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The Best Interest Of The Child And The Law

Christian Reichel Van Deusen*

The laws in this country have their genesis in the English common law. The various proceedings and writs allowed under the common law found their way to this country with the early settlers and became the basis for American law. One element of our legal heritage directly involves children's rights.

I. *Introduction*

Under common law, parents were allowed to indenture¹ their children—most often for the purpose of an apprenticeship—and the wages that were earned by the child belonged to the parent. Indentures into servitude traditionally were for the period of minority, in effect placing the child into slavery until the age of twenty-one.

The concept of indenture of children prevailed in this country until about the same time as the enactment of the Emancipation Act that freed the slaves of the South.² From that time forward what has been a prevalent attitude towards children still exists: that children

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1. The word "indenture" is derived from a parchment that used to be prepared with a scoured or indented line through the middle to separate the two sides of the document, one to be given to each party. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 928 (2d ed. 1983). The same document was used when there was a bailment of chattel or a granting of a deed to real property. The term has lost its meaning because documents, both under the common law and in the American jurisdictions, no longer have the indented parchment or document that delineates the various rights of the parties.

2. President Abraham Lincoln issued the Emancipation Proclamation on January 1, 1863, after several preliminary proclamations. The Emancipation Proclamation declared freedom for all slaves in areas still involved in rebellion. ENCYCLOPEDIA OF AMERICAN HISTORY 283-84 (R. Morris Bicentennial ed. 1976).

are a chattel over which the parents have the absolute right to possession.³ It was not until well into the twentieth century that the law recognized that children were people, not chattels, and as people they shared constitutional rights.⁴ In turn, children were entitled to the protection of the state and to services designed to help them when parental care, control, and assistance were not available or were beyond parental capacity. Finally in the late twenties and early thirties of this century, governmental entities dared to interfere in this absolute right to the possession of children by their parents.⁵

We look with amazement at the late twenties and early thirties and the abuse of child labor in the sweatshops of the industrialized East of this country where, for pennies, children were made to work eight, ten and twelve hours a day.⁶ Why did it take decades before society would interfere, before government would enact laws to prevent this abuse of children? These children were for the most part illiterate, with no opportunity to go to school. The gains of their earnings and their labor often were paid directly over to their parents. Those abuses, however, did serve a purpose, for they caused an awareness and a recognition of the fact that children were being undereducated, underfed, and treated as possessory chattel. That awareness caused the enactment of child labor laws to prevent the exploitation of children in industry.⁷ Except for cases where the enterprise was a family operation and children participated mostly in farming, children were forbidden to be employed.

Shortly after these movements gained momentum, various legislatures passed the first child welfare acts providing services for children.⁸ During the Depression, many parents simply turned their

3. Early American common law, based on the English common law, recognized a father's proprietary interest in his child's labor. See Messina, *Corporal Punishment v. Classroom Discipline: A Case of Mistaken Identity*, 34 LOY. L. REV. 35, 37 (1988).

4. Children are precluded from some constitutional privileges because of age and the traditional assessment that maturity is required for decision making. Roche, *Childhood and Its Environment: The Implication For Children's Rights*, 34 LOY. L. REV. 5, 12-15 (1988). The United States Supreme Court first provided due process protection to minors in *In re Gault*, 387 U.S. 1 (1967), and has increased such rights since then.

5. The parental right to possession of a child springs from the concept that parenting is a fundamental right and will not be interfered with except in extreme cases. See *In re Carmaleta B.*, 21 Cal. 3d 482, 489, 579 P.2d 514, 518, 146 Cal. Rptr. 623, 627 (1978).

6. In 1912, Massachusetts adopted the first minimum wage law in the United States, which established a commission to decide wage rates for women and children. This law was invalidated by the United States Supreme Court in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

7. In 1936 for instance, the Walsh-Hardy Government Contracts Act barred labor on government contracts by boys under sixteen and girls under eighteen. ENCYCLOPEDIA OF AMERICAN HISTORY, *supra* note 2, at 419.

8. Congress passed laws that protect handicapped children and provide services for children in crisis. Many states followed suit. See Soler, *An Introduction To Children's Rights*, A.B.A. J., Dec. 1988, at 52.

children over to orphanages that would then place the children for adoption with anyone in a position to provide food, shelter, and clothing. There was no determination made as to whether these people would be suitable parents. In particular, no determination was made whether the adoptive parents had criminal records. The phrase "child abuse" was unknown in those days. As a consequence, many orphanages were emptied by putting children on what was called the "orphan train." Along the way, children were dropped off in farming communities for the purpose of merely providing another pair of hands and another working member to contribute to the income or the "assets" of a family.⁹

Ultimately, enactment of child protective services stemmed from a recognition that in many communities and families, what was considered reasonable discipline was, in fact, child abuse.¹⁰ Those services have been in place for only about twenty or thirty years now; the same abusive type of treatment has been inflicted on children for centuries.¹¹ It is only with time that our social standards have come to the point where we recognize that reasonable discipline, unreasonable discipline, sexual abuse, and emotional abuse of children exists.

It took decades before the judicial system took cognizance of the fact that a child was entitled to have his or her best interests protected by a court of law. It was a tremendous hurdle to overcome. Invariably, the judicial system found itself balancing the possessory interests of parents in their child with the best interests of the child.¹²

The term "the best interests of the child"¹³ is a rather nebulous and ill-defined standard that opens a plethora of considerations.

9. "Trainloads of East Coast children were shipped to western farms, without the formality of indenture. It was thought that these families could provide the 'moral disinfections' that the children needed from their immigrant family influences." FOSTER CHILDREN IN THE COURTS 452 (1983).

10. See Messina, *supra* note 3.

11. 5 SPINETTA & RIGLER, *The Child-Abusing Parent: A Psychological Review*, in TRAUMATIC ABUSE AND NEGLECT OF CHILDREN AT HOME 117 (1980).

12. The paramount purpose underlying dependency proceedings is the protection of the child. See *In re Kerry O.*, 210 Cal. App. 3d 326, 333, 258 Cal. Rptr. 448, 453 (1989); *In re Nicole B.*, 93 Cal. App. 3d 874, 879, 155 Cal. Rptr. 916, 918 (1979); *In re Michael S.*, 127 Cal. App. 3d 348, 359, 179 Cal. Rptr. 546, 552 (1981) ("The parents do not represent a competing interest . . .").

13. Implicit in the phrase "the best interests of the child" is a consideration of all options and the selection of the alternative that best serves the child. The selection of an alternative that is not in the best interests of the child would be detrimental to the child because it contravenes the very terminology used. For instance, if one were to put a child into an alternative placement that is not in the best interest of the child,

There have been many attempts by courts, not only in California but in other jurisdictions, to attach to that standard some definitive, concrete, and objective terms. Those efforts have failed, for the most part, differing even from case to case.¹⁴ There is still no concrete or definitive standard to which a judge can look when the court must consider the best interests of the child. The elements of evidence vary from case to case, and ultimately the one concrete element that does exist is that which serves the interests of the child best.

II. *Legislating the Best Interest of the Child*

The progress of children's rights remained slow, even as the courts became enlightened and legislators became sensitive to the issue. The intrusion of the state, via the courts, into the family was hesitant and occurred only in the most serious circumstances. In the juvenile court system, not only do courts require a finding that a parent is "unfit" before intervening, that finding must be by clear and convincing evidence.¹⁵

The law, still treating children as chattel, tipped the scales drastically in favor of parental rights and, all too often, the child would suffer the consequences. The "unfit" standard itself is a very restrictive and narrow criteria which limits the court's examination to a consideration of only the individual parent.

The extremes that have been reached border on the insane. In one case where a court was to terminate a father's parental rights, it was presented with the fact that the father had murdered the mother of the children. Yet the court left his rights intact because he did not

when there is a better alternative available, the court system would then be acting to the detriment of the child.

One of the earliest cases to consider the best interests of the child was *State ex rel. Paine v. Paine*, 32 Tenn. (4 Hum.) 523 (1843). The court recognized its discretion to act in the child's interest even though the strict letter of the law might dictate otherwise.

14. In one section of the California Civil Code, the legislature mandates that: Consideration of the best interests of the child shall include, but not be limited to, an assessment of the child's age, the extent of bonding with the prospective adoptive parent or parents, the extent of bonding or the potential to bond with the natural parent or parents, and the ability of the natural parent or parents to provide adequate and proper care and guidance to the child.

CAL. CIV. CODE § 226(a) (West Supp. 1991). See also CAL. CIV. CODE § 7017: "The court, in making the determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement of the child." CAL. CIV. CODE § 7017(d)(2) (West Supp. 1991).

15. "A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns." *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). See also *California Supreme Court Survey, A Review of Decisions, December 1980-February 1981*, 8 PEPPERDINE L. REV. 1111, 1178 (1981); Comment, *Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of "Clear and Convincing"*, 14 SAN DIEGO L. REV. 1155 (1977).

commit the murder in the children's presence!¹⁶ There are also cases where the courts have removed only one of a number of children from parental custody as a result of battery, sexual abuse, or neglect.¹⁷ Since the parent targeted his or her abuse at only one child, the law would not deprive the parent of the custody and control (possession) of his or her other children.

California recently remedied such incongruities by amendments to the Welfare and Institutions Code which specify that a judge must consider the parent's treatment of siblings.¹⁸ Indeed, abuse or molestation of one child, by statute, is grounds for removal of other children, provided the court finds that there is a substantial risk of harm or detriment to the child.¹⁹

In 1969, California enacted the Family Law Act²⁰ and revised the

16. *In re James M.*, 65 Cal. App. 3d 254, 135 Cal. Rptr. 222 (1976). The father was convicted of second degree murder for stabbing his ex-wife to death. There was a series of incidents that led the court to view the stabbing as a crime of passion. The court found that second degree murder was not "necessarily among" crimes of such depravity as to bring the child into the custody of the court. *Id.* at 266, 135 Cal. Rptr. at 229. Using the best interests of the child test, the court affirmed the father's continuing parental rights. *Id.* at 267, 135 Cal. Rptr. at 229.

17. See, e.g., *In re Jeannette S.*, 94 Cal. App. 3d 52, 156 Cal. Rptr. 262 (1979).

18. As one court explained:

Prior to 1989, [California] Welfare and Institution Code section 300 did not specify sibling abuse as a ground for declaring a child a dependent of the juvenile court. Nonetheless, case law upheld petitions seeking to declare children dependents on this basis. "Sibling petitions have been accepted for many years in this jurisdiction and others. The state may intervene to protect a minor when the minor's sibling has been mistreated."

