THE PRACTITIONER | MITCHELL A. JACOBS & DAVID L. MARCUS

When Is a Parent a 'Parent' Under Current California Law?

With the proliferation of nontraditional families, it has become increasingly common for two unmarried persons living together to raise a child where only one of the parties is the biological or adoptive parent. If the parties later separate, the person who is not the biological or adoptive parent may desire visitation or custody rights to the child. However, they have not had much success nationwide (see 84 A.L.R. 4th, "Parental Rights of Man Who Is Not Biological or Adoptive Father of Child but Was Husband or Co-habitant of Mother When Child Was Conceived of Born," (1991), and 1 A.L.R. 4th, "Visitation Rights of Persons Other Than Natural Parents or Grandparents," (1980)). Several leading cases in California on the issue show that they have not been very successful in California, either.

Suits for custody or visitation can be brought under several statutes, including guardianship, dependency or parentage statutes, and an existing dissolution of marriage action can be joined as well. Generally, the cases either flatly deny custody or visitation or hold that these rights will be granted to persons other than the biological or adoptive parent only if an award of custody to the biological or adoptive parent would be detrimental to the child. (Of course, if it is detrimental for the child to be in the custody of the natural or adoptive parent, the action will likely proceed in juvenile court as a dependency proceeding. Custody and visitation rights of relatives, grandparents and stepparents are also not considered here.)

A leading case is *Curiale v. Reagan*, 222 Cal.App.3d 1597 (1990), which flatly held that "a nonparent in a same-sex bilateral relationship [does not have] any right of custody or visitation upon the termination of the relationship." The plaintiff and the defendant were two women who lived together. The defendant had conceived a child through artificial insemination, and the plaintiff had raised the child as a co-parent for 2 years. The plaintiff brought a complaint to establish de facto parent status and maternity and the right to custody and visitation. She also brought an order to show cause seeking custody and visitation. The court held that the plaintiff could not bring a valid claim under any California statute, including dissolution of marriage, parentage, guardianship or dependency. She could not sue under the Uniform Parentage Act (former Civ. Code section 7000 et seq., now Fam. Code sections 7600-7730), since the defendant was the child's natural mother. Although the parties had executed a settlement agreement providing for shared physical custody, the plaintiff did not assert any contractual claim, and the trial court did not give effect to the agreement. In response to the plaintiff's request that the court fashion a remedy for this type of dispute, the court stated that the proper governmental body to make such a remedy was the Legislature.

FAMILY LAW:
Nonmarried parents have few custody or visitation rights.

A similar situation was presented in *Nancy S. v. Michele G.*, 228 Cal.App.3d 831 (1991), where the court acknowledged the status of a lesbian partner who was a nonbiological, nonadoptive parent as a "parentlike figure" but found that this status did not entitle her to a grant of custody. The respondent had conceived two children by artificial insemination with the appellant named as the father on both children's birth certificates. Both parties participated in child-rearing, and both children called each party "Mom." When the parties separated, they arranged a visitation and custody schedule that provided both parties access to the children. After several years, the parties reached an impasse with regard to their parenting plan. Both brought actions under the Uniform Parentage Act seeking custody and visitation.

The key issue in the case was whether or not the appellant was a parent: First, only a "parent" can bring an action under the Uniform Parentage Act. Second, under the applicable statute (now Fam. Code section 3041) for determining whether or not to award custody to a "nonparent," custody will be awarded only if "granting custody to a parent would be detrimental to the child and ... granting custody to [a] nonparent is required to serve the best interest of the child."

The appellant was not a "parent" under the express terms of the Uniform Parentage Act because she was neither a natural or adoptive mother. The court also rejected four other theories under which the appellant asserted she was a

4055, is Child Support = K[HN-(H%)(TN)]. In this formula, K is as stated above, HN is the high earner's net monthly disposable income (as determined under section 4059), H% is the "approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent" or the average amount of time that parent spends with each child if different amounts of time are spent with different children of the marriage, and TN refers to the total net monthly disposable income of both parties. The new section also removes the former section's requirement that the formula use a zero timeshare assumption for AFDC cases.

Effect of grandparent visitation: Grandparents may, under various conditions, petition a court to order visitation. If a court makes such an order, it may allocate between the parents this visitation time for purposes of calculating support and may order a parent or a grandparent to pay to the other parent visitation-related and other basic expenses.

Hardship deductions: Section 4071(a)(2) permits a hardship deduction for the "minimum basic living expenses of either parent's natural or adopted children for [sic] whom the parent has the obligation to support from other marriages or relationships who reside with the parent." However, the deduction "for each child who resides with the parent may be equal to, but shall not exceed, the support allocated each child subject to the order." Section 4071(b).

Wage assignments: Section 4507 permits courts to order the payor spouse to pay child or family support as provided for in Government Code section 1151.5. This section allows a state employee to authorize paycheck deductions for payment of child, family or spouse support obligations and permits a service charge to be assessed for the deduction.

Phase-in: Section 4076 provides for a phase-in of child support orders that have been modified to reflect the uniform guidelines. Adams and Sevitch point out that a reading of sections 4076(a) and (b) together produces the following list of pre-requisites to eligibility for a phase-in order: "(1) The obligor owes no support arrearages; (2) the obligor has a history of good-faith compliance with all prior support orders; (3) the obligor would suffer extraordinary hardship from immediate imposition of the full guideline amount; and (4) the obligor's hardship outweighs the supported children's hardship from phasing in the full support amount." 17 Cal.Fam.L.Rep. (No.12) at 5.

