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California Supreme Court Survey October 1992 - October 1993

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The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have recently been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. CONSTITUTIONAL LAW

Section 10012.1 of the California Elections Code, which limits a judicial candidate's statement in voter pamphlets to the candidate's personal background and qualifications and disallows any reference to other candidates, does not violate the First or the Fourteenth Amendments to the United States Constitution: **Clark v. Burleigh.**

I. INTRODUCTION

In *Clark v. Burleigh*,[1] the California Supreme Court considered whether section 10012.1 of the Elections Code[2] was repugnant to the First and Fourteenth Amendments to the United States Constitution because it restricted a judicial candidate's statement in a voter pamphlet to the candidate's personal background and qualifications and prohibited reference to other candidates.[3] The court utilized a forum classification ap-

1. 4 Cal. 4th 474, 841 P.2d 975, 14 Cal. Rptr. 2d 455 (1992).

2. Section 10012.1 provides in pertinent part: "any candidate's statement submitted pursuant to section 10012 by a candidate for judicial office shall be limited to a recitation of the candidate's own personal background and qualifications and shall not in any way make reference to other candidates for judicial office or to any other candidate's qualifications, character, or activities." CAL. ELEC. CODE § 10012.1 (West Supp. 1993). *See also* 28 CAL. JUR. 3D *Elections* § 92 (1986).

3. *Clark*, 4 Cal. 4th at 482, 841 P.2d at 979, 14 Cal. Rptr. 2d at 459. In *Clark*, Judge Burleigh, a candidate for superior court judge in Monterey County, sought to have his statement published in the voters' pamphlet. *Id.* at 480, 841 P.2d at 978, 14 Cal. Rptr. 2d at 458. A predominant segment of Burleigh's statement was dedicated to an explicit attack on the incumbent candidate. *Id.* Judge Burleigh criticized the incumbent for allegedly poor decisions handed down under his jurisprudence. *Id.* A recital of examples of his decisions included the dismissal of a narcotics charge involving a police seizure, the finding of "no malice" in a stabbing incident related to a fight, and the ordering of a supermarket to stay open after it announced its intention to close. *Id.* The Monterey County Registrar of Voters sought a judicial declaration as to whether Judge Burleigh's statement violated § 10012.1 and further sought a determination of the constitutionality of this statute. *Id.* Burleigh acquiesced that his references to the other candidate violated 10012.1. However, he maintained that the statute should be declared unconstitutional because it impinged on his rights to freedom of speech and equal protection of the law. *Id.* The trial court found § 10012.1 constitutional, and after striking all references to the incumbent, ordered the statement printed in the election pamphlet. *Id.* at 480-81, 841 P.2d at 978, 14 Cal. Rptr. 2d at 458. The court of appeal reversed, holding that § 10012.1 violated the First Amendment. *Id.* at 481, 841 P.2d at 979, 14 Cal. Rptr. 2d at 459. The California Supreme Court disagreed, holding that § 10012.1 did not violate the free speech guarantee to the First Amendment or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.* The court specifically declined to consider possible

proach in ascertaining the degree of constitutional protection to be afforded to speech affected by section 10012.1.[4] Upon classifying the "candidate's statement" as a nonpublic forum,[5] the California Supreme Court held that restricting the candidate's statement to factual background and qualifications did not violate the First Amendment.[6]

The First Amendment, as made applicable to the states through the Fourteenth Amendment,[7] provides that: "Congress shall make no law . . . abridging the freedom of speech . . . ."[8] Although political speech is a form of communication traditionally protected by the First Amendment,[9] the government may still limit such expression upon demonstrating a sufficient interest.[10]

The degree of governmental interest required before limitations on political speech are constitutionally permissible varies depending upon the classification of the forum as a traditional public forum, a designated public forum, or a nonpublic forum.[11]

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violations of the California Constitution based on Judge Burleigh's failure to properly address that issue. *Id.* at 481-82, 841 P.2d at 979, 14 Cal. Rptr. 2d at 459. Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Kennard, Arabian, Baxter, and George concurred.

4. *Id.* at 484, 841 P.2d at 980-81, 14 Cal. Rptr. 2d at 260-61. The degree of protection afforded to a particular form of protected speech varies according to the relevant forum classification. *Id.* at 482, 841 P.2d at 979, 14 Cal. Rptr. 2d at 459 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799-800 (1985)).

5. *Clark*, 4 Cal. 4th at 488, 841 P.2d at 984, 14 Cal. Rptr. 2d at 464.

6. *Id.* at 495, 841 P.2d at 988, 14 Cal. Rptr. 2d at 468.

7. Gitton v. New York, 268 U.S. 652, 666 (1925).

8. U.S. CONST. amend. I.

9. *Clark*, 4 Cal. 4th at 482, 841 P.2d at 979, 14 Cal. Rptr. 2d at 459 (citing Eu v. San Francisco Democratic Comm'n, 489 U.S. 214, 223 (1989) (stating that the First Amendment "'has its fullest and most urgent application' to political speech.")).

10. *Id. See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799-800 (1985). The *Cornelius* Court stated that "[e]ven protected speech is not equally permissible in all places and at all times." *Id.* The extent of protection afforded varies depending upon the nature of the forum. *Id.* The Supreme Court stated that "it is also settled that the government need not permit all forms of speech on property that it owns and controls." International Society for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2705 (1992).

11. Clark v. Burleigh, 4 Cal. 4th 474, 482-83, 841 P.2d 975, 980, 14 Cal. Rptr. 2d 455, 460 (1992).

II. TREATMENT

In following the mandate of the United States Supreme Court, the court utilized a traditional forum approach in determining the constitutionality of section 10012.1.[12] The court began by ascertaining the relevant forum.[13] In defining the forum, the court found it necessary to decide whether the forum was the entire voter pamphlet or merely the judicial candidate's statement.[14] The court held that the candidate's statement was the appropriate forum.[15] The court reasoned that Judge Burleigh did not seek access to the entire voter's pamphlet "but only to the specific portion of that pamphlet represented by his candidate's statement."[16]

Having defined the forum, the court next evaluated whether the statement was to be classified as a traditional public forum,[17] a designated public forum,[18] or a nonpublic forum.[19] The court immediately dis-

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12. The forum approach is "a means of determining when the government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes." *Id.* at 482, 841 P.2d at 979, 14 Cal. Rptr. 2d at 459.

13. *Id.* at 484, 841 P.2d at 981, 14 Cal. Rptr. 2d at 461.

14. *Id.* The court of appeal held that the relevant forum was the voter pamphlet. *Id.* at 482-83, 841 P.2d at 980, 14 Cal. Rptr. 2d at 460.

15. *Id.* at 485, 841 P.2d at 981, 14 Cal. Rptr. 2d at 461. For instances where courts have defined the forum as the entire pamphlet, see Kaplan v. County of Los Angeles, 894 F.2d 1076, 1080 (9th Cir. 1990) (involving a candidate's payment of costs associated with the pamphlet) and Gebert v. Patterson, 186 Cal. App. 3d 868, 874 (1986) (involving a local ordinance requiring the proponent of a ballot measure to pay a publication fee).

16. *Clark*, 4 Cal. 4th at 485, 841 P.2d at 981, 14 Cal. Rptr. 2d at 461. Definition of the proper forum involves not only identifying the government property at issue, but also a consideration of the access sought by the speaker. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 801 (1985).

17. The traditional public forum is a place traditionally "used by the public at large for the free exchange of ideas," such as public streets and public parks. *Clark*, 4 Cal. 4th at 482-83, 841 P.2d at 980, 14 Cal. Rptr. 2d at 460. Regulation of the content of speech taking place in a traditional public forum must satisfy the requirements of strict scrutiny by serving a compelling state interest and by being narrowly tailored to achieve that compelling interest. *Id.*

18. The designated public forum involves the rare instance in which the court determines that the state has opened its property for public expression. *Id.* Regulation of speech content on such property is subject to the same strict scrutiny analysis as in the traditional public forum. *Id.*

19. Classification as a nonpublic forum simply means that the forum does not meet the definition of a traditional or designated public forum, not that it is privately owned. *Id.* at 483 n.9, 841 P.2d at 980 n.9, 14 Cal. Rptr. 2d at 460 n.9. As long as the restriction is not intended to suppress speech based merely on opposition to the speaker's viewpoints, the regulation of the speech need only be reasonable to satisfy constitutional scrutiny. *Id.*

missed the judicial candidate's statement as a traditional public forum, because section 10012.1 was adopted in 1980, making it too recent to be considered traditional.[20] Next, the court looked to the legislative intent to determine if the candidate's statement took place in a designated public forum.[21] Because the legislature neither authorized the candidate's statement to be used for the purpose of "attacking their opponents," nor adopted a policy to permit such use, it was held not to be a designated public forum.[22] Therefore, the court concluded that a candidate's statement in a voter's pamphlet was a nonpublic forum.[23]

In accordance with its classification of the statement as a nonpublic forum, the court sought to determine whether limiting the candidate's statement was reasonably calculated to achieve a legitimate public purpose.[24] The court concluded that the limitation was reasonable for two reasons. First, the legislature intended that the statement be used to give voters at least a minimal amount of information about the candidate and not that it serve as a source of potentially confusing mixed messages.[25] Second, the candidates had access to other channels of communication.[26] Thus, the court found that the restriction placed on the candidate's statement was rationally related to providing information to voters about candidates running for judicial office.[27] The court held that

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20. *Id.* at 484, 841 P.2d at 981, 14 Cal. Rptr. 2d at 461.

21. *Id.* "[T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985)).

22. *Clark*, 4 Cal. 4th at 488, 841 P.2d at 984, 14 Cal. Rptr. 2d at 464.

23. *Id.* at 489, 841 P.2d at 984, 14 Cal. Rptr. 2d at 464.

24. *Id.* at 491, 841 P.2d at 986, 14 Cal. Rptr. 2d at 465. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (holding that the restrictions must be "reasonable in light of the purpose which the forum at issue serves"); Sheila M. Cahill, Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117, 138 (1975) (stating that in "evaluating a claim for access to a nontraditional area, the court should direct its attention to the actual level of disruption engendered by the particular expressive activity.").

25. *Clark*, 4 Cal. 4th at 493, 841 P.2d at 987, 14 Cal. Rptr. 2d at 467. In addition, the court noted that the use of the limited candidate's statements space for attacking opponents would leave less room for pertinent background and qualification information, and furthermore, opponents would not have an opportunity to counter accusations because the pamphlet was kept confidential until publication. *Id.*

26. *Id.* at 493-94, 841 P.2d at 987, 14 Cal. Rptr. 2d at 467. Such channels included advertisements, interviews, direct mailings, handbills, and personal appearances.

27. *Id.* at 494, 841 P.2d at 988, 14 Cal. Rptr. 2d at 467. The court further concluded that the regulation was viewpoint neutral and was applied evenhandedly; thus, it

section 10012.1 did not violate the First Amendment's free speech guarantee.[28]

Upon examining the free speech issue, the court addressed the issue of whether section 10012.1 violated the Equal Protection Clause.[29] The Equal Protection Clause provides that: "no State shall . . . deny any persons within its jurisdiction the equal protection of the laws."[30] Judge Burleigh argued that because candidates for judicial office were subject to such limitations while candidates for other offices were not, section 10012.1 denied equal protection of the laws.[31] The court concluded that section 10012.1 did not violate the Equal Protection Clause because the regulation of the candidate's statement did not implicate a fundamental right.[32] Thus, the section may withstand constitutional challenge, provided that the restriction is rationally related to a legitimate state purpose.[33] Under the same reasoning as applied to the First Amendment issue, the court held that section 10012.1 was rationally related to a legitimate state purpose, and therefore, was not violative of the Fourteenth Amendment.[34]

III. CONCLUSION

In *Clark*, the California Supreme Court held that the state legislature had the right to limit a judicial candidate's statement in a voter pamphlet to biographical data and personal qualifications.[35] The court reasoned first that comments regarding opposing candidates could be limited because a candidate's statement was a nonpublic forum.[36] Second, there was a legitimate state interest which was outweighed by the speaker's interest in unlimited political comment in such a nonpublic forum.[37] Finally, the restrictions were not applicable to political rhetoric in other forums, thus leaving open alternative channels of communication.[38]

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was not intended to suppress speech based on disagreement with the message. *Id.*

28. *Id.* at 495, 841 P.2d at 988, 14 Cal. Rptr. 2d at 468.

29. *Id.*

30. U.S. CONST. amend. XIV.

31. *Clark*, 4 Cal. 4th at 495, 841 P.2d at 988, 14 Cal. Rptr. 2d at 468.

32. *Id.*

33. *Id.* "If a statute regulating the use of public places for speech activities does not conflict with first amendment principles, it almost certainly will be held not to violate equal protection because it does not improperly allocate the ability to engage in a fundamental right." 4 RONALD D. ROTUNDA & JOHN E. NOWACK, TREATISE ON CONSTITUTIONAL LAW, 49 (2d ed. 1992).

34. *Clark*, 4 Cal. 4th at 496, 841 P.2d at 989, 14 Cal. Rptr. 2d at 468.

35. *Id.* at 494-95, 841 P.2d at 988, 14 Cal. Rptr. 2d at 468.

36. *Id.* at 489, 841 P.2d at 981, 14 Cal. Rptr. 2d at 461.

37. *Id.* at 494, 841 P.2d at 988, 14 Cal. Rptr. 2d at 468.

38. However, there have been proposals for restrictions on television political ad-

Nevertheless, the court glossed over three possible disadvantages to this line of reasoning. First, the designation of a forum as a nonpublic forum on the ground that the government intended to limit the forum would involve circular reasoning.[39] Secondly, by giving nonjudicial candidates unrestricted access to the voter pamphlet, the government opened the forum to public expression and thus should treat all candidates equally.[40] Finally, when the court did not find that the voter pamphlet was a limited forum, it depleted the limited public forum of its true meaning.[41] Although the court held that section 10012.1 satisfied the reasonableness standard, the court could have easily applied strict scrutiny under a limited public forum analysis and found section 10012.1 constitutional.

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vertisements. Timothy J. Moran, Note, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L.J. 663 (1992) (discussing the regulation of political advertising).

39. Justice Blackmun's dissenting opinion in *Cornelius* noted that the majority's holding that a forum was a limited public forum based upon the government's opening of the forum solely to a particular class of speakers involved an element of circular reasoning. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 813-15 (1985) (Blackmun, J., dissenting).

40. Lehman v. City of Shaker Heights, 418 U.S. 298, 310 (1974) (Brennan, J., dissenting). In *Lehman*, Justice Brennan, in his dissenting opinion, argued that the city created a forum for the dissemination of information and expression of ideas and having opened up a forum for communication, the city is thereby barred from discriminating among forum users. *Id.* (Brennan, J., dissenting).

41. *Cornelius*, 473 U.S. at 813-15.

II. CRIMINAL LAW

A. *A trial court may properly exercise its discretion in denying a motion for a new trial which is based on an unreliable post-trial declaration. Furthermore, no prejudicial error occurs when the trial court's ex parte communication with the jury is harmless beyond a reasonable doubt:*
People v. Delgado.

I. INTRODUCTION

In *People v. Delgado*,[1] the California Supreme Court considered two issues. The first issue was whether the trial court erred by denying the defendant's motion for a new trial which was based on a witness' inculpatory post-trial declaration.[2] The second issue was whether the trial court's ex parte communication with the jury sufficiently prejudiced the defendant so as to merit the granting of a mistrial.[3] The court answered both questions in the negative.[4]

II. STATEMENT OF THE CASE

The defendant, Steven Delgado, was charged with second degree murder and misdemeanor child abuse of eleven-month-old Amanda Ruiz,[5] daughter of Elizabeth Ruiz, whom the defendant had been dating.[6] Evidence against the defendant included statements and testimony given by Elizabeth Ruiz.[7] In her initial statements to the police, Ruiz denied any involvement in the events surrounding Amanda's death.[8] However, at the

1. 5 Cal. 4th 312, 851 P.2d 811, 19 Cal. Rptr. 2d 529 (1993). Justice Arabian authored the majority opinion with Chief Justice Lucas and Justices Panelli, Kennard, Baxter, and George concurring. *Id.* at 315-32, 851 P.2d at 812-23, 19 Cal. Rptr. 2d at 530-41. Justice Mosk delivered a dissenting opinion. *Id.* at 332-36, 851 P.2d at 823-26, 19 Cal. Rptr. 2d at 541-44.

2. *Id.* at 315, 851 P.2d at 812, 19 Cal. Rptr. 2d at 530.

3. *Id.*

4. *Id.*

5. *Id.* Amanda's autopsy revealed extensive abdominal bleeding and brain injury. *Id.* A blunt instrument, possibly knuckles, caused her abdominal injuries. *Id.* at 316, 851 P.2d at 812, 19 Cal. Rptr. 2d at 530. Her head injuries indicated that she was thrown against a wall. *Id.* Amanda suffered other injuries which were consistent with physical abuse. *Id.*

6. *Id.* at 315-16, 851 P.2d at 812, 19 Cal. Rptr. 2d at 530.

7. *Id.* at 316, 851 P.2d at 812, 19 Cal. Rptr. 2d at 530.

8. *Id.*

preliminary hearing and later at trial, Ruiz implicated both herself and her estranged husband, Manuel Ortiz and exculpated the defendant.[9]

The jury found the defendant guilty of second degree murder and misdemeanor child abuse.[10] Three months later, the defendant moved for a new trial, supported by a signed declaration from Elizabeth Ruiz.[11] The trial court questioned whether Ruiz's declaration amounted to newly discovered evidence, and in doubting the credibility of her latest statement, denied the motion for a new trial.[12] Considering the inconsistencies in Ruiz's statements and testimony, coupled with the overall strength of the case against the defendant, the court believed "beyond a reasonable doubt" that the defendant murdered Amanda.[13] In addition, the

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9. *Id.* at 316-19, 851 P.2d at 812-14, 19 Cal. Rptr. 2d at 530-32. At trial, Ruiz admitted for the first time that she had been taking sleeping pills and amphetamines for seven months or more prior to Amanda's death. *Id.* at 316 n.1, 851 P.2d at 812 n.1, 19 Cal. Rptr. 2d 530 n.1. Ruiz also claimed for the first time at trial that she experienced two confused and fuzzy periods during the evening that Amanda died. *Id.* at 317, 851 P.2d at 813, 19 Cal. Rptr. 2d at 531. Ruiz testified that she told her therapist about the anxiety she had about her inability to recall events from the night of Amanda's death. *Id.* at 319, 851 P.2d at 814, 19 Cal. Rptr. 2d at 532.

It was not until trial that she recalled "diving into the bed in which Amanda was sleeping," before receiving a phone call from the defendant. *Id.* at 318, 851 P.2d at 813, 19 Cal. Rptr. 2d at 531. After the defendant arrived at Ruiz's apartment, she drove to a store for soda. Upon her return, Ruiz noticed Amanda's hairband in the living room. *Id.* Although Ruiz told the police that she had not removed Amanda's hairband, at trial she stated that she "remembered removing the hairband." *Id.*

Furthermore, on defendant's date of arraignment, Ruiz told the district attorney that she had lied at the preliminary hearing when she claimed that she and defendant were the only two adults in her apartment on the night in question. *Id.* at 317 n.2, 851 P.2d at 813 n.2, 19 Cal. Rptr. 2d at 531 n.2. Ruiz then claimed that her estranged husband, Manuel Ortiz, had also visited the apartment that night. *Id.*

10. *Id.* at 324, 851 P.2d at 817, 19 Cal. Rptr. 2d at 535.

11. In her declaration, Ruiz claimed that she was responsible for Amanda's death and that any inconsistent prior statements were untrue. *Id.* at 324, 851 P.2d at 817-18, 19 Cal. Rptr. 2d at 535-36.

12. *Id.* at 325, 851 P.2d at 818, 19 Cal. Rptr. 2d at 536. The trial court recognized that the declaration may have been merely cumulative evidence because Ruiz had already incriminated herself. The court noted that not only had Ruiz been cross-examined as to her contradictory statements, but the defendant's counsel used her inculpatory statements in an unsuccessful attempt to shift blame to Ruiz. *Id.* Hence, the court believed that because the defendant's counsel could not convince one jury, then in context of the overall evidence against the defendant, a new jury would not be likely to reach a different conclusion even with Ruiz's declaration. *Id.*

13. *Id.* at 326, 851 P.2d at 819, 19 Cal. Rptr. 2d at 537.

defendant's motion for a new trial based on the judge's ex parte communication with the jury was denied.[14]

The court of appeal reversed the judgment based on both the post-trial declaration and the ex parte communication.[15] The court of appeal concluded that in ruling on a motion for a new trial, the court does not have discretion to determine whether the witness testified truthfully, but rather whether the evidence would probably result in a different result on retrial.[16]

The court of appeal found that the judge's ex parte communication[17] was prejudicial, reasoning that the conversation apparently motivated the jury's submission of a written question shortly thereafter asking the judge how to apply the subject matter of the conversation to the present case.[18] The state appealed to the California Supreme Court which granted the petition for review.[19]

III. TREATMENT

A. *Majority Opinion*

1. Ruiz's Declaration

California Penal Code section 1181 provides a defendant with the opportunity for a new trial upon the discovery of new material evidence.[20] The supreme court first emphasized that a trial court must be accorded considerable discretion in its determination on a motion for a new tri-

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14. *Id.*

15. *Id.*

16. *Id.* at 326-27, 851 P.2d at 819, 19 Cal. Rptr. 2d at 537.

17. The conversation involved the relevancy of prior conduct in a criminal trial. *See infra* note 36.

18. *Delgado*, 5 Cal. 4th at 327, 851 P.2d at 820, 19 Cal. Rptr. 2d at 538. In recommending a proper response to this situation, the appellate court advised that "'this was the time to tell the jury flatly that the prosecution would have been allowed to produce such evidence, if any there was.'" *Id.* The court of appeal cited California Evidence Code § 1101(b) for support. Section 1101(b) states in pertinent part: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ." CAL. EVID. CODE § 1101(b) (West Supp. 1993).

19. People v. Delgado, 1992 Cal. LEXIS 3774 (July 23, 1992).

20. Penal Code § 1181 states in pertinent part: "When a verdict has been rendered . . . against the defendant, the court may, upon his application, grant a new trial . . . [w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." CAL. PENAL CODE § 1181 (West 1985).

al.[21] Moreover, the court previously stressed that the review of a trial court's discretion hinges upon the factual background of each case.[22] In *People v. Sutton*,[23] the supreme court established the factors to apply when reviewing a trial court's denial of a motion for a new trial.[24] The determinative factor in *Delgado* was whether the new evidence provided by Ruiz's declaration made it more probable than not that a retrial would render a different result.[25] Several factors led the court to conclude that the declaration would not have increased the likelihood of a different result.[26]

The supreme court found that Ruiz had demonstrated a pattern of increasing self-inculpation, culminating in her declaration.[27] Interpreting the declaration as newly discovered evidence, rather than as merely cumulative self-incriminating evidence, the court found a different result unlikely on retrial because the declaration did not detract from the injurious nature of Ruiz's prior statements and the testimony of other witnesses.[28]

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21. *Delgado*, 5 Cal. 4th at 328, 851 P.2d at 820, 10 Cal. Rptr. 2d at 538. The supreme court stated that the decision to grant a new trial is wholly within the court's discretion and "'will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'" *Id.* (quoting *People v. Williams*, 45 Cal. 3d 1268, 1318, 756 P.2d 221, 250, 248 Cal. Rptr. 834, 863 (1988), *cert. denied*, 488 U.S. 1050 (1989)).

22. *Id.* (quoting People v. Dyer, 45 Cal. 3d 26, 52, 753 P.2d 1, 15, 246 Cal. Rptr. 209, 223 (1988)).

23. 73 Cal. 243, 15 P. 86 (1887).

24. The court set forth the following factors for consideration when ruling on a motion for new trial:

> 'First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence is not cumulative merely; third, that it is such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; fifth, that these facts be shown by the best evidence of which the case admits.'

