

Termination of Parental Rights and the Child Support Obligation— *In Re Marriage of O'Connell*

California Civil Code section 232 provides the means and circumstances for terminating parental rights towards minor children. This article discusses a recent decision of the California Court of Appeals construing the effect of a termination order on a parent's child support obligations.

The California Court of Appeals for the Third District recently held that an obligation for child support could survive even the complete termination of parental rights.¹ Prior to this decision, no California court had addressed the question of whether a parent's child support obligation could continue after the issuance of an order terminating custody and control of the child. By consider-

¹ *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 146 Cal. Rptr. 26 (3d Dist. 1978). The trial court in *O'Connell* issued a parental termination order pursuant to CAL. CIV. CODE § 232 (West Cum. Supp. 1979). The section provides in pertinent parts: (a) An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such persons comes within any of the following descriptions:

(1) Who has been left . . . by one parent in the care and custody of the other parent for a period of one year without any provision for his support, or without communication from such parent or parents to abandon such person. Such failure . . . to provide or failure to communicate shall be presumptive evidence of intent to abandon. Such persons shall be deemed and called a person abandoned by the parent or parents abandoning him. If, in the opinion of the court the evidence indicates that such parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by such parent or parents . . .

(The remaining descriptions include: (2) Person cruelly treated or neglected by parents . . . ; (3) Person whose parents are under disability due to use of alcohol or controlled substances or are morally depraved . . . ; (4) Person whose parents are convicted of a felony . . . ; (5) Person whose parents are declared mentally deficient or mentally ill . . . ; (6) Person whose parents are incapable of supporting or controlling the child due to mental deficiency or illness . . . ; and (7) Person cared for in a foster home for two consecutive years.)

ing the possible extension of the support obligation beyond termination, the Court of Appeals purported to follow the modern trend which increasingly places greater emphasis on the needs and welfare of the child than on the rights of the parents.² Paradoxically, however, the court concluded that the termination of parental rights is a factor to consider in determining the existence or amount of a child support obligation.

This article examines the Court of Appeals' decision in *In re Marriage of O'Connell*.³ After a brief discussion of the purposes and effects of proceedings to terminate parental rights, the article reviews the facts and analysis of the *O'Connell* case. It then critically examines the court's reasoning in *O'Connell*, contending that the court provides little guidance on the issue of child support in the unusual situation where termination of parental rights is not followed by adoption of the child by another person who then assumes financial responsibility for the child. The article concludes by suggesting that parental custody should not be a factor in determining the existence or extent of a child support obligation.

I. TERMINATION OF PARENTAL RIGHTS

The termination of a parent's rights⁴ with respect to his or her

² *E.g.*, *In re Eugene W.*, 29 Cal. App. 3d 623, 105 Cal. Rptr. 736 (1st Dist. 1972), involved a petition from a county public welfare department to declare a mother's minor child free of parental custody and control. The petition was granted pursuant to CAL. CIV. CODE § 232 (g). Analyzing the legislature's intent behind the termination provisions the court said:

Indeed, contrary to the previous feudalistic view which claimed a parental property right in the child (citations omitted) the modern trend of cases and authorities places a growing emphasis on the paramount interest of the child. Thus, in *In re Neal* (1968) 265 Cal. App. 2d 482, 490, 71 Cal. Rptr. 300, the court emphatically pointed out in applying the provisions of section 232 the trial court must consider the best interest and welfare of the child. The authorities likewise urge that the dominant parent-right doctrine should be replaced by a broadened, best-interests-of-the-child test, so that the court's inquiry will focus on the needs of the child rather than the rights of the parents (citation omitted).

Id. at 629, 105 Cal. Rptr. at 740.

³ 80 Cal. App. 3d 849, 146 Cal. Rptr. 26 (3d Dist. 1978).