In re Jason L., 2 Cal. App. 3d 1206, 1215, 272 Cal. Rptr. 316, 321 (1990) (quoting *In re Dorothy I.*, 162 Cal. App. 3d 1154, 1157, 209 Cal. Rptr. 5, 6 (1984), and citing *In re Michael S.*, 127 Cal. App. 3d 348, 179 Cal. Rptr. 546 (1981); *In re Edward C.*, 126 Cal. App. 3d 193, 178 Cal. Rptr. 694 (1981); *In re Jeannie Q.*, 32 Cal. App. 3d 288, 107 Cal. Rptr. 646 (1973)).

Effective January 1, 1989, the Legislature added subdivision (j) to section 300. 1987 Cal. Legis. Serv. 678 (West). Subdivision (j) states that a minor may be declared a dependent if: "[t]he minor's sibling has been abused or neglected . . . and there is substantial risk that the minor will be abused or neglected." CAL. WELF. & INST. CODE § 300(j) (West Supp. 1991). Further, subdivision (d) allows the juvenile court to exercise jurisdiction where "[t]he minor has been sexually abused, or there is a substantial risk that the minor will be sexually abused." CAL. WELF. & INST. CODE § 300(d) (West Supp. 1991).

19. The Code states:

The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the minor.

CAL. WELF. & INST. CODE § 300(j) (West Supp. 1991). See *supra* note 18.

20. CAL. CIV. CODE §§ 4000-5004 (West 1983 & Supp. 1991).

procedures and standards for resolving custody issues.²¹ The statute eliminated the terms "fit" or "unfit", and set the criteria for custody determinations as the detriment and best interest standard. Consequently, the Act provided courts with a much broader consideration of the type of environment in which a child is reared. Under the unfit parent standard, for example, the courts were largely restricted to court review of parental capabilities as affected by such matters as drug or alcohol abuse and psychological difficulties that could cause an individual to be prone to molest or abuse children.²² Under the detriment standard, a parent can be completely fit to care for a child, and yet, if the parent associates with others in the environment who are prone to endanger a child, then that factor can be considered.²³ Other factors such as prenatal abuse of an unborn child may be considered as well under the detriment standard.

The new statute requires the court to make a determination of custodial placements in a specific order of priorities.²⁴ In order to place a child in the custody of a non-parent, the court would have to find that placing custody with the parent would be detrimental to the child and that placement with the non-parent would serve the best interest of the child.²⁵ This dual standard, however, is not applicable in a divorce situation, where the court considers only the best interests of the child.²⁶

21. See CAL. CIV. CODE § 4600 (West Supp. 1991).

22. CAL. CIV. CODE § 232(a)(3), (4) (West Supp. 1991); CAL. CIV. CODE § 4608 (West Supp. 1991). See *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985).

23. See, e.g., *In re Gonzales*, 116 Cal. App. 3d 556, 172 Cal. Rptr. 179 (1981) (the court may consider the impact from cohabitation where there is compelling evidence that cohabitation with another has a significant impact on the welfare of the child).

24. According to California Civil Code § 4600, custody should be awarded according to the following preference:

(1) To both parents or to either parent;

(2) To the home where the child has been living, if it is a "wholesome and stable environment";

(3) To any other person "deemed suitable by the court."

CAL. CIV. CODE § 4600(b)(1-3) (West Supp. 1991).

25. CAL. CIV. CODE § 4600(c) (West Supp. 1991) states:

Before the court makes any order awarding custody to a person or persons other than a parent without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.

Id.

26. CAL. CIV. CODE § 4608 (West Supp. 1991) enumerates the best interest considerations as follows:

(a) The health, safety, and welfare of the child.

(b) Any history of abuse by one parent against the child or against the other parent. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of

III. THE DUAL STANDARD OF BEST INTERESTS AND DETRIMENT

The California Supreme Court broadened the application of this new dual standard of the best interests of the child and detriment to the child in *In re B.G.*²⁷ The court found that this dual standard applied in all custody proceedings.²⁸ This broad and sweeping application of the detriment and best interests standards created substantial controversy. The preamble of the Family Law Act requires the court to follow the criteria as set out in section 4600 of the California Civil Code between parents who are in the process of separating or obtaining a divorce.²⁹ After *In re B.G.*, the detriment standard was applied in all termination proceedings, all Juvenile Court proceedings, and subsequently even in putative father cases.³⁰ The controversy as to the applicability of the detriment standard to putative fathers was heightened further by the California court's decision in *Michael U. v. Jamie B.*, wherein the court was sharply divided.³¹ This controversy ultimately resulted in a further amendment to the California Civil Code titled the Uniform Parentage Act.³² When a putative father seeks to intervene in an adoption, this Act mandates that the court look only to the best interests of the child standard and determine whether the father's consent to the adoption is required.³³

sexual assault or domestic violence. As used in this subdivision, "abuse against the child" means child abuse as defined in Section 11165.6 of the Penal Code and "abuse against the other parent" means abuse as defined in subdivision (a) of Section 542 of the Code of Civil Procedure.

(c) The nature and amount of contact with both parents.

Id.

27. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

28. *Id.* at 698-99, 523 P.2d at 257-58, 114 Cal. Rptr. at 457-58.

29. See CAL. CIV. CODE § 4600 (West Supp. 1991).

30. The California Supreme Court applied the detriment standard in *In re Baby Girl M.*, 37 Cal. 3d 65, 75, 688 P.2d 918, 925, 207 Cal. Rptr. 309, 316 (1984). In this case the court found that California Civil Code § 4600 was applicable to all section 7017(d) termination proceedings. *Id.* See CAL. CIV. CODE § 4600; CAL. CIV. CODE § 7017(d) (West Supp. 1991).

31. *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985). Four separate decisions were issued in this case. Three of the justices in the majority found that in a putative father case, the detriment standard should not be applied and the appropriate standard should be strictly the best interests of the child. *Id.*

32. CAL. CIV. CODE §§ 7000-7201 (West 1983 & Supp. 1991).

33. CAL. CIV. CODE § 7017(d)(2) (West Supp. 1991) states:

If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in *the best interest of the child* that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child and the effects of a change of placement on the child.

Some insight is needed to appreciate clearly the difficulty of applying the best interest of the child standard. Consider for example, the progress of California law. The history of the applicability of section 4600 of the Civil Code, the detriment test or parental preference doctrine, has been quite tumultuous. Indeed, the California Supreme Court and courts of appeal have wrestled with section 4600 for years and unfortunately have arrived at divergent interpretations of what the legislature intended. That such a debate arose at all is puzzling in light of the introductory statement of section 4600, which reads in pertinent part:

The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents *after the parents have separated or dissolved their marriage*, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.³⁴

There followed a line of cases, beginning with *In re B.G.*, that effectively applied Civil Code section 4600 and the parental preference doctrine to *any* action involving child custody including guardianship, termination, and putative father cases.³⁵

IV. CALIFORNIA CIVIL CODE AND LEGISLATIVE INTENT

Subsequent to *In re B.G.*, the Legislature amended section 232.5 to require the court to use the best interests test in all proceedings to free a child from parental custody or control.³⁶ The courts continued

If the court finds that it is in *the best interest of the child* that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in *the child's best interest* that an adoption be allowed to proceed, it shall order that persons's consent is not required for an adoption: such a finding terminates all parental rights and responsibilities with respect to the child. Section 4600 does not apply to this proceeding. Nothing in this section changes the rights of a presumed father.

Id. (emphasis added).

34. CAL. CIV. CODE § 4600(a) (West Supp. 1991) (emphasis added).

35. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974). *See also In re Baby Boy D.*, 159 Cal. App. 3d 8, 205 Cal. Rptr. 361 (1984).

In 1986, the Legislature resolved the issue and expressly stated that the proper test was the best interest of the child, and that the detriment standard of Civil Code § 4600 did not apply. 1986 Cal. Stat. 1370.

The court in *Micah S.* stated:

But in 232 [termination] cases, every right afforded the parents, every reunification service ordered, every continuance, and especially every appeal taken is purchased at the expense of the person who is in law and morality the primary object of judicial solicitude, namely the child. That, in a nutshell, is the frightful dilemma. And it is no longer open to question that the child's best interest must be paramount.

In re Micah S., 198 Cal. App. 3d 557, 565, 243 Cal. Rptr. 756, 761 (1988) (Brauer, J., concurring).

36. "At all proceedings to declare a child free from parental custody and control, the court shall consider the wishes of the child, bearing in mind the age of the child, and shall act in the best interests of the child." 1983 Cal. Stat. 906 (codified as CAL.

to require, however a finding of detriment as well as the best interests of the child before terminating parental rights.

Surprisingly, in 1984 the supreme court, in its opinion in *In re Baby Girl M.*,³⁷ applied the detriment standard of Civil Code section 4600 to section 7017, putative father actions, seeking to dispense with the necessity of a putative father's consent to adoption.³⁸

In reaction to *In re Baby Girl M.* and *Michael U. v. Jamie B.*, the Legislature resolved the dispute as to paternity actions by excluding the detriment standard of section 4600 in these actions, and by placing the focus on the best interests of the child.³⁹ In termination proceedings under section 232, however, the supreme court continued to require a finding of "detriment" before parental rights could be terminated.⁴⁰ The disagreement regarding applicability continued despite the obvious trend in the Legislature to thwart application of the detriment standard. In a 1986 decision, the dichotomy was well analyzed in a thorough review by Justice Anderson of the First District Court of Appeal.⁴¹ Justice Anderson traced the history of sections 232 and 4600 and concluded that the legislative changes to section 232 make it clear that the Legislature did not intend section 4600 to apply to all termination proceedings.⁴² The Justice questioned the California Supreme Court's application of section 4600 to any parental ter-

CIV. CODE § 232.5 (West Supp. 1991)). This was the same language previously set out in § 232(b).

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

38. The court followed the rationale of *In re B.G.* that section 4600 applied to all custody proceedings. *In re Baby M.*, 37 Cal. 3d at 69-71, 688 P.2d at 921-22, 207 Cal. Rptr. at 312-13. Prior decisions such as *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979), and *In re Marie R.*, 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978), and *Cheryl H. v. Superior Court for County of Los Angeles*, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974), were thus, in effect, overruled.

39. Paternity actions fall under Civil Code Sections 7006 and 7017. CAL. CIV. CODE §§ 7006, 7017 (West Supp. 1991). Section 7017(d)(2) explicitly requires the best interests of the child standard. See *supra* note 33.

40. See *In re Carmaleta B.*, 21 Cal. 3d 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978); *In re Richard E.*, 21 Cal. 3d 349, 579 P.2d 495, 146 Cal. Rptr. 604 (1978).

41. *In re B.J.B.*, 185 Cal. App. 3d 1201, 230 Cal. Rptr. 332 (1986).