Id. at 247-48, 15 P. 88 (quoting 1 I.R. HAYNE, NEW TRIAL & APPEAL § 83 (1812)). *See also Delgado*, 5 Cal. 4th at 328, 851 P.2d at 820, 19 Cal. Rptr. 2d at 538.

25. *Delgado*, 5 Cal. 4th at 328, 851 P.2d at 821, 19 Cal. Rptr. 2d at 539.

26. *Id.* at 328-29, 851 P.2d at 821, 19 Cal. Rptr. 2d at 539.

27. *Id.*

28. *Id.* Ruiz's five-year-old son Johnnie and nine-year-old David Cano Yanez, a next door neighbor also testified at trial. *Id.* at 320, 329, 851 P.2d at 815, 821, 19 Cal. Rptr. 2d at 533, 539. At the time that Amanda was discovered dead, Johnnie was found with a bloodied mouth. *Id.* at 315, 851 P.2d at 812, 19 Cal. Rptr. 2d at 530. His statements to police officers and a therapist were somewhat inconsistent, but at trial, Johnnie identified the defendant as the one who hurt him and his sister. *Id.* at 320-21, 851 P.2d at 815, 19 Cal. Rptr. at 533.

Yanez's bedroom shared the same wall as Elizabeth Ruiz's bedroom. *Id.* at 320,

The court next examined the trial court's determination that Ruiz's post-trial declaration lacked credibility, concluding that the decision was within the court's discretion.[29] A trial court may consider the credibility of newly discovered evidence when determining whether its introduction would render a different result reasonably probable.[30] Noting that a motion for a new trial based on the credibility of newly discovered evidence is wholly within the trial court's discretion, the supreme court found that the court of appeal had no basis to interfere.[31]

2. Ex Parte Communication

The court also considered the ex parte communication between the judge and jury finding it "harmless beyond a reasonable doubt."[32] The court in *People v. Jennings*[33] set out a two-part test to determine wheth-

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851 P.2d at 815, 19 Cal. Rptr. 2d at 533. He testified that at about midnight, he heard a baby crying, a woman crying out for help, pounding against the wall and a man saying, "Shhh." *Id.*

The court noted that "'a motion for a new trial should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant.'" *Id.* at 329, 851 P.2d at 821, 19 Cal. Rptr. 2d at 539 (quoting People v. Martinez, 36 Cal. 3d 816, 823, 685 P.2d 1203, 1206, 205 Cal. Rptr. 852, 855 (1984)). The court concluded that Ruiz's confession hardly contradicted or diminished "any probative value of her earlier testimony regarding defendant's guilt," and failed to lessen the more injurious evidence, including the testimony of Johnnie Ruiz and David Cano Yanez. *Id.*

29. *Delgado*, 5 Cal. 4th at 329, 851 P.2d at 821, 19 Cal. Rptr. 2d at 539. The trial court deemed the declaration not credible in light of Ruiz's conflicting testimony, her on-going progression toward implicating both herself and her estranged husband Ortiz, and her ability to remember evidence which went to exculpate the defendant to whom she still had great attachment. *Id.*

30. *Id.* (citing People v. Beyer, 38 Cal. App. 3d 176, 202, 113 Cal. Rptr. 254, 271 (1974)). *See* People v. Dyer, 45 Cal. 3d 26, 51, 753 P.2d 1, 14, 246 Cal. Rptr. 209, 222 (1988) (upholding the denial of a new trial because defendant's trial testimony contradicted the declarations forming the basis of his new trial motion), *cert. denied*, 488 U.S. 934 (1988); *see also* People v. Langlois, 220 Cal. App. 2d 831, 834-35, 34 Cal. Rptr. 116, 119 (1963) (deeming not credible the recantation of an important prosecution witness who stated she was in love with defendant and desired to help him avoid punishment).

31. *Delgado*, 5 Cal. 4th at 329, 851 P.2d at 821, 19 Cal. Rptr. 2d at 539.

32. *Id.* at 331-32, 851 P.2d at 823, 19 Cal. Rptr. 2d at 541. Ex parte communications generally constitute federal constitutional error because they infringe upon a defendant's right to be present, and right to counsel, at all critical stages of trial. *See* People v. Wright, 52 Cal. 3d 367, 403, 802 P.2d 221, 244, 276 Cal. Rptr. 731, 754 (1990) (discussing the rationale for the rule against ex parte communications), *cert. denied*, 112 S. Ct. 113 (1991). *See generally* Leslie Y. Kim, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990-1991*, 80 GEO. L.J. 1396 (1992) (discussing contact between jury and judge); Steven Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*, 74 AM. JUDICATURE SOC'Y 733 (1991) (discussing characteristics of ex parte communications).

33. 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (1991), *cert. denied*, 112 S.

er an ex parte communication with the jury is harmless beyond a reasonable doubt. The first factor to consider is whether the statements of the law were accurate.[34] The second factor is whether the court promptly notified counsel of the ex parte communication and invited defendant's counsel to offer further admonition.[35]

In *Delgado*, the court concluded that the trial court erred in answering the juror's question rather than terminating the conversation and advising the jury to submit all questions in writing.[36] The trial judge in *Delgado*, as in *Jennings*, gave an accurate statement of the law.[37] In addition, the judge promptly notified counsel of the communication.[38] The court gave significant weight to the fact that the defendant cooperated in drafting the written answer to the jury's question.[39] The court found that the defendant waived any objection to the instruction, reasoning that the

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Ct. 443 (1991).

34. *Id.* at 384-85, 807 P.2d at 1041, 279 Cal. Rptr. at 812.

35. *Id.* at 385, 807 P.2d at 1041, 279 Cal. Rptr. at 812. In *Jennings*, the judge responded to a juror's "personal question" by urging the jury to reach a verdict. *Id.* The error was harmless because the judge correctly stated the law and promptly notified defense counsel of its action, encouraging counsel to review the court reporter's notes and suggest a further admonition if desired. *Id.*

36. *Delgado*, 5 Cal. 4th at 331, 851 P.2d 822, 19 Cal. Rptr. 2d at 540. The conversation at issue took place on the second day of deliberations. *Id.* at 322, 807 P.2d at 816, 19 Cal. Rptr. 2d at 534. It began innocuously as the judge advised the jurors that they may hear alarms because work was being done to the system. *Id.* at 323, 851 P.2d at 817, 19 Cal. Rptr. 2d at 535. A juror then requested permission to ask a general question. *Id.* After the judge's reminder that he could not answer questions relating to the case outside the presence of the attorneys, the juror asked about a person charged with rape who has a prior conviction for rape. *Id.* The judge explained the prior conviction's inadmissibility based on the risk of prejudice. *Id.* Another juror then asked whether previous conduct in general was relevant. *Id.* The judge answered that it was not relevant except in specific instances. *Id.* Later that day, the jury submitted a written inquiry asking: "'If available, would the prosecution have been allowed to present evidence and/or testimony indicating that Mr. Delgado had a tendency toward violence (for example, similar to that presented concerning Manual [sic] Ortiz.)?'" *Id.* The judge consulted with counsel and responded with the following writing: "'You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You are not to speculate as to the existence or nonexistence of any fact not suggested by the evidence.'" *Id.* *See generally* 3 B.E. WITKIN, CALIFORNIA EVIDENCE, §§ 1746-1747 (3d ed. 1986) (discussing jurors questioning of judge).

37. *Delgado*, 5 Cal. 4th at 331, 851 P.2d at 822, 19 Cal. Rptr. 2d at 540.

38. *Id.*

39. *Id.*

defendant's failure to request further admonition to the jury impliedly indicated acquiescence.[40]

B. Dissenting Opinion

Justice Mosk dissented, arguing that the trial court abused its discretion by evaluating the credibility of the new evidence presented in Ruiz's declaration.[41] According to Justice Mosk, the trial court's duty is limited to determining whether a jury could find the newly discovered evidence credible.[42] He deemed that a determination on the credibility of Ruiz's declaration was a question for the jury.[43] Preferring to "err on the side of caution," Justice Mosk advocated that the jury, as the ultimate finder of fact, rule on the post-trial confession of an individual present at the scene of the crime.[44]

In acknowledging that the review of a denial of a motion for a new trial based on a post-trial declaration is fact dependent, the dissent found the facts in *Delgado* less probative than the majority.[45] While the trial court was convinced of the defendant's guilt, Justice Mosk asserted that the facts cast substantial doubt on the issue.[46] Differing with the trial court, Justice Mosk suggested that Ruiz's declaration could in fact result in a different verdict on retrial.[47] He conceded, however, that if the trial court had complete deference on the issue of credibility, then its determination would be dispositive on whether a new trial should be granted.[48]

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40. *Id. Cf.* People v. Poon, 125 Cal. App. 3d 55, 75, 178 Cal. Rptr. 375, 387 (1981) (holding that failure to seek appropriate admonishment constitutes waiver by defendant). Defendant failed to move for a mistrial until the next day, indicating to the court that defendant did not immediately perceive any prejudice. *Delgado*, 5 Cal. 4th at 331, 851 P.2d at 822, 19 Cal. Rptr. 2d at 540.

41. *Delgado*, 5 Cal 4th at 332-33, 851 P.2d at 823-24, 19 Cal. Rptr. 2d at 541-42 (Mosk, J., dissenting).

42. *Id.* (Mosk, J., dissenting).

43. *Id.* at 335, 851 P.2d at 825, 19 Cal. Rptr. 2d at 543 (Mosk, J., dissenting).

44. *Id.* at 334, 336, 851 P.2d at 825, 826, 19 Cal. Rptr. 2d at 543, 544 (Mosk, J., dissenting).

45. *Id.* at 332-33, 851 P.2d at 823-24, 19 Cal. Rptr. 2d at 541-42 (Mosk, J., dissenting).

46. *Id.* at 332, 851 P.2d at 823, 19 Cal. Rptr. 2d at 541 (Mosk, J., dissenting).

47. *Id.* at 334, 851 P.2d at 825, 19 Cal. Rptr. 2d at 543 (Mosk, J., dissenting). Recognizing the difficult factual circumstances of the case, Justice Mosk believed that "twelve minds may be better than one." *Id.* at 333, 851 P.2d at 824, 19 Cal. Rptr. 2d at 542 (Mosk, J., dissenting).

48. *Id.* at 335, 851 P.2d at 825, 19 Cal. Rptr. 2d at 543 (Mosk, J., dissenting). It would appear that Justice Mosk's statement regarding deference to the trial court is somewhat inconsistent with his prior statement that a trial court must determine whether a jury might find the new evidence credible. *See id.* at 332, 851 P.2d at 823,

Justice Mosk's concern focused primarily on the majority's characterization of Ruiz's declaration as cumulative evidence.[49] He noted that unless the jury had rejected a prior confession introduced at trial, a confession could never be cumulative evidence because "it would always 'contradict[] the strongest evidence introduced against the defendant.'"[50] Hence, Justice Mosk would have affirmed the court of appeal's conclusion that the determination of the truthfulness in the declaration was a decision for the jury.[51]

IV. CONCLUSION

In *Delgado*, the California Supreme Court held that the evaluation of a post-trial declaration's credibility is a matter squarely within the trial court's discretion, and therefore, does not provide grounds for reversal.[52] As a result of this case, in a motion for a new trial which is predicated upon the confession of a witness, a judge's determination regarding the declarant's credibility may preclude the confession from ever reaching a jury.

Additionally, the court restated the criteria for finding an ex parte communication with the jury harmless beyond a reasonable doubt. If a court properly states the law, promptly notifies defense counsel of the communication, and provides counsel the opportunity to further instruct the jury, no prejudice results.[53] Hence, *Delgado* exemplifies the court's continued conservative trend of reversing fewer criminal convictions.[54]

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19 Cal. Rptr. 2d at 541 (Mosk, J., dissenting).

49. *Id.* at 335, 851 P.2d at 825, 19 Cal. Rptr. 2d at 543 (Mosk, J., dissenting).

50. *Id.* at 335-36, 851 P.2d at 825, 19 Cal. Rptr. 2d at 543 (Mosk, J., dissenting) (quoting People v. Martinez, 36 Cal. 3d 816, 823, 685 P.2d 1203, 1206-07, 205 Cal. Rptr. 852, 855-56 (1984) (alteration in original)).

51. *Id.* at 336, 851 P.2d at 826, 19 Cal. Rptr. 2d at 544 (Mosk, J., dissenting).

52. *Id.* at 328, 851 P.2d at 820, 19 Cal. Rptr. 2d at 538.

53. *Id.* at 331-32, 851 P.2d at 823, 19 Cal. Rptr. 2d at 541.

54. *See generally*, Peter Allen, *Deukmejian's Judicial Legacy*, CAL. LAWYER 25 (Sept. 1993)(noting that Deukmejian's judicial appointees view most criminal procedural errors as minor). Justice Mosk has recorded almost as many dissents in the past four years as he did during his first 22 years on the court. His lifetime total of 330 dissenting opinions is now third-highest in the court's history. Gerald F. Uelmen, *The Disappearing Dissenters*, CAL. LAWYER 34, 38 (June 1991).

B. *When evaluating whether to impose a sentence enhancement for prior foreign jurisdiction convictions under section 667 of the California Penal Code, the trier of fact may look to the entire conviction record:* **People v. Myers.**

In *People v. Myers*,[1] the court faced the issue of interpreting the California Penal Code section 667(a) sentence enhancement provisions[2] to determine whether a court may look beyond statutory elements to the entire foreign jurisdiction conviction record of a defendant in satisfying the sentence enhancement requirements.[3] The trial court advocated using the entire conviction record as opposed to merely satisfying statutory elements when determining the proper sentence enhancement for foreign jurisdiction convictions.[4] The court of appeal disagreed with the trial court articulating that a court may only use the statutory elements of the foreign jurisdiction crime in satisfying the requirement of "all of the elements".[5] The California Supreme Court, however, rejected the appel-

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1. 5 Cal. 4th 1193, 858 P.2d 301, 22 Cal. Rptr. 2d 911 (1993). Justice Baxter delivered the unanimous opinion of the court joined by Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Arabian, and George.

2. California Penal Code § 667(a) provides a five year sentence enhancement for previously committed serious felonies in the state of California and other jurisdictions if the previous felony satisfies all of the elements of the California crime. CAL. PENAL CODE § 667(a) (West 1988 & Supp. 1993). According to § 667(d) of the California Penal Code, "serious felonies" consist of those felonies listed in § 1192.7(c) of the California Penal Code. CAL. PENAL CODE § 667(d) (West 1988 & Supp. 1993). All further statutory references are to the California Penal Code.

3. *Myers*, 5 Cal. 4th at 1195, 858 P.2d at 301, 22 Cal. Rptr. 2d at 911. In *Myers*, the defendant pleaded guilty to burglary under § 459, but contended that a prior Arizona conviction for burglary could not be used for sentence enhancement purposes because the Arizona statute lacked elements of the California crime, and thus, failed to satisfy the language of § 667(a). *Id.* at 1196, 858 P.2d at 301, 22 Cal. Rptr. 2d at 911. The Arizona burglary statute (former Arizona Revised Statute § 13-302) did not contain the California burglary element of "inhabited." *Id.* at 1197, 858 P.2d at 303, 22 Cal. Rptr. 2d at 913. For a general overview of sentence enhancements see 3 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1473 (1989); 22 CAL. JUR. 3D, *Criminal Law* § 3378 (1985 & Supp. 1993).

4. *Myers*, 5 Cal. 4th at 1195, 858 P.2d at 301, 22 Cal. Rptr. 2d at 911. The trial court chose to rely on a probation report in addition to the statutory elements in determining that the crime constituted a serious felony under § 667(a). *Id.* at 1197-98, 858 P.2d at 303, 22 Cal. Rptr. 2d at 913.

5. *Id.* at 1195, 858 P.2d at 301, 22 Cal. Rptr. 2d at 911. The court of appeal relied on People v. Crowson, 33 Cal. 3d 623, 660 P.2d 389, 190 Cal. Rptr. 165 (1983), in overturning the trial court. *Id.* In *Crowson*, the court held that for § 667.5(f), which deals with enhancements of prison terms for new offenses, a court must look only to the statutory elements of a crime in a foreign jurisdiction. *Id.* at 635, 660 P.2d at 397, 190 Cal. Rptr. at 173; *see also* In re *Finley*, 68 Cal. 2d 389, 393, 438 P.2d 381, 384, 66 Cal. Rptr. 733, 736 (advocating the use of the "least adjudicated elements of the prior conviction" rule adopted by the *Crowson* court for § 667.5); 22

late court ruling, and held that a court may look beyond the mere statutory elements of a foreign jurisdiction crime in determining sentence enhancements under section 667.[6]

In overturning the court of appeal's decision, the supreme court relied heavily on the intent of the electorate in enacting section 667.[7] Section 667(d) mandates enhancement for those serious felonies listed in section 1192.7(c), two of which are not statutory crimes, but rather descriptions of criminal conduct.[8] The court reasoned that the inclusion of the two paragraphs describing criminal conduct demonstrates the voters' intention to subject defendants to enhancements for criminal conduct beyond those defined by statutory elements.[9] By including conduct within the definition of serious felony, the court deemed it fair for the trier of fact to look at the whole foreign jurisdiction conviction record in determining whether the "all elements" requirement for enhancement is satisfied.[10]

CAL. JUR. 3D, *Criminal Law* § 3380 (1985 & Supp. 1993) (supporting the use of the "minimum adjudicated elements" test for foreign jurisdiction conviction sentence enhancement). The court of appeal agreed with the defendant that the similar language in §§ 667 and 667.5 calls for a similar interpretation. *Myers*, 5 Cal. 4th at 1199, 858 P.2d at 304, 22 Cal. Rptr. 2d at 914.

6. *Id.* at 1201, 858 P.2d at 306, 22 Cal. Rptr. 2d at 916.

7. *Id.* at 1201, 858 P.2d at 305, 22 Cal. Rptr. 2d at 915. Proposition 8, which mandated § 667, became effective on June 8, 1982, and is embodied in Article 1, § 28 of the California Constitution. CAL. CONST., art. I, § 28 (West 1983).

8. *Myers*, 5 Cal. 4th at 1199, 858 P.2d at 304, 22 Cal. Rptr. 2d. at 914. The relevant paragraphs, 18 and 24, of § 1192.7 state:

> (18) burglary of an inhabited dwelling house, or trailer coach as defined by the Vehicle Code, or inhabited portion of any other building;
>
> . . . .
>
> (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine phencyclidine (PCP), or any methamphetamine-related drug, as described in paragraph (2) of subdivision (d) of Section 1105 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of section 11055 or subdivision (a) of section 11100 of the Health and Safety Code.

CAL. PENAL CODE § 1192.7(c) (West 1982 & Supp. 1993).

9. *Myers*, 5 Cal. 4th at 1199-1200, 858 P.2d at 304, 22 Cal. Rptr. 2d at 914. For a discussion on the voters' intent relating to § 1192.7 see People v. Jackson, 37 Cal. 3d 826, 833, 694 P.2d 736, 739, 210 Cal. Rptr. 623, 626 (1985) (discussing the implications of the inclusion of paragraphs (18) and (24) of § 1192.7 in § 667). The *Myers* court also referred to People v. Guerrero, 44 Cal. 3d 343, 748 P.2d 1150, 243 Cal. Rptr. 688 (1988), in which the court analyzed the same issue concerning in-state crimes. *Myers*, 5 Cal. 4th at 1199, 858 P.2d at 304, 22 Cal. Rptr. 2d at 914.

10. *Id.* at 1200, 858 P.2d at 305, 22 Cal. Rptr. 2d at 915 (citing *Guerrero*, 44 Cal.

With this decision the court clarified section 667's application to prior convictions in foreign jurisdiction by utilizing the same reasoning previously applied to prior California convictions.[11] This decision also exemplifies the judicial ideology of giving deference to the voters by interpreting section 667 in accord with the voters' intent. In addition, the ruling denotes the willingness to see justice done by allowing the trier of fact to utilize all relevant evidence providing for a deserved sentence enhancement.

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3d at 355, 748 P.2d at 1157, 243 Cal. Rptr. at 695) (applying the same reasoning for both in-state and foreign convictions). Evidentiary rules still exist, therefore the prosecution does not possess carte blanche to use the entire conviction record. *Id.* at 1201, 858 P.2d at 306, 22 Cal. Rptr. 2d at 916.

11. *Id.* at 1201-02, 858 P.2d at 306, 22 Cal. Rptr. 2d at 916. *See, Guerrero*, 44 Cal. 3d at 355-56, 748 P.2d at 1157, 243 Cal. Rptr. at 695.

III. HEALTH AND SAFETY LAW

A competent, informed patient has the right to refuse unwanted medical treatment, even where such treatment is necessary to sustain the patient's life. In addition, a prison inmate has the same right to decline treatment as a nonincarcerated individual unless his refusal threatens prison discipline or security: **Thor v. Superior Court.**

I. INTRODUCTION

In *Thor v. Superior Court*,[1] the California Supreme Court considered whether an individual has the right to refuse "life-sustaining" medical treatment.[2] Under California's Natural Death Act, terminally ill and per-

1. 5 Cal. 4th 725, 855 P.2d 375, 21 Cal. Rptr. 2d 357 (1993). Justice Arabian wrote the unanimous opinion for the court, with Chief Justice Lucas and Justices Mosk, Panelli, Kennard, Baxter, and George concurring.

2. *Thor*, 5 Cal. 4th at 732, 855 P.2d at 378, 21 Cal. Rptr. 2d at 360. The court's use of the term "life-sustaining treatment" is inconsistent with the California Legislature's definition of the term. Health & Safety Code § 7186(d) defines "life-sustaining treatment" as a "medical procedure or intervention that . . . will serve only to prolong the process of dying or an irreversible coma or persistent vegetative state." CAL. HEALTH & SAFETY CODE § 7186(d) (West Supp. 1994). *Thor* involved a prison inmate who was a quadriplegic. While lack of medical treatment placed him at a substantial risk of death, he was neither dying nor in a vegetative state. *See infra* notes 10-14 and accompanying text for a further discussion of the prisoner's medical condition.

A more precise example of life-sustaining treatment as defined by the legislature is *Barber v. Superior Court*, involving the removal of intravenous tubes from a patient who suffered severe brain damage and who was in a deeply comatose state from which recovery was unlikely. 147 Cal. App. 3d 1006, 1010, 195 Cal. Rptr. 484, 486 (1983). Other cases involving life-sustaining treatment within the meaning set forth by the California Legislature are: Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 265 (1990) (involving the withdrawal of artificial nutrition and hydration where the patient "had no chance of recovering her cognitive faculties"); *In re* Estate of Longeway, 549 N.E.2d 292, 293 (Ill. 1989) (involving the withdrawal of artificial nutrition and hydration where "neurological damage [was] so extensive that she [would] never regain consciousness"); Rasmussen *ex rel.* Mitchell v. Fleming, 741 P.2d 674, 679 (Ariz. 1987) (involving removal of nasogastric tube where patient was in a chronic vegetative state); *In re* Farrel, 529 A.2d 404, 408-09 (N.J. 1987) (involving the removal of a respirator where it only served to prolong the process of dying); *In re* Gardner, 534 A.2d 947, 949 (Me. 1987) (involving the removal of a nasogastric tube where the patient was in a persistent vegetative state); *In re* Quinlan, 355 A.2d 647,

manently comatose patients already had the right to terminate life-sustaining treatment.[3] While the opinion itself did not focus on the Natural Death Act or the fact that terminal patients had an existing right to withhold or withdraw treatment, an awareness of this legislation is critical to understanding the significance of the case.[4] In holding that any competent patient has the right to refuse unwanted medical treatment, the court established that the right to withhold or withdraw life support is not reserved only for terminal and comatose patients.[5]

However, the right to refuse medical treatment is not absolute.[6] If the state has a countervailing interest which outweighs an individual's right to personal autonomy and self-determination, then the right to refuse treatment may be limited.[7] The court enumerated four state interests which might limit a patient's right to refuse treatment: 1) preserving life, 2) preventing suicide, 3) maintaining the ethical integrity of the medical profession, and 4) the protection of innocent third parties.[8] In addition,

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654 (N.J. 1976) *cert. denied*, 429 U.S. 922 (1976) (involving the removal of a respirator where patient was comatose and in a chronic vegetative state). *See generally* John D. Hodson, Annotation, *Judicial Power to Order Discontinuance of Life-Sustaining Treatment*, 48 A.L.R. 4th 67 (1986).

