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# GUARDIANSHIP OF PHILLIP B.: NONPARENTS' RIGHT TO CUSTODY IN CALIFORNIA

## I. INTRODUCTION

On May 30, 1983, an article<sup>1</sup> appeared in *Newsweek* Magazine warning the public of the consequences of the California Court of Appeal's recent decision in *Guardianship of Phillip B.*,<sup>2</sup> a case in which the court awarded custody of a Down's syndrome teenager to nonparents over the objection of the biological parents. Warren and Patricia Becker, the authors of the article and the parents of the child, decried the court's intrusion into the private enclave of family life, comparing the court's intervention to that of "Big Brother" in George Orwell's novel *1984*.<sup>3</sup> The Beckers cautioned that "parents and families of loved ones in another's care [had] something to fear."<sup>4</sup> This fear, according to the Beckers, was that a third party would convince the court that he is more "involved" with a child than the parents and, therefore, is in a position to make better choices for the child.<sup>5</sup> Consequently, even though the parents have neither abandoned, abused, nor neglected their child, the court might be persuaded to grant custody to a third party to fulfill the child's "best interests."<sup>6</sup>

The Beckers' fear that the court will regularly interject itself into a family's home, disrupting the autonomous structure of the family, is unfounded. *Guardianship of Phillip B.* does not represent the court's intention to interfere with parents' fundamental right to make decisions dealing with their child's welfare. Rather, the decision represents the court's reaffirmation that it will no longer defer to parental autonomy when doing so might not serve the best interests of the child. *Guardianship of Phillip B.* exemplifies California's approach to resolving custody cases in which the parents' right to care and make decisions for their child directly conflicts with the child's best interests. This Note examines the effectiveness, the vulnerabilities, and the social and legal consequences that such an approach will have on California child custody law in the future.

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1. Becker, *Mourning the Loss of a Son*, NEWSWEEK, May 30, 1983, at 17.

2. 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (1983).

3. Becker, *Mourning the Loss of a Son*, NEWSWEEK, May 30, 1983, at 17, col. 3.

4. *Id.*

5. *Id.*

6. *Id.*

## II. CALIFORNIA CUSTODY LAW IN PERSPECTIVE: THE RIGHTS OF NONPARENTS

At the beginning of the twentieth century, California courts adhered to the parental rights doctrine, a theory which gave parents the absolute right to exercise control over all aspects of their children's lives without fear of interference from the state or third parties. In *In re Campbell*,<sup>7</sup> a case in which a father contested the award of custody of his two year old daughter to her maternal grandparents, the court equated the father's right to care for his daughter to his right to exercise control over his property.<sup>8</sup> The court stated that the father had a "natural right to the care and custody of his child . . . [This] right, at least so far as the services of the child are concerned, is strictly a property right, for loss of which . . . an action could at common law be maintained . . ." <sup>9</sup> The court added that the only way to involuntarily divest a parent of this constitutional right to custody was to make a finding that the parent was unfit.<sup>10</sup>

During the early part of the century, California courts abandoned the feudal concept that a father's right to custody was superior to that of all others', including a mother's right.<sup>11</sup> Instead, where the custody battle was between two parents, the court focused on the "best interests of the child" theory to determine the proper custodial parent.<sup>12</sup> Although the court's rejection of the father's superior right to custody signified a monumental change in custody law, the most significant innovation was the court's use of California Civil Code section 138<sup>13</sup> which allowed the court to make orders for the custody and care of a minor child as it

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7. 130 Cal. 380, 62 P. 613 (1900).

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

9. *Id.*, 62 P. at 614.

10. *Id.* at 383, 62 P. at 614. A finding of detriment, however, could not be made unless a parent severely abused or neglected the child; minor infractions did not warrant a finding of unfitness. Porter & Walsh, *The Evolution of California's Child Custody Laws: A Question of Statutory Interpretation*, 7 Sw. 1 (1975).

11. In *Miller v. Higgins*, 14 Cal. App. 156, 111 P. 403 (1910), the court discussed the modification of § 197 of California Civil Code which granted the father a superior right to the custody, services and earnings of his children. A subsequent section of the code removed the father's superior right in situations where the mother and father were separated and living apart. More significantly, however, the court recognized as early as 1910 that it had the power "to make such orders for the custody and care of minor children as it may deem necessary or proper and may at any time modify and vacate the same." *Id.* at 161, 111 P. at 405.

12. *Id.*, 111 P. at 405.

13. Former § 138 subdivision 2 set forth the theory that neither parent was entitled to custody as a right; but "other things being equal" if the child is of tender years, he or she should be given to the mother. During the early part of the 1900's, especially during the war years, women proved that they were capable of earning a living and supporting themselves.

deemed necessary and proper.<sup>14</sup> In *Miller v. Higgins*,<sup>15</sup> the court commented that it had the power to award custody to either parent, even if that parent had been responsible for causing the divorce on grounds of cruelty, if such an award had been in the best interests of the child. The *Miller* court emphasized that its function was not to determine which parent was unfit but rather what was the best interest of the child.<sup>16</sup>

As between parents and nonparents, however, an extreme preference for the parental rights doctrine prevailed during the 1940's and 1950's. The court went so far as to rule that a parent who had been awarded custody in a dissolution proceeding could not later place the children in the custody of grandparents or other close relatives, to the exclusion of the other parent.<sup>17</sup> In *Robertson v. Robertson*,<sup>18</sup> the court refused to allow a father to leave his child in the custody of his parents while he was on military duty because doing so would, in effect, favor nonparents' right to custody over that of the mother's.<sup>19</sup> Because this kind of "custody transfer" would deprive a natural parent of the fundamental right to care for her child, the court refused to permit such arrangements.<sup>20</sup>

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The change in custodial preference for the mother reflected a legislative supposition that it was now economically feasible for a "single" woman to raise a child on her own.

