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Recent Trends in California Law Concerning the Best Interests of the Child

"Stress has been laid in argument upon the welfare of the child, her prosperity and happiness. We do not dwell upon such considerations, for they are foreign to the issue." Thus spoke the late Justice Cardozo when handing down the New York Supreme Court's opinion in the 1924 case, *In Matter of Bistany*.¹ Justice Marks of the Fourth District Court of Appeals reflected this continuing thread of reasoning when he stated in the 1947 case of *Adoption of McDonnell*:² "It is conceivable, of course, that granting the adoption might promote the moral and temporal interests of the child. My investigation indicates that petitioners are persons of high standing in their community and have ample financial resources to extend to the child comforts and advantages which otherwise might be denied her. Unfortunately, however, the law does not permit me to give weight to such considerations. The rights of the natural parents are paramount."

In the twenty-five years which have passed since Justice Marks wrote these words, the legal attitude surrounding the law of adoption has shifted from primary and pre-emptive concern for the rights and interests of the natural parents to one which now holds paramount the best interests of the child.³ There are other indicia

1. *In Matter of Bistany*, 239 N.Y. 19, 145 N.E. 70 (1924).

2. *Adoption of McDonnell*, 77 Cal. App. 2d 805, 176 P.2d 778 (1947). See also, *In re Kitchens*, 116 Cal. App. 2d 254, 253 P.2d 690 (1953), a case involving an agency adoption where the court analogized the agency to a parent and required its consent as a jurisdictional pre-requisite to an agency adoption, *In re Bisenius*, 173 Cal. App. 2d 518, 343 P.2d 319 (1959) holding the welfare of the child is not an issue in abandonment proceedings, and *Ex parte Clark*, 87 Cal. 638, 25 P. 967 (1891) for the old rule that adoption statutes being in derogation of the common law are to be strictly construed in favor of the natural parents.

3. For some minor and major changes favorable to the child see: *In re Barents*, 99 Cal. App. 2d 748, 222 P.2d 488 (1950), which analyzed a 1949 addition to CAL. CIV. CODE § 226 (West 1949), making consent in an independent adoption revocable only with court approval. This case also analyzed a 1945 addition to the CAL. CIV. CODE § 226 (West 1945), which gave the court jurisdiction to proceed with an adoption despite the agency's

of change. Adoption and related proceedings have become more adversary. Decisions made by adoption agencies as to what is best for the child, once accepted as a matter of course, are no longer adopted by the courts as conclusive of the matter.⁴ In many instances the role of final arbiter is assumed by the court.⁵ Additionally, prospective adoptive parents have taken a more vigorous attitude in the defense of their interests in, and the welfare of, the adoptive child.⁶

Consistent with these developments are several recent expansions of adoption and related law implementing the concept that the interests of the child are of primary consideration. The first area covered in this article concerns the appointment of a guardian

lack of approval or consent. See also, *Adoption of D.S.*, 107 Cal. App. 2d 211, 236 P.2d 821 (1951), a case of independent adoption where the court held the agency's consent to the adoption unnecessary and ordered the adoption as in the best interests of the child; *Adoption of McDonald*, 43 Cal. 2d 447, 274 P.2d 860 (1954), a case of agency adoption where the court held the agency's consent to the adoption unnecessary. *Adoption of McDonald*, *supra*, is distinguishable from *In re Kitchens*, *supra* note 2, since in this case the child was relinquished but never placed with petitioners. *In re Kitchens*, *supra* note 2, is still good law and the holding is codified in CAL. CIV. CODE § 224n (West 1953) which remains an anachronism in California's progressive adoption code.

For other changes reflecting the attitude of the courts and legislature concerning the child's welfare see: *Adoption of Laws*, 201 Cal. App. 2d 494, 20 Cal. Rptr. 64 (1962), allowing the mother of an illegitimate child to act on behalf of both parents in giving consent, and *Adoption of Barnett*, 54 Cal. 2d 370, 345 P.2d 18 (1960), overturning the strict construction rule of the adoption statutes in favor of the natural parents. See also CAL. CIV. CODE § 226 1(d) (West 1963) which precludes the minority of the mother as grounds for revocation of consent, and CAL. CIV. CODE § 227d (West 1951), setting out a statute of limitations for adoptions. Compare, *Arnold v. Howell*, 98 Cal. App. 2d 203, 219 P.2d 854 (1950), with *Walter v. August*, 186 Cal. App. 2d 395, 8 Cal. Rptr. 778 (1960), in regard to CAL. CIV. CODE § 227d (West 1951).