3. See CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1994)(enacted in 1976), which sets forth the California Natural Death Act. *See generally* Diane L. Redleaf et al., *The California Natural Death Act: An Empirical Study of Physicians' Practices*, 31 STAN. L. REV. 913 (1979). Under the Natural Death Act a person has the right to withhold or withdraw life-sustaining treatment "in instances of a terminal condition or permanent unconscious condition." CAL. HEALTH & SAFETY CODE § 7185.5(a) (West Supp. 1994). A "terminal" condition is one which will cause death within a relatively short period of time, with or without medical treatment. *Id.* at § 7186(j). It is important to note that this case does not fall under the Natural Death Act because Andrews was not terminally ill nor was he in a comatose state. *See supra* note 2.

In *Bouvia v. Superior Court*, the court of appeal stated that "[a]lthough addressed to terminally ill patients, the significance of this legislation is its expression as state policy 'that adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care.'" 179 Cal. App. 3d 1127, 1139, 225 Cal. Rptr. 297, 302 (1986) (quoting CAL. HEATH & SAFETY CODE § 7185.5(a)) *See also Bartling v. Superior Court*, 163 Cal. App. 3d 186, 193, 209 Cal. Rptr. 220, 223 (1984) (concluding that the right to have life-support equipment disconnected was not limited to terminally ill or comatose patients).

4. The court briefly alluded to the Natural Death Act, however, when it stated that no distinction should be made with respect to "terminal" or "nonterminal" patients. *Thor*, 5 Cal. 4th at 736-37, 855 P.2d at 382, 21 Cal. Rptr. 2d at 364.

5. *Id. See infra* note 22 and accompanying text, discussing the requirement that a patient be competent in order to refuse medical intervention. *See generally* Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375 (1988) (discussing legal standards governing termination of an incompetent patient's medical treatment).

6. *See infra* note 27 and accompanying text.

7. *See infra* note 28 and accompanying text.

8. *See infra* notes 28-49 and accompanying text.

when a patient is a prison inmate, his right to decline medical treatment may be restricted if such refusal threatens prison discipline or security.[9]

II. STATEMENT OF THE CASE

On May 24, 1991, Howard Andrews "jumped or fell" from a prison wall rendering himself a quadriplegic.[10] Medical personnel had to feed and medicate him because he lacked all feeling below his shoulders.[11] Andrews, however, refused to cooperate, rejecting food and medication. His refusal to eat and receive medical treatment placed him at risk of death due to starvation and potential complications with his condition.[12] The physician overseeing his medical condition wanted to use a gastrojejunostromy tube[13] to artificially feed and medicate him.[14]

Andrews would not consent to the surgical procedure necessary to insert the feeding tube into his stomach, and, consequently, the physician sought an order in superior court granting him permission to perform the procedure.[15] The trial court ruled that the inmate had the right to refuse medical intervention.[16] The court of appeal denied the physician's petition for a writ of mandate on the same grounds.[17] The supreme court granted review.[18]

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9. *See infra* notes 50-55 and accompanying text, which discusses the extent to which a prison inmate may refuse medical treatment.

10. *Thor*, 5 Cal. 4th at 732, 855 P.2d at 379, 21 Cal. Rptr. 2d at 361.

11. *Id.*

12. *Id.* Andrews' refusal of medication placed him at risk of "pulmonary emboli, starvation, infection, and renal failure." *Id.*

13. A "gastrojejunostromy" is a surgical operation which creates an artificial bypass for food between the stomach and the small intestine. *Id.* at 733 n.1, 855 P.2d at 379 n.1, 21 Cal. Rptr. 2d at 361 n.1.

14. *Id.* at 733, 855 P.2d at 379, 21 Cal. Rptr. 2d at 361.

15. *Id.* The physician initiated an ex parte proceeding. *Id.*

16. *Id.*

17. *Id.* The court of appeal relied on Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) and Bartling v. Superior Court, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984). *Bouvia* involved facts which are similar to the facts of this case. The patient was a quadriplegic and had to be "spoon fed in order to eat." *Bouvia*, 179 Cal. App. 3d at 1136, 225 Cal. Rptr. at 300. Because she intermittently refused to be fed, medical staff inserted a nasogastric tube to artificially feed her. *Id.* The *Bouvia* court held that "a patient has the right to refuse any medical treatment or medical service . . . even if its exercise creates a 'life-threatening condition.'" *Id.* at 1137, 225 Cal. Rptr. at 300.

18. *Thor*, 5 Cal. 4th at 733, 855 P.2d at 379, 21 Cal. Rptr. 2d at 361.

III. TREATMENT OF THE CASE

A. *Personal Autonomy and the Right to Self-Determination*

The court first addressed the issue of whether *any* patient has the right to refuse medical treatment when to do so could result in death.[19] The court explained that the right to refuse medical treatment is inherent in the "doctrine of informed consent."[20] Under this doctrine, a physician must disclose to a patient the risks and benefits of any proposed treatment and all available alternatives to that treatment.[21] Provided that the patient is mentally competent, he has a right to choose from the available alternatives.[22] The court emphasized that the concept of informed consent implicitly includes informed refusal as well.[23]

Having established that a competent patient may decline medical treatment when properly informed, the court then stated that a patient's decision is personal and need not rest on "medical rationality."[24] The court

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19. *Id.* at 734, 855 P.2d at 380, 21 Cal. Rptr. 2d at 362. The court specifically removed this issue from the "prison context" in determining whether Andrews would have the right to prohibit nonconsensual medical intervention if he were not incarcerated. *Id.*

20. *Thor*, 5 Cal. 4th at 735, 855 P.2d at 381, 21 Cal. Rptr. 2d at 363. *See generally* Cobbs v. Grant, 8 Cal. 3d 229, 239-43, 502 P.2d 1, 6-10, 104 Cal. Rptr. 505, 511-14 (1972) (discussing the doctrine of informed consent).

21. *Thor*, 5 Cal. 4th at 735, 855 P.2d at 381, 21 Cal. Rptr. 2d at 363. *See generally Cobbs*, 8 Cal. 3d 229, 243-44, 502 P.2d 1, 10-11, 104 Cal. Rptr. 505, 514-15 (discussing the scope of a doctor's duty to disclose).

22. *Thor*, 5 Cal. 4th at 736, 855 P.2d at 381, 21 Cal. Rptr. 2d at 363. "A patient should be denied the opportunity to weigh the risks only where it is evident that he can not weigh the data, as for example, where . . . the patient is . . . incompetent." *Cobbs*, 8 Cal. 3d at 243, 502 P.2d at 10, 104 Cal. Rptr. at 514. Under the doctrine of informed consent "the patient must have the capacity to reason and make judgments." Rasmussen *ex rel.* Mitchell v. Fleming, 741 P.2d 674, 683 (Ariz. 1987). *See also* Lane v. Candura, 376 N.E. 2d 1232, 1235 (Mass. App. Ct. 1978) (stating that "[a] person is presumed to be competent unless shown by evidence not to be competent). *See generally In re* Estate of Longeway, 549 N.E. 2d 292, 298 (Ill. 1989) (defining the right of an incompetent patient to refuse medical treatment through a guardian).

23. *Thor*, 5 Cal. 4th at 735-36, 855 P.2d at 381, 21 Cal. Rptr. 2d at 363. In *Rasmussen*, the court stated that "[t]he purpose underlying the doctrine of informed consent is defeated if . . . the patient is forced to choose only from alternative methods of treatment and precluded from foregoing all treatment whatsoever." *Rasmussen*, 741 P.2d at 683. *See also In re* Gardner, 534 A.2d 947, 951 (Me. 1987) (explaining that informed consent encompasses the right of "informed refusal"); *In re* Conroy, 486 A.2d 1209, 1222 (N.J. 1985) (same).

24. *Thor*, 5 Cal. 4th at 736, 855 P.2d at 381, 21 Cal. Rptr. 2d at 363. In *Bouvia*, the court stated that a patient's decision to forego medical treatment "is not a medical decision for her physicians to make . . . [nor] is it a legal question whose soundness is to be resolved by lawyers or judges." *Bouvia*, 179 Cal. App. 3d at 1143, 225 Cal. Rptr. at 305.

emphasized that the concepts of self-determination and personal autonomy are fundamental to Anglo-American law, and, therefore, a doctor's judgment should not be permitted to interfere with a patient's "subjective sense of well-being."[25] The court ultimately concluded that once the patient has made an informed decision to decline treatment, the doctor's duty to render additional treatment is discharged.[26]

B. State Interests

While the court expressed a desire to protect patient autonomy, it acknowledged that "the right to be free from nonconsensual invasions of bodily integrity is not absolute."[27] The court identified four countervailing state interests which must be balanced against the general policy in favor of personal autonomy and the right of self-determination: "preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting innocent third parties."[28]

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25. *Thor*, 5 Cal. 4th at 736, 855 P.2d at 381-82, 21 Cal. Rptr. 2d at 363-64. The court specifically stated, "No right is held more sacred, or is more carefully guarded . . . than the right of every individual to possession and control of his own person, free from restraint or interference of others." *Id.* at 732, 855 P.2d at 378, 21 Cal. Rptr. 2d at 360. (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)). The court also asserted that "a person of adult years and in sound mind has the right . . . to determine whether or not to submit to lawful medical treatment." *Id.* at 731, 855 P.2d at 378, 21 Cal. Rptr. at 360. (quoting Cobbs v. Grant, 8 Cal. 3d 229, 242, 502 P.2d 1, 9, 104 Cal. Rptr. 505, 513 (1972)).

In addition to the common law right of self-determination, courts have recognized a constitutional liberty interest in refusing medical treatment. *See* Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 277 n.7 (1990) (stating that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment" in "right to die" cases).

26. *Thor*, 5 Cal. 4th at 738, 855 P.2d at 383, 21 Cal. Rptr. 2d at 365.

27. *Id.*

28. *Id. See also* Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 279 (1990) (stating a court must balance "his liberty interests against the relevant state interests.") Two California appellate courts have used a balancing test in determining whether a patient may refuse unwanted medical treatment. *See Bouvia*, 179 Cal. App. 3d at 1142, 225 Cal. Rptr. at 304 (balancing patient's right to refuse medical treatment against state interests of preserving life, preventing suicide, protecting third parties and maintaining the professional standards of the profession); *Bartling*, 163 Cal. App. 3d at 195, 209 Cal. Rptr. at 225 (1984) (same). Various other state courts have also used this balancing test. *See* McKay v. Bergstedt, 801 P.2d 617, 622 (Nev. 1990); Rasmussen *ex rel.* Mitchell v. Fleming, 741 P.2d 674, 683 (Ariz. 1987); *In re* Farrell, 529 A.2d. 404, 410 (N.J. 1987); Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 634 (Mass. 1986); *In re* Conroy, 486 A.2d 1209, 1222 (N.J. 1985).

1. The State's Interest in Preserving Life

The court interpreted the state's interest in preserving life as encompassing an interest in preserving the quality of life.[29] It stated that an individual has the "right to avoid circumstances in which . . . efforts to sustain life demean or degrade his humanity."[30] Examining the facts of the case, the court found that the state's interest in preserving life did not outweigh Andrews' right to refuse unwanted medical treatment.[31] It reasoned that Andrews had a debilitating and dehumanizing condition that rendered him entirely dependent on others for all bodily functions.[32] In addition, the proposed treatment involved a surgical procedure which might have potentially increased the risks and pain that Andrews faced.[33] Furthermore, the proposed treatment would not reverse Andrews' condition or improve his quality of life, but would merely prolong his life.[34] The court indicated that "the State's interest in preserving life may . . . decrease" when that patient's quality of life declines as a result of physical deterioration.[35]

2. The State's Interest in Preventing Suicide

The court emphasized that California has a limited interest in preventing suicide, as evidenced by the fact that there is no "criminal or civil sanction for intentional acts of self-destruction."[36] In addition, the court rejected "the contention that acquiescence in the decision to forego a life-sustaining procedure subjects the physician to liability for aiding and abetting suicide."[37]

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29. *Thor*, 5 Cal. 4th at 740, 855 P.2d at 384-85, 21 Cal. Rptr. 2d at 366-67.

30. *Id.* at 739, 855 P.2d at 383, 21 Cal. Rptr. 2d at 365.

31. *Id.* at 740, 855 P.2d at 384, 21 Cal. Rptr. 2d at 366.

32. *Id. See also* McKay v. Bergstedt, 801 P.2d 617, 627 (Nev. 1990) (describing quadriplegic patient as being wholly dependent on others); *Bouvia*, 179 Cal. App. 3d at 1136, 225 Cal. Rptr. at 300 (describing quadriplegic's condition as dehumanizing because she had to rely on others for "feeding, washing, cleaning, toileting, turning, and helping her with elimination and other bodily functions").

33. *Thor*, 5 Cal. 4th at 740, 855 P.2d at 384, 21 Cal. Rptr. 2d. at 366.

34. *Id. See also Bouvia*, 179 Cal. App. 3d at 1142, 225 Cal. Rptr. at 304 (explaining that the quality of an individual's life is at least as significant as the length of time one lives).

35. *Thor*, 5 Cal. 4th at 740, 855 P.2d at 384-85, 21 Cal. Rptr. 2d. at 366-67. *See also McKay*, 801 P.2d at 622 (stating when the quality of life diminishes, "the state's interest in preserving life may correspondingly decrease"); *Bouvia*, 179 Cal. App. 3d at 1143, 225 Cal. Rptr. at 305 (indicating the state's interest in preserving life decreases when a patient is "physically helpless [and] subject to the . . . embarrassment, humiliation and dehumanizing aspects created by her helplessness").

36. *Thor*, 5 Cal. 4th at 741, 855 P.2d at 385, 21 Cal. Rptr. 2d at 367.

37. *Id. But see* CAL. PENAL CODE § 401 (West 1988 & Supp. 1994), which states that "[e]very person who deliberately aids, or advises, or encourages another to com-

The court distinguished an individual that is already afflicted with a serious condition from one who is healthy and deliberately attempts to take his own life.[38] The court asserted that there is a presumption against suicide when life must be sustained artificially.[39] The court failed to acknowledge, however, that Andrews' life did not have to be sustained artificially. It was his refusal to receive food and medication that gave rise to the need for a feeding tube.[40] Moreover, the court did not differentiate between Andrews' refusal to eat and his refusal to accept medical treatment. While his refusal to accept medical treatment directly related to his underlying illness, and therefore may be presumed not to have been suicidal, his refusal to eat did not directly relate to his underlying illness and, thus, appeared to contain a suicidal motive.[41]

3. Maintaining the Ethical Integrity of The Medical Profession

The court concluded that the right to decline life-sustaining treatment does not jeopardize the ethical integrity of the medical profession.[42] In fact, the California Medical Association, which represents over 30,000 physicians statewide, urged the court "to affirm that a mentally competent [person] has a virtually unqualified right to refuse unwanted medical treatment."[43] The court rejected the notion of medical paternalism,[44] emphasizing that a patient's choice between treatment or nontreatment

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mit suicide, is guilty of a felony." In *Bartling*, the court stated that if a physician disconnects life support, this does not constitute aiding or abetting suicide because it does not involve death by unnatural means. 163 Cal. App. 3d at 196, 209 Cal. Rptr. at 225. Rather, it merely "hasten[s] his inevitable death by natural causes." *Id.* (citing Satz v. Perlmutter, 362 So. 2d 160, 162-63 (1978)). Proposition 161, which proposed legislation allowing physicians to aid in the death of terminally ill patients was rejected at the November 1992 election. CAL. CIV. CODE §§ 2525-2525.24 (West 1994) (Death With Dignity Act [rejected]).

38. *Thor*, 5 Cal. 4th at 742, 855 P.2d at 385-86, 21 Cal. Rptr. 2d at 367-68. *See also Bartling*, 163 Cal. App. 3d at 196, 209 Cal. Rptr. at 226 (distinguishing between "the self-infliction of deadly harm and a self-determination against artificial life-support or radical surgery").

39. *Thor*, 5 Cal. 4th at 742, 855 P.2d at 386, 21 Cal. Rptr. 2d at 368 (citing *McKay*, 801 P.2d at 627).

40. *See supra* note 12 and accompanying text.

41. However, the *Bouvia* court asserted that the patient's motive behind refusal of treatment is irrelevant. 179 Cal. App. 3d at 1145, 225 Cal. Rptr. at 306. The court stated that "[i]f a right exists, it matters not what 'motivates' its exercise." *Id.*

42. *Thor*, 5 Cal. 4th at 742, 855 P.2d at 386, 21 Cal. Rptr. 2d at 368.

43. *Id.* at 743, 855 P.2d at 386, 21 Cal. Rptr. 2d at 368.

44. *Id.* at 742, 855 P.2d at 386, 21 Cal. Rptr. 2d at 368.

enhances rather than compromises the integrity of the medical profession.[45] In response to the Petitioner's concerns over potential liability, the court held that a physician will not be subject to civil or criminal liability when he withholds or withdraws treatment at the request of the patient.[46] This remains true whether or not the withdrawal or withholding of treatment risks either hastening or causing death.[47]

4. The Protection of Innocent Third Parties

The court summarily dismissed the state's asserted interest of protecting third parties as inapplicable under the facts of the case.[48] The court commented that this concern usually arises in two situations: 1) when refusal of treatment would threaten public health, or 2) when a patient has children, and the parent's death would deprive the family of necessary financial and emotional support.[49]

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45. *Id.* at 743, 855 P.2d at 386, 21 Cal. Rptr. 2d at 368.

46. *Id. See Bouvia*, 179 Cal. App. 3d at 1145, 225 Cal. Rptr. at 306 (holding that "no criminal or civil liability attaches to honoring a competent, informed patient's refusal of medical service"); *Bartling*, 163 Cal. App. 3d at 197, 209 Cal. Rptr. at 226 (holding that physicians will not be held criminally or civilly liable for carrying out a patient's instructions to terminate life support); Barber v. Superior Court, 147 Cal. App. 3d 1006, 1022, 195 Cal. Rptr. 484, 493 (1983) (finding no criminal liability where doctors were charged with murder and conspiracy to commit murder for carrying out family's instructions to remove life support); In the Matter of Quinlin, 355 A.2d 647, 669 (N.J. 1976) *cert. denied*, 429 U.S. 922 (1976) (concluding that ensuing death from removal of life-support does not constitute a homicide but rather "expiration from existing natural causes").

See also CAL. HEALTH & SAFETY CODE § 7190.5 (West Supp. 1993), which states that there is no civil or criminal liability for giving effect to declaration under the Natural Death Act. While the case at hand does not fall within the Natural Death Act, the statute is based on a legislative intent to release physicians from liability in situations where they are acting in good faith. *See also* CAL. CIV. CODE § 2512(a) (West 1993) (no liability for relying in good faith on power of attorney for health care decisions). *See generally* Gregory G. Sarno, *Tortious Maintenance or Removal of Life Support*, 58 A.L.R. 4th 222 (1987) (analyzing state and federal cases which have held persons civilly liable for prolongation and maintenance of life support).

47. *Thor*, 5 Cal. 4th at 743, 855 P.2d at 386, 21 Cal. Rptr. 2d at 368.

48. *Id.* at 744, 855 P.2d at 387, 21 Cal. Rptr. 2d at 369.

49. *Id. See, e.g., In re* President of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (refusing to allow discontinuation of life-sustaining care where patient had a seven month old child); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964), *cert. denied*, 377 U.S. 985 (refusing to allow discontinuation of life-sustaining treatment where patient was eight months pregnant).

C. *The Extent to which a Prison Inmate May Exercise the Right to Refuse Medical Treatment*

1. Prison Security and Public Safety

The court held that prisoners generally retain the same right to decline medical treatment as non incarcerated individuals.[50] However, the court noted that this right may be limited if there is either a threat to prison discipline or public safety.[51] The court based its findings on the legislative intent underlying California Penal Code section 2600,[52] which provides that a prisoner "may . . . be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."[53] Under the facts of this case, the court concluded that Andrews' refusal of medical treatment in no way threatened prison security or endangered the public.[54] Therefore, the court prohibited prison officials from forcing him to accept further medical treatment.[55]

2. Emergency Medical Treatment

Pursuant to the California Code of Regulations, title 15, section 3351, medical personnel may administer treatment without consent in order "to save the life or avoid serious physical damage to an inmate."[56] The court

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50. *Thor*, 5 Cal. 4th at 745, 855 P.2d at 388, 21 Cal. Rptr. 2d at 370.

51. *Thor*, 5 Cal. 4th at 744-45, 855 P.2d at 387-88, 21 Cal. Rptr. 2d at 369-70. *See* Washington v. Harper, 494 U.S. 210 (1990) (holding that prison officials could administer unwanted psychotropic drugs when inmate's mental condition posed a threat to prison security); *In re* Caulk, 480 A.2d 93, 95-96 (N.H. 1984) (holding that prison officials could intervene with medical treatment when healthy inmate's attempt to starve himself posed a threat to prison security and discipline); Von Holden v. Chapman, 87 A.D.2d 66 (N.Y. 1982) (same). The *Thor* court specifically declined to address the issue of whether forced medical intervention would be justified in a situation where a healthy inmate places himself at risk of death for nonmedical reasons, such as a hunger strike. *Thor*, 5 Cal. 4th at 747 n.16, 855 P.2d at 389 n.16, 21 Cal. Rptr. 2d at 371 n.16.

52. *Thor*, 5 Cal. 4th at 745, 855 P.2d at 388, 21 Cal. Rptr. 2d at 370.

53. CAL. PENAL CODE § 2600 (West 1982 & 1994). While the court acknowledged that prison security is a legitimate concern, it emphasized that the measures employed to maintain security "must be demonstrably 'reasonable' and 'necessary,' not a matter of conjecture." *Thor*, 5 Cal. 4th at 746, 855 P.2d at 388, 21 Cal. Rptr. 2d at 370.

54. *Thor*, 5 Cal. 4th at 745, 855 P.2d at 388, 21 Cal. Rptr. 2d at 370.

55. *Id.*

56. CAL. CODE REGS. tit. 15, § 3351 (1993).

construed section 3351 to apply only in emergency situations where it is "impracticable" to obtain consent prior to treatment and concluded that it was not applicable to the present situation.[57] The court reasoned that the purpose of the law was to protect a prisoner's right to receive necessary medical attention, not to force unwanted treatment on an inmate.[58]

IV. CONCLUSION

In *Thor v. Superior Court*, the California Supreme Court established that the right to refuse artificial life support is not limited to patients with terminal conditions.[59] In cases where the patient has an incurable or irreversible condition which is severely debilitating and dehumanizing, courts will most likely find that the patient has the right to refuse treatment, even if refusal will cause death. The *Thor* court recognized that an individual has the right to avoid a demeaning and helpless existence, emphasizing that the quality of a person's life is more important than the length of that life.[60]

Thor, however, does not stand for the proposition that patients have an unqualified right to refuse medical intervention.[61] Future courts will

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57. *Thor*, 5 Cal. 4th at 746 n.15, 855 P.2d at 388-89 n.15, 21 Cal. Rptr. 2d at 371 n.15. The court explained that the regulation is "simply a statement of 'the general rule that in cases of emergency, or unanticipated conditions where immediate action is found necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent to the operation or treatment,' consent will be presumed and the physician may proceed." *Id.* (quoting Preston v. Hubbell, 87 Cal. App. 2d 53, 57-58, 196 P.2d 113 (1948).