It should be noted, however, that the language of § 138 left a great deal of discretion to the court. By allowing the court to interpret the expression "all things being equal," the court could maneuver around the "maternal preference" clause if it so desired. See *Priest v. Priest*, 90 Cal. App. 2d 185, 202 P.2d 561 (1949) (where court found both parents fit to have custody, award of custody to the father was not an abuse of discretion).

Section 138 was repealed in 1969 and custody provisions are now codified at CAL. CIV. CODE § 4600 (West 1983). See *infra* note 42 and accompanying text.

14. See *supra* note 11.

15. 14 Cal. App. 156, 111 P. 403 (1910).

16. *Id.* at 161, 111 P. at 405.

17. *Robertson v. Robertson*, 72 Cal. App. 2d 129, 164 P.2d 52 (1945).

18. *Id.*, 164 P.2d at 52.

19. *Id.* at 135, 164 P.2d at 56. The court was strongly influenced by a popular theory of that era that a child's mother was best suited to fulfill the child's needs and desires. The *Robertson* court stated:

In the case of a child of tender years, experience has taught that in the vast majority of cases, there is no one who will give such complete and selfless devotion, and so unhesitatingly and unstintingly make the sacrifices which the welfare of the child demands, as the child's own mother. . . . [F]airness alone requires that she and not a third person be allowed the opportunity to carry out the trust she as a mother owes her child.

*Id.*, 164 P.2d at 56.

20. *Id.* at 133, 164 P.2d at 57. That the nonparent seeking custody is related to the minor is of no consequence. The court commented that "[a grandparent's] right [to custody], if it can be called that, is no different from that of any third person or stranger." *Id.* at 137, 164 P.2d at 57. This is a harsh rule because in any case where a biological parent contested a close relative's bid for custody, the court could not give the relative any greater preference than it would give to a complete stranger, even if an award of custody to the relative would be in the best interests of the child. In discounting the best interests of the child theory, the court held that it

A similar result was reached in *Loomis v. Loomis*,<sup>21</sup> a case in which a trial court awarded custody to the father in a dissolution proceeding, notwithstanding the mother's objections, knowing that the father intended to send the child to live with his aunts.<sup>22</sup> The father, a Maryland resident, testified that he had no way of caring for his son but, if awarded custody, he would arrange for the boy to live with his aunts who had "nice homes" in California. The father also argued that his son would be better off with the aunts than with the child's mother since the mother would have to place the child in a nursery school during the day while she worked.<sup>23</sup> The court of appeal reversed, stating that the trial court erred in awarding custody to the father merely because the best interest of the child would be served if the child were placed in the home of "strangers."<sup>24</sup> The court held that such a ruling violated the underlying principle of parental rights and was therefore improper.<sup>25</sup>

While the result in *Loomis* reinforced compliance with the parental rights doctrine, the decision was important because it introduced a discussion of the best interests of the child into the context of a nonparent's bid for custody. It reflected the growing concern that the best interests of the child should be afforded greater weight than parents' rights in custody proceedings.

By the mid-1950's, the dual standard created by using the parental rights doctrine in custody disputes involving nonparents and the best interests of the child theory in custody disputes between parents produced a great deal of confusion in the courts. Courts were not always sure

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was improper to award custody to a stranger "merely because a court may feel that by so doing the child may have greater material advantages, . . . or that 'some third person can give the child better care and greater protection.'" *Id.* at 133, 164 P.2d at 55-56 (quoting *Roche v. Roche*, 25 Cal. 2d 141, 144, 152 P.2d 999, 1000 (1944)).

21. 89 Cal. App. 2d 232, 201 P.2d 33 (1948).

22. *Id.* at 235, 201 P.2d at 35.

23. *Id.*, 164 P.2d at 35.

24. *Id.* at 238, 164 P.2d at 36.

25. Both the *Loomis* and *Robertson* courts elected to follow the rationale articulated in *Succession of Reiss*, 46 La. Ann. 347, 15 So. 151 (1894), a case in which a maternal grandmother sought to compel the widowed father of her two grandchildren to send them to visit her. In reversing the trial court's decision in favor of the grandmother, the Louisiana Supreme Court stated:

[T]he law properly accords [the grandparents] no authority over the children. To permit them to intervene would occasion embarrassment and annoyance; evenmore, it would injuriously hinder proper paternal authority by dividing it. . . . Without doubt it is desirable that the ties of affection that nature creates between [the grandparents] and their grandchildren be strengthened and unceasing, but, if there is a conflict, the father alone or the mother should be the judge. The law gives no right of action to the grandparents.

*Id.* at 352, 15 So. at 152.

when a discussion of the best interests of the child theory was necessary and when one was inappropriate. This confusion produced decisions like *Stewart v. Stewart*,<sup>26</sup> in which the court applied a hybrid "parental rights-best interests of the child" analysis in resolving a custody dispute. In *Stewart*, the parents had stipulated by contract that they would place their children in the custody of the father's aunt and her husband.<sup>27</sup> The court, however, refused to enforce the contract, stating that although parents have the right to contract with each other about the custody of their children or the right to "stipulate away" their respective parental rights, "such [contracts] should not be permitted to interfere with or impede . . . that wide discretionary power given to the courts in the disposition of the custody of children, in accord with their best interests, or independently of the desire of a parent."<sup>28</sup> In essence, the court refused to enforce any pre-trial custody arrangement which did not accommodate the best interests of the child. Because, however, the *Stewart* court reasoned that the best interests of the child would always be served by preserving custody in a parent whenever possible, it refused to allow the parents to defer their right to custody to nonparents.<sup>29</sup> Consequently, after *Stewart*, nonparents seeking custody were presented with a curious dilemma. While it appeared that the court was now willing to focus on the best interest theory in custody disputes between parents and nonparents, it appeared equally true that a nonparent's chance of gaining custody was dismal since the court equated "best interest" with parental retention of custody.

