earnings is being comfortably supported by a spouse's separate property earnings. However, reliance on *Shupe* might have exposed contracting spouses to risks because the result in *Shupe* apparently contradicted the results in two prior decisions by the court of appeal, *Gammell v. Gammell*¹²⁶ and *Fuller v. Fuller*.¹²⁷

Neither *Gammell* nor *Fuller* was discussed in *Shupe*. The *Gammell* court held that separate property of a second wife could be considered in denying a husband's motion to reduce spousal support to his first wife after his own income had been reduced by his retirement.¹²⁸ In *Fuller*, the court held that a cohabitor's earnings, which were pooled with the noncustodial father's and reduced the father's living expenses, could be considered in denying the father's motion to reduce child support after he became disabled and ceased work.¹²⁹ In justifying their decisions, both courts focused on the availability of the new partner's income to the new household and its use in reducing the payor's living expenses. In deciding the spousal support issue, the *Gammell* court did not seem influenced by the fact that the second wife's income was "true" separate property derived from a family trust, rather than earnings made separate by agreement. The court stated, "as a pragmatic matter this income directly or indirectly reduces the needs of the husband and it directly or indirectly affects the husband's ability to meet the needs of his former wife."¹³⁰ The court noted, however, that it was not considering the rights of the parties where a second wife did not contribute the income from her separate property to the common expenses of the second

125. Separate property agreements are generally effective in insulating the stepparent's earnings from liability for child support obligations because, under general community property principles, one spouse's separate property is not liable for the other spouse's debt. CAL. CIV. CODE § 5120.130 (West Supp. 1988). See *infra*, discussion in text accompanying notes 286-301 for a possible exception.

For whatever other reasons they may have made their separate property agreement, the former Mrs. Shupe and her new husband were probably aware that it protected their earnings from liability for their stepchildren's support. Currently, Civil Code § 5120.110 provides such protection for stepparent's earnings without sacrificing the benefits of the community property system. CAL. CIV. CODE § 5120.110 (West Supp. 1988).

126. 90 Cal. App. 3d 90, 153 Cal. Rptr. 169 (1979).

127. 89 Cal. App. 3d 405, 152 Cal. Rptr. 467 (1979).

128. *Gammell*, 90 Cal. App. 3d at 93, 153 Cal. Rptr. at 171.

129. *Fuller*, 89 Cal. App. 3d at 405, 152 Cal. Rptr. at 467.

130. *Gammell*, 90 Cal. App. 3d at 93, 153 Cal. Rptr. at 171.

marriage.¹³¹

The *Fuller* decision went even further in stressing the court's power to consider the availability of funds not legally liable for the obligation in determining the amount of that obligation. The father lived with a woman and her child by a previous marriage. In sidestepping the father's contention that his cohabitor had no duty to support his children, the court said that such a lack of duty did not mean that it is improper to consider a cohabitor's income when that income was being used to reduce the parent's expenses.¹³² The appellate court even countenanced the trial court's rejection of evidence of the cohabitor's expenses, presumably for her child, stating "[i]t is irrelevant what expenses [she] may have. What is relevant is what expenses Mr. Fuller has which are being effectively reduced by the particular living circumstances of this case."¹³³

Do the holdings in *Gammell* and *Fuller* truly contradict the holding in *Shupe*? If so, which represents the better view? More importantly, which, if either, represents the view of the current statutes? One difference between *Shupe* and *Gammell/Fuller* is that the separate property being considered in *Shupe* was that of the recipient's spouse, rather than that of the payor's spouse. That seems too fine a distinction to explain the result, especially in light of *Shupe's* conclusion that no rational basis exists for distinguishing between custodial and noncustodial parents for the purpose of presuming the availability of additional assets for their child's support.¹³⁴

Mr. *Shupe* would have had a stronger legal position had he relied on a reverse *Gammell/Fuller* argument, namely that his ex-wife's ability to share expenses with her new husband reduced her own living expenses, leaving her more disposable income to contribute to their son's needs.¹³⁵

131. *Id.* at 94, 153 Cal. Rptr. at 171-72.

132. *Fuller*, 89 Cal. App. 3d at 410, 152 Cal. Rptr. at 470.

133. *Id.* at 411, 152 Cal. Rptr. at 471.

134. *Shupe*, 139 Cal. App. 3d at 1034, 189 Cal. Rptr. at 292. An explanation of the results, if not a reconciliation of the analyses, may lie in the courts' perceptions of the equities. The *Gammell* court was obviously more sympathetic to the ex-wife, divorced after 31 years of marriage and still working part-time at age 69, than it was to her retired ex-husband who had married a woman with a trust fund. Where the second wife's income nearly made up the decrease in income the husband experienced on retirement, the court refused to grant a reduction, even while noting "we do not here decide whether such income may be relied on for an increase . . ." *Gammell*, 90 Cal. App. 3d at 94, 153 Cal. Rptr. at 171. Similarly, the *Fuller* trial court expressed the view that the support payments it refused to reduce after the father's disability retirement were "super low." *Fuller*, 89 Cal. App. 3d at 412, 152 Cal. Rptr. at 471.

135. This argument would probably have failed in his particular case because the numbers were against him. His ex-wife would probably have been able to demonstrate that she was contributing more to their son's support than he was, whether measured by cash or as a proportion of her income, even disregarding the value of her caretaking services.

The appellate court's consideration of such an argument might have prevented the conflict between the *Gammell/Fuller* position that the character of the new partner's property is irrelevant if it reduces the obligor's expenses and the *Shupe* position that a new partner's separate property earnings may be disregarded in apportioning support obligations between the parents. The *Shupe* decision is unfortunate for another reason: the former Mrs. Shupe won her child support battle, but at a very high cost. She prevailed because she had agreed to forego any community property rights in the accumulations of her spouse, who probably earned more than she did.

Another distinction is that in *Shupe* the father asked the court to consider the stepfather's earnings as part of his defense against his ex-wife's request for increased payments, whereas in *Gammell* and *Fuller* the former husbands asked the courts to disregard their current mates' incomes in granting them reductions in their support payments.¹³⁶ The cases can be reconciled by focusing on the obligor's standard of living. When the obligor requests a reduction in support payments, he must demonstrate a decline in his standard of living, not merely a decline in his income. According to this principle, where the obligor's standard of living has risen since the last increase in support payments, the custodial stepparent's income, whether it is community or separate property, is irrelevant. Similarly, where the obligor's income has dropped, but his standard of living has not declined because of contributions from a new mate, those contributions, whether community or separate, should be considered. *Shupe* reached the right result for the wrong reasons. Because it relied on statutes now repealed that are inconsistent with the current statute, it can be disregarded. The analyses in *Gammell* and *Fuller* are consistent with support principles found in both the former and the current legislation and the cases are therefore still good law, although their holdings are narrower than a later appellate decision assumed.¹³⁷

In considering whether *Gammell* and *Fuller* support the broader contention that a stepparent's community earnings should be considered in determining whether to grant increased child support, it should be noted that neither case involved a couple entitled to claim the benefits of the community property system. Neither case relied, therefore, on the subsequently repealed sections 5127.5 or 5127.6. In *Gammell*, the husband had retired and his income, which apparently was from a pension

136. *Gammell*, 90 Cal. App. 3d at 92-93, 153 Cal. Rptr. at 171; *Fuller*, 89 Cal. App. 3d at 408-09, 152 Cal. Rptr. at 469.

137. See *In re Marriage of Ramer*, 187 Cal. App. 3d 263, 231 Cal. Rptr. 647 (1986).

or investments, was presumptively separate property,¹³⁸ as was the income from his wife's trust fund. In *Fuller*, the couple was not married and did not assert an agreement to pool earnings and share accumulations.

Neither court cited any direct authority for its holdings' that a new partner's income could be considered in determining the amount of the support obligation.¹³⁹ The holdings seemed logical: since two can live more cheaply together than separately, the new partner's income would provide the obligor with a net savings if the couple maintained their premarriage standard of living because her income would exceed the increased expenses of her joining her husband's (or cohabitor's) household. Probably because neither couple was entitled to the benefits of the community property system and because both cases were appeals from denials of motions to reduce support, the courts did not weigh the new couple's community right to benefit from their joint efforts against the former spouse's and children's right to support. Such a balancing would have to wait for a case involving a remarriage with both spouses contributing community earnings.

3. Duty to work to support stepchildren

In *In re Marriage of Williams*,¹⁴⁰ the court of appeal drew the line, however, at imposing an affirmative obligation on a stepmother to work in order to increase the amount of child support her husband could pay for the children of his former marriage. *Williams* involved a working custodial mother's request for increased child support from her remarried former husband. She sought to double a three year old order for the support of her two daughters primarily on the basis of her ex-husband's increased community income. He had married a woman whose earnings were nearly equal to his own.¹⁴¹ But before his ex-wife's motion was

138. *Gammell*, 90 Cal. App. 3d at 92, 153 Cal. Rptr. at 170-71. The husband alleged that retirement had reduced his income by \$18,601 per year and that he owned property worth \$117,093. Income from separate property is separate property. *George v. Ransom*, 15 Cal. 322 (1860); see also CAL. CIV. CODE §§ 5107, 5108 (West 1983).

139. The most pertinent precedent was cited in *Gammell*, where the court noted that "[s]ince a remarriage with its additional burdens is a factor to be considered in modifying support payments, it appears fair and equitable that a remarriage with its additional benefits also ought to be considered." *Gammell*, 90 Cal. App. 3d at 93, 153 Cal. Rptr. at 171. It is highly doubtful that a former husband who married an unemployed wife today could use that argument to reduce either spousal or child support payments. Witness the denial of Mr. Williams' motion to reduce child support. *In re Marriage of Williams*, 155 Cal. App. 3d 57, 63, 202 Cal. Rptr. 10, 14 (1984).

140. 155 Cal. App. 3d 57, 202 Cal. Rptr. 10 (1984).

141. *Id.* at 59, 202 Cal. Rptr. at 11-12.

heard, the father and his new wife quit their jobs and moved out of state to escape the high cost of living in the Los Angeles area. The father found work at a lower salary but his wife, then pregnant, was not seeking employment at the time of the hearing.¹⁴²

The trial court granted the mother a modest increase, presumably based on her ex-husband's income from the sale of real estate in California and his decreased living expenses.¹⁴³ The mother appealed, claiming the court had abused its discretion in basing the award on the father's and stepmother's actual income instead of their earning capacities. In affirming the trial court, the appellate panel applied different standards for evaluating the noncustodial parent's and the stepparent's duties. It found that it had been well established that a child support award may be assessed against a parent based on earning capacity rather than actual earnings only where some conduct indicates a deliberate intent to avoid financial responsibilities.¹⁴⁴ However, while a stepparent's earnings should be considered as available to reduce the paying spouse's expenses, the panel noted that a stepparent's earning capacity, as opposed to actual earnings, has never been considered the appropriate standard for determining the obligor spouse's ability to pay.¹⁴⁵ The court refused to impose a duty to work for the benefit of her stepchildren on a stepmother who had quit work to have a child of her own.¹⁴⁶

The court cited no authority for its position that a stepparent has no duty to work to support noncustodial stepchildren. The burden of proof was on the custodial mother as appellant to prove abuse of discretion. Her claim was a bold one, tantamount to claiming that all stepparents have a personal obligation to support their stepchildren. Former Civil Code section 199, repealed as of January 1, 1985, would have furnished some support for the court's position.¹⁴⁷ It provided that the child support obligation of the divorced parent shall extend only to, and be satisfied only from, the parent's total earnings and separate property. But the strongest support for the court's position is the long common-law tradition that noncustodial stepparents have no obligation toward their stepchildren.¹⁴⁸ The appellate decisions in *Wood v. Woods*¹⁴⁹ and *In re*

142. *Id.* at 60, 202 Cal. Rptr. at 12.

143. What the court apparently failed to consider was whether, because of the father's out-of-state move, he would be spending substantially less time with his children and their mother, therefore, would be responsible for a larger share of their expenses and care.

144. *Williams*, 155 Cal. App. 3d at 62, 202 Cal. Rptr. at 14.

145. *Id.* at 64, 202 Cal. Rptr. at 15.

146. *Id.*

147. CAL. CIV. CODE § 199 (repealed 1985).

148. Mahoney, *supra* note 1, at 41.

*Marriage of Shupe*¹⁵⁰ confirmed that the legislature was not willing to impose a general support obligation on all stepparents, even when that offered a guaranteed reduction in California's welfare expenditures.¹⁵¹

A review of the cases discussed above demonstrates that the position taken in the Agnos Act, and affirmed by the debt liability legislation, that stepparent income can be considered in determining child support obligations, is rooted in case law. The unresolved issue is whether the statutes intended to broaden the holdings of such cases, particularly *Gammell*. The *Gammell* court was careful to limit its holdings to the facts of the case. It noted that it was not deciding the rights of the parties where the current spouse did not contribute her income to the new household nor was it deciding whether the current spouse's income could be considered in granting an increase.¹⁵² The complication in analyzing the Agnos Act in light of *Gammell* is the difference in the standards for spousal and child support. *Gammell* was a spousal support case. The spousal support obligation is capped by the standard of living enjoyed during the marriage.¹⁵³ Thus, a former wife who through her own earnings and her current support payments is able to maintain herself at that level has no claim for increased payments based either on increases in her former husband's post-divorce earnings or his new wife's income. That either has raised his standard of living above that of the prior marriage is irrelevant. In contrast, children are entitled to share in their parents' increased standard of living. Their claim that stepparent resources are a proper basis for granting them increased support cannot be easily dismissed. This brings the argument around to the relevance of the stepparent's decision to segregate some or all of his or her earnings rather than contributing them to the household budget. If a stepparent does so, the income is not raising the parent's standard of living or, in the terms of the Agnos Act, not meeting the parent's basic living expenses, therefore, neither increasing his disposable income nor increasing his ability to pay.

B. Post-Agnos Cases

1. Impact of obligor-spouse's new community income

Whether the new legislation apportioning child support responsibil-

149. 133 Cal. App. 3d 954, 184 Cal. Rptr. 471 (1982).

