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Domestic Relations

University of the Pacific; McGeorge School of Law

Domestic Relations

Domestic Relations; adoption investigations—fingerprinting

Civil Code §226.55 (new).
SB 1077 (Coombs); STATS 1973, Ch 596
Opposition: Attorney General of California

Section 226.6 of the Civil Code requires the Department of Health or the licensed county adoption agency to investigate all proposed adoptions. A full report of the facts disclosed by the investigation along with a recommendation must be submitted to the court within 180 days after the petition for adoption is filed. If the investigation discloses a serious question concerning the suitability of either the petitioners, the care provided the child, or the availability of the consent to adoption, the report must be filed immediately with the court.

Section 226.55 has been added to provide that the Department of Health or a local public adoption agency *may* require persons desiring to adopt a child to be fingerprinted and *may* secure from the Federal Bureau of Investigation or State Department of Justice the full criminal record, if any, of such person.

COMMENT

Fingerprinting is one method of providing a positive identification leading to a full and complete background of prospective adopting parents before children are placed in their custody. The language of Section 226.55, however, is permissive rather than mandatory; no standards are set forth to determine when fingerprints will be required or when a criminal record should be secured. Such permissive language may allow this section to be used in a manner that will have a discriminatory effect. Also, it is unclear whether a refusal to submit to fingerprinting will constitute grounds for denying the petition for adoption.

Domestic Relations; adoption—birth certificates

Health and Safety Code §§10433, 10433.4 (amended).
AB 104 (Boatwright); STATS 1973, Ch 960
Support: California Association of Adoption Agencies

Section 10432 of the Health and Safety Code provides that a new

birth certificate is to be issued by the State Registrar upon receipt of a report of adoption. Section 10433 provides that the new certificate is to be identical with a certificate registered for the birth of a child of natural parents, and that the adopting parents shall appear as the minor's natural parents. The adopting parents are allowed to request that the new certificate not indicate the name and address of the hospital where the birth occurred. Section 10433.4 provides that the adopting parents, subsequent to issuance of the new certificate, may request issuance of an amended certificate which deletes the city and county of birth and the name and address of the hospital.

Section 10433 has been amended to allow the adopting parents to request deletion of their color and race from the new birth certificate. Section 10433.4 has been amended to allow the adopting parents to request deletion of their color and race from the amended certificate.

See Generally:

1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §88 (Supp. 1969).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 339, 340 (1972).

Domestic Relations; community property

Civil Code §§5101, 5124 (repealed); §§5102, 5105, 5110, 5113.5, 5116, 5117, 5120, 5121, 5122, 5123, 5125, 5127, 5131, 5132 (amended); §199 (new); Welfare and Institutions Code §§12101, 17300 (amended).

SB 569 (Dymally); STATS 1973, Ch 987

Support: League of Women Voters; Business and Professional Women; American Association of University Women

Chapter 987, which will become operative on January 1, 1975, makes two substantial changes in the community property law in California. It will give *equal* management and control to both spouses and will make the community property subject to the post-marriage obligations of either spouse. Prior to this enactment Civil Code Section 5105 provided equal interests in the community property for both spouses but the property was primarily under the management and control of the husband. Chapter 987 has deleted the reference to management and control by the husband and states simply that the respective interests of the spouses in community property during marriage are present, existing, and equal. Any question as to the intent of the legislature in making the deletion is answered by the amendments to Sections 5125 and 5127. Prior to amendment, these sections gave the husband management and control. Chapter 987 has

amended Section 5125 to provide that *either* spouse has the management and control of the community personal property, with like absolute power of disposition other than testamentary, as each has over his separate property subject to *the restrictions that previously applied to the husband.* Section 5123(b), as amended, provides that a spouse who is operating or managing a business which is community personal property has the sole management and control of that business. Section 5127 has been amended to give either spouse management and control over the community real property but provides that both must join in executing an instrument which conveys, encumbers, or leases such property for longer than one year. One effect of the above-mentioned amendments is that Section 5124, which gave the wife management and control of the community personal property earned by her and of the community personal property received by her in satisfaction of claims for her personal injuries, will no longer be effective and is repealed.

Chapter 987 has effected substantial change in the community property law as it relates to the claims of creditors on that property. Section 5116 stated that the property of the community was not liable for the contracts of the wife made after marriage unless the husband executed a pledge of liability. Section 5116 as amended will provide that the community property is liable for the contracts of either spouse made after marriage and on or after January 1, 1975, subject to the restriction that the wages of one spouse shall not be garnished for debts of the other spouse.

Section 5117 specifies that the earnings and community property personal injury damages of the wife are free from the debts of the husband, except when the debts are incurred to provide necessities of life while the husband and wife are living together. Chapter 987 has amended Section 5117 to provide that those earnings and personal injury damages are not subject to the husband's debts if incurred prior to January 1, 1975.

Section 5120 exempts the husband's separate property and earnings after marriage from liability for the debts of the wife which were contracted for prior to marriage. Section 5121 exempts the wife's separate property from liability for debts of her husband except expenses for necessities while they live together. Currently this liability for necessities applies only to separate property obtained by the wife after marriage, which property is not obtained from her husband. Chapter 987 has amended these sections to make the treatment of both spouses

equal. Section 5120 has been amended to provide that neither the separate property nor the earnings after marriage of a spouse is liable for the debts of the other spouse which were contracted before marriage. Section 5121 frees the separate property of either spouse from liability for the other spouse's debts contracted after marriage, except in the case of necessities.

