Proceedings to Terminate Parental Rights: Too Much or Too Little Protection for Parents?

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PROCEEDINGS TO TERMINATE PARENTAL RIGHTS: TOO MUCH OR TOO LITTLE PROTECTION FOR PARENTS?

INTRODUCTION

Traditionally the courts of this country have been loath to interfere with the right of a parent to the custody and control of his child. Courts have characterized the parent's right as a property interest, as a “natural and sacred” right, and as “among the most basic of civil rights.” Many decisions reflect a social interest in preserving the family unit.

Although parental rights are recognized as important, they

1. A definition of parental rights is elusive. See generally Eekelaar, What Are Parental Rights?, 89 L.Q. Rev. 210 (1973). Eekelaar identifies and discusses the following rights: right to possession, right to visit the child, right to determine education, right to determine religious upbringing, right to discipline the child, right to choose medical treatment, right concerning the child’s name, right to consent to marriage, right to services, right to determine nationality and domicile, and right to appoint guardians and consent to adoption.

Several of these rights are recognized by statute in California: Cal. Civ. Code § 197.5 (West Supp. 1975) (right to visit); id. § 213 (West 1954) (right to determine residence); id. § 4101 (West Supp. 1975) (right to consent to marriage); Cal. Stats. (1975), ch. 1244, § 3, at 3438 (West Leg. Serv.) (right to custody, services and earnings), amending Cal. Civ. Code § 197 (West 1954); id. § 7, at 3440 (right to consent to adoption), amending Cal. Civ. Code § 224 (West 1954).

2. See, e.g., In re Gutierrez, 47 Cal. App. 128, 130, 190 P. 200, 202 (1920): “We think it is only in instances where there is demonstrated incapacity or something akin to criminal neglect that the law is justified in interfering with the natural relations of parent and child.”


This concept has its roots in ancient law which treated all dependents as the property of the head of the household. Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 180 (1916) [hereinafter cited as Pound].


Commenting on the law’s concern for the family unit, Pound stated, “family law in general is one of the earliest branches of the law to become fixed and hence preserves traces of an archaic condition in which group interests rather than individual interests were secured.” Pound, supra note 3, at 187.
are not absolute. In California, statutes have existed for judicially terminating parental rights since 1872. Early adoption statutes provided that under certain conditions adoption, which "severs absolutely the legal relation between the parents and child," could be granted without parental consent. The juvenile court law enacted in 1915 provided for a separate proceeding for the purpose of declaring a child free of the custody and control of his parents.

Today the exclusive judicial means of terminating parental rights in California is found in Civil Code sections 232 through 239. A termination proceeding may be brought under the following circumstances: if the child has been abandoned, abused, or neglected; if the parent is morally depraved or suffers from disability due to habitual use of alcohol or drugs; if the parent has been convicted of a certain type of felony; if the parent is declared mentally ill or deficient or is incapable of supporting or controlling the child because of mental deficiency.

In an effort to "[e]xpand [the] circumstances under which an action may be brought," the California Legislature in 1973 established a general ground for freeing a child who has been in foster care for two years: parental rights can be terminated if the court finds beyond a reasonable doubt that return of the child to his parents would be detrimental to the child, and if the parents are unable to provide a home, care and

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California has recognized this proposition by statute since 1872. Cal. CIV. CODE § 203 (West 1954): "The abuse of parental authority is the subject of judicial cognizance in a civil action . . . and when the abuse is established, the child may be freed from the dominion of the parent . . . ."


9. In re Cozza, 163 Cal. 514, 523, 126 P. 161, 165 (1912); see Cal. CIV. CODE § 229 (West 1954) (from the time of adoption the natural parents are "relieved of all parental duties toward, and all responsibility for, the child so adopted, and have no right over it").


For a comprehensive list of statutory reasons for dispensing with consent in adoption cases in other states, see Simpson, The Unfit Parent: Conditions Under Which a Child May be Adopted without the Consent of His Parent, 39 U. DET. L.J. 347, 362-64 nn.96-108 (1962) [hereinafter cited as Simpson].


13. Id. § 232(a) (West Supp. 1975).

control, and are unable to maintain an adequate parental relationship with the child.\textsuperscript{15}

It is the view of this author that this statutory scheme\textsuperscript{16} both underprotects and overprotects the natural parent-child relationship. Major problem areas, with particular emphasis on the 1973 amendment, include: inadequate notice, the “detriment to the child” test, the reasonable doubt standard of proof, the evidence requirements, and failure to provide requirements for permanent placements and speedy decisions. The purpose of this comment is to identify and examine these problem areas, with analysis focusing on section 232(a)(7), and to suggest changes which would render the proceedings more equitable to both parent and child.

**NOTICE**

When a petition has been filed to free a child from the custody and control of his parents, the first problem encountered is whether the parents receive adequate notice. Notice to the parents of such a proceeding is required by statute\textsuperscript{7} as well as by due process considerations.\textsuperscript{18}

Although the statute permits service by publication if the mother or father cannot be located,\textsuperscript{19} the section has been con-

\textsuperscript{15} Cal. Civ. Code § 232(a)(7) (West Supp. 1975) provides that a child may be freed from the custody and control of his parents when the child comes within the following description:

Who has been cared for in one or more foster homes under the supervision of the juvenile court, the county welfare department or other public or private licensed child-placing agency for two or more consecutive years, providing that the court finds beyond reasonable doubt that return of the child to his parent or parents would be detrimental to the child and that the parent or parents have failed during such period, and are likely to fail in the future, to

(i) Provide a home for said child;
(ii) Provide care and control for the child; and
(iii) Maintain an adequate parental relationship with the child.

