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Domestic Relations

University of the Pacific; McGeorge School of Law

Domestic Relations

Domestic Relations; domestic violence

Code of Civil Procedure §527 (amended); Welfare and Institutions Code §§18290, 18291, 18292, 18293, 18294, 18295, 18296, 18297, 18298, 18299, 18300, 18301, 18302, 18303 (new).
AB 1019 (Fazio); STATS 1977, Ch 720
Support: California National Organization of Women; Commission on the Status of Women
SB 91 (Presley); STATS 1977, Ch 892
Support: California Peace Officers' Association; California District Attorneys' Association; California Rural Legal Assistance; Commission on the Status of Women

The California Legislature has determined that there are hundreds of thousands of persons who are regularly beaten and many who die as a result of domestic violence [*See* CAL. WELF. & INST. CODE §18290]. Family conflicts account for more police calls than either murders, aggravated batteries, or other serious crime [*See* Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914 n.2]. With spouse-beating becoming more apparent, if not more prevalent, Chapters 720 and 892 have been enacted to afford greater protection to the battered spouse.

Prior to the enactment of Chapter 720, a restraining order for the protection of a spouse could be obtained only during dissolution actions [*Compare* CAL. CIV. PROC. CODE §527(b) *with* CAL. CIV. CODE §§4359 *and* 5102]. Chapter 720 amends Section 527 of the Code of Civil Procedure to provide for the granting of a temporary restraining order to any person who, prior to or at the time the order is granted, was actually residing with the person at whom the order is directed regardless of whether an action for legal separation, annulment, or dissolution has been commenced [CAL. CIV. PROC. CODE §527(b)]. The stated purpose of these restraining orders is to prevent a recurrence of actual domestic violence and to ensure a period of separation for the parties involved [CAL. CIV. PROC. CODE §527(b)]. In addition, Section 527 specifies that in order to obtain a "domestic violence" restraining order, a party must satisfy the court of the necessity of the restraining order, including a reasonable showing of "a past act or acts of actual violence resulting in physical injury" [CAL. CIV. PROC. CODE §527(b)]. Once a restraining order is issued the county clerk is required to transmit the order the same day it was granted to the local law enforcement agency having jurisdiction over the residence of the party who obtained the

order or the residence at which the recurrence of actual domestic violence is the subject of a temporary restraining order [CAL. CIV. PROC. CODE §527(b)]. Furthermore, these law enforcement agencies are now given the discretion of making information available concerning the existence and current status of any restraining order to any law enforcement officer responding to the scene of reported domestic violence [CAL. CIV. PROC. CODE §527(b)].

Further, it is interesting to note the differences between the domestic violence restraining order provided by Chapter 720 and the standard restraining order provided for in Code of Civil Procedure Section 527(a). First, a domestic violence restraining order may be granted with *or without* notice to the other party, whereas a standard order may be granted without notice only when the facts of the situation show that "great or irreparable injury would result" [*Compare* CAL. CIV. PROC. CODE §527(a) *with* CAL. CIV. PROC. CODE §527(b)]. Second, unlike a standard restraining order, a domestic violence restraining order that is granted with notice may remain in effect for up to 30 days without having to show cause to continue the order past 15 days. [*Con.pare* CAL. CIV. PROC. CODE §527(a) *with* CAL. CIV. PROC. CODE §527(b)]. Further, willful disobedience of a domestic violence restraining order is now defined as a misdemeanor instead of as conduct constituting criminal contempt, which is also punishable as a misdemeanor [*Compare* CAL. CIV. PROC. CODE §527(b) *with* CAL. PENAL CODE §166(4)].

