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## California Custody Awards to Non-parents: A View of Civil Code Section 4600

### INTRODUCTION

Within the last five years the California Legislature has enacted a comprehensive *Family Law Act*.<sup>1</sup> Section 4600<sup>2</sup> of this act covers custody proceedings for minor children, the preferences to be considered when an award of custody is made, and the allegations necessary when an award is made to a non-parent. Under prior California law, custody of a minor child could be made to a non-parent only after an express finding of unfitness of the natural parent. Section 4600 has obviated the necessity of first finding parental unfitness. Now, before the parent may be deprived of custody, the court must first find that it would be detrimental to the child to be in the custody of the parent, and secondly that an award to a non-parent would be in the best interests of the child.

On its face the dual findings required under section 4600 would seem to be a less strict standard than that of parental unfitness.

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1. CAL. CIV. CODE § 4400, *et seq.* (West 1970).

2. CAL. CIV. CODE § 4600 (West Supp. 1974):

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent according to the best interests of the child.

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may in its discretion, exclude the public from the hearing on this issue.

The thesis of this comment is that although the findings required under section 4600 have been modified, there will be little or no change in the frequency of custody awards to non-parents. The new *Family Law Act* will not significantly change California custody awards to non-parents because of (1) the level of evidence required in custody proceedings; (2) the constitutional limitations placed on the court involving relations between parent and child; and (3) the expressed legislative intent behind section 4600.

The cumulative effect of these three factors will be such that, although procedurally the custody action has been modified by section 4600, this act will not significantly increase the removal of minor children from their natural parents.

#### THE CHILD AS PROPERTY AND OTHER CONSIDERATIONS

The California courts have generally followed the rule that when there is a custody proceeding for a minor child the court must give preference to the natural parents before custody may be given to strangers.<sup>3</sup> This basic rule of parental preference has been rationalized and expressed through two basic theories.

The first of these theories was expressed in the case of *In re Campbell*.<sup>4</sup> The court discussed the common law basis for the right of the parents as against strangers to the custody of minor children. It cited Kent's *Commentaries* and his discourse on the natural right of the parents to the custody of the child. This court determined that:

Under the general law . . . the father has a natural right to the care and custody of his child. . . . [T]he right of custody is essentially the same as the right of property. For though the subject of the right is not saleable, it is valuable and of all species of property the most valuable to the parent.<sup>5</sup>

The court continued its discussion of the parents' natural right to custody in its statement that the court was not free to appoint custody to a stranger unless there was evidence of parental incompetence.<sup>6</sup>

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3. *Stewart v. Stewart*, 41 Cal. 2d 441, 260 P.2d 44 (1953).

4. 130 Cal. 380, 62 P. 613 (1900). This case was a guardianship proceeding decided under California Civil Code § 197, which is now California Probate Code § 1407.

5. *Id.* at 382, 62 P. at 614.

6. *Id.* at 382-83, 62 P. at 614.

This theory of natural right was followed and reaffirmed by a series of cases which spanned over fifty years. In *Newby v. Newby*<sup>7</sup> and in *Stever v. Stever*<sup>8</sup> (which upheld the earlier *Newby* rationale) the court held that the "interest of a child will be best subserved by awarding its care to a parent, unless he or she is unfit to have its care."<sup>9</sup> The court held that the legislative intent behind the custody statutes at issue,<sup>10</sup> when construed together, "contemplate that the natural right of the parent to the care of a minor child, if a fit and proper person, shall prevail as against an entire stranger."<sup>11</sup>

This natural right theory was further buttressed by the cases of *Roche v. Roche*<sup>12</sup> and *Stewart v. Stewart*.<sup>13</sup> In *Stewart* the court recited the well established rule that "The court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide. . . ."<sup>14</sup>

In *Roche*, however, the lower court based its decision directly on section 138 of the Civil Code.<sup>15</sup> The trial court awarded custody to the child's grandparents rather than to the parents. Section 138 stated that the court, in awarding custody of a minor child, should be guided by what appeared to be the child's "best interests."<sup>16</sup> The Supreme Court reversed the lower decisions at the trial and appellate levels. It flatly declared that the parental right was such that it required the court to award custody to a parent unless the parent was found to be unfit.<sup>17</sup>

This principle of parental preference in custody proceedings was expressed differently by Justice Traynor in his concurring opinion

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7. 55 Cal. App. 114, 202 P. 891 (1921). This case involved an appeal from a child custody award made in a divorce action. The case was reversed by the appellate court on the basis of California Civil Code §§ 138 and 246.