Physical custody of the child by the parent or parents for insubstantial periods of time during the required two-year period will not serve to interrupt the running of such period.


\textsuperscript{17} Id. § 235 (West Supp. 1975).

\textsuperscript{18} The United States Supreme Court, in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), observed that notice and an opportunity to be heard were fundamental to the constitutional guarantee of procedural due process. Id. at 314.

In Armstrong v. Manzo, 380 U.S. 545 (1965), the Court held that failure to notify a father of an adoption proceeding “violated the most rudimentary demands of due process of law.” Id. at 550.

strued to require "a showing of due diligence to locate and serve the parent as a prerequisite to an order for service upon him by publication." An allegation by the petitioner that the parents' address is unknown is not a sufficient showing to permit service by publication.

In a recent decision, In re B.G., the California Supreme Court emphasized the importance of notice in the context of a child custody proceeding:

Since the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights . . . the state, before depriving a parent of this interest, must afford him adequate notice and an opportunity to be heard.

Although the right to notice of the proceeding appears to be firmly established, it can be argued that current notice requirements are inadequate. Many termination proceedings are uncontested because the parents cannot be located. Studies have revealed the paralyzing sense of guilt experienced by many parents who have been deprived of the custody of their children: "The sense of guilt and resulting hopelessness can be so great that they repudiate the relationship altogether and feel no sense of responsibility." Moreover, many parents apparently believe that the original placement of their children into foster care is in fact a permanent placement.

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21. Id.
22. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).
23. Id. at 688-89, 523 P.2d at 250, 114 Cal. Rptr. at 450.
24. Interview with Jeff Bryson, Deputy County Counsel for Santa Clara County, in San Jose, California, Feb. 10, 1976. Mr. Bryson stated that these cases are "rarely contested," and estimated that notice is by publication in nearly 50 percent of the cases. In those cases notice is also sent to the parents' last known address. Mr. Bryson also noted that generally the agency filing the petition or other county agencies have made independent efforts to reach the parents.

By statute, the county counsel handles termination proceedings that are initiated by the State Department of Social Welfare, a county welfare department, a county adoption department, or a county probation department. Cal. Civ. Code § 232.9 (West Supp. 1975).

26. See Simpson, supra note 10. "Deprivation of custody under the dependency statutes can mean adoption without consent of the parent in most of the states . . . ." Id. at 382.

This was true for California at one time. The first adoption statute, enacted in 1872, provided that parental consent could be dispensed with for a parent "who has
Such is the aura of power surrounding a judge acting par-

cens patriae that these demoralized parents simply let the
temporary disposition drift on until the child became in-
ured to institutionalized life and the empty place at home
healed over. 27

These feelings are often reinforced by social workers who dis-
courage parents from maintaining contact with their children
in foster care. 28

The statutes do not require periodic review of most foster
care placements; 29 therefore, a termination proceeding may be
the first court contact with the parents since placement. When
the parents cannot be located, notice is by publication, 30 al-
though, as the Supreme Court has acknowledged, “It would be
idle to pretend that publication alone . . . is a reliable means
of acquainting interested parties of the fact that their rights are
before the courts.” 31

In an effort to meet the requirements of adequate notice 32
it is recommended that notice be given to parents at the time
of the original placement that foster care is temporary, and
that under certain circumstances a termination proceeding
may be brought. Those circumstances should be adequately
explained and the parents should be encouraged to maintain
contact with their child. 33 It is believed that such notice would
help counteract the feelings of demoralization that lead to a
loss of contact. One juvenile court judge who made the effort
to review all current placements in his court found that

[most parents evidenced a renewed interest in their chil-
dren when it appeared that they might lose them perma-

bein judicially deprived of the custody of the child on account of cruelty or neglect.”
[hereinafter cited as Dobson].
28. See note 118 and accompanying text infra.
29. Only those placements made pursuant to Welfare and Institutions Code
section 600 are subject to annual review, Cal. Welf. & Inst'ns Code § 729 (West 1972).
32. The Mullane Court stated that notice must be “reasonably calculated, under
all the circumstances, to apprise interested parties of the pendency of the action and
afford them an opportunity to present their objections.” Id. at 314. And further,
“[t]he means employed must be such as one desirous of actually informing the absent-
tee might reasonably adopt to accomplish it.” Id. at 315.
33. See notes 120-21 and accompanying text infra.
nently and many made plans for return of their children to their homes or those of relatives.\(^{34}\)

If such an "early warning system" would encourage families to stay in contact during foster placement,\(^{35}\) some termination proceedings might be avoided altogether, and when such proceedings do become necessary, more parents could be located and would thus receive actual notice. This "early warning" notice, combined with the current requirement for notice just prior to the proceeding, would better protect the important interests at stake\(^{36}\) and would promote the stated goal of juvenile court law "to preserve and strengthen the minor's family ties whenever possible."\(^{37}\)

**DETRIMENT TO THE CHILD TEST**

The next problem faced by parents whose rights may be judicially terminated is whether the parents' interest in the custody of their child will be given preference over the claims of third parties. In this regard it is important to know what test the court will use to resolve conflicting claims. The 1973 amendment to Civil Code section 232 requires that before a child can be freed from the custody and control of his parents the court must find that "return of the child to his parent or parents would be detrimental to the child."\(^{38}\) The decision of the Legislature to use this "detriment to the child" standard is significant since it represents, by implication, a decision not to adopt a "best interests of the child" test.