4. One of the primary roles of adoption agencies is to furnish the court with information concerning the child's suitability as a subject for adoption, and the suitability of the adoptive parents. See CAL. CIV. CODE §§ 226a, 226.6 and 227aaa (West 1973). The agency filing the report can make a favorable or unfavorable recommendation, but the court is not bound although it will give the recommendation due weight in rendering a decision.

5. See CAL. CIV. CODE §§ 224n, 222a, 226b, and 226.4 (West 1973).

6. The most recent development in support of this contention is the case of *Sacramento Super. Ct. v. Dept. of Soc. Wel.*, Cal. App. Rpt., Jan. 29, 1973, at 39. In this case the adoptive parents successfully challenged the constitutionality of a part CAL. CIV. CODE § 224n (West 1970) on due process grounds. The court held that where an adoption petition has not yet been filed by the persons with whom the agency has placed the child and the agency has decided to terminate placement, notice and a hearing must be given the prospective parents. The scope of review of the agency's decision is a trial *de novo* and the central consideration is whether the abrogation of placement is justified in the best interests of the child.

after relinquishment by the parent, and the second relates to a new standard used in deciding whether a child is to be declared free from the custody and control of his parents.

THE APPOINTMENT OF A GUARDIAN AFTER RELINQUISHMENT

An adoption is accomplished in stages. Relinquishment of a child to an agency is a necessary first stage if the natural parents have chosen an adoption agency as the vehicle for placement of the child.⁷ The legal effect of relinquishment is that it severs the natural parents' rights to custody and control over the child, it places custody and control in the agency, and it sets the child free for adoption.⁸

Since the agency has custody of the child after relinquishment, it becomes, in effect, the child's quasi-guardian. The legal relationship between a relinquished child and the adoption agency, however, is distinguishable from legal guardianship in that the latter requires a legal proceeding.⁹ Still, the duties to the child of the adoption agency and those of a legal guardian are similar. Given these similarities, the question arises as to why anyone other than the adoption agency should be appointed the guardian of a relinquished child. In the normal course of events guardianship in this situation is unnecessary. But there are cases where guardianship is not only desirable and convenient, but necessary to protect the welfare of the child.

The appointment of a guardian after relinquishment has a limited history. Its occurrence is rare. In this author's knowledge there are only three reported cases.¹⁰ The case which established the precedent was *Guardianship of Henwood*.¹¹ The minors in *Henwood*, ages eight and five, were relinquished to an adoption agency by their father after the mother's death. The grandparents

7. See CAL. CIV. CODE § 224m (West 1971) for the method of accomplishing a relinquishment. An alternative vehicle for placement of the child is independent placement. See note 15 for an explanation of the differences.

8. See CAL. CIV. CODE § 224n (West 1970).

9. See CAL. PROB. CODE §§ 1400-1410 and 1440-1443 (West 1972).

10. See *San Diego Dept. of Pub. Wel. v. Super. Ct.*, 7 Cal. 3d 1, 496 P.3d 453 (1972); *Guardianship of Henwood*, 49 Cal. 2d 639, 320 P.2d 1 (1958) and *Adoption of Pierce*, 15 Cal. App. 3d 244, 93 Cal. Rptr. 171 (1971).

11. *Guardianship of Henwood*, *supra*, note 10.

wished to keep the children but the agency disapproved on the basis of the grandparents' age. The grandparents could not adopt the children because they could not file a petition for adoption. Under Civil Code Section 224n, once a child has been relinquished, no petition for adoption can be filed except by the persons with whom the agency has placed the child.¹² This particular code section affects the jurisdiction of the court. It cannot hear any petition filed in violation thereof. Subsequently, the grandparents filed a petition for guardianship which the court granted.