8. 6 Cal. 2d 166, 56 P.2d 1229 (1936).

9. 55 Cal. App. 114, 116, 202 P. 891, 892 (1921).

10. California Civil Code § 138, which was repealed by Stats. 1969, c. 1608, p. 3313 and replaced by California Civil Code §§ 4600 and 197.

11. *Supra* note 9.

12. 25 Cal. 2d 141, 152 P.2d 999 (1944).

13. 41 Cal. 2d 447, 260 P.2d 44 (1953). The mother appealed a custody award to a non-parent on the basis that the award had been made without first having found the mother unfit.

14. *Id.* at 451, 260 P.2d at 47.

15. § 138 of the California Civil Code, since replaced by § 4600, provided that in awarding custody of minor children the court should be guided by what would be in the child's best interests. It also stated that if the child were of sufficient age and able to form an intelligent preference, the court could consider that preference in awarding custody.

16. *Id.*

17. 25 Cal. 2d 141, 143, 152 P.2d 994, 1000 (1944).

in *Guardianship of Smith*.<sup>18</sup> The modern view was that the preference was to be given to the natural parents because the parents' claim to first consideration was in fact synonymous with the best interest of the child.<sup>19</sup> A fit parent would naturally be responsible for the child's welfare.<sup>20</sup> Additionally the court wished to preserve established family units<sup>21</sup> and to refrain from intruding into areas of life that should be left to the private interest.<sup>22</sup> Justice Traynor admitted that cases could possibly arise in which the child's interests would not be served by a custody award to the parents.<sup>23</sup> However, in such cases the parents' insistence on their right to the child's custody when such custody would obviously harm the child would itself be evidence of unfitness.<sup>24</sup>

This policy of parental preference based on the best interests of the child found support in later decisions.<sup>25</sup> Although the courts applied the same rule of law, the difference was that the decisions were written on the basis of modern considerations in regard to family life, and not on the outdated feudal law of an analogy to property rights.

#### UNFITNESS AS A BAR TO PARENTAL RIGHT

As previously stated, parental preference in child custody proceedings could only be overcome after it was proven that the natural parents were unfit to care for the child. The definition of "unfitness" was never thoroughly developed in the decisions that dealt with the issue of parental unfitness.<sup>26</sup> The question of fitness

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18. 42 Cal. 2d 91, 265 P.2d 888 (1954). The trial court had awarded custody of the minor children to the daughter of a deceased mother. The natural father appealed on the basis that the trial court had not found the father unfit. The Supreme Court, speaking through Justice Carter, reversed.

19. *Id.* at 94, 265 P.2d at 891.

20. *Id.*

21. *Id.*

22. *Id.* at 96-97, 265 P.2d at 892.

23. *Id.*

24. *Id.*

25. *In re Miller*, 244 Cal. App. 2d 454, 53 Cal. Rptr. 211 (1966); *Marlow v. Wene*, 240 Cal. App. 2d 670, 49 Cal. Rptr. 881 (1966); *Application of Miller*, 179 Cal. App. 2d 12, 3 Cal. Rptr. 450 (1960).