58. *Thor*, 5 Cal. 4th at 746, 855 P.2d at 389, 21 Cal. Rptr. 2d at 371. The *Thor* court, in essence, "decline[d] to transmute the prisoner's shield into the physician's sword." *Id.*

59. *Thor*, 5 Cal. 4th at 744, 855 P.2d at 387, 21 Cal. Rptr. 2d at 369. California appellate courts had already determined that nonterminal patients could withdraw or withhold artificial life-prolonging treatment. *See* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1139-40, 225 Cal. Rptr. 297, 302 (1986) (stating that "there is no practical or logical reason to limit the exercise of this right to 'terminal' patients); *Bartling*, 163 Cal. App. 3d at 188, 209 Cal. Rptr. at 220 (1984) (holding that a competent adult patient with serious illness, which is incurable but has not been diagnosed as terminal, has the right to have life-support removed). *See also supra* notes 3-5 and accompanying text.

The *Thor* court also concluded that the right to refuse treatment "does not depend upon the nature of the treatment refused or withdrawn." *Thor*, 5 Cal. 4th at 744, 855 P.2d at 387, Cal. Rptr. 2d at 369. This suggests that the court's holding would apply to a patient's refusal to have life-saving surgery, chemotherapy or a host of other treatments not specifically addressed in this case.

60. *Id.* at 739-40, 855 P.2d at 383-84, 21 Cal. Rptr. 2d at 365-66.

61. See *supra* note 27 and accompanying text, which states that the right to refuse medical treatment is not absolute.

most likely apply the balancing test used by this court in determining the extent to which a patient has the right to refuse medical treatment.[62] In cases where the patient is a prison inmate, an additional question of whether refusal of treatment threatens prison discipline or security may arise.[63]

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62. *See supra* notes 28-49 and accompanying text.
63. *See supra* notes 51-53 and accompanying text.

IV. INDEPENDENT CONTRACTORS

An independent contractor's employee injured in the course of inherently dangerous work cannot invoke the peculiar risk doctrine to recover against the principal who hired the independent contractor employer when the employee's injuries are covered by workers' compensation benefits: **Privette v. Superior Court.**

Privette v. Superior Court[1] addressed whether, in light of California's workers' compensation scheme, an employee of an independent contractor engaging in inherently dangerous work can invoke the peculiar risk doctrine[2] to recover against the party who hired the independent contractor.[3] The California Supreme Court, in a unanimous decision, held that an independent contractor's employee cannot avail herself of the peculiar risk doctrine where workers' compensation benefits cover the employee's injuries.[4]

At common law, a party who hired an independent contractor generally could not be held liable to third parties for injuries suffered as a result of the contractor's negligence.[5] Lower courts have reasoned that because the party hiring the independent contractor cannot control the manner in which work is performed, the independent contractor is in a better position to absorb the cost of injuries to third parties.[6]

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1. 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993). Justice Kennard wrote the opinion for the court in which Chief Justice Lucas and Justices Mosk, Panelli, Arabian, Baxter, and George concurred.

2. The peculiar risk doctrine allows a third party injured by an independent contractor engaging in inherently dangerous work to recover against the principal who hired the contractor. *See infra* notes 8-9 and accompanying text.

3. *Privette*, 5 Cal. 4th at 691, 854 P.2d at 723, 21 Cal. Rptr. 2d at 73.

4. *Id.* at 692, 854 P.2d at 723, 21 Cal. Rptr. 2d at 730. The court noted that the policies underlying both the workers' compensation scheme and the peculiar risk doctrine were identical, and thus, to allow recovery under both theories would afford the employee a windfall. *Id.* at 692 and 701, 854 P.2d at 723 and 730, 21 Cal. Rptr. 2d at 73 and 80.

5. *Id.* at 693, 854 P.2d at 724, 21 Cal. Rptr. 2d at 74. For a discussion concerning this general rule of "nonliability," see W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 71 (5th ed. 1984).

6. *Privette*, 5 Cal. 4th at 693, 854 P.2d at 724, 21 Cal. Rptr. 2d at 74. It has been suggested that independent contractors could recoup these costs by adjusting contract prices. *Id.* For cases applying the common law rule of nonliability, see McDonald v. Shell Oil Co., 44 Cal. 2d 785, 285 P.2d 902 (1955); Greene v. Soule, 145 Cal. 96, 78 P. 337 (1904).

There were, however, many exceptions to this general rule.[7] One exception is the peculiar risk doctrine.[8] When a principle hires an independent contractor to perform inherently dangerous work, the peculiar risk doctrine permits third parties who are injured as a result of the contractor's failure to provide safe working conditions to recover directly against the employer of the contractor.[9] The courts that created this exception[10] reasoned that a landowner choosing to perform inherently dangerous work should not escape liability to third parties simply by hiring an intermediary to perform the work.[11] The doctrine also ensures that injured third parties will not have to rely solely on the contractor's solvency for recovery.[12]

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7. *See* Van Arsdale v. Hollinger, 68 Cal. 2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968); Pacific Fire Ins. Co. v. Kenny Boiler & Mfg. Co., 201 Minn. 500, 277 N.W. 226 (1937).

8. *Privette*, 5 Cal. 4th at 693, 854 P.2d at 724, 21 Cal. Rptr. 2d at 74. The peculiar risk doctrine pertains to injuries arising from "contracted work that poses some inherent risk of injury to others." *Id.* The particular risk need not be unique to fall within the purview of the peculiar risk doctrine; rather, the risk need only be a "recognizable danger arising out of the work to be performed." *Id.* at 695, 854 P.2d at 725-26, 21 Cal. Rptr. 2d at 76 (quoting Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 509, 595 P.2d 619, 622, 156 Cal. Rptr. 41, 44 (1979)).

9. *Id.* at 694, 854 P.2d at 725, 21 Cal. Rptr. 2d at 75. RESTATEMENT (SECOND) OF TORTS § 413 (1965) reads in pertinent part:

> One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the absence of such precautions . . . .

See also, 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §§ 1013-16 (9th ed. 1988 & Supp. 1993) (discussing liability for injuries suffered in the course of inherently dangerous work).

10. *See, e.g.*, Chicago v. Robbins 67 U.S. 418, 426-427 (1862) (reasoning that a landowner should be held responsible for injuries resulting from "the very nuisance which he ha[d] created for his own benefit.").

11. *Privette*, 5 Cal. 4th at 694, 854 P.2d at 724, 21 Cal. Rptr. 2d at 74. *See also* Bower v. Peate 1 Q.B.D. 321, 326 (1876) (holding that "a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise . . . cannot relieve himself of his responsibility by employing some one else.").

12. *Privette*, 5 Cal. 4th at 694, 854 P.2d at 725, 21 Cal. Rptr. 2d at 75. Of course, an independent contractor is not completely immune from liability under the peculiar risk doctrine. The party hiring the independent contractor can always recover against the contractor for equitable indemnity if the contractor is found to be at fault. *Id.* at 694, 854 P.2d at 725, 21 Cal. Rptr. 2d at 75. Thus, one basis for the peculiar risk doctrine was to place the risk of an independent contractor's insolvency on the land-

In California and a minority of other jurisdictions the courts have extended the peculiar risk doctrine to employees of independent contractors engaging in inherently dangerous work.[13] California employees injured in the course of their employment are also covered under the Workers' Compensation Act (hereinafter, "the Act").[14] The Act was created "to guarantee prompt, limited compensation for an employee's work injuries" and to assure that such costs would be reflected in the price of goods.[15] The Act was also designed to limit the amount of damages to which an employer is obligated for its employee's injuries, whether or not the injury had resulted from the employer's negligence or misconduct.[16] To facilitate the latter goal the Act provides for an "exclusive remedy"[17] which shields the employer from all liability concerning the employee's injuries.[18]

The California Supreme Court granted review in *Privette* to clarify the peculiar risk doctrine's inherent conflict with California's workers' compensation scheme as applied to employees of independent contractors.[19] Justice Kennard, writing for a unanimous court, began the opinion by

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owner who benefited from the work. *See id.* at 694, 854 P.2d at 725, 21 Cal. Rptr. 2d at 75.

13. *Id.* at 696, 854 P.2d at 726, 21 Cal. Rptr. 2d at 76. For cases extending the doctrine of peculiar risk to employees of independent contractors, see Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979); Griesel v. Dart Indus., Inc., 23 Cal. 3d 578, 591 P.2d 503, 153 Cal. Rptr. 213 (1979); Van Arsdale v. Hollinger 68 Cal. 2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968); Ferrel v. Safway Steel Scaffolds 57 Cal. 2d 651, 371 P.2d 311, 21 Cal. Rptr. 575 (1962); Woolen v. Aerojet Gen. Corp., 57 Cal. 2d 407, 410-411, 369 P.2d 708, 711, 20 Cal. Rptr. 12, 15 (1962). All of these cases have subsequently been overruled by *Privette*, 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993).

14. *Id.* at 696-97, 854 P.2d at 726-27, 21 Cal. Rptr. 2d at 77. *See* CAL. LAB. CODE § 3600(a) (West 1989 & Supp. 1994).

15. *Privette*, 5 Cal. 4th at 697, 854 P.2d at 726-27, 21 Cal. Rptr. 2d at 77 (quoting S.G. Borello & Sons, Inc. v. Department of Indus. Relations, 48 Cal. 3d 341, 354, 769 P.2d 399, 406, 256 Cal. Rptr. 543, 550 (1989)(citations omitted)).

16. *Privette*, 5 Cal. 4th at 697, 854 P.2d at 727, 21 Cal. Rptr. 2d at 77.

17. *See* CAL. LAB. CODE § 3602 (West 1989 & Supp. 1994).

18. *Privette*, 5 Cal. 4th at 697, 854 P.2d at 727, 21 Cal. Rptr. 2d at 77. *See also*, 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW *Workers' Compensation* § 25 (9th ed. 1987 & Supp. 1993) (discussing the exclusive remedy aspect of California's workers' compensation scheme); 65 CAL. JUR. 3D *Work Injury Compensation* § 22 (1981 & Supp. 1993) (same).

19. *Privette*, 5 Cal. 4th at 691, 854 P.2d at 723, 21 Cal. Rptr. 2d at 73. Franklin Privette hired Jim Krause Roofing Inc. (hereinafter Krause) as an independent contractor to perform certain roofing work on one of his duplexes. Krause's foreman instructed an employee to carry five-gallon buckets of hot tar up a ladder to the roof. The employee fell off the ladder and was burned by the tar. He sought redress for his injuries from workers' compensation. He also brought suit against Privette both on a theory of negligence (which was later abandoned) and under the peculiar risk doctrine. *Id.* at 692-93 & n.1, 854 P.2d at 723-724 & n.1, 21 Cal. Rptr. 2d at 74 & n.1.

providing a brief background of both the peculiar risk doctrine and the California workers' compensation scheme.[20] The court then discussed the effect of the Act's exclusive remedy provision on the ability of a principal to recover against his independent contractor for equitable indemnity where the employee of the contractor recovers against the principal under the peculiar risk doctrine.[21] The court concluded that the Act's exclusive remedy provision prevents a principal's equitable indemnity action against an independent contractor.[22]

The court reasoned that by allowing an employee to recover against the principal and not allowing the principal to sue the independent contractor for equitable indemnity, such would lead to the "anomalous result" where a inculpable principal's liability would exceed the contractor's whose negligence or misconduct actually caused the injury.[23] In addition, because the principal effectively paid for the employee's workers' compensation benefits in the contract price when he hired the independent contractor, the court reasoned that additional recovery under the peculiar risk doctrine would subject the principal to a double obligation for the same injuries.[24] Moreover, the employee would recover an unwarranted windfall because she would receive reimbursement for the same injuries from both the principal, under the peculiar risk doctrine, and the workers' compensation benefits.[25] Thus, the court held that the underlying goals of California's workers' compensation scheme prevent employees of independent contractors from recovering under the peculiar risk doctrine.[26]

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20. *Id.* at 691-98, 854 P.2d at 723-27, 21 Cal. Rptr. 2d at 73-78. For synopses of both the peculiar risk doctrine as applied in California and California's workers' compensation scheme, see *supra* notes 5-18 and accompanying text.

21. *Privette*, 5 Cal. 4th at 698, 854 P.2d at 727-28, 21 Cal. Rptr. 2d at 77-78.

22. *Id.* However, one policy underlying the peculiar risk doctrine was to assure that the party who hired an independent contractor could, in turn, sue the independent contractor for equitable indemnity where the contractor was found at fault. *See supra* note 12 and accompanying text.

23. *Id.* at 698, 854 P.2d at 728, 21 Cal. Rptr. 2d at 78. For a criticism of the peculiar risk doctrine in California see generally, B. Tilden Kim, *The Peculiar Risk Doctrine: A Criticism of Its Application in California*, 22 U.C. DAVIS L. REV. 215 (1988); Edward J. Henderson, *Liability to Employees of Independent Contractors Engaged in Inherently Dangerous Work: A Workable Workers' Compensation Proposal*, 48 FORDHAM L. REV. 1165 (1980).

24. *Privette*, 5 Cal. 4th at 699, 854 P.2d at 727-28, 21 Cal. Rptr. 2d at 78.

25. *Id.* at 699-700, 854 P.2d at 729, 21 Cal. Rptr. 2d at 79.

26. *Id.* at 701-02, 854 P.2d at 730, 21 Cal. Rptr. 2d at 80.

In *Privette*, the California Supreme Court decided that under California's workers' compensation scheme, an employee of an independent contractor may not avail herself of the peculiar risk doctrine because it would permit a double recovery for the employee, subject the principal who hired the independent contractor to the obligation of reimbursing the employee twice for the same injuries, and immunize an independent contractor whose negligence or misconduct actually caused the injury. California has now joined the majority of jurisdictions in disallowing recovery under the peculiar risk doctrine to employees of independent contractors injured in the course of inherently dangerous work.[27]

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27. The question remains, however, whether an employee could nevertheless invoke the peculiar risk doctrine in the situation where her employer failed to provide workers' compensation insurance. *See* 65 CAL. JUR. 3D *Work Injury Compensation* § 22 (1981 & Supp. 1993) (acknowledging that CAL. LAB. CODE § 3601(a) does not allow an employer to invoke the "exclusive remedy" provision "where the employer has failed to secure payment of compensation.").

V. MUNICIPALITIES LAW

State law prohibiting any political candidate from accepting public funds does not preclude a city from adopting a partial public financing measure under the "home rule" provision of the State Constitution: **Johnson v. Bradley.**

I. INTRODUCTION

In *Johnson v. Bradley*,[1] the California Supreme Court considered whether a city measure granting partial public funding to support political campaigns violated a state ban on public funding of such activities.[2] The court concluded that the measure was valid because of the independence afforded to municipalities under the "home rule" provision of the California Constitution.[3]

In June 1988, Proposition 73, a statewide initiative that added chapter five to the Political Reform Act of 1974, was adopted.[4] The new law, which includes Government Code section 85300, imposes various restrictions on contributions to political candidates, including a prohibition on the use of public funds for political campaigns.[5]

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1. 4 Cal. 4th 389, 841 P.2d 990, 14 Cal. Rptr. 2d 470 (1992). Chief Justice Lucas authored the opinion of the court, with Justices Panelli, Arabian, Baxter, and George concurring. *Id.* at 392-411, 841 P.2d 991-1004, 15 Cal. Rptr. 2d at 471-84. Justice Kennard wrote a separate concurring opinion. *Id.* at 411-14, 841 P.2d at 1004-06, 14 Cal. Rptr. 2d at 484-86. Justice Mosk wrote a concurring and dissenting opinion. *Id.* at 414-21, 841 P.2d at 1004-06, 14 Cal. Rptr. 2d at 486-91.

2. *Id.* at 392, 841 P.2d at 991, 14 Cal. Rptr. 2d at 471.

3. *Id.* at 411, 841 P.2d at 1004, 14 Cal. Rptr. 2d at 484. The home rule provision, article XI, § 5, provides in part that a city can enact a law with respect to "municipal affairs," including "the manner in which . . . the several municipal officers . . . shall be elected." CAL. CONST. art. XI § 5. *See also* 45 CAL. JUR. 3D *Municipalities* § 93 (1978 & Supp. 1993) (discussing home rule in California).

4. *Johnson*, 4 Cal. 4th at 392, 841 P.2d at 991, 14 Cal. Rptr. 2d at 471. *See also* CAL. GOV'T CODE §§ 81000-91015 (West 1987 & Supp. 1993) (codification of Chapter 5 of the Political Reform Act).

5. *Johnson*, 4 Cal. 4th at 392, 841 P.2d at 991, 14 Cal. Rptr. 2d at 471. Government Code section 85300 provides: "No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office." CAL. GOV'T CODE § 85300 (West Supp. 1993).

Two years later, Los Angeles voters adopted a comprehensive election campaign reform plan known as Measure H.[6] Measure H included a provision which limits contributions to political campaigns.[7] However, for Measure H to be constitutionally valid, it must condition spending limitations upon acceptance of public funds.[8]

The petitioners[9] alleged that to allow partial financing of political campaigns was in direct conflict with the state law prohibition on such grants, thus making the city measure invalid and unenforceable.[10] The respondents,[11] however, argued that as a charter city under the state constitution, the city may enact laws that conflict with state law provided the city regulation concerns a "municipal affair" rather than a "statewide concern."[12] Amicus curiae for the respondents argued that a federal district court of appeal decision rendered the state law inoperative.[13]

The petitioners invoked the court of appeal's original jurisdiction, and the appellate court "issued an alternative writ and a temporary restraining order enjoining the implementation of the challenged [law]."[14] After rejecting the respondents' procedural claims, the court proceeded to

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6. *Johnson*, 4 Cal. 4th at 392, 841 P.2d at 991, 14 Cal. Rptr. 2d at 471.

7. The Measure H campaign reform plan provided for:

> (i) the creation of a city ethics commission to oversee, administer, and enforce the new ethics code; (ii) limitations on campaign contributions; (iii) limitations on the total amount of contributions that a candidate may accept in any election; (iv) prohibitions on the transfer of contributions between candidates or their controlled committees; (v) disclosure of candidates' economic interests and income; and (vi) limitations on gifts and honoraria that public officials may accept.

Id. at 392, 841 P.2d at 991, 14 Cal. Rptr. 2d at 471 (footnote omitted).

8. *Id.* at 392-93, 841 P.2d 991-92, 14 Cal. Rptr. 2d at 471-72 (citing Buckley v. Valeo, 424 U.S. 1, 54-59 (1976)) (holding that "spending limits [are] constitutionally invalid unless they are conditioned on a candidates acceptance of public funds").

9. The petitioners were State Assemblyman Ross Johnson, and State Senator Quentin Kopp, the sponsors of Proposition 73, and Los Angeles City Councilman Ernani Bernardi. *Id.* at 392 n.1, 841 P.2d at 991 n.1, 14 Cal. Rptr. 2d at 471 n.1.

10. *Id.* at 394, 841 P.2d at 992, 14 Cal. Rptr. 2d at 472.

11. The respondents were Los Angeles Mayor Tom Bradley, 11 members of the city council, the city controller, and the city clerk. *Id.* at 394 n.4, 841 P.2d at 992 n.4, 14 Cal. Rptr. 2d at 472 n.4.

12. *Johnson*, 4 Cal. 4th at 394, 841 P.2d at 992, 14 Cal. Rptr. 2d at 472. Respondents also argued that the petitioners lacked standing and had named the wrong parties in the suit. *Id.*

13. *Id.* The court did not divulge which federal decision was discussed by the amicus curiae.

14. *Id.* at 392-93, 841 P.2d at 992, 14 Cal. Rptr. 2d at 472. *See* Lungren v. Deukmejian, 45 Cal. 3d 727, 731, 755 P.2d 299, 301, 248 Cal. Rptr. 115, 117 (1988) (recognizing that the need for speedy review and the importance of political issues may serve as grounds for the court of appeal to grant of original jurisdiction).

reject the argument made by amicus curiae that the federal court decision rendered the state law invalid.[15] Nevertheless, the court accepted the respondents' argument that "a charter city's decision to provide its own public funds to finance city political campaigns is a 'municipal affair' and not a matter of 'statewide concern.'"[16] Thus, the court discharged the writ and lifted the temporary restraining order.[17] The supreme court granted review to consider the municipal affairs issue.[18]

II. TREATMENT

A. *Application of Article XI, Section 5*[19]

Article XI, section 5 of the state constitution concerns the governing of political subdivisions.[20] Section 5(a) provides for the general power of a chartered city to govern itself, and subsection (b) specifically enumerates four additional powers.[21] These powers are: (1) the regulation of the police force, (2) control of sub-government within the city, (3) conduct of city elections, and (4) to provide for the manner of municipal elections.[22]

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15. At that time, the federal proceedings were not final. *Johnson*, 4 Cal. 4th at 394, 841 P.2d at 993, 14 Cal. Rptr. 2d at 473.

16. *Id.*

17. *Id.*

18. Johnson v. Bradley, 813 P.2d 652, 284 Cal. Rptr. 85 (1991). The court summarily reviewed the issues of standing and proper parties and found that the decision of the court of appeal was not erroneous. Johnson v. Bradley, 4 Cal. 4th at 394 n.5, 841 P.2d at 993 n.5, 14 Cal. Rptr. 2d at 473 n.5. Thus, only the "municipal affairs" issue remained for the court to decide. *Id.*

19. Prior to discussing the current version of article XI, § 5, Chief Justice Lucas examined the history of the "municipal affairs" exception. *See id.* at 394-97, 841 P.2d at 993-95, 14 Cal. Rptr. 2d at 473-75.

20. *Johnson*, 4 Cal. 4th at 397, 841 P.2d at 995, 14 Cal. Rptr. 2d at 475.

21. *Id.*

22. *Id.* Section 5 states:

> (a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.
>
> (b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force

In deciding how to apply section 5, the court reviewed its recent decision in *California Federal Savings & Loan Ass'n v. City of Los Angeles.*[23] In *CalFed*, the court established a procedure for resolving a "putative conflict between a state statute and a charter city measure."[24] First, the court must determine whether there is an *actual* conflict between the state and municipal regulations.[25] If none exists, the issue is resolved.[26] This analysis is designed to avoid any unnecessary substantive determinations of the extent of municipal affairs.[27]

If there is a genuine conflict, the court must turn to the state statute to determine whether the matter is a statewide concern.[28] If it is not a statewide concern, the matter is deemed a municipal affair and thus beyond the reach of the legislature.[29] If, however, the statute does address a statewide concern, it must be reasonably related and narrowly tailored to its purpose.[30] Therefore, if these criteria are met, the legislature can effectively preempt the municipality on that issue.[31]

In *CalFed*, the California Supreme Court was faced with a conflict between a city license tax on a savings and loan association and a state law declaring that a state income tax on financial institutions was in lieu

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(2) sub-government in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

CAL. CONST. art. XI, § 5.

23. 54 Cal. 3d 1, 812 P.2d 916, 283 Cal. Rptr. 569 (1991). *See Johnson*, 4 Cal. 4th at 398-99, 841 P.2d at 995-96, 14 Cal. Rptr. 2d at 475-76.

24. *CalFed*, 54 Cal. 3d at 16, 812 P.2d at 925, 283 Cal. Rptr. at 578.

25. *Id.*

26. *Id.*

27. *Id.* at 16-17, 812 P.2d at 925, 283 Cal. Rptr. at 578. "To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one . . . ." *Id.*

28. *Id.* at 17, 812 P.2d at 925, 282 Cal. Rptr. at 578.

29. California Fed. Sav. & Loan Ass'n v. City of L.A., 54 Cal. 3d 1, 17, 812 P.2d 916, 925, 283 Cal. Rptr. 569, 578 (1991) (citing *Ex parte* Braun, 141 Cal. 204, 74 P. 780 (1903)).

30. *Id.* The court in *Johnson* added the narrowly tailored requirement to the reasonably related requirement. *See Johnson*, 4 Cal. 4th at 399 n.10, 841 P.2d at 996 n.10, 14 Cal. Rptr. 2d at 476 n.10.