Prior to amendment, Section 5122 allowed the liability of a married person for death or injury to person or property to be satisfied from the separate property of that spouse and from the community property under his control. The section has been amended to distinguish the type of property available to satisfy a judgment on the basis of the nature of the tortious act performed. If the act by which the liability was incurred was being done for the benefit of the community, the liability is satisfied first from community property and then from the separate property of that person. If the act is not for the benefit of the community, liability is to be satisfied first from the person's separate property and then from community property.

Chapter 987 has amended Section 5123, which formerly provided that the separate property of the wife was not liable for debts secured by pledges of the community property without her written consent. The section now gives equal treatment to either spouse in this regard for obligations executed on or after January 1, 1975, so that the separate property of both is now liable.

Section 5131 provided that a husband was not liable for the support of his wife while they were living separately by agreement. This section has been amended to provide this freedom from liability to either spouse unless such support is stipulated in the agreement. Section 5132 required the wife to support the husband out of her separate property if they were living together, he had no separate property, there was no community or quasi-community property, and he was unable from infirmity to support himself. This section has been amended to require either spouse to support the other out of his own separate property if they are living together and there is no community property or quasi-community property. The requirement that the supported spouse have no separate property has been deleted.

In addition, Chapter 987 has added Section 199 to the Civil Code to provide that a mother and father may be required to support their natural children only out of their earnings and separate property if there has been a dissolution of the marriage. This section prevents this obligation of support from encumbering the community property

of any subsequent marriage except the earnings of either parent. Since it is likely that only the husband will be required to provide support and also likely that he will continue to have a job, this section should pose no problems. In those cases where the father does not have earnings or separate property, he is also unlikely to accumulate community property which could provide support to his children.

Chapter 987, in keeping with its theme of equality, has repealed Section 5101 which proclaimed the husband as head of the family and allowed him to choose the place and mode of living. However, other Civil Code sections still describe the husband as the head of the family—for example, Section 261 defines head of the family for homesteading.

Section 5102 has been amended to provide that neither spouse has an interest in the *separate* property of the other. Though "separate" was not included in the section previously, the courts had construed it as though it was, because Section 5105 had previously given them equal interests in community property.

Section 5110, which provided that property acquired by a married woman by an instrument in writing was presumed to be her separate property, has been amended so that this presumption shall apply only to property acquired prior to January 1, 1975. As amended, the section requires that such property be treated as community property so as to place the woman on equal footing with her spouse, for whom this presumption did not apply. Section 5113.5, which states that community property placed in trust may remain community property, has been amended by this chapter to conform to the granting of equal control over community property under Sections 5125 and 5127.

Chapter 987 has also amended Sections 12101 and 17300 of the Welfare and Institutions Code relative to an adult child's requirement to reimburse the state for a portion of the state aid received by the child's parent and to subsequently contribute that amount to the parent. Section 12101 previously provided that the income to be used in calculating the child's contribution was defined as the sum of the income constituting the separate property of that child, and the earnings of that child but not of his spouse. This section has been amended to provide for a separate determination of income depending on whether the child is male or female. A male child's income will be computed as it was before amendment of the section. The female child's income for determination of her contribution is the sum of the income constituting the separate property of the female

and the earnings of the female but not of her spouse. Thus for the female the income which is community property subject to her control by virtue of this chapter's amendment to Section 5125 of the Civil Code is not to be added in determining her monthly contribution to her parent. The amendment to Section 17300 merely adds a paragraph which reiterates the differentiation made in Section 12101 as to the factors to be taken into account in determining the ability and amount of contribution of the child to its parent depending on the child's sex.

COMMENT

California's community property system is derived from the Spanish-Mexican civil law in effect at the time of annexation of California [Knutson, *California Community Property Laws: A Plea For Legislative Study*, 39 So. CAL. L. REV. 240 (1966)]. At that time, the reality of the respective roles played by husband and wife in society made it quite reasonable to give management and control of the community property to the husband. Also the male's traditional disdain for the business acumen of the female caused the legislatures of the time to protect, as much as possible, the community property from being subject to liability for the debts of the wife. Though Chapter 987 does not eliminate all vestiges of this attitude, it does attempt to end some of the more obvious discriminatory effects of the community property laws.

The ability of the legislature to take exclusive management and control over community property out of the hands of the husband and to give equal control to the wife would at one time have been subject to constitutional challenge in California [Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228 (1897)]. This case which held that changes in the community property system which affected vested rights could not constitutionally be applied retroactively was not successfully challenged until 1965 [Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965)]. Even though the holding was partly based on a premise that the applicable statute did not apply except in the case of divorce or separate maintenance and thus was not being applied retroactively, the recognition that vested rights might be changed if necessary for the public welfare signaled the attitude of the court.

While Chapter 987 takes a step in the right direction by giving the husband and wife equal power of disposition and control over the community property and by making the community property sub-

ject to the debts of the wife, it will not likely bring equality in the market place to women. Section 5116 while subjecting the community property to liability for a wife's debts will possibly have little effect on her ability to get credit, particularly when she is not working. Since the husband's wages cannot be garnished, and the merchant may not know whether there is community property which is not exempt from judgment execution, the merchant is not apt to extend credit without the husband's guarantee. This is true even with the 1974 additions to the Civil Code [A.B. 312, CAL. STATS. 1973, c. 999]. Under that enactment a woman may not be denied credit if *her uncommingled earnings* or *separate property* are such that a man possessing the same amount of property or earnings would receive credit. However, in the great majority of homes in which the wife is not working she will not have any uncommingled earnings or separate property.