⁴ The scope of "parental rights" has yet to be definitively established. *See, e.g.*, Eekelaar, *What Are Parental Rights?*, 89 L.Q. REV. 210 (1973). In *Burge v. City & County of San Francisco*, 41 Cal. 2d 608, 617, 262 P. 2d 6, 12 (1953), Justice Traynor described parental rights as embracing "(T)he sum of parental rights with respect to the rearing of a child, including its care. It includes the

offspring has been characterized as a "terrible punishment"⁵ and a deprivation of a fundamental civil right.⁶ Understandably, the courts have been extremely reluctant to remove a child from the parental fold.⁷ California courts in particular have been loath to deprive a parent of a child's custody.⁸

California has procedures which terminate parental rights to custody and control, normally when adoption is imminent.⁹ Prior to *O'Connell*, the courts typically construed the termination order itself, in conjunction with the adoption proceeding, as completely and finally severing the relationship between the child and its natural parents.¹⁰ The courts apparently relied upon the language of the California adoption statutes¹¹ which specifically

right to the child's services and earnings and the right to direct his activities and make decisions regarding his care and control, education, health, and religion." See also *Emery v. Emery*, 45 Cal. 2d 421, 429-430, 289 P. 2d 218, 224 (1955).

⁵ See *In re Blumenthal's Adoption*, 346 F. 2d 783, 788 (3d Cir. 1965). See also H. CLARK, *LAW OF DOMESTIC RELATIONS* 632 (1968).

⁶ *In re B.G.*, 11 Cal. 3d 679, 688, 523 P. 2d 244, 250, 114 Cal. Rptr. 444, 450 (1974); *Lois R. v. Superior Court*, 19 Cal. App. 3d 895, 901, 97 Cal. Rptr. 158, 163 (2d Dist. 1971). See also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

⁷ See H. KRAUSE, *FAMILY LAW* 242-244 (1977).

⁸ See Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 48 So. CAL. L. REV. 10, 23 (1975).

⁹ CAL. CIV. CODE § 232, *supra* note 2.

¹⁰ *E.g.*, in *In re Susan M.*, 53 Cal. App. 3d 300, 310, 125 Cal. Rptr. 707, 713 (5th Dist. 1975), the Court of Appeals concluded: "A judgment freeing a child from the custody and control of its parents results in the total severance of the natural ties between the parents and the child . . ." *Accord*, *In re Zimmerman*, 206 Cal. App. 2d 835, 843, 24 Cal. Rptr. 329, 334 (1st Dist. 1962).

The final nature of a termination order is expressed in the California termination statutes:

Any order and judgment of the court declaring a minor person free from the custody and control of any parent or parents under the provisions of this chapter shall be conclusive and binding upon such minor person, upon such parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making such order and judgment, the court shall have no power to set aside, change, or modify it, but nothing in this section shall be construed to limit the right to appeal from such order and judgment.

CAL. CIV. CODE § 238 (West Cum. Supp. 1979).

Thus, prior to *O'Connell*, a termination order presumably had the effect of working a final severance of all natural ties between the terminated parent and the child which could not be altered in a later proceeding. All subsequent references in this article to the "rule of finality" express this conclusion.

¹¹ California adoption proceedings are governed by CAL. CIV. CODE sections 221 through 230.5 and 232.3 (West 1954 & Cum. Supp. 1979).

provide that all the legal rights and legal responsibilities of the natural parent towards the adopted child come to an end.¹² The adopted child in effect receives a substitute parent who assumes all parental obligations.¹³ *O'Connell*, however, involves the unusual situation where a termination is not followed by an adoption.

The usual purpose of a termination proceeding and an adoption which usually follows, is to facilitate the complete integration of the minor child into a substitute family.¹⁴ One California opinion¹⁵ which examined the legislative intent behind the California termination statute concluded that it was the legislature's intent "to serve the welfare and best interest of the child by freeing him from parental care when adoptive homes would provide stability and security otherwise missing from his life."¹⁶ Similar statutory termination provisions in other jurisdictions reflect comparable considerations.¹⁷ Thus, actions to terminate parental rights by freeing the child from parental custody have traditionally severed all parental rights and obligations in order to facilitate the adoption of the minor child. *O'Connell*, however, reaches a different result.

II. THE O'CONNELL CASE

In December 1970, the trial court entered a final judgment of dissolution in the marriage of James and Pamela O'Connell. Pamela O'Connell obtained custody of the two minor children of the marriage. The trial court also ordered James to provide for the support of Pamela and the two children, and granted James

¹² CAL. CIV. CODE § 229 (West 1954): "EFFECT OF FORMER RELATIONS OF CHILD. The parents of an adopted child are, from the time of adoption, relieved of all parental duties toward, and all responsibility for, the child so adopted, and have no rights over it."