31. *CalFed*, 54 Cal. 3d at 17, 812 P.2d at 925, 283 Cal. Rptr. at 578.

of all other taxes and fees.[32] The court found that a conflict existed, and there was a legitimate statewide concern in uniformity of regulation that outweighed the local interest.[33] The court acknowledged that "statewide concern" and "municipal affair" were not mutually exclusive terms.[34] However, when a court finds a valid statewide concern, it prevails over the city's interest.[35] Thus, the city had no authority to tax the savings and loan.[36]

B. Application of Procedure to the Facts

In *CalFed*, the city relied on section 5(a) which includes the municipal affairs exception.[37] In *Johnson*, the city of Los Angeles had the benefit of section 5(b)(4) which provides for municipal control over the "manner" by which local officers are elected.[38] The court rejected petitioners' argument that "manner" should be interpreted narrowly to apply only to procedural issues.[39] Similarly, the court rejected the respondents' call for an expansive view of "manner."[40] Ultimately, the court declined to define the scope of the term and instead found that the municipal affairs language of subsection (a) was sufficient to include the city charter section.[41]

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32. *Id.* at 6, 812 P.2d at 917-18, 283 Cal. Rptr. at 570-71.

33. *Id.* at 17, 812 P.2d at 925, 283 Cal. Rptr. at 578.

34. *Id.* at 17, 812 P.2d at 925-26, 283 Cal. Rptr. at 578-79. "[C]ourts should avoid the error of 'compartmentalization,' that is, of cordoning off an entire area of governmental activity as either a 'municipal affair' or one of statewide concern." *Id.*

35. *Id.* at 17, 812 P.2d at 925, 283 Cal. Rptr. at 578.

36. *Id.* at 25-26, 812 P.2d at 930-31, 283 Cal. Rptr. at 583-84.

37. *See id.* at 17, 812 P.2d at 925, 283 Cal. Rptr. at 578; *supra* note 22.

38. *See Johnson*, 4 Cal. 4th at 401, 841 P.2d at 997, 14 Cal. Rptr. 2d at 477; *see supra* note 22.

39. *Johnson*, 4 Cal. 4th at 393, 841 P.2d at 994, 14 Cal. Rptr. 2d at 479.

40. *Id.*

41. *Id.* at 403-04, 841 P.2d at 999, 14 Cal. Rptr. 2d at 479.

> Although we believe charter section 313 clearly 'implicates' a municipal affair . . . we need not, and do not, determine whether charter section 313 is by definition a 'core' municipal affair . . . because we conclude that in any event, the charter section is enforceable as a municipal affair under article XI, section 5, subdivision (a) . . .

Id. (citations omitted).

The court assumed that there was a conflict between the laws[42] and proceeded to determine whether Government Code section 85300 addressed a matter of statewide concern.[43]

Petitioners asserted four reasons why the state law dealt with a statewide concern.[44] First, they argued that because Proposition 73 was a statewide measure, it addressed a statewide concern.[45] The court, however, was not convinced and reasoned that following this argument to its fullest extent would always allow state law to be of statewide concern when intended to apply to the entire state.[46]

Second, petitioners relied on the reasoning provided in *County of Sacramento v. Fair Political Practices Commission*,[47] which held that Government Code section 85300 invalidated a county regulation which provided public funding for elections.[48] The *Johnson* court, however, distinguished *County of Sacramento* because counties do not have the same plenary authority over local matters that chartered cities possess.[49] The *Johnson* court found that *County of Sacramento*'s conclusion that section 85300 addressed a matter of statewide concern was "highly questionable," and thus, there was no "convincing reason" to test local elections.[50]

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42. The majority explicitly declined to resolve this issue because "(i) the same and related severability issues are pending before us in *Gerken v. Fair Political Practices Comm'n* (SO25815), and will be resolved in that case; (ii) this case presents an important issue of constitutional law that potentially affects all charter cities." *Id.* at 401, 841 P.2d at 997, 14 Cal. Rptr. 2d at 477. *See generally* Gerken v. Fair Political Practices Comm'n, 6 Cal. 4th 707, 863 P.2d 694, 25 Cal. Rptr. 2d 449 (1993).

However, in her concurring opinion, Justice Kennard articulated the conflict as:

> In this case, it is not reasonably possible to construe either section 85300 or Measure H in a manner that does not put them in conflict. Section 85300 prohibits public financing of political campaigns for elective office at all levels of government, while Measure H provides for partial public financing of municipal elections by local taxes. Because section 85300 and Measure H are irreconcilable, this court must decide which is to prevail.

Johnson, 4 Cal. 4th at 413, 841 P.2d at 1005-06, 14 Cal. Rptr. 2d at 485-86 (Kennard, J., concurring).

43. *Johnson*, 4 Cal. 4th at 404, 841 P.2d at 999, 14 Cal. Rptr. 2d at 479.

44. *See id.* at 404-09, 841 P.2d at 1000-03, 14 Cal. Rptr. 2d at 480-83.

45. *Id.* at 404-05, 841 P.2d at 1000, 14 Cal. Rptr. 2d at 480.

46. *Id.* "This point need not detain us long. The assertion that a legislative body may define what is, and is not, a matter of statewide concern was rejected in [petitioner's own case authority]." *Id.* at 405, 841 P.2d at 1000, 14 Cal. Rptr. 3d at 480.

47. 222 Cal. App. 3d 687, 271 Cal. Rptr. 802 (1990).

48. *Johnson*, 4 Cal. 4th at 405, 841 P.2d at 1001, 14 Cal. Rptr. 2d at 481 (citing *County of Sacramento*, 222 Cal. App. 3d 687, 271 Cal. Rptr. 802).

49. *Id.* at 405-06, 841 P.2d at 1001, 14 Cal. Rptr. 2d at 481.

50. *Id.* at 406, 841 P.2d at 1001, 14 Cal. Rptr. at 481. The supreme court found that the court of appeal

Third, petitioners asserted that Proposition 73 evidenced a statewide concern aimed at reducing political spending and, in particular, the amount of public funds spent on election campaigns.[51] While the court acknowledged that protection of state funds is a matter of statewide concern, it could "'think of nothing that is of greater municipal concern than how a city's tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.'"[52]

Petitioners argued, however, that the ballot arguments in support of Proposition 73 reflect the voters' concern that public funding of political campaigns might "(1) divert funds away from other local needs such as police, fire protection, or schools and (2) provide funds to political extremists, such as "communists or members of the Ku Klux Klan."[53]

The court rejected the first part of the argument for much the same reason it rejected the conservation of public funds argument.[54] In doing so, the court noted that to accept the argument would effectively put all municipal spending under potential control of the state legislature.[55] The court rejected the second part of the argument because it found that the state has no legitimate interest in attempting to protect public funds from "non-mainstream" candidates who meet the objective requirements.[56]

> offered no 'convincing basis' for its determination that public financing of election campaigns, and partial public funding of local election campaigns in particular, is necessarily a matter of statewide concern. Instead, the court simply asserted that public funding might, for some unarticulated reason, adversely affect the integrity of election contests by contributing to 'corruption or undue influence caused by financial interests.'

Id. at 406, 841 P.2d at 1001, 14 Cal. Rptr. 2d at 481 (citing *County of Sacramento*, 222 Cal. App. 3d at 692, 271 Cal. Rptr. at 807).

51. *Id.* at 407, 841 P.2d at 1001-02, 14 Cal. Rptr. 2d at 481-82.

52. *Id.* at 407, 841 P.2d at 1002, 14 Cal. Rptr. 2d at 482 (quoting Johnson v. Bradley, 7 Cal. App. 4th 236, 250-51, 279 Cal. Rptr. 881, 889 (1991)).

53. *Id.*

54. *Id.* *See supra* notes 59-60 and accompanying text.

55. *Johnson*, 4 Cal. 4th at 407-08, 841 P.2d at 1002, 14 Cal. Rptr. 2d at 482. The court found that petitioners' own argument "proves too much, by effectively negating the authority of charter cities to regulate any municipal affair that involves expenditure of funds." *Id.*

56. *Id.* at 408, 841 P.2d at 1002, 14 Cal. Rptr. 2d at 482. The city charter required certain objective criteria be met:

> for example, a city council candidate must, inter alia, receive contributions (from other than him or herself or family) of at least $25,000 over a specified time period in order to qualify for partial matching funds. In calculating

Lastly, petitioners asserted that the "integrity of the political process" was a statewide concern addressed by section 85300's ban on public funding.[57] The supreme court agreed that the integrity of the electoral process is a statewide concern, but it took issue with petitioner's unsupported assertion that section 85300's ban was reasonably calculated to ensure the integrity of the electoral process.[58] Thus, the court evaluated whether section 85300 was reasonably related and narrowly tailored to meet its objectives.[59]

The court found that section 85300 would not ensure the integrity of elections, and may in fact have the opposite effect.[60] The limitation on private contributions to political candidates increases the integrity of the election process by reducing the impact of wealthy entities on the election.[61] In turn, the state must offer reasonable alternative financing.[62] Thus, the court reasoned that providing state funds is an appropriate means of alleviating the needs of candidates to solicit private funds.[63] The supreme court noted that "it seems obvious that public money reduces rather than increases the fund raising pressures on public office seekers and thereby reduces the undue influence of special interest groups."[64]

Although the City of Los Angeles wanted to impose spending limits on candidates, in *Buckley v. Valeo*,[65] the United States Supreme Court concluded that the acceptance of public funds could be employed to offset

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> the threshold eligibility amount, the city's code provides that a candidate for the council 'may receive a contribution up to the allowable contribution limits [i.e., $500 (charter § 312, subd. C(5))] but only the first . . . $250 . . . shall count toward the qualification threshold.' (Los Angeles Mun. Code § 49.7.19. A.1.). Similar (albeit higher) contribution limits and eligibility requirements are placed on city controller, city attorney, and mayoral candidates.

Id. at 408 n.19, 841 P.2d at 1002 n.19, 14 Cal. Rptr. 2d at 483 n.19.

57. *Id.* at 408-09, 841 P.2d at 1003, 14 Cal. Rptr. 2d at 483. The argument was actually presented as: "(i) the 'integrity of the electoral process' is itself a statewide concern; (ii) section 85300's ban on public funding of election campaigns is reasonably calculated to resolve that statewide concern; and (iii) therefore section 85300 addresses a statewide concern." *Id.*

58. *Id.* at 409, 841 P.2d at 1003, 14 Cal. Rptr. 2d at 483.

59. *Id.*

60. *Id.* at 410, 841 P.2d at 1003, 14 Cal. Rptr. 2d at 483.

61. *Id.* "'It cannot be gainsaid that public financing as a means of eliminating improper influence of large private contributions furthers a significant governmental interest.'" *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 96 (1992)).

62. *Id.* at 410, 841 P.2d at 1004, 14 Cal. Rptr. 2d at 484.

63. *Johnson*, 4 Cal. 4th at 410, 841 P.2d at 1003-04, 14 Cal. Rptr. 2d at 483-84.

64. *Id.* at 410, 841 P.2d at 1004, 14 Cal. Rptr. 2d at 484 (quoting Johnson v. Bradley, 7 Cal. App. 4th 236, 250, 279 Cal. Rptr. 881, 888 (1991)).

65. 424 U.S. 1 (1976).

the burdens imposed by contribution limits.[66] Thus, in an effort to increase integrity in the political process, the city could offer public funds to candidates.[67]

Therefore, the *Johnson* court concluded that section 85300 was "not reasonably related to the statewide concern of enhancing the integrity of the electoral process."[68] Without a valid statewide concern, section 85300 could not interfere with the part of the city charter that regulates "municipal affairs."[69] Thus, the court affirmed the judgment of the court of appeal.[70]

III. CONCLUSION

The holding in *Johnson v. Bradley* directly affects the City of Los Angeles. The city can now proceed with its new electoral scheme in the hopes that it will significantly reduce undue influence by large contributors. Further, the court limited impact of section 83500 to the state and county level, while leaving municipalities the freedom to develop campaign contribution plans.

Johnson, however, has a far greater consequence in the arena of "home rule." It establishes clear precedence for municipal independence.[71] Moreover, it establishes that the state has the burden of proving that a general law addresses a statewide concern in a reasonable manner. *Johnson* thereby demonstrates that the courts will strictly analyze the reasonableness to prevent infringement on the rights of chartered cities.

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66. *Johnson*, 4 Cal. 4th at 410, 841 P.2d at 1003-04, 14 Cal. Rptr. 2d at 483-84 (quoting *Buckley*, 424 U.S. at 96).

67. *Id.* at 410-11, 841 P.2d at 1004, 14 Cal. Rptr. 2d at 484.

68. *Id.* at 411, 841 P.2d at 1004, 14 Cal. Rptr. 2d at 484. "It follows that, assuming spending limitations may enhance the integrity of the electoral process, a ban on public funding would actually frustrate achievement of that goal." *Id.*

69. *See id.*

70. *Id.*

71. *See* 45 CAL. JUR. 3D *Municipalities* § 93-99 (1978 & Supp. 1993) (discussing the relationship between municipalities and the state).

VI. PARENTAL RIGHTS

A. *Under the Uniform Parentage Act, when two women meet the criteria for establishing a mother and child relationship, as is the case when there is both a genetic mother and a gestational mother, courts will defer to the intent of the parties prior to conception to determine who will be deemed the natural mother:* **Johnson v. Calvert.**

I. INTRODUCTION

In *Johnson v. Calvert*,[1] the California Supreme Court assessed the validity of a surrogacy contract between Mark and Crispina Calvert, the genetic parents who supplied the fertilized egg, and Anna Johnson, the gestational mother who carried the zygote to term.[2] The supreme court affirmed the court of appeal's decision and upheld the surrogacy contract.[3] The court determined Crispina Calvert to be the "natural mother"

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1. 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494, *cert. denied*, 114 S. Ct. 206 (1993). Justice Panelli authored the majority opinion of the court with Chief Justice Lucas and Justices Mosk, Baxter, and George concurring. Justice Arabian wrote a separate concurring opinion, and Justice Kennard filed a dissenting opinion.

2. *Id.* at 87, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496. The Uniform Parentage Act was introduced before Congress in 1975 as Senate Bill No. 347. The California Legislature adopted the pertinent portion of the Act as California Civil Code §§ 7000-7021. Effective January 1, 1994, however, Civil Code §§ 7000-7021 were repealed and replaced with equivalent provisions in Family Code §§ 7600-7650. These sections define the parent and child relationship as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." CAL. FAM. CODE § 7601 (1994) (formerly CAL. CIV. CODE § 7001 (West 1993)). *See generally*, 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 410, 448(c) (9th ed. 1989 & Supp. 1993) (defining the parent and child relationship); 32 CAL. JUR. 3D *Family Law* § 68 (1977 & Supp. 1993) (defining parent).

3. *Johnson*, 5 Cal. 4th at 88, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496. In January 1990, Mark and Crispina Calvert contracted with Anna Johnson to carry the Calvert embryo to term and to relinquish all parental rights in exchange for $10,000. Six months after Anna was implanted with the zygote, Anna told the Calverts that she would refuse to give up the child, later filing an action to be declared the mother of the child.

On September 19, 1990, Christopher was born, and blood tests precluded the possibility that Anna had any genetic relation to the child. By court order, Christopher lived with the Calverts during the trial. The court also ordered visitation rights to Anna. The trial court upheld the surrogacy contract, concluding that the Calverts were the child's "genetic, biological, and natural" parents. *Id.* The court further determined that Anna Johnson had no "parental" rights to the child and terminated her visitation rights. *Id.* The court of appeal affirmed, and the California Supreme Court

and awarded the biological parents custody on the ground that they intended to effectuate the birth of a child that they planned to raise.[4]

II. TREATMENT

A. The Majority Opinion

The issue in this case was whether the gestational mother or the genetic mother was the child's natural mother under the Uniform Parentage Act.[5] Anna Johnson contended that she was the mother on the ground that she gave birth to the child.[6] Conversely, Crispina Calvert argued that blood tests established that she was Christopher's genetic mother.[7]

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granted review. *Id.*

4. *Id.* at 93, 851 P.2d at 782, 19 Cal. Rptr. 2d at 500.

5. *Id.* at 87, 851 P.2d at 777-78, 19 Cal. Rptr. 2d at 495-96. In 1975, Congress drafted the Uniform Parentage Act to eliminate laws that treat legitimate and illegitimate children unequally; the Act was never designed to address issues of surrogacy. *Id.* at 88-89, 851 P.2d at 778-79, 19 Cal. Rptr. 2d at 496-97. Nevertheless, the court looked to the Uniform Parentage Act to determine the proper adjudication of maternity. *Id.* at 90, 851 P.2d at 780, 19 Cal. Rptr. 2d at 498.

6. *Id.* at 89, 851 P.2d at 779, 19 Cal. Rptr. 2d at 497. Civil Code § 7003(1) provides that a mother and child relationship may be established "by proof of her having given birth to the child." CAL. FAM. CODE § 7610 (West 1994) (formerly CAL. CIV. CODE § 7003(1) (West 1993)). *See generally*, 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 412, 448(d) (9th ed. 1989 & Supp. 1993) (establishing natural mother's parental relationship); 32 CAL. JUR. 3D *Family Law* § 88 (Supp. 1993) (requiring consent of mother prior to adoption).

7. *Johnson*, 5 Cal. 4th at 90, 851 P.2d at 779, 19 Cal. Rptr. at 497. The California Family Code states that insofar as practicable, the techniques used to establish a father and child relationship apply in actions to determine the existence of a mother and child relationship. CAL. FAM. CODE § 7650 (West 1994) (formerly CAL. CIV. CODE § 7015 (West 1993)). *See generally*, 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, Parent and Child § 439 (9th ed. 1989 & Supp. 1993) (ascertaining mother and child relationship); 32 CAL. JUR. 3D *Family Law* § 235 (1977 & Supp. 1993) (discussing awards of custody and the right of the parent against the non-parent). Family Code § 7551 provides that "[i]n a civil action in which paternity [hence, maternity as well] is a relevant fact, the court may . . . order the mother, child, and alleged father to submit to blood tests." CAL. FAM. CODE § 7551 (West 1994) (formerly CAL. EVID. CODE § 892 (West 1993)).

Family Code § 7554 further states that "[i]f the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the [blood] tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly." CAL. FAM. CODE § 7554 (West 1994) (formerly CAL. EVID. CODE § 895 (West 1993)). Family Code § 7555 provides, "a rebuttable presumption . . . of

In a case of first impression, the court acknowledged that both Anna Johnson and Crispina Calvert met the criteria for establishing a mother and child relationship under the Uniform Parentage Act.[8] Nevertheless, the court observed that there can be only one legally recognized natural mother.[9] The statute, however, failed to identify any legislative preference among the methods of establishing a mother and child relationship.[10]

The court found it necessary to examine the intent of the parties to adjudicate the maternity issue properly.[11] The court examined the surrogacy contract and concluded that the Calverts intended to be parents to their genetic child and that Anna agreed to carry the embryo solely to facilitate the child's birth.[12] Although Anna later decided she wanted to establish a mother and child relationship with the baby she bore, the court found that Anna's change of heart was insufficient to alter its conclusion.[13] The court held that where two women meet the criteria for establishing a mother and child relationship, the natural mother is the woman who initially intended to raise the child.[14]

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paternity, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater." CAL. FAM. CODE § 7555 (West 1994) (formerly CAL. EVID. CODE § 895.5(a)). Similarly, a rebuttable presumption of maternity may be established with the use of blood testing. *See* CAL. FAM. CODE § 7650 (West 1994) (formerly CAL. CIV. CODE § 7015 (1993)).

8. *Johnson*, 5 Cal. 4th at 92, 851 P.2d at 781, 19 Cal. Rptr. 2d at 499. *See* CAL. FAM. CODE §§ 7551, 7554-55, 7610, 7650 (West 1994).

9. *Johnson*, 5 Cal. 4th at 92, 851 P.2d at 781, 19 Cal. Rptr. 2d at 499. The American Civil Liberties Union ("ACLU") filed a brief as amicus curiae on behalf of Anna Johnson, but the court rejected the ACLU's argument that both women should be recognized as the child's mother considering the unusual circumstances. *Id.* at 92 n.8, 851 P.2d at 781 n.8, 19 Cal. Rptr. at 499 n.8.

10. *Id.* at 92-93 n.9, 851 P.2d at 781-82 n.9, 19 Cal. Rptr. 2d at 499-500 n.9. *See* CAL. FAM. CODE § 7610 (West 1994) (formerly CAL. CIV. CODE § 7003 (West 1993)). *See generally* John Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 386 (1991) (arguing that persons with the intent to have a child should be preferred as legal parents over those with a gestational or biological relation).

11. *Johnson*, 5 Cal. 4th at 93, 851 P.2d at 782, 19 Cal. Rptr. 2d at 500.

12. *Id.*

13. *Id.*

14. *Id.* Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196-202 (1986) (arguing that persons possessing the intent to raise a child are parents). The court noted that in cases where the genetic parents intended to donate a zygote to the gestational mother for her to raise, the birth mother is the natural mother under California law. *Johnson*, 5 Cal. 4th at 93 n.10, 851 P.2d at 782 n.10, 19 Cal. Rptr. 2d at 500 n.10. *See* Hill, *supra* note 10; Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (arguing that it is the intentions of the parties that determine parenthood).

The court rejected the argument that the surrogacy contract should be held invalid as inconsistent with public policy.[15] Reasoning that the parties agreed voluntarily to the contract prior to conception, the court viewed the stipulated payments as compensation for Johnson's services rather than payment for the relinquishment of parental rights.[16] The court declined to view the surrogacy contract as an involuntary servitude arrangement that was dehumanizing to women.[17] In addition, the court reasoned that the contract provided Anna Johnson with the absolute right to terminate her pregnancy; therefore, the agreement did not violate public policy because it did not limit her rights.[18]

Finally, the court addressed Johnson's claim that the contract violated her constitutional rights by prohibiting her from establishing a relationship with the child she carried to term.[19] Anna Johnson argued that such an agreement violated her liberty interest in developing a mother and child relationship.[20] The court rejected Johnson's claim of a constitutional right to procreative privacy and upheld the lower court's ruling that Johnson was not the natural mother.[21] The court reasoned that any rights Johnson may have had to the child were secondary to Crispina Calvert's rights, and Johnson had no expectation of raising the child at the time the surrogacy agreement was executed.[22]

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15. *Johnson*, 5 Cal. 4th at 96, 851 P.2d at 784, 19 Cal. Rptr. 2d at 502.

16. *Id.* The court declined to find that the surrogacy contract violated Penal Code § 273 which prohibits the payment of money to obtain consent to the adoption of a child. CAL. PENAL CODE § 273(a) (West 1993).

17. *Johnson*, 5 Cal. 4th at 96, 851 P.2d at 784, 19 Cal. Rptr. 2d at 502. Section 181 prohibits the buying or selling of any person. CAL. PENAL CODE § 181 (West 1988).

18. *Johnson*, 5 Cal. 4th at 96-97, 851 P.2d at 784, 19 Cal. Rptr. 2d at 502. The court deferred to the legislature to formulate policies to be applied to future surrogacy contracts. *Id.*

19. *Id.* at 98, 851 P.2d at 785, 19 Cal. Rptr. 2d at 503.

20. *Id.* For cases guaranteeing protection of due process and liberty interests see, Santosky v. Kramer, 455 U.S. 745, 768 (1982); Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981); Smith v. Organization of Foster Families, 431 U.S. 816, 842 (1977); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

21. *Johnson*, 5 Cal. 4th at 98, 851 P.2d at 786, 19 Cal. Rptr. 2d at 504.