Federal requirements for medical support: State court medical child support orders are subject to federal statutory requirements that limit the enforceability of domestic relations orders to maintain group health coverage for dependent children. See section 609 of ERISA. However, the rules also provide for direct enforcement of coverage and reimbursement rights against the group plan. For a more detailed discussion of this issue, see Hogoboom and King Cal.Prac.Guide:Family Law, section 6:350 et seq.

Spousal Support

Like child support, spousal support is also to be determined without reference to a new mate's income. Under section 4323(b), "[t]he income of a supporting spouse's subsequent spouse or nonmarital partner shall not be considered when determining or modifying spousal support." However, the same section, at 4323(a)(1), contains the presumption that "[e]xcept as otherwise agreed to by the parties in writing, there is a rebuttable presumption affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex."

On the surface, and maybe in practice, the continued coexistence of the rebuttable presumption of decreased need at section 4323(a) and the prohibition against considering new mate income at 4323(b) is problematic. Adams and Sevitch suggest that the "only way to reconcile [the two sections] is to conclude that the Legislature only intended to ban the court from 'considering' new mate income by directly imputing all or a portion of that income to either spouse for spousal-support purposes." 17 Cal.Fam.L.Rep. (No.12) at 5995. Adams and Sevitch further emphasize the illogical and possibly gender-biased result if the statute is interpreted to preclude consideration only of the payor spouse's new income.

One wonders why the statute limits itself to presumptions on the basis of persons cohabiting with someone of the opposite sex, particularly since the cohabitants need not be married. Certainly, it is just as possible for a relationship between same sex partners to result in need-decreasing living arrangements.

Disclosure Obligations

Sections 2100-2111 set forth the disclosure obligations of parties to a marital dissolution, legal separation or nullity action. The Code provides for both preliminary and final declarations of disclosure. Preliminary declarations of disclosure must be served within 60 days of the service of the petition, though the parties may extend this period by written stipulation or by oral stipulation in open court.

Final declarations, along with current income and expense declarations, are to be served "[b]efore or at the time the parties enter into an agreement for the resolution of property or support issues, other than pendente lite support, or, in the event the case goes to trial, no later than 45 days before the first assigned trial date." Section 2105(a). Unless both parties sign and serve final declarations, a current Income and Expense Declaration, and a sworn declaration of service of these two documents on the other party, no judgment will be entered absent a showing of good cause. Section 2106. (Under section 2100, a petitioner may waive the respondent's final declaration in true default cases, not settlements or stipulated judgments.) Adams and Sevitch warn that you should be as full and complete in your client's disclosure as possible lest your client's recovery be limited to those items appearing on the declaration. To the relief of certain litigants, section 2105(a) removes the previous requirement that the final declarations be filed with the court.

Some of the disclosure requirements, consistent with the explicit statement of legislative intent at section 2100, augment the disclosure requirements as they existed last year, while some may diminish the duty to disclose. The most obvious of the increased obligations is that the disclosure duty now applies to nullity and legal separation actions and not just to dissolutions.

Section 2100(c) governs each party's duty to update the preliminary disclosure declaration for the other party. In its previous form, the section imposed a duty to update the other party as to all changes. The new version requires updating the other party only as to "material changes." Given the lack of definition or guidance as to this term's meaning, it is not clear how limiting the new language really is. Adams and Sevitch suggest that "material changes" might reasonably mean "any known fact that might change the way a client would act regarding settlement." 17 Cal.Fam.L.Rep. (No.12) at 5991.

An interesting extension of the disclosure obligation language appears in section 2102. That section now reads, in part, "From the date of separation to the date of distribution of the community asset or liability in question, each party is subject to the standards provided in Section 721, as to all activities that affect the property and *support* rights of the other party" (emphasis added). Adams and Sevitch suggest that the addition of the phrase, "and support" means "that there is now no arena in which the spouses do not owe each other the highest fiduciary standard" of treatment. At 5993.

In a change that ostensibly reduces the disclosure obligation, section 2102(b) arguably may increase the requirement. The section requires "[t]he accurate and complete written disclosure of any investment opportunity that presents itself after the date of separation, but that results from any investment of either spouse from the date of marriage to the date of separation, inclusive." The section decreases the range of the required disclosure compared to its predecessor by deleting the terms "activity" and "involvement," leaving only "investment." At the same time, the statute also deletes the term "directly" from its predecessor's formulation, leaving "any investment." How significant the changes are and how "indirect" an investment opportunity must be to avoid the disclosure obligation is unclear.

While increasing the disclosure obligations overall, the Code decreased the liability for non-compliance. Section 2107(c) provides that if a party fails to comply with the disclosure obligations, "the court shall, in addition to any other remedy provided by law, order the noncomplying party to pay to the complying party any reasonable attorney's fees, costs incurred, or both, unless the court finds the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust." The earlier version's specific provision for the inclusion of expert witness fees is no longer included.

These legislative changes may merely alter the terms of the debate rather than resolve problems. As is often the case, it remains to be seen how lawyers and the courts will interpret these and other provisions of the new Code.