In realization of the need to develop "innovative strategies and services" to deal with the problems attendant to domestic violence [CAL. WELF. & INST. CODE §18290], the legislature has further established state supported havens for battered spouses [CAL. WELF. & INST. CODE §§18290-18303]. Although the state has previously recognized the need to care for battered children [*See* CAL. CIV. CODE §232], and authorized the placing of injured children in foster or group homes or in an institution [*See* Wald, *State Intervention on Behalf of Neglected Children*, 28 STAN. L. REV. 625, 630-33 (1975-76)], no public centers had previously been established for battered spouses [*See* CAL. WELF. & INST. CODE §18290]. Chapter 892 has established at least four, but not more than six, project centers for victims of domestic violence [CAL. WELF. & INST. CODE §18292(a)]. To provide geographically diverse protection for domestic violence victims, the centers are to be established throughout the state with at least one center in northern California, at least one center in central California, and at least one center in southern California [*See* CAL. WELF. & INST. CODE §18292(b)]. Each center is required to provide: (1) shelter available on a 24-hour-a-day, seven-days-a-week basis; (2) a 24-hour crisis call phone line to be available seven days a week; (3) temporary housing and food facilities; (4) psycho-

logical support and peer counseling; (5) referral procedures to other services in the community and follow-up service for such referrals; (6) a drop-in center for victims of domestic violence who have not yet left their homes or who have found other shelter but have a need for other services that could be provided by the center; (7) arrangements for the children of the victims to continue their schooling during the parent's stay at the center; and (8) emergency transportation to the center [CAL. WELF. & INST. CODE §18294]. Furthermore, each center is required "to the extent possible, and in conjunction with already existing community services" to obtain for the victims of domestic violence medical care, legal assistance, psychological support and counseling, and information about existing social services such as family or job counseling [CAL. WELF. & INST. CODE §18295].

The centers are required to employ a standardized intake and follow-up form that is to be developed by the State Department of Health [CAL. WELF. & INST. CODE §18300], which will confidentially record socioeconomic data about the person served, a history of that person's contact with the center, descriptions of the episodes of domestic violence and probable causes thereof, and the follow-up services provided by the center as well as such other pertinent data that the State Department of Health deems necessary [CAL. WELF. & INST. CODE §18300]. Each center is also required to submit quarterly progress reports concerning its activities and maintain quarterly and final fiscal reports in a form prescribed by the State Department of Health [CAL. WELF. & INST. CODE §§18299, 18301]. Each center is required to submit final project reports to the State Department of Health on or before October 1, 1979, with these reports to be synthesized by that department and then filed with the legislature on or before January 1, 1980 [CAL. WELF. & INST. CODE §§18302, 18303]. Since Chapter 892 is only to remain in effect until June 30, 1980, these final project reports apparently will aid the legislature in determining the future of similar projects [*Compare* CAL. WELF. & INST. CODE §18302 *and* CAL. WELF. & INST. CODE §18303 *with* CAL. STATS. 1977, c. 892, §3, at —].

Through the enactment of Chapters 720 and 892, the legislature has taken steps to protect California citizens from domestic violence by providing that victims of domestic violence may now request a temporary restraining order for the purpose of obtaining a court imposed cooling off period [*See* CAL. CIV. PROC. CODE §527(a)] and may, in addition, take refuge in state supported shelters [*See* CAL. WELF. & INST. CODE §18290]. Thus, Chapters 720 and 892 would appear to be positive measures designed to reduce the incidence of domestic violence in California and to provide both immediate and long term assistance to victims of this violence.

See Generally:
1) 2 B. WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§85-94 (temporary restraining orders) (2d ed. 1970).
2) Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259 (1971).

Domestic Relations; same sex marriages

Civil Code §§4100, 4101 (amended).
AB 607 (Nestande); STATS 1977, Ch 339
Support: County Clerks' Association of California
Opposition: Gay Rights Chapter of American Civil Liberties Union

Under prior law, marriage was defined as "a personal relationship arising out of a civil contract" [CAL. STATS. 1969, c. 1608, §8, at 3314], which ambiguously left unanswered the legality of same-sex marriages. Although courts in other jurisdictions have rejected same-sex marriages as being no marriage at all [*See, e.g.*, McConnell v. Nooner, 547 F.2d 54, 55 (8th Cir. 1976); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 311-12, 191 N.W.2d 185, 186 (1971); Anonymous v. Anonymous, 67 Misc. 2d 982, 984, 325 N.Y.S.2d 499, 501 (1971); Singer v. Hara, 11 Wash. App. 247, 249, 522 P.2d 1187, 1189 (1974)], Chapter 339, by requiring marriage to be between a male and a female, appears to be the first definitive statement on same-sex marriages in California.