As courts and scholars began to focus attention on the rights of children,\(^{39}\) the "best interests of the child" was urged as the appropriate standard for resolving disputes over child custody.\(^{40}\) Under this test the child's welfare is considered as

\(^{34}\) Crary, *A Juvenile Court's Responsibility to Neglected and Dependent Children*, 38 Iowa L. Rev. 79, 80 (1952) [hereinafter cited as Crary].

\(^{35}\) In a recent termination proceeding, *In re Susan Lynn M.*, 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1975), the court stated, "the Legislature obviously intended that every effort be made to reunite the family" during the time the child is in placement. *Id.* at 311 n.3, 125 Cal. Rptr. at 714 n.3.

\(^{36}\) See notes 2-6 and accompanying text supra.


\(^{40}\) See, e.g., J. Goldstein, A. Freud, & A. Solnit, *Beyond the Best Interests of the Child* (1973) [hereinafter cited as Beyond the Best Interests]; Foster &
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paramount, and the interest of parents in the custody of their children is not "thought of in terms of an absolute parental right, but rather as another factor in determining the best interests of the child."41

Those apprehensive over how a court might apply a "pure" best interests test cite the notorious case of Painter v. Bannister42 in which the Supreme Court of Iowa awarded custody of a minor to his grandparents in preference to his father. The grandparents' home provided "a stable, dependable, conventional, middle-class, middlewest background,"43 whereas his father's home, although offering "more freedom of conduct and . . . an opportunity to develop his individual talents," was "romantic, impractical and unstable."44

The Iowa court claimed that "it is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits,"45 but it certainly appeared to do just that. The court concluded that the child's life in his father's home "would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating."46 That, however, would not be in the best interests of the child, since in the opinion of the court, "security and stability in the home are more important than intellectual stimulation in the proper development of a child."47 As one critic has noted, the court's decision was based not on empirical studies, but on the court's own value judgment about "what kind of a child one hopes to produce: a decision that society normally leaves to the parents."48

Although the Painter decision illustrates the potential for abuse of the best interests standard, in most jurisdictions in which the test has been adopted, it has been modified by judi-

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Freed, Child Custody, 39 N.Y.U.L. Rev. 423 (1964) [hereinafter cited as Foster & Freed]; Note, Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, 73 Yale L.J. 151 (1963) [hereinafter cited as Alternatives].


42. 258 Iowa 1390, 140 N.W.2d 152 (1966).
43. Id. at 1393, 140 N.W.2d at 154.
44. Id.
45. Id.
46. Id. at 1396, 140 N.W.2d at 156.
47. Id.
cial construction to require an initial finding that the parent is unfit. Essentially this creates a "legal presumption that the natural parent is fit and that his home is a good one. The burden of proof is upon the contender to show that the parent is unfit." Another common modification of the best interests test is the assumption that the welfare of the child is best served by awarding custody to the parents. In the words of one commentator,

"The parent will start off with a strong initial advantage. . . . This is not because the courts are expressly deferring to notions of parental rights in this connection, but because long experience, observation and common sense have all served to implant the lesson that prima facie at any rate the best place for a child is with its parent."

The multiplicity and complexity of these devices have led some to conclude that, at best, the "pure" best interests test is unworkable and, at worst, the test is a "mere cloak for the operation of judicial intuition." Reluctance to accept the "best interests" test can also be attributed to a concern that adoption of the test would render it easier for the courts to "interfere" with family relationships—a power that some com-

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49. The tendency of courts to resort to procedural devices to give greater protection to parental interests in such cases may be due to a judicial attitude described by Pound as follows:

"Tenderness of the individual interests of parents, since legal interference in family relations touches individuals in a peculiarly sensitive spot, has induced hesitation in changing established rules, even where reasons for change were evident.

Pound, supra note 3, at 187.

50. Simpson, supra note 10; Foster & Freed, supra note 40, at 425: "The best interest test usually has been accepted, if at all, in modified form."


52. Foster & Freed, supra note 40, at 437, contend that in many cases this assumption in effect creates a conclusive presumption in favor of the natural parents.


55. Alternatives, supra note 40, at 154.
mentators feel is already too freely available under the broadly written juvenile court statutes.\textsuperscript{58}

The best interests test and its modifications are reflected in the California statutes and cases. The stated intention of the legislature in enacting the Freedom from Parental Custody and Control Act\textsuperscript{57} (which includes Civil Code section 232) was “to extend adoption services for the benefit of children.”\textsuperscript{58} Furthermore, Civil Code section 232.5 directs that the chapter “be liberally construed to serve and protect the interests and welfare of the child.”\textsuperscript{59}

California cases prior to the enactment of Civil Code section 232.5 had held that in abandonment proceedings the emphasis was upon the parents’ intent to abandon, and that the child’s best interest was not an issue.\textsuperscript{60} In subsequent cases courts looked to the legislative history:

the Legislature had become concerned with the rigidity of existing custody rules preferential to the natural parents over third parties. . . . \textsuperscript{61}[T]he trial court must now consider, in a liberal application of those provisions, the best interest and welfare of the child before reaching its conclusion upon the issue of abandonment.