42. Justice Anderson explained:

Section 232 was added to the Civil Code in 1961 . . . as part of an act which completely revised the Welfare and Institutions Code chapter relating to juvenile court law. . . . Section 232 begins a chapter entitled "*Freedom from Parental Custody and Control*" (emphasis added) and defines the actions available under the statute as "termination proceedings". . . . Section 4600 was added eight years later in 1969 . . . as part of "The Family Law Act"—an extensive body of legislation covering marriage, the dissolution thereof, custody of children, support of children and the law of community property. . . . Section 4600 set forth the order of preference for awards of custody . . . then made it clear that any award to non-parents under the statute had to be sup-

mination proceeding without analyzing legislative intent.⁴³

Finally, it should be noted that since 1965, proceedings under section 232 have been governed by the mandate of section 232.5 which states that it "shall be liberally construed to serve and protect the in-

ported by a finding that an award to a parent would be detrimental to the child.

There is concrete evidence that the Legislature never intended section 232 termination proceedings to be governed by the mandate of section 4600, subdivision (c). When section 4600 was added to the Civil Code in 1969, it contained essentially the same language as exists today. Four years later in 1973, section 232 was substantially changed, including the addition of subdivision (a)(7). . . . Unlike any of the other circumstances, the finding of which supports a termination of parental rights under subdivisions (a) (1) through (a)(6), subdivision (a)(7) specifically required a determination "that return of the child to his parent or parents would be detrimental to the child. . . ." Likewise, in 1984 the Legislature added subdivision (a)(8) providing for termination of the parental relationship for minors who have been declared dependent children of the juvenile court as a result of physical abuse. That enactment specifically requires a finding by the juvenile court "that attempts at reunification with his or her parent or parents would be detrimental."

Moreover, the Legislature has twice amended the language requiring a finding of detriment in subdivision (a)(7) since its enactment in 1973. It was originally required that this element be shown beyond a reasonable doubt. . . . Later, the statute was changed to require a showing of detriment only by clear and convincing evidence. . . . Most recently, the clear and convincing evidence language was removed. . . . Given this repeated legislative attention to the detriment requirement of section 232, subdivision (a)(7) and (a)(8), it cannot be concluded that the Legislature had already, years before, intended the detriment language of section 4600 to govern all termination proceedings. For, if section 4600 applied to all termination subdivisions of section 232 when it was enacted in 1969, it likewise applied when section 232 was amended to add subdivision (a)(7) in 1973; it also applied in 1976 and also in 1983 when these subdivisions were amended; and it applied in 1984 when subdivision (a)(8) was added. And if applied in 1969, then the Legislature was engaging in idle acts in 1973, 1976, 1983 and 1984.

In re B.J.B., 185 Cal. App. 3d at 1205-06, 230 Cal. Rptr. at 334-35 (citations omitted).

43. Justice Anderson went on to say:

Keeping in mind the presumption that the Legislature has in mind existing laws when it passes a statute . . . and that every word, phrase and provision employed in the statute is intended to have meaning . . . , it is clear that the Legislature would have had no reason to add this language to subdivisions (a)(7) or (a)(8) if it had intended section 4600 to control all actions under section 232.

The conclusion that the Legislature did not intend the detriment requirement of section 4600 to have any application to termination proceedings is further buttressed by an independent examination of section 232. Termination of parental rights may be adjudged on grounds of (1) child abandonment, (2) child neglect, (3) parent moral depravity, (4) parent conviction of felony, (5) parent mental illness, (6) parent mental disability, (7) child being in juvenile court ordered out-of-home placement for more than one year, (8) child severely abused. Detriment is specifically mentioned *only* in the latter two situations. Applying the cardinal rule of statutory interpretation, *inclusion unius est exclusio alterius*, the only rational conclusion is that legislative inclusion of a detriment requirement for subdivision (a)(7) and (a)(8) without such specific inclusion in subdivisions (a)(1) through (a)(6) is a legislative exclusion of such requirement for the latter notwithstanding the enactment of section 4600 elsewhere in the code.

In re B.J.B., 185 Cal. App. 3d at 1206-07, 230 Cal. Rptr. at 335 (citations omitted).

terest and welfare of the child."⁴⁴ Recently, section 232.5 was amended to require that when deciding whether to terminate the parental relationship, the court should "consider the wishes of the child."⁴⁵ It follows that the Legislature could have included the detriment requirement in the section 232.5 amendment if it had wanted to apply the detriment standard to all proceedings.

The continuing dispute and the misinterpretation of section 4600 in the *In re B.G.* decision was finally settled by legislative action in 1988.⁴⁶ The amended section states that section 4600 does not apply to "proceedings pursuant to this section."⁴⁷ To emphasize the point further, the Legislature in 1987 added section 366.26 of the Welfare and Institution Code.⁴⁸ This section states in part, "[s]ection 4600 of the Civil Code is not applicable to these proceedings [to terminate parental rights]."⁴⁹ Further, the statute specifically requires the courts to consider the best interests of the child: "At all termination proceedings, the court *shall* consider the wishes of the child and *shall* act in the best interests of the child."⁵⁰

In light of the history leading to the enactment of this section, there can be no doubt that the legislative intent is, and always has been, that the best interests of the child is the only standard to be applied in any and all termination actions, and the detriment standard set out in section 4600 does not now, nor did it ever apply.⁵¹

To fully appreciate the impact of the changes to the Civil Code, consider them in light of the comprehensive revisions of the Welfare and Institutions Code. The Welfare and Institutions Code revisions show a better comprehension of the needs of the child, and the best

44. 1965 Cal. Stat. 2710 (codified at CAL. CIV. CODE § 232.5 (West Supp. 1991)).

45. The code was amended subsequent to the supreme court's decisions in *In re Carmaleta B.*, 21 Cal. 3d 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978) and *In re Richard E.*, 21 Cal. 3d 349, 579 P.2d 495, 146 Cal. Rptr. 604 (1978). See 1983 Cal. Stat. 906 (codified at CAL. CIV. CODE § 232.5 (West Supp. 1991)).

The "wishes of the child" are explained as follows: "If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court must consider and give due weight to his wishes in making an award of custody or modification thereof." CAL. CIV. CODE § 4600(a) (West 1983 & Supp. 1991).

46. 1988 Cal. Legis. Serv. 1584 (West) (codified as Cal. Civ. Code § 232(d) (West Supp. 1991)).

47. CAL. CIV. CODE § 232(d) (West Supp. 1991).

48. 1987 Cal. Legis. Serv. 709-12 (West) (amended by 1988 Cal. Legis. Serv. 2585-88 (West) (codified at CAL. WELF. & INST. CODE § 366.26 (West Supp. 1991))).

49. CAL. WELF. & INST. CODE § 366.26(a) (West Supp. 1991). This language does not change in the amended version effective July 1, 1991. *Id.*

50. CAL. WELF. & INST. CODE § 366.26(g) (West Supp. 1991) (emphasis added).

51. See *supra* notes 42-43.

interests of the child.⁵²

V. CALIFORNIA CIVIL CODE SECTION 232

Prior to January 1, 1989, section 232 delineated the eight categories under which parental rights could be terminated. These include:

(1) A child has been abandoned without support by both parents for six months or by one parent for twelve months.⁵³

(2) A child has been neglected or treated cruelly, and parents were deprived of custody for one year.⁵⁴

(3) Parents are disabled by alcohol or substance abuse, and parent has not had custody for one year because of the alcohol or substance

52. 1982 revisions of the law have shortened the time within which children are to be placed in a permanent home. The express intent was to extract children that were in foster care under CAL. WELF. & INST. CODE § 300 (West Supp. 1991). Cf. CAL. CIV. CODE § 232 (West Supp. 1991).

53. Under CAL. CIV. CODE § 232(a)(1) (West Supp. 1991), parental rights may be terminated when the parent has not maintained contact or has not provided support for a six (6) month period preceding the filing of a freedom petition. That six (6) month period will not be deemed broken by token or sporadic contacts. CAL. CIV. CODE § 232(a)(1) (West Supp. 1991). See *In re Oukes*, 14 Cal. App. 3d 459, 92 Cal. Rptr. 390 (1971); *In re T.M.R.*, 41 Cal. App. 3d 694, 116 Cal. Rptr. 292 (1974). The period is twelve (12) months when the child is with a parent. Signing a consent to adoption is also probative evidence of intent to abandon. See *In re Baby Boy M.*, 66 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1975).

54. Cf. CAL. WELF. & INST. CODE § 300 (West Supp. 1991). Civil Code section 232(a)(2) provides for termination of parental rights upon a showing that the Juvenile Court had deprived the parent of custody of the minor for a period exceeding one (1) year, on the grounds that the minor was "cruelly treated or neglected by his or her parents." CAL. CIV. CODE § 232(a)(2) (West Supp. 1991). See also *In re Carmaleta B.*, 21 Cal. 3d 482, 579 P.2d 514, 146 Cal. Rptr. 623 (1978). However, an additional element deemed implicit therein is that the condition leading to Juvenile Court jurisdiction is a "present circumstance" at the time of the freedom trial. *Id.* at 493, 579 P.2d at 521, 146 Cal. Rptr. at 630. See also *In re Susan Lynn M.*, 53 Cal. App. 3d 300, 313, 125 Cal. Rptr. 707, 715 (1976).

In considering whether the conditions that initially gave rise to the cruelty and/or neglect persist, i.e., they are a "present circumstance", the court may consider the following factors:

1. The parent's efforts to correct the personality/psychological problems that gave rise to the cruelty and/or neglect;

2. The parent's efforts to train and/or find and maintain suitable employment so that he/she might regain custody;

3. The parent's degree of rehabilitation and present capability to undertake the care of the minor; and

4. The parent's willingness to acknowledge the source of the cruelty and/or neglect, and take steps to assure the minor's future protection.

See *In re Carmaleta B.*, 21 Cal. 3d at 494-95, 579 P.2d at 521-22, 146 Cal. Rptr. at 630-31.