Chapter 339 amends Section 4100 of the Civil Code to define marriage as "a personal relationship arising out of a civil contract *between a man and a woman*" (emphasis added). According to several courts, such language is redundant [*See, e.g.*, McConnell v. Nooner, 547 F.2d 54, 55 (8th Cir. 1976); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 311-12, 191 N.W.2d 185, 186 (1971); Anonymous v. Anonymous, 67 Misc. 2d 982, 984, 325 N.Y.S.2d 499, 501 (1971); Singer v. Hara, 11 Wash. App. 247, 249, 522 P.2d 1187, 1189 (1974). *See generally* BLACK'S LAW DICTIONARY 1123 (4th ed. 1968)]. One court went so far as to state that the terms "husband and wife" clearly and obviously denoted man and woman [Zanone v. Sprague, 16 Cal. App. 333, 343, 116 P. 989, 993 (1911)]. Similarly, several courts' analyses were based on traditional definitions of marriage and of such terms as "husband" and "wife" [*See, e.g., id.*; Singer v. Hara, 11 Wash. App. 247, 249-50, 522 P.2d 1187, 1189 (1974)]. The California Legislature, however, apparently determined that further clarification was still necessary and has responded by insertng specific language into Section 4100 of the Civil Code to deny same-sex marriages [*See* CAL. CIV. CODE §4100]. Furthermore, Section 4101 of the Civil Code has been similarly amended to provide that the capacity to consent to marriage only exists between unmarried *males* and

females 18 years of age or older and that such *males* and *females* under the age of 18 may consent to marriage if certain documents are filed with the clerk issuing the marriage license [CAL. CIV. CODE §4101(a)-(b)]. It should be noted, however, that Chapter 339 affects only the licensing of marriages, and that Section 4213 of the Civil Code, which provides that couples who have been living together as "man and wife" may be married by a clergyman without the requisite marriage license, remains unaffected by Chapter 339.

Chapter 339 is an apparent attempt to prevent homosexual marriages in California. By amending Sections 4100 and 4101 of the Civil Code to make specific references to "man and woman" and "male and female," the legislature has made it clear that same-sex relationships cannot qualify for marriage licenses.

See Generally:
1) Annot., 63 A.L.R. 3d 1199 (same-sex marriages) (1975).

Domestic Relations; modification of spousal support and gifts of community personal property

Civil Code §§4531, 4812, 5110, 5125 (amended).
AB 1269 (Maddy); STATS 1977, Ch 332

Although the state courts have consistently differentiated between a discharge in bankruptcy of spousal support and a discharge of a property settlement, Section 4812 apparently diminishes this dichotomy. Prior to the enactment of Chapter 332, a discharge in bankruptcy of spousal support obligations could be set aside and the obligation reinstated [Roberts v. Roberts, 261 Cal. App. 2d 424, 427, 68 Cal. Rptr. 59, 61 (1968)]. On the other hand, a discharge of a property settlement relieved the obligor of any legal duty to fulfill his or her obligation [*Id.*; Smalley v. Smalley, 176 Cal. App. 2d 374, 375, 1 Cal. Rptr. 440, 442 (1960)]. This interpretation was consistent with the provisions of the Federal Bankruptcy Act concerning discharges [11 U.S.C. 35(a)(7) (1970)] and has led the courts to distinguish between spousal support and property settlement payments owed prior to discharge before determining whether the particular payments could be reinstated or would be completely discharged [Myhers v. Myhers, 6 Cal. App. 3d 855, 858, 86 Cal. Rptr. 356, 357 (1970); Roberts v. Roberts, 261 Cal. App. 2d 424, 427, 68 Cal. Rptr. 59, 61 (1968); *see* 1A COLLIER ON BANKRUPTCY §§17.18, 17.19 (Moore ed. 1976)]. Section 4812 no longer requires this distinction, since the court may now consider discharged property settlements in establishing an adequate amount of support for a former spouse.