See also *In re Jobson's Estate*, 164 Cal. 312, 128 P. 938 (1912); H. CLARK, *supra* note 5, at 659. *But cf.*, *Dwyer v. Dwyer*, 366 Ill. 630, 10 N.E. 2d 344 (1937) (support obligation imposed on natural parent after adoption when the state statute failed to expressly relieve the natural father of the duty of child support).

¹³ See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 22-23 (1973) for a discussion of the psychological relationship between the adoptive parent and the minor child.

¹⁴ *In re Kitchens*, 116 Cal. App. 2d 254, 253 P. 2d 690 (4th Dist. 1953); *In re Zimmerman*, 206 Cal. App. 2d 835, 24 Cal. Rptr. 329 (1st Dist. 1962). For a discussion of this problem in the stepfamily situation, see Comment, *Stepparent Custody—An Alternative to Adoption*, this volume.

¹⁵ *In re Eugene W.*, 29 Cal. App. 3d 623, 105 Cal. Rptr. 736 (1st Dist. 1972).

¹⁶ *Id.* at 629, 105 Cal. Rptr. at 740.

¹⁷ See H. CLARK, *supra* note 5, at 629-638.

visitation rights.¹⁸

In November 1971, the trial court held James in contempt of court for refusal to make support payments.¹⁹ In February 1973, Pamela, then remarried, petitioned the court to declare the children free of James' custody and control under the provisions of the California termination statute.²⁰ The trial court granted the petition, and James did not appeal the denial of his motion to set it aside.²¹ Pamela's new husband, however, did not seek to adopt the children.

Three years later, James sought modification of the original child support order, or, in the alternative, reasonable visitation. The trial court denied James' motion for reasonable visitation but entered an order discontinuing James' obligation for child support solely because of the prior termination order.²² Pamela appealed, claiming that the termination order did not affect James' child support obligation. The California Court of Appeals reversed.

Initially, the court recognized that the parent entitled to the custody of the child is required by statute to provide support and education suitable to the child's circumstances.²³ The court examined early California divorce cases in which the courts refused to allow an action for child support where the father was not awarded custody and where no order of support had accompanied the divorce decree.²⁴ Recognizing, however, that such decisions do not preclude the imposition of a support obligation in a subse-

¹⁸ In re Marriage of O'Connell, 80 Cal. App. 3d 849, 852, 146 Cal. Rptr. 26, 28 (3d Dist. 1978). The support order included fifty dollars per month for Pamela and fifty dollars per month for each of the minor children.

¹⁹ *Id.*

²⁰ CAL. CIV. CODE § 232, *supra* note 2.

²¹ In re Marriage of O'Connell, 80 Cal. App. 3d 849, 853, 855, 146 Cal. Rptr. 26, 28, 31 (3d Dist. 1978).

²² *Id.* at 852, 858, 146 Cal. Rptr. at 28, 31.

²³ CAL. CIV. CODE § 196 (West Cum. Supp. 1979). See note 36 *infra* for text of statute.

²⁴ *E.g.*, in Lewis v. Lewis, 174 Cal. 336, 163 P. 42 (1917) the California Supreme Court said:

Interpreting and applying the several provisions of the code, the decisions of this court are clear to the effect that when there has been a decree of divorce, and such decree vests the custody of the minor children in the mother, the father is under no obligation to provide for such children any support or education beyond that which may be directed by the court which has granted the divorce, either in its decree or by subsequent modification.

Id. at 339, 163 P. at 44.

quent hearing,²⁵ the court then analyzed cases which elevated the rights of children above those of the parents.²⁶ From this perspective, the court distinguished an adoption proceeding from a proceeding to terminate parental rights, noting that the termination statute,²⁷ unlike the adoption provision,²⁸ does not provide for a substitute parent. Additionally, the court noted the absence of language in the termination statute which would specifically relieve the noncustodial parent of the support obligation. Based on the legislative silence as to the effect of a termination order, in contrast to the explicit language of the adoption provision,²⁹ the court concluded that a termination order does not automatically relieve a parent of the duty of support.³⁰ Because no substitute parent assumes the support obligation when there is merely a termination of parental rights, the court refused to read language comparable to the specific wording of the adoption provisions into the termination statute, holding that parental obligations do not necessarily cease simply because parental rights have terminated. The court concluded that while the parental interest in custody and control of their children is important, consideration of the needs and welfare of the child outweigh the parents' interest.³¹