Other courts also recognized that “the modern trend of cases and authorities places a growing emphasis on the paramount interest of the child” in contrast to the “previous feudalistic view which claimed a parental property right in the child. . . .”\textsuperscript{62} However, in an important recent custody case, \textit{In

\textsuperscript{56} See, e.g., Crary, supra note 34, at 81: “Many engaged in social work are inclined to the idea that the child is better off with proper institutional care than he is in a home that is sub-standard.” Dobson, supra note 27, at 398:

It is to be feared that where the power to make disposition of a child exists, disposition will be made; the power will be exercised, rather than held in reserve. Those courts most committed to the doctrine of parens patriae most often commit.

\textit{Edwards, The Rights of Children, 37 Fed. Prob. 34, 38 (1973)} [hereinafter cited as \textit{Edwards}]: “So many of the cases coming to the court could and should have been diverted earlier and would therefore not be before the court.”

\textsuperscript{57} \textit{CAL. CIV. CODE} § 232 et seq. (West Supp. 1975).

\textsuperscript{58} \textit{CAL. STATS. (1970), ch. 583, § 1, at 1160 (West Leg. Serv.)} (emphasis added).

\textsuperscript{59} \textit{CAL. CIV. CODE} § 232.5 (West Supp. 1975).


\textsuperscript{62} \textit{In re W.}, 29 Cal. App. 3d 623, 629, 105 Cal. Rptr. 736, 740 (1972); accord, \textit{In
re B.G., the California Supreme Court rejected the pure "best interest of the child" test and reversed a decision in which the trial court, on that ground, had awarded custody to a nonparent against a fit parent. Although the case had originated in juvenile court, the supreme court applied Civil Code section 4600, which requires that

[b]efore the court makes any order awarding custody to a person or persons other than a parent . . . it shall make a finding that an award of custody to a parent would be detrimental to the child.

The court analyzed the legislative history of the detriment standard, placing particular emphasis on the following excerpt from the Assembly Journal:

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 nonparent.

The court concluded that although the Family Law Act changed the emphasis in custody cases from fitness of the parents to detriment to the child, it did not change the judicial practice of awarding custody to nonparents "only in unusual and extreme cases."

The adoption of the detriment to the child test in Civil Code section 232(a)(7) undoubtedly represents a legislative intention that parental rights should receive at least as much protection in termination proceedings (which permanently sever the parent-child relationship) as in custody disputes.

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63. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).
67. 11 Cal. 3d at 698, 523 P.2d at 257, 114 Cal. Rptr. at 457.
69. In In re Rodriguez, 34 Cal. App. 3d 510, 110 Cal. Rptr. 56 (1973), the court noted that in termination proceedings "the state seeks to deprive a parent of all further parental relationships with a child . . . . " Id. at 514, 110 Cal. Rptr. at 58. By contrast, custody orders are modifiable upon a showing of changed circumstances: "In the event of an appropriate change in circumstances, appellant may, of course, apply to the trial court for modification of the custody order." Chaffin v. Frye, 45 Cal. App. 3d 39, 47, 119 Cal. Rptr. 22, 26 (1975). An order terminating parental rights is not modifiable. Cal. Civ. Code § 238 (West Supp. 1975).
Adoption of the test provides a uniform standard for custody disputes between parents and third parties, regardless of the forum of the dispute: a juvenile court disposition, a custody dispute following dissolution of a marriage, or a termination proceeding. As interpreted by the B.G. court, the detriment test, while focusing the inquiry on the interests of the child rather than the fitness of the parent, nevertheless is highly preferential to parental rights.

**The Beyond a Reasonable Doubt Standard**

Perhaps the most unusual element of Civil Code section 232(a)(7) is the requirement that the necessary factors for termination of parental rights—that return of a child to its parents would be detrimental to the child, that parents are unable to provide a home, care and control and to maintain an adequate parental relationship with the child—must be shown beyond a reasonable doubt. The standard of proof that applies to court findings under the remaining parts of Civil Code section 232 is the normal civil burden of a preponderance of the evidence. The reasonable doubt standard undoubtedly represents a legislative intention that the highest degree of protection be afforded parental rights; such a high standard, however, seems inappropriate.

Courts are often urged to look to the true nature of an action in determining what safeguards should be applied to protect the rights of the parties. Judge Rives, dissenting from a decision denying a free transcript to an indigent mother, argued:

> [A] child custody proceeding also amounts to far more than an ordinary civil action. . . . Denominating this ac-

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70. The California Supreme Court has emphasized the need for a uniform rule because of the numerous proceedings in which custody disputes can be litigated in California. In re B.G., 11 Cal. 3d 679, 696 n.25, 523 P.2d 244, 256 n.25, 114 Cal. Rptr. 444, 456 n.25. Citing B.G. on the desirability of applying a uniform test, one court recently applied the detriment to the child test in a termination proceeding. In re Susan Lynn M., 53 Cal. App. 3d 300, 314, 125 Cal. Rptr. 707, 716 (1975).

For an excellent article on the several proceedings in which child custody disputes are handled, see Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems in California Law*, 23 STAN. L. REV. 703 (1971).

71. 11 Cal. 3d at 698, 523 P.2d at 257, 114 Cal. Rptr. at 457.