Prior to the enactment of Chapter 332, when determining the modification of spousal support, the law limited a court's analysis to the "circumstances of the respective parties" without defining what circumstances the courts could consider [CAL. STATS. 1969, c. 1608, §8, at 3337]. Chapter 332 now permits the courts to consider discharged property settlements as a change that may justify modification of spousal support [CAL. CIV. CODE §4812]. To illustrate, prior law allowed the discharge of property settlements without a concomitant modification of spousal support, resulting in a reduction of one spouse's payment obligation without compensating the other spouse, a situation apparently remedied by Section 4812. This section now allows the court to compensate the other spouse through a readjustment of spousal support [CAL. CIV. CODE §4812; *see In re* Marriage of Lopez, 38 Cal. App. 3d 93, 116-17, 113 Cal. Rptr. 58, 72-73 (1974); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 892-93, 101 Cal. Rptr. 295, 300-01 (1972)]. Consequently, although a property settlement may be discharged in bankruptcy, a payment obligation can now still survive in the form of adjusted spousal support [CAL. CIV. CODE §4812].

Chapter 332 also amends Section 5125 of the Civil Code to reinstate the requirement of written consent by one's spouse to validate a gift of community personal property. The requirement of written consent was deleted from the Civil Code in 1975 after having been a part of the code since 1872 [CAL. STATS. 1974, c. 1206, §4, at 2609]. The result of this deletion was to limit disposal of community personal property to those situations where valuable consideration was received [CAL. STATS. 1974, c. 1206, §4, at 2609]. Thus, consent by a spouse could not validate a gift of community personal property. Since Chapter 332 contains language identical to that deleted in 1975—providing that a valid disposition of community personal property may be made either for valuable consideration *or* with the written consent of the other spouse—it is arguable that the courts will apply this new law in a manner that is consistent with earlier cases. Accordingly, a simple withholding of written consent may now be sufficient to invalidate a gift of community personal property [*See* Strong v. Strong, 22 Cal. 2d 540, 544, 140 P.2d 386, 388 (1943)], and such gifts made without this consent are now apparently voidable [*See* Harris v. Harris, 57 Cal. 2d 367, 369, 369 P.2d 481, 482, 19 Cal. Rptr. 793, 794 (1962)]. Furthermore, it would seem that a gift of community personal property may be ratified after a conveyance has been completed [*See* Spreckels v. Spreckels, 172 Cal. 775, 788, 158 P. 537, 542 (1916)]. Thus, it would appear that, just as before 1975, community personal property may now be disposed of either for valuable consideration or with the written consent of one's spouse.

See Generally:
1) 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§58-66 (gifts of community property) (8th ed. 1973), (Supp. 1976).

Domestic Relations; joinder of employee benefit plans

Civil Code §§4363.1, 4363.2, 4363.3 (new); §§4351, 4363 (amended).
AB 1090 (McAlister); STATS 1977, Ch 860
Support: Family Law Section of the State Bar of California; Public Employees' Retirement System

In recent years, the courts have consistently established that pension and retirement benefits, to the extent that these benefits are earned during marriage, are community property and subject to disposition in dissolution proceeding [*E.g., In re* Marriage of Brown, 15 Cal. 3d 838, 847, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976); *In re* Marriage of Fithian, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (1974); Waite v. Waite, 6 Cal. 3d 461, 470, 492 P.2d 13, 19, 99 Cal. Rptr. 325, 331 (1972); Phillipson v. Board of Admin., 3 Cal. 3d 32, 40, 473 P.2d 765, 769, 89 Cal. Rptr. 61, 65 (1970); *In re* Marriage of Ward, 50 Cal. App. 3d 150, 153, 123 Cal. Rptr. 234, 236 (1975)]. The recognition of employee benefits as community property has in turn created certain problems for the courts, among which is the difficulty of binding the benefit plan to the disposition as ordered by the court in a dissolution action, possibly allowing one of the parties to avoid the court order to distribute the benefits of the plan [*See In re* Marriage of Maunder, 57 Cal. App. 3d 570, 572, 127 Cal. Rptr. 707, 708 (1976)]. Chapter 860 has apparently been enacted to resolve this problem.