By the mid-1960's, California custody law was in drastic need of clarification and revision. In 1966, Governor Reagan established the Commission on the Family to evaluate the current state of family law and to suggest reform in areas of domestic relations that were outdated and ineffective.<sup>30</sup> One of the particular areas in which California was behind the times was in its procedure for resolving child custody disputes between parents and nonparents.<sup>31</sup> While other states<sup>32</sup> were already focusing on the best interest of the child theory in custody disputes, California still adhered to the "parental rights doctrine" and required that the trial court find a parent "unfit" before awarding custody to a

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26. 130 Cal. App. 2d 186, 278 P.2d 441 (1955).

27. *Id.* at 187-88, 278 P.2d at 442.

28. *Id.* at 193, 278 P.2d at 445 (citing *Anderson v. Anderson*, 56 Cal. App. 87, 202 P. 426 (1922)).

29. *Id.*, 278 P.2d at 445-46.

30. Porter & Walsh, *supra* note 10, at 1-2.

31. *Id.*

32. *Id.*

nonparent.<sup>33</sup> The Commission sent a recommendation to the California Legislature proposing that California abandon the prerequisite finding of parental unfitness and allow an award of custody to a nonparent upon finding that "such an award was necessary to promote the best interest of the child."<sup>34</sup> The Commission reassured the legislature that its proposal did not attempt to undermine parents' fundamental custody right and accordingly, advocated that wherever possible, a parent was to be given preference over all others seeking custody of the child.<sup>35</sup> Thus, the Commission recommended that the legislature seek to regulate such disputes to the extent that whenever the court awarded custody to a nonparent, the court must specifically articulate the reasons why such an award was necessary to serve the child's best interests.<sup>36</sup>

Notwithstanding the Commission's stated position that parents should retain primary consideration in custody disputes, the California Legislature did not accept this recommendation. The legislature feared that a standard which focused solely on the best interests of the child would grant unlimited discretion to the trial court which could lead to abuse.<sup>37</sup> This fear may have been based on the result of a 1966 Iowa case, *Painter v. Bannister*,<sup>38</sup> where the court found that it was in a child's best interest to remain on a midwestern farm with his grandparents rather than live in California with his "Bohemian" father. Although the *Bannister* court found that the child's father was indeed a fit parent, it ruled that security and stability in a home were more important than intellectual stimulation; thus, an award of custody to the grandparents who provided a stable, dependable, conventional, middle-class background was preferable to returning the child to the "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating" household of the father.<sup>39</sup> The result in *Bannister* was controversial not only because the court made a value judgment in comparing the two lifestyles but also because the best interest of the child theory took precedence over the parental rights doctrine.<sup>40</sup>

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33. *Id.* at 4-5.

34. *Id.* at 10-11.

35. *Id.* at 11.

36. *Id.*

37. *Id.* at 11-12.

38. 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966).

39. *Id.* at 1393, 1396, 140 N.W.2d at 154, 156.

40. The decision advocated that since the child's welfare was the court's paramount concern, a parent's right to custody was merely a secondary consideration for the court to entertain in making a decision. Consequently, Iowa courts were no longer constrained by the parental preference doctrine and were free to place a child with whichever party was better suited to accommodate the child's best interests.

The California Legislature was reluctant to give state courts discretion to impose value-laden decisions on the parties to a custody dispute.<sup>41</sup> It therefore adopted a two-prong test which a court must meet before awarding custody to a nonparent: the court must make a finding that (1) the award of custody to a parent would be detrimental to the child, and (2) the award of custody to a nonparent would be required to serve the child's best interests.<sup>42</sup> This double requirement codified in California Civil Code section 4600<sup>43</sup> was considered flexible enough to ensure that the child's best interests are served in every case yet strict enough to curb any court abuse in attempting to impose its morals on society.<sup>44</sup> Section 4600 was principally designed to control the court's subjectivity and to aid the court in dealing with difficult emotional situations.<sup>45</sup>

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41. Porter & Walsh, *supra* note 10, at 11-13.

42. CAL. CIV. CODE § 4600(c) (West 1983).

43. (West 1983). California Civil Code § 4600 provides:

(a) The legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making the award of custody or modification thereof. In determining the person or persons to whom custody shall be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider and give weight to the nomination of a guardian of the person of the child by a parent under Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) to both parties jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent and shall not prefer a parent as custodian because of that parent's sex. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

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

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

44. Porter v. Walsh, *supra* note 10, at 13-14.

45. *In re B.G.*, 11 Cal. 3d 679, 697-98, 523 P.2d 244, 257, 114 Cal. Rptr. 444, 457 (1974) (quoting COMMITTEE ON JUDICIARY, REPORT OF 1969 DIVORCE REFORM LEGISLATION, 4 CAL. ASSEM. J. 8060-61 (1969)).



The legislature did not provide a definition for "detriment."<sup>46</sup> Instead, it advocated that the trial court should determine "detriment" on a case-by-case basis in light of the particular circumstances.<sup>47</sup> While this was probably the most practical approach, it seems odd that the legislature, which enacted section 4600 specifically to curb judicial power, would allow the courts to define "detriment." Additionally, section 4600 is difficult to apply in custody disputes between parents and nonparents and often does not accomplish the two purposes for which it was enacted.

One of the principal cases construing section 4600 was *In re B.G.*,<sup>48</sup> a case in which a Czechoslovakian mother sought to regain custody of her two young children from American foster parents with whom the children resided. The foster parents gained custody of the children shortly after the biological father, a political refugee who fled Czechoslovakia with the children, died of cancer. In his will, the father requested that his children not be returned to Czechoslovakia; his first wish was that his mother care for the children at her home in Yucaipa, California.<sup>49</sup> If this was not possible, the father wanted his friends, Mr. and Mrs. Smith, to care for the children.<sup>50</sup> After a dependency hearing on August 29, 1961, a juvenile court adjudged the children dependents of the court and placed them in the custody of the welfare department to be maintained in the Smiths' house with the Smiths as their foster parents.<sup>51</sup> The children lived with the Smiths for the next two years until their biological mother sought to regain custody.