150. 139 Cal. App. 3d 1026, 189 Cal. Rptr. 288 (1983).

151. See *supra* notes 61-66 and accompanying text.

152. *Gammell*, 90 Cal. App. 3d at 94, 153 Cal. Rptr. at 171-72.

153. CAL. CIV. CODE § 4801(a)(1) (West Supp. 1988).

ity between parents¹⁵⁴ or that allocating liability for debts between spouses¹⁵⁵ will substantially change the standards for determining child support between remarried parents will not be known for some time, but two cases decided after the new statutes' passage offer some guidance. The first, *In re Marriage of Ramer*,¹⁵⁶ concerned a rare appellate reversal of a trial judge's decision modifying spousal support owed by a remarried ex-husband. The trial judge's apparent failure to consider the new wife's community earnings was partially responsible for the reversal. In the second case, *In re Marriage of Nolte*,¹⁵⁷ the court held that the trial court properly refused to consider the custodial stepfather's earnings in determining the minimum child support award under the Agnos Act.

Ramer represented the appellate court's first opportunity to balance the support needs of a former spouse and her child against the entitlements of the new community to which both spouses contributed substantial income. The published opinion in *Ramer* concerned the former wife's second appeal following a retrial before the same judge. Spousal support was the principal issue on appeal. After the appellate court reversed the first support order because it was so low it constituted an abuse of discretion, the trial judge almost doubled the award, made it retroactive for two years and ordered monthly payments on the "arrearage."¹⁵⁸ Following the ex-wife's second successful appeal, the appellate court granted the litigants' request to modify the judgment rather than remand again.

The husband had contended that no law mandated consideration of his new wife's income in computing his ability to pay spousal support. Relying on *Gammell v. Gammell*¹⁵⁹ and *In re Marriage of Williams*, the appellate court disagreed.¹⁶⁰ The court asserted that "[t]he proper method for determining what funds are available is to treat the combined income of the supporting spouse and the new spouse as the income of the new community and deduct the combined expenses of the new community therefrom to the extent they are reasonable or necessary."¹⁶¹

Despite the *Ramer* court's assertion, neither *Gammell* nor *Williams* requires that the new spouse's income be considered on a motion to in-

154. CAL. CIV. CODE §§ 4722-4732 (West Supp. 1988).

155. CAL. CIV. CODE §§ 5120.010-5120.210 (West Supp. 1988).

156. 187 Cal. App. 3d 263, 231 Cal. Rptr. 647 (1986).

157. 191 Cal. App. 3d 966, 236 Cal. Rptr. 706 (1987).

158. *Ramer*, 187 Cal. App. 3d at 270, 231 Cal. Rptr. at 650.

159. 90 Cal. App. 3d 90, 153 Cal. Rptr. 169 (1979).

160. 155 Cal. App. 3d 57, 202 Cal. Rptr. 10 (1984).

161. *Ramer*, 187 Cal. App. 3d at 272, 231 Cal. Rptr. at 651-52.

crease spousal support.¹⁶² *Gammell* was decided on the ex-husband's motion to reduce spousal support to an elderly wife.¹⁶³ The *Gammell* court specifically declined to decide whether the second wife's income that was available for the couple's living expenses could be considered in granting an increase in the support award.¹⁶⁴ *Williams* involved a child support claim only. Additionally, the stepmother had recently become unemployed, so the decision's language that "the court should consider the second spouse's income, if any, as available to reduce the paying spouse's personal expenses"¹⁶⁵ was dicta.

Different standards apply to the determination of spousal and child support awards. This is a factor which the *Ramer* decision ignores. The Agnos Act specifically grants a child the right to share in his or her parent's standard of living, even where the increase over the parent's pre-divorce standard is made possible by a new spouse's income. Spousal support, on the other hand, is governed by Civil Code section 4801(a).¹⁶⁶ While section 4801(a) considers the obligor spouse's ability to pay, it sets a cap on the recipient spouse's need, which is the standard of living enjoyed during the dissolved marriage.¹⁶⁷ Thus, a former spouse can make no claim to share in a higher standard of living made possible by her former spouse's fortuitous remarriage.

The *Ramer* decision also ignored the legislative reclassification of support obligations from post-marital to pre-marital debts, effective January 1, 1985. Most pertinent is *Ramer's* failure to discuss the impact of recently enacted Civil Code sections 5120.110 and 5120.150. Section 5120.110 provides that a spouse's earnings are not liable for the other spouse's pre-marital debts so long as the earnings are kept uncommingled and beyond the debtor's reach. Section 5120.150 classifies support obligations as premarital debts. This section also states that nothing in the section limits what a court may consider in setting support orders. Section 5120.320 provides that the Act is applicable to debts enforced after its operative date regardless of when the debt was incurred.¹⁶⁸

The *Ramer* court did not consider whether the second wife had

162. *Ramer* was procedurally an appeal of the trial court's order on remand following the first appeal. Because the husband remarried during the pendency of the first appeal, analytically the case is like that of a motion to increase support based on the changed circumstance of remarriage.

163. *Gammell*, 90 Cal. App. 3d at 92, 95, 153 Cal. Rptr. at 170, 172.

164. *Id.* at 94, 153 Cal. Rptr. at 171.

165. *Williams*, 155 Cal. App. 3d at 63, 202 Cal. Rptr. at 14.

166. CAL. CIV. CODE § 4801 (West Supp. 1988).

167. *Id.* § 4801(a)(7).

168. CAL. CIV. CODE § 5120.320 (West Supp. 1988).

availed herself of the protection offered by section 5120.110 and if so, what effect, if any, that would have on the determination of the underlying obligation. The court stated that "it is abundantly clear the new community was living well while the wife and the dependent child were not."¹⁶⁹ As one commentator noted, "[s]eldom does an appellate court express such strong emotion in a published opinion."¹⁷⁰ While it appears from the record that the appellate court related that the new community was living well, it also appears from the same facts that the former wife was living in the family home and had chosen to live off an inheritance rather than find a job in the five years since the separation, despite the fact that her youngest child was in high school.¹⁷¹

The situation encountered by Mr. Ramer and his second wife illustrates a remarried couple's difficulty in planning their financial future together. At the time of their wedding in late 1982, the couple expected that Mr. Ramer would pay \$550 per month in spousal support, and \$300 per month in child support to his ex-wife, and that the family home would shortly be sold and its equity of \$52,000 divided equally between Mr. Ramer and his ex-wife.¹⁷² On remand two years later, following his ex-wife's first appeal, the trial court retroactively increased Mr. Ramer's spousal support obligation to \$900 per month plus \$100 per month on the "arrearage" and delayed the sale of the family home until late 1987, when the youngest child would reach eighteen.¹⁷³ Also, while the case was on appeal the second time, Mr. Ramer's child support obligation was increased to \$450 per month.¹⁷⁴ In deciding the second appeal in late 1986, the appellate court retroactively increased the husband's spousal support obligation to the point where the "arrearage" exceeded the value of his equity in the family home. The court then awarded the home to the first wife, canceling the "arrearage" it had created.¹⁷⁵

Consider for a moment the *Ramer* court's conclusion that the new community was living well while the ex-wife and child were not. Part of the evidence that the new community was living well was the purchase of a condominium with a monthly trust deed and association fees of

169. *Ramer*, 187 Cal. App. 3d at 273, 231 Cal. Rptr. at 652.

170. 1987 CAL. FAM. L. REP. 3278.

171. *Ramer*, 187 Cal. App. 3d at 269-70, 231 Cal. Rptr. at 650.

172. *Id.* at 258-70, 231 Cal. Rptr. at 648-49. Mr. Ramer remarried very shortly after the trial court's decision and possibly before his first wife's appeal was filed. But even if he knew of her appeal before his second marriage, he may also have been advised of her statistically low chance of success.

173. *Id.* at 269-70, 231 Cal. Rptr. at 649-50.

174. *Id.* at 268, 231 Cal. Rptr. at 649.

175. *Id.* at 280, 231 Cal. Rptr. at 656-57.

\$1,500. The court apparently failed to consider whether the reason the monthly payments were so high was because the couple lacked the ability to make more than a minimal down payment. Mr. Ramer's \$26,000 in equity was tied up in the home his ex-wife and child were occupying. Payments on the Ramer family home totalled only \$517, which does not necessarily mean it was less comfortable than the condominium.¹⁷⁶ If the home had been purchased several years before the couple separated, its fair rental value would have greatly exceeded the mortgage payments. Since the first Mrs. Ramer was enjoying exclusive occupancy at below market rates and Mr. Ramer was denied the use of his capital, he should have been entitled to a credit on the spousal or child payments he was making. Unlike the situation in *In re Marriage of Escamilla*,¹⁷⁷ Mr. Ramer was making support payments above the level usually ordered by trial courts.¹⁷⁸ The court not only failed to consider this issue, but it also failed to consider whether the adult children living with the first Mrs. Ramer were contributing to the household expenses. Such oversight may have effectively forced Mr. Ramer to contribute to the support of his adult children.

The *Ramer* opinion rejected the husband's argument that basing his spousal support obligations on his new wife's income would deter remarriage.¹⁷⁹ The *Ramer* court stated:

As to deterring remarriage, we can only say that to the extent the rule makes persons realize they may not pursue their own pleasures in utter disregard of an earlier marriage of 22 years that has produced four children and a dependent spouse, it is to be commended rather than faulted.¹⁸⁰

176. *Id.* at 263, 273, 231 Cal. Rptr. at 650, 652.

177. 127 Cal. App. 3d 963, 179 Cal. Rptr. 842 (1982).

178. Mr. Ramer was under an order to pay \$1000 per month in spousal support and \$450 per month in child support. *Ramer*, 187 Cal. App. 3d at 268, 279-81, 231 Cal. Rptr. at 649, 656-57. The total equalled 36% of the combined net income of Mr. Ramer and his new wife and equalled approximately 54% of his net disposable income. See Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1234 (1981), which notes that judges rarely order a husband to part with more than one-third of his net income in combined spousal and child support.

179. *Ramer*, 187 Cal. App. 3d at 273, 231 Cal. Rptr. at 652.

180. *Id.* Such language sounds almost punitive and reminiscent of the days of fault-based divorce. The language echoes the views expressed by the author of the opinion, Justice Marcus Kaufman, in *In re Marriage of Sullivan*, 184 Cal. Rptr. 796 (1982), where he stated in a concurring opinion:

[S]o what we have is an unfulfilled expectation that the marriage would continue with mutual benefit accruing from the additional education afforded one spouse. Whether early dissolution of the marriage has resulted in an injustice may well depend, either wholly or in part, on which spouse was at fault or most at fault in bringing about termination of the marriage. Under the Family Law Act, of course, California courts

If the *Ramer* court's view that a subsequent spouse's income must be considered in increasing a spousal support award is correct, then it would follow that a stepparent's income must also be considered in increasing child support awards. But the decision in *Ramer* is simply wrong. The appellate court made two obvious errors which seriously discredit its opinion. First, the court failed to determine the ex-wife's earning capacity and whether she had made good faith efforts to find suitable employment.¹⁸¹ Second, the court misread *Gammell* as supporting the assertions that the current spouse's income is to be considered in increasing support payments, an issue the *Gammell* court specifically stated it did not decide. The *Ramer* decision, therefore, cannot be used to argue that a stepparent's resources must be considered on a motion to increase child support, especially where the income does not increase the parent's standard of living.

2. Impact of custodial parent's earning capacity and custodial stepparent's earnings

*In re Marriage of Nolte*¹⁸² was the first reported decision interpreting the Agnos Act's application to remarried parents. In *Nolte*, both the custodial mother and the father's new wife were homemakers. A few days after the effective date of the Agnos Act, the mother requested that the father's support payments, set four years earlier, be raised to the Agnos Act minimum. The father, who was paying substantially below the minimum, had been attempting to have his child support payments reduced. Since the mother had no earnings, the trial court ordered the father to pay the entire amount of the Agnos Act minimum. The father claimed on appeal that the court erred in failing to consider his ex-wife's

may not receive evidence with respect to nor may they consider marital fault in dissolving a marriage or in dividing the marital property.

Id. at 802 (1982) (Kaufman, J., concurring), *vacated*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (emphasis added).

181. CAL. CIV. CODE § 4801(a)(1) (West Supp. 1988). The court also apparently failed to order the wife to be examined by a vocational training consultant, as provided by Civil Code § 4801(e). See also *In re Marriage of Dennis*, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973).

182. 191 Cal. App. 3d 966, 969-70, 236 Cal. Rptr. 706, 707-08 (1987). Despite the firmness of the appellate court's decision, Mike Nolte may not actually have to pay the minimum Agnos award. Marilyn Nolte subsequently married Carl Neves, who was previously married to Mike Nolte's new wife, Pam. Each wife received custody of her children. Pam and Carl's three children live with Pam and Mike. Carl pays \$600 per month. Marilyn and Mike's one child lives with Marilyn and Carl. Mike was ordered to pay Marilyn \$288 per month. If Carl's \$600 payment is less than the Agnos minimum for three children or if his income is high enough to justify a supplemental award, he could be ordered to pay more child support. The four spouses could consolidate their actions and request the court to order one net payment from Carl to Pam.

earning capacity and her new husband's income.¹⁸³

The Agnos Act specifically directs that the stepparent's income shall not be considered in computing the parent's gross income,¹⁸⁴ but allows the court to consider the parent's earning capacity to the extent consistent with the child's best interest.¹⁸⁵ The *Nolte* court noted that, historically, courts had based child support awards on earning capacity only where it appeared there had been a deliberate attempt to avoid family responsibilities. In determining minimum support awards, the court concluded that the Act replaces that standard with the best interests test¹⁸⁶ and that this is one of the few areas in which the trial court has discretion in computing the minimum award.¹⁸⁷ In affirming the lower court's decision, the appellate court observed that the record failed to demonstrate: (1) that it was in the six-year-old child's best interest that earning capacity be attributed to his mother; or (2) the custodial mother's earning capacity.