The primary reason compelling the court to grant the grandparents' petition was the unadoptability of the children. The court took judicial notice of this circumstance. Although not explicitly stated in the case, the court was influenced by the probable future of the children under agency custody; a succession of foster homes with the possibility of the children being separated, or institutionalization until adulthood.

The opinion in *Henwood*, however, was cautious. The criteria formulated for the appointment of a guardian after relinquishment were limited to the facts of that case. There had to be a showing either that the children were unadoptable or the agency was unfit.¹³

The inadequacy of these criteria and the need for more flexibility were illustrated in *Guardianship of Runyon*,¹⁴ a case decided under the *Henwood* rule.

The minor in *Runyon* was relinquished at birth to an adoption agency. Thereafter, he was placed with foster parents with whom he spent eight years. The prospective parents wished to adopt him, but the agency considered them unsuitable. They could not file an adoption petition because the agency refused to place the child with them. After eight years the agency found people willing to adopt the child. The foster parents then filed a petition for guardianship. The court, following *Henwood*, denied the petition since the child was obviously adoptable.

The result reached in *Runyon* was inconsistent with the concept of promoting the child's welfare. Few would contend that severing an eight-year relationship would promote the child's security and emotional stability. Realizing the need for a less narrow standard,

12. See CAL. CIV. CODE § 224n (West 1970).

13. The CALIFORNIA CIVIL CODE does not provide for the appointment of a guardian after relinquishment. The authority for the appointment stems from CAL. PROB. CODE §§ 1405-1406 (West 1972), which provides for the appointment of a guardian whenever necessary and convenient and gives as the standard the best interests of the child.

14. *Adoption of Runyon*, 268 Cal. App. 2d 918, 74 Cal. Rptr. 514 (1969).

the court, in a recent decision, has broadened the *Henwood* standard.

In the case of *San Diego Department of Public Welfare v. Superior Court*,¹⁵ the child was placed for adoption by the natural mother with prospective adoptive parents. The baby was well cared for for almost two years before all pre-adoption proceedings were completed. However, the natural mother had never signed a consent form, a jurisdictional prerequisite in an independent adoption.¹⁶ The adoption agency induced the natural mother to refuse to sign the required consent form for the adoption and procured a relinquishment from her. The adoptive parents had filed a petition for adoption prior to the relinquishment and a petition for guardianship subsequent thereto.¹⁷

The adoption agency initiated a proceeding to gain custody of the child, but the court, departing from *Henwood*, appointed the prospective adoptive parents guardians, specifically finding the child adoptable without a showing of agency unfitness. In the opinion, the court stated that the best interests of the child would be promoted by the guardianship and that it would be contrary to the spirit of *Henwood* to hold otherwise. The holding in *San Diego* has introduced a flexibility into adoption law which could not be

15. *San Diego Dept. of Pub. Wel. v. Super. Ct.*, *supra*, note 10.

16. See CAL. CIV. CODE § 226.1 (West 1973) for the method of giving consent in an independent adoption. Reference has frequently been made to agency versus independent adoption. The primary difference is the role of the adoption agency. In an independent adoption the mother (or the father or both) chooses the adoptive parents and places the child with them. These private parties have the primary responsibility for initiating and completing the adoption. In an agency adoption the child is relinquished to the agency which then has the responsibility of caring for the child, placing it and initiating and completing the adoption. In both instances, however, the agency has an investigative function and must report to the court.

17. The time for filing an adoption petition where there has been an independent placement and then a relinquishment is crucial. If the petition is filed prior to the relinquishment the agency has no control over the adoption except an investigative one. If the petition is filed after relinquishment the agency has complete control over the child and can halt the adoption if it so desires. This is an excellent illustration of the differences between agency and independent adoptions. A relinquishment after an independent placement where no adoption petition has been filed prior to the relinquishment transforms an independent adoption into an agency adoption.

achieved under *Henwood*. The only showing which need now be made is that the guardianship after relinquishment is necessary to promote the child's welfare.

The most difficult problem with the *San Diego* test will arise in the application to future cases. To illustrate, consider the following hypothetical.