22. *Id.*

B. *The Concurring Opinion*

Justice Arabian concurred with the majority's decision to recognize Crispina Calvert as Christopher's natural mother, but believed that determination alone was sufficient.[23]

Justice Arabian criticized the majority for addressing issues beyond the scope of the case, particularly the determination that surrogacy contracts are not inconsistent with public policy.[24] Justice Arabian concluded that the decision to recognize surrogacy contracts should be made by the legislature.[25] Justice Arabian reasoned that one function of the legislature was to ascertain whether or not surrogacy contracts contravene public policy.[26]

C. *The Dissenting Opinion*

Justice Kennard dissented from the majority opinion stating that, in a gestational surrogacy case, the court should look to the best interests of the child, rather than resorting to the intent of the parties in determining which woman is the legal mother.[27] Justice Kennard reasoned that courts should be concerned primarily with the well-being of the child.[28] Justice Kennard suggested several factors that a court should consider in determining the best interests of a child: the parents' ability to care for the child's physical and psychological needs, the parents' desire to provide moral and intellectual guidance, the parents' ability to give the child a stable home, and the intent of the genetic mother to create a child.[29]

Justice Kennard disagreed with the majority's reliance on the genetic mother's intent to raise the child as the deciding factor in adjudicating

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23. *Id.* at 101, 851 P.2d at 787, 19 Cal. Rptr. 2d at 505.

24. *Id.* at 101, 851 P.2d at 788, 19 Cal. Rptr. 2d at 506.

25. *Johnson*, 5 Cal. 4th at 102, 851 P.2d at 788, 19 Cal. Rptr. 2d at 506.

26. *Id.*

27. *Id.* at 102-03, 851 P.2d at 788-89, 19 Cal. Rptr. 2d at 506-07. Justice Kennard distinguished gestational surrogacy, where one woman provides the genetic material and a second woman carries the implanted embryo to term, from other surrogacy arrangements in which one woman supplies both the genetic material and gestates the fetus. For a non-gestational surrogacy case, see *In re Baby M.*, 537 A.2d 1227 (N.J. 1988) (holding in favor of the birth mother and declaring surrogate contracts void for violating public policy).

28. *Johnson*, 5 Cal. 4th at 118, 851 P.2d at 799, 19 Cal. Rptr. 2d at 517.

29. *Id.* at 119-20, 851 P.2d at 800, 19 Cal. Rptr. 2d at 517. *See* Matter of Baby M., 537 A.2d 1227, 1249 (N.J. 1988) (noting that economic circumstances are not conclusive in determining a child's best interests); Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (recognizing that wealth is not necessarily indicative of good parenting skills); *In re* Marriage of Carney, 598 P.2d 36 (Cal. 1979) (finding parents' ability to nurture essential).

maternity.[30] Understanding that this court's decision may affect future cases, Justice Kennard criticized the majority's use of a standard that did not give priority to the protection of the child.[31] Justice Kennard faulted the majority for treating children like a commodity for which parties may contract and for which courts may compel specific performance.[32]

Because the issue of gestational surrogacy was not addressed in the Uniform Parentage Act, Justice Kennard supported enactment of the Uniform Status of Children of Assisted Conception Act.[33] Under this model legislation, a court would determine the natural mother in a gestational surrogacy arrangement prior to the child's conception.[34] The couple initiating the surrogacy arrangement would be the child's legal parents provided they meet the criteria set forth in the legislation.[35] Otherwise, the child would be placed with the gestational mother.[36] Believing

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30. *Johnson*, 5 Cal. 4th at 113, 851 P.2d at 795, 19 Cal. Rptr. 2d at 513.

31. *Id.* at 118, 851 P.2d at 799, 19 Cal. Rptr. 2d 517.

32. *Id.* at 114-15, 851 P.2d at 796, 19 Cal. Rptr. 2d at 514-15.

33. *Id.* at 110, 851 P.2d 793-94, 19 Cal. Rptr. 2d at 511-12. The proposed legislation provides that "a woman who gives birth to a child is the child's mother." UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 2, 9B U.L.A. § 135 (Supp. 1993). However, the intended parents may be recognized as the parents of the child when a court approves a written surrogacy agreement prior to conception. *Id.* §§ 5-6. To approve a surrogacy agreement, the court shall hold a hearing and determine, *inter alia*, that:

> (2) [T]he intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence;
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> . . . .
>
> (4) the intended parents, the surrogate, and the surrogate's husband, if she is married, meet the standards of fitness applicable to adoptive parents in this State; (5) all parties have voluntarily entered into the agreement and understand its terms, nature, and meaning, and the effect of the proceeding; (6) the surrogate has had at least one pregnancy and delivery and bearing another child will not pose an unreasonable risk to the unborn child or to the physical or mental health of the surrogate or the child, and this finding is supported by medical evidence; (7) all parties have received counseling concerning the effect of the surrogacy by [a qualified health-care professional or social worker] and a report containing conclusions about the capacity of the parties to enter into and fulfill the agreement has been filed with the court.

Id. § 6(b).

34. *Johnson*, 5 Cal. 4th at 111, 851 P.2d at 794, 19 Cal. Rptr. 2d at 512.

35. *Id.*

36. *Id.*

the best interests of the child standard to be the proper standard to use in gestational surrogacy cases, Justice Kennard would have reversed the judgment of the court of appeal and remanded the case for a determination based on this standard.[37]

III. CONCLUSION

The California Supreme Court set a national precedent in its decision to enforce a gestational surrogacy contract and to award custody to the genetic mother who brought about the birth of a child she intended to raise.[38] In doing so, the court rejected the claim that surrogacy contracts are inconsistent with public policy.[39] Furthermore, the court held that recognizing the genetic mother as the natural mother did not violate the constitutional rights of the woman who carried the child to term.[40] The impact of this decision is significant because state legislation, including the Uniform Parentage Act, has failed to address issues surrounding gestational surrogacy arrangements.[41] Thus, the court has developed a new standard: the parties' intent prior to conception must be examined when two women fulfill the statutory criteria for establishing a mother and child relationship.[42]

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37. *Id.* at 121, 851 P.2d at 801, 19 Cal. Rptr. 2d at 519.
38. *Id.* at 93, 851 P.2d at 782, 19 Cal. Rptr. 2d at 500.
39. *Johnson*, 5 Cal. 4th at 95, 851 P.2d at 783, 19 Cal. Rptr. 2d at 501.
40. *Id.* at 98, 851 P.2d at 786, 19 Cal. Rptr. 2d at 504.
41. *Id.* at 101, 851 P.2d at 787, 19 Cal. Rptr. 2d at 505.
42. *Id.* at 93, 851 P.2d at 782, 19 Cal. Rptr. 2d at 500.

B. *A participatory nonparent may not act as the victim's de facto parent in juvenile dependency proceedings arising from the nonparent's abusive conduct:* **In re Kieshia E.**

I. INTRODUCTION

The California Supreme Court decision of *In re Kieshia E.*[1] considered whether a nonparent may participate as a de facto parent in a juvenile dependency proceeding when the nonparental caretaker has committed substantial harm to the child thereby causing the minor to become a dependent of the court.[2] The supreme court reversed the court of appeal's decision and denied the nonparent de facto parent status in the victim's juvenile dependency proceeding.[3] The court determined that

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1. 6 Cal. 4th 68, 859 P.2d 1290, 23 Cal. Rptr. 2d 775 (1993). Justice Baxter authored the majority opinion of the court with Chief Justice Lucas and Justices Mosk, Panelli, Arabian, and George concurring. Id. at 70-80, 859 P.2d at 1294-98, 23 Cal. Rptr. 2d at 779-83. Justice Kennard filed a dissenting opinion. *Id.* at 80-85, 859 P.2d at 1298-1301, 23 Cal. Rptr. 2d at 783-86 (Kennard, J., dissenting).

2. *Id.* at 71, 859 P.2d at 1291, 23 Cal. Rptr. 2d at 776. In May 1989, Cherie Williams and her daughter Kieshia began living with Derrick Chapple. On June 11, 1991, the San Diego County Department of Social Services filed a petition establishing Kieshia as a dependent of the court because Derrick Chapple had allegedly molested her. On November 26, 1991, Derrick Chapple applied for standing as Kieshia's de facto parent. *Id.* at 71-73, 859 P.2d at 1291-93, 23 Cal. Rptr. 2d at 776-78.

Several months later, the trial court granted Derrick Chapple's application for de facto parent status and found that Derrick was a psychological parent to Kieshia E. *Id.* at 74, 859 P.2d at 1293, 23 Cal. Rptr. 2d at 778. The court of appeal affirmed and the California Supreme Court granted review. *Id.*

3. *Id.* at 80, 859 P.2d at 1298, 23 Cal. Rptr. 2d at 783. California Rules of Court, rule 1401(a)(4) defines a de facto parent as "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period . . . . " CAL. R. CT. 1401(a)(4) (West 1993). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 460-548 (9th ed. 1989 & Supp. 1993) (discussing de facto parents as persons entitled to be present at juvenile court proceedings). California Rules of Court, Rule 1412(e) provides that "[u]pon a sufficient showing the court may recognize the child's present or previous custodians as de facto parents and grant standing to participate as parties in disposition hearings and any hearing thereafter at which the status of the dependent child is at issue." CAL. R. CT. 1412(e) (West 1993 & Supp. 1993). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 664-694 (9th ed. 1989) (discussing de facto parents and rules regarding juvenile disposition hearings); 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 88 (1987 & Supp. 1993) (discussing

Derrick Chapple, the nonparental caretaker, did not possess the legal right to participate in the juvenile's dependency proceeding due to his abusive conduct inconsistent with the role of a parent.[4]

II. TREATMENT

A. *The Majority Opinion*

The California Supreme Court acknowledged that a person who undertakes a parental role on a daily basis may establish a de facto parental relationship with the child.[5] The de facto parent has the right to participate in the juvenile's dependency hearing to protect his own interest when the court is determining the child's custody.[6] However, the court has imposed some limitations on the standing accorded to de facto parents.[7]

The supreme court noted the lack of precedent supporting the proposition that an abusive nonparent has standing to assert an interest in the victim's custody.[8] In fact, an adult whose abuse of a minor makes it necessary for the child to become a dependent of the court is not considered to be a participatory parent.[9] Accordingly, an abusive nonparental caretaker may be denied de facto parent status and the corresponding right to participate in the victim's dependency hearings.[10]

The California Supreme Court rejected the court of appeal's reliance on *In re Rachael C.*[11] to grant the abusive nonparent de facto parent

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general rules applied to protect the best interest of the child).

4. *Kieshia E.*, 6 Cal. 4th at 80, 859 P.2d at 1297-98, 23 Cal. Rptr. 2d at 782-83.

5. *Id.* at 75, 859 P.2d at 1294, 23 Cal. Rptr. 2d at 779 (quoting *In re* B.G., 11 Cal. 3d 679, 692 n.18, 523 P.2d 244, 253 n.18, 114 Cal. Rptr. 444, 453 n.18 (1974)). *See* CAL. R. CT. 1401(a)(4) (West 1993); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973).

6. *Kieshia E.*, 6 Cal. 4th at 75-76, 859 P.2d at 1294, 23 Cal. Rptr. 2d 779 (quoting *In re* B.G., 11 Cal. 3d 679, 693, 523 P.2d 244, 253-54, 114 Cal. Rptr. 444, 453-54 (1974)). *See* CAL. R. CT. 1401(a)(4), 1412(e) (West 1993).

7. *Kieshia E.*, 6 Cal. 4th at 77, 859 P.2d at 1295-96, 23 Cal. Rptr. 2d at 780-81 (citing *In re* B.G., 11 Cal. 3d at 693 n.21, 523 P.2d at 254 n.21, 114 Cal. Rptr. 2d at 454 n.21 (declining to grant de facto parent all the rights and privileges that a parent or guardian would be entitled to at a dependency proceeding)). *See* CAL. R. CT. 1401(a)(4), 1412(e) (West 1993); *In re* Rachael C., 235 Cal. App. 3d 1445, 1452, 1 Cal. Rptr. 2d 473, 477 (1990) (discussing limitations on rights of de facto parents).

8. *Kieshia E.*, 6 Cal. 4th at 76, 859 P.2d at 1295, 23 Cal. Rptr. 2d at 780.

9. *Id.* at 78, 859 P.2d at 1296, 23 Cal. Rptr. 2d at 781 (quoting *In re* B.G., 11 Cal. 3d at 692 n.18, 523 P.2d at 253 n.18, 114 Cal. Rptr. at 453 n.18).

10. *Kieshia E.*, 6 Cal. 4th at 78, 859 P.2d at 1296, 23 Cal. Rptr. 2d at 781.

11. 235 Cal. App. 3d 1445, 1452-54, 1 Cal. Rptr. 2d 473, 477-79 (1991), *overruled by In re* Kieshia E., 6 Cal. 4th 68, 859 P.2d 1290, 23 Cal. Rptr. 2d 775 (1992).

status.[12] In overruling *In re Rachael C.*, the court stated that the nonparent's right to participate in the juvenile's dependency proceeding does not extend to situations where the child comes under the jurisdiction of the court as a result of being abused by the nonparental caretaker.[13] The court reasoned that, as a direct consequence of the perpetrator's abuse of the child, the nonparent's right to participate as a de facto parent should be extinguished.[14]

The court rejected the contention that denying de facto parent standing to nonparental abusers would prevent the caretaker from refuting the allegations of molestation.[15] The majority observed that the actual parent, and other persons properly before the court, have the right to argue on behalf of the nonparent in the dependency proceedings, even though the nonparent does not have standing as a party.[16] The court also rejected the argument that denial of standing to nonparental abusers would discourage reunification of the family.[17] In acknowledging the existence of authority suggesting that it may be in the child's best interest to reunite the child with the nonparental abuser, the court concluded that a nonparent should not be afforded the same legal rights as a parent, especially when the nonparent is abusive to the child.[18]

The California Supreme Court reversed the court of appeal's decision and refused to extend the de facto parent doctrine to allow an abusive nonparent to intervene in the victim's juvenile dependency proceeding.[19] The court declined to address whether the live-in companion of one parent is per se ineligible for de facto parent status when the child's other parent is seeking to establish parental rights.[20]

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12. Kieshia E., 6 Cal. 4th. at 78, 859 P.2d at 1296, 23 Cal. Rptr. 2d at 781.

13. *Id. See In re* Rachael C., 235 Cal. App. 3d at 1452-54, 1 Cal. Rptr. 2d at 477-79 (holding that the misconduct of a participatory nonparent does not preclude the caretaker from participating in the juvenile's dependency proceedings).

14. *Kieshia E.*, 6 Cal. 4th at 78, 859 P.2d at 1296, 23 Cal. Rptr. 2d at 781.

15. *Id.* at 79, 859 P.2d at 1297, 23 Cal. Rptr. 2d at 782.

16. *Id.*

17. *Id.*

18. *Id. See generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973).

19. *Kieshia E.*, 6 Cal. 4th at 79-80, 859 P.2d at 1297, 23 Cal. Rptr. 2d at 782.

20. *Id.* at 79-80, 859 P.2d at 1298, 23 Cal. Rptr. 2d at 783.

B. *The Dissenting Opinion*

Justice Kennard dissented, stating that a psychological parent, regardless of having abused the child, should be heard as a party in the juvenile's dependency proceeding.[21] Given that the purpose of the dependency hearings is to determine the best interest of the child, Justice Kennard noted that the trial court should consider all relevant evidence to make a well-informed decision.[22]

Justice Kennard observed that a participatory nonparent, who cared for the child on a daily basis, may have valuable information regarding the juvenile which the court could utilize in adjudicating custody issues.[23] Furthermore, the dissent explained that not all contact between the abusive nonparent and the child is necessarily harmful.[24]

Justice Kennard emphasized that the purpose of de facto parent standing is to assist the court in determining the best interest of the child.[25] De facto parent status entitles the nonparent caretaker solely the right to participate in dependency hearings as a party; it does not entitle the nonparent caretaker to custody, visitation, or reunification with the child.[26] Even abusive nonparents who care for the juvenile be eligible for de facto parent status, according to Justice Kennard, who would have affirmed the judgment of the court of appeal.[27]

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21. *Id.* at 81, 859 P.2d at 1298, 23 Cal. Rptr. 2d at 783 (Kennard, J., dissenting). *See* CAL. R. CT. 1412(e) (West 1993).

22. *Kieshia E.*, 6 Cal. 4th at 81, 859 P.2d at 1298, 23 Cal. Rptr. 2d at 783 (Kennard, J., dissenting).

23. *Id.* at 84, 859 P.2d at 1300, 23 Cal. Rptr. 2d at 785 (Kennard, J., dissenting).

24. *Id.* at 83, 859 P.2d at 1299, 23 Cal. Rptr. 2d at 785 (Kennard, J., dissenting). Dr. Raymond Murphy, a psychologist, testified that "sexual abuse by a psychological parent would not necessarily destroy the psychological parent child relationship and the child would continue to view that person as his or her psychological parent." *Id.* Kieshia's therapist testified that "if the abuser is a psychological parent, that person should be reintroduced slowly into the child's life, unless he or she is in denial or is not actively participating in a treatment program." *Id.*

25. *Id.* at 84, 859 P.2d at 1300, 23 Cal. Rptr. 2d at 785 (Kennard, J., dissenting).

26. *Id.* at 82, 859 P.2d at 1299, 23 Cal. Rptr. 2d at 784 (Kennard, J., dissenting). *See generally In re* Jaime G., 196 Cal. App. 3d 675, 684, 241 Cal. Rptr. 869, 875 (1987) (holding that a de facto mother, unlike natural or adoptive parents or guardians, had no process right to reunification services).

27. *Kieshia E.*, 6 Cal. 4th at 84-85, 859 P.2d at 1300-01, 23 Cal. Rptr. 2d at 785-86 (Kennard, J., dissenting). Factors a court should consider when determining whether to grant de facto parent status include:

> whether (1) the child is "psychologically bonded" to the adult; (2) the adult has assumed the role of a parent on a day-to[-]day basis for a substantial period of time; (3) the adult possesses information about the child unique from the other participants in the process; (4) the adult has regularly attended juvenile court hearings; and (5) a future proceeding may result in an order permanently foreclosing any future contact with the adult.

III. CONCLUSION

The California Supreme Court decided not to extend the de facto parent doctrine to a participatory nonparent whose sexual misconduct gave rise to the need for the victim's juvenile dependency proceeding.[28] The supreme court concluded that even though a caretaker assumed the parental function, the nonparent's abusive misconduct precludes the court from allowing that individual to participate as a party in the juvenile's dependency proceeding.[29] This decision clarifies the application of the de facto parent doctrine in holding that de facto parent standing is limited to nonabusive caretakers.[30]

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Id. at 84, 859 P.2d at 1300, 23 Cal. Rptr. 2d at 785 (quoting *In re* Patricia L., 9 Cal. App. 4th 61, 66-67, 11 Cal. Rptr. 2d 631, 633-34 (1992).

28. *Kieshia E.*, 6 Cal. 4th at 79-80, 859 P.2d at 1297, 23 Cal. Rptr. 2d at 783. *See* CAL. R. CT. 1401(a)(4) (West 1993).

29. *Kieshia E.*, 6 Cal. 4th at 78, 859 P.2d at 1296, 23 Cal. Rptr. 2d at 781. *See* CAL. R. CT. 1412(e) (West 1993); *see also In re* Rachael C., 235 Cal. App. 3d 1445, 1 Cal. Rptr. 2d 473 (1991), *overruled by In re* Kieshia E., 6 Cal. 4th 68, 859 P.2d 1290, 23 Cal. Rptr. 2d 775 (1993).

30. *Kieshia E.*, 6 Cal. 4th at 79-80, 859 P.2d at 1297, 23 Cal. Rptr. 2d at 783.

VII. TAX

California's pre-1983 annual vehicle license fee and use tax plan which resulted in higher charges for vehicles originally sold outside the state violated the Commerce Clause of the United States Constitution: **People v. Woosley.**

In *People v. Woosley*,[1] the California Supreme Court decided whether the state's pre-1983 assessment guidelines for vehicle license fees and use taxes violated the Commerce Clause of the United States Constitution.[2] The court held that the fees and taxes were unconstitutional because they discriminated against the owners of vehicles that were originally sold outside California.[3] The court also ruled that the Department of Motor Vehicles ("DMV") was not required to refund use taxes, properly due despite its failure to comply with procedural requirements, by altering its collection practices.[4] Finally, the court ruled that the class action claim filed in this case was not authorized by statute, thus only persons who timely filed valid claims were entitled to join in the action for refunds.[5]

In this case, the plaintiff, Charles Woosley, purchased a used car for $25,000 in North Carolina.[6] When he registered the automobile in California, the state imposed a license fee of $427 and use tax of $1500.[7] Had the automobile had been sold in California originally, the charges would have been $2 and $6, respectively.[8] Woosley filed a class action

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1. 3 Cal. 4th 758, 838 P.2d 758, 13 Cal. Rptr. 2d 30 (1992) *cert. denied*, 113 S. Ct. 2416 (1993). Justice George delivered the unanimous opinion of the court. Justice Mosk, acting C.J., and Justices Panelli, Arabian, Baxter, Strankman, and Sills concurred. Justices Strankman and Sills were assigned by the Chairperson of the Judicial Council and Strankman presided on the court of appeal.

2. *Id.* at 766, 838 P.2d at 760, 13 Cal. Rptr. 2d at 32.

3. *Id.*

4. *Id.* The plaintiff class claimed that the requirements of the Administrative Procedures Act ("APA") were not followed. *See infra* note 27.

5. *Woosley*, 3 Cal. 4th at 766, 838 P.2d at 760, 13 Cal. Rptr. 2d at 32.

6. *Id.* The car at issue in this case was a 1936 Auburn speedster. It could have been registered as a historic vehicle, which required a lower fee, pursuant to California's Revenue and Taxation Code § 10753.5. *Id.* at 767 n.5, 838 P.2d at 761 n.5, 13 Cal. Rptr. 2d at 33 n.5. However, historic vehicles must be operated "principally for purposes of exhibition and historic vehicle club activities." CAL. VEH. CODE § 5004(f) (West 1987).

7. *Woosley*, 3 Cal. 4th at 766-67, 838 P.2d at 761, 13 Cal. Rptr. 2d at 33. These charges were based upon the purchase price of $25,000. *Id.* at 767 n.5, 838 P.2d at 761 n.5, 13 Cal. Rptr. 2d at 33 n.5.

8. California's system for determining the market value of the car caused the large disparity in treatment. If the speedster had been originally purchased and sold in California, this determination would not have reflected its appreciated value as an

suit in 1978 following the unsuccessful pursuit of administrative remedies.[9]

The state of California imposed a fee "for the privilege of operating [a vehicle] upon the public highways in this state . . . ."[10] The fee was 2% of the market value of the vehicle.[11] The issue before the court involved the method for determining market value.[12] Section 10753, amended in 1967, required the DMV to determine market value by referring to the "California suggested base price" which was the sticker price of the car without factory-installed optional equipment.[13] If unable to ascertain the sticker price, the DMV was to determine the market value based on the buyer's actual purchase price.[14]

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antique. *Woosley*, 3 Cal. 4th at 767 n.5, 838 P.2d at 761 n.5, 13 Cal. Rptr. 2d at 33 n.5.

9. *Id.* at 767, 838 P.2d at 761, 13 Cal. Rptr. 2d at 33. The trial court subsequently bifurcated the trial, separating the liability issue from the class certification issue. *Id.* In December 1983, the trial court ruled in favor of the plaintiff on the issue of liability. *Id.* Nearly a year later, the court certified Woosley's class and, in July 1985, entered judgment in favor of the plaintiff class. *Id.* The court of appeal affirmed. *Id.* The state appealed and the California Supreme Court granted review. Woosley v. State, 791 P.2d 337, 269 Cal. Rptr. 767 (1990).

10. Section 10751 states: "A license fee is hereby imposed for the privilege of operating upon the public highways in this state any vehicle of a type which is subject to registration under the Vehicle Code . . . ." CAL. REV. & TAX. CODE § 10751 (West Supp. 1992). *See also* 8 CAL. JUR. 3D §§ 43-45 (discussing license fee exemptions and purposes).

11. CAL. REV. & TAX. CODE § 10752 (West Supp. 1992). The purpose of the fee is to provide a fund for the construction and maintenance of roads. 8 CAL. JUR. 3D § 44.

12. *Woosley*, 3 Cal 4th at 766, 838 P.2d at 760, 13 Cal. Rptr. 2d at 32.