At trial, the court determined that both the foster parents and the mother were fit to properly care for the children.<sup>52</sup> The court did, however, express its concern that the mother had experienced some difficulties in her former and present marriages, that she was not affectionate toward her children and that her children had become "Americanized" and had virtually forgotten the Czech language.<sup>53</sup> In denying the mother's motion, the trial court stated:

We have to weigh and balance the good and the bad in both directions and then choose that which, all in all, will be in the best interests of the children. . . . [I]t is the consideration of

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46. *Id.*

47. *Id.*

48. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

49. *Id.* at 684 n.3, 523 P.2d at 247 n.3, 114 Cal. Rptr. at 447 n.3.

50. *Id.*, 523 P.2d at 247 n.3, 114 Cal. Rptr. at 447 n.3.

51. *Id.* at 684-85, 523 P.2d at 247, 114 Cal. Rptr. at 447.

52. *Id.* at 686 & n.9, 523 P.2d at 248 & n.9, 114 Cal. Rptr. at 448 & n.9.

53. *Id.* at 686 & n.10, 523 P.2d at 249 & n.10, 114 Cal. Rptr. at 449 & n.10.

the Court . . . that the welfare and best interests of the children require that they be continued as dependent children of the Court to be maintained at a home to be selected by the Court . . . .<sup>54</sup>

The court never made a finding that an award of custody to the mother would be detrimental to the children.<sup>55</sup> The California Supreme Court reversed, stating that what occurred at the trial court was exactly what section 4600 was designed to prevent.<sup>56</sup> The court ruled that it was not the trial court's function to choose between two equally suitable lifestyles; without a finding of detriment, the court could not deprive the mother of her fundamental right to custody.<sup>57</sup> Moreover, because the

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

55. *Id.* at 688-89 & n.11, 523 P.2d at 249 & n.11, 114 Cal. Rptr. 449 & n.11.

56. *Id.* at 688-89, 523 P.2d at 258, 114 Cal. Rptr. at 458.

57. *Id.*, 523 P.2d at 258, 114 Cal. Rptr. at 458. Although the *B.G.* court could have rationally concluded that the children would suffer detriment if forced to return to Czechoslovakia with their mother, it failed to do so. Surely, the children would have suffered emotional trauma leaving the United States and returning to a foreign country where they would have had to re-learn their native language and adjust to a new lifestyle. Because, however, both the Smiths and the mother offered the children suitable homes and the children would suffer no physical or developmental harm in moving with the mother, the court was reluctant to make a finding of detriment. Similarly, the court placed little weight on the mother's lack of involvement with the children during their residency with the Smiths, reasoning that the mother did not choose to lose contact with her children. *Id.* at 683, 523 P.2d at 446, 114 Cal. Rptr. at 426.

The father had initially "kidnapped" the children when he fled from the Communist regime in Czechoslovakia. The mother did not consent to the children's departure nor did she discover it until the children were out of the country. Shortly after the family's departure, when the father contacted the mother in an attempt to convince her to join them, the mother begged her husband to return the children. The father, however, refused. *Id.*, 523 P.2d at 446, 114 Cal. Rptr. at 246.

While the *B.G.* court seemed to distinguish between a conscious decision to abandon children and the taking of children against a parent's wishes, a court today might not make the same distinction. Under the Uniform Child Custody Jurisdiction Act, the court will not reinstate a proper decree of custody to the parent of a kidnapped child where doing so would punish the "kidnapping" parent at the expense of the child's well-being. The court in *Smith v. Smith*, 135 Cal. App. 2d 100, 286 P.2d 1009 (1955), stated: "[C]hildren are the persons beneficially interested. The question 'What is for the best interest of [the children]?' furnishes the major issue. We must not suffer the urge to punish either parent to lead to judicial action which in effect punishes these innocent children. . . ." *Id.* at 107, 286 P.2d at 1013. See also *In re Guardianship of Rodgers*, 100 Ariz. 269, 413 P.2d 744 (1966). In *Rodgers*, the Arizona Supreme Court found an award of custody to the mother to be in the child's best interest despite evidence that the mother had removed her daughter from Texas in violation of a Texas award of temporary custody to the father. The court stated:

[W]hile an act of misconduct or malfeasance should be related to the fitness of a parent to be a suitable custodian, such does not, as an absolute rule, prohibit a court from reexamining a sister state custody decree. . . . We believe when such conduct as defying a sister state custody decree occurs the trial judge must delicately weigh that factor with all other evidence before him in properly exercising his discretion. Any other holding would punish innocent children for the wrongs committed by

supreme court attributed the mother's apparent "disinterest" to misunderstandings and poor communication between parents in two distant countries rather than to a conscious decision to abandon her children, it concluded that the mother had not severed her maternal ties to her children.<sup>58</sup>

The court of appeal reached a different conclusion in *In re Guardianship of Marino*,<sup>59</sup> a key child custody case decided one year before *In re B.G.* In *Marino*, the court of appeal affirmed the trial court's decision to award custody of a young boy to his maternal aunt and uncle over the father's objections even though the trial court had not made an express finding of detriment. When confronted with the assertion that the requirements of section 4600 had not been met, the court reasoned that it would be "self-stultifying" to remand the case on that issue.<sup>60</sup> The *Marino* court added, "[w]hen [the trial court] spoke of [section 4600] requiring a finding of 'best interest,' it was using that term synecdochically to stand for both findings required by the section."<sup>61</sup>

The *Marino* court considered the de facto parent-child relationship

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their parents and would prevent the inquiry to be made by the trial judge in determining where the best interests and welfare of the child lie.