²⁵ See, e.g., *Kresteller v. Superior Court*, 248 Cal. App. 2d 545, 549, 56 Cal. Rptr. 771, 773 (1st Dist. 1967): "The effect of the conclusion reached by us is that section 196, when read in conjunction with section 137.1 and Penal Code section 270, no longer requires the conclusion that a father deprived of the custody of his child owes no duty to provide for the support, maintenance, and education of the child." The court found that an independent action for child support was maintained even if the previous judgment awarding custody to the mother did not include a support order against the father. *Accord*, *Hoover v. Hoover*, 307 Ill. App. 590, 30 N.E. 2d 940 (1940); *Barrett v. Barrett*, 44 Ariz. 509, 39 P. 2d 621 (1934). See generally, Goodman, Oberman, & Wheat, *Rights and Obligations of Child Support*, 7 Sw. U. L. Rev. 36, 45 (1975).

The court in *O'Connell*, however, does not consider the distinction between the effect of a custody award upon dissolution and a parental termination order. See text accompanying note 50 *infra*.

²⁶ *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 856, 146 Cal. Rptr. 26, 30-31 (3d Dist. 1978). The court reviewed dissolution, emancipation, juvenile commitment, and guardianship cases where a support obligation was imposed on the noncustodial parent.

²⁷ CAL. CIV. CODE § 232, *supra* note 2.

²⁸ CAL. CIV. CODE § 229, *supra* note 12.

²⁹ Compare CAL. CIV. CODE § 232, *supra* note 2, with Cal. Civ. Code § 229, *supra* note 12.

³⁰ *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 852, 146 Cal. Rptr. 26, 28 (3d Dist. 1978).

³¹ *Id.* at 856, 146 Cal. Rptr. at 30.

III. DISCUSSION

Early decisions held the right to the child's services and earnings to be an essential element of the parental right to custody.³² Courts viewed the parent's right to the child's services and earnings as "compensation" for assuming the duty of support.³³ These decisions generally reasoned that a parent deprived of custody, and therefore of the services and earnings of the child, should no longer be liable for the support of the child.³⁴ In essence, the courts looked at whether the parent had custody and its attendant parental rights to determine whether the court could properly impose a support obligation on that parent.³⁵ Thus, the parent entitled to custody not only would receive the benefits of the child's services and earnings, but was also obligated to support and educate the child.³⁶

Modern decisions involving child support have not followed this *quid pro quo* approach to imposing support obligations on the natural parents, even though state statutes typically recognize a right to the services and earnings of the child.³⁷ Recent cases have instead emphasized the needs and welfare of the child rather than the custodial rights of the parent.³⁸ For example, in *Armstrong v.*

³² *E.g.*, *McGarr v. National & Providence Worsted Mills*, 24 R.I. 447, 449, 53 A. 320, 321, 60 L.R.A. 122, 124, 96 Am. St. Rep. 749, 751 (1902): "His [the father's] right to their [his children's] services, like his right to custody, rests upon the parental duty of maintenance, and it is said to furnish some compensation to him for his own services rendered to the child." *See also* *Barrett v. Riley*, 42 Ill. App. 258, 261 (1891).

³³ *Wardrobe v. Miller*, 53 Cal. App. 370, 375, 200 P. 77, 79 (3d Dist. 1921).

³⁴ *Goodman, Oberman, & Wheat*, *supra* note 25, at 45.

³⁵ Prior to *O'Connell*, the issue of the natural parent's obligation to support his or her minor children arose primarily in the context of cases dealing with dissolution, where custody was placed in the hands of one parent without completely and finally terminating the rights of the noncustodial parent.

³⁶ *E.g.*, CAL. CIV. CODE § 196 (West Cum. Supp. 1979) provides: "The parent entitled to the custody of the child must give him support and education suitable to his circumstances. If the support and education which the father of the child is able to give is inadequate, the mother must assist him to the extent of her ability."