Inferentially, the courts may also consider whether the parent has maintained the reunification plan provided by the Juvenile Court and the Department of Social Services (hereinafter "DSS"); acknowledged the long-term, and possibly permanent, damage to the minor resulting from the cruelty and/or neglect—including the parent's willingness to deal with those problems; or attempted to overcome the estrangement of the minor due to the length of separation. See *In re Lynna B.*, 92 Cal. App. 3d 682, 700, 155 Cal. Rptr. 256, 265-66 (1979).

abuse.⁵⁵

(4) Parent is convicted of a felony of a nature to prove unfitness.⁵⁶

(5) Parent is declared mentally ill or developmentally disabled and is unable to care for the child.⁵⁷

(6) Parent is unable to control or support child because of parent's mental deficiency or illness.⁵⁸

(7) The child is under the court's or welfare department's supervision, or in a foster home, for one year and return to the home is detrimental to the child.⁵⁹

(8) A minor is determined to be a dependent child of the judicial court and reunification is not available.⁶⁰

55. CAL. CIV. CODE § 232(a)(3) (West Supp. 1991). Cf. CAL. WELF. & INST. CODE § 300 (West Supp. 1991).

56. Under Civil Code section 232(a)(4), a showing that the parent was convicted of child abuse will sustain a finding of unfitness. CAL. CIV. CODE § 232(a)(4) (West Supp. 1991). See *In re Angelia P.*, 28 Cal. 3d 908, 623 P.2d 198, 171 Cal. Rptr. 637 (1981); *In re Sarah H.*, 106 Cal. App. 3d 326, 165 Cal. Rptr. 61 (1980) (conviction of manslaughter arising out of the father beating the mother to death). The facts must be of a nature that show the parent is unfit to have custody and control of the child. See also *In re D.S.C.*, 93 Cal. App. 3d 14, 155 Cal. Rptr. 406 (1979) (burglary); *In re Geoffrey G.*, 98 Cal. App. 3d 412, 159 Cal. Rptr. 460 (1979) (murder while intoxicated).

57. CAL. CIV. CODE § 232(a)(5) (West Supp. 1991). A sustained defense of a criminal action on the grounds of insanity is a sufficient judicial declaration. See *In re Mark K.*, 159 Cal. App. 3d 99, 205 Cal. Rptr. 393 (1984).

58. Such a finding was sustained on the testimony of two qualified experts who found the parent to suffer from chronic schizophrenia which disabled the parent to the point of being unable to care for the child. *In re Heidi T.*, 87 Cal. App. 3d 864, 871-73, 151 Cal. Rptr. 263, 266-67 (1978) (citing CAL. CIV. CODE § 232(a)(6) (West Supp. 1991)). The requirements for this subsection are met when the father's violent tendency is shown, and the requirements of Civil Code section 232(a)(5) have been met. See *In re Mark K.*, 159 Cal. App. 3d 99, 104-08, 205 Cal. Rptr. 393, 398-401 (1984) (citing CAL. CIV. CODE § 232(a)(5) (West Supp. 1991)).

Harm cannot be presumed from the mere fact of mental illness. The court must balance the alternatives and consider the nature of the illness and how it affects the ability to parent. See *In re Jamie M.*, 134 Cal. App. 3d 530, 184 Cal. Rptr. 778 (1982).

59. In essence, Civil Code section 232(a)(7) requires a showing that: (a) the minor has been in out-of-home placement for at least one year and (b) "the parents have failed and are likely to fail in the future to provide a home and family relationship." CAL. CIV. CODE § 232(a)(7) (West Supp. 1991). See *In re Norma M.*, 77 Cal. App. 3d 110, 116, 143 Cal. Rptr. 412, 415 (1978); *In re Lynna B.*, 92 Cal. App. 3d at 700, 155 Cal. Rptr. at 265-66. In considering this issue, the court properly may distinguish between a "home" ("a place where one lives with . . . her family . . . feels secure with its familiar conditions, circumstances, and associations"), and a suitable furnished "house." *Id.* at 699-700, 155 Cal. Rptr. at 265-66. Further, the court may consider the efforts made by the parent to overcome the lack of relationship with the minor and the parent's likelihood of overcoming these difficulties. *Id.*

60. This subsection requires a showing that a child three years or under has been severely abused and reunification should not be provided pursuant to CAL. WELF. &

When a child has been placed in out-of-home placement, the court considers detriment to the child if returned to the parent. The court looks to the parent's past behavior as an indication of future behavior.⁶¹ Courts that focused on the parent-child relationship raised high hopes that custody would be awarded in the best interests of the child.

Unfortunately, the language of the statute requires that petitioners prove that return of the minor to the parent would be detrimental to the minor's interests and also determine the best interests of the child.⁶² However, this may be shown by proof that termination of parental rights is the "least detrimental alternative."⁶³ This test can be met by showing that return of the minor will mean disrupting a healthy existing bond with psychological parents in the mere hope that the biological parents will one day be able to provide a suitable "home".⁶⁴

Petitioners must still prove, however, that the parents were afforded assistance and a reasonable opportunity to rehabilitate themselves as parents and were unable to do so.⁶⁵ This requirement is shown by proof that appropriate guidance, education and assistance were provided by DSS, that it was offered and refused by the parents, or that there was some other reason rendering it impossible to do so.⁶⁶

For instance, in considering whether "present circumstances" show a continuation of the condition that led to the Juvenile Court finding of "cruel treatment and neglect," the court may:

1. Deem the findings of the Juvenile Court as conclusively binding, i.e., a collateral estoppel—in reference to the literal requirements of section 232(a)(2);⁶⁷ and

INST. CODE § 361.5(b)(3)-(5) (West Supp. 1991). See also CAL. CIV. CODE § 232(a)(8) (West Supp. 1991).

61. "[A] measure of a parent's future potential is undoubtedly revealed in the parent's past behavior with the child." *In re Angelia P.*, 28 Cal. 3d at 925, 623 P.2d at 208, 171 Cal. Rptr. at 647. See also *In re Lynna B.*, 92 Cal. App. 3d at 700, 155 Cal. Rptr. at 265-66; *In re Norma M.*, 77 Cal. App. 3d at 116, 143 Cal. Rptr. at 415.

62. See, e.g., *In re Carmaleta B.*, 21 Cal. 3d at 495-96, 579 P.2d at 518, 146 Cal. Rptr. at 627; *In re Susan Lynn M.*, 53 Cal. App. 3d at 315, 125 Cal. Rptr. at 716.

63. See *In re Carmaleta B.*, 21 Cal. 3d at 496, 579 P.2d at 518, 146 Cal. Rptr. at 627.

64. See *In re Lynna B.*, 92 Cal. App. 3d at 696-99, 155 Cal. Rptr. at 262-65; *In re Laura F.*, 33 Cal. 3d 826, 838, 662 P.2d 922, 930, 191 Cal. Rptr. 464, 472 (1983).

65. See CAL. CIV. CODE § 232 (West Supp. 1991); *In re Susan Lynn M.*, 53 Cal. App. 3d at 310-12, 125 Cal. Rptr. at 713-15; *In re Lynna B.*, 92 Cal. App. 3d at 701-02, 155 Cal. Rptr. at 266-67.

66. *In re Susan Lynn M.*, 53 Cal. App. 3d at 310-12, 125 Cal. Rptr. at 715-17; *In re Lynna B.*, 92 Cal. App. 3d at 701-02, 155 Cal. Rptr. at 913-15. In order to meet their burden of proof, petitioners must prove the elements of their case by "clear and convincing" evidence. CAL. CIV. CODE § 232(c) (West Supp. 1991); *In re Lynna B.*, 92 Cal. App. 3d at 701, 155 Cal. Rptr. at 266; *In re David E.*, 85 Cal. App. 3d 632, 634-35, 150 Cal. Rptr. 790, 790-91 (1978).

67. CAL. CIV. CODE § 232(a)(2) (West Supp. 1991).

2. Consider the past acts as evidence tending to show "present circumstances."⁶⁸ Similarly, past acts may be considered as evidence tending to show that the parent is unlikely to cure past and present problems.⁶⁹

VI. CALIFORNIA WELFARE AND INSTITUTIONS CODE

California Welfare and Institutions Code section 366.26 provides that parental rights⁷⁰ shall be terminated if the court determines by clear and convincing evidence that it is likely the minor will be adopted.⁷¹ This code contemplates factors that sustain or deny a parent-child relationship. The factors closely align with those enumerated in section 232.⁷² The considerations include:

1. The whereabouts of the parents is unknown.⁷³
2. The parent is suffering from a mental disability rendering the parent unable to adequately care for and control the child.⁷⁴
3. The minor child, after being removed due to physical/sexual abuse and subsequently returned to the parents, is removed a second time due to physical/sexual abuse.⁷⁵
4. The parent of the minor has been convicted of causing the death of another child through abuse or neglect.⁷⁶

68. See *In re Carmaleta B.*, 21 Cal. 3d at 493, 579 P.2d at 521, 146 Cal. Rptr. at 630.

69. See *In re Lynna B.*, 92 Cal. App. 3d at 700, 155 Cal. Rptr. at 265-66; *In re Laura F.*, 33 Cal. 3d at 835, 662 P.2d at 928, 191 Cal. Rptr. at 470; *In re T.M.R.*, 41 Cal. App. 3d 694, 698, 116 Cal. Rptr. 292, 294 (1974) ("[C]ommunications which took place only when legal action was threatened may properly be found to be token only."); *In re Oukes*, 14 Cal. App. 3d 459, 92 Cal. Rptr. 390 (1971). However, section 232 was amended in 1988, effective August 29, 1988, applicable to children that become dependents of the Juvenile Court after January 1, 1989, to include section 232(e) which provides:

This section does not apply to minors adjudged dependent children of the juvenile court pursuant to subdivision (c) of Section 360 of the Welfare and Institutions Code and Section 224, 224(m), and 7017 of this code provide the exclusive means for the termination of parental rights.

CAL. CIV. CODE § 232(e) (West Supp. 1991).

70. Parental rights are defined as rights of a biological mother or presumed father. In general, a father becomes presumed when he takes steps that would have legitimated the child. See *In re Michael D.*, 209 Cal. App. 3d 122, 256 Cal. Rptr. 884 (1989). These acts include a marriage with the mother or the father receiving the child into his home and holding the child out as his own. See CAL. CIV. CODE § 7004(a) (West 1983 & Supp. 1990).

71. CAL. WELF. & INST. CODE § 366.26(c) (West Supp. 1991).

72. See *supra* notes 53-61 and accompanying text.

73. CAL. WELF. & INST. CODE § 361.5(b)(1) (West Supp. 1991).

74. CAL. WELF. & INST. CODE § 361.5(2) (West Supp. 1991). Cf. CAL. CIV. CODE § 232(a)(6) (West Supp. 1991).

75. CAL. WELF. & INST. CODE § 361.5(3) (West Supp. 1991).

76. CAL. WELF. & INST. CODE § 361.5(4) (West Supp. 1991).

5. The minor has suffered severe physical abuse by a parent or persons known by the parent (where parent knows or reasonably should know of abuse).⁷⁷

6. The whereabouts of the parents have been unknown for six months, and the grounds for the minor's removal were that the minor had been left without provision for support or the parent has been incarcerated or institutionalized and cannot arrange for the minor's care.⁷⁸

7. The parent has been convicted of a felony indicating parental unfitness.⁷⁹

8. The parent has failed to visit or contact the child for a period of six months.⁸⁰

9. Return of the child after eighteen months of out-of-home placement would create a substantial risk of detriment to the physical or emotional well-being of the child.⁸¹

Notwithstanding satisfaction of any grounds for parental termination, the court may refrain from terminating parental rights to custody if it is found termination would be detrimental to the minor. Such detriment may be due to: established contact with the parents; the child's objection, where the child is at least ten years old; the child is unlikely to be adopted; or, removal from the present nonparental home would be detrimental.⁸² If the court finds the minor is not adoptable or termination of parental rights is contrary to the minor's interests, the court orders placement in a preferential order.⁸³

77. CAL. WELF. & INST. CODE § 361.5(5) (West Supp. 1991).

78. CAL. WELF. & INST. CODE §§ 366.21(e), .26 (West Supp. 1991).

79. CAL. WELF. & INST. CODE § 366.21(e) (West Supp. 1991).

80. *Id.*

81. CAL. WELF. & INST. CODE § 366.22(a) (West Supp. 1991).

82. CAL. WELF. & INST. CODE § 366.26(c)(1) (West Supp. 1991).

(A) The parents or guardians have maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship.