73. Id.
tion as civil cannot, by some talismanic effect blind us to
the fundamental importance of the values at stake here. 74

Recognizing parental rights as fundamental in the constitu-
tional sense 75 does not necessarily compel application of a
higher than normal standard of proof; however, that result is
not uncommon. For example, the United States Supreme
Court, in Woodby v. Immigration and Naturalization Service, 76
held that “clear, unequivocal, and convincing evidence” was
required to support a deportation order. The Court character-
ized deportation as a “drastic deprivation” and stated that the
civil rather than criminal nature of the proceeding did not
justify “banish[ment] from this country upon no higher de-
gree of proof than applies in a negligence case.” 77

Termination of parental rights has also been called a
“drastic remedy” 78 and such proceedings have been compared
with criminal prosecutions. In the words of one court, “the loss
of parental relationship to [one’s] child may be vastly greater
punishment than levying of a fine or even imprisonment result-
ing from a criminal conviction.” 79 Since the preference for par-
etal custody is so firmly embedded in California law, 80 it is
probably appropriate that a higher than normal standard of
proof be required.

On the other hand, the rights of the parents are not the
only rights at issue in such cases. Increasing attention is being
focused on the rights of children, 81 and some persons believe
that those rights will take on constitutional dimensions no less
compelling than the rights of parents. A recent New York deci-
sion took just such a position:

Here, the constitutional rights of the respondent mother

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74. Brown v. Chastain, 416 F.2d 1012, 1025 (5th Cir. 1969) (dissenting opinion),
75. For a good analysis of the doctrine of fundamental rights as applied to family
relationships, see generally Comment, Dependency Hearings: What Rights for the
77. Id. at 285.
80. See, e.g., In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974);
Stewart v. Stewart, 41 Cal. 2d 447, 260 P.2d 44 (1953); In re T.M.R., 41 Cal. App. 3d
694, 116 Cal. Rptr. 292 (1974); In re Gano, 160 Cal. App. 2d 700, 325 P.2d 485 (1958);
128 (1920).
81. See authorities cited in note 39 supra.
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are superseded by those of the infant Tyease. The constitutional rights of the infant to a stable, permanent home cannot be disrupted by the mother's desire to have her child for the first time after four years of inexcusable sleeping on her duties and on her rights.\textsuperscript{82}

Parental preference is built into the standard at the outset, since termination of parental rights must be based on a finding that return of the child to the parent would be detrimental to the child.\textsuperscript{83} A standard of clear and convincing evidence would seem to protect the parents' rights adequately without making termination a practical impossibility in those cases where it is appropriate.\textsuperscript{84}

EVIDENCE REQUIREMENTS

Another problem area in termination proceedings involves the evidence that may be introduced. Upon what kind of evidence may a court base a finding that return of a child to his parent would be detrimental to the child?

Probation Reports

Probably the most frequently used evidence is the report submitted by a probation officer pursuant to Civil Code section 233.\textsuperscript{85} "The law sets no limits on the contents of such a report and of course, hearsay evidence . . . often constitutes a major portion of the report."\textsuperscript{86} Interpreting a similar provision in the


\textsuperscript{83} CAL. CIV. CODE \S 232(a)(7) (West Supp. 1975). For the complete text of this subsection see note 15 supra.

For a discussion of the detriment to the child test as a test preferential to parental rights, see text accompanying notes 63-67 supra.

\textsuperscript{84} That such a burden of proof may amount to a practical impossibility may account for the fact that to date there are no reported cases construing this subsection.

\textsuperscript{85} CAL. CIV. CODE \S 233 (West Supp. 1975) provides in pertinent part:

Upon the filing of such petition, the clerk of the court shall, in accordance with the direction of the court, immediately notify the juvenile probation officer, or the county department designated by the board of supervisors to administer the public social services program, who shall immediately investigate the circumstances of said minor person and the circumstances which are alleged to bring said minor person within any of the provisions of Section 232. The juvenile probation officer or the county department shall render to the court a written report of the investigation with a recommendation to the court of the proper disposition to be made in the action in the best interests of said minor person. The court shall receive such report in evidence and shall read and consider the contents thereof in rendering its judgment.

\textsuperscript{86} Edwards, supra note 56, at 39.
Welfare and Institutions Code, the court in Long v. Long held that since the reports are primarily hearsay evidence, certain procedural safeguards must be read into the section to protect the rights of the parties:

Due process of law requires that each party (a) receive a copy of the report, (b) be given an opportunity to cross-examine the investigative officer and to subpoena and examine persons whose hearsay statements are contained in the report, and (c) be permitted to introduce evidence by way of rebuttal.

The Long court was particularly concerned with the dangers inherent in a denial of the rights of confrontation and cross-examination. In that case the report contained statements by the father claiming that the mother was unfit and that he had been tricked into signing an adoption consent form. In court and under oath, however, he declined to make those allegations.

Even with due process safeguards an adverse probation department report can be very difficult to overcome. A recent case, Chaffin v. Frye, is illustrative. In this case the mother was attempting to gain custody of her children, who had been living with their maternal grandparents. The findings of the


Compare CAL. WELF. & INST’NS CODE § 582 (West 1972), which contains no procedural safeguards, with CAL. CIV. PRO. CODE § 263 (West 1954), which provides in pertinent part:

[N]ot less than 10 days before the trial of such action a copy of the report shall be served on each party to the divorce action.