The background for Chapter 860 would seem to be found in the recent California Appellate Court decision of *In re Marriage of Sommers* [53 Cal. App. 3d 509, 126 Cal. Rptr. 220 (1975)], in which the court held that a pension plan could be joined in a dissolution action, thereby binding the pension plan to the court-ordered property disposition [*Id.* at 514, 126 Cal. Rptr. at 223]. In *Sommers*, the court relied upon California Rules of the Court 1252 and 1254, which allow for the joinder of any third person who has in his or her possession any property that was subject to the disposition of the court [*Id.*, at 513, 126 Cal. Rptr. at 223]. The court found that since the employee's interest in the pension plan had vested there was a community property interest and consequently the plan was subject to disposition in accordance with the court's orders [*Id.*, at 514, 126 Cal. Rptr. at 223].

Apparently, from this background the legislature has enacted Chapter 860 which provides for the joinder of employee pension benefit plans as a party to any proceeding under the Family Law Act [*See* CAL. CIV. CODE

§4363.1]. As used in the Family Law Act, the term "employee pension benefit plan" includes public and private retirement and pension plans [CAL. CIV. CODE §4363.3]. Chapter 860 provides that in such proceedings an order or judgment against an employee pension benefit plan is enforceable only if the plan has been joined as a party to the proceeding [CAL. CIV. CODE §4351]. Despite the apparent application of this joinder procedure to all proceedings under the Family Law Act [*See* CAL. CIV. CODE §4351], any judgment establishing community or quasi-community property rights in an employee pension benefit plan will apparently be issued either in an action for marriage dissolution or legal separation unless the court expressly reserves jurisdiction over the employee pension benefit plan [*See* CAL. CIV. CODE §4800(a)]. Thus, this review of Chapter 860 will focus only upon the joining of employee pension benefit plans in these Family Law Act proceedings.

Section 4363.1 of the Civil Code, as added by Chapter 860, sets forth the following preconditions to the joinder of an employee pension benefit plan to an action for dissolution or legal separation or any other proceeding under the Family Law Act: (1) the party seeking to join the plan has made a written application to the clerk requesting that the plan be joined [CAL. CIV. CODE §4363.1(a)]; (2) the employee pension benefit plan to be joined, or its trustee, administrator, or designated agent, has been served with a copy of the joinder request, a copy of the summons, and a blank copy of a notice of appearance [CAL. CIV. CODE §4363.1(a)]; and (3) within 45 days after the service of the joinder request and summons, a notice of appearance has been filed and served upon the party requesting joinder in which the benefit plan must have indicated its decision to be governed by Section 4363.2 or be deemed to have consented to this option [CAL. CIV. CODE §4363.1(b)]. If the employee pension benefit plan has been served, but fails to file a notice of appearance, a notice of motion to quash service of summons, or a notice of the filing of a petition for writ of mandate, the clerk of the court is required to enter the default of the employee pension benefit plan pursuant to Sections 585 and 586 of the Code of Civil Procedure [CAL. CIV. CODE §4363.1(c)].

An employee pension benefit plan may elect to be governed by newly created Section 4363.2 of the Civil Code [CAL. CIV. CODE §4363.1(b)], which provides for certain procedural protections governing the joinder of these plans in dissolution and legal separation actions. Section 4363.2 allows the employee pension benefit plan the option to appear at any hearing in any proceeding in which the benefit plan has been joined and also establishes a 30-day grace period before any court order that affects the plan will take effect unless the plan has waived this provision in writing [CAL. CIV. CODE §4363.2(a)]. Furthermore, during this 30-day period, the plan