(B) A minor 10 years of age or older objects to termination of parental rights.

(C) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(D) The minor is living with a relative or foster parent who is unable or unwilling to adopt the minor because of exceptionable circumstances, which do not include an unwillingness to accept legal responsibility for the minor, but who is willing and capable of providing the minor with a stable and permanent environment and the removal of the minor from the physical custody of his or her relative or foster parent would be detrimental to the emotional well-being of the minor.

Id.

83. The court will order placement in the following order:

1. Appointment of the minor's present caretakers or appropriate persons as guardians of the minor. However, if the minor is living with a relative or foster parents who are unwilling to become guardians, but willing and able to continue providing care and

Amended section 366.26 of the Welfare and Institutions Code represents the California Legislature's intent to focus primarily on the child's best interests. Those provisions that establish grounds for termination of parental rights allow for *prompt* termination of parental rights, thus avoiding the problems often encountered with judicial review and permanency planning hearings. Once a child has been made a dependent, a court may proceed immediately to terminate parental rights if certain factors are present.⁸⁴ These include situations where the whereabouts of the parent is unknown, or the parent is mentally disabled, or the child was sexually or physically abused, or the parent caused the death of another child, or the child was abused by a person known by the parent, or the parent was convicted of a felony indicative of unfitness.⁸⁵ Arguably, a termination proceeding could occur as soon as six months at the first judicial review. This interpretation, however, has met certain opposition which contends that reunification must provide for at least a twelve month period.⁸⁶

Yet, the latter opposition is not reasonable considering the remaining grounds for termination of parental rights. These include situations where the whereabouts of the parent is unknown for six months and the child was removed because he or she was left without support or the parent was incarcerated or institutionalized; or the parent has not contacted the child in six months, or the child has been out of the home for eighteen months and returning the child would be detrimental.⁸⁷ Essentially, these situations allow the court to terminate parental rights where reunification has been offered for a twelve month period and the guardian or biological parent has failed to adequately comply with reunification,⁸⁸ thus failing to maintain a parent-child relationship.

It must be noted that whenever a court hears grounds outlined in

removal, due to substantial psychological ties, would be seriously detrimental for the minor, the court shall order the minor remain with such relative or foster parents; or

2. Order the minor remain in long-term foster care; or

3. If the court finds there exists no suitable foster parents, the court may order the care, custody, and control of the minor transferred to a licensed foster agency for suitable placement. CAL. WELF. & INST. CODE § 366.26(c)(3), (4) (West Supp. 1991).

84. CAL. WELF. & INST. CODE §§ 300-304 (West 1983 & Supp. 1991).

85. The elements the court considers are numbers one through five and number seven discussed *supra* at notes 71-77 and accompanying text.

86. The opposition usually argues that parental rights are supreme and that to preserve them the parent must be given every opportunity to protect those rights.

87. See *supra* notes 71-79 and accompanying text.

88. Failure to comply with reunification occurs when "the conditions that caused the original dependency have not been, and are not likely to be corrected." *In re Albert B.*, 215 Cal. App. 3d 361, 378, 263 Cal. Rptr. 694, 702 (1989).

section 366.26, all the court must first assess is whether the child is adoptable.⁸⁹ If so, the court shall order the child referred to the appropriate adoption agency for adoptive placement. The adoption statutes of all jurisdictions are aimed at promoting the best interests of the child.

California Civil Code section 233 provides that "interested" persons may petition under section 232 to free a child from parental control and custody.⁹⁰ However, unless the child is also a dependent child under the juvenile court, this applies only (1) if the child is "abandoned to [the] care and custody of another"; or (2) the parent is "convicted of a felony"; or (3) the parents "are declared to be developmentally disabled or mentally ill"; or (4) the "parent or parents are mentally disabled."⁹¹ The courts have applied section 232(a)(7) where the child has been under the probate court's supervision via guardianship and the parent has failed to maintain the parent-child relationship.⁹²

Pursuant to section 366.25(g) of the Welfare & Institution Code, foster parents are entitled to preference and may proceed under Civil Code section 233 when a child is available for adoption, was declared a dependent prior to January 1, 1989, and the agency seeks to make other placement, or fails to pursue termination.⁹³ In the case of adopting petitioners, the provisions of section 224 also apply, and a choice must be made between section 232(a)(1) and section 224.⁹⁴ Section 224 imposes the burden of proving both failure to communicate *and* failure to support in order to meet the abandonment criteria.⁹⁵

In all other respects, the applicable subsections of section 232 apply, including the clear and convincing standard of proof, appoint-

89. Section 366.26 applies to hearings terminating parental rights or establishing guardianship of minors adjudged dependent children of the court. CAL. WELF. & INST. CODE § 366.26.

90. In pertinent part, Civil Code section § 233 provides that, "[a]ny interested person may petition . . . for an order or judgment declaring the minor person free from the custody and control of either or both his or her parents." CAL. CIV. CODE § 233 (West 1982).

91. CAL. CIV. CODE § 232 (a)(1), (4)-(7) (West Supp. 1991).

92. *In re Mark Anthony B.*, No. Civ. G003927 (Cal. Ct. App. May 29, 1987). See also CAL. PROB. CODE § 2102 (West 1981).

93. CAL. WELF. & INST. CODE § 366.25(g) (West Supp. 1991).

94. Section 232(a)(1) states: "An action may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both of his or her parents when the child comes within any of the following descriptions:" See *supra* notes 53-60 and accompanying text. CAL. CIV. CODE § 232(a)(1) (West Supp. 1991).

Section 224 states that the consent of a parent is not required when (1) the parent has been judicially deprived of custody, or (2) the parent has deserted the child, or (3) where the parent has relinquished the child for adoption. CAL. CIV. CODE § 224 (West 1982).

95. *In re Murray*, 86 Cal. App. 3d 222, 150 Cal. Rptr. 58 (1978).

ment of counsel for the minor,⁹⁶ as well as a "guardian ad litem,"⁹⁷ and appointed counsel for the parent.⁹⁸ However, the detriment standard of section 4600 does not apply, and the best interests of the child is the controlling criteria.⁹⁹

The legislature reacted to the judicial propensity for over-emphasis on parental rights, and in 1983 adopted the following language:

The provision of this chapter shall be liberally construed to serve and protect the interests and welfare of the child. At all proceedings to declare a child free from parental custody and control, the court shall consider the wishes of the child, bearing in mind the age of the child, and shall act in the best interests of the child.¹⁰⁰

The legislature made it even clearer that the standard should be the best interests of the child with the following language: "The purpose of this chapter is to serve the welfare and best interests of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing from his other life."¹⁰¹

When determining what is in the best interests of the child, the court looks to the impact and/or harmful effects that are likely to occur if the child is uprooted. The court must consider the bonds that a child forms in early years and the emotional impact if those bonds are severed.¹⁰² Further, the court analyzes the impact of interrupting the child's continuity of environment.¹⁰³ Child psychiatrists sug-

96. CAL. CIV. CODE § 237.5(a) (West Supp. 1991).

97. CAL. CIV. CODE § 237 (West Supp. 1991).

98. CAL. CIV. CODE § 237.5(b) (West Supp. 1991).

99. *In re Christopher S.*, 197 Cal. App. 3d 433, 438, 242 Cal. Rptr. 866, 868 (1987).

100. CAL. CIV. CODE § 232.5 (West Supp. 1991).

101. CAL. CIV. CODE § 232.6 (West Supp. 1991). In one case, the court stated:

It may be suggested that nothing be done, that the children be permitted to stay where they are. As noted several times, however, the purpose of the statute permitting termination of parental rights is to 'serve the welfare and best interests of a child by providing the stability and security of an adoptive home To facilitate the stated goals, "it seems indisputable that . . . the state as a *parens patriae* not only has a compelling interest but also a duty to sever the parental bonds once a situation contemplated by the statute arises."

See *In re Laura F.*, 33 Cal. 3d 826, 837, 662 P.2d 922, 929, 191 Cal. Rptr. 464, 471 (1983) (citations omitted).

102. In *In re Rose Lynn G.*, 57 Cal. App. 3d 406, 129 Cal. Rptr. 338 (1976), the court said:

[A]n important element that a trial court must consider, when making a decision about children, is the impact of the passage of time. Childhood is short; many basic attitudes and capacities are developed in very early years. Ties are formed to the adults present in the child's life, and can only be broken by inviting emotional disaster.

Id. at 425, 129 Cal. Rptr. at 350.

103. In *In re Michelle T.*, 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (1975), the court rejected removal of the child from the petitioners saying:

According to the authorities, changes or interruptions in this relationship

gest that "stability of the environment" is more important than the type of environment.¹⁰⁴

The courts tend to perceive children as easily adaptable to change.¹⁰⁵ But some experts warn that because of a child's limited perception of the future, the child is less able to adapt to a sudden change in environment than an adult.¹⁰⁶ To a young child, a current catastrophe may appear permanent. Serious harmful effects are likely to follow the uprooting of a child.

VII. THE UNIFORM PARENTAGE ACT.

In January 1976, the Uniform Parentage Act became effective and removed from the code the archaic terms "legitimate" and "illegitimate," and therewith the connotation of bastardy.¹⁰⁷ The UPA rec-

cause the child to regress "along the whole line of his affections, skills, achievements and social adaptation". . . . "Recently, authorities have recognized the importance of the continuity of the environment and the trauma to a young child caused by separation from its established home has been viewed by the courts as a serious consideration in adoption cases.

Id. at 706, 117 Cal. Rptr. at 859-60 (quoting J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 18 (1973)). See also *Williams v. Neumann*, 405 S.W.2d 556, 557 (Ky. App. 1966), where the court stated: "[The child] cannot suddenly be transplanted like a dogwood tree without running serious and dangerous risk of frustration and bewilderment."