³⁷ CAL. CIV. CODE § 197 (West Cum. Supp. 1979) provides in part: "The mother of an unmarried minor child is entitled to its custody, services, and earnings. The father of the child, if presumed to be the father under subdivision (a) of section 7004, is equally entitled to the custody, services, and earnings of the unmarried minor. . . ."

³⁸ While CAL. CIV. CODE § 196 places the duty of support on the parent entitled to custody of the child, the provision does not proscribe the imposition of a support duty on the noncustodial parent. Decisions such as *Bierl v. McMahon*, 270 Cal. App. 2d 97, 75 Cal. Rptr. 473 (5th Dist. 1969), consider the child's needs

Armstrong,³⁹ the mother was awarded custody, and the minor children brought an action for support and maintenance against their father pursuant to a support order which had accompanied the dissolution decree. Focusing on the basic needs of the children, the California Supreme Court held that the trial court must assess the ability of the father to meet the basic needs of the children notwithstanding his lack of custody.⁴⁰

While a divorced, noncustodial parent has no obligation to support a child in the absence of a support order,⁴¹ the initial failure of a custodial parent to seek an order of support from the trial court does not preclude the imposition of a support obligation in a later proceeding.⁴² Likewise, it is the well-settled rule in California that the child's own right to bring a support action against his or her parents cannot be abridged by agreements between the mother and the father,⁴³ nor by the denial of custody to one of the parents.⁴⁴ Moreover, even if the custodial parent forfeits his or her own right to spousal support, the child's claim is unaffected.⁴⁵ Thus, the debt that arises out of the support obligation is owed to the minor child, not the custodial parent.⁴⁶

While *O'Connell* acknowledges the needs and welfare of the child as factors in considering whether to continue the support obligation after the termination of parental rights, the opinion is seriously deficient in several respects. On one hand the court abandons without discussion the rule of finality which has traditionally governed parental termination,⁴⁷ while on the other hand

and the parent's ability to pay as the main criteria in disputes involving child support.

³⁹ 15 Cal. 3d 942, 544 P. 2d 941, 126 Cal. Rptr. 805 (1976).

⁴⁰ *Id.* at 952, 544 P. 2d at 948, 126 Cal. Rptr. at 811.

⁴¹ B. WITKIN, SUMMARY OF CALIFORNIA LAW, PARENT AND CHILD, § 120 (8th ed. 1974).

⁴² *Kresteller v. Superior Court*, 248 Cal. App. 2d 545, 56 Cal. Rptr. 771 (1st Dist. 1967). See note 25 *supra*.

⁴³ *Elkind v. Byck*, 68 Cal. 2d 453, 439 P. 2d 316, 67 Cal. Rptr. 404 (1968); *Hunter v. Hunter*, 170 Cal. App. 2d 576, 339 P. 2d 247 (2d Dist. 1959); *Allen v. Allen*, 138 Cal. App. 2d 706, 292 P. 2d 581 (1st Dist. 1956).

⁴⁴ *Fagan v. Fagan*, 54 Cal. App. 2d 189, 110 P. 2d 560 (4th Dist. 1941); *Dixon v. Dixon*, 216 Cal. 440, 14 P. 2d 497 (1932). See also B. WITKIN, note 41 *supra*, at § 122. See also Annot., 13 A.L.R. 2d 1142 (1950).

⁴⁵ *Evans v. Evans*, 154 Cal. 664, 98 P. 1044 (1908).

⁴⁶ *Williams v. Williams*, 8 Cal. App. 3d 636, 639, 87 Cal. Rptr. 754, 756 (1st Dist. 1970).

⁴⁷ See note 10 *supra*. Under CAL. CIV. CODE § 238, a termination order ends all possibility of a return of custody to the terminated parent. An award of custody upon dissolution, however, is not final in all respects and the court

it takes an equivocal position as to the newly created possibility of support after termination. Anachronistic notions of parental custody rights still appear to retain some weight in the court's determination of support, even after termination. Additionally, the court fails to discuss the policy reasons for recognizing a continuing support obligation.