The court found no contradiction between the Agnos Act and the statutory provisions allocating liability for debts between spouses. The court cited Civil Code section 4724 of the Act, which allows consideration of stepparent resources in determining supplementary awards to further the legislative intent that children share in their parents' standard of living.¹⁸⁸ Taking the opposite view from *Ramer*, the court found nothing in section 5120.150(c) that mandated consideration of a stepparent's earnings.¹⁸⁹ Because the mother did not seek an award above the Agnos Act minimum, her husband's income was irrelevant.¹⁹⁰ The *Nolte* court, therefore, did not reach the question of how a trial court should factor stepparent income into its supplementary award calculation. No appellate court has yet done so.

Trial courts charged with determining supplemental child support awards certainly have discretion to consider the income of the noncustodial parent's new spouse if it is used to reduce the parent's living expenses. This is true whether the income is separate or community property.¹⁹¹ An unanswered question is whether the court may consider

183. *Id.* at 969-70, 236 Cal. Rptr. at 707-08.

184. CAL. CIV. CODE § 4721(e) (West Supp. 1988).

185. *Id.* § 4721(a).

186. *Nolte*, 191 Cal. App. 3d at 973, 236 Cal. Rptr. at 709.

187. *Id.*

188. *Id.* at 974, 236 Cal. Rptr. at 710-11.

189. *Id.* at 975, 136 Cal. Rptr. at 711.

190. *See also In re Marriage of Bailey*, 198 Cal. App. 3d 505, 243 Cal. Rptr. 776 (1988), which held the custodial stepmother's income was irrelevant in determining the mandatory minimum award.

191. CAL. CIV. CODE § 5120.150(c) (West Supp. 1988).

the income of a noncustodial stepparent who has taken advantage of section 5120.150 and segregated her community earnings. In such a case her husband, the noncustodial parent, is presumably paying her living expenses. While it is hard to imagine a trial court granting a husband's motion to reduce child support based on the increased expenses of supporting a wife in such circumstances, that is not the posture in which the issue will arise. It is far more likely that a court will face the issue on the custodial mother's motion to increase support following the father's remarriage. The father will respond that the order should remain unchanged because his new wife's income is not reducing his living expenses and thus his ability to pay has not increased. He could also argue remarriage has not increased his standard of living, thus neutralizing the impact of section 4720(e), which gives a child the right to share in his parent's standard of living. Such arguments, if supported by the evidence, should be persuasive. No well-reasoned case law supports the conclusion that the trial court must consider the stepparent's resources in all circumstances. The Agnos Act vests discretion in the trial courts.

The practical problem in most remarriages, however, may very well be that the stepparent cannot segregate her earnings. Even if she has no children living with her, her husband's net income after paying support may be insufficient to maintain them both. She would then contribute some of her income to their joint expenses. As soon as she does, however, she opens the issue of whether she is reducing his living expenses. The husband would probably need fairly detailed financial records to establish that her contributions did not reduce his expenses. If the stepparent has children living with her, the situation is even more complicated. Rarely will *her* ex-husband's support payments cover all her children's personal expenses (clothes, recreation, health, lessons or child care). Assuming she contributes her earnings to the new household budget, how can the court determine that she is paying only her and her children's expenses and not reducing those of her new husband?

Another unanswered question is whether trial courts should treat the custodial stepparent's income exactly like that of the noncustodial stepparent or whether there really is a rational basis, not apparent to the court in *Shupe*,¹⁹² to distinguish between the two in at least some cases. Such a rational basis can be found in the economic reality that the custodial stepparent is actually contributing to the stepchild's support by contributing to the household in which the child lives. For example, if a custodial mother and her child move into the separate property home of

192. *In re Marriage of Shupe*, 139 Cal. App. 3d 1026, 189 Cal. Rptr. 288 (1983).

her new husband and the noncustodial mother is thereby relieved of paying rent or making mortgage payments, the stepparent is tangibly contributing to the child's support. To count his income in determining the mother's share of responsibility for child support, without also crediting him with the support he actually provides, is patently unfair. His situation differs from that of the noncustodial stepmother, whose spouse's contribution is limited to a monthly check and who provides little or no caretaking services. That difference in contributions to the children's support is exactly why legislatures vest courts with discretion and why guidelines governing such discretion need to be tailored to the variety of family living situations.

C. *Practical Problems*

1. Motion to increase support following noncustodial parent's remarriage

Consider the problem of C, the hypothetical client described in the introduction. Assume that C has net earnings of \$2,500 per month, receives \$500 per month child support from her former-husband, F, and that her new husband, N, has net income of \$4,000 per month, \$3,300 from employment and \$700 from rental of separate property. N is currently paying \$600 in child support for two school-age daughters. His children's mother, M, who has not remarried, has net earnings of \$1,800 per month. The client, her new husband and two sons thus have \$6,400 per month or \$1,600 per person available for their needs. Her husband's ex-wife, M, and two daughters have \$2,400 per month or \$800 per person available for their needs.

There appears to be a great disparity between the two household's standards of living, especially if the client's household is enjoying substantially below market housing costs in the home she and her ex-husband purchased several years before and M's household is living in a rented house or apartment. To know to what extent N's daughters are participating in their father's standard of living, we would need to know how frequently they visit him overnight, whether they go on family vacations with him, whether he provides clothes and other gifts beyond the court ordered support and whether he is putting money aside for their college education.¹⁹³ In deciding any child support award, regardless of

193. Because money beyond that needed for daily care is usually not included in child support orders for minor children, many young people who might have benefitted from planned savings on their behalf had the family remained intact find themselves suddenly impoverished when they reach majority. Bruch, *Problems Inherent in Designing Child Support Guidelines*, ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND

whether either parent has remarried, a court should consider and count the value of all assistance that the noncustodial parent provides the children. Failure to count such assistance will discourage its continuance, especially where a much higher support award to the custodial parent results. Discontinuance of such assistance will further undermine the relationship between the children and their noncustodial parent. But even if N is sharing his means with his daughters far beyond the court ordered payment, a noticeable disparity in their standards of living may remain and M may see N's remarriage as a good time to seek a modification.

If the current support order is dated earlier than July 1, 1985, the passage of the Agnos Act itself provides the changed circumstances necessary to recalculate the award.¹⁹⁴ In considering M's motion, the court would first apportion the Agnos minimum between the parents (M and N) based on their individual incomes. Because the father has 69% of the combined income, he would be ordered to pay 69% of the minimum award, which in 1988 was \$424 for two children.¹⁹⁵ This would yield an amount lower than his current monthly payment and would not satisfy the mother's request. She would then request a supplemental award under section 4724. Clearly the father has sufficient income to pay a supplemental award. In fact, the current award is low according to pre-Agnos standards, which suggested that a noncustodial parent earning \$4,000 per month pay \$800-1000 as support for two children.¹⁹⁶

A court applying typical guidelines, such as those currently in use in Santa Clara County,¹⁹⁷ would compare the noncustodial father's (N's) disposable income to half the total of the father's and stepmother's (C's) incomes and use the higher figure to determine the supplemental award. In calculating the stepmother's disposable income, the court subtracts the basic living expenses of her children. Thus, the court would subtract the \$500 child support award the stepmother (C) receives from her ex-husband (F) and probably a similar amount from her own earnings. This would leave her \$2000 a month in disposable earnings, which when ad-

POLICY CONSIDERATIONS (Proceedings of the Women's Legal Defense Fund's National Conference on the Development of Child Support Guidelines, Queenstown, Maryland, September 1986) (Office of Child Support Enforcement, May 1987), 41, 45 [hereinafter Bruch, *Problems Inherent*].

194. CAL. CIV. CODE § 4730 (West Supp. 1988).

195. CAL. WELF. & INST. CODE §§ 11452, 11453 (West Supp. 1988).

196. Weitzman, *supra* note 178, at 1233-35; see also Norton, *supra* note 122, at 7, noting that Santa Clara County suggested 27% of the higher earning parent's income for two children.

197. CAL. RULES OF CT., COUNTY OF SANTA CLARA, Child and Spousal Support, "Appendix A," 52-64 (1984-85) [hereinafter SANTA CLARA COUNTY GUIDELINES].

ded to N's \$4000 and divided by two, would be \$3000. The court would therefore base the award on N's \$4000 per month.

The guideline's direction to use the higher figure systematically favors the children whose support is at issue over the new community. The guideline appears to be drawn from *In re Marriage of Havens*,¹⁹⁸ which affirmed that courts should consider the parent's earning capacity in setting awards. But the guidelines also allow the possibility that a figure higher than \$4000 could be used. This is because the court is directed to add to the noncustodial parent's income that portion of the stepparent's income that defrays his expenses. Logically, if the noncustodial parent's new spouse has less disposable income than he does, she is not defraying his expenses. This should be especially clear if she keeps her earnings in an uncommingled account from which she pays those expenses clearly attributable to herself and her children.

Using a disposable income figure of \$4000 per month, the court will undoubtedly grant the ex-wife (M) an increased award, probably around \$925.¹⁹⁹ Per section 5120.150(b), N would be well-advised to pay the award first from his \$700 in separate income and then from his community earnings.

If C is considering leaving the workforce to become a full-time homemaker, she will probably find that the loss of her \$2,500 per month income would not prevent the previously described increase in N's support obligation. Even though C and N's household would now have only \$3,575 per month for four persons, that would still be almost \$900 per person, while M and her two daughters would have slightly more than \$900 per person with a \$925 per month award. Another way of looking at the situation would be to say that C's additional income is not the source of N's increased support obligation unless the court orders him to pay more than \$900. N's obligation to support his new wife was considered by the court's decision to allow his new household approximately the same per person income, excluding C's earnings, as his former wife and daughters' household. If the court were to order N to pay \$900 per month and C were to quit her job, her household would still fare better than M's because it would save work-related expenses and have the bene-

198. 125 Cal. App. 3d 1012, 178 Cal. Rptr. 477 (1981).

199. This figure is based on the assumption that the noncustodial father has his daughters with him 20% of the time. The calculations are based on the Judicial Council guidelines, *infra* note 212, which are designed to yield the same result as the Santa Clara guidelines. Since the Judicial Council guidelines authorize a range of 15% either way, a trial judge could make an order from \$785-1060 without having to explain why she or he deviated from the guidelines. CAL. CIV. CODE § 4724(d) (West Supp. 1988). Without more exactitude, these guidelines would appear to be of little help to a practicing attorney advising a client.

fit of her homemaker services. And if C continues to work and segregates her earnings, in the event N defaults on his child support obligation, M cannot execute on C's individual bank account.

Still C may feel aggrieved. She married a man who was paying \$600 per month in child support and now finds he must pay over \$900 per month. Even assuming F, her ex-husband, earns as much as N, her new husband, and is therefore underpaying for his two boys, any attempt to seek an increase from him will mean more, expensive attorney fees. She may also be advised that her chances of substantially increasing *her* award are not as good as M's because F's wife K is pregnant and has a child who is not being supported by her own father. The Santa Clara guidelines, however, do not provide for subtracting the basic living expenses of a stepchild or child of the new marriage from the obligor-parent's disposable income. Such deductions appear to be limited to the case where the stepparent, in this case K, has income. These guidelines will probably be revised to conform with recent amendments to the Agnos Act. A relevant amendment, effective January 1, 1988, provides that a parent may claim a "hardship deduction" from income to meet the minimum basic living expenses of natural or adopted children from other relationships who live with that parent.²⁰⁰ F would therefore be allowed to deduct his new baby's living expenses, but not his stepchild's, from his income.

2. Effect of noncustodial parent's voluntary support of stepchildren

Given the innumerable permutations of parent-child and stepparent-stepchild relationships, somewhere along the line there will be a parent who manages to evade support responsibility altogether and a stepparent who willingly assumes the responsibility to support such a stepchild. One writer who described her experiences as stepchild and stepparent recounted how her stepfather "was forced" to stop supporting his own children in order to support her and her brothers and sisters.²⁰¹ Her own father had abandoned the family. Her mother presumably was a homemaker. The author's experience in practice revealed a strong tendency on the part of father/stepfathers to place the needs of their stepchildren who lived with them before those of their own children who lived with their ex-wives or ex-girlfriends.²⁰²

Where parents who have an obligation to pay child support for their

200. CAL. CIV. CODE § 4725(b) (West Supp. 1988).

201. E. EINSTEIN, *THE STEPFAMILY: LIVING, LOVING AND LEARNING* 11 (1982).

202. Research on noncustodial fathers' compliance with child support obligations following their remarriage to a custodial mother or the birth of a child in their new marriage reveals a

own children argue that the needs of their unadopted stepchildren should be taken into account in determining their ability to pay, how should the courts respond? Several appellate cases have considered the issue of a noncustodial father's conflicting obligations to the children of his first and second marriages.²⁰³ The general rule before the Agnos Act was that it was improper to order a parent to pay more for children not in his custody than he would have left to support his children that were in his custody.²⁰⁴ It was not clear, however, whether a father could rely on evidence that he was voluntarily supporting his current wife's (or cohabitor's) children to reduce his obligation to his own children. It seems self-evident, and the Santa Clara guidelines so provide, that where a new spouse's income is to be counted, the expenses of supporting his or her children should be subtracted. The question considered in this section is whether the expenses of supporting a new spouse's child from a prior relationship may be subtracted from the stepparent's income in cases where the child's parent has no income or the children's expenses exceed the parent's income.

Hypothetically, if C, our client, moves for increased child support from F, her former husband, can F subtract the living expenses of his stepchild from his own income where K, his new wife, has neither earnings nor child support income of her own and F therefore is providing that child's entire support? The Agnos Act should control this situation. To begin with, in apportioning the mandatory minimum award, section 4721(c) provides that a parent's net disposable income shall be calculated by deducting only certain specified items. One of the allowable items is, "[a]ny child or spousal support actually being paid by the parent *pursuant to a court order*, to or for the benefit of any person who is not a subject of the award to be established by the court."²⁰⁵ No other references to support payments are included in the list of allowable deductions. Section 4721(f) states, "[t]he court shall inquire of each party as to the total number of minor children he or she is legally obligated to support."²⁰⁶ Since stepparents have no personal obligation to support their stepchildren, section 4721 implies that only the parent's support

decrease in support payments to children of the first marriage, even when the fathers were able to support two households. Wallerstein & Corbin, *supra* note 15, at 115.