may file a motion to set aside or modify the court ordered disposition of the plan's benefits and thus delay the effect of the disputed order until the court rules on the motion [CAL. CIV. CODE §4363.2(a)]. At any hearing on a motion to set aside or modify the provisions of the court order, further evidence on any issue relating to the parties' rights under the benefit plan or to the parties' community or quasi-community interest in the plan may be presented by any of the parties to the action [CAL. CIV. CODE §4363.2(b)]. As a result of such a hearing, a court may set aside or modify the ordered disposition of an employee pension benefit plan, but Chapter 860 specifies that the grounds for such action must include, but are not limited to the following: (1) neither party has any interest, vested or unvested, in the employee pension benefit plan; (2) greater or different rights have been granted to the employee or nonemployee spouse, or to both combined, than the employee held under the terms of the benefit plan; (3) the order requires payment to the nonemployee spouse of a benefit that is payable only after the death of the employee spouse to a person *designated* by the benefit plan and *not* chosen by the employee spouse; (4) the order requires the benefit plan to make payments to the nonemployee spouse after his or her death; and (5) the order awards to the nonemployee spouse any of the employee's separate property interest, or more than 50 percent of the community or quasi-community interest of the employee under the terms of the plan [CAL. CIV. CODE §4363.2(c)].

Finally, Chapter 860 specifies that the requirements for joinder of an employee pension benefit plan in any proceeding under the Family Law Act and the provisions allowing election by such a plan to be governed by Section 4363.2 are applicable to all orders and judgments entered under the Family Law Act after January 1, 1977 [*See* CAL. STATS. 1977, c. 860, §6, at —]. Furthermore, even if an employee pension benefit plan has been joined as a party in a proceeding under the Family Law Act prior to January 1, 1977, such a plan may still elect to appear and move to modify or set aside the ordered disposition of the benefits of the pension or retirement plan by filing a written election to be governed by this section with the court [*See* CAL. STATS. 1977, c. 860, §6, at —; CAL. CIV. CODE §4363.2]. A copy of this written election must be served upon the party who requested the joinder of the employee pension benefit plan in the manner prescribed by law [CAL. STATS. 1977, c. 860, §6, at —].

Chapter 860 has established a detailed procedure for joinder of employee pension benefit plans in proceedings under the Family Law Act [*See* CAL. CIV. CODE §§4363-4363.2]. Included in the new joinder scheme are procedural safeguards that would appear to deter the unnecessary joinder of benefit plans, allow for the review of court ordered disposition of benefits, and to ensure the enforcement of such dispositions.

See Generally:
1) 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Community Property* §§22, 23 (pension and retirement benefits) (8th ed. 1974).

Domestic Relations; recoupment for custody investigations

Civil Code §4602 (amended).
SB 368 (Nejedly); STATS 1977, Ch 772
Support: California Organization of Police and Sheriffs
Opposition: Western Center on Law and Poverty

Section 4602 of the Civil Code requires probation officers or domestic relations investigators [*See generally* CAL. CIV. PROC. CODE §263; *see also* Pfaff, *Domestic Relations Investigators*, 36 L.A. BAR BULL. 192 (1961)], when directed by any court in a proceeding under the Family Law Act [CAL. CIV. CODE §§4000-5174], to conduct a custody investigation and to file a written confidential report that may be considered by the court. These reports must also be made available to the parties or their attorneys at least ten days before any hearing regarding custody of a child and may be received in evidence upon stipulation of all interested parties [CAL. CIV. CODE §4602].

Chapter 772 has added a provision to Section 4602 that requires a court to inquire into the financial condition of the person(s) charged with support and maintenance of the child upon whom the custody investigation was made, and if the person(s) is found able, to make an order requiring such person(s) to repay the county that portion of the expense of the investigation and report that the court deems proper. Repayment is to be made to a county officer to be designated by the board of supervisors [CAL. CIV. CODE §4602].