A child is placed with prospective adoptive parents by the natural parents. There is a subsequent relinquishment to an adoption agency, but a failure to file an adoption petition by the prospective parents prior to such relinquishment. The prospective parents now file a guardianship petition with the court. What result on the guardianship petition? If the court grants the petition, it is impliedly holding the guardianship preferable to adoption. The guardians cannot adopt because the agency has not placed the child with them. What has been identified as a meaningful and emotional relationship between the guardians and the child has begun, and as the child becomes older he becomes less adoptable. There is a strong possibility under these circumstances that the child will never be adopted even though there might be persons who desire to adopt.

The *Henwood* court was not unaware of this difficulty and commented on it in dicta. However, it was of minor importance in that case since the children had only a slight chance for adoption under agency custody anyway. This difficulty was also absent in *San Diego*. There, the adoption was pending, the adoption petition having been filed prior to the relinquishment. The agency could not have prevented that adoption if the court found it to be in the best interests of the child.¹⁸ The guardianship petition in *San Diego* was granted to prevent a transfer of custody to the agency while the adoption proceeded. A case which would require a court to choose between guardianship and adoption has not yet arisen for decision under the broader criteria. The decision a court will reach in this situation can be discussed only in terms of probability, taking into account the factors likely to influence a court.

Among an infinite variety of factors, the age of the child is likely to be important in determining whether a guardianship petition should be granted. In this respect *Henwood* will continue to have vitality although it has been superseded by *San Diego*. The older

18. CAL. CIV. CODE § 226.8 (West 1963) provides for review by the Superior Court where the agency recommends denial of an adoption petition. The court can grant or deny the petition depending on the best interests of the child, but giving due weight to the recommendation.

the child the less its chances for adoption. Thus the court would find less difficulty in granting the guardianship petition where an older child is involved. However, where the agency has found people willing to adopt the child regardless of age, this factor is not important. Of paramount importance in this situation is the nature and duration of the relationship between the prospective guardian and the child. Courts are reluctant to sever long and continued relationships and this may be true even if the child could be adopted. The longer the relationship the more reluctance on the part of the court to sever it. Additional considerations here would be the greater suitability of either the prospective guardians or the prospective adoptive parents chosen by the agency. Also the legal advantages to the child in being adopted would be a factor. The granting of a guardianship petition which would preserve the child's environment but prevent an adoption is an inadequate solution to this problem. The fact that the court could be presented with such a difficult choice indicates a pressing need for a modification of that part of Section 224n of the Civil Code which prohibits the filing of an adoption petition after relinquishment except by those persons with whom the agency has placed the child.¹⁹ This particular code section is the heart of the problem. The problem could be remedied by an addition to the code allowing those persons who have had a continuing relation with the child, which in all respects is identical to parenthood, to file an adoption petition even if there has been a relinquishment subsequent to the advent of this relationship. The time for the filing of a petition is a mere fortuitous event which should not be allowed to control the future of a child. So long as an adoption agency can sever a relationship between a child and those acting as his parent without a court review, there can be no guarantee that the welfare and interests of the child will be given full consideration.

The legislative purpose behind that area of Section 224n under discussion is to prevent competition for the child by a multitude

19. The relevant part of CAL. CIV. CODE § 224n (West 1970) reads, "No petition may be filed to adopt a child relinquished to a licensed adoption agency. . . ., except by the the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency." This particular part withstood constitutional attack on the grounds of due process and equal protection in *Adoption of Runyon*, *supra*, note 13.

of parties who want to adopt and to promote order in procedure.²⁰ Neither purpose would be frustrated by allowing those persons who are acting as parents without an actual adoptive placement or who have had a child placed with them by the natural mother pursuant to an independent adoption, to file an adoption petition if the child has been subsequently relinquished. It makes little difference who has placed the child or whether there has been a formal placement at all. The most important consideration is the child and the relationship that has developed, not the adoption agency and its desires.²¹ The remedy suggested can be supported as consistent with the child's welfare since it would promote emotional stability and security for the child by providing continuity of relationship and environment. It would also be consistent with the idea which has found acceptance in the legislature that the court is to determine what is in the child's interests.²² The agency, by not placing the child with those persons who have already had a continuing relationship with it, is deciding what is in the child's best interest. This crucial consideration should be left to an unbiased body and the court is peculiarly suited to this function. Allowing guardians to file an adoption petition, of course, will not insure an adoption by them. What it will insure, however, is that the child's welfare will be decided by an unbiased judge. Once the petition is before the court it is the court that decides whether the adoption petition should be granted and the only criterion used for this determination is the best interest of the child.