203. See *Baron v. Baron*, 9 Cal. App. 3d 933, 943, 88 Cal. Rptr. 404, 410 (1970); see also *Philbin v. Philbin*, 19 Cal. App. 3d 115, 119-20, 96 Cal. Rptr. 408, 410-11 (1971).

204. *Id.*

205. CAL. CIV. CODE § 4721(c)(5) (West Supp. 1988)(emphasis added). This section was amended, effective January 1, 1988, to allow deduction of child support payments being paid pursuant to an agreement as well as pursuant to a court order.

206. *Id.* § 4721(f).

obligation to his own children will be considered in determining mandatory minimum child support awards.

This conclusion is strengthened by section 4725, which provides additional income deductions in cases of "extreme financial hardship due to justifiable expenses."²⁰⁷ One of the hardships mentioned is "the minimum basic living expenses of either parent's natural or adopted dependent minor children from other marriages or relationships."²⁰⁸ This section would apply to the parent's own children who are living in his household.²⁰⁹ Therefore, a stepparent should not be able to subtract the costs of voluntarily supporting stepchildren living in his household from his net disposable income for the purpose of computing the mandatory minimum award.

The next issue is whether the stepparent's contributions to his stepchildren's support can be considered in determining whether to make a supplemental support award. Supplemental awards are discretionary, but the trial court's discretion is controlled by section 4724. This discretion is to be guided by applicable statutes, relevant case law and state and local guidelines as well as by the legislative intent that children share in their parents' standard of living. Trial courts setting child support amounts below the discretionary guidelines in use in their county must state their reasons on the record.²¹⁰

The Judicial Council Discretionary Child Support Guidelines are to be used in counties that have not adopted their own guidelines.²¹¹ These guidelines state in relevant part that: "(c) The following adjustments to gross income are within the court's discretion: . . . (3) The court may consider, to the extent permitted by law, the income earned by new partners of either parent and the expenses related to the new partner *or to other children of that parent*."²¹² The basic question is, who is covered by the terms "other children" and "that parent"? A straight-forward reading indicates that the term "parent" is used to describe the mother and father of the children whose support is at issue in the proceeding before the court. The "children" included in the term "other children" would be the natural or adopted children of either parent whose support is not at issue. If the legislature had intended to include stepchildren's ex-

207. *Id.* § 4725.

208. *Id.* § 4725(b).

209. This is confirmed by the example illustrated in the MINIMUM CHILD SUPPORT INFORMATION BOOKLET, Judicial Council Form 1285.25A, 3, 4, 6 (1988).

210. CAL. CIV. CODE § 4724(d) (West Supp. 1988).

211. *Id.* § 4724(b).

212. CAL. RULES OF CT. DIV. VI, Discretionary Child Support, A-54 to A-55 (April 1986) [hereinafter JUDICIAL COUNCIL GUIDELINES] (emphasis added).

penses, it would have referred to them as "stepchildren" or "children of the new partner." It therefore appears that unless a stepparent can find support in other statutes or case law, he or she will not be allowed to reduce the amount of support due his or her noncustodial children by voluntarily assuming the support of his or her custodial stepchildren.

Nevertheless, a stepfather resisting a request for a supplemental award to his own children could make a sympathetic argument. First, his wife is a homemaker who is needed by her children as a full-time caretaker because of their age or special needs. Secondly, his stepchildren's father is either missing or so impecunious that it would be futile to try to collect child support from him. Thirdly, when his wife applied for AFDC benefits for her children she was told that his (the stepfather's) income disqualified her children from receiving benefits.²¹³ Furthermore, he could point to the legislative intent that children share their parents' standard of living and argue that his standard of living is much lower than his income normally could support because he is supporting his stepchildren.

As long as he is not supporting his stepchildren at a standard above that which his own children will experience if he pays only the mandatory minimum amount, this could be a persuasive argument. If it fails, the stepfather could initiate adoption proceedings based on the natural father's consent or his abandonment.²¹⁴ Once the stepfather had adopted the children, they would be treated like children born to his subsequent marriage and would therefore qualify for "extreme financial hardship" deductions under section 4725. Their basic minimum living expenses could then be used to reduce his noncustodial children's mandatory minimum awards as well as the higher supplemental awards.

But not all stepfathers who would make such an argument would be willing to adopt their stepchildren. They would balk at incurring a support obligation that would continue until the children reached the age of majority even if their marriage to the children's mother terminated earlier. Requiring legal adoption before the stepchildren's needs can be placed on a par with those of the parent's own children would serve to separate out those stepparents who have truly formed a parental relationship with the stepchildren from those who are merely using their stepchildren's needs to retain money in their own household or act out their anger against their former spouses.

213. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357-933 (1981).

214. CAL. CIV. CODE § 224 (West 1982).

3. Exercising discretion under Agnos guidelines

The Agnos Act directs counties to develop guidelines for determining supplemental awards. One county has been a pioneer in publishing guidelines. Santa Clara County adopted a guideline effective July 1, 1987,²¹⁵ which directs trial courts to use whichever of two formulas results in a higher income figure for the obligor-parent. The first formula adds the income of the obligor-parent to that of his or her new spouse and divides the sum in half. Expenses related to supporting the spouse's new children are to be deducted from his or her income. The second formula focuses on the obligor-parent's income and does not count any part of the stepparent's income except what is actually contributed to the parent's living expenses.²¹⁶

The Santa Clara guideline appears to provide some recognition of the noncustodial stepparent's ability to segregate her community earnings, but its effect is that segregation insulates the earnings from consideration in determining the amount of support only where the noncustodial parent's income exceeds the stepparent's. This is so because the court is to use the higher of half the combined earnings or the parent's earnings. The guideline also appears to ignore the separate or community character of the stepparent's earnings.

If this guideline were applied only to the noncustodial parent's new spouse, it presumably would conflict with the decision in *In re Marriage of Shupe*.²¹⁷ That case held that a statute which conclusively presumed that custodial parents, but not noncustodial parents, had a community interest in their new spouse's earnings lacked a rational basis and therefore violated equal protection guarantees.²¹⁸ Unless a clear rationale for treating custodial stepparents differently from noncustodial stepparents is articulated, noncustodial parents are likely to challenge a guideline

215. 1987 CAL. FAM. L. REP. 3385 (1987) (emphasis added). The court will use whichever of the following approaches produces the higher net disposable income for the *payor* spouse:

1) The court will add the net disposable income of the new spouse to that of the *payor* and divide by two.

2) The court will use the net disposable income of the *payor* spouse only and ignore the income of the new spouse except to the extent that it is used to defray the expenses of the *payor* spouse.

In approach no. 1, the court will deduct from the income of the new spouse, in arriving at net disposable income, the basic living expenses of children living with and supported by the new spouse, child support paid by the new spouse, as well as other appropriate "hardship deductions."

216. *Id.*

217. *In re Marriage of Shupe*, 139 Cal. App. 3d 1026, 189 Cal. Rptr. 288 (1983).

218. *Id.* at 1034-35, 189 Cal. Rptr. at 292-93.

under which their new spouses' incomes are factored into the court's calculation, but their ex-spouses' new mates' incomes are ignored.

If, however, the Santa Clara guideline were applied to custodial parents and stepparents, it might very well decrease the amount of child support a noncustodial parent would pay. The custodial mother who is a homemaker or who has lower earnings than her new husband would find half their combined income factored into the calculation. She might experience difficulty securing a supplementary award from her ex-husband unless she could demonstrate that their child had higher needs or she could articulate an acceptable rationale for departing from the guideline.

If other county guidelines for determining discretionary child support do not deal with the consideration of stepparent income any more specifically than Santa Clara's or the Judicial Council's, trial judges will have more discretion than guidance and a major goal of the Agnos Act, to promote predictability and uniformity in support awards, will remain unmet. The author therefore proposes that a stepparent's income should *not* be considered in apportioning the discretionary child support obligation between the parents except in three circumstances:

- 1) The parent and stepparent have a mutual child or children whose expenses they seek to deduct in determining the parent's ability to contribute;
- 2) The parent's earnings have decreased because of the remarriage or cohabitation, although in such cases the value of the care that parent provides to the children must be considered;
- 3) The stepparent's income is commingled with the parent's and reduces the parent's living expenses or increases the parent's standard of living above what it would have been but for the remarriage or cohabitation.

The first circumstance is largely self-explanatory. If a parent asserts that he or she should contribute less to the support of some children because of an obligation to others, it is essential to consider the ability of the other children's other parent to share that obligation.

The second circumstance is also easy to grasp. If a parent who has previously been employed and was contributing monetarily to her children's support quits her job upon remarriage to become a full-time homemaker for her second husband, it would be unfair to expect her ex-husband to shoulder an increased share of the financial obligation. The way to avoid this is to consider the stepfather's earnings. This analysis would also apply to the less common case of a father who leaves a very high-paying but demanding job for a lower-paying one because his new spouse's income will make up the difference. He should not expect his

children to suffer a drop in their standard of living where he has not experienced a drop in his own standard of living.

The fairness of this second circumstance, however, depends upon including a reasonable valuation of the parents' caretaking services in the equation. Indeed, the most serious flaw in the Agnos Act and in child support criteria historically is the failure to value the caretaking services provided by parents.²¹⁹ In addition to food, shelter, clothing, medical care and education, children also require virtually constant supervision, discipline and custodial care. This cost is apparently figured into the support formula only when the custodial parent employs someone else to provide these services so that she can work outside the home. The failure to value the custodial mother's services—for in most cases she will bear a greater portion of the childrearing burden than her ex-husband, his new wife and her new husband combined—results in an unfair allocation of the total responsibility for rearing children.

A more equitable allocation would be to apportion the cash costs of rearing the children according to their parents' incomes and then calculate a credit for the custodial parent for the portion of caretaking services she provides beyond the fifty percent that is her natural obligation.²²⁰

Applying this method to the case of a custodial mother who has quit her job upon remarriage, the court would consider the income of the custodial stepfather and the noncustodial father in determining the amount of any discretionary award for direct expenses. Whether the court would also consider the income of the noncustodial stepmother would depend upon whether she fell into any of the three categories described above. The court would also calculate the fair market value of the extra caretaking services the unemployed mother provides. Thus, if a child needs seventy hours a week of supervision (excluding sleep and school time) and the custodial mother provides sixty of those hours or twenty-five more than her half, the court would value her services for those twenty-five hours and credit her with that contribution. Her ex-husband would then pay the remainder of the child's needs as his supplemental award. In many cases, this would negate the effect of counting the stepfather's income. This method would also be fairer to the new

219. Although there is increased theoretical appreciation for the nonmonetary contributions of caretakers, little has been done to translate this into figures that can be used in establishing or evaluating the parties' monetary contributions. Bruch, *Problems Inherent*, *supra* note 193, at 58.

220. Analytically, this credit payment should be considered spousal support because it compensates the custodial parent for performing services that are the natural obligation of the other spouse. But as long as California terminates spousal support at the recipient's remarriage, this payment must be labelled child support.

community that is losing substantial income because the wife is caring for her children by a prior marriage.

Fairness to the new mother/stepfather community also dictates disregarding the stepfather's income in such cases. Since each spouse owes her or his labor to the community, the homemaker who devotes a significant part of her labor to a non-income producing separate endeavor, which is the proper way to characterize rearing children from a former marriage, does not fulfill her end of the implied contract. Her new husband presumably understood this when he married her, but that is no justification for saying he should pay twice; once in the loss of her earnings or labor and again by assuming responsibility for his stepchildren's bills. The *Shupe* court was wrong in concluding that no rational basis exists for treating custodial and noncustodial stepparents' incomes differently. Loss of community earnings or services that the custodial household experiences when children are younger or have special needs requiring substantial care constitutes such a reasonable basis.²²¹

Noncustodial parents will probably object to such an unorthodox allocation of support costs, especially where custody itself has been disputed between the parents. They might even borrow the argument from the "wrongful life"²²² cases that the financial burden which the custodial family bears is more than offset by the emotional rewards of raising the children. But such factors have never been considered in apportioning child support costs between parents. Custody is decided first in the best interests of the children and then support is ordered according to the parents' abilities to pay.²²³ That custodial parents pay with their time away from the job market has historically been ignored. Now that so many married women have demonstrable earning abilities, this sacrifice must be considered in determining support.

The third circumstance in which a stepparent's income should be considered in apportioning discretionary child support obligations between the parents is the one most closely related to the language of the Agnos Act, but with an important clarification. It focuses on the Act's

221. This proposal, to discount the income of custodial stepparents because of the economic contributions and/or sacrifices they already make, runs directly counter to some commentators' proposals to lessen or eliminate a noncustodial parent's financial obligation to his children after the custodial parent's remarriage. See Redman, *Stepchild Support: The Real World*, 7 FAIRSHARE 8, 9 (1987). Such a policy would be disastrous to children because it would break the link to their biological parent in favor of an ephemeral tie to their stepparent. Judge Redman does not deal with the difficult issue of who would be responsible for the children's support after the custodial parent's second divorce. For statistics demonstrating that likelihood, see *infra* note 241.

222. *Stills v. Gratton*, 55 Cal. App. 3d 698, 708-09, 127 Cal. Rptr. 652, 658-59 (1976).

223. *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986).

rationale for allowing consideration of stepparent income, namely, the effect access to the stepparent's income has on the parent's financial circumstances. When a divorced parent remarries (or begins living with another person), the parent's lifestyle will be affected in one of several ways depending on decisions the new couple makes. First, the parent and the new partner may pool their incomes to achieve a higher standard of living than the parent enjoyed before the new marriage. Second, the new couple may pool their incomes and maintain the parent's premarriage standard of living, accumulating joint savings. Third, the new couple may maintain separate bank accounts, paying bills according to an agreement and retaining savings from their incomes individually. The issue is whether the stepparent's income should be treated differently in any of these situations.