Similar to the change to Section 5116, the amendment of Section 5123 requiring written assent of the spouse to subject his personal property to liability is likely to have little actual impact. Credit managers desire as much security as they can obtain, and this new law is not likely to halt their attempt to insure against all eventualities by requiring both signatures. The legislature, by adopting a scheme of equal management and control instead of *joint* management and control, has avoided the requirement of getting the signatures of both husband and wife for all transactions, which could have caused numerous problems in day-to-day transactions, particularly spousal sales of community property. For example, many men felt that requiring their wife's signature every time they wished to make a transaction in the stock market would be extremely burdensome. Also they were fearful that the consent might be withheld for petty reasons. The provision that a spouse operating a business has sole management and control, even though the business is community property, also should silence many of these critics. Without this provision it was felt that a spouse who knew nothing about the operation of a particular business could insist on exercising her right to equal management and control.

One of the problems not solved by equal management and control is the dissipation of community property by an unhappy spouse, an event that often takes place immediately prior to dissolution. Since this chapter does not require the signatures of both spouses, the community property is still subject to dissipation by an unhappy spouse and now either spouse can dissipate it. However, a wife after separation is less likely to dissipate the community property than the husband

since her earnings are likely to be small and she will need to rely on her share of the community property to supplement her income. The man, with his higher earnings, should be able to live without the need of supplementary income from community property.

The validity of the amendments to Sections 12101 and 17300 of the Welfare and Institutions Code relating to a child's support of a needy parent is subject to question. Section 12101 has been held to be constitutional in requiring a child to pay a disproportionate share of the funding of a program which is a proper state function only when there is a rational ground for imposing that burden. Where the child has no preexisting duty to support the parent, he cannot be made to reimburse the county [See County of San Mateo v. Boss, 3 Cal. 3d 962, 479 P.2d 654, 92 Cal. Rptr. 294 (1971)]. The amendments provided by this chapter should subject the legislation to further attack on the basis of equal protection. Utilizing all of the income over which the husband has control in the determination of this contribution to his parent while only utilizing a portion of the income under the control of the wife to determine her contribution would appear to be an arbitrary classification on the basis of sex. Contrary to the amendments to the Civil Code which purport to emphasize equality, these amendments of the Welfare and Insitutitons Code discriminate on the basis of sex and are thus questionable, particularly if the equal rights amendment should be ratified [See Note, *Equal Rights and Equal Protection: Who Has Management and Control?*, 46 So. CAL. L. REV. 892 (1973)]. With the repeal of Section 5124 of the Civil Code, a separate standard for determination of the adult female's contribution to the parent support should no longer have been required. Prior to this it was felt that a daughter had to have income which constituted her separate property in order to compel her to contribute [See 20 OPS. ATT'Y GEN. 164 (1952)].

See Generally:

1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§1-65 (7th ed. 1960).
2) TEX. FAM. CODE ANN. §5.01 *et seq.* (1970) (similar statutory scheme).
3) H. VERRALL & A. SAMMIS, CALIFORNIA COMMUNITY PROPERTY (2d ed. 1971).
4) JOINT COMMITTEE ON JUDICIARY, TRANSCRIPT OF HEARINGS ON COMMUNITY PROPERTY (1972).
5) Knutson, *California Community Property Laws: A Plea for Legislative Study*, 39 So. CAL. L. REV. 240 (1966).

Domestic Relations; credit for women

Civil Code Chapter 2 (commencing with §1812.30) (new); §5116 (amended).

AB 312 (Waxman); STATS 1973, Ch 999
Support: League of Women Voters of California, Inc.; Los Angeles County Federation of Labor, AFL-CIO; National Organization for Women of California

Section 1812.30 has been added to the Civil Code to provide that no woman, regardless of marital status, shall be denied credit in her own name if her uncommingled earnings or separate property are such that a man with similar earnings or property would be granted credit. The person extending credit, however, is not prohibited from utilizing other relevant factors or methods in determining whether to extend credit to a woman. For the purposes of this section credit has been defined as "obtainance of money, property, labor, or services on a deferred-payment basis." Additionally, a credit reporting agency must, upon the written request of a *married person*, identify within the report delivered by the agency both the credit history of each spouse and of their joint accounts if they have such information on file.

Section 1812.31 has been added to provide that a woman who suffers any damage as a result of a willful violation of the provisions of Section 1812.30 may on her own behalf, and for her own benefit only, bring an action to recover actual damages and $500 in addition, for each violation. The woman may also petition the court to order the violator to extend credit to her upon such terms, conditions, and standards as he normally utilizes in granting credit to males.

Previously, Section 5116 provided that the community property was not liable for the contracts of the wife made after marriage unless secured by her husband's pledge. Chapter 999 has amended this section to provide that the community property is liable for the contracts of the wife which are made after marriage and on or after January 1, 1974, to the extent that her earnings or separate property have become community property. This provision will be in effect only until January 1, 1975. At that time Section 5116 will be further amended to provide that the community property is liable for the contracts of either spouse which are made after marriage [See *Domestic Relations; community property*, this volume at 352].