104. One writer suggests:

Today most experts in these fields agree that once a child is placed in a foster or adoptive home for a period of time enabling the child to adjust to that home, it may be dangerous to the child's emotional health to uproot him. "In the view of most child psychiatrists, stability of the environment is far more crucial than its precise nature and content." Scientific findings have led psychiatrists to testify in foster care and adoption proceedings, that to uproot a child threatens the development of the child's ability to form relationships based upon love, for the child seeks to insulate against an anticipated sudden loss.

Inker, *Expanding the Rights of Children in Custody and Adoption Cases*, 5 FAM. L. Q. 417, 420-21 (1971) (quoting Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 71 (1969)).

105. See *infra* note 156 and accompanying text.

106. Psychiatrists and psychologists have warned for some time that a young child, far from being more adaptable to change, is emotionally more delicate than an adult and more apt to be damaged, sometime permanently, when uprooted from a secure environment. Young children are more emotionally delicate than adults in part because they have no "sense of time" which prevents them from seeing beyond a current catastrophe.

Bodenheimer, *New Trends and Requirements in Adoption Law and Proposal for Legislative Change*, 49 S. CAL. L. REV. 10, 20 (1975).

107. The Uniform Parentage Act [hereinafter UPA] was enacted by the California Legislature in modified form as CAL. CIV. CODE §§ 7000-7021 (West 1983 & Supp. 1990). The UPA has been enacted in sixteen other states. See ALA. CODE §§ 26-17-1 to -21 (1975); COLO. REV. STAT. §§ 19-4-101 to -129 (Supp. 1988); DEL. CODE ANN. tit. 13 §§ 801 to 819 (Supp. 1990); HAW. REV. STAT. §§ 584-1 to -26 (Supp. 1987); ILL. ANN. STAT. ch. 40, ¶¶ 2501-2526 (Smith-Hurd Supp. 1989); KAN. STAT. ANN. §§ 38-1110 to -1129 (1986); MINN. STAT. ANN. §§ 257.51 - .74 (West 1982); MO. ANN. STAT. §§ 210.817 - .852 (Vernon Supp. 1989); MONT. CODE ANN. §§ 40-6-101 to -135 (1989); NEV. REV. STAT. §§ 126.011 - .391 (1987); N.J. STAT. ANN. §§ 9:17-38 to -59 (West Supp. 1989); N.D. CENT. CODE §§ 14-

ognizes that a parent-child relationship exists regardless of marital status.¹⁰⁸ The California courts, however, still required a finding of detriment to the child in applying the Act.¹⁰⁹ The code created, instead, two classes of fathers: "alleged fathers" and "presumed fathers."¹¹⁰ Civil Code section 7004 delineates the criteria by which the court determines into which category a father fits. The criteria are similar to the former legitimation statutes.¹¹¹

The terms "alleged" and "presumed" are not used in the evidentiary sense, rather they are identifying terms of the two classes of fathers. The rights attached to the two classes are significantly different. Indeed, a biological father is not necessarily a "presumed" father.¹¹²

The presumed father has the right to custody, services, and earnings of the unmarried minor child,¹¹³ and the right to veto an adoption.¹¹⁴ The alleged father has the right to a hearing to determine his status as presumed versus alleged.¹¹⁵ The reported cases decided since the effective date of the Uniform Parentage Act bring into focus the policy behind the Act.

A mother can prevent the alleged father from becoming a pre-

17-01 to -26 (1981 & Supp. 1989); OHIO REV. CODE ANN. §§ 3111.01 - .38 (Anderson 1989); R.I. GEN. LAWS §§ 15-8 to -27 (1988); WASH. REV. CODE ANN. §§ 26.26.010 - .905 (Supp. 1989); WYO. STAT. §§ 14-2-101 to -120 (1977).

108. See CAL. CIV. CODE § 7002 (West 1983 & Supp. 1990); UNIF. PARENTAGE ACT § 2, 9B U.L.A. 287, 296 (1987).

109. See *In re Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984); *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985). See *supra* notes 30-31.

110. CAL. CIV. CODE § 7004(a) (West 1983 & Supp. 1990). A father becomes presumed when he does certain acts that "legitimate" the child. These acts include marrying the child's mother and receiving the child into his home as his own child. *Id.*

111. CAL. CIV. CODE § 230. Custodial rights are now delineated in CAL. CIV. CODE § 197 (West 1982) which is similar to the former CAL. CIV. CODE § 200. The new section replaced the old at the effective date of the Uniform Parentage Act, January 1976.

112. As one court noted:

It is apparent that the term "presumed father" as used in California Civil Code § 7017 does not denote a presumption in the evidentiary sense at all. Rather it uses the term as a convenient means of identifying a class reference to § 7004. . . . The effect of this classification is that a man may be able to show that he is indisputably the biological father of the child, *but he may not hold a power to veto an adoption because he does not come within the class defined by reference to § 7004.*

W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 789 (1979) (emphasis added).

113. CAL. CIV. CODE § 197 (West 1982).

114. CAL. CIV. CODE § 7017(d) (West Supp. 1991).

115. CAL. CIV. CODE § 7006 (West Supp. 1991). A § 7006 hearing must be consolidated with a § 7017 hearing. 1986 Cal. Stat. 4901.

sumed father by obstructing the minimum required contact. It is not sufficient that the father attempt such contacts. In *In re Marie R.*,¹¹⁶ for example, the court recognized that a mother may prevent a natural father from establishing the minimum contact required to become a presumed father.¹¹⁷ A year later in *W.E.J. v. Superior Court*,¹¹⁸ the court explicitly stated that "with respect to a non-marital child, the mother may, by her conduct, prevent the male from acquiring the status of 'presumed father' which would have given him a veto over adoption."¹¹⁹

There are two situations where a father cannot legitimate a non-marital child where he wants to recognize the child. First, the father cannot legitimate the child in situations where his wife, not the mother of the child, refuses to allow the child into the home. Second, the father cannot legitimate the child where the natural mother will not relinquish custody and prevents the father from receiving the child.¹²⁰

In broad terms, California Civil Code section 7006 provides that a mother, presumed father, or other interested party can bring an action to establish the non-existence of a parental relationship.¹²¹ Sec-

116. 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978); see also *In re Rebecca B.*, 68 Cal. App. 3d 193, 137 Cal. Rptr. 100 (1977).

117. *In re Marie R.*, 79 Cal. App. 3d. at 630, 145 Cal. Rptr. at 126 ("Absent even the minimal contact . . . there can be no receipt, constructive or otherwise, into the house of a purported father.") (citations omitted).

118. 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979).

119. *Id.* at 310, 160 Cal. Rptr. at 867. *But see In re Baby Girl M.*, 37 Cal. 3d 365, 688 P.2d 918, 207 Cal. Rptr. 309 (1984) (the father must have "a reasonable opportunity to assert and effectuate the right of parental preference"). For twenty years prior to the decisions in *Marie R.*, 79 Cal. App. 3d 624, 145 Cal. Rptr. 122, and *W.E.J.*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862, the courts had refused to hold that the putative father could legitimate the child against the will of the mother. See *Cheryl H. v. Superior Court*, 41 Cal. App. 3d 273, 115 Cal. Rptr. 849 (1974); *In re Pierce*, 15 Cal. App. 3d 244, 93 Cal. Rptr. 171 (1971); *Truschke v. LaRocca*, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); *In re Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964); *In re Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954).

120. The Court noted in *In re Irby*:

This case recognizes that there are two situations in which the father of an illegitimate child cannot legitimate the child even though he is willing to do so. The first situation is where his wife who is not the mother of the child, refuses to permit him to receive the child into the family circle and the second is where the natural mother of the child refuses to give up custody of the child thereby preventing him from receiving the child. If either of these consents is lacking, he may not legitimate the child.

226 Cal. App. 2d at 238, 241 Cal. Rptr. at 881.

121. Section 7006 generally states that:

(a) The child, its mother or a presumed father under 7004(a)(1), (2), (3) may bring an action (1) any time to establish presumed father status, or (2) if within a reasonable time to declare the non-existence of the paternal relationship presumed is rebutted then any other man who a party may have paternity established.

(b) Any interested party, at any time, may bring an action to determine the existence or non-existence of the paternal relationship presumed under 7004(a).

(c) When there is no presumed father under 7004, an action may be brought to de-

tion 7017 contemplates that where notice of the alleged paternity is served on the father he must, within thirty days, bring an action under section 7006 to assert his rights. The thirty-day period can also be started by the birth of the child, whichever period ends later.¹²²

The filing of the section 7006 petition case holds in abeyance the proceedings in the adoption case until ruling on the pending petition under sections 7017(d)(2) and 7006, which must be consolidated.¹²³

The October, 1984 California Supreme Court decision in *Baby Girl M.*¹²⁴ cast doubt on earlier cases that dealt with the prior language of section 7006 and section 7017. The Court applied the parental preference of section 4600 to all section 7017(d) proceedings. The court ruled that the mother's consent to adoption triggers the elevation of the putative father's rights, and the detriment standard of section 4600 applies before his rights may be terminated.¹²⁵ The "alleged" father's rights in such cases are then the same as those of a presumed father. The alleged father's rights, including custody, may be terminated only on a showing that granting such rights would be detrimental to the child.¹²⁶ *Baby Girl M.* seemed to take a 180 degree turn from case and statutory law going back over twenty years, which focused on the best interest of the child, and which abrogated the "alleged" father's rights to that goal.¹²⁷

Following this, an appellate court in *Michael U. v. Jamie B.* awarded the "alleged" father custody *pendente lite*, but did so without stating which standard the court applied, nor providing any other findings upon which the decision was based.¹²⁸ The law in the area

terminate the existence of the paternal relationship. Such an action shall be consolidated with the § 7017 action.

CAL. CIV. CODE § 7006 (West Supp. 1991).

122. CAL. CIV. CODE § 7017(d)(1) (West Supp. 1991).

123. Adoption cannot proceed without consent except under specific circumstances. CAL. CIV. CODE § 224 (West 1982).

124. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

125. See, e.g., *In re Baby Boy D.*, 159 Cal. App. 3d 8, 205 Cal. Rptr. 361 (1984); *In re Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

126. "Alleged" father and "presumed" father are not terms of evidentiary meaning, but rather are labels to define the legal status of a father. See *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979). See also notes 69 and 107-09 and accompanying text.

127. See *In re Richard M.*, 14 Cal. 3d 783, 537 P.2d 363, 122 Cal. Rptr. 531 (1975); *In re Barnett*, 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1969); *W.E.J. v. Superior Court*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979); *In re Marie R.*, 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978).