*Id.* at 276, 413 P.2d at 749 (citation omitted).

The *B.G.* court also considered the circumstances under which the mother acted in attempting to reach her children and arrange for their return to Czechoslovakia. 11 Cal. 3d at 684-85, 523 P.2d at 247-48, 114 Cal. Rptr. at 447-48. The mother testified that before her former husband died, she obtained a Czechoslovakian divorce because she was advised by an attorney that the divorce decree would facilitate the return of the children. *Id.* at 683 n.2, 523 P.2d at 247 n.2, 114 Cal. Rptr. at 447 n.2. She also sought help from the Czechoslovakian Red Cross, the Brno Office for the Protection of Children, the Ministry of Foreign Affairs and the Czechoslovakian Embassy in Washington, D.C. *Id.* at 685, 523 P.2d at 248, 114 Cal. Rptr. at 448.

Compare the situation in *B.G.* with that of *In re TMR*, 41 Cal. App. 3d 694, 116 Cal. Rptr. 292 (1974). The mother in *TMR* was imprisoned for possession of marijuana and could only communicate with the children through bi-weekly letters. The court of appeal found that this was a reasonable means of maintaining a parent-child relationship under the circumstances and did not find the mother's conduct neglectful. *Id.* at 698-702, 116 Cal. Rptr. at 295-96. Furthermore, because the mother was to be released shortly, a normal parent-child interaction would replace the sporadic relationship that had existed while the mother and daughter were separated.

58. *Id.* at 685 & n.6, 523 P.2d at 247 & n.6, 114 Cal. Rptr. at 447 & n.6. The mother was not initially informed of the juvenile court hearings because the court could not locate her address in Czechoslovakia. The welfare department sent inquiries to the International Social Service asking for information pertaining to the mother's whereabouts. Although the International Social Service could not help, the welfare department eventually located the mother after finding an old letter with her address on it in the case file. *Id.*, 523 P.2d at 247 & n.6, 114 Cal. Rptr. at 447 & n.6.

59. 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973).

60. *Id.* at 961, 106 Cal. Rptr. at 661.

61. *Id.* at 960, 106 Cal. Rptr. at 661.

between the child and his aunt and uncle<sup>62</sup> and recognized the significant benefits derived from the relationship and the risk of psychological trauma the child would experience if that bond were severed.<sup>63</sup> The court commented that because the father never attempted to form a parent-child relationship with his son, a bond essential to the child's emotional and developmental growth was never formed. Because forcing the boy to leave his psychological parents would cause him emotional distress as well as physical upset and developmental problems, the court found that it was in the child's best interest to remain with his aunt and uncle. Implicit in this finding was the fact that an award of custody to the father would harm the boy. The *Marino* court was more eager to find detriment than the *B.G.* court when the child was threatened with emotional, physical and developmental harm. Furthermore, the *Marino* court was influenced by the father's passive attitude toward his relationship with his son.<sup>64</sup> The father's motive in seeking custody was more closely related to a somewhat archaic desire to regain control over loaned property than a desire to establish a loving relationship with his son.<sup>65</sup> Under these circumstances the court did not hesitate to make full use of its discretion to find "detriment."

After the *Marino* and *B.G.* decisions interpreting section 4600, it appeared clear that in dealing with custody disputes between parents and nonparents, California courts would no longer blindly apply the parental rights doctrine. Instead, courts would view parents' right to custody

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62. In *Marino*, the boy's aunt and uncle, Mr. and Mrs. Miller, began caring for him shortly after his mother's death. They agreed to care for the infant until his father was able to do so. Mr. and Mrs. Miller raised the child as their own. Even though Donald's aunt and uncle told him about his biological parents, he insisted on calling Mrs. Miller "mommie" and Mr. Miller "Tink." Until Donald was six years old, his father rarely visited him. By this time, Donald thought of the Millers as his parents and was rather confused by his father's sudden visits. Soon afterwards, Donald's father insisted that Donald live with him. Though the Millers were unhappy about the situation, they worked out a transitional program whereby Donald would continue to live with them but would begin to spend more weekends with his father until eventually, he would live with his father and spend alternate weekends with the Millers. Whenever Donald visited his father, however, he would become extremely nervous and tense, developing substantial intestinal distress. He sometimes became so distraught that he ran away and begged his aunt and uncle to take him "home." Seeing the agony Donald was suffering, the Millers filed a petition for custody. *Id.* at 954-55, 106 Cal. Rptr. at 656-57.

63. *Id.* at 954-56, 106 Cal. Rptr. at 656-58.

64. *See supra* notes 49-50 and accompanying text. In *B.G.*, the mother's neglect was not caused by conscious disregard for her children whereas in *Marino*, it appears that the father simply decided he did not wish to play an active role in the early years of his son's life. 30 Cal. App. 3d at 954, 106 Cal. Rptr. at 656.

65. *Id.* at 954-55, 106 Cal. Rptr. at 656-57. When asked why he wanted custody of his son, the boy's father replied, "If you had an iron that belonged to you wouldn't you want it back?" *Id.* at 955, 106 Cal. Rptr. at 657.

within the context of the best interests of the child. This was the state of California custody law when the court was faced with the peculiar facts of *Guardianship of Phillip B.*

### III. STATEMENT OF FACTS

Phillip Becker is an eighteen year old teenager who was born with Down's syndrome.<sup>66</sup> Six days after his birth, Phillip's parents placed him in an institution<sup>67</sup> because they were advised by Phillip's pediatrician and a state social worker that such a facility would be better able to provide the special care that he required. Although Mr. and Mrs. Becker made sure that Phillip's basic physical needs were met, they did not attempt to provide him with any emotional nurturing.<sup>68</sup> They justified their detachment by claiming that Phillip was so severely retarded he was incapable of forming or needing emotional ties.<sup>69</sup>

When Phillip was three years old, he was diagnosed as having a ventricular septal defect,<sup>70</sup> a congenital heart defect which commonly occurs in Down's syndrome children. Phillip's pediatrician recommended open-heart surgery to correct the condition but his parents delayed having the preliminary surgical procedures<sup>71</sup> and eventually dismissed the matter.