COMMENT

Previously, when a woman married, she lost her personal credit rating since she usually had to reapply for credit under her husband's

name. If she later became a widow or a divorcee, the importance of this loss became apparent since she would be unable to get credit as she had no credit history in her name [Assemblyman Henry Waxman, Press Release, June 11, 1973 (hereinafter cited as *Waxman*)]. Additionally, many creditors refused to extend credit to a married woman unless she got her husband's consent; this was very demeaning for a married woman who had earnings or property of her own [*Waxman*].

Section 1812.30 is designed to remedy this situation by requiring a creditor to grant a woman credit in her own name if credit would be given to a man in a similar financial situation. The provisions of this section regarding credit for married and single women parallel Section 1747.80 of the Civil Code (part of the Song-Beverly Credit Card Act of 1971) dealing with discrimination in issuance of credit cards.

It was also necessary to amend Section 5116 since creditors could have denied credit to a woman pursuant to Section 1812.30 based on the fact that once a married woman's earnings or separate property became commingled with the community property it would no longer be subject to her debts contracted after marriage. The great majority of married women do not keep separate accounts, so a credit manager could have denied credit to such a woman and would not have been subjected to liability. Thus Section 5116 was amended to make the community property liable for the debts of the wife contracted after marriage, at least to the extent of her earnings and separate property. This is, however, unlikely to silence the cries of equal rights advocates for two reasons. First, the total community property, including the wife's commingled earnings and property, is still liable for the husband's debts made before or after marriage. Second, the non-working wife will still be unable to obtain credit in her own right. This is contrary to the theory of community property which gives the wife an equal share of the property on the basis that her work in the home is an equal contribution to the wealth of the community.

Chapter 999 allows a woman to recover her *actual* damages plus $500. Actual damages would probably include recovery for higher rates of interest actually obtained and the increased price of the item at a business where she could receive credit. It is not clear whether this would include expenses, such as rental of the desired item, until credit could be obtained.

Domestic Relations; developmentally disabled

Health and Safety Code §38064 (repealed); §416.95 (new); §§416, 416.5, 416.6, 416.7, 416.8, 416.9, 416.14, 416.15, 416.17, 416.18, 416.23, 38000, 38001, 38003, 38004, 38050, 38051, 38054, 38057, 38058, 38059, 38062, 38100, 38101, 38103, 38104, 38105, 38106, 38109, 38120, 38121, 38122, 38123, 38150, 38200, 38201, 38202, 38203, 38250, 38251, 38252, 38253, 38255, 38256, 38257, 38257.1, 38258, 38260, 38291, 38300 (amended); Penal Code §1370.1 (amended); Probate Code §1461.5 (new); Welfare and Institutions Code §6501 (repealed); §6000.5 (new); §§6000, 7518 (amended).
AB 846 (Lanterman); STATS 1973, Ch 546
(Effective September 17, 1973)

Chapter 546 has been enacted to change the name of the Lanterman Mental Retardation Services Act of 1969 [CAL. HEALTH & SAFETY CODE div. 25 (commencing with §38000)] to the Lanterman Developmental Disabilities Services Act. The amended code sections change references in the act from "mentally retarded" and "mental retardation" to "developmentally disabled" and "developmental disabilities." Section 38003(h) of the Health and Safety Code defines developmental disability as being a disability attributable to mental retardation, cerebral palsy, epilepsy, or other neurological handicapping condition found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals.

Article 7.5 (commencing with §416) of the Health and Safety Code has been amended to change references in provisions relating to conservatorship and guardianship for mentally retarded persons to refer to developmentally disabled persons. Section 416.95 has been added to provide that prior to appointment of the Director of Health as guardian or conservator of the person and/or the estate of a minor or adult who is a developmentally disabled person, the court shall inform such person: (1) of the nature and purpose of the proceedings; (2) that appointment of a guardian is a legal adjudication of the person's incompetence; and (3) the effect of such adjudication on his basic rights. After giving the person such information, the court shall consult with the person so as to determine his opinion concerning the appointment. Chapter 546 has also added Probate Code Section 1461.5 to require the court to similarly inform an alleged insane or incompetent person prior to the appointment of a guardian

for his person and/or estate and also to require the court to identify the person who has been nominated as his guardian.

Section 38105 of the Health and Safety Code has been amended to extend to each developmentally disabled person who is placed in an out-of-home residential facility the personal rights (right to telephone, correspondence, visitation, access to storage, and keeping of personal possessions) and patient treatment rights (right to refuse shock treatment and lobotomy) set forth in Section 5325 of the Welfare and Institutions Code. These rights must be brought to the person's attention by such means as the Director of Health may designate. Section 6501 of the Welfare and Institutions Code required that a mentally retarded person requiring hospitalization could be committed to the State Department of Health for placement in a state hospital only if the mentally retarded person had been a resident of the state for at least one year. This section has been repealed.

Domestic Relations; mental health services—right to refuse a lobotomy

Welfare and Institutions Code §5326 (amended).
AB 47 (Lanterman); STATS 1973, Ch 959

Section 5325 of the Welfare and Institutions Code reserves two types of rights to the mentally ill and developmentally disabled—personal rights (right to telephone, correspondence, visitation, access to storage space, and keeping of personal possessions) and patient treatment right (right to refuse shock treatment and lobotomy). Section 5326 previously allowed the professional person in charge of the mental facility or his designee to deny the patient these rights for good cause.

Section 5326 has been amended to prohibit the professional person in charge from denying the patient's right to refuse a lobotomy, and also to require the Director of Health to adopt regulations specifying the conditions under which the remaining rights in Section 5325 may be denied for good cause. In addition, each local mental health director must report quarterly to the Director of Health the number of persons whose rights were denied and which rights were denied. These reports are to be used by the Director of Health to identify individual treatment records which may require further analysis and investigation.