The first option, pooling incomes for a higher standard of living, falls within the Agnos Act's criteria, as does the second option, pooling incomes for higher savings. In both cases, the parent need not spend as much of his or her income on basic living expenses and has more income to spend on nonnecessities or to save and invest. Where the noncustodial parent and stepparent are consuming most or all of their income to maintain a higher standard of living than the children, the courts may require the parent to share that standard of living with the children by basing the parent's total support responsibility on his or her total household income. It is vital for courts in such circumstances to consider the total amount of money the noncustodial parent devotes to the children in setting the amount of the cash support payment since many noncustodial parents spend considerable amounts directly on their children, especially as the children grow older.

Similarly, where the noncustodial parent and stepparent have made a decision to live moderately and save considerable income, the court should be sensitive to the parent's values. An alternative to ordering a large support payment would be to require the parent to make a cash payment sufficient to support the children at his or her standard of living and to place an appropriate portion of the new couple's savings in trust for the children. This method not only approximates how the children would have lived had their parents remained married, but it avoids penalizing the frugal parent, who appears to have considerable disposable income.

Income-pooling and joint decision-making are more typical of couples in first marriages than in remarriages, especially those following

divorce.²²⁴ In second marriages, memories of disagreements over money in an earlier marriage or the need to maintain a degree of financial independence as a protection against another divorce may lead the couple to maintain separate accounts, even where they do not make a separate property agreement. Where spouses pool only as much of their incomes as is necessary to pay joint obligations, the amount the stepparent retains is certainly not being used to reduce the parent's living expenses. Neither does that amount have any bearing on the parent's ability to pay child support. In such a case the stepparent is functionally like a roommate. The court should inquire how much the stepparent contributes to the joint expenses to ensure that he or she pays a fair share, but beyond that, the stepparent's income and resources are irrelevant. Such a rule reinforces the point that a stepparent has no personal obligation to support a stepchild. The rule would not penalize the children because they would receive at least as much as they would have had their parent not remarried and, by implementation of the Agnos Act's mandatory minimum awards, they can expect to share in their higher-earning parent's standard of living.

In recommending adoption of the current debt liability statute, the California Law Revision Commission took the position that a stepparent's earnings should not be liable for child support debts because such a law would deter remarriage, but inconsistently argued that the stepparent's earnings should be considered in determining support because they affect the parent's ability to pay.²²⁵ A couple contemplating marriage is unlikely to consider the prospect of one spouse's default on a child support debt and, if they did, they could make a separate property agreement before marriage, which would protect the stepparent's earnings. The current debt liability law actually protects the stability of the stepparent marriage during financial reverses by stemming the flow of money out of that household to another. A couple contemplating marriage is more likely to consider the effect the marriage will have on either's child support obligations. Consideration of a stepparent's earnings will deter remarriage where the state of the law is so uncertain that the effect of the marriage cannot be predicted, as well as where either person's standard of living will be lower after the marriage than before. To avoid deterring remarriage, courts should set guidelines that are "marriage-neutral." This means ignoring stepparent income unless a specific justification exists for considering it. The justifications should be limited to marriages

224. Fishman, *The Economic Behavior of Stepfamilies*, 1983 FAMILY RELATIONS 359 (July 1983).

225. See *Recommendations*, *supra* note 44, at 256.

where additional children are born or adopted, where the parent's income decreases or where the partners pool their incomes to produce a higher standard of living than the parent enjoyed previously.

4. Motion to require sale of the family home following custodial parent's remarriage

Before C, our client, decides to quit work, she must consider how a relatively new code section affects her right to remain in the home she and F, her former husband, own as tenants in common. If her exclusive occupancy of the family home is based on a court order made after trial or based on a negotiated agreement that was incorporated into the court order, she must reckon with Civil Code section 4800.7, which became effective January 1, 1985.²²⁶ Section 4800.7 authorizes a court to modify a family home award at any time unless the former spouses have made a nonmodifiable written agreement.²²⁷ Furthermore, the section states that if the custodial parent remarries, she bears the burden of proving that the temporary use award should not be terminated.²²⁸

Section 4800.7 overrules that part of *In re Marriage of Escamilla*²²⁹ which held that temporary use of the family home could not be terminated upon the mother's remarriage since that event was not reasonably related to the children's need for support.²³⁰ One court of appeal panel recently ruled that section 4800.7 may not be applied retroactively to modify a stipulated order unless the parties intended the family home award to be additional child support.²³¹ If the award was intended as child support, retroactive application of the statute would not impair due process rights because prior to the statute's enactment, trial courts could modify family home awards intended as child support on a showing of

226. CAL. CIV. CODE § 4800.7 (West Supp. 1988). This provision states in pertinent part:

(b) Except as otherwise agreed to by the parties in writing:

(1) A family home award may be modified or terminated at any time at the discretion of the court.

(2) If the party awarded the temporary use of the family home remarries . . . a rebuttable presumption, affecting the burden of proof, is created that further delay in the sale of the family home and division of the proceeds of the sale is no longer an equitable method of minimizing the adverse impact of the dissolution or legal separation on the welfare of the children.

(c) The provisions of this section are applicable regardless of whether the family home award is made before or after January 1, 1985.

Id.

227. *Id.*

228. *Id.*

229. 127 Cal. App. 3d 963, 179 Cal. Rptr. 842 (1982).

230. *Id.*

231. *In re Marriage of Guthrie*, 191 Cal. App. 3d 654, 236 Cal. Rptr. 583 (1987).

changed circumstances without reserving jurisdiction.²³²

The award of the family home to the custodial parent is an exception to the rule requiring equal division of the community property at dissolution. It was clearly contemplated in the Family Law Act's legislative history.²³³ Although not all courts agree, the court in *In re Marriage of Duke*²³⁴ held that deferred sale of the home must be ordered until the youngest child reaches majority to avoid adverse economic, emotional and social impacts on the child resulting from an immediate loss of a long-established family home.²³⁵ In practical terms, when a noncustodial parent is unable to pay sufficient child support to enable the custodial parent to purchase or rent comparable housing in the same neighborhood, but where the custodial parent can, with her earnings and the child support, maintain the family home, the court will order a deferred sale and give the custodial parent exclusive occupancy. Often, after being so advised by their lawyers, the spouses make a similar agreement.

Section 4800.7 originated in a California Law Revision Commission recommendation that courts be given express statutory authority to modify or terminate a family home award in the case of the custodial parent's remarriage or cohabitation. The Commission believed a court could find

that the presence of a third party in the home unduly increases domestic strife . . . , that the presence of a third party constitutes a substantial change in the need of the family unit for protection, or simply that there is a decreased need for support because the third party is present.²³⁶

The Commission's recommendation failed to explain why the possible presence of such factors justified putting the burden of proof on the custodial parent rather than on the noncustodial parent, who is the party moving for modification and the party who normally shoulders that burden.

232. Whether a family home award was intended as child support may be difficult to discern. Each co-tenant is equally entitled to a share in the possession of the entire property, and neither can exclude the other from any part of it. 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Property § 216 (8th ed. 1973). Consequently where a court orders a noncustodial parent to pay the mortgage payments on the family home, it frequently designates such payments "additional child support" to avoid a reimbursement claim at the deferred sale. The underlying family home award may, however, have been made for the reasons cited in *In re Marriage of Duke*, 101 Cal. App. 3d 152, 155-58, 161 Cal. Rptr. 444, 445-47 (1980).

233. G. BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 542 (1987).

234. 101 Cal. App. 3d 152, 161 Cal. Rptr. 444 (1980).

235. *Id.* at 155-58, 161 Cal. Rptr. at 446-47; *cf. In re Marriage of Herrmann*, 84 Cal. App. 3d 361, 366-67, 148 Cal. Rptr. 550, 553-54 (1978); *In re Marriage of Boseman*, 31 Cal. App. 3d 372, 376-77, 107 Cal. Rptr. 232 (1973).

236. *Recommendations, supra* note 44, at 266.

The adoption of section 4800.7 demonstrates the legislature's continued uncertainty over its position on stepparents' responsibility for child support. The legislature has repeatedly declined to impose a general duty of support on stepparents²³⁷ and has gone so far as to repeal legislation that imposed such an obligation on some custodial stepparents.²³⁸ The legislature has also made provisions for balancing the support obligation between remarried parents by allowing courts to consider stepparents' earnings in setting supplementary support awards.²³⁹

By presuming that the family home can be sold upon the custodial parent's remarriage without adverse effect on the children, the legislature comes very close to imposing a support obligation on custodial stepparents. Sale of the home could certainly deter a custodial mother's marriage to a man whose income and assets were insufficient, when combined with her own, to purchase a comparable home. She would be forced to choose between her own happiness and the benefits of having a stepfather for her children on the one hand, and the financial security of remaining in the family home on the other. She would need to consider how the difficult transition from single parent to stepparent household would be affected by the children's realization that the remarriage had lowered their standard of living. The stepfather might be unable to contribute sufficient income to the new household because he is complying with a high child support order of his own. It would seem that all section 4800.7 accomplishes is to spare the noncustodial father the mental anguish caused by having another man living in "his" house.

One method of opposing the noncustodial parent's motion to require a sale, in addition to trying to carry the burden of proof that further delay is indeed equitable, would be to seek an increase in child support from the noncustodial parent. Either the circumstances which prevented him from paying adequate support previously may have improved, or the passage of the Agnos Act and the adoption of county guidelines may lead to a more favorable recalculation. Even if the latest child support order is dated after July 1, 1985, the fact that the family must seek new housing will probably be a sufficient change of circumstances to justify a new order. The difficult question is how the custodial stepfather's (N's) income should be evaluated at the combined hearing on the father's (F's) section 4800.7 motion and the mother's (C's) motion to increase child support. Assuming that C wants to remain in the house and F wants his equity out, it would be reasonable for C and N to refinance the house,

237. CAL. CIV. CODE §§ 5127.5, 5127.6 (repealed 1985).

238. *Id.* § 199 (repealed 1985).

239. *Id.* § 4724 (West Supp. 1988).

pay F his equity, retitle the house as their community property and live with any higher mortgage payments. If they cannot afford to refinance the house because N's income is insufficient to qualify for the new loan, then it is difficult to see how remarriage has improved C's economic position. F, on the other hand, if he is successful in forcing a sale, will have significantly greater assets as well as whatever increased earnings he has experienced since the divorce. In such a case the court should ignore N's earnings and recalculate F's total support obligation on the basis of his and C's incomes. Any other method runs the risk of decreasing C and F's children's standard of living. The children would lose their family home because their mother has remarried. Furthermore, they would be forced to move to a smaller house or a less desirable neighborhood because their father is allowed to pay no greater or even less child support. The justification for this would be their mother's illusory increase in community income.

Section 4800.7 imposes a serious financial penalty upon the remarriage of a custodial parent who has received a family home award. She must carry the burden of proving that continued deferral of the sale of the home is still an equitable method of minimizing the adverse impact of the divorce on the children.²⁴⁰ If she fails to meet this burden, the home will be sold and the proceeds divided even though her new marriage may quickly founder,²⁴¹ leaving her children without a comparable home. Furthermore, current law leaves open the possibility that the *noncustodial* parent's remarriage could be "a change in circumstances affecting the economic status of the parties" that would also shift the burden of proof to the custodial parent.

Section 4800.7 should be amended in three respects.²⁴² First, a fam-

240. *Id.* § 4800.7(b)(2) (West Supp. 1988).

241. Statistics show that among people who have divorced once, the median duration of marriage before the first divorce was 6.5 years; if both had been divorced before, the duration before the next divorce was 3.5 years; and if both had been divorced twice, the duration of marriage before the next divorce was only 1.7 years. D. MAYLEAS, *REWEDDED BLISS* 11 (1977); see also U.S. BUREAU OF CENSUS, *NUMBER, TIMING AND DURATION OF MARRIAGE AND DIVORCES IN THE UNITED STATES: JUNE 1975 CURRENT POPULATION REPORTS, SERIES P-20 No. 297* (1976); and VISHER & VISHER, *supra* note 18, at xix, citing reports that 40 percent of second marriages end in divorce within four years.

242. See also Senate Bill 1341 (Hart and Watson), introduced Mar. 6, 1987, which would repeal § 4800.7 and provide guidelines for ordering deferred sale of the family home. The measure would require a judge dividing community property in a dissolution involving minor children to consider specific factors relating to the children in deciding whether or not to force the sale of the family home. The criteria include the length of time the child has lived in the home, the child's school placement, the home's proximity to school and child care, the home's adaptation to accommodate a particular child's disability, the emotional detriment to the child of a change in residence, the proximity of the home to the custodial parent's employment, the

ily home award should be terminated only upon a showing of good cause by the noncustodial parent. Good cause must be directly related to a change in the children's need to remain in the home. Second, the noncustodial parent's remarriage should not constitute good cause. The birth of a child to the new marriage could, however, constitute good cause. The noncustodial parent's remarriage will not directly affect the children's need to remain in the home. Third, the noncustodial parent should not be allowed to bring a termination motion based on the custodial parent's remarriage until one year after the remarriage. This would give the custodial parent and stepparent time to decide if they wish to remain in the home and refinance it to purchase the other parent's equity. More importantly, it would give the custodial parent an opportunity to assess her second marriage's stability before she must risk the loss of her children's home.

V. STEPPARENT'S LIABILITY FOR CHILD SUPPORT DEBTS

A. *Issues During the Second Marriage*

Two issues likely to arise during a stepparent's marriage are the liability of the stepparent's earnings and property for child support arrearages and the parent's responsibility, if any, to manage separate property in a way that maximizes income from which the parent can pay support.