O'Connell is not a typical case. The usual purpose of a custody termination decree is to facilitate the commencement of adoption proceedings,⁴⁸ yet no adoption took place in *O'Connell*, nor, apparently, did anyone seek to adopt the two minor children. Legally, the two minor children could turn only to their mother for support. Thus, the court squarely faced the question whether there should be a continuing support obligation after a custody termination order when the children obtain no substitute parent through adoption.⁴⁹

Prior to *O'Connell*, a parental termination order, unlike a simple custody award upon dissolution, had the effect of completely and finally severing the legal rights and legal obligations between the terminated parent and the child.⁵⁰ Since termination normally precedes an adoption, the final nature of the termination order served to break the child's ties with a presumably disruptive past,⁵¹ facilitating the creation of a new parent-child relationship. Ultimately, such a permanent break with the past brought a semblance of continuity to the new relationship by preventing the intrusion of the terminated parent into the child's new family

retains jurisdiction to modify or vacate its prior order. See, e.g., *Lewis v. Lewis*, 174 Cal. 336, 163 P. 42 (1917).

⁴⁸ See text accompanying notes 14-16 *supra*.

⁴⁹ The court, however, did make reference to the motive of the mother in seeking the termination order and appeared to be disappointed that the father did not appeal from the grant of the termination petition. The court questioned the apparent use by the trial court of the termination order as a means of punishing the father for failing to provide support as originally ordered. In *re* *Marriage of O'Connell*, 80 Cal. App. 3d 849, 855, 146 Cal. Rptr. 26, 29-30 (3d Dist. 1978).

⁵⁰ See note 10 *supra*.

⁵¹ This conclusion reflects the circumstances under which a termination proceeding may be commenced under CAL. CIV. CODE § 232: 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 felony; if the parent is declared mentally ill or deficient or is incapable of supporting or controlling the child because of mental deficiency. See generally, Comment, *Proceedings to Terminate Parental Rights: Too Much or Too Little Protection for Parents*, 16 SANTA CLARA L. REV. 337, 338 (1976); Comment, *Domestic Relations Problems of California Prisoners*, 6 U.C. DAVIS L. REV. 313, 321 (1973).

life.⁵² Thus, termination contemplated the complete integration of the child into the new adoptive family, complete with an obligation of the new parents to support and maintain the child.⁵³

When for some reason adoption of the child does not follow termination of parental rights, the child acquires no substitute parent or family.⁵⁴ Arguably in this case, parental rights and duties should not be terminated at all.⁵⁵ In some instances, however, it may be in the best interests of the child to terminate parental rights despite the lack of a substitute family;⁵⁶ in other cases, the anticipated adoption may never in fact take place. In any event, the financial needs of the child remain the same, and the termination order in such cases leaves the child with only the custodial parent as a source of support. A termination order, which typically is final, thus fails to promote the child's interest in having a financially secure home because it eliminates a preexisting source of support while making no substitution.

Since the rule of finality fails to provide the child with financial security in those cases where adoption does not follow a termination, the paramount interest in the needs and welfare of the child suggests the necessity of continuing the support obligation beyond the termination of parental rights. In view of this problem area, the court in *O'Connell* takes a less-than-satisfactory approach in determining whether the support obligation should continue after termination.

The *O'Connell* opinion directs the trial court to consider five factors in deciding whether to discontinue or modify its original child support order upon termination of parental rights: (1) the parent's ability to pay; (2) the financial needs of the children; (3) in this case, Pamela's attempts to deny visitation; (4) her remarriage; and (5) the termination order itself.⁵⁷ Consideration of the

⁵² For an excellent discussion of the child's need for continuity of relationships, surroundings, and environment, see J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-39 (1973). See also, H. CLARK, *supra* note 5, at 633; Note, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U.L. REV. 446, 450 (1976).

⁵³ See H. CLARK, *supra* note 5, at 658-659.

⁵⁴ *But cf.* CAL. CIV. CODE § 239 (West Cum. Supp. 1979) (directing a court to appoint a guardian when both parent's rights have been terminated). One authority suggests that the statutory guardian in this instance is in effect a substitute parent. See 1978 CAL. FAM. L. REP. 1147, 1148 (1978).

⁵⁵ The Court expressed some concern as to the propriety of the original termination order, but its validity was not raised on appeal.

⁵⁶ The circumstances for commencement of a termination proceeding pursuant to CAL. CIV. CODE § 232 are summarized in note 51 *supra*.