It may be that a legislative change in Civil Code Section 224n

20. The legislature made no comment in CAL. STATS. 1955, C. 949 P. 1835, § 1 as to the purpose of the statutory addition. However, it is obvious that if there were no provision such as that under discussion, there would be considerable chaos if anyone could walk into adoption facilities and pick the child they desire. This rationale does not apply to the suggested change since the child would be residing already with those who desired to file an adoption petition. The suggested change would not abrogate this legitimate purpose of the statute.

21. The court is cognizant of the fact that emotional attachments do not await an official imprimatur. In *Sacramento Super. Ct. v. Dept. of Soc. Wel.*, *supra*, note 6 at 41, the court said: "Gain of a child for adoption fulfills the prospective parents' most cherished hopes. The event marks the onset of a close and meaningful relationship. The emotional investment does not await the ultimate decree of adoption. Love and mutual dependence set in ahead of official cachets, administrative or judicial."

The court is also cognizant of the fact that adoption agencies are not always unbiased. In *Guardianship of Henwood*, *supra*, note 10 at 644, the court said: "We cannot assume that adoption agencies will necessarily in all cases have such wisdom and competence that they may be set apart from other custodians and given *carte blanche* in their control of relinquished children until a petition for adoption is before the court."

22. See *supra* note 5.

will be the only method to assure that the adoptive child and the prospective adoptive parents in a guardianship capacity will have an opportunity to culminate an existing satisfactory relationship through adoption. In addition, the court may feel that to grant a guardianship petition which will prevent a certain or possible adoption flies in the face of the statute, and it will be reluctant to act under these circumstances. There is no easy solution to this problem which must await future court determinations.

DEVELOPMENTS IN ABANDONMENT PROCEEDINGS

The historical development of the "child's best interest" philosophy in the field of adoption law has been a slow process of filling in gaps in the law for the protection of the child. No code, no matter how comprehensive, can predict and encompass all fact situations likely to arise under it. Thus, there exists the necessity for piecemeal legislation. In 1965, the legislature enacted Civil Code Section 232.5 which closed one gap in the law dealing with abandonment.

Usually, an adoption requires the consent of the parents. Where, however, a child has been judicially declared free from the custody and control of its parents, consent to an adoption by the parents is not required.²³ Various parental shortcomings can serve as grounds for declaring a child free from custody and control of the parents.²³ Among these are abandonment, cruel treatment and neglect, moral depravity, felony conviction with a long prison sentence and mental illness or deficiency.²⁴ Abandonment is the ground upon which this article will focus.

Civil Code Section 232.5 mandates the court to liberally construe Section 232 of the Civil Code, along with other sections of the same chapter of which abandonment is a subdivision in order to serve and protect the interests and welfare of the child. Prior to the enactment of the statute, subdivision (a) was construed in favor of the natural rights of the parent.²⁵ Section 232.5 has its corollary in the case of *Adoption of Barnett*.^{25a} In that case, the court abro-

23. See CAL. CIV. CODE § 224 (West 1970) which sets out the conditions under which consent is dispensed with.

24. These grounds are set out in CAL. CIV. CODE § 232 (West 1971).

25. See *In re Bisenius*, *supra*, note 2.

25a. *Adoption of Barnett*, *supra*, note 3.

gated the common law rule that the adoption statutes were to be construed in favor of the rights and interests of the natural parents. The court adopted as its standard the philosophy of the best interest of the child.

A great deal of time and research were spent in attempting to collect and analyze cases decided under Civil Code Section 232.5, and only four such cases could be found.²⁶ Of these the first has no appellate decision, the second was decided on the basis of earlier opinions handed down before the enactment of Section 232.5 and the third commented on the statute only in dicta.²⁷ However, Section 232.5 was the deciding factor in declaring the child abandoned in *Adoption of Morrow*, and a comparison of *Morrow* and cases decided before the enactment of Section 232.5 indicates a departure from previous law.