Phillip remained in the board and care facility until 1972 when the

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66. Down's syndrome, a form of mongolism, is caused by the abnormal production of chromosomes in the early stages of fertilized egg cells. While average cells contain twenty-three pairs of chromosomes, the cells of a Down's syndrome child usually contain an extra, unmatched chromosome which results in mild to severe levels of mental retardation. T.R. HARRISON, HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1847 (6th ed. 1970).

67. While this institution was a state licensed board and care facility for disabled children, it lacked structured education and developmental programs. *Guardianship of Phillip B.*, 139 Cal. App. 3d 407, 414, 188 Cal. Rptr. 781, 785 (1983).

68. *Id.* at 424, 188 Cal. Rptr. at 792.

69. *Id.* at 417, 188 Cal. Rptr. at 787.

70. A ventricular septal defect is a hole between the right and left ventricles of the heart. As a result of this opening, the heart pumps some of the blood directly into the circulatory system without passing it through the lungs. Consequently, some blood reenters the body unoxygenated. To compensate, the heart must work much harder than normal to supply the blood with the necessary amount of oxygenated blood, which, in turn, elevates blood pressure. If untreated, this disease becomes progressively worse to the point where the lungs can no longer oxygenate any blood. T.A. HARRISON, HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1170-71 (6th ed. 1970).

71. Phillip's doctor recommended heart catheterization. 139 Cal. App. 3d at 417, 188 Cal. Rptr. at 787. For this procedure, a surgeon inserts a thin tube called a catheter into a vein in the patient's arm. By way of the vein, the surgeon then pushes the catheter into the interior of the heart and through the hole. Using a fluoroscope, the surgeon is able to note the course of the catheter and the size of the hole. Brinsfield & Plauth, *Clinical Recognition and Medical Management of Congenital Heart Disease*, in THE HEART 841-47 (4th ed. 1978).

Beckers discovered that the facility's condition had severely deteriorated.<sup>72</sup> In January 1972, the Beckers transferred Phillip to "We Care," a licensed residential facility for developmentally disabled children in San Jose.<sup>73</sup> "We Care" recruited local volunteers to work with the children to encourage development of their basic skills. Mrs. Heath, a daily volunteer, was assigned to work with Phillip to improve his sensory perception and body coordination.<sup>74</sup> When Phillip showed significant progress after working with Mrs. Heath, the director of "We Care" contacted Mr. and Mrs. Becker seeking permission to enroll Phillip in a pre-school program.<sup>75</sup> In October 1972, with the Beckers' permission, Phillip was enrolled in a school for the trainable mentally retarded (TMR) where he was taught basic vocabulary and survival skills.<sup>76</sup>

Shortly after Phillip started attending school, the Heaths began to bring Phillip to their home for weekend visits.<sup>77</sup> During these visits, the entire family made efforts to teach Phillip social amenities and conventions such as eating with utensils, using the toilet and sleeping in a bed. With the Heaths' help and encouragement, Phillip joined a special boy scout troupe and learned how to build simple toys and play games. Phillip became an accepted member of the Heath family; he began to refer to the Heaths' house as "my house" and to Mr. and Mrs. Heath as "Dad and Mom."<sup>78</sup> As a result of these weekend visits, both the director of "We Care" and Phillip's teachers noticed remarkable improvement in Phillip's development and emotional behavior.<sup>79</sup>

In the meantime, the Beckers continued to distance themselves from their son. Not only did the Beckers neglect Phillip's emotional needs, they also avoided the continuing issue of corrective heart surgery. In 1977, Phillip's pediatrician once again recommended "corrective surgery in order to avoid a progressively deteriorating condition resulting in a 'bed-to-chair existence' and the probability of death before the age of

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72. After the health care facility was sold in 1971, the new management let it become dirty and run-down. The Beckers also discovered that Phillip was very thin and listless and that he was not receiving nutritious meals. 139 Cal. App. 3d at 414-15, 188 Cal. Rptr. at 785.

73. *Id.* at 415, 188 Cal. Rptr. at 785.

74. Shortly after Mrs. Heath began to work at "We Care," her husband and children began to participate in the volunteer program and developed a good rapport with Phillip. *Id.* at 416, 188 Cal. Rptr. at 786.

75. *Id.* at 415-16, 188 Cal. Rptr. at 786.

76. While TMR children are not taught any academic subjects, they are taught simple community skills such as marketing and game playing which will enable them to live sheltered but productive lives as adults. *Id.* at 416, 188 Cal. Rptr. at 786.

77. *Id.*, 188 Cal. Rptr. at 786.

78. *Id.* at 416-17 & n.5, 188 Cal. Rptr. at 786-87 & n.5.

79. *Id.* at 417, 188 Cal. Rptr. at 787.

30."<sup>80</sup> Initially, the Beckers showed some interest in the surgery<sup>81</sup> and asked the doctor for the name of a parent whose Down's syndrome child had a heart disease similar to Phillip's. Later that summer, however, without contacting the other parent or seeking another doctor's opinion, Mr. and Mrs. Becker ruled out the surgery.<sup>82</sup> They felt that the doctor's view of the situation was unrealistic. Furthermore, the Beckers felt that the surgery was "merely life-prolonging rather than life-saving" which presented the problem that they might not be able to care for Phillip during his later years.<sup>83</sup> In 1978, the district attorney challenged the Beckers' decision and brought suit alleging that their refusal to allow the surgery constituted neglect under Welfare and Institutions Code section 300(b).<sup>84</sup> The Beckers were successful both at the trial court level and on appeal on the basis of "inconclusive evidence."<sup>85</sup>

While the Beckers were involved in this litigation, Mr. Becker put an abrupt stop to any further weekend visits to the Heaths' home.<sup>86</sup> Additionally, Mr. Becker requested that the Heaths be denied "personal visits" with Phillip at "We Care."<sup>87</sup> As a result of this curtailment of the

80. *Id.*, 188 Cal. Rptr. at 787.