⁵⁷ *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 857, 146 Cal. Rptr. 26, 31

parent's ability to pay and the financial needs of the children is the accepted rule in determining the amount of support, but courts generally have held that the denial of visitation rights is no reason for reducing or terminating a parent's support obligation.⁵⁸ Also, the remarriage of the custodial parent normally has no effect on the support obligation of the noncustodial parent.⁵⁹ *O'Connell*, however, suggests that purposeful frustration of visitation rights by the custodial parent and the effects of remarriage are proper subjects for evaluation in child support disputes.⁶⁰ This suggestion unfortunately revives vestiges of the earlier *quid pro quo* notions, i.e., no visitation, no support. Prior to *O'Connell*, the courts in dissolution cases refused to consider visitation as a factor in view of the paramount interests of the child.⁶¹

When a court considers such factors as parental ability to pay, the needs of the child, or the effects of remarriage, as *O'Connell* directs, it engages in a balancing of essentially financial considerations. In contrast, termination of parental rights and frustration of visitation do not affect the financial needs and resources of the child; instead they relate more to concerns with the fairness of

(3d Dist. 1978).

⁵⁸ *E.g.*, *In re Marriage of Ciganovich*, 61 Cal. App. 3d 289, 132 Cal. Rptr. 261 (3d Dist. 1976). In *Ciganovich*, a mother attempted to prevent exercise of visitation rights granted to the father upon dissolution by concealing the whereabouts of herself and the children. The father unsuccessfully petitioned to change custody and modify the support order. The Court of Appeals remanded on the custody issue, and said:

Confronted with such a situation, a trial court should be concerned with the child's welfare as the paramount consideration. The court should bear in mind that preservation of parental relationships is in the best interests of the child as well as the parent (citations omitted) . . . (A) mother's sabotage of the father's visitation right furnishes no ground for withholding child support . . ."

Id. at 294, 132 Cal. Rptr. at 264.

Thus, while frustration of visitation has been a factor in custody redetermination in dissolution cases, it generally is not regarded as a basis for altering the child support obligation. *Accord*, *In re Marriage of Roesch*, 83 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1st Dist. 1978), *rev. denied*, 47 U.S.L.W. 3549 (1979); *Ernst v. Ernst*, 214 Cal. App. 2d 174, 29 Cal. Rptr. 478 (2d Dist. 1963). *But cf.*, *Szamocki v. Szamocki*, 47 Cal. App. 3d 812, 121 Cal. Rptr. 231 (2d Dist. 1975).

⁵⁹ See Goodman, Oberman, & Wheat, *supra* note 25, at 59.

⁶⁰ *In re Marriage of O'Connell*, 80 Cal. App. 3d 849, 858, 146 Cal. Rptr. 26, 32 (3d Dist. 1978).

⁶¹ See Goodman, Oberman, & Wheat, *supra* note 25, at 59. See, *e.g.*, *Gaidos v. Gaidos*, 48 Wash. 2d 276, 280, 293 P. 2d 388, 390 (1956): "The extent of a parent's duty to contribute to the support of his minor child depends on the child's need and the parent's ability to pay; it is not a *quid pro quo* for the visitation privilege."

imposing a support obligation on the noncustodial parent. While the fairness of imposing a support obligation is arguably a legitimate concern, the court is apparently emphasizing fairness to the terminated parent over fairness to the child. This seems to be inconsistent with the court's prior acknowledgement of the modern trend towards recognition of the child's needs without reference to parental rights regarding the child. Moreover, *O'Connell* provides no guidelines for the trial court as to the amount of weight to be assigned to this questionable "parental fairness" factor.⁶² The only certainty is that a termination order may not be the sole reason for discontinuing child support.⁶³

If, *arguendo*, the notion of fairness to the terminated parent is a legitimate concern, then certainly it is fair to hold a parent responsible for the support and maintenance of his or her minor, unadopted offspring. The circumstances for terminating parental rights are predicated on a finding that the parents have not provided, or are not capable of providing a healthy environment for the child.⁶⁴ Surely the legislature did not intend a parent to benefit from abandoning, neglecting, or abusing his or her minor children by escaping existing legal obligations.⁶⁵ Additionally, the legislature has specifically declared that courts must construe the termination provisions⁶⁶ liberally to protect the interests and welfare of the child.⁶⁷

⁶² In re Marriage of O'Connell, 80 Cal. App. 3d 849, 858, 146 Cal. Rptr. 26, 32 (3d Dist. 1978).