The child in *Morrow* was born in 1958 and declared a ward of the juvenile court in 1964, based on parental neglect. The wardship lasted for four years before the child was declared abandoned so the adoption could proceed. The natural mother requested permission to see the child but permission was refused. She requested a second time to visit the child and was refused again. Based on these facts the child was declared abandoned for failure to communicate within the statutory period required in subdivision (a) of Civil Code Section 232.

On similar facts in other cases decided under the same subdivision, the court has consistently refused to sustain the abandonment petition. Consider *In Re Williams*.²⁸ In that case the mother left the child with friends so she could search for a job. The friends, without the mother's knowledge, turned the child over to the welfare authorities. When the mother returned, she endeavored to get the child back. The welfare department refused to return the child and would not permit her to visit him. The child was then made a ward of the juvenile court. Abandonment proceedings were brought against the mother under Section 701(a) of the Welfare and Institutions Code but the court denied the petition.²⁹ The court

26. *Sluis v. Welch*, Cal. App. Rpts. Jan. 22, 1973 at 10, *Adoption of Oukes*, 14 Cal. App. 3d 459, 92 Cal. Rptr. 390 (1971), *In re Morrow*, 9 Cal. App. 3d 39, 88 Cal. Rptr. 142 (1970), and *In re Neal*, 265 Cal. App. 2d 482, 71 Cal. Rptr. 300 (1968).

27. *Sluis v. Welch*, *Adoption of Oukes*, and *In re Neal*, *supra*, note 26, respectively. In regard to the *Oukes* case compare *In re Gano*, 160 Cal. App. 2d 700, 325 P.2d 485 (1958), and *In re Sanders*, 88 Cal. Rptr. 251, 198 P.2d 523 (1948).

28. *In re Williams*, 133 Cal. App. 2d 515, 284 P.2d 510 (1955).

29. Re-enacted into CAL. CRV. CODE § 232 (West 1961). It should be

stated that the actions of the mother did not come within the code section. That section contemplates a voluntary leaving on the part of the parents. Since the child was made a ward of the juvenile court there was no leaving within the meaning of subdivision (a) of the code. In arriving at its decision the court stressed the actions of the welfare authorities in refusing the mother visitation rights with the child.

Similarly in *In Re Jones*,³⁰ the parents of the child were divorced and custody was granted to the father. The father then remarried and brought abandonment proceedings for failure on the part of the mother to communicate within the statutory period. The court denied the petition on the grounds that one of the necessary elements to constitute abandonment was not satisfied. Since custody was awarded by court decree, the child was not "left" within the meaning of the statute.³¹

There are several elements which must be satisfied before a child can be declared abandoned: the child must be left by his parents in the care and custody of another without provision for support or without communication for a period of six months, *with intent to abandon*.³² It is clear from *Jones* and *Williams* that the word "left" in the statute has been interpreted to mean a voluntary leaving and if there was no voluntary leaving by the parent there could be no abandonment. It is equally clear that the court in *Morrow* has given the word "left by the parent" an interpretation different

noted that *In re Gano*, *supra*, note 27, and *In re Sanders*, *supra*, note 27, were decided under 701 of the CAL. WELF. & INSTT. CODE but that § 232 and § 701 are the same in all essentials.

30. *In re Jones*, 131 Cal. App. 2d 831, 281 P.2d 310 (1955).

31. In accord with *In re Jones*, *supra*, note 30, and *In re Williams*, *supra*, note 28, are *Matter of Cozza*, 163 Cal. 514, 126 P. 161 (1912), and *In re Cattalini*, 72 Cal. App. 2d 662, 165 P.2d 250 (1946). In *Cozza*, the step-father of the children had them declared wards of the juvenile court. Representations were made to the mother by the welfare authorities that she could do nothing and could not visit the child until the end of the year. She tried to get permission but it was denied. The persons having custody got the child declared abandoned and adopted her. The court overturned the adoption holding that the statutes must be construed in favor of the natural parents and that there was no abandonment because the child was not "left" as required by the code. In *Cattalini* the parents were divorced, as in *Jones*, and the wife tried to get the child declared abandoned so her new husband could adopt him. The court held there was no voluntary leaving and refused to sustain the abandonment petition.