26. *Guardianship of Turk*, 194 Cal. App. 2d 736, 15 Cal. Rptr. 256 (1961); *Guardianship of Smith*, 147 Cal. App. 2d 686, 306 P.2d 86 (1957); *Guardianship of Morris*, 107 Cal. App. 2d 758, 237 P.2d 989 (1951).

was one of fact and there were basically no strictly applied judicial standards.<sup>27</sup> Rather than use strict criteria the court generally considered the parents' character, emotional stability, neglect or disdain toward the interests of the child, and the parents' acts or conduct toward the child.<sup>28</sup>

One of the more recent discussions of unfitness was contained in the case of *O'Brien v. O'Brien*.<sup>29</sup> That case quoted a definition followed in a Massachusetts case<sup>30</sup> which stated:

[T]he word usually although not necessarily imports something of moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects.<sup>31</sup>

The quoted definition rather loosely defined parental unfitness as either moral delinquency or incapacity to perform the obligations of a parent.

In order to apply a stricter test of unfitness strong evidence of unfitness was required before the preferential right of the parent could be overcome. Thus the fact that a mother was poor and had to seek charity to support her child was held not sufficient to justify an award of the child to a third party.<sup>32</sup> Nor was evidence of some lack of integrity,<sup>33</sup> or past indifference to the child<sup>34</sup> held to bar the right of the parent to custody of the child.

Further limits on custody procedures were established when the courts also refused to grant custody to non-parents "merely because it feels that they may be more fit or that they may be more able to provide financial, educational, social or other benefits."<sup>35</sup> The effect of this qualification in addition to the requirement of clear and convincing proof of unfitness tended to limit placement of children with non-parents. Only when the court was convinced that the physical, moral, and emotional well-being of the child was imperiled because of the unfitness of the parents would a custody

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27. *Guardianship of Wisdom*, 146 Cal. App. 2d 635, 304 P.2d 641 (1956); *Guardianship of Casad*, 106 Cal. App. 2d 134, 234 P.2d 647 (1951).

28. *Id.*

29. 259 Cal. App. 2d 418, 66 Cal. Rptr. 424 (1968).

30. *Richards v. Forrest*, 278 Mass. 547, 180 N.E. 508 (1932).

31. 259 Cal. App. 2d 418, 422, 66 Cal. Rptr. 424, 427 (1968).

32. *In re Mathews*, 174 Cal. 679, 164 P. 8 (1917).

33. *In re Akers*, 184 Cal. 514, 194 P. 706 (1920).

34. *In re Green*, 192 Cal. 714, 221 P. 903 (1923).

35. 41 Cal. 2d 447, 451-52, 260 P.2d 44, 47 (1953).

award to a non-parent take precedence over an award to the natural parent.

This rule of parental preference and its corollary that the parent must be proven unfit before a custody award would be granted to a non-parent did not totally escape criticism.<sup>36</sup> However, as previously shown, the rule was repeatedly affirmed by the California courts. In 1969 the California Legislature passed a comprehensive *Family Law Act* which included statutes to cover child custody proceedings.<sup>37</sup> Section 4600<sup>38</sup> of this Act has significantly changed the procedure involved in a custody award to a non-parent. The remainder of this article will analyze the changes that took place with the passage of section 4600 and its effect and possible implications in regard to custody awards to non-parents.

#### AN ANALYSIS OF CHANGES UNDER SECTION 4600

Section 4600 of the *Family Law Act* specifically states that it shall apply "In any proceeding where there is at issue the custody of a minor child." Therefore, in any of the various proceedings in California where custody of the child is either a central or collateral function of the action section 4600 will be applied.<sup>39</sup> Section 4600 has specifically been applied in guardianship proceedings<sup>40</sup> and in custody proceedings arising in the juvenile court.<sup>41</sup> It has been declared the uniform rule in all custody proceedings.<sup>42</sup>

Subsection (a) retains the parental preference rule which was established under previous statutory and case law. The second paragraph of section 4600 has abrogated the old requirement of parental unfitness before an award to a non-parent may be ordered. Under the new statute a finding of unfitness of the parent is not required, but a finding of both of two statutory conditions

36. *Guardianship of Casad*, 106 Cal. App. 2d 134, 234 P.2d 647 (1951); *Shea v. Shea*, 100 Cal. App. 2d 60, 223 P.2d 32 (1950) (dicta); *Roche v. Roche*, 25 Cal. 2d 141, 144, 152 P.2d 999, 1000 (1944) (dissenting opinion).