Such investigator or investigators who have investigated the care, welfare and custody of the minor children as provided for in this section, shall be present at the trial of the divorce action of the parties who are the parents or custodians of such minor children, and may be called to testify by the judge or either party as to any matter which they have investigated. The testimony of such investigators shall be subject to questions direct and cross which are proper, and shall be competent as evidence.

89. 251 Cal. App. 2d at 736, 59 Cal. Rptr. at 794.
90. Id.
92. Id. at 43, 119 Cal. Rptr. at 22.
court were based almost entirely on the probation report, which included information about the mother’s income and living conditions, her arrest record, and her status as a homosexual, as well as information about the grandparents’ home and income and their opinions about the mother.93

Facts relating to income and living conditions clearly are relevant when considering ability to provide care and a home for a child, but such evidence should not be used to compare competing homes. The statute, in unambiguous terms, requires that before parental rights may be terminated it must be found that “return of the child to his parent or parents would be detrimental to the child.”94 It is suggested that until the parents’ home has been found detrimental, information about a “competing” home should be inadmissible as irrelevant.95

In addition to relevant factual material, the probation report in the Chaffin case96 contained statements of the probation officer’s opinions and beliefs. For example, the mother admitted past homosexual conduct, but testified that she had not engaged in homosexual activity for two years;97 however, the report stated that “the probation officer believes the possibility of homosexual conduct still exists.”98 The children told the officer that they preferred to live with their mother,99 but he “believed that some of the children’s statements were rehearsed.”100 It is difficult to know what kind of evidence the mother could have presented to overcome this “opinion evidence.”

Any probation report is expected to contain a recommendation,101 but it seems questionable whether the officer’s opinions and beliefs should be included. If the court is persuaded

93. Id. at 43-44, 119 Cal. Rptr. at 23.
95. It is interesting to note that as long as certain minimum standards are met (adequate nourishment, clothing and shelter), psychologists and psychiatrists do not consider environmental factors as particularly significant to child-rearing ability. Alternatives, supra note 40, at 159-60 n.38.
97. Id. at 43, 119 Cal. Rptr. at 23.
98. Id.
99. Id.
100. Id.
101. Cal. Civ. Code § 233 (West Supp. 1975) provides in pertinent part: “The juvenile probation officer or the county department shall render to the court a written report of the investigation with a recommendation to the court of the proper disposition to be made . . . .”
by the probation officer's opinion before ever hearing the parent's testimony or evidence, it is arguable that the burden of proof has unfairly been shifted to the parent to prove his fitness.\textsuperscript{102} A fair hearing requires that evidence be produced by all parties, and that the court weigh the evidence and draw its own conclusions.\textsuperscript{103}

It should also be noted that the probation officer is directed by statute to base his recommendation on "the best interests of said minor person,"\textsuperscript{104} whereas the termination petition can be granted only if the court finds that "return of the child to his parent or parents would be detrimental to the child."\textsuperscript{105} This difference could be very significant since, as discussed in the previous section, under the best interests test parental custody isn't necessarily preferred,\textsuperscript{106} while the detriment to the child test is highly preferential to the parents' interests.\textsuperscript{107} The difference between the tests should be brought to the attention of the court when the recommendation of the probation officer is being considered.

\textsuperscript{102} In cases involving return of a child to his parent after the child has been the subject of abuse or neglect, the burden generally is on the parent to prove that he can adequately care for the child. Premature return of children to abusive parents presents a serious risk to the child since there is a high repeat record for abusive parents. One study concluded that 25 to 50 percent of the children would be permanently injured or killed within a few months following a premature return to their homes. Grumet, The Plaintive Plaintiffs: Victims of the Battered Child Syndrome, 4 Fam. L.Q. 296, 304 (1970).

In California, the cases of such children are subject to an annual review at which time the parents have the opportunity "to show cause, if they have cause, why the jurisdiction of the court over the minor should be terminated." Cal. Welf. & Inst'ns Code § 729 (West 1972).

\textsuperscript{103} The power of decision vested in the trial court is to be exercised by a duly constituted judge, and that power may not be delegated to investigators or other subordinate officials or attaches of the court, or anyone else.


If the court is persuaded by the report before hearing the parents' evidence, an issue of prejudgment may arise. Compare Webber v. Webber, 33 Cal. 2d 153, 199 P.2d 934 (1948) with In re Davis, 162 Cal. App. 2d 648, 328 P.2d 455 (1958).


\textsuperscript{106} See authorities cited in notes 40-41 and accompanying text supra.

\textsuperscript{107} See text accompanying notes 63-67 supra.
Parent-Child Relationship

In addition to the issues of providing a home and adequate physical care of the child, Civil Code section 232(a)(7) requires a finding that the parents “are likely to fail in the future, to . . . maintain an adequate parental relationship with the child.”108 Such a finding cannot be based simply on the fact that the parents, in the past, “so conducted themselves that they were deprived of the custody of their children”;109 however, it would seem that a court will have to review and evaluate the past and present parent-child relationship in order to make a meaningful prediction about the future. A strong factor against the mother in the Chaffin case110 was her past unwillingness to assume responsibility for her children (they had lived with their grandparents for nearly their entire lives). On the basis of that conduct, the court characterized her efforts to gain custody as “temporary good intentions.”111

An important factor in evaluating the parent-child relationship is the nature and quality of parent-child communications and visits during the period that the child has been living out of the home. Although this is not an easy evaluation to make, the task is not completely unfamiliar to the courts. In abandonment proceedings it is within the discretion of the court to determine whether efforts to communicate with the child have been “only token efforts.”112 Three communications in one year was considered mere token in In re Adoption of Oukes.113 Although the mother in that case testified that her