California statutes provide for investigations into child welfare cases of various types [*See, e.g.*, CAL. CIV. PROC. CODE §263 (domestic relations cases investigators); CAL. PROB. CODE §1443 (guardianship petition investigations); CAL. WELF. & INST. CODE §281 (probation officers' investigations and reports)], but Chapter 772 has only provided recoupment for custody investigations conducted in conjunction with proceedings under the Family Law Act.

See Generally:
1) CONTINUING EDUCATION OF THE BAR, ATTORNEY'S GUIDE TO THE FAMILY LAW ACT PRACTICE §617 (2d ed. 1972).

Domestic Relations; adoption procedures

Civil Code §§7008, 7017 (amended).
AB 994 (Stirling); STATS 1977, Ch 207
Support: Volunteer Legislative Advocate for Children

Chapter 207 makes several "technical modifications" to the Uniform Parentage Act [CAL. CIV. CODE §§7000-7018] in an attempt to "clarify [the] existing law" applicable to adoption procedures [CAL. STATS. 1977, c. 207, §3, at —]. In the area of parental rights, the prior law required that notice of adoption proceedings need only be given to the presumed or legal father of a child whose mother had relinquished, consented to, or had proposed to relinquish the child for adoption, but no concomitant prescription was applied to such acts by a father [*See* CAL. STATS. 1975, c. 1244, §11, at 3200]. In apparent recognition that *both* parents retain residual rights in the child [*See* Adoption of Rebecca B., 68 Cal. App. 3d 193, 199, 137 Cal. Rptr. 100, 104 (1977)], Chapter 207 now requires that there be an identical attempt to notify the mother should a father act to allow adoption of a child unless the mother's relationship to the child has been previously terminated by the court, or the mother has voluntarily relinquished or consented to the child's adoption [CAL. CIV. CODE §7017(a)(2)]. Further, Chapter 207 directs that any order dispensing with a father's consent to the adoption of a child may be appealed in the same manner as is an order decreeing a person to be a ward of the juvenile court [CAL. CIV. CODE §7017(g)]. Appeals from orders of wardship are identical to all other appeals except that: (1) the order can be stayed pending resolution only if suitable provision is made for the maintenance, care, and custody of the minor involved during the appeal process; and (2) the appeal is given precedence over all other cases [CAL. WELF. & INST. CODE §800].

Chapter 207 also amends Civil Code Section 7008 which previously required that *any* child subject to an adoption proceeding be made a party to the action [CAL. STATS. 1975, c. 1244, §11, at 3199]. Joinder in adoption proceedings is now *mandatory* for children 12 years of age or older and *discretionary* in cases involving younger children [CAL. CIV. CODE §7008]. The age distinction made by Section 7008 brings this joinder provision into conformity with existing law, which requires that only children over 12 years of age must consent to their adoption [*See* CAL. CIV. CODE §225]. Finally, Chapter 207 retains the requirement that *any* child, regardless of age, who is made a party to an adoption action must be represented by a guardian ad litem, but removes a prior prohibition against appointment of the mother or father to this representative position [*Compare* CAL. CIV. CODE §7008 *with* CAL. STATS. 1975, c. 1244, §11, at 3199], a proscription that has been indicated by one court to protect the minor's rights [Everett v. Everett, 57 Cal. App. 3d 65, 71 n.9, 129 Cal. Rptr. 8, 12 n.9 (1976)]. Thus, Chapter 207 clarifies adoption procedures by: (1) providing equal preadoption notice for both natural parents; (2) providing for an appeal procedure whenever parental consent is dispensed with; (3) specifying when it is

necessary to join the subject child; and (4) permitting either parent to serve as guardian ad litem in an adoption proceeding.

See Generally:
1) Comment, *The Role of the Child's Wishes in California Custody Proceedings*, 6 U. CAL. D. L. REV. 332 (1973).