⁶³ *Id.*

⁶⁴ CAL. CIV. CODE § 232 (a) (1) appears to have been the basis for issuance of the termination order under the circumstances before the trial court in *O'Connell*. See note 2 *supra*.

⁶⁵ In *Pacific Gold Dredging Co. v. Indus. Accident Comm'n*, 184 Cal. 462, 194 P. 1 (1920), the California Supreme Court discussed the child support obligation of a father when custody was awarded to the mother upon divorce, and the father was found to be unfit as a parent due to habitual use of alcohol. The Court said:

We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child who has no other source of maintenance, because, on account of his own fault, he has been deprived of custody of the child. Both a legal and moral obligation rests upon a father to support his minor children . . . (I)t certainly would be a reproach upon the law if a father, by his own misconduct making him an unfit custodian of the child, could absolve himself from legal responsibility for its support.

Id. at 466, 194 P. at 3.

⁶⁶ CAL. CIV. CODE § 232, *supra* note 2.

⁶⁷ CAL. CIV. CODE § 232.5 (West Cum. Supp. 1979) provides: "The provisions

This declaration is not without substantive effect.⁶⁸ For example, *In re Neal*⁶⁹ concerned an abandonment proceeding pursuant to the termination statute involved in *O'Connell*. In reversing an order denying an abandonment petition, the California Court of Appeals directed the trial court to "consider, in a liberal application of those [termination] provisions, the best interest and welfare of the child before reaching its conclusion on the issue of abandonment."⁷⁰

There is thus ample support in statute, policy, and modern trend to find a continuing obligation of child support for a parent whose rights have terminated. Furthermore, the effectiveness of such a requirement should not be reduced by weighing antiquated notions of parental rights regarding their children in the determination of child support as the *O'Connell* court did. Until a child receives a substitute parent, the courts should not deprive that child of a source of support simply because the terminated parent is unfit to retain custody. If the needs and welfare of the minor child are the paramount concerns, then visitation and termination of parental rights should not be a factor in determining whether the support obligation should continue.

CONCLUSION

O'Connell is the first decision construing the effect of a decree terminating parental rights on the support obligation of the minor child's parents. The court in *O'Connell* held that such a decree does not automatically terminate a parent's support obligation but that the trial court may consider it as a factor, along with the parent's ability to pay, the financial interests of the child, any attempt by the custodial parent to frustrate visitation rights, and the effect of the custodial parent's remarriage.

The court arrived at an obscure basis for considering the effects of a termination order. The court acknowledged the modern trend which emphasizes the needs and welfare of the child above the interests of the parents, but it then adopted an approach which revived antiquated notions of child support that tied the existence of the support obligation to the exercise of parental rights to custody and control. *O'Connell* equivocates on its purported adherence to the modern trend, finding only that the support

of this chapter shall be liberally construed to serve and protect the interests and welfare of the child."

⁶⁸ See generally, B. WIKIN, *supra* note 41.

⁶⁹ 265 Cal. App. 2d 482, 71 Cal. Rptr. 300 (3d Dist. 1968).

⁷⁰ *Id.* at 490, 71 Cal. Rptr. at 305.

obligation is not automatically erased by a parental termination decree. If the needs and welfare of the minor child are the paramount concerns, however, then the trend away from the consideration of parental rights militates against any specific consideration of a termination order.

This article suggests that termination of parental rights should not be a factor in determining the child support obligation when adoption of the child does not ensue. The policy behind treating termination with finality is not applicable when no substitute parent adopts the child. The financial needs of the child still remain when adoption does not take place. Parents should not be rewarded for neglecting their children by receiving relief from their support obligation. Equitable notions of fairness should place a continuing support obligation on the parent whose rights are terminated if the child does not receive a substitute parent. Since the legislature has expressed an intent that the custody termination provisions be interpreted liberally to protect the interests of the child, finding a continuing obligation of support would effectuate this intent.

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