111. Id. at 46, 119 Cal. Rptr. at 25; accord, In re Adoption of Morrow, 9 Cal. App. 3d 39, 88 Cal. Rptr. 142 (1970) (affirming an order freeing a child from the custody and control of the mother, the court noted that the mother failed to visit the child, though she regularly visited her other children who were in other placements); In re Maxwell, 117 Cal. App. 2d 156, 255 P.2d 87 (1953) (held that complete lack of effort by the mother to maintain contact with her child could support a finding of abandonment, even though the original “leaving” of the child did not amount to an intent to abandon).
112. Cal. Civ. Code § 232(a)(1) (West Supp. 1975). According to the court in In re Gano, 160 Cal. App. 2d 700, 325 P.2d 485 (1958), the California Legislature amended the statute to give the trial judge discretion to determine that the communications were “token only” because the California Supreme Court had held that if either parent made any communication with the child during the one year period, abandonment could not be found. See, e.g., In re Edwards, 208 Cal. 725, 284 P. 916 (1930).
failure to communicate was due to emotional and mental strain, the court, noting that she had maintained frequent contact with her other children, stated that that was not a legal excuse.\textsuperscript{111} A finding that two letters a month was token only was reversed in \textit{In re T.M.R.},\textsuperscript{115} since the mother was in jail and letters were her only means of maintaining contact with her children.\textsuperscript{116}

A particularly difficult problem in this area arises when the parents do not communicate with their children in foster care because they were discouraged or prevented from doing so.\textsuperscript{117} The prevailing view among social welfare workers has been that "foster parents are often unable to properly train, discipline, and educate the child when the child is visited by his natural parents, who may undermine the authority of the foster parents."\textsuperscript{118} In neglect and child abuse cases it is indeed often in the child's best interest not to permit parental contact, at least for some time after placement.\textsuperscript{119} In other cases, however, recent studies in child development have indicated that children in foster homes demonstrate fewer behavior problems if they are able to maintain contact with their own parents.\textsuperscript{120} Courts and welfare agencies should encourage and assist parents in maintaining meaningful contact with their children in placement,\textsuperscript{121} thus implementing the goal of the Juvenile Court

\textsuperscript{114} Id. at 468, 92 Cal. Rptr. at 396.

\textsuperscript{115} 41 Cal. App. 3d 694, 116 Cal. Rptr. 292 (1974); accord, \textit{In re Susan Lynn M.}, 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1975) (monthly visits were not "token only" even though the welfare department had made arrangements for semi-monthly visits).

\textsuperscript{116} 41 Cal. App 3d at 699-700, 116 Cal. Rptr. at 295.

\textsuperscript{117} Even when the parents are not actively discouraged or prohibited from visiting their children in foster care, the parents may believe that they are not supposed to visit their children. See, e.g., \textit{In re Barton}, 168 Cal. App. 2d 584, 336 P.2d 210 (1959). The mother in that case said she did not communicate with her child because "she was under the impression the court order which deprived her of custody forbade her to communicate with the child or bother the petitioners as guardians." \textit{Id.} at 589, 336 P.2d at 214 (emphasis added).


\textsuperscript{119} See \textit{In re Adoption of Morrow}, 9 Cal. App. 3d 39, 88 Cal. Rptr. 142 (1970) (the evidence indicated that the child—six years old—was very frightened of her mother, vomited and hid when the mother came to visit, and reverted to bed-wetting after the visit).

\textsuperscript{120} Macintyre, \textit{Adolescence, Identity, and Foster Family Care}, 17 CHILDREN 213 (1970) [hereinafter cited as Macintyre].

\textsuperscript{121} In a recent case, \textit{In re Susan Lynn M.}, 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1975), the court of appeal interpreted section 232 of the Civil Code, stating that "the Legislature obviously intended that every effort be made to reunite the family during the waiting period." \textit{Id.} at 311 n.3, 125 Cal. Rptr. at 714 n.3.
Law to "preserve and strengthen the minor's family ties." It may also render it easier to locate the parents for purposes of notice for those cases in which termination proceedings are necessary.

Expert witnesses (psychiatrists, psychologists, and social workers) are likely to be called on the issue of the parent-child relationship whenever the parties can afford them. Although this can be very helpful for the court, it is not without its problems. It can give one side a tremendous advantage if the opposing side cannot afford an expert; on the other hand, if both sides present experts the court may be faced with a "classic battle of the experts."

The case against the parent would seem to be quite strong if the nonparent has been in custody for a sufficient length of time to have become the "psychological parent" of the child.

Whether any adult becomes the "psychological parent" of

Accordingly, we embrace the viewpoint that before initiating proceedings to declare a minor free from the custody of its parents under section 232 of the Civil Code, a county welfare department must consider child protective services as a possible solution to the problems at hand and must offer such services to qualified parents if appropriate under the circumstances. Child protective services are designed to preserve the family unit through education, guidance and other social services, and ordinary concepts of human compassion impel the conclusion that the possibility of offering these services to the parents in a "last ditch" effort to save the family should be weighed carefully by social welfare departments before such departments embark on a course which at best offers a drastic and irrevocable solution.

Id. at 311, 125 Cal. Rptr. at 713-14; accord, Macintyre, supra note 120.