Domestic relations; adoptions—attorney representation

Civil Code §225m (new).
AB 309 (McVittie); STATS 1977, Ch 718
Support: California Association of Adoption Agencies

The Civil Code prescribes the legal parameters and procedures applicable to the adoption process [*See* CAL. CIV. CODE §224-224s]. Chapter 718 has added Section 225m to the Civil Code to prohibit an attorney from undertaking the representation of both the prospective adoptive parents and the natural parents of a child in either the negotiation process or the legal proceedings attendant to adoption. Section 225m denominates such dual representation as "unethical" unless written consent is obtained from both parties. Excepted from this limitation are adoptions by stepparents and those in which a State Department of Health licensed organization joins in the underlying petition for adoption [CAL. CIV. CODE 225m]. Since it is conceivable that the natural parents in a contested adoption proceeding may have insufficient resources to retain private counsel, Chapter 718 permits the court to appoint an attorney to represent the natural parents in such adoption negotiation and proceedings upon the motion of *any* party [CAL. CIV. CODE §225m].

Read in light of several provisions of the Business and Professions Code, Chapter 718 appears to expose an attorney entering into an unconsented dual representation of both parties to an adoption proceeding to a risk of suspension or disbarment. Section 6103 indicates that violation of the oath taken by an attorney, or of his or her duties as an attorney, constitutes cause for suspension or disbarment [CAL. BUS. & PROF. CODE §6103]. Further, each attorney must, by law, take an oath to "faithfully discharge the duties of an attorney at law" upon admission to the bar [CAL. BUS. & PROF. CODE §6067]. Finally, one element of an attorney's statutory duty is to support the laws of California [CAL. BUS. & PROF. CODE §6068(a)] Thus, Chapter 718 appears to provide both the adoptive and natural parents with the opportunity to be represented by independent counsel in any adoption negotiation or proceeding by subjecting any attorney who attempts to undertake such dual representation without the written consent of both parties to a threat of suspension or disbarment [*See* CAL. CIV. CODE §225m].

See Generally:
1) Arden v. State Bar, 52 Cal. 2d 310, 321 P.2d 6 (1954) (discipline of attorney for conflict of interest in adoption process).
2) Bodenheimer, *New Trends and Requirements in Adoption Laws and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975).
3) State Bar of California, Committee on Adoptions, *The Attorney's Role in Independent Adoptions*, 36 CAL. ST. B.J. 970 (1961).
4) Comment, *Black Market Adoptions*, 22 CATH. LAW. 48 (1976).

Domestic Relations; consent to adoption

Civil Code §224.1 (new).
AB 198 (Stirling); STATS 1977, Ch 376
Support: California Association of Adoption Agencies; Foster Parents Association

Prior to the enactment of Chapter 376, there was an apparent oversight in the law regulating adoption. Unless a child had been abandoned, or custody had been voluntarily relinquished or judicially withdrawn, it was recognized that the consent of the natural parents was required before a child could be adopted [*See* CAL. CIV. CODE §224], but the law previously contained no provision for obtaining consent if the natural parents and other persons whose consent to the adoption was required by law were dead. Consequently, it was suggested in the past that "approval" be obtained from a close relative or foster parent [*See* CONTINUING EDUCATION OF THE BAR, CALIFORNIA FAMILY LAWYER §19.54 (1961)]. Chapter 376 appears to correct this oversight by providing that when a child is in the costody of a public agency or a licensed adoption agency and it has been established that the persons whose consent to the adoption is required by law, are deceased, the State Department of Health or a licensed adoption agency may now petition the court for the right to custody and control of the child, obtaining at the same time the authority to consent to the child's adoption [CAL. CIV. CODE §224.1]. Under the provisions of Section 224.1, however, no agency is permitted to petition for control of the child if a guardian has been appointed by will. Furthermore, guidelines are provided to protect the child's interest by requiring that notice of an agency's petition for control be given to all known relatives up to and including the third degree of lineal and collateral consanguinity, which includes all great grandparents, grandparents, uncles, aunts, nieces, nephews, brothers and sisters [CAL. CIV. CODE §224.1; *see* CAL. PROB. CODE §§252, 253]. Thus, Chapter 376 would appear to facilitate the adoption of fully-orphaned children by establishing a specific procedure through which public agencies having custody of such minors may now obtain authority to place these children for adoption [*See* CAL. CIV. CODE §224.1].