32. See CAL. CIV. CODE § 232(a) (West 1961).

from that in prior cases. The *Morrow* court gave great weight to the fact that the child had been voluntarily placed in the care and custody of another and lightly considered that it had not been "left by the parent." The court glossed over this technical requirement of the statute. The whole attitude of the case suggests that since the conduct of the parents in the first instance was responsible for the wardship which necessitated placing the child elsewhere, the child really was "left by the parent," although derivatively. This reasoning is similar to that used in *In Re Maxwell*³³ and *In Re Barton*.³⁴ In both cases the child was declared abandoned after it was made a ward of the juvenile court. No effort or only token effort was made by the parents to communicate with the child and neither faced strenuous opposition from the welfare authorities. The court in sustaining the abandonment petition said that although the leaving in the first instance was not a leaving within the meaning of the code, the inaction by the parents amounted to such leaving. Cases like *Jones* and *Williams*, where the abandonment petitions were not sustained because the child was taken by court decree, were distinguished on the grounds that the parents desired and attempted to see the child. *Morrow* is distinguishable on the same grounds.

Even though the court finds as a matter of law that the child has been left in the care and custody of another, there can be no abandonment unless there has been a failure to communicate or a failure to support concurrent with the leaving.³⁵ In *Morrow*, the mother had failed to communicate for a period of time longer than the minimum required by the statute. The particular circumstances surrounding this failure to communicate, however, have always elicited the sympathy of the court. The mother of the child in *Morrow* had been told by the welfare authorities that she could not visit the child. Former courts have realized that the welfare authorities represent authority to those people who deal with them. Consequently in the past, courts have scrutinized the actions of the welfare department to ascertain whether the failure to communicate was the fault of the parent or the welfare authorities. Where it was found that the welfare department made it difficult or impossible to communicate (for instance by giving false advice to the parents as to their legal rights or concealing the location of the child), this circumstance was considered a legitimate excuse for

33. *In re Maxwell*, 117 Cal. App. 2d 156, 255 P.2d 87 (1953).

34. *In re Barton*, 168 Cal. App. 2d 584, 336 P.2d 210 (1959).

35. See CAL. CIV. CODE § 232(a) (West 1961).

failure to communicate.³⁶ The court refused to sanction this excuse in *Morrow*, despite the support of precedent, saying the burden was on the parent to question the instructions of the welfare department. There was an additional factor in *Morrow* of the mother's deteriorating mental condition. Prior cases have also considered this factor an excuse for failure to communicate based on inability, but the *Morrow* court refused to consider this element, merely finding the ability to communicate despite the emotional instability.³⁷

The lack of sympathy for the parent in *Morrow* indicates a change in judicial attitude. This is the most significant aspect of the case. The emphasis has shifted from a technical interpretation—of statutes which favors the rights and interests of the natural parents to one which more readily considers the needs of the child. The court did not fail to take notice of the fact that a parental relationship had developed between the child and those who cared for her under wardship. A natural substitution took place. Courts—have not always been considerate of the relationship which arises when a child is placed in the care of another. The *Morrow* court summed up its feeling concerning the relationship which had arisen under wardship by upholding the opinion of the trial court which found “the best interests of the child control under Section 232.5, which would be promoted by granting the abandonment petition so the adoption could proceed.”

The effects of *Morrow* and Section 232.5 cannot be analyzed more fully until a larger body of case law is developed. However, the case is a significant step toward ensuring emotional stability and security for the child which has been lacking in the past. The preceding years have documented a steady erosion of the pre-eminence of the rights of natural parents concept with a corresponding emphasis on the child's welfare. *Morrow* is consistent with this trend. If future cases are decided in this spirit we can expect the court—
to continue to subordinate form to substance and to focus on the child as the primary recipient of the court's concern.

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36. See *Matter of Cozza*, *supra*, note 31, and *In re Williams*, *supra*, note 28.

37. See *Adoption of Smith*, 270 Cal. App. 2d 605, 75 Cal. Rptr. 900 (1969).