Prior to passage of the Agnos Act and debt liability statutes, no California appellate court had decided whether a stepparent's earnings could be garnished to satisfy her spouse's child support obligation. But in *Van Dyke v. Thompson*²⁴³ a Washington appeals court, interpreting somewhat different community property law, narrowly decided that a noncustodial stepmother's earnings could not be garnished. The situation is a common one. When the husband and wife divorced, she was awarded custody and he was ordered to pay child support. The husband remarried and later became unemployed. When he stopped making support payments, his ex-wife applied for welfare benefits. The state sought reimbursement from the husband's second wife, who was employed, contending that under the community property system, both spouses' earnings were liable for either's debts. In a 4-3 decision, the majority held that child support was a pre-marital debt, for which the other spouse's earnings were not liable.²⁴⁴ The majority also relied on the common-law

parents' financial ability to obtain suitable housing, the tax consequences to the parents, the economic detriment to the noncustodial parent and any other factors the court deems just and equitable.

243. 95 Wash. 2d 726, 630 P.2d 420 (1981).

244. *Id.* at 733, 630 P.2d at 423.

tradition that only custodial stepparents have a support duty, reasoning that if the legislature had intended to hold noncustodial stepparents liable, it would have done so unequivocally.²⁴⁵

A strong dissent argued that the basis of the community property system is equal ownership regardless of which spouse earns the money and, therefore, a stepparent's community earnings should not be exempted from liability for the parent's obligations.²⁴⁶ At the time *Van Dyke* was decided, California classified child support obligations as post-marital debts. Thus, whether it would have followed the reasoning of the *Van Dyke* majority that the stepparent's earnings should be exempt from liability only for pre-marital debts, or that of the dissent, a California court might well have held a noncustodial stepparent's earnings liable if a similar case had arisen before the passage of the current debt liability statutes.²⁴⁷

The weakness of the minority position is that under a threat of garnishment, a California stepparent need only separate from the obligor parent to make her future earnings her separate property and put them beyond the reach of her husband's creditors.²⁴⁸ The results are two broken homes instead of one and no reimbursement to the taxpayers. Worse yet, a stepmother who separates from the obligor parent in order to preserve her modest earnings for the benefit of her own children may find that she cannot adequately support the children on her own and may apply for welfare benefits herself.

Such an unfortunate event will not occur under the current debt liability statutes. Civil Code section 5120.150(a) protects the stepparent's future earnings from garnishment²⁴⁹ as well as protecting her uncommingled community earnings from seizure to pay her husband's support arrearages. This rule will not harm children being supported by welfare benefits because they will continue to receive benefits despite their father's inability to reimburse the county. Where the children are not receiving welfare because their mother's and/or stepfather's income disqualifies them, they will receive less support because of this rule only

245. *Id.* at 732, 630 P.2d at 422. Washington apparently considers the support of a child in the couple's home to be a community obligation even if the child is a stepchild of one spouse, but considers the support of a child not in the parent-spouse's custody to be the separate obligation of the parent-spouse. Riley, *Stepparent's Responsibility of Support*, 44 LA. L. REV. 1753, 1769 (1984).

246. *Van Dyke*, 96 Wash. 2d at 734-35, 630 P.2d at 424 (Utter, J., concurring in part, dissenting in part).

247. See Reppy, *supra* note 86 at 204-06.

248. CAL. CIV. CODE § 5118 (West 1983).

249. *Id.* § 5120.150(a) (West Supp. 1988); see also *Recommendations*, *supra* note 44, at 256-58.

where their stepmother has had the forethought and ability to save uncommingled earnings. Such savings are probably crucial to the second marriage's survival during the father's prolonged unemployment.

Ordinarily, neither spouse has any responsibility to the other with respect to the management of separate property. If section 5120.150(b) is to have any impact, it should carry with it a duty to make the parent's separate property income-producing if that can be done without destroying the nature of the property. Property produces benefit to its owner in one of three ways: it allows current enjoyment, it produces income or it appreciates in value. Property that allows current enjoyment such as jewelry or motor vehicles need not be liquidated to produce income whether it is enjoyed by the obligor parent alone or shared with his spouse. But the distinction between income and appreciation is illusory, as Professor Blumberg clearly explained in criticizing the Uniform Marital Property Act's decision to characterize separate property appreciation as separate and separate property income as community:

If a spouse decides to invest his separate property in a growth stock for its appreciation, he preserves the separate nature of that property. If, instead, he buys a bond for its interest, the bond generates community income Furthermore, in the individual business, partnership or closely-held corporation, the allocation between appreciation and income is in the hands of the managing spouse since he or she decides whether and how much to draw out of the business. Unless we develop some notion of imputed income when separate property business income is reinvested rather than withdrawn, the decision to reinvest will deprive the marital community of its proper share. . . . The nub of the problem is that appreciation and income are economically indistinguishable.²⁵⁰

This analysis applies with equal force to the issue of what separate property should be used to pay child support obligations. Section 5125 should be amended to impose a duty on a spouse with children from prior relationships to make most types of separate property income-producing. That duty could be met, for example, by renting out a vacation home rather than allowing it to sit empty or lending it to friends when the family is not using it. With investments, the duty would be met by investing to maximize income rather than appreciation. In the absence of such action, a fair rate of income should be imputed.

250. BLUMBERG, *supra* note 233, at 100.

B. Problems Arising at Termination of Stepparent's Marriage

1. Liability for arrearages

Even given the best intentions (and such intentions are not always present) a parent under a child support order may allow arrearages to accumulate. The parent may become unemployed and not realize that this "changed circumstance" will not be recognized as grounds to reduce support payments unless he obtains a court-ordered modification or a stipulation from his ex-spouse.²⁵¹ The parent may be unaware of the amount owed, such as when orders include responsibility for medical and dental costs not covered by insurance. Or the parent may simply have stopped paying to conserve resources for his new household and been lulled by lack of immediate legal action into believing his ex-wife will not seek to recover the arrearages.

Whatever the cause of the arrearage, if the noncustodial parent dies owing child support payments, his surviving spouse—the child's stepparent—may be left to pay the bill. At least two appellate cases²⁵² decided prior to the passage of the current debt liability statutes held that support arrearages from a prior marriage are chargeable against the community property of a subsequent marriage. Moreover, these cases held that the surviving spouse is personally liable for the arrearage up to the amount of nonexempt community property she owned and community and separate property she received from her deceased husband without Probate Court administration.²⁵³

In *In re Marriage of D'Antoni*,²⁵⁴ the husband died leaving spousal and child support debts from his first marriage. He also left a home, which was the community property of his second marriage. His ex-wife

251. See, e.g., *In re Marriage of Koppelman*, 159 Cal. App. 3d 627, 633, 205 Cal. Rptr. 629, 633 (1984); *In re Marriage of Acosta*, 67 Cal. App. 3d 899, 901-02, 137 Cal. Rptr. 33, 34 (1977).

252. *In re Marriage of D'Antoni*, 125 Cal. App. 3d 747, 178 Cal. Rptr. 285 (1981); *In re Marriage of Barnes*, 83 Cal. App. 3d 143, 147 Cal. Rptr. 710 (1978).

253. Support arrearages also constitute a creditor's claim against the decedent's estate, which is normally all his separate property and his half of the community property. The widow has the option to probate her half of the community property. CAL. PROB. CODE §§ 13502, 13553 (West Supp. 1988).

254. 125 Cal. App. 3d 747, 178 Cal. Rptr. 285 (1981). While it reached the same conclusion on liability as the *D'Antoni* court, the appellate panel in *In re Marriage of Barnes*, 83 Cal. App. 3d 143, 152-53, 147 Cal. Rptr. 710, 715-16 (1978), held that the former wife's right was qualified and that the widow was entitled to a judicial inquiry into any defenses, counterclaims, or setoffs she might have. This may be an illusory protection for the surviving spouse, who may never have been aware of the obligation, may lack access to the decedent's records (assuming he kept any) and lacks access to the decedent's testimony on such issues as actual payment and release.

sought to levy execution against the community property. Although the trial court rejected her claim, the appellate court reversed, relying on former Probate Code section 205.²⁵⁵ That section has been recodified twice, first as Probate Code section 694.4 and most recently as Probate Code sections 13550-13554.²⁵⁶ The Probate Code says that when a married person dies, the surviving spouse is personally liable for the decedent's debts up to the limits specified in the code. Those limits are the sum of the survivor's half interest in the community property, and the portions of the decedent's community property and separate property which the survivor receives. These sections apply when the decedent's estate is not administered in formal probate proceedings.

A crucial question is whether Civil Code sections 5120.110(b) and 5120.150(a), which insulate the stepparent's uncommingled earnings from liability for support debts, conflict with Probate Code sections 13550-13554. The answer would seem to turn on whether uncommingled community earnings are exempt from "enforcement of a money judgment" as required by Probate Code section 13551(a). The legislature clearly intended that the stepparent's uncommingled community earnings be exempt from enforcement of a money judgment for any premarital debt of the other spouse, including child support, that was executed on during the debtor's lifetime.²⁵⁷ To destroy this protection at the time of the parent's death, just when the surviving spouse may need it most, would be unjust. Yet the uncommingled earnings of the stepparent remain community property. If the earnings represent more than one-half of the total community property and her deceased husband left a will giving his half of the community property to his children, the stepmother

255. CAL. PROB. CODE § 205 (repealed 1985).

256. CAL. PROB. CODE §§ 13550-13554 (West Supp. 1988). "Except as provided in Sections 951.1, 13552, 13553, and 13554, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551 to the extent provided in Section 13551." *Id.* Section 13551 states:

The liability imposed by Section 13550 shall not exceed the fair market value at the date of the decedent's death, less the amount of any liens and encumbrances, of the total of the following:

(a) The portion of the one-half of the community and quasi-community property belonging to the surviving spouse under Sections 100 and 101 that is not exempt from enforcement of a money judgment and is not administered in the estate of the deceased spouse.

(b) The portion of the one-half of the community and quasi-community property belonging to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration.

(c) The separate property of the decedent that passes to the surviving spouse without administration.

Id.

257. See generally *Recommendations*, *supra* note 44.

would be forced to part with some of her uncommingled earnings to fulfill the terms of the bequest. Assuming, however, that the stepparent's liability is to be no greater if she does not probate her late husband's estate than if she does, Probate Code section 980(e) provides some guidance. That section states that in probate proceedings the decedent's debts shall be apportioned to all property of the spouses liable for the debts.²⁵⁸ Because the surviving spouse's uncommingled earnings are not liable for premarital debts, the decedent's death would not expose them to liability in probate proceedings.

The legislature does not seem to have anticipated this conflict. Alternatively, it may have assumed the issue was determined by reference to Code of Civil Procedure section 695.020, which defines what share of the community property is exempt from a money judgment.²⁵⁹ That section refers back to the Civil Code title defining liability of marital property for debts. The problem is that while Civil Code sections 5120.110(a) and 5120.150(b) exempt the non-debtor spouse's uncommingled earnings from the other's child support debts regardless of the percentage of the community property those earnings represent, Probate Code section 13551 imposes debt liability on the debtor spouse's half interest in the community regardless of its source. One possible way to harmonize this conflict would be to limit the surviving spouse's protection of her uncommingled earnings to one-half the community property on hand at the debtor's death.

Sound policy would dictate continuing the protection of the stepparent's uncommingled earnings after the obligor-parent's death. In a statutory scheme that systematically favors the claims of children over those of the new spouse, the protection of uncommingled earnings at least draws a line that says "this far and no farther." The stepmother will not be forced to separate from her husband in order to protect her future earnings from garnishment. After the husband's death this interest in preserving the second marriage necessarily disappears, but the stepmother's need for support may become even more acute. Given that the children have a claim on their late parent's estate for future support,²⁶⁰ which will be satisfied before the widow inherits, the law should at least leave the widow her own earnings. As creditors, the children can force the widow to probate their late father's estate, which would include all his separate property and his half of the community property, but usually not property held in joint tenancy, which would now be the widow/step-

258. CAL. PROB. CODE § 980(e) (West 1987).

259. CAL. CIV. PROC. CODE § 695.020 (West Supp. 1988).

260. See *infra* notes 273-78 and accompanying text.

mother's separate property.²⁶¹ How strange would be a law that protected the stepmother's earnings from child support debts during the marriage only if they were in an uncommingled account in her name alone and not if they were in a joint tenancy account, but upon her debtor-husband's death reversed the result! In such a case, the stepmother's only sure protection would be a premarital agreement making her earnings separate property.

The difficult issue is whether property purchased with community property of the second marriage and titled as joint tenancy should be subject to the children's claim for support arrearages. During marriage, joint tenancy property is considered to be half the separate property of each spouse. Frequently, one spouse's creditors attempt to set the title aside so that they can reach the entire property. To do so, the creditors must show the transfer made the debtor insolvent. This works well when debtors attempt to transfer title on the eve of execution. But many middle income couples routinely put title in joint tenancy form at the time of acquisition. After the parent's death, it would be extremely difficult for the children to prove the title choice made their parent insolvent, since one-half the property was still within their reach. It was their parent's death and the survivorship characteristic of joint tenancy that removed the property from their grasp.

Children should be treated at least as well as other premarital creditors in enforcing their support claims. But in this situation, premarital creditors will lose. The question is, therefore, should children be treated better than other premarital creditors? Children should be treated better in a situation where the stepparent is attempting to claim both the advantages of exemption of uncommingled earnings and joint tenancy property. The stepparent should be allowed to protect uncommingled earnings or joint tenancy property, but not both. But where the stepparent has no uncommingled earnings, the equities are different. If the stepparent contributed earnings to the joint tenancy before Civil Code section 5120.110 was enacted, he or she should be able to protect those earnings through the change in form. However, in cases where the stepparent was on notice of the arrearage, the children's claim should prevail. Where the stepparent did not know of the arrearage, he or she has not taken unfair advantage of the children, such as by urging their parent to de-

261. CAL. PROB. CODE §§ 323, 422 (West Supp. 1988) (creditors' right to administer estate); *Silva v. Superior Court*, 83 Cal. App. 2d 521, 189 P.2d 314 (1948); *In re Edward's Estate*, 154 Cal. 91, 97 (1908); CAL. PROB. CODE § 704.4 (West Supp. 1988) (community property part of probate estate).

fault, and should not be forced to surrender the protection of joint tenancy title on which he or she may have relied.