See Generally:
1) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 438 (1973).

Domestic Relations; mentally retarded adult's release from state hospitals

Health and Safety Code §§38120, 38121 (amended).
AB 188 (Cullen); STATS 1973, Ch 161
(Effective July 6, 1973)

Section 38120 of the Health and Safety Code provides that any adult who has been admitted to a state hospital as a mentally retarded patient has the right to a hearing by a writ of habeas corpus after he submits a written request for release from the facility. Previously, when the director of the facility or his designee received a written request for release, he was required to notify only the superior court of the request. Chapter 161 has amended Section 38120 to provide that the director or his designee must also send a copy of the request for release to the patient's parent, guardian, or conservator together with a statement that notice of judicial proceedings taken pursuant to such request will be forwarded by the court. These shall be sent by registered or certified mail with a return receipt requested. A copy of the request for release and the name and address of the patient's parent, guardian, or conservator must also be sent to the court.

Chapter 161 has also amended Section 38121 (relating to the time and place of hearing, right to counsel, and grounds for release) to provide that at the time the petition for the writ of habeas corpus is filed with the court, the clerk must send a copy of the petition, along with notification of the time and place of any evidentiary hearing in the matter, to the parent, guardian, or conservator of the patient seeking release or for whom release is sought. This is to be sent by registered or certified mail with a return receipt requested. The section has also been amended to require that the evidentiary hearing in response to the petition be held no sooner than five judicial days nor later than ten judicial days after a copy of the petition and notice to the patient's parent, guardian, or conservator have been mailed. Previously, the hearing was to be held within two days of the mailing. Apparently Chapter 161 is designed to increase participation by the person directly responsible for a mentally retarded adult in the judicial hearing on his petition for release.

See Generally:

1) CAL. HEALTH & SAFETY CODE §38000 *et seq.* (Lanterman Mental Retardation Services Act of 1969).
2) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 437 (1973) (proceedings for appointment of a guardian or conservator).

Domestic Relations; termination of parental control

Civil Code §232 (amended).
AB 1012 (Gonsalves); STATS 1973, Ch 686
Support: Los Angeles County Board of Supervisors

Section 232 of the Civil Code provides that children can be removed from their parents and placed out for adoption when the parents have proven themselves unfit. Reasons for removal from parental control include abandonment, cruelty, neglect, habitual intemperance, moral depravity, conviction of a felony, mental deficiency or mental illness, and incapability of control or support. Section 232 has been amended to expand the criteria upon which parents can be found unfit.

Section 232(a)(7) has been added to provide that the child can be taken from the parents and placed out for adoption when the child has been cared for in a foster home (having been placed there by the juvenile court or other public or private agency) for a total of two or more consecutive years and the court finds beyond a reasonable doubt that return of the child to the parents would be detrimental to the child and that his parents have failed during such period in the foster home and are likely to fail in the future to provide him with a home, care, control, and an adequate parental relationship. Physical custody of the child by the parent or parents for insubstantial periods of time during the required two-year period will not interrupt the running of such period.

Section 232(a)(1) has been amended to modify prior law regarding abandonment to provide that where one parent has abandoned the child in the custody of the other parent for a period of one year or more, the minor is freed from the custody and control of the parent who has abandoned him. Previously, only when both parents had abandoned the child for more than six months could the parent-child relationship be terminated. Additionally, Section 232(a)(1) now provides that in abandonment cases where the parents' whereabouts are unknown, a petition can be filed and citation by publication commenced on the 120th day after the discovery of the child and the proceedings commenced on the 180th day.

Habitual intemperance, as used in Section 232(a)(3), has been expanded to include those parents who are disabled (physical or mental incapacity rendering the parent incapable of adequately caring for the child) because of the habitual use of controlled substances [CAL. HEALTH & SAFETY CODE §§11053-11058 (schedules I-V)], unless they

are used as part of a medically prescribed plan. If the parents are residents of another state or are foreign citizens, Section 232(a)(6) provides that they may now be adjudged mentally ill or deficient by two certified physicians and surgeons who are residents of such state or foreign country. Additionally, Section 232(a)(6) now provides that the parents of the child must be cited to be present at the hearing and that the court must appoint an attorney to represent them if they have no attorney.

See Generally:

1) 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §127 (Supp. 1969).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 337 (1972).
3) Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703 (1971).

Domestic Relations; Uniform Child Custody Jurisdiction Act

Civil Code Title 9 (commencing with §5150) (new).
AB 1220 (Z'berg); STATS 1973, Ch 693

Specifies jurisdictional prerequisites for custody proceedings; specifies reciprocal procedures by which foreign and domestic courts may determine the appropriate forum for hearing custody proceedings; establishes a custody registry in the superior courts of California and specifies the information to be contained therein.

The Uniform Child Custody Jurisdiction Act [CAL. CIV. CODE tit. 9 (commencing with §5150)] has been enacted to avoid jurisdictional competition and conflicts with foreign courts in matters of child custody and to assure that child custody litigation will ordinarily take place in the state with which the child and his family have the closest connection (§5150). The general policies of this act extend to other nations as well as other states (§5172). These goals have been accomplished primarily through the specific description of jurisdictional prerequisties for custody proceedings, by requiring that foreign decrees be respected by the courts of this state, and by requiring that calendar priority shall be given to all jurisdictional issues raised by a party to the proceeding.