37. CAL. CIV. CODE, §§ 4600-4603 (West 1970).

38. See *supra* note 2.

39. See generally, Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703 (1971).

40. *Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973).

41. *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

42. *Id.*

is essential before an award to a non-parent.<sup>43</sup>

Section 4600 states that the court shall first make express findings that (1) an award of custody to the parents would be detrimental to the child and (2) an award to the non-parent would be in the best interests of the child. The new code specifically recognizes and reinforces the parental preference stated in the first paragraph of the section by requiring the court to make the dual findings of detrimental effect and best interests of the child.

It may be argued that the new law has reduced the substantial standard of parental unfitness. Theoretically, therefore, more awards to non-parents would be made under section 4600 than were ordered under the old standard of unfitness. What may be detrimental to a minor child and in his best interests would seem to be a more liberal test than the former requirement of parental unfitness. Additionally, under the new law what is "detrimental" has not been defined. The language of section 4600, if broadly construed, could well result in more awards of custody of minor children to non-parents.

However, the potential for an increase in the number of awards to non-parents, when considered in conjunction with three important modifying factors will be significantly lessened.

#### THE LEGISLATIVE INTENT BEHIND SECTION 4600

The legislative intent in respect to parental preference and awards of custody to non-parents was stated in the report of the Assembly Judiciary Committee. The report expressed the concern of the Committee that courts might unilaterally remove minor children from the custody of parents merely because the court disapproved of the parents' mode of living.<sup>44</sup> The reason for the new amendment was for the "Limitation of the court to award custody of children to persons other than a parent. . . ."<sup>45</sup> (This was the "primary intent of the provisions in the new act relating to child custody."<sup>46</sup>)

The primary intent of the new act was to make it more difficult for the court to award custody to a non-parent. For a court to greatly increase awards to non-parents would be to ignore the expressed intent of the Legislature.

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43. 30 Cal. App. 3d at 952, 106 Cal. Rptr. at 660 (1973).

44. 4 CAL. ASSEMBLY J. (1969 Reg. Sess.) at 8060-8061.

45. *Id.* at 8060.

46. *Id.*



As can be readily seen from the Committee report, the legislative purpose was to reinforce the right of parental preference, not to weaken it. The report further stated that, "The important point is that the intent of the Legislature is that the court consider parental custody to be highly preferable. Parental custody must be clearly detrimental to the child before custody can be awarded to a non-parent."<sup>47</sup> The enactment of section 4600 changes the former requirement of detriment to the child, but the express intent of the Legislature is that an award to a non-parent should only be made in highly unusual cases.

#### SECTION 4600 AND THE CALIFORNIA SUPREME COURT

In the recent Supreme Court case of *In re B. G.*,<sup>48</sup> the court had the first juvenile court custody case before it since the passage of the *Family Law Act*. This action was a case in which the superior court had awarded custody to a non-parent against the claim of a parent expressly found fit to provide care for the children.

Two years earlier the court had found the children to be dependent children of the court and had placed them in the custody of foster parents when their father had died shortly after having entered this country as a political refugee from Czechoslovakia.<sup>49</sup> The mother, who had remained in Czechoslovakia, had not been notified of the original dependency hearing.<sup>50</sup> Though the court found the mother was a fit parent it concluded that the children's best interests required the continuation of maintenance in a foster home.<sup>51</sup> It made no finding of whether an award of custody to the mother would be detrimental to the children.<sup>52</sup>

The Supreme Court reversed. The court, speaking through Justice Tobriner, stated that section 4600 expressly gave preference to parents over non-parents in custody proceedings.<sup>53</sup> Justice Tobriner concluded, "that section 4600 permits . . . custody to a non-parent against the claim of a parent only upon a clear showing that such award is essential to avert harm to the child."<sup>54</sup> He

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47. *Id.* at 8061.