To settle this uncertainty, existing statutes should be modified in three areas to increase protections for stepparents without depriving children of remarried parents of their entitled support. A stepparent, especially one who is economically dependent upon her spouse, needs and deserves financial security. Current law provides a measure of security for the working stepparent during the marriage by protecting her uncommingled community earnings from liability for her husband's child support obligations. That security should be extended beyond the second marriage in three ways.

First, the stepparent's uncommingled earnings or her half of the community property, whichever is greater, should not be liable for the post-death support claims of her deceased spouse's children. Current law would allow the children to reach their stepmother's uncommingled community earnings if they represented more than half of the community property because the deceased parent's estate—his separate property and his half of the community property—is liable for their future support.²⁶² There is no logical reason why the employed stepmother's property that was not liable for their support during her marriage to their father should become liable at his death. The children's standard of living can be protected by Social Security benefits²⁶³ or insurance on the parent's life.²⁶⁴

Second, if an arrearage exists at the time of the parent's death, it should be paid first from the parent's separate property. Current law apportions the decedent's debts according to the amount of the spouses' property that is liable for the debts.²⁶⁵ But during the marriage the decedent was obliged to pay child support first from his separate income, if any. The purpose of this rule is to allow the second community the benefit of its labors as long as the children's needs are met. At death, the distinction between separate property and its income vanishes. Even if the decedent who allowed arrearages to accumulate had only non-income producing separate property during his life, and therefore did not breach his duty to his second spouse to pay support obligations from separate income before using community funds, that spouse should still have a

262. See *infra* note 273 and accompanying text.

263. CAL. CIV. CODE § 4705 (West 1983).

264. Cf. CAL. CIV. CODE § 4801.4 (West Supp. 1988) authorizing the court, in determining amount of spousal support obligation, to include amount sufficient to allow supported spouse to maintain insurance on the life of the obligor-spouse to secure support following the obligor's death.

265. CAL. PROB. CODE § 980(e) (West 1987).

superior claim on her husband's half of the community property as long as the debt to his children is paid. Put another way, if a parent who owns considerable separate property and possibly even more separate than community property dies intestate, his children should not be able to claim against the community as creditors and also take their intestate share of his separate property relatively unreduced by debt payments.

Third, the stepparent's uncommingled earnings should not be liable for arrearages existing at the parent's death. Currently it is unclear whether the stepparent's uncommingled earnings can be reached for arrearages at death when the stepparent takes the parent's property without administration.²⁶⁶ Just as in the prior case, there is no reason why the stepmother's property that was protected from liability for child support debts during the marriage should be exposed to liability at the marriage's termination.

The issue of liability for arrearages may also arise during the obligor-parent and stepparent's dissolution action. Except in unusual cases where a stepparent has led a child to believe he or she is that child's natural parent²⁶⁷ or where a stepparent has contracted to support a stepchild,²⁶⁸ responsibility for support ends at his or her divorce from the child's parent. The stepparent's earnings become separate property when the couple separates.²⁶⁹ Thus, they are not liable for the parent's ongoing support obligation. Furthermore, the stepparent's share of the community property comes to him or her free of any unadjudicated claim for child support arrearages, including those accrued during the marriage. This is so because Civil Code section 5120.160(b) protects the property a spouse receives in the division of community property from debts incurred by the person's spouse before or during marriage unless the court assigned the debt to the nondebtor spouse for payment or unless the property was previously encumbered by a lien.²⁷⁰ The problem a divorcing stepparent may confront, however, is that the obligor-parent may list his child support arrearage as a community debt, agreeing that it should be assigned to him, but claiming an offsetting share of community property. This appears to be the proper course where arrearages accrued

266. See *supra* note 256 and accompanying text.

267. See, e.g., *In re Marriage of Johnson*, 88 Cal. App. 3d 848, 849, 152 Cal. Rptr. 121, 122 (1979); *Clevenger v. Clevenger*, 189 Cal. App. 2d 658, 673-74, 11 Cal. Rptr. 707, 717 (1961).

268. See, e.g., *In re Marriage of Dawley*, 17 Cal. 3d 342, 353-54, 551 P.2d 323, 330-31, 131 Cal. Rptr. 3, 10-11 (1976); *Glickman v. Collins*, 13 Cal. 3d 852, 862-63, 533 P.2d 204, 210-11, 120 Cal. Rptr. 76, 82-83 (1975).

269. CAL. CIV. CODE § 5118 (West 1983).

270. *Id.* § 5120.160(b) (West Supp. 1988).

during the marriage.²⁷¹ But arrearages incurred before the marriage are to be assigned to the obligor without offset.²⁷²

2. Liability for future support following parent's death

In order to understand and secure her financial position, it is not sufficient for a stepmother to know the extent of her spouse's child support obligation and know that the obligation has been met. His minor children from prior relationships have a claim on his assets for their future support that survives his death.²⁷³ A stepmother may be the legatee of her husband's half of their community property and his separate property under his will, but his minor children's future support rights will take precedence because once again they claim as creditors while she is merely an heir.²⁷⁴ Property which was acquired through a stepparent's earnings or which was in daily use during the subsequent marriage can be taken to pay future support claims.

This situation could upset the expectations of spouses who thought they had made careful estate plans. For example, many attorneys routinely advise married couples to take title to major assets as community property rather than as joint tenants in order to secure the income tax advantage of receiving a stepped up basis to the decedent's date of death on the entire property.²⁷⁵ But joint tenancies will most probably pass to the survivor free of any creditor's claims against the deceased joint tenant.²⁷⁶ By titling property as community property to gain future tax advantages, the couple may be exposing the parent's half to his children's

271. *Id.* § 4800(c)(2).

272. *Id.* § 4800(c)(1).

273. 4 C. MARKEY, CALIFORNIA FAMILY LAW PRACTICE & PROCEDURE § 23.28[3] (1987); *Taylor v. George*, 34 Cal. 2d 552, 556, 212 P.2d 505, 508 (1949); *Lynn v. Hubbard*, 25 Cal. App. 3d 603, 605, 102 Cal. Rptr. 303, 303 (1972); *Stebbins v. Imerman*, 21 Cal. App. 3d 942, 945, 98 Cal. Rptr. 865, 867 (1971).

274. 4 C. MARKEY, CALIFORNIA FAMILY LAW PRACTICE & PROCEDURE § 23.28[3] (1987); *Taylor v. George*, 34 Cal. 2d 552, 556, 212 P.2d 505, 508 (1949); *Lynn v. Hubbard*, 25 Cal. App. 3d 603, 605, 102 Cal. Rptr. 303, 303 (1972); *Stebbins v. Imerman*, 21 Cal. App. 3d 942, 945, 98 Cal. Rptr. 865, 867 (1971).

275. I.R.C. § 1014(b)(6) (West Supp. 1988).

276. *King v. King*, 107 Cal. App. 2d 257, 236 P.2d 912 (1951). *Cf.* CAL. PROB. CODE § 5305 (West Supp. 1988), which creates a presumption that funds on deposit in certain joint tenancy accounts of spouses remain their community property. Whether this is sound policy is arguable. Placing assets purchased with community funds in joint tenancy title usually transmutes the asset to one-half the separate property of each spouse as well as providing automatic survivorship rights. This form of title takes the property out of the decedent's estate. If the change in title occurred while the obligor-parent was in arrears and rendered him insolvent, it could be voided as a fraudulent conveyance. But where the obligor is paying his support payments regularly and simply wants to benefit his current spouse instead of his children, it is not a fraudulent conveyance.

claims for future support. This could be particularly disastrous where the property involved is the family home of the widow and her children. It could also be quite unfair to the surviving spouse who provided the larger share of community earnings during a lengthy marriage. During lengthy marriages it becomes infeasible to retain the bulk of a stepparent's earnings in an uncommingled account and the money is necessarily invested in various properties, forfeiting whatever protection it enjoyed under section 5120.110(b).

Many noncustodial parents arrange to meet post-death child support obligations through life insurance or expect that Social Security survivor's payments will suffice.²⁷⁷ They should be aware that the probate court lacks jurisdiction to reduce the child support order; however, the deceased parent's personal representative could seek a reduction based on changed circumstances by substituting into the dissolution proceedings.²⁷⁸

3. Reimbursement claims

Whether the subsequent marriage ends by death or by divorce, a stepparent who believes her spouse has improperly paid support obligations from community funds when he had separate income available may make a claim for reimbursement on behalf of the community.²⁷⁹ Section 5120.150(b) represents a preference for the second community over the obligor-parent's separate estate. If the obligor-parent has nonexempt separate property income, he is to exhaust that income in making his support payments before resorting to community funds, including his own earnings. Thus, the second community gains an opportunity to improve its standard of living or accumulate savings that otherwise would be the obligor-parent's separate property.

The legislative history of section 5121.150(b)²⁸⁰ incorrectly states that subdivision (b) codifies the rule in *Weinberg v. Weinberg*.²⁸¹ *Weinberg* involved a husband who possessed far greater separate than commu-

277. See CAL. CIV. CODE § 4705 (West 1983), granting credit against noncustodial parent's support obligation for Social Security Act or Railroad Retirement Act benefits received by the child because of the noncustodial parent's retirement or disability unless those benefits were considered in setting the amount of support. See also *Taylor*, 34 Cal. 2d at 558, 212 P.2d at 508; *Estate of Schumacher*, 18 Cal. App. 3d 146, 152-54, 95 Cal. Rptr. 572, 574-76 (1971).

278. C. MARKEY, *supra* note 273, at § 23.28[3] (1987); *Kress v. Kress*, 219 Cal. App. 2d 173, 174-75, 33 Cal. Rptr. 77, 79 (1963); CAL. CIV. PROC. CODE § 385 (West Supp. 1988).

279. CAL. CIV. CODE § 5120.150(b) (West Supp. 1988).

280. CAL. CIV. CODE § 5120.150(b), Legislative Committee Comment—Assembly, 1984 Addition (West Supp. 1988).

281. 67 Cal. 2d 557, 432 P.2d 709, 63 Cal. Rptr. 13 (1967).

nity income. Nevertheless, during marriage he paid substantial support obligations from his community income. At dissolution his second wife sought reimbursement of the entire amount on the theory that the payments did not benefit the community and therefore should have been charged against his separate property. The court granted only partial reimbursement, holding that since the amount of the obligation was determined by his total income, payment should have been apportioned between the separate and community income in the proportions each bore to his total income.²⁸² If an identical case arose under section 5120.150(b), the second wife would totally prevail and the community would be fully reimbursed. This is the correct result and courts should ignore the mistaken legislative history and the partially contradictory holding in *Weinberg*.

Although reimbursement claims will usually arise at death or divorce, a stepparent may have to risk disrupting her marriage to preserve her reimbursement right if she gains actual knowledge that the community funds have been used. Section 5120.150(b) does not specify, however, whether the actual knowledge that triggers the three-year statute of limitations is mere knowledge that community property was used to pay the support debt, or knowledge that community property was used at a time when nonexempt separate property income was available. If it is the former, then many stepparents will find their reimbursement right cut off because they knew their spouse paid support from his current community earnings. But since the law currently affords stepparents no right to knowledge of their spouse's separate property or income,²⁸³ how are they to know whether it was available at any given time? The section should be interpreted to require knowledge that nonexempt separate property was available when community property was used. Furthermore, because Civil Code section 5125(e) imposes a duty on spouses to pay prior support obligations with separate income, section 5125(e) should be amended to require these spouses to disclose their separate property and income to their current spouse.

Likewise, a stepparent may know that her spouse has separate property income, but if he deposits both it and his current community earnings in his individual account and pays child support from that account, how is she to know from what source he intended to pay the debt? The stepparent should be able to argue that a reverse "family expense pre-

282. *Id.* at 571, 432 P.2d at 717, 63 Cal. Rptr. at 21.

283. See CAL. CIV. CODE § 5125.1 (West Supp. 1988), effective July 1, 1987, which grants spouses a right to an accounting of the community property without having to initiate divorce proceedings.

sumption"²⁸⁴ applies. The family expense presumption assumes that family living expenses paid from an account in which separate and community property have been commingled are paid first from community funds. The reverse argument would be that separate debts paid from a commingled account are presumed to be paid first from separate funds so that funds remaining in the account or later purchases from the account are presumed to be community property. Use of the reverse presumption would obviate the need to make a reimbursement claim because the obligor-spouse would be deemed to have paid support from his separate income, whatever his actual intentions.

VI. PREPARING FOR STEPPARENTHOOD

The author now turns to the client's final question, is there anything parents contemplating a second marriage can do to secure their financial future? As previously discussed,²⁸⁵ they can agree to segregate the stepparent's earnings in order to reduce the likelihood that those earnings will result in a higher support order and to protect them from liability for arrearages. They can also plan to keep careful records and avoid commingling community and separate property. This, along with maximizing the income derived from separate property, will insure the support obligations are paid from the parent's separate property wherever possible and avoid reimbursement claims. Beyond that, prospective spouses may wonder whether they would be better off with a written premarital agreement or whether they could avoid any of the problems of stepparenthood by living together without marriage.

A. Use of Premarital Agreements

In *In re Marriage of Shupe*,²⁸⁶ the mother and stepfather's premarital agreement making their earnings separate property was effective for two purposes. It insulated the stepfather's earnings from liability for his stepchild's support and it persuaded the court to disregard his earnings in determining how to apportion child support between his wife and her ex-husband. Today in California, such an agreement probably would not accomplish the second purpose and in certain circumstances might not even accomplish the first.

The Agnos Act controls trial courts' discretion to consider stepparent earnings in support cases. Where the parent and stepparent pool

284. See *v. See*, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966).

285. See *supra* notes 154-181 and accompanying text.

286. 139 Cal. App. 3d 1026, 189 Cal. Rptr. 288 (1983).

their earnings and achieve a higher standard of living than the parent enjoyed before remarriage, or where greater disposable income results in higher savings and investments, courts are likely to consider the new spouse's earnings in determining supplemental support awards regardless of their separate or community character.