128. 160 Cal. App. 3d 193, 206 Cal. Rptr. 323 (1984), *vacated*, 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985).

of parental rights was then thrown into an extreme state of flux when the California Supreme Court reversed the appellate court.¹²⁹ The court was highly divided, as reflected in four separate opinions. Three of the majority justices urged that *Baby Girl M.* be reversed. In response to *Baby Girl M.* and *Michael U. v. Jamie B.*, the legislature acted in the 1986 session and identified the correct standard to be the best interest of the child.¹³⁰

The decisions in *Baby Girl M.* and *Michael U. v. Jamie B.* provide an historical background and give meaning to the 1986 amendment to sections 7006 and 7017. Those amendments provide that the best interest of the child is the standard for determining whether an alleged father should obtain custody of a non-marital child.¹³¹

The clarity of the statute was again cast into confusion, however, with the case of *Jermstad v. McNelis*.¹³² In May, 1989, the Third District Court of Appeal concluded in a circuitous decision that to the extent that *Baby Girl M.* was based on constitutional grounds, legislative enactment could not overturn the decision.¹³³ The court held that a putative father could not be denied a parental preference and that the statute as amended would not preclude such a preference.¹³⁴ The court went so far as to state that the best interests of the child was not a consideration, implying that the putative father had to be shown to be "unfit".¹³⁵

129. 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985).

130. 1986 Cal. Stat. 4904 (codified as CAL. CIV. CODE § 7017(d)(2) (West Supp. 1991)). See *In re Christopher Brian S.*, 197 Cal. App. 3d 433, 242 Cal. Rptr. 866 (1987).

131. In pertinent part, the amendments provided:

Such an action shall be consolidated with a proceeding pursuant to subdivision (b) of Section 7017. The parental rights of the alleged natural father shall be determined as set forth in subdivision (d) of Section 7017.

CAL. CIV. CODE § 7006(c) (West Supp. 1991).

If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making the determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement of the child. If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that person's consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child. Section 4600 does not apply to this proceeding. Nothing in this section changes the rights of a presumed father.

CAL. CIV. CODE § 7017(d)(2) (West Supp. 1991).

132. 210 Cal. App. 3d 528, 258 Cal. Rptr. 519 (1989).

133. *Id.* at 549, 258 Cal. Rptr. at 531.

134. *Id.* at 551, 258 Cal. Rptr. at 533. The court relied on *Lehr v. Robertson*, 463 U.S. 248 (1983).

135. *Jermstad*, 210 Cal. App. at 553, 258 Cal. Rptr. at 534. *But see Michael U. v. Jamie B.*, 39 Cal. 3d 787, 796, 705 P.2d 362, 368, 218 Cal. Rptr. 39, 45 (1985).

On February 22, 1990, the Sixth District Court of Appeal issued its decision in *In re Kelsey S.*¹³⁶ The putative father there argued that he was a presumed father by virtue of constructive receipt of the child into his home, that he was entitled to parental placement preference, and that his rights could not be terminated absent application of the clear and convincing standard of proof.

The court rejected those contentions and ruled that the constructive receipt doctrine is not constitutionally mandated.¹³⁷ The court stated that the United States Supreme Court case of *Lehr v. Robertson* does not mandate that the rights of putative fathers are equal to those of the mother.¹³⁸ Further, the court disagreed with the broad statements of *Jermstad* that a parental preference must be afforded the father.¹³⁹ Finally, the court ruled that termination of the non-presumed father's rights required a preponderance of the evidence rather than the higher standard of clear and convincing evidence.¹⁴⁰

VIII. CUSTODY BATTLES AND THE IMPACT ON THE CHILD

In general, a section 7017(d) petition usually arises in adoption cases after initial investigation by the Department of Social Services and an interview with the mother.¹⁴¹ If the potential father has been identified, he must be given notice of potential paternity, and as a further caution, he must be put on notice¹⁴² that he must initiate an action within thirty days to assert any right he might have.¹⁴³ If he fails to file such an action within thirty days of service, his rights may be terminated.¹⁴⁴

In the processing of these contested cases, regardless of the code section under which they are filed, the court must act with a great deal of caution in order to avoid multiple changes of custody. The impact on the child can be disastrous. These principles require that

136. 218 Cal. App. 3d 130, 266 Cal. Rptr. 760, review granted, 790 P.2d 238, 269 Cal. Rptr. 74 (1990).

137. *Kelsey S.*, 218 Cal. App. 3d at 133-36, 266 Cal. Rptr. at 762-64; see also *In re Sabrina H.*, 217 Cal. App. 3d 702, 266 Cal. Rptr. 274 (1990).

138. "Nothing in *Lehr* mandates that the rights of fathers . . . with 'potential' rather than 'substantial' relationships with their children be equal to those of the child's mother." *Kelsey S.*, 218 Cal. App. 3d at 136, 266 Cal. Rptr. at 764.

139. *Kelsey S.*, 218 Cal. App. 3d at 138, 266 Cal. Rptr. at 765. See *Jermstad v. McNelis*, 210 Cal. App. 3d 528, 258 Cal. Rptr. 519 (1989).

140. *Kelsey S.*, 218 Cal. App. 3d at 139-40, 266 Cal. Rptr. at 766.

141. CAL. CIV. CODE § 7017(c) (West Supp. 1991).

142. CAL. CIV. CODE § 7017(f) (West Supp. 1991).

143. CAL. CIV. CODE § 7017(d)(1) (West Supp. 1991).

144. See *In re Manuel J.*, 150 Cal. App. 3d 513, 197 Cal. Rptr. 777 (1984).

interim changes in custody be avoided, unless the child is in imminent danger or will suffer adverse consequences as a result of the current environment.¹⁴⁵ These principles should apply to stays pending appeal as well as *pendente lite* changes in custody.¹⁴⁶

Unlike the "standard of detriment" which the court must find before naming adoptive parents the guardians of the child over the interests of a natural parent, the arena of temporary letters of guardianship employs the standard of "good cause," and is often before the courts in emergency cases.¹⁴⁷

There are few cases which interpret "good cause." In *Dority v. Superior Court*¹⁴⁸ the trial court, over the infant's parents' objection, appointed the director of the Department of Public Social Services as the temporary guardian of the child who was medically diagnosed as being "brain dead". The purpose of the appointment was to enable the director to vicariously assert the child's constitutional right to refuse medical treatment and withdraw life-support devices.

The appointment of a temporary guardian in *Dority* was made pursuant to California Probate Code section 2250, which provides that a temporary guardian may be appointed for good cause or other showing.¹⁴⁹ Good cause was shown when the court found the state had a compelling interest in providing care for the child.¹⁵⁰ The court stated it need find only that there is a "potential" threat to the

145. See *In re Cox*, 58 Cal. 3d 434, 24 Cal. Rptr. 864 (1962) (child should stay with adoptive parents during hearing); *Smith v. Superior Court*, 41 Cal. App. 3d 109, 115 Cal. Rptr. 677 (1974) (visitation by natural mother pending appeal not in the best interest of the child); *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973) (where there is no threat to child, the status quo is preferred).

146. "In dealing with problems of physical custody pending the resolution of adoption litigation, the courts normally call for the preservation of the status quo when it poses no threat to the child. . . . The courts assume that the agency will not make unnecessary changes in custody." *C.V.C.*, 29 Cal. App. 3d at 920-21, 106 Cal. Rptr. at 131.

147. Pursuant to California Probate Code section 2250, the court, on "good cause", may order that temporary letters of guardianship be issued. They must show a specific date of termination which, as a rule, will be the date set for hearing on the general guardianship.

Temporary guardianship letters empower the guardian with the same authority as general letters, unless specified otherwise in the order to issue the letters. CAL. PROB. CODE § 2252 (West 1981).

148. 145 Cal. App. 3d 273, 193 Cal. Rptr. 288 (1983).

149. "The petition shall state facts which establish good cause for appointment of the temporary guardian or temporary conservator." CAL. PROB. CODE § 2250(d) (West Supp. 1991).

150. The *Dority* court stated:

The state has a substantial interest in protecting and providing for the child's care when the parents represent a potential threat to the child's well-being or where the parents, for some reason, become unavailable. Investigations reveal that the parents in this case may have been responsible for the child's injuries. . . . Parents, by their own action, can become legally unavailable and unable to provide the proper care for their child.

Dority, 145 Cal. App. 3d at 278, 193 Cal. Rptr. at 291.

child's well-being before good cause is shown. There need not be a showing of actual abuse.¹⁵¹

The purpose in seeking temporary guardianship for adoptive parents pending a guardianship hearing is to keep the child with the adoptive parents and avoid interim changes of custody of the child. Such interim changes may be unnecessary if the court anticipates finding that it would be detrimental for the child to be in the biological parent's custody. The state has recognized that interim changes in custody are detrimental to children.¹⁵² In considering whether "good cause" may be found, the courts should be cognizant of the effects of changes in custody pending a guardianship hearing which may be only thirty to sixty days in the future.

It is fundamental that in considering the effects of custody change and visitation orders, a court must be extremely sensitive to avoid adverse effects on the child. Both the California Supreme Court and courts of appeal have recognized that a court should carefully consider, before any changes are ordered, the effects that changes in environment have on children who are subjects of adoption proceedings.¹⁵³ The Court must act with regard to the best interest and safety of the infant.

Courts are recognizing the serious harmful effects which are likely to follow the uprooting of a child. In *In re Rose Lynn G.*, the court said:

An important element that a trial court must consider, when making a decision about children, is the impact of the passage of time. Childhood is short; many basic attitudes and capacities are developed in the very early years. Ties are formed to the adults present in the child's life, and can only be broken by inviting emotional disaster.¹⁵⁴

In other cases, the courts have recognized the importance of continuity in a child's life and rejected moving a child.¹⁵⁵ Courts are reluctant to unnecessarily transplant a child and subject the child to the trauma of separation.¹⁵⁶ Sudden upheaval in a child's life may

151. Although the parents had been held to answer on charges of child neglect and abuse, they had not been convicted nor had it been unequivocally shown that they actually committed the abuse. *Id.* at 278-79, 193 Cal. Rptr. at 291.

152. See *supra* notes 143-44.

153. See *In re Cox*, 58 Cal. 2d 434, 24 Cal. Rptr. 864 (1962) (best interests are served by maintaining child's status quo during appeal); *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 106 Cal. Rptr. 123 (1973). See *supra* note 144.

154. 57 Cal. App. 3d 408, 425, 129 Cal. Rptr. 338, 350 (1976).

155. In *In re Michelle T.*, 44 Cal. App. 3d 699, 706-08, 117 Cal. Rptr. 856, 859-60 (1975), the court rejected removal of the child from the petitioners because of the trauma likely to be caused by removal from a stable environment. See *supra* note 102.