Section 5151 defines the terms which are necessary for the interpretation of this act. Some of the more important definitions are: (1) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights, but does not include a decision relating to child support or

any other monetary obligation of any person; (2) "custody proceedding" includes proceedings in which a custody determination is one of several issues, such as an action for dissolution of marriage or legal separation, and includes child neglect and dependence proceedings; and (3) "home state" means the state in which the child lived with his parents, a parent, or a person acting as parent for at least six consecutive months immediately preceding the time involved, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned.

Prior to the enactment of the Uniform Child Custody Jurisdiction Act, the jurisdiction over child custody proceedings was normally vested in either the state in which the child was domiciled or in which he resided [3 WITKINS, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§7-9 (7th ed. 1960)]. Section 5152 has modified this general rule by providing that, unless otherwise specified, the physical presence of the child, or of the child and one of the contestants, is not sufficient alone to confer jurisdiction; nor is the physical presence of the child an absolute jurisdictional prerequisite. This section confers jurisdiction to render an initial or modified decree upon any court which is otherwise competent to decide custody matters in any of the following situations: (1) California is the home state of the child at the time of commencement of the proceeding; (2) the child is absent from this state but a parent or person acting as a parent continues to live in this state and California was the child's home state within six months prior to the commencement of the proceeding; (3) it is in the child's best interest that a court of this state assume jurisdiction because the child and his parents, or the child and at least one contestant, have a significant connection with this state, and substantial evidence is available in this state concerning the child's present or future care, protection, training, and personal relationships; (4) the child is physically present in this state, and he has been abandoned or it is necessary to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependant; or (5) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with the above, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

Section 5155 provides that a court of this state shall not exercise

jurisdiction if at the time of filing the petition a proceeding concerning the custody of the child is pending in another state exercising jurisdiction in substantial conformity with the provisions of this act, unless the proceeding has been stayed because the out-of-state court believes that this state is the more appropriate forum or for other reasons. This section also specifies procedures by which a court of this state is required to make inquiries regarding the pendency of child custody proceedings in foreign courts. Upon being informed of a pending foreign proceeding and that it was initiated prior to the California court's assumption of jurisdiction, the California court must stay its proceedings and communicate with the foreign court for the purpose of determining the more appropriate forum. Even if the California court is informed of the initiation of foreign custody proceedings after it has assumed jurisdiction, it must still communicate with that court in order to determine the more appropriate forum.

Section 5156 provides that a court of this state may decline to exercise jurisdiction in a custody proceeding at any time prior to rendering a decree if, under the circumstances of the case, it finds that it is an inconvenient forum and that a court of another state is a more appropriate forum. The motion of inconvenient forum may be made by the court, either party to the proceeding, the guardian *ad litem*, or a representative of the child. In determining the question of inconvenient forum, the court must consider the child's interest in having another state assume jurisdiction. For this purpose the court may take into account several factors, including: (1) whether another state is or recently was the child's home state; (2) whether another state has a closer connection with the child and his family or with the child and one or more of the contestants; (3) whether substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state; (4) whether the parties have agreed on another forum which is no less appropriate; and (5) whether the exercise of jurisdiction by the court of this state would contravene any of the purposes of this title (§5150). If the court determines that this state is an inconvenient forum, it may either dismiss the proceedings or stay the proceedings upon the condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum. If it appears to the court that this state is clearly an inappropriate forum,

it may require the party who commenced the proceedings to pay costs, attorneys' fees, travel, and other necessary expenses incurred by other parties or witnesses. Even if it is determined that this state is an appropriate forum, the court may decline to exercise its jurisdiction if the custody proceeding is incidental to an action for divorce or other proceeding. The court does not necessarily relinquish jurisdiction over the divorce or other proceeding by so declining. Section 5156 also provides certain procedures regarding communication with foreign courts concerning the issue of inconvenient forum. One such requirement is that a communication from a foreign court stating that this state is a more convenient forum must be filed in the custody registry of the appropriate court (discussed *infra*).

Section 5157 grants discretion to the courts of this state in exercising jurisdiction over custody cases where the petitioner has acted improperly in acquiring custody of the child. Specifically, this section provides that: (1) the court has discretionary jurisdiction if the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct; (2) a court of this state cannot exercise jurisdiction unless it is required in the child's best interests when the petitioner for a modification of a foreign decree has improperly removed or retained the child from the person lawfully entitled to custody; and (3) a court of this state has discretionary jurisdiction if the petitioner has violated any other provision of a foreign custody decree. A court dismissing a petition under the authority of this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

Section 5163 prohibits a court of this state from modifying a foreign custody decree unless: (1) it appears to the court that the court which rendered the decree does not now have jurisdiction substantially in conformance with the provisions of this title or has declined to assume jurisdiction; and (2) the court of this state has jurisdiction. It should be noted that Section 5163 is a general restriction on a court's power to modify foreign decrees and the specific limitation set forth in Section 5157(2) must also be satisfied (discussed *supra*).