This new rule will have little impact on the custodial stepparent because his stepchildren are already enjoying the increased standard of living his earnings make possible. The custodial stepparent's financial expectations will be thwarted only if the noncustodial parent is successful in reducing his support obligation based on the custodial parent's fortuitous remarriage. For example, if F is successful in reducing his obligation to C on the grounds that N's income allows C to pay a larger share of the children's expenses, N will see a reduction in his disposable income.

However, the noncustodial stepparent's situation is different, and a separate property agreement may be of little assistance in guaranteeing her "what she bargained for." Under the various state and local guidelines,²⁸⁷ her income will likely be added to that of her new husband's in determining his ability to pay. Prior case law was undecided on the propriety of counting the separate income of a stepparent or subsequent spouse that was not actually used for household expenses.²⁸⁸ The Agnos-mandated guidelines do not seem to have made a specific provision for disregarding either separate income not used for household expenses or community income kept in an uncommingled account.²⁸⁹ While courts retain discretion to disregard such income, the stepparent-to-be still faces uncertainty as to her new household's financial resources or even its financial viability. The simple reason is that in the case of the noncustodial stepparent, the higher child support expenditures flow out of the new household, while in the case of the custodial stepparent, the benefits of higher expenditures are frequently shared by the entire household.

Despite the relative certainty that earnings made separate property by agreement will be considered by trial courts in setting child support amounts if they are used to reduce the parent's living expenses, those contemplating marriage may still wish to make separate property agreements to protect their earnings and property purchased from their earnings from liability for arrearages in cases where it is not feasible to keep the earnings in an uncommingled account. Prior to the adoption of the

287. See JUDICIAL COUNCIL GUIDELINES for counties that have not adopted their own guidelines, *supra* note 212; see also SANTA CLARA COUNTY GUIDELINES, *supra* note 197.

288. *Gammell v. Gammell*, 90 Cal. App. 3d 90, 94; 153 Cal. Rptr. 169, 171-72 (1979).

289. See JUDICIAL COUNCIL GUIDELINES, *supra* note 212.

Uniform Premarital Agreement Act²⁹⁰ in California, such agreements undoubtedly would have been effective to protect the stepparent's earnings. The standard for determining the validity of the agreement in a dispute between the spouses was whether the objective terms of the agreement promoted divorce.²⁹¹ Examples of such terms were waivers of spousal support rights and agreements conferring substantial settlements in the event of no-fault divorce.²⁹² Agreements dealing with property rights during the marriage were routinely upheld.²⁹³ It is difficult to see how a separate property agreement, even if made to protect the stepparent's earnings from liability for child support, could have been invalidated as encouraging divorce.

Similarly, under the pre-1986 standards, third party creditors have not been successful in attacking the validity of separate property premarital agreements.²⁹⁴ Because the agreements were made before marriage, and therefore before the debtor had any rights in his fiancée's earnings, the agreements could not be set aside as fraudulent transfers.²⁹⁵ Indeed, an important reason for separate property premarital agreements has been to protect one spouse's earnings from the other's creditors.

The Uniform Premarital Agreement Act introduces a new standard for determining the validity of a premarital agreement and lists specific subjects on which parties may and may not contract. The standard for establishing invalidity is the highest one in use in the United States.²⁹⁶ It requires the person seeking to avoid the agreement to prove either that it was not entered into voluntarily or that it was unconscionable at the time it was made *and* that the spouse seeking to avoid the agreement did not have knowledge of the other's assets and obligations.²⁹⁷ Thus, a fiancée who agreed to transmute substantial separate property to community property without knowledge of an impecunious fiancée's child support arrearages should be able to avoid the agreement because she could meet the twin tests of unconscionability and ignorance.

The most salient part of the Act for those about to become stepparents is the protection it provides children. Section 5312(b) states: "[t]he

290. CAL. CIV. CODE §§ 5300-5317 (West Supp. 1988).

291. *In re Marriage of Dawley*, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).

292. *In re Marriage of Higgason*, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973) (waiver of spousal support), *overruled on other grounds*; *In re Marriage of Noghrey*, 169 Cal. App. 3d 326, 215 Cal. Rptr. 153 (1985) (substantial settlement in no-fault divorce).

293. *Dawley*, 17 Cal. 3d at 358, 551 P.2d at 333-34, 131 Cal. Rptr. at 13-14.

294. *See generally* C. MARKEY, *supra* note 273, at 2.14[1].

295. *Id.*

296. BLUMBERG, *supra* note 233, at 122.

297. CAL. CIV. CODE § 5315 (West Supp. 1988).

right of a child to support may not be adversely affected by a premarital agreement."²⁹⁸ The language of the Act protects all children, not only those who are children of the marriage.²⁹⁹ California courts might find themselves asked to construe section 5312(b) in a collateral attack by a child who claims his support enforcement rights were adversely affected. The most sympathetic situation would be one in which a noncustodial parent with little or no nonexempt property had made a separate property agreement. The debtor parent furnishes homemaking services to her new spouse, who in turn supports her. The child would find no assets against which he could execute to enforce a support award.

Prior to the adoption of the Agnos Act, courts dealt with this scenario through the contempt power, finding those parents who had the capacity to work but did not in contempt of court.³⁰⁰ But the Agnos Act has redefined the role of earning capacity in apportioning child support.³⁰¹ A noncustodial mother who is the full time caretaker of young children from her current marriage might be determined to have no earning capacity since it would not be in their best interest for her to work. Even if this was not the case, the child might find courts reluctant to use the contempt power against an involuntarily unemployed or disabled parent.

If the premarital agreement was the sole barrier to executing on property enjoyed by the obligor-parent, and the child otherwise would be without means of support, it is difficult to see how the child's right to support was not adversely affected by the premarital agreement. The court could then void that provision of the agreement making the stepparent's earnings separate property and enforce the support award as though the property were community property. This would not guarantee that the child could reach the stepparent's earnings. If the stepparent deposited his or her earnings in an individual account uncommingled with other property, he or she could still fall back on the protection of Civil Code section 5120.110(b), which insulates a stepparent's uncommingled community earnings from liability for the parent's child support

298. *Id.* § 5312(b).

299. Where the legislature intends to limit applicability to children of the marriage, it has specifically so stated. For an example, see CAL. CIV. CODE § 4351 (West Supp. 1988) (jurisdiction to order child support in dissolution).

300. CAL. CIV. CODE § 4703 (West 1983); *See also In re Marriage of Williams*, 155 Cal. App. 3d 57, 202 Cal. Rptr. 10 (1984), and cases cited therein. A court might well have construed a separate property agreement made by a spouse who anticipated being a homemaker solely supported by her new spouse as conduct indicating a deliberate attempt to avoid her financial responsibilities to her children.

301. CAL. CIV. CODE § 4721(a) (West Supp. 1988).

obligations. The child's recourse in such a case would be to levy the stepparent's nonexempt property that would have been community property but for the premarital agreement.

B. Comparison with Cohabitation

Given the financial uncertainty of marriage to a parent, some couples may prefer to cohabit without marriage. Others may prefer to cohabit for reasons unrelated to child support obligations. As has been previously discussed, where cohabitators pool incomes and the nonparent's earnings reduce the parent's living expenses, the cohabitor's income will be considered in determining the noncustodial parent's ability to pay.³⁰² Also, where a custodial parent cohabits and is unemployed, furnishing both homemaking services to her cohabitor and child care services to her children, she may find the amount of child support she is awarded reduced.³⁰³ Cohabitators thus assume the same risks as remarried couples that the presence of children from prior relationships will reduce their standard of living without gaining the advantages of the community property system such as vested property rights at the termination of the relationship.

Nevertheless, cohabitators possess at least two advantages over their married counterparts. The first is that one cohabitor's earnings and property are not liable for the other's debts.³⁰⁴ Thus, a person cohabiting with a noncustodial parent could not find his or her earnings or property taken to enforce the parent's child support obligation. Another advantage is that a cohabiting custodial parent who has a family home award should not have to bear the burden of proving that continued delay in the sale of the family home is in the children's best interest. The California Law Revision Commission recommended that trial courts be allowed to automatically terminate the award of any custodial parent who remarried or cohabited.³⁰⁵ The legislature rejected this standard in favor of the one embodied in section 4800.7(b)(2).³⁰⁶ That standard creates a rebuttable presumption that further delay is no longer equitable if the custodial parent remarries or "there is otherwise a change in circumstances affecting the economic status of the parties."³⁰⁷ Thus, a court would first need

302. *Id.* § 4720(e).

303. *Id.* § 4729; *In re Marriage of Kepley*, 193 Cal. App. 3d 946, 952-53, 238 Cal. Rptr. 691, 695 (1987).

304. *Planck v. Hartung*, 98 Cal. App. 3d 838, 840-43, 159 Cal. Rptr. 673, 674-75 (1979).

305. *Recommendation Relating to Awarding Temporary Use of Family Home*, 17 CAL. L. REVISION COMM'N REP. 261, 267 (1984).

306. For a discussion of § 4800.7, see *supra* notes 226-39 and accompanying text.

307. CAL. CIV. CODE § 4800.7(b)(2) (West Supp. 1988).

to find that the cohabitation affected the economic status of the parties before it could shift the burden of proof to the custodial parent.

C. Remaining Tensions

The current system of apportioning responsibility for child support, with the refinements proposed, is almost equitable to the employed stepparent. Without sacrificing the advantages of the community property system, she can protect her earnings from liability for her spouse's obligation. She can also be confident that her community earnings will result in higher support payments only if they actually reduce her spouse's living expenses. Once, however, she invests her community earnings in some form of property, the earnings can be reached by creditors to satisfy her spouse's premarital debts, including support obligations. To this extent, the stepchildren receive a windfall at the stepparent's expense. But the stepchildren are treated like any other premarital creditors, who may also reach such property.

The unemployed stepparent receives no such protection or assurances. Because California has chosen to treat prior support obligations like other premarital debts for purposes of liability, the unemployed stepparent finds that all of the community, including his or her share, is liable for his or her spouse's support obligation. This is a specific instance of preferring premarital creditors generally over subsequent spouses. Where the subsequent spouse has no earnings, the premarital creditors can reach neither more nor less than if the debtor had not remarried. And where the subsequent spouse has community earnings and invests them in nonexempt property, the creditors are able to reach more property than if the debtor had not remarried. The employed subsequent spouse can protect her earnings through changes in form by making a premarital separate property agreement. However, a premarital agreement making any part of the debtor-parent's earnings the unemployed stepparent's separate property would likely be set aside as a fraudulent conveyance against the interests of premarital creditors.

Despite the community property system's assumption that the value of the homemaker's services is equal to the value of the wage earner's income, the unemployed spouse will find that although he or she contributes the full measure of his or her services to the new community, he or she does not receive half the value of his or her spouse's earnings. This result is inevitable given California's preference for premarital creditors. It is also a judgment that children should not have to make do with less while their father supports a full-time homemaker—and their mother undoubtedly has to work to make up the difference. Those who believe that

the superiority of the community property system over the common-law system lies in the value and dignity it accords to the homemaker spouse must recognize that the theory yields to a preference for premarital creditors and particularly to the reality of children's needs. In most marriages, the existence of premarital debts is either not a substantial issue or is one that is resolved through payment early in the marriage. However, support obligations are a unique class of premarital debt. They have the potential to continue for many years, often into subsequent marriages. They also represent large outlays for which the new community receives no benefit, unlike other typical premarital debts for consumer goods that are enjoyed by both spouses.

VII. CONCLUSION

California has attempted to resolve the conflict between the rights of children to receive support from their remarried parents and the rights of stepparents to the benefits of the community property system. Recently enacted statutes have distinguished the issues of liability for child support debts from those of whose resources should be considered in determining child support awards. The debt liability statute appears to provide certainty and security to the stepparent who can afford to segregate his or her earnings from the parent's. The employed stepparent can shelter earnings from liability without making a separate property agreement and thereby forfeiting the benefits of the community property system. However, two serious weaknesses arise from this approach. First, the failure to coordinate the debt liability statutes, which clearly cover liability during the stepparent's marriage, with other code sections governing debt liability upon divorce or death, creates needless uncertainty and makes financial planning difficult. Second, the statutory scheme provides no security to the homemaker stepparent, who is not allowed to shelter any portion of the community property from liability for child support obligations.

In determining whose resources should be considered in setting child support awards, California has chosen flexibility over certainty. By focusing on the extent to which the stepparent's income reduces the parent's living expenses, the Agnos Act essentially makes separate property agreements irrelevant. The decision to base child support awards on the remarried parent's standard of living, rather than on how the parent and stepparent have agreed to handle their resources, provides an important protection to the children. The general directions of the statute still need to be refined by specific guidelines at the trial court level. These guidelines should consider such factors as whether the obligor-parent and step-

parent have children of their own, whether a parent's income has decreased because of the remarriage, and whether a parent contributes valuable child rearing services in addition to financial support, as well as whether a stepparent's shared income reduces the parent's living expenses. The courts need to guard against the imposition of an inequitable support burden on the custodial parent/stepparent household. This could easily occur if both stepparents' incomes were treated similarly, without considering the differences in in-kind contributions the two households make to the children's support.

Before California adopted the current statutes on stepparent responsibility for child support, Professor Bruch argued that, "[i]f [custodial] stepparents were required to support their stepchildren, . . . a 'negative dowry' would be created. Rather than bringing the once traditional dowry to a marriage, a woman with custody of her children would bring financial liabilities with her, decreasing the already impaired likelihood of her remarriage."³⁰⁸

California has chosen not to place personal support responsibility on stepparents, but has granted courts discretion to consider the earnings of both custodial and noncustodial stepparents in determining the parents' shares of their support obligation. Thus, all parents bring a "negative dowry" to their subsequent marriages. That "negative dowry" is smaller, however, because it is borne by both parents rather than the custodial parent alone. Legal responsibility for child support remains where it belongs, on both the child's parents, to be apportioned according to their abilities to pay. But, indirectly and inevitably, stepparents contribute a portion of what would otherwise have been their community property.

308. Bruch, *supra* note 29, at 60.