81. The Beckers finally consented to heart catheterization. The doctor discovered that Phillip's heart defect was surgically correctable with a maximum risk of five percent. *Id.*, 188 Cal. Rptr. at 787.

82. *Id.*, 188 Cal. Rptr. at 787.

83. *Id.* at 417-18, 188 Cal. Rptr. at 787.

84. CAL. WELF. & INST. CODE § 300(b) (West Supp. 1984) provides:

Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

. . . .

(b) who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.

85. *In re Phillip B.*, 92 Cal. App. 3d 796, 803, 156 Cal. Rptr. 48, 52 (1979), *cert. denied*, 445 U.S. 949 (1980). The court stated that although it had the power to intervene in the private domain of family decisions, it advocated a "serious burden of justification before abridging parental autonomy." *Id.* at 801-02, 156 Cal. Rptr. at 51. Before the state may require the medical treatment rejected by a child's parents, the court must consider the seriousness of harm the child is suffering, the medical profession's evaluation for treatment, the risks involved in the treatment, the preferences of the child, and whether the child's best interests will be served by medical treatment. *Id.* at 802, 156 Cal. Rptr. at 51. At trial, Phillip's parents presented evidence that his surgery would be more risky than average because: (1) his pulmonary vascular changes subjected him to greater complications; and (2) children with Down's syndrome have more post-operative difficulties. *Id.*, 156 Cal. Rptr. at 51. Further testimony revealed that the operation presented the possibility of damage to the nerve which controls the heartbeat. *Id.*, 156 Cal. Rptr. at 51. After balancing the benefits of the operation against the risks, the court concluded that as a matter of law, there was no substantial evidence that the Beckers' refusal of Phillip's surgery was abusive. *Id.* at 803, 156 Cal. Rptr. at 52.

86. 139 Cal. App. 3d at 418, 188 Cal. Rptr. at 788.

87. *Id.*, 188 Cal. Rptr. at 788.

Phillip-Heath relationship, Phillip suffered severe emotional and developmental setbacks. He became sullen and withdrawn, displayed violent outbursts when the Heaths prepared to leave the health care facility without him, regularly wet his bed and, on one occasion, set his clothes on fire.<sup>88</sup> When Phillip's regressive behavior was brought to his parents' attention, the Beckers stood firm in their decision and attempted to move Phillip to another facility to completely sever their son's ties with the Heaths.<sup>89</sup> Because another institution capable of providing Phillip with proper care could not be found, Phillip remained at "We Care" where the Heaths continued to visit him on a limited basis.<sup>90</sup> Even though Phillip could no longer spend weekends with the Heaths, he retained a strong emotional attachment to the family through their daily visits.<sup>91</sup>

On February 23, 1981, the Heaths petitioned for guardianship of Phillip and his estate.<sup>92</sup> Mr. and Mrs. Becker staunchly opposed this petition. In an emotional twelve-day trial, Judge Fernandez of the Santa Clara Superior Court issued letters of guardianship to the Heaths granting them permission to seek heart catheterization for Phillip.<sup>93</sup> Subsequently, the California Supreme Court stayed this order authorizing surgery<sup>94</sup> and retransferred the issue to the court of appeal for determination of the merits.<sup>95</sup>

The court of appeal unanimously upheld the superior court's decision to award custody of Phillip to the Heaths.<sup>96</sup> The court concluded that the trial court had not abused its discretion in finding that custody in the Heaths would be in Phillip's best interest while custody in the Beckers would be detrimental to him.<sup>97</sup>

#### IV. COURT'S REASONING

In upholding the custody award to the Heaths, the court of appeal was primarily concerned with Phillip's best interests.<sup>98</sup> While the court

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88. *Id.*, 188 Cal. Rptr. at 788.

89. *Id.*, 188 Cal. Rptr. at 788.

90. *Id.* at 418-19, 188 Cal. Rptr. at 788.

91. *Id.* at 419, 188 Cal. Rptr. at 788.

92. *Id.* at 412, 188 Cal. Rptr. at 784.

93. *Id.* at 413, 188 Cal. Rptr. at 784.

94. In October 1983, the Santa Clara Superior Court granted the order authorizing heart surgery for Phillip. The operation successfully repaired the hole in Phillip's heart and, as of late 1983, Phillip was recovering nicely.

95. *Id.*, 188 Cal. Rptr. at 784.

96. *Id.*, 188 Cal. Rptr. at 784.

97. *Id.* at 424, 188 Cal. Rptr. at 792. The Beckers subsequently appealed to the California Supreme Court but a rehearing was denied.