One of the few studies that has been conducted on the families of children in foster care revealed a severe deterioration of the family structure. The authors studied the families of 624 children under the age of 13 years who had entered foster care for the first time in 1966 in New York City. Interviews with 390 parents revealed that in only 13 percent of the cases did a basic mother-father-child family unit exist. Seventy-nine percent of the mothers headed single-parent homes. By contrast, 46 percent of the mothers themselves had been raised in single-parent families or in homes other than the homes of their natural parents. Jenkins & Norman, Families of Children in Foster Care, 16 CHILDREN 155 (1969).


123. Discussing this problem, one commentator recounted the following incident:

The psychiatrist not being amenable to the mother's purpose, his testimony was, of course, not called for in court. The father, an unworlthy man . . . never realized that expert testimony was buried somewhere which might have been of help to him.

J. DESPERT, CHILDREN OF DIVORCE 210 (1953).

124. Kay & Philips, supra note 48, at 723. The authors cite as an example a case from their files in which five expert witnesses testified concerning the fitness of the parties. Id. at 723-24.
the child is based . . . on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled . . . by . . . any caring adult, whatever his biological or legal relationship to the child may be.125

Even without expert testimony courts are aware that continuity and stability "are potent factors which carry great persuasiveness in the determination of what would serve the children's best interests."126

In conclusion, then, problems for parents do exist in the area of evidence requirements for termination proceedings. The probation report may include the investigating officer's opinions, as well as relevant factual material, and the recommendation in the report will be based on the best interests of the child, not on the detriment to the child test. In addition, evidence on the parent-child relationship can be a problem for parents if they have been discouraged from maintaining contact with their child and if the parent cannot afford an expert witness, but the party seeking termination can afford one.

NEED FOR PERMANENT PLACEMENTS AND SPEEDY DECISIONS

One of the most severe shortcomings of the proceedings for termination of parental rights is that there is no requirement for a permanent placement of the child. If the termination petition is granted, the child may be placed for adoption. However, if the petition is denied, the child will not necessarily return to his parents. Foster care may be continued, since "once juvenile court jurisdiction is established, that jurisdiction continues as long as the best interests of the minor so require."127

The evidence seems overwhelming that long-term "temporary" care, with its attendant lack of continuity, can be disastrous in terms of normal child development.128 Children in long-term care usually have two or three foster homes; the length of time and the number of placements are directly related to the

125. BEYOND THE BEST INTERESTS, supra note 40, at 19.
126. Chaffin v. Frye, 45 Cal. App. 3d 39, 46, 119 Cal. Rptr. 22, 25 (1975); accord, Rothstein v. Lutheran Social Servs. of Wis., 405 U.S. 1051 (1972) (unwed father has a right to a hearing prior to adoption of his child; at the hearing the trial court should consider the length of time the child has already lived with the adoptive parents).
128. See generally BEYOND THE BEST INTERESTS, supra note 40, at ch. 3; Michaels, supra note 54; Foster Parents' Dilemma, supra note 41.
incidence of emotional disturbance. Recognizing the child’s interest in a stable and permanent environment, one court concluded that “the state as a parens patriae not only has a compelling interest but also a duty to sever the parental bonds once the situation contemplated by the statute arises.” After serving on the juvenile court bench, one judge concluded, “[S]omeone has to be hurt in this type of case and it is better to hurt the parents after they have been given every reasonable chance than to condemn the innocent child to a life of insecurity.”

The child’s interest in a permanent environment is also adversely affected by the time required for appeals. A brief review of recent cases indicates that the time between the filing of the petition and the final appellate decision is approximately two years. Courts must begin to view placement decisions “as the emergency that it is for the child.”

It is recommended that courts handle custody cases (including termination proceedings) on an emergency basis to reduce the time awaiting appeal to the minimum. In addition, every effort should be made when a termination proceeding is brought to render a decision that will recognize the child’s need for a permanent environment: the child should be returned to his parents or freed for adoption. For those few cases in which it is desirable neither to terminate parental rights nor to return the child to the parent, it has been suggested that “permanent” foster care be devised.

**Conclusions and Recommendations**

Civil Code section 232(a)(7), the most recent legislative enactment concerning termination of parental rights, is consistent with the current trend in California law. That trend represents a continuing preference for parental rights and a determination that the standard to be applied in both custody and termination proceedings is the “detriment to the child” test.

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129. Macintyre, supra note 120, at 214.
131. Crary, supra note 34, at 81 (emphasis added).
133. Beyond the Best Interests, supra note 40, at 43.
134. Simpson, supra note 10, at 391.
Although the reasonable doubt standard of proof may be too high, a standard higher than a mere preponderance does seem appropriate.

Certain changes in the law are recommended. Parents should be advised at the time their child is placed in foster care that such care is temporary, but that under certain circumstances a proceeding to terminate their rights may be brought. The circumstances should be clearly explained. Parents should be encouraged to maintain communication with their children in foster care, and services should be available to help the family prepare for return of the child. All cases should be reviewed regularly, and once a termination proceeding has been brought, every effort should be made to arrive at a permanent placement: return to parents, adoption, or permanent foster care. The time for appeals must be reduced, since extended periods of uncertainty and insecurity are detrimental to all parties. By better protecting the important interests of both parents and children in termination proceedings, such changes would render those proceedings more equitable to both parents and children.

Coeta Chambers