156. See *supra* notes 101-02.

have a long term impact on the child's ability to form relationships because of the fear of loss.¹⁵⁷

The problem of uprooting children is also discussed by Professor Bodenheimer. She notes that "[t]here has been a persistent tendency on the part of courts to assume that children, being young and malleable, can adapt to change more readily than adults."¹⁵⁸ But Professor Bodenheimer points out that, in fact, the opposite is true. Children are actually more sensitive to change and more likely to be harmed by upheaval from a secure home.¹⁵⁹

Generally, it is in the best interests of the child to deny a parent the ability to withdraw consent to an adoption "once the child has become settled in the adoptive home."¹⁶⁰ Currently, California allows the withdrawal of consent only after a hearing and only with court approval. Courts generally agree that the welfare of the child should take precedence over the statutory rights of the natural parent.¹⁶¹

The nature of these cases is such that emotional factors favoring either the biological parent or the adopting parents are always present and pose an obstacle to properly analyzing the case from the perspective of the child. In order to analyze this question, a number of factors must be considered. The court, of course, has a great deal of discretion, not only in determining what these various factors should be, but also in weighing the effect of each factor. Factors such as comparative wealth and parental preference clearly have no place in the best interests analysis.

157. See Inker, *supra* note 102.

158. Bodenheimer, *supra* note 104, at 19 (quoting Note, *Natural v. Adoptive Parents: Divided Children and the Wisdom of Solomon*, 57 IOWA L. REV. 171, 174 (1971)).

159. See *supra* note 104.

160.

Once consent to the adoption has been given, California law, unlike the law of some jurisdictions, generally protects the child's interest in remaining in an adoptive home that has become its real home. . . . In an independent adoption, consent may be withdrawn only with court approval after a hearing. The court may permit withdrawal of the consent and return of the child to his natural parents only if, under all the circumstances, withdrawal is reasonable and in the best interests of the child. Since this provision gives no specific guidelines to the courts, it is recommended that language be added to the effect that withdrawal of consent by a parent should, as a rule, be denied once the child has become settled in the adoptive home.

Bodenheimer, *supra* note 104, at 34.

161. *In re Barnett*, 54 Cal. 2d 370, 354 P.2d 18, 6 Cal. Rptr. 562 (1960), held that: "The rule of strict construction of our adoption statutes in favor of the natural parents. . . being inconsistent with the decisions of this court. . . as well as with Civil Code § 4, is disapproved." *Id.* at 378, 354 P.2d at 22-23, 6 Cal. Rptr. at 566 (citations omitted).

The court in *In re Robinson*, 48 Cal. App. 3d 244, 121 Cal. Rptr. 574 (1975), stated that: "The requirement of consent by a natural parent is not strictly construed in favor of the rights of the natural parent, but *instead is liberally construed in order to effect the object of the adoption statute in promoting the welfare of the children.*" *Id.* at 248, 121 Cal. Rptr. at 577 (citing *San Diego County Dep't of Public Welfare v. Superior Court*, 7 Cal. 3d 1, 101 Cal. Rptr. 541 (1972)) (emphasis added).

Michigan's Child Custody Act enumerates factors that form a good framework for analyzing the best interests of the child. Following is an excerpt of the considerations that Michigan believes lead to a decision that is in the best interests of the child:

- (a) The love, affection and other emotional ties existing among the competing parties and the child,
- (b) The capacity and disposition of competing parties to give the child love, affection, and guidance, and continuation of the educating and rearing of the child in its religion or creed, if any,
- (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the law in lieu of medical care, and other material needs,
- (d) The length of time the child has lived in a satisfactory, stable environment and the desirability of maintaining continuity,
- (e) The permanence, as a family unit, of the existing or proposed custodial home,
- (f) The moral fitness of the competing parties,
- (g) The mental and physical health of the competing parties,
- (h) The home, school, and community record of the child,
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference,
- (j) Any other factor considered by the court to be relevant to a particular child custody dispute.¹⁶²

A comparative analysis without the application of any parental preference is required to decide the best interests of the child. This analysis must be from the perspective of the child, not from the perspective of the contesting adults.¹⁶³ Further, the analysis must include consideration of the "trauma" caused by removal from a stable and established home.¹⁶⁴

By far, the most important issue is the detriment that befalls the

162. Child Custody Act of 1970, MICH COMP. LAWS ANN. § 722.23 (West Supp. 1976).

163. *In re Michelle T.*, 44 Cal. App. 3d 699, 117 Cal. Rptr. 856 (1975).

164. See *In re Tachick*, 60 Wis. 2d 540, 210 N.W.2d 865, 869-71 (1973). In *Williams v. Neumann*, 405 S.W.2d 556 (Ky. App. 1966), the court stated that,

[the petitioners have] attended every baby and childhood need and demand of [the child] from the fourth day of her life when she could neither focus her eyes nor raise her head. Up to this hour, according to this record, [she] has known no other mother as she has never seen her natural mother. She is now three and one-half years old and talking. She cannot suddenly be transplanted.

Id. at 557.

child when he or she is uprooted from the home and the attachments to the psychological parents are broken. It is now recognized that strong attachments form by the age of three months.

The syndrome that follows the disruption is anaclitic depression. Experts agree that the impact of such a loss will be felt in varying degrees throughout the individual's life. The symptoms may include regression of verbal and motor skills, sleep loss, refusal of food, suppression of the immune system, bowel upset, general failure to thrive, lack of trust, refusal to form new attachments and repeated respiratory infections.¹⁶⁵ The intensity of these symptoms is directly proportional to the intensity of the reciprocal attachments between child and parent.¹⁶⁶

IX. THE TREND TO RECOGNIZE CHILDREN'S RIGHTS

Recent appellate decisions show a trend that appears to be placing growing emphasis on the rights of children. Since the California Supreme Court's decision in *In re B.G.*,¹⁶⁷ strict standards have been imposed on the trial courts before there would be an encroachment into the parent's right to the custody and control of his or her child. The decision in *In re B.G.* made a broad and sweeping application of California Civil Code section 4600 and the detriment standard set out in the code. *Baby Girl M.*¹⁶⁸ applied the detriment standard in the putative father cases under California Civil Code sections 7006 and 7017.¹⁶⁹

The California Supreme Court then granted hearing in *Michael U. v. Jamie B.*¹⁷⁰ The *Michael U. v. Jamie B.* court was severely divided with three justices in the majority of five urging reversal of *Baby Girl M.* and a return to the best interests of the child standard. The 1986 legislature followed the court's recommendation by passing the amendment to sections 7006 and 7017.¹⁷¹ That amendment affords the putative father the opportunity to prove that awarding custody to him rather than the adoptive couple would serve the best interests of the child; otherwise, his consent to the adoption is not required. Thus, the legislature has dispensed with the detriment standard and shifted the burden of proof to the putative father.¹⁷²

165. Call, *Helping Infants Cope with Change*, 3 EARLY CHILD DEV. CARE 229, 230 (1974).

166. See generally GOLDSTEIN, FREUD & SOLNIT, *supra* note 103.

167. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

168. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

169. See *supra* notes 31-41 and accompanying text.

170. 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985).

171. 1986 Cal. Stat. 1370, 1408.

172. In an action under CAL. CIV. CODE § 224 (West 1982), to dispense with a marital father's rights, the court in *In re Christopher S.*, 197 Cal. App. 3d 433, 242 Cal. Rptr.

X. ADOPTIVE PARENT'S RIGHTS

Adoptive parent's rights are also gaining recognition. Adoptive parents have a constitutionally protected right to a hearing before a child can be removed from their custody.¹⁷³ Further, California courts are supporting finality in adoption actions and disapproving appeals that postpone finality.¹⁷⁴

Justice Friedman wrote a perceptive statement that gives insight into the emotions and feelings that make these cases the most difficult of all to handle:

In determining whether a status of rights is fundamental, the courts consider its effect in human terms and its importance to the individual's life situation. Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets, administrative or judicial. The placement initiates the "closest conceivable counterpart of the relationship of parent and child." To characterize enforced removal of the child as a "grievous loss" is to state the obvious.

The governmental interest is weighty. The statutory system for relinquishment to the agency, for agency placement and agency approval, bespeaks a state policy to promote the child's welfare in derogation of all other values.¹⁷⁵

Although the notion that "blood is thicker than water" is still prevalent, it is clear today that biological relationship should not and cannot, in the interests of the child, take precedence over the bond formed between a child and psychological parents.¹⁷⁶

866 (1987), held that the best interests of the child was the appropriate standard, and a finding of detriment was not required.

The decision of *In re B.G.*, making the broad application of both section 4600 and the detriment standard, was challenged as well in *In re B.J.B.*, 185 Cal. App. 3d 1201, 230 Cal. Rptr. 332 (1986).

173. *Jinny N. v. Superior Court*, 195 Cal. App. 3d 967, 971, 241 Cal. Rptr. 95, 97 (1987), held that the agency violated the expectancy of a prospective adoptive mother when the agency intervened and the court granted a motion to dismiss. See also *Christina K. v. Superior Court*, 184 Cal. App. 3d 1463, 229 Cal. Rptr. 564 (1986).

174. The California Supreme Court in *In re Alexander S.*, 44 Cal. 3d 857, 750 P.2d 778, 245 Cal. Rptr. 1 (1988), ruled that a final non-modifiable judgment in an adoption related action cannot be attacked by habeas corpus. The unanimous court rested its opinion on "sound public policy" that requires finality in child custody cases. *Id.* at 868, 750 P.2d at 784, 245 Cal. Rptr. at 7. The court in *In re Micah S.*, 198 Cal. App. 3d 557, 243 Cal. Rptr. 756 (1988), likewise urged finality in adoption cases. The concurring opinion by Justice Brauer renders a scathing indictment of the appellate process wherein appointed counsel brings appeals that lack substance and delay finality. *Id.* at 564-68, 243 Cal. Rptr. at 760-63.

175. *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909, 916, 106 Cal. Rptr. 123, 128 (1973).

176. Is [biological parenthood] more natural or more important than the mutual, reciprocal and continuous relation between parent and child, which may occur in adoptive or non-adoptive families involved in the rearing of a child

The litigants in these cases, be they biological or adoptive parents, facing such a grievous loss, their emotional as well as financial resources taxed to the point of depletion, are going through a hell all their own. To sit in fair judgment of these competing interests takes an extraordinary jurist, with a cast iron constitution, the wisdom of Solomon, and the heart of a parent.

from infancy to maturity with all of the impact of day-to-day care and upbringing upon character, psychology, outlook, emotional make-up, and even biology which that entails? In this sense, does not nature "do the work of nature" and create one a child who by nature is a stranger? In fact, in this sense, does not nature do the work of nature and create one a child who is not a stranger?

Id. (citing TenBroek, *California's Adoption Law and Programs*, 6 HASTINGS L.J. 261, 276 (1955)).