Section 5158 provides that every party to a custody proceeding must provide, under oath, certain information in his first pleading or in an affidavit attached to that pleading. The information required by this section is as follows: (1) the child's present address and the places where the child has lived within the last five years; (2) the

names and present addresses of the persons with whom the child has lived during this five-year period; (3) whether the party has participated as a witness, party, or in any other capacity in any other litigation concerning the custody of the same child in this or any other state; (4) whether he has information of any custody proceeding pending in a court of this or any other state concerning the same child; and (5) whether the party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child. Section 5158 also provides that every party to the proceeding is under a continuing duty to inform the court of any other custody proceeding regarding the same child, whether foreign or domestic, of which he acquires knowledge. Section 5159 provides that if a court acquires knowledge by virtue of Section 5158 or otherwise that any person other than a party to the proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, then it must join any such person as a party to the proceeding. Any person so joined must be duly notified of the pending proceeding and his joinder as a party.

Section 5153 provides that before a court may render a custody decree the following persons must be given reasonable notice and an opportunity to be heard: (1) contestants; (2) any parent whose parental rights have not been previously terminated; and (3) any person who has physical custody of the child. If any of the persons specified in this section are outside the state of California, then notice must be given in accordance with the provisions of Section 5154. Under Section 5154, the notice required in order to exercise jurisdiction over persons situated in a foreign state may be made in any of the following ways: (1) by personal delivery in the manner prescribed for service of process within this state; (2) the manner prescribed for service of process by the law of the place in which service is made; (3) by any form of mail addressed to the person to be served and requesting a receipt; and (4) as directed by the court (including publication if other means of notification are ineffective). Any notice given pursuant to this section must be served, mailed, delivered, or last published at least ten days before any hearing is commenced in this state. However, no notice must be given if a person submits to the jurisdiction of the court. Depending upon the manner in which the notice was given, proof of service of process may be made by utilizing any of the following procedures: (1) by affidavit of the process server;

(2) in the manner prescribed by the law of this state or in accordance with the law of the place in which the service is made; (3) if service is made by mail, a receipt signed by the addressee or other evidence of delivery to the addressee; or (4) if notice is given by publication or in any other manner directed by the court, proof of service of process may be shown in the manner directed by the court order pursuant to which the service is made.

Section 5162 provides that the courts of this state must recognize and enforce an initial or modification decree of a foreign court which has either: (1) assumed jurisdiction under statutory provisions substantially in accordance with this title; or (2) rendered its decree under factual circumstances meeting the jurisdictional standards substantially similar to those of this title. Section 5161 provides that a custody decree rendered by a court of this state which has jurisdiction under Section 5152 (discussed *supra*) is binding on all parties who have been notified pursuant to the provisions of this title, or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this title.

Sections 5167 through 5169 specify certain procedures by which the court or any party to the proceeding may gather evidence concerning the issue of custody. Section 5167 authorizes any party to the proceeding, or a guardian *ad litem* or other representative of the child, to take testimony of witnesses in another state by deposition or otherwise. The court may also direct that the testimony of a person be taken in another state and prescribe the manner and terms upon which it shall be taken. Section 5168 provides that a court of this state may request a foreign court to hold a hearing to adduce evidence, to order a party to produce or give evidence, or to have social studies made concerning the custody of the child. The cost of these services may be assessed against the parties or, if necessary, paid by the state. A court of this state may request a foreign court to order a party to appear at the proceedings pending in this state and, if that party has physical custody of the child, to appear with the child. Section 5169 provides that a court of this state may hold a hearing to adduce evidence concerning custody matters and that it may order a person in this state to appear alone or with the child at a custody proceeding in another state. The authority vested under Section 5169 may only

be exercised when a foreign court has requested the hearing or the appearance of the party. Section 5170 requires a court of this state to preserve the pleadings, orders, decrees, and any records of hearings, social studies, and other pertinent documents until the child reaches 18 years of age. Upon appropriate request by a foreign court, the court of this state must forward certified copies of any or all of such documents.

Section 5165 provides that the clerk of each superior court of this state must establish and maintain a custody register which shall contain the following information: (1) certified copies of custody decrees of other states received for filing; (2) communications as to the pendency of custody proceedings in other states; (3) communications concerning a finding of inconvenient forum by a court of another state; and (4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding. Section 5164 provides that a certified copy of a foreign custody decree may be filed with the clerk of a superior court of this state and upon such filing that it shall be given effect as though rendered in this state. Section 5164 also provides that any person who violates a foreign custody decree in this state may be required to pay the necessary expenses of the person entitled to custody or his witnesses. Section 5166 provides that upon the request of a foreign court or a party who has a legitimate interest in a custody decree, the clerk of the superior court must forward a certified copy of the decree to that individual.

COMMENT

By specifically delineating the instances in which the court may exercise jurisdiction in child custody cases, the Uniform Child Custody Jurisdiction Act serves to eliminate many of the jurisdictional conflicts which were created by case law in this area. In any child custody case, the main concern of the court should be for the child's best interests and welfare [Kovacs v. Brewer, 356 U.S. 604, 612 (1958)]. This consideration appears to be the basis of the rule in *Sampsell v. Superior Court* [32 Cal. 2d 763, 197 P.2d 739 (1948)], the leading California custody jurisdiction case. There the court held that jurisdiction is based on the state's interest in the welfare of children or in the family unit of which he is a part [32 Cal. 2d at 773, 197 P.2d at 750]. In effect, this meant that a court could assume jurisdiction when the child was domiciled or physically present in the state. It

further meant that a court could consider a case brought by a parent or other petitioner domiciled in the child's "home state" even though the child was then residing elsewhere. This dual basis of jurisdiction created problems which often produced results more detrimental than beneficial to the child's welfare.