48. *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

49. *Id.* at 684-85, 523 P.2d at 246-48, 114 Cal. Rptr. at 446-48.

50. *Id.* at 685, 523 P.2d at 248, 114 Cal. Rptr. at 448.

51. *Id.* at 686-87, 523 P.2d at 248-49, 114 Cal. Rptr. at 448-49.

52. *Id.* at 687, 523 P.2d at 249, 114 Cal. Rptr. at 449.

53. *Id.* at 698-99, 523 P.2d at 255, 114 Cal. Rptr. at 455-56.

54. *Id.*

referred to the earlier California case of *Ferreira v. Ferreira*,<sup>55</sup> in which the court had characterized the harm necessary to remove a child from the custody of his parents.<sup>56</sup> The parent was to receive custody unless the act would "seriously endanger the child's health or safety."<sup>57</sup> Such jeopardy to the child included proof of "substantial emotional harm or other forms of injury in addition to physical mistreatment."<sup>58</sup> A mere allegation that the award be based solely on the child's best interest or welfare is not sufficient when an award to a non-parent is sought.<sup>59</sup>

The California Supreme Court has placed strict limits on the application of section 4600 in its decisions which have involved custody awards to non-parents. The court has stated that only in an exceptional case should the court in such a custody proceeding move to place a child in a home other than that of the natural parent.

#### SECTION 4600 AND THE FOURTEENTH AMENDMENT

The fourteenth amendment of the U.S. Constitution presents an additional limitation on California courts when the rights of parents and their children are involved. Under guidelines enunciated by the United States Supreme Court, any state action is subject to certain limitations when it touches familial rights and relations. When an award of child custody has been made to a person other than the natural parent, the attorney who represents that parent should make sure such award has been made within the strictures of the fourteenth amendment. Although the rights guaranteed have been enunciated in broad terms, the parents and their attorney should make every effort to ensure that their particular case has been given the protection that the fourteenth amendment affords to familial rights and relations.

Certain rights are guaranteed protection under the due process clause of the fourteenth amendment if they "are so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>60</sup> In *Griswold v. Connecticut*<sup>61</sup> the Court stated that various guarantees under the fourteenth amendment have created certain zones of privacy upon which the state *must not trespass*.

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55. 9 Cal. 3d 824, 512 P.2d 304, 109 Cal. Rptr. 80 (1973).

56. *Supra* note 48 at 699, n.27, 523 P.2d at 258, n.27, 114 Cal. Rptr. at 458, n.27.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

61. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

One of these zones of privacy is the "private realm of family life which the state cannot enter."<sup>62</sup> Logically there would seem to be a fourteenth amendment right on the part of a parent to the custody of his child. This statement, of course, is subject to the qualification that the state may enter into private family relations if there is a proper and substantial state purpose.<sup>63</sup>

The protection of the welfare of children is a legitimate and compelling state interest. Yet the countermanding rights "to marry, establish a home and bring up children,"<sup>64</sup> are grouped among "the basic civil rights of man."<sup>65</sup> Section 4600, as all laws which seek to effect and control basic human liberties, must be strictly construed in order not to violate these liberties.

The dual findings necessary before a child may be removed from the custody of the parent must be narrowly applied so as not to transgress the parents' rights to raise their family as they see fit. Unless there is a clear and present need to remove the child in order to protect his physical or emotional well being the courts should not disregard the parents' right to custody of their children.

#### CONCLUSION

Through an analysis of legislative intent, case law, and constitutional implications, this comment shows that section 4600 of the *Family Law Act* will not present a radical change in child custody awards to non-parents. Because of the nature of the subject and the unique interests involved, child custody awards to non-parents will always be subject to strict standards and close scrutiny. The California courts have always given preference to parents and section 4600 has not replaced this traditional concept.

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62. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

63. *Zemel v. Rusk*, 381 U.S. 1 (1965).

64. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

65. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).