13. Woosley, 3 Cal. 4th at 768, 838 P.2d at 762, 13 Cal. Rptr. 2d at 34. Section 10753 stated: "For the purposes of this part the market value of passenger vehicles as defined in Section 465 of the Vehicle Code shall be determined by the department upon the basis of the California suggested base price as herein defined and as established by the manufacturers." CAL. VEH. CODE § 10753 (West 1970). Prior to the 1967 amendment, California required manufacturers to inform the DMV of the delivered price of each of their models. Using this information, the DMV created a rate book whereby market value was assigned according to a statutory depreciation schedule. The rate book value applied regardless of whether the car was bought and sold in California. *Woosley*, 3 Cal. 4th at 768, 838 P.2d at 761-62, 13 Cal. Rptr. 2d at 33-34.

14. *Woosley*, 3 Cal. 4th at 769, 838 P.2d at 762, 13 Cal. Rptr. 2d at 34. Destination charges and the cost of statutorily required emissions control devices were included. CAL. REV. & TAX. CODE § 10753(g) (West 1991) (amended 1983). A depreciation schedule contained in § 10753.2 of the Revenue and Taxation Code determined the market value of used cars that were sold originally in California. Because an antique car, such as the one purchased by Mr. Woosley, depreciated greatly according to the

In determining the sticker price, the DMV required auto dealers in California to provide the price for each type of car sold.[15] The DMV would then assign a classification code to each type of car.[16] If the car was purchased outside of California, the DMV could not use the classification code, instead, it would use the actual purchase price to determine market value.[17] As a result, cars purchased outside the state were charged higher fees because the California sticker price, unlike the actual purchase price, did not include the factory-installed options.[18] In 1983, while this suit was pending, section 10753 was amended to provide that the market value of all vehicles would be determined by the actual cost price.[19] A similar change was made for the market value of used cars.[20]

California Revenue and Taxation Code section 6201 imposed a use tax that was collected in conjunction with the state sales tax.[21] The use tax applied to goods purchased from out-of-state retailers who were exempt from the California sales tax,[22] and was based upon a percentage of the sales price.[23] In *Woosley*, the plaintiff disputed the method of determining the sales price of his automobile.[24] Pursuant to former section 6276

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statutory schedule, the tax did not reflect its actual value. *See* CAL. REV. & TAX. CODE § 10753.2 (West Supp. 1992).

15. *Id.*

16. *Woosley*, 3 Cal. 4th at 769, 838 P.2d at 762, 13 Cal. Rptr. 2d at 34.

17. *Id.*

18. *Id.* at 769, 838 P.2d at 762-63, 13 Cal. Rptr. 2d at 34-35.

19. *Id.* at 770-71, 838 P.2d at 763, 13 Cal. Rptr. 2d at 35. Section 10753 now reads in pertinent part:

> For the purposes of this part, upon the first sale of a new vehicle to a consumer and upon each sale of a used vehicle to a consumer, the department shall determine the market value of the vehicle on the basis of the cost price to the purchaser as evidence by a certificate of cost, but not including California sales or use tax or any local sales or other local tax.

CAL. REV. & TAX. CODE § 10753(a) (West Supp. 1992). *See supra* note 12.

20. *Id.* The 1983 version of § 10753 did not include the reference to "each sale of a used vehicle." *See supra* note 17.

21. Section 6201 reads in pertinent part: "An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . ." CAL. REV. & TAX. CODE § 6201 (West Supp. 1992).

22. *Woosley*, 3 Cal. 4th at 771, 838 P.2d at 764, 13 Cal. Rptr. 2d at 36. *See also* 1 ROY E. CRAWFORD III ET AL., CALIFORNIA TAXES § 2.39 (Carol E. Gamble ed., 2d ed. 1992) (explaining use tax in California). The DMV collects this tax for the State Board of Equalization on cars purchased outside the state. CAL. VEH. CODE § 4750.5(b) (West 1987). *See also Crawford*, *supra*, § 2.85 (explaining practice of collecting use taxes on vehicles).

23. Section 4750.5 reads in pertinent part: "The department shall withhold the registration . . . of any vehicle sold at retail to any applicant . . . until the applicant pays to the department the use tax measured by the sales price of the vehicle . . . ." CAL. VEH. CODE § 4750.5(a) (West 1987).

24. *Woosley*, 3 Cal. 4th at 771, 838 P.2d at 764, 13 Cal. Rptr. 2d at 36.

of the Revenue and Taxation Code, the sales price used to determine the use tax was the same price used to determine vehicle license fees.[25] Under this section, the sales price was equal to the market value at the time of purchase.[26] Thus, when a private party sold a car outside the state, the use tax varied depending on whether the automobile had originally been purchased in California.[27] If the owner originally purchased the car in California, the DMV took the sticker price mentioned above and depreciated the value according to the depreciation schedule.[28] If, however, the owner purchased the car outside of California, the DMV used the actual purchase price to determine the use tax.[29] The same disparity resulted - cars sold originally outside the state were charged higher taxes.

In 1976, (after Woosley registered his vehicle), the DMV calculated the use tax based on actual purchase price, regardless of whether the original purchase of the automobile took place in California.[30] This change in policy raised the issue of whether such alteration could be made without following the procedural requirements for establishing new regulations.[31]

In deciding whether the imposition of these fees and taxes violated the federal Commerce Clause, the court applied the four-part test announced in *Complete Auto Transit, Inc. v. Brady*.[32] The third prong requires a determination as to whether the tax discriminates against interstate com-

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25. CAL. REV. & TAX CODE § 6276 (West 1987).

26. *Woosley*, 3 Cal. 4th at 772, 838 P.2d at 764, 13 Cal. Rptr. 2d at 36. Section 6276 reads in pertinent part:

> [W]henever the purchaser of a vehicle is required to pay the use tax to . . . the [DMV], the sales price shall be presumed to be an amount equal to the market value of the vehicle at the time of the purchase as that value is determined to measure vehicle license fees . . . .

CAL. REV. & TAX. CODE § 6276(a) (West 1987).

27. *Woosley*, 3 Cal. 4th at 772, 838 P.2d at 765, 13 Cal. Rptr. 2d at 36-37.

28. *Id.* at 773, 838 P.2d at 765, 13 Cal. Rptr. at 37.

29. *Id.*

30. *Id.* The change was made after reviewing an opinion by the Attorney General. The State Board of Equalization requested an opinion from former Attorney General Evelle J. Younger. The opinion stressed that the presumption of vehicle fee value was rebuttable by evidence of the actual cost price. 59 Op. Cal. Att'y Gen. 47 (1976).

31. Formal regulations must be adopted pursuant to the Administrative Procedure Act found in the Government Code starting at § 11340. Certain basic, minimum procedural guidelines must be followed. *See* CAL. GOV. CODE § 11346 (West 1992). For example, the state must give adequate notice to interested persons and hold public hearings. *See* CAL. GOV. CODE §§ 11346.4, 11346.8 (West 1992).

32. 430 U.S. 274 (1977) (stating that laws affecting interstate commerce must meet a four-part test mandated by the Commerce Clause).

merce.[33] The *Woosley* court found that, because vehicles purchased out-of-state were charged higher fees, the law was patently discriminatory.[34] The court quickly dismissed the state's contention that the Commerce Clause was not implicated if the taxes were imposed only on California residents.[35] The only justification the state offered for the discrimination was a claim of administrative convenience.[36] The court rejected the justification provided by the state due to the existence of less restrictive alternatives.[37] Therefore, the vehicle license fee and the pre-1976 use tax policy of the DMV were held to be in violation of the Commerce Clause.[38]

In response to the DMV's 1976 change in use tax policy, the plaintiffs asserted that the collected taxes should be refunded as a result of the DMV's failure to comply with procedural requirements.[39] In essence, the plaintiffs argued that the DMV was not statutorily authorized to charge a use tax based on the actual purchase price of cars originally sold in California and resold outside the state.[40] The court, however, held that the statute gave the DMV discretion as to which method to use in computing the tax.[41] Inasmuch as the taxes collected after 1976 were properly due, the court refused to order refunds despite the state's failure to follow proper procedures.[42]

The state argued that the class certification was improper.[43] Nevertheless, the court did not determine the certification issue, holding that the class claim filed was not authorized by statute.[44] The court first consid-

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33. *Woosley*, 3 Cal. 4th at 777, 838 P.2d at 768, 13 Cal. Rptr. 2d at 40. The discrimination may appear in three different guises: facial discrimination, discriminatory intent, or undue burden on interstate commerce. *See* Amerada Hess Corp. v. New Jersey Taxation Div., 490 U.S. 66, 75 (1989) (discussing types of discrimination which violate the Commerce Clause).

34. *Woosley*, 3 Cal. 4th at 777, 838 P.2d at 768, 13 Cal. Rptr. 2d at 40.

35. *Id.* at 781-82, 838 P.2d at 771, 13 Cal. Rptr. 2d at 42-43. The state argued for the application of Goldberg v. Sweet, 488 U.S. 252 (1989), where the Court, noting that the tax was imposed only on residents of the taxing state, declined to strike down a tax on Commerce Clause grounds. The *Woosley* court observed that this fact was only one of many factors and not a dispositive element of the case. *Woosley*, 3 Cal. 4th at 781-82, 838 P.2d at 771, 13 Cal. Rptr. 2d at 43.

36. *Woosley*, 4 Cal. 4th at 782, 838 P.2d 771, 13 Cal. Rptr. 2d at 43.

37. *Id.* The court mentioned that neither the current system for determining market value nor the previous procedure discriminated on the basis of the site of the original sale. Thus, there were nondiscriminatory alternatives.

38. *Id.* at 783, 838 P.2d at 772, 13 Cal. Rptr. 2d at 44.

39. *Id.* at 786, 838 P.2d at 774, 13 Cal. Rptr. 2d at 46.

40. *Id.*

41. *Id.* at 787, 838 P.2d at 774, 13 Cal. Rptr. 2d at 46.

42. *Id.* at 785, 838 P.2d at 773, 13 Cal. Rptr. 2d at 45.

43. *Id.* at 788, 838 P.2d at 775, 13 Cal. Rptr. 2d at 47.

44. *Id.*

ered Article XIII, section 32 of the California Constitution which states that, "[a]fter payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the legislature."[45] Section 10901 of the Revenue and Taxation Code provides the only valid manner for a "person" to obtain a refund of the vehicle fee.[46] The court held that the reference to "person" in that statute does not include a class action.[47]

Regarding the use tax, section 6902 provides the procedure for valid refund claims,[48] which is substantially the same as the procedure for obtaining a vehicle fee refund.[49] Therefore, the court held that the statutes did not allow for a class action claim seeking the type of refunds desired by the *Woosley* class.[50] This decision overruled a string of appellate rulings permitting such actions.[51]

As a result of the court's determination on the validity of the class action, the case was remanded to the trial court, and relief was granted

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45. CAL. CONST. art. VIII, § 32.

46. Section 10901 reads in pertinent part: "Whenever the department erroneously collects any license fee not required to be paid under this part, the amount shall be refunded to the *person* paying it upon application therefor made within three years after the date of the payment." CAL. REV. & TAX. CODE § 10901 (West Supp. 1992) (emphasis added).

47. *Woosley*, 3 Cal. 4th at 790, 838 P.2d at 776, 13 Cal. Rptr. 2d at 48. *See* B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency & Employment* §§ 36-40 (1987) (a class representative does not become the agent of class members merely by filing a claim on behalf of those similarly situated).

48. Section 6902 reads in pertinent part: "[N]o refund shall be approved by the board after three years from the last day of the month . . . the overpayment was made . . . unless a claim therefor is filed with the board within that period." CAL. REV. & TAX. CODE § 6902(a)(1) (West Supp. 1992). Furthermore, § 6905 reads in pertinent part: "Failure to file a claim within the time prescribed in this article constitutes a waiver of any demand against the State on account of overpayment." CAL. REV. & TAX. CODE § 6905 (West Supp. 1992).

49. *Woosley*, 3 Cal. 4th at 790-91, 838 P.2d at 49, 13 Cal. Rptr. 2d at 49.

50. *Id.*

51. The California Supreme Court held, in City of San Jose v. Superior Court, 12 Cal. 3d 447, 457, 525 P.2d 701, 707, 115 Cal. Rptr. 797, 803, that a class claim could be filed pursuant to § 910 of the Government Code. Several appeals courts have extended this holding to allow the filing of class claims by those seeking tax refunds. *See* Lattin v. Franchise Tax Bd., 75 Cal. App. 3d 377, 142 Cal. Rptr. 130 (1977); Javor v. State Bd. of Equalization, 73 Cal. App. 3d 939, 141 Cal. Rptr. 226 (1977); Santa Barbara Optical Co. v. State Bd. of Equalization, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (1975). The court overruled these decisions to the extent that they allowed class claims for tax refunds. *Woosley*, 3 Cal. 4th at 792, 838 P.2d at 778, 13 Cal. Rptr. 2d at 50.

solely to those individuals who had filed timely claims.[52]

With respect to the use tax, the court's decision in *Woosley* will certainly save the state a significant amount of money. It has been estimated that 14 million citizens paid use taxes for vehicles after the DMV's 1976 change in collection policy.[53] Also, under the *Woosley* decision future class action suits for tax refunds will be restricted.[54]

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52. *Woosley*, 3 Cal. 4th at 795, 838 P.2d at 780, 13 Cal. Rptr. 2d at 52. This action excluded from the class all members who had paid use taxes following the DMV change in policy in 1976. The only members recognized as having valid claims were those who paid the vehicle fees for out of state automobiles prior to 1983 and those who paid use taxes on those vehicles prior to 1967. Woosley argued that because the class action had been accepted, the three-year period in which to file a claim had been tolled for those with valid claims and that public notice thereof was required. The court dismissed this contention, however, holding that this decision should be applied retroactively. *Id.* at 794, 838 P.2d at 779, 13 Cal. Rptr. 2d at 51.

53. The state conservatively estimated that the amount would exceed one billion dollars. *Id.* at 766, 838 P.2d at 760, 13 Cal. Rptr. 2d at 32.

54. The court affirmed the premise that strict legislative control over the manner in which tax refunds are claimed served the important policy objective that the government must be able to plan expected revenues. *Id.* at 789, 838 P.2d at 776, 13 Cal. Rptr. 2d at 47. *See also supra* note 49.

VIII. TORTS

Under Civil Code section 47(b), communications that are related to judicial proceedings are privileged communications immune from tort liability, and not subject to injunctive relief under the unfair competition statute:
Rubin v. Green.

I. INTRODUCTION

In *Rubin v. Green*,[1] the California Supreme Court considered whether the "litigation privilege" of Civil Code section 47(b) precluded the plaintiff from suing the defendants for wrongful solicitation of litigation.[2] The court held that section 47(b) protected the defendants' alleged solicitation and inducement of the mobile home park residents to file a lawsuit.[3] The court also held that the plaintiff could not plead around the

1. 4 Cal. 4th 1187, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993). Justice Arabian wrote the majority opinion in which Chief Justice Lucas and Justices Mosk and Kennard concurred. *Id.* at 1190-1204, 847 P.2d at 1045-54, 17 Cal. Rptr. 2d at 829-38. Justice Baxter wrote a separate concurring and dissenting opinion with Justices Panelli, and George joining. *Id.* at 1204-12, 847 P.2d at 1055-60, 17 Cal. Rptr. 2d at 836-44.

The defendants in this case included Norma Green and her attorney's law firm. *Id.* at 1191, 847 P.2d at 1645-46, 17 Cal. Rptr. 2d at 830-31. Green resided at a mobile home park operated by the plaintiff. *Id.* at 1191, 847 P.2d at 1045, 17 Cal. Rptr. 2d at 829. The plaintiff accused the defendant of soliciting other residents of the mobile home park to participate in a lawsuit against the plaintiff. *Id.* at 1191, 847 P.2d at 1046, 17 Cal. Rptr. 2d at 830. The plaintiff alleged that the defendants maliciously attempted to harm the plaintiff's business and economic standing by inciting animosity among the park residents. *Id.* The trial court sustained the defendants' demurrer and dismissed the action. *Id.* at 1192, 847 P.2d at 1046, 17 Cal. Rptr. 2d at 830. The court of appeal reversed, holding that the defendants' alleged solicitation constituted unfair competition and thus entitled the plaintiff to bring an action for damages and injunctive relief. *Id.* at 1193, 847 P.2d at 1046-47, 17 Cal. Rptr. 2d at 830-31. The California Supreme Court reversed the appellate court decision. *Id.* at 1204, 847 P.2d at 1054, 17 Cal. Rptr. 2d at 838.

2. *Id.* at 1190-93, 847 P.2d at 1045-47, 17 Cal. Rptr. 2d at 829-31. Civil Code § 47(b) provides in relevant part: "A privileged publication or broadcast is one made . . . in any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law." CAL. CIV. CODE § 47(b) (West Supp. 1994).

3. *Rubin*, 4 Cal. 4th at 1193, 847 P.2d at 1047, 17 Cal. Rptr. 2d at 831.

privilege by recasting the cause of action as one for injunctive relief under the unfair competition statute.[4]

II. TREATMENT OF THE CASE

A. *Majority Opinion*

The majority prefaced its analysis by noting that the defendants' alleged solicitation was communicative in nature and within the scope of the privilege provided by section 47(b).[5] The court differentiated between protected communicative conduct and unprotected noncommunicative conduct.[6] The court rejected the court of appeal's interpretation of *Kimmel v. Goland*,[7] which illustrated the difference between communicative and noncommunicative conduct.[8] The court concluded that because the defendants' acts were essentially communicative, they were protected under Civil Code section 47(b), regardless of whether the alleged solicitation was wrongful.[9]

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4. *Id.* at 1204, 847 P.2d at 1054, 17 Cal. Rptr. 2d at 838. *See* CAL. BUS. & PROF. CODE § 17200 (West 1987 & Supp. 1994) (stating "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising").

5. *Rubin*, 4 Cal. 4th at 1193, 847 P.2d at 1047, 17 Cal. Rptr. 2d at 831. The court stated that the plaintiff's cause of action essentially pertained to the defendant's alleged misrepresentations regarding the conditions of the mobile home park and the filing of a lawsuit against the plaintiff. *Id.* at 1196, 847 P.2d at 1047, 17 Cal. Rptr. 2d at 833. The court concluded that these actions were privileged because, even if "the acts amounted to wrongful attorney solicitation or not, they [were] communicative in their essential nature and therefore within the privilege of section 47(b)." *Id.*

6. *Id.* at 1194-95, 847 P.2d at 1047-48, 17 Cal. Rptr. 2d at 831-32. The court stated that such a distinction is "'traditionally . . . a threshold issue in determining the applicability of section 47[b].'" *Id.* at 1195, 847 P.2d at 1048, 17 Cal. Rptr. 2d at 832 (quoting Kimmel v. Goland, 51 Cal. 3d 202, 211, 793 P.2d 524, 529, 271 Cal. Rptr. 191, 196 (1990)) (alterations in original).

7. 51 Cal. 3d 202, 793 P.2d 524, 271 Cal. Rptr. 191 (1990).

8. *Rubin*, 4 Cal. 4th at 1195-96, 847 P.2d at 1048-49, 17 Cal. Rptr. 2d at 832-33. In *Kimmel*, the defendants claimed that they were injured by the tape recording of confidential telephone conversations, not from the dissemination of the information of the conversations. *Kimmel*, 51 Cal. 3d at 209, 793 P.2d at 528, 271 Cal. Rptr. at 195. The *Kimmel* court held that the applicability of the litigation privilege was limited to the actual injury resulting from the plaintiff's and lawyer's conduct. *Id.* at 212, 214, 793 P.2d at 530, 531, 271 Cal. Rptr. at 197, 198. The court distinguished the actions involved in *Kimmel* from the communicative aspects of litigation, such as counseling and advising, which clearly fall within the privilege. *Id.* at 209, 793 P.2d at 528, 271 Cal. Rptr. at 195.

9. *Rubin*, 4 Cal. 4th at 1196, 847 P.2d at 1049, 17 Cal. Rptr. 2d at 833.

After establishing the communicative nature of the defendants' acts, the court ascertained the defendants' degree of protection from tort liability.[10] The court stated that the plaintiff's claim of improper attorney solicitation was not maintainable because it lacked the essential elements of malicious prosecution.[11] The court noted that the underlying rationale for the immunity granted by section 47(b) is to afford litigants unfettered access to the courts without the worry of subsequent derivative tort actions.[12] The court rejected the plaintiff's policy argument that uncontrolled attorney solicitation has increased litigation.[13] The court reasoned that allowing the plaintiff to maintain his cause of action without showing the elements of malicious prosecution would itself lead to increased litigation.[14]

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10. *Id.* at 1196, 847 P.2d at 1049, 17 Cal. Rptr. 2d at 833. *See generally* Erick J. Feitshans, *California Civil Code Section 47(2): Do Remedies Exist For Those Injured By the Privilege?*, 18 SW. U. L. REV. 127 (1988)(analyzing the scope of the remedies offered by Civil Code § 47(b)).

11. *Rubin*, 4 Cal. 4th at 1196-97, 847 P.2d at 1049, 17 Cal. Rptr. 2d at 833. "After canvassing the arguments supporting restrictions on the use of the malicious prosecution tort as a means of controlling excessive litigation and those contra, our opinion concluded that 'the most promising remedy for excessive litigation does not lie in an expansion of malicious prosecution liability.'" *Id.* (quoting Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 873, 765 P.2d 498, 508, 254 Cal. Rptr. 336, 340-41 (1989). *See also* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 324 (9th ed. 1988)(stating that § 47 "provides a privilege for a publication or broadcast in the proper discharge of an official duty, in a legislative or judicial proceeding . . . and for reports of judicial, legislative, or other public official proceedings or public meetings").

12. *Rubin*, 4 Cal. 4th at 1194, 847 P.2d at 1047, 17 Cal. Rptr. 2d at 831. *See also* 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 214 (Supp. 1993). "Several policies underlie the litigation privilege. First, it affords litigants free access to the courts to secure and defend their rights without fear of harassment by later suits. Second, the courts rely on the privilege to prevent the proliferation of lawsuits after the first one is resolved." *Id.* (citation omitted).

13. *Rubin*, 4 Cal. 4th at 1198-99, 847 P.2d at 1051, 17 Cal. Rptr. 2d at 835. The plaintiff argued that the courts should discourage attorney solicitation because the remedies that protect against solicitation are inadequate. *Id.* at 1198, 847 P.2d at 1051, 17 Cal. Rptr. 2d at 835. Furthermore, the plaintiff contended that although attorney solicitation may foster the filing of some meritorious claims, the practice should be firmly discouraged by the courts. *Id.* at 1198-99, 847 P.2d at 1051, 17 Cal. Rptr. 2d at 835.

14. *Id.* at 1199, 847 P.2d at 1051, 17 Cal. Rptr. 2d at 835. The court acknowledged that attorney solicitation may be growing with the advent of relaxed restrictions on attorney advertising and the marketing of legal services. *Id.* (citing Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Bates v. State Bar of Arizona, 433 U.S. 350 (1977)). However, the court noted that even if it were to adopt the plaintiff's argu-

The court further reasoned that the plaintiff could not avoid the preclusive effect of section 47(b) by requesting injunctive relief under the unfair competition provision in section 17204 of the Business and Professions Code.[15] The court stated that a plaintiff cannot avoid legislatively granted immunity by simply attempting to plead around the immunized action.[16] Similarly, the court noted that the courts of appeal have consistently rejected attempts to plead around absolute barriers to relief by altering the cause of action to state an unfair competition claim.[17] The court reasoned that the underlying purpose of the statute is to allow for a greater degree of immunity regarding publications made in the course of judicial proceedings.[18]

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ment, the increased litigation problem would be exacerbated because it would encourage subsequent litigation by the same parties, such as an action for malicious prosecution. *Id.* This would only intensify the problems that the plaintiff sought to avoid. *Id.*

15. *Id.* at 1200, 1203, 847 P.2d at 1051, 1053-54, 17 Cal. Rptr. 2d at 835, 837-38. Business and Professions Code § 17204 states in part: "Actions for any relief pursuant to this chapter shall be prosecuted . . . [by] a city attorney in any city and county . . . upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." CAL. BUS. & PROF. CODE § 17204 (West 1987 & Supp. 1994).