In custody suits resulting from a dissolution or separation of the child's parents, often one parent would take the child, go to a foreign state, and maintain a custody action there on the basis of the child's presence in that state. At the same time, the spouse remaining in the home state could file a custody action there on the basis of the state's interest in the family unit. This often resulted in conflicting decrees from the different jurisdictions regarding the custody of the same child. In some cases, because the foreign court had not obtained jurisdiction over the out-of-state spouse through either service of process or by giving him actual notice, he was not bound by its decree. *Sampsell* did little to alleviate this problem. In that case, the court held that since both states had jurisdiction each could conceivably decide the issue of custody [32 Cal. 2d at 779, 197 P.2d at 750]. The issue was further confused by the court's holding that since a state can modify its own decrees or issue a new decree on the basis of a change in circumstances, a sister state also had the right to modify a foreign state's decree on the same basis [32 Cal. 2d at 780, 197 P.2d at 750]. Thus a parent or other contestant in a custody proceeding could "seize" the child, "run" to a foreign state, and petition the court for a custody decree on the basis of the child's presence in that state. There the petitioner could plead a change in circumstances with respect to the legal custodian who was often unable to appear or perhaps even unaware of the proceedings in the foreign state. The "seize and run" incentive which apparently results from the *Sampsell* decision certainly does not appear to be beneficial to the welfare of the child who conceivably could become the object of successive "kidnappings" in order for a parent to gain access to a foreign court.

The absurdity of the situation was reflected in *Stout v. Pate* [120 Cal. App. 2d 699, 261 P.2d 788 (1953)]. In *Stout* the father "seized" his children and "ran" to Georgia. The mother followed and instituted proceedings in Georgia on the basis of the children's presence there. She then "seized" the children and returned them to California. Once in California, she initiated a separate custody proceeding and attempted to have the Georgia proceeding dismissed. However, the Georgia court refused to do so. The father challenged the California suit on the ground that a proceeding was pending

in another state. The California court held that because the children were physically present in this state, the court had jurisdiction and that proceedings in another state were not a bar to such jurisdiction. As to the Georgia proceeding, the court held that recognition of the Georgia court's decree was purely a matter of comity and, as the court could use its discretion as to what was best for the children, it was not required to honor Georgia's decree [120 Cal. App. 2d at 704, 261 P.2d at 790].

When confronted with the possibility of continuous "kidnappings" of children involved in custody matters, California adopted a "clean hands" doctrine with respect to these suits. In *Leathers v. Leathers* [162 Cal. App. 2d 768, 328 P.2d 853 (1958)] it was held that in "seize and run" cases the petitioner who had abducted the children came into court with "unclean hands." The court declared that in these instances the foreign decree would be enforced without a reexamination of the merits [162 Cal. App. 2d at 775, 328 P.2d at 856]. This appears to have solved the "seize and run" problem in many California cases, but it did not prevent the petitioner from "seizing" a child in California and going to a foreign jurisdiction to obtain a decree.

In light of these problems and their grave implications with respect to the welfare of children, the drafters of the Uniform Act felt that it was necessary to devise precise jurisdictional guidelines to overcome the problems of conflicts of laws and the "seize and run" situation. [See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legal Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969)]. The drafters felt that the following jurisdictional elements were necessary in custody cases to bolster the interstate recognition of foreign decrees: (1) a provision for the granting of exclusive jurisdiction to the court which has the greatest access to information concerning the child; (2) a provision for channeling all out-of-state evidence to this forum to guarantee a decree based on all available evidence; and (3) a provision for resolution of jurisdictional conflicts on the basis of *forum non conveniens* or priority of initiation of proceedings.

The enactment of Chapter 693 is a significant step in promoting the welfare of the child. Though the prerequisites to jurisdiction are essentially the same as those required by case law (§5152), the court no longer has an automatic right to take jurisdiction in disregard of pending foreign proceedings. The limitations of jurisdiction set forth in the Act are designed "in the interests of greater stability of home

environment and of secure family relationships for the child" (§5150d). When comparing this act to the previous case law where the results were often detrimental to the stability and security of the child, it appears that the Act at least provides the means to effectively reduce the uncertainties inherent in the case law and to eliminate the threat to the child of abduction and continuous decree modifications.

This chapter ensures that a court will include all relevant factors in its determination of what is best for the child's welfare by refusing to allow a court to engage in jurisdictional battles with courts of other states (§5155) and by requiring courts to make every effort to notify all parties (§§5158, 5159, 5160, 5167, 5168). The possibility of subsequent modifications of a decree by other courts is reduced by: (1) gathering all possible parties in one action and providing for travel expenses if necessary (§5161); (2) making the result of that action binding on those parties (§5162); and (3) requiring that a court which does modify a decree to take into consideration the decree itself and any other documents that may have been filed with the foreign court (§5163).

This chapter also codifies the "clean hands" doctrine (§5157). By providing a statutory bar to "seize and run" cases, the Act effectively discourages such conduct on the part of any contestant who may litigate his case in the courts of this state.

Finally, additional impetus is given to foreign courts to enforce California decrees by requiring California courts to: (1) enforce the decrees of other states (§5164); (2) provide copies of their decrees to other courts which may request them (§5166); and (3) hold hearings to adduce evidence to be used in suits in other states (§5169). Such cooperation from California courts may induce foreign courts, in the spirit of reciprocity, to enforce California decrees. It appears that these changes will significantly contribute to the primary objective of all child custody cases—the attainment of a stable home environment which is beneficial to the child in whose interest the state acts.