16. *Rubin*, 4 Cal. 4th at 1203, 847 P.2d at 1053-54, 17 Cal. Rptr. 2d at 837-38. To support its position, the court cited Ribas v. Clark, 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985). *Rubin*, 4 Cal. 4th at 1201, 847 P.2d at 1052, 17 Cal. Rptr. 2d at 836. In *Ribas*, the plaintiff sought damages under various tort theories and under Penal Code § 637.2, which grants standing to persons injured by eavesdropping. *Ribas*, 38 Cal. 3d at 358-59, 696 P.2d at 639, 212 Cal. Rptr. at 145. The defendant, who allegedly eavesdropped on the plaintiff's telephone conversation, maintained that her testimony during a judicial proceeding was privileged under Civil Code § 47(b). *Id.* at 363-64, 696 P.2d at 642-43, 212 Cal. Rptr. at 148. The court stated that § 47(b) applied only to statutory causes of action, and it reasoned that in granting the broad immunity powers of § 47(b), the legislature did not intend to differentiate between statutory and traditional causes of action. *Id.* at 365, 696 P.2d at 643, 212 Cal. Rptr. at 149.

17. *Rubin*, 4 Cal. 4th at 1201-02, 847 P.2d at 1053, 17 Cal. Rptr. 2d at 937 (citing Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 301, 758 P.2d 58, 66, 250 Cal. Rptr. 116, 124 (1988) (rejecting the proposition that a party can plead around an absolute barrier to relief by restating the action under § 17200 of the Business and Professions Code); Maler v. Superior Court, 220 Cal. App. 3d 1592, 1598, 270 Cal. Rptr. 222, 226-27 (1990)(holding that the barring of a bad faith action against insurers could not be recast as a cause of action under the unfair competition statute)).

18. *Rubin*, 4 Cal. 4th at 1203, 847 P.2d at 1053, 17 Cal. Rptr. 2d at 837. The court stated, "To permit the same communicative acts to be the subject of an injunctive relief proceeding brought by this same plaintiff under the unfair competition statute undermines that immunity." *Id.* *See also* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 440(a) (9th ed. 1988).

> The defense of absolute privilege under C.C. 47(2) is unlike ordinary procedural defenses such as statue of limitations and laches . . . [A] termination of the proceeding for this reason 'reflects the opinion of the Legislature that

B. Justice Baxter's Concurring and Dissenting Opinion

Justice Baxter concurred in both the result and the reasoning of the majority's decision, but disagreed with the conclusion that the plaintiff could not seek injunctive relief.[19] Justice Baxter stated that the majority opinion disregarded the provisions of Business and Professions Code sections 17203 and 17204 which allow the courts to enjoin any unlawful business practice.[20] The dissent additionally contended that the majority ignored section 1858 of the Code of Civil Procedure, which states that the role of the judge is to interpret statutes, not to add or detract from their meanings.[21]

Justice Baxter also found anomalous the majority's conclusion that its decision promotes unfettered access to the courts because Business and Professions Code section 17204 grants standing to any member of the public to bring a cause of action, except the person who actually suffers the injury.[22]

> the action lacks merit because the protection of the right of an individual's access to the courts outweighs an individual's right to a civil remedy for harm resulting from misrepresentations made at a judicial proceeding.'

Id. (citations omitted).

19. *Id.* at 1204, 847 P.2d at 1055, 17 Cal. Rptr. 2d at 839 (Baxter, J., concurring and dissenting).

20. *Id.* at 1205, 847 P.2d at 1055, 17 Cal. Rptr. 2d at 839 (Baxter, J., concurring and dissenting). Justice Baxter stated, "No matter how strongly *this court* might believe that good public policy should prevent injunctive relief, *the Legislature* has determined for good or bad that injunctive relief is available." *Id.*

21. *Rubin*, 4 Cal. 4th at 1205, 847 P.2d at 1055, 17 Cal. Rptr. 2d at 839 (Baxter, J., concurring and dissenting). Code of Civil Procedure § 1858 states in relevant part: "In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." CAL. CIV. PROC. CODE § 1858 (West 1983 & Supp. 1994).

22. *Rubin*, 4 Cal. 4th at 1206, 847 P.2d at 1055-56, 17 Cal. Rptr. 2d at 839-40 (Baxter, J., concurring and dissenting). Justice Baxter noted that the majority attempted to bolster its argument by commenting on the "'broad standing provision of Business and Professions Code section 17204,'" yet the injured party himself does not have standing to contest the issue under § 17204. *Id.* (Baxter, J., concurring and dissenting) (quoting *Id.* at 1204, 847 P.2d at 1054, 17 Cal. Rptr. 2d at 838). "Thus, all the solicitation victim need do to avoid the majority's restriction of his ability to seek injunctive relief is to persuade a friend, relative, or colleague to bring an injunctive relief action as a member of the public—a procedure the majority explicitly approves." *Id.* at 1206, 847 P.2d at 1056, 17 Cal. Rptr. 2d at 840.

Next, Justice Baxter questioned the conflict that the majority observed between Civil Code section 47(b) with its privilege for communications in the course of judicial proceedings and the Business and Professions Code's provisions for injunctive relief from unlawful business practices.[23] Justice Baxter asserted that the actions of the legislature indicate no conflict between the code section at issue.[24] Justice Baxter further emphasized that the legislature intended to allow litigants to pursue injunctive relief under the unfair competition statute when precluded from pursuing a compensatory cause of action.[25]

III. CONCLUSION

In determining that the elements of malicious prosecution are a prerequisite to permitting tortious litigation regarding communicative conduct, the California Supreme Court effectively promotes the policy of allowing litigants greater access to the courts. This results in a diminished fear of retaliatory action by the adverse party because these elements must be met to maintain the cause of action.[26] The result of this decision should eliminate any perceived contradiction between Civil Code section 47(b) and Business and Professions Code section 17200 because to protect the immunity granted under 47(b), the plaintiff is effectively barred from pleading for injunctive relief.

Thus, *Rubin* allows more people who have been solicited by attorneys to litigate causes of action, whether or not the solicitation was wrongful. In addition, it encourages people to litigate claims without the fear of being sued when the adversary cannot prove malicious prosecution.

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23. *Id.* at 1207, 847 P.2d at 1056, 17 Cal. Rptr. 2d at 840 (Baxter, J., concurring and dissenting).

24. *Id.* at 1207-08, 847 P.2d at 1056-57, 17 Cal. Rptr. 2d at 840-41 (Baxter, J., concurring and dissenting).

25. *Id.* at 1208, 847 P.2d at 1057, 17 Cal. Rptr. 2d at 841 (Baxter, J., concurring and dissenting). Additionally, Justice Baxter questioned the majority's reliance on prior authority. *Id.* Justice Baxter stated that practically all of the cited cases did not concern injunctive relief. *Id.* at 1208-09, 847 P.2d at 1057, 17 Cal. Rptr. 2d at 841. *See, e.g.*, Moradi-Shahal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 292, 758 P.2d 58, 60, 250 Cal. Rptr. 116, 118 (1988) (stating only that the plaintiff sought damages in her personal injury suit); Maler v. Superior Court, 220 Cal. App. 3d 1592, 1598-1600, 270 Cal. Rptr. 222, 224-26 (1990) (holding that an injured party could not sustain a private cause of action for unfair competition against his insurance carrier).

26. *Rubin*, 4 Cal. 4th at 1203, 847 P.2d. at 1054, 17 Cal. Rptr. 2d at 837. *See also* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 440(b) (9th ed. 1988). "'Those who speak at judicial proceedings could be harassed by having to defend against suits based on their privileged publications, at least to the extent that they would have to hire an attorney to raise the privilege by answer or demurrer until the case was dismissed.'" *Id.* (citation omitted).

While the *Rubin* decision may allow for greater abuse of the judicial system, the litigation privilege under Civil Code section 47(b) serves to protect against dubious solicitations by unscrupulous attorneys. In attempting to balance the two competing policies, the California Supreme Court determined that the ability of litigants to pursue their claims without harassment and obstacles in the judicial system is more important than protecting the same system from the potential abuse by lawyers who seek to exploit it for their own gain.

JOSHUA MARK FRIED

IX. WORKERS COMPENSATION

When the claimant seeking death benefits is a minor Labor Code section 5408 tolls only that portion of the 240-week limitation of section 5406 which remains unexpired upon the death of the decedent: **Massey v. Workers' Compensation Appeals Board.**

I. INTRODUCTION

In *Massey v. Workers' Compensation Appeals Board*,[1] the California Supreme Court assessed the validity of Martin Massey's claim for worker's compensation death benefits when Massey filed his application less than 240 weeks after his eighteenth birthday and less than one year after the death of the decedent.[2] The supreme court affirmed the court of appeal decision and vacated the award of death benefits granted by the workers' compensation judge.[3] The court found that Massey's claim

1. 5 Cal. 4th 674, 854 P.2d 117, 20 Cal. Rptr. 2d 825 (1993). Justice Baxter authored the majority opinion, with Chief Justice Lucas and Justices Panelli, Kennard, Arabian, and George concurring. Justice Mosk wrote a dissenting opinion. *Id.* at 686-88, 854 P.2d at 124-25, 20 Cal. Rptr. 2d at 832-33.

2. *Id.* at 678-79, 854 P.2d at 119, 20 Cal. Rptr. 2d at 827. On October 19, 1979, Tommy G. Thompson suffered a heart attack thought to be caused by his employment as an attorney. *Id.* at 678, 854 P.2d at 118, 20 Cal. Rptr. 2d at 826. Mr. Thompson died during heart surgery on October 28, 1987. *Id.* On April 21, 1988, Paulette Thompson, the decedent's widow, filed claims seeking death benefits on behalf of herself, her two daughters, and her son, Martin Massey. *Id.* at 678, 854 P.2d at 118, 20 Cal. Rptr. 2d at 826. The judge determined that the claims made for Mrs. Thompson and her two daughters were barred because the applications were filed more than 240 weeks after the date of injury. *Id.* at 678-79, 854 P.2d at 118-19, 20 Cal. Rptr. 2d at 826-27.

The workers' compensation judge found that the limitations period was tolled until Massey's eighteenth birthday, which occurred on December 15, 1985. *Id.* at 678, 854 P.2d at 119, 20 Cal. Rptr. 2d at 827. The judge awarded Massey death benefits because Massey's claim had been filed less than 240 weeks after his 18th birthday. *Id.* The Workers' Compensation Appeals Board vacated the award because Mr. Thompson survived his injury by more that 240 weeks. *Id.* The court of appeal affirmed the Workers' Compensation Appeals Board's decision and the California Supreme Court granted review. *Id.* at 678-79, 854 P.2d at 119, 20 Cal. Rptr. 2d at 827.

3. *Massey*, 5 Cal. 4th at 678-79, 854 P.2d at 119, 20 Cal. Rptr. 2d at 827. Labor Code § 5406 provides, in relevant part, that no proceeding for death benefits "may be commenced more than one year after the date of death, nor more than 240 weeks from the date of injury." CAL. LAB. CODE § 5406 (West 1989). *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 370 (9th ed. 1987 & Supp. 1993) (claiming death benefits); 65 CAL. JUR. 3D *Work Injury Compensation* §§ 240, 250 (1981 & Supp. 1993) (discussing occupational injuries and infancy of

was barred by Labor Code section 5406 and determined that section 5408 did not toll the statute of limitations period since 240 weeks had expired prior to the death of the decedent.[4]

II. TREATMENT

A. *The Majority Opinion*

The majority prefaced its opinion by noting that the determinative issue in the case pertained to whether a minor dependent could collect death benefits when the deceased survived the date of injury by 240 weeks.[5] Massey contended that section 5408 tolled the statute of limitations until he turned eighteen and that his application for death benefits was timely because he filed the claim less than 240 weeks after his eighteenth birthday and less than one year after the decedent's death.[6] The employer's insurer, State Compensation Insurance Fund, however, argued that the tolling provision of Labor Code section 5408 was inapplicable because Mr. Thompson, the injured worker, survived his injury by more than 240 weeks.[7]

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dependent). Labor Code § 5408 states, in relevant part, that "No limitation of time provided by this division shall run against any person under 18 years age or any incompetent unless and until a guardian or conservator of the estate or trustee is appointed." CAL. LAB. CODE § 5408 (West 1989). *See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* § 372 (9th ed. 1987) (tolling statute of limitations for minors); 65 CAL. JUR. 3D *Work Injury Compensation* §§ 141, 250, 261 (1981) (discussing payment of death benefits and appointment of guardians for minors).

4. *Massey*, 5 Cal. 4th at 679, 854 P.2d at 119, 20 Cal. Rptr. 2d at 827. *See* CAL. LAB. CODE §§ 5406, 5408 (West 1989).

5. *Massey*, 5 Cal. 4th at 677, 854 P.2d at 118, 20 Cal. Rptr. 2d at 826. The initial date of injury was October 19, 1979, on which date Mr. Thompson suffered a heart attack. He died during heart surgery on October 28, 1987, surviving the initial injury by approximately eight years. *Id.* at 678, 854 P.2d at 118, 20 Cal. Rptr. 2d at 826.

6. *Id.* at 681, 854 P.2d 120, 20 Cal. Rptr. 2d 828. *See* CAL. LAB. CODE §§ 5406, 5408 (West 1989). In 1947, the legislature amended § 5406 to its present form after the supreme court construed the statute to allow claims for death benefits if filed *either* within two years from the date of injury *or* within one year after the date of death. Bianco v. Industrial Accident Comm'n, 24 Cal. 2d 584, 587, 150 P.2d 806, 808 (1944). After the legislature amended § 5406, the supreme court concluded that the claimant should commence a timely filing of his petition for death benefits within 240 weeks from the date of injury *and* within one year of the decedent's death. Ruiz v. Industrial Accident Comm'n, 45 Cal. 2d 409, 412-13, 289 P.2d 229, 232 (1955).

7. *Massey*, 5 Cal. 4th at 678, 854 P.2d at 119, 20 Cal. Rptr. at 827. *See* CAL. LAB.

The supreme court acknowledged that tolling provisions protect minors from a loss of rights as a result of the running of a statute of limitations.[8] Nevertheless, the court observed that in order to recognize a claim for death benefits, the claim must be filed within 240 weeks of the date of injury.[9] The court reasoned that the 240-week requirement is an element in determining whether the claimant may receive death benefits.[10] The court found that the 240-week interval was a prerequisite to a claim for death benefits, but did not run against any potential claimant.[11] Accordingly, any tolling provisions under section 5408 were not applicable to the 240-week period because a claim for death benefits did not arise.[12] Therefore, the court held that Massey could not claim death benefits under section 5408 and the tolling provision of the statute was not applicable.[13]

The court rejected Massey's contention that it should rely on *Fisher v. Workers' Compensation Appeals Board* and *Roblyer v. Workers' Compensation Appeals Board* and find a tolling of the 240-week period while he was a minor.[14] Although the California Legislature remained silent after the courts of appeal had interpreted the statute, the supreme court reasoned that it retained the authority to reconsider the rationale behind the decision and declined to follow lower court precedent.[15] Furthermore,

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CODE §§ 5406, 5408 (West 1989).

8. *Massey*, 5 Cal. 4th at 681-82, 854 P.2d at 121, 20 Cal. Rptr. 2d at 829. "Because a minor does not have the understanding or experience of an adult, and because a minor may not bring an action except through a guardian, special safeguards are required to *protect* the minor's right of action." Amie v. Superior Court, 99 Cal. App. 3d 421, 426, 160 Cal. Rptr. 271, 273 (1979).

9. *Massey*, 5 Cal. 4th at 682, 854 P.2d at 121, 20 Cal. Rptr. 2d at 829. *See* CAL. LAB. CODE §§ 5406, 5408 (West 1989).

10. *Massey*, 5 Cal. 4th at 682, 854 P.2d at 121, 20 Cal. Rptr. 2d at 829. In *Ruiz*, the California Supreme Court found the 240-week interval "a qualifying condition in the exercise of any right to death benefits." Ruiz v. Industrial Accident Comm'n, 45 Cal. 2d 409, 414, 289 P.2d 229, 233 (1955). In *Massey*, the California Supreme Court further explained that a claim for death benefits would not arise if the 240-week period expired prior to the decedent's death. *Massey*, 5 Cal. 4th at 682, 854 P.2d at 121, 20 Cal. Rptr. 2d at 829. On the other hand, a claim for death benefits would arise and be subject to the tolling provision under § 5408 if a portion of the 240-week limitation remained unexpired upon the decedent's death. *Id.*

11. *Massey*, 5 Cal. 4th at 682, 854 P.2d at 121, 20 Cal. Rptr. 2d at 829.

12. *Id.* at 685, 854 P.2d at 124, 20 Cal. Rptr. 2d at 832.

13. *Id. See* CAL. LAB. CODE §§ 5406, 5408 (West 1989).

14. *Massey*, 5 Cal. 4th at 681, 854 P.2d at 121, 20 Cal. Rptr. 2d at 829. *See* Fisher v. Workers' Compensation Appeals Bd., 62 Cal. App. 3d 924, 133 Cal. Rptr. 471 (1976). Roblyer v. Workers' Compensation Appeals Bd., 62 Cal. App. 3d 574, 133 Cal. Rptr. 246 (1976).

15. *Massey*, 5 Cal. 4th at 683, 854 P.2d at 122, 20 Cal. Rptr. 2d at 830.

> [l]egislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence

the court noted that the 1979 amendment to section 5408 was consistent with the supreme court's interpretation of the code because both constructions of the statute presumed that the tolling provision applied only when a claim for death benefits had already accrued.[16] The majority concluded that Massey's claim had never accrued, the application of section 5408 was inappropriate, and Massey should not receive any award of death benefits.[17]

B. The Dissenting Opinion

Justice Mosk dissented from the majority opinion because the tolling provision of section 5408 was applicable, and thus, Massey was entitled to receive death benefits.[18] Justice Mosk concurred with the dissenting opinion from the court of appeal, authored by Justice Yegan, which noted that the California Legislature did not pass "corrective" legislation that would supersede the *Fisher* and *Roblyer* decisions.[19] Justice Yegan reasoned that during the fifteen years since *Fisher* and *Roblyer*, dependent plaintiffs such as Massey have received death benefits under section 5408's tolling provision.[20] Therefore, Justice Mosk believed that the court should have construed section 5408 to toll the 240-week limitation during Massey's minority.[21]

> or positive approval . . . . [S]omething more than mere silence should be required before that acquiescence is elevated into a species of implied legislation such as to bar the court from reexamining its own premises.

Id. (quoting People v. Daniels, 71 Cal. 2d 1119, 1127-28, 459 P.2d 225, 229-30, 80 Cal. Rptr. 897, 901-02 (1969) (footnote omitted)).

16. *Id.* at 683-84, 854 P.2d at 122, 20 Cal. Rptr. 2d at 830. The 1979 amendment added the words "conservator of the estate" indicating the legislature's intent that the tolling provision apply upon the decedent's death. *See* CAL. LAB. CODE § 5408 (West 1989).

17. *Massey*, 5 Cal. 4th at 685-86, 854 P.2d at 124, 20 Cal. Rptr. 2d at 832. *See* CAL. LAB. CODE §§ 5406, 5408 (West 1989).

18. *Massey*, 5 Cal. 4th at 686, 854 P.2d at 124, 20 Cal. Rptr. 2d at 832. *See* CAL. LAB. CODE § 5408 (West 1989).

19. *Massey*, 5 Cal. 4th at 686, 854 P.2d at 124, 20 Cal. Rptr. 2d at 832 (quoting Massey v. Workers' Compensation Appeals Bd., 13 Cal. App. 4th 270, 277, 8 Cal. Rptr. 2d 878, 882 (1992) (Yegan, J., dissenting)).

20. *Id.* at 687, 854 P.2d at 124, 20 Cal. Rptr. 2d at 832. *See* CAL. LAB. CODE § 5408 (West 1989); Fisher v. Workers' Compensation Appeals Bd., 62 Cal. App. 3d 924, 133 Cal. Rptr. 471 (1976); Roblyer v. Workers' Compensation Appeals Bd., 62 Cal. App. 3d 574, 133 Cal. Rptr. 246 (1976).

21. *Massey*, 5 Cal. 4th at 686-87, 854 P.2d at 124-25, 20 Cal. Rptr. 2d at 832-33

Justice Yegan, in his dissent, distinguished the majority's reliance on *Ruiz v. Industrial Accident Commission*,[22] which held that a widow was not entitled to death benefits if more than 240 weeks passed between the date of injury and the decedent's death.[23] Justice Mosk agreed with Justice Yegan's observation in distinguishing *Ruiz* from the instant case in that *Ruiz* pertained to a widow as opposed to a minor child entitled to the tolling provision under section 5408.[24]

Justice Mosk further criticized the majority's interpretation of section 5408 because it did not liberally construe the tolling of limitations in favor of the claimant as directed by precedent.[25] Justice Mosk reasoned that the legislative intent of section 5408 was to toll all limitations periods and construe such statutes in favor of the dependent minor, and thus, would have reversed the judgment of the court of appeal.[26]

III. CONCLUSION

The California Supreme Court held that a dependent claimant who filed his application less than 240 weeks after attaining majority and less than one year after the decedent's death was not entitled to death benefits.[27] The supreme court rejected two apposite cases decided by separate courts of appeal and concluded that section 5408's tolling provision did not apply when 240 weeks had expired prior to the death of the decedent.[28] The California Supreme Court's decision clarifies the appli-

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(quoting Massey v. Workers' Compensation Appeals Bd., 13 Cal. App. 4th 270, 277, 8 Cal. Rptr. 2d 878, 882 (1992) (Yegan, J., dissenting)). *See* CAL. LAB. CODE § 5408 (West 1989).

22. 45 Cal. 2d 409, 289 P.2d 229 (1955).

23. *Massey*, 5 Cal. 4th at 687, 854 P.2d at 125, 20 Cal. Rptr. 2d at 833 (quoting Massey v. Workers' Compensation Appeals Bd., 13 Cal. App. 4th 270, 278, 8 Cal. Rptr. 2d 878, 882 (1992) (Yegan, J., dissenting)). *See Ruiz*, 45 Cal. 2d. at 414, 289 P.2d at 233.

24. *Massey*, 5 Cal. 4th at 687, 854 P.2d at 125, 20 Cal. Rptr. 2d at 833 (quoting Massey v. Workers' Compensation Appeals Bd., 13 Cal. App. 4th 270, 278, 8 Cal. Rptr. 2d 878, 882 (1992) (Yegan, J., dissenting)). *See* CAL. LAB. CODE § 5408 (West 1989); *Ruiz*, 45 Cal. 2d at 410, 289 P.2d at 231.

25. *Massey*, 5 Cal. 4th at 687, 854 P.2d at 125, 20 Cal. Rptr. 2d at 833 (quoting Massey v. Workers' Compensation Appeals Bd., 13 Cal. App. 4th 270, 278, 8 Cal. Rptr. 2d 878, 882 (1992) (Yegan, J., dissenting)). *See* CAL. LAB. CODE § 5408 (West 1989).

26. *Massey*, 5 Cal. 4th at 687-88, 854 P.2d at 125, 20 Cal. Rptr. 2d at 833; *See* CAL. LAB. CODE § 5408 (West 1989).

27. *Massey*, 5 Cal. 4th at 681, 854 P.2d at 120-21, 20 Cal. Rptr. 2d at 828-29.

28. *Id.* at 685, 854 P.2d at 124, 20 Cal. Rptr. 2d at 832. *See* CAL. LAB. CODE §§ 5406, 5408 (West 1989).

cation of section 5408's tolling provision by establishing that a claim for death benefits must arise before the statute of limitations may be tolled.[29]

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29. *Massey*, 5 Cal. 4th at 682, 854 P.2d at 121, 20 Cal. Rptr. 2d at 829. *See* CAL. LAB. CODE § 5408 (West 1989).