98. *Id.* at 412, 188 Cal. Rptr. at 781.



expressed its preference for parental rights in all but the most extraordinary cases,<sup>99</sup> it also expressed its "deeply ingrained concern that the needs of the child remain paramount in the judicial monitoring of custody."<sup>100</sup> According to well-developed doctrine, where the fundamental right of parental custody directly conflicts with the best interests of the child, the former must yield to the latter.<sup>101</sup> In reaching its decision, the *Phillip B.* court combined this concept with the requirements of California Civil Code section 4600<sup>102</sup> that "before a court may make an order awarding custody of a child to a nonparent without the consent of the parents, 'it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.'"<sup>103</sup> Applying this two-prong test, the court found that Phillip had established a "de facto" or psychological parental relationship with the Heaths<sup>104</sup> and determined that separation from his "psychological" parents would seriously impair not only Phillip's physical and emotional well-being, but the develop-

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99. *Id.* at 419, 188 Cal. Rptr. at 788 (citing *In re Angelia P.*, 28 Cal. 3d 908, 916, 623 P.2d 198, 202, 171 Cal. Rptr. 637, 641 (1981) (where both parents had abused and neglected the child and the father, currently in prison, had been convicted of felony child abuse resulting in permanent brain damage to the child, it is in minor child's best interest to be free from parents' custody and to child's detriment to be placed with either parent at any future time); *In re Carmaleta B.*, 21 Cal. 3d 482, 489, 579 P.2d 514, 518, 146 Cal. Rptr. 623, 627 (1978) (mother not denied custody of youngest child on ground of failure to protect child from father's cruel treatment because cruelty and neglect occurred to other siblings before youngest child's birth)).

100. *Id.* at 412, 188 Cal. Rptr. at 784.

101. *Id.* at 419, 188 Cal. Rptr. at 788-89. Occasionally, the child's best interests will coincide with the parents' right to retain custody and the courts will be able to satisfy both doctrines. This usually occurs in cases, unlike *Phillip B.*, where the mother and father confront each other for custody of their child. In these cases, "[e]ach parent . . . tends to identify as coterminous the child's interest and his or her own interests and usually rationalizes that the two are one because of the amorphous character of the 'best interests' test and the vague standards, criteria, and factors which it subsumes." Foster & Freed, *Child Custody and the Adversary Process: Forum Conveniens?*, 17 FAM. L. Q. 133, 141 (1983) (footnote omitted). The courts cannot, however, reconcile the two principles where the parents' interests do not encompass the child's best interest. It is in this situation that the courts must act as a "watchdog" to assure that the best interests of the child are met. While some critics protest that requiring the court to act as a "watchdog" is impractical and ineffective in achieving the child's best interests, such a requirement is the currently acceptable procedure in child custody cases. Because, however, most custody disputes involve confrontations between two parents, a total abrogation of parental rights is uncommon. Usually, at least one parent, if not both, retains the fundamental right to care and make decisions for the child as long as the child's best interests are satisfied. Thus, the court may avoid direct confrontation of the two theories.

102. (West 1983). See *supra* note 43 and accompanying text.

103. 139 Cal. App. 3d at 419, 188 Cal. Rptr. at 788 (quoting CAL. CIV. CODE § 4600(c) (West 1983)).

104. *Id.*, 188 Cal. Rptr. at 789.

ment of skills necessary for independent living as well.<sup>105</sup>

The court rejected the Beckers' contention that a true parent-child relationship had never been created between the Heaths and Phillip because Phillip never permanently resided with the Heaths.<sup>106</sup> While the court conceded that psychological parenthood is usually established through residency on a "24 hour basis,"<sup>107</sup> it stressed that, in some situations, consistent daily interaction, companionship, and shared experiences can create a parent-child relationship.<sup>108</sup> Because Phillip frequently spent weekends at the Heaths' home and the Heaths visited him daily during the week at "We Care," the court concluded that there was sufficient interaction between Phillip and the Heaths to establish a "loving and trusting" parent-child relationship.<sup>109</sup>

The Beckers argued on appeal that the court's use of subjective criteria such as "substantial interaction" or "love and affection" to determine whether parental custody would be detrimental to the child invited abuse and allowed courts to impose value-laden judgments as to parental fitness on the parties in a custody battle.<sup>110</sup> The Beckers suggested that use of a fixed set of objective criteria in order to determine "detriment" in each particular case would avoid such abuse.<sup>111</sup> The court, noting that the legislature enacted section 4600 to promote the best interest of the child and to promote the child's need "to be raised with love, emotional security and physical safety,"<sup>112</sup> dismissed the Beckers' argument as impractical and contrary to the clear intent behind section 4600.<sup>113</sup> The court emphatically professed its duty to be guided by the stated purpose of section 4600 "rather than by the personal beliefs or attitudes of the contesting parties, since it is the child's [best] interest which remains paramount."<sup>114</sup> It noted that use of an objective set of criteria might not allow the court enough flexibility to ensure that the best interests of the child are served in every situation, thereby frustrating the purpose of the

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105. *Id.* at 421 n.13, 422, 188 Cal. Rptr. at 789 n.13, 791.

106. *Id.* at 420, 188 Cal. Rptr. at 789. *See, e.g., In re Lynna B.*, 92 Cal. App. 3d 682, 155 Cal. Rptr. 256 (1979); *In re Volkland*, 74 Cal. App. 3d 674, 141 Cal. Rptr. 625 (1977); *Chaffin v. Frye*, 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1975); *In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973), *see supra* notes 59-65 and accompanying text.

107. 139 Cal. App. 3d at 421, 188 Cal. Rptr. at 790.

108. *Id.* at 420-21, 188 Cal. Rptr. at 790.

109. *Id.* at 421, 188 Cal. Rptr. at 790.

110. *Id.* at 420, 188 Cal. Rptr. at 789.

111. *Id.* at 421, 188 Cal. Rptr. at 790.

112. *Id.* at 424, 188 Cal. Rptr. at 792.

113. *Id.* at 421, 188 Cal. Rptr. at 790.

114. *Id.* at 424, 188 Cal. Rptr. at 792.

specifically enacted statutory standards.<sup>115</sup> Abuse of the court's discretion or appearance of impropriety in application of the statutory standards is, the court noted, checked by the requirement that "detriment" be established by a clear and convincing standard of proof before custody is awarded to a nonparent.<sup>116</sup> The *Phillip B.* court found that the Heaths had met this strict standard by showing that Phillip would suffer physical, emotional, and developmental harm if he were deprived of the normal benefits of a parent-child relationship with the Heaths.<sup>117</sup>

In concluding that the evidence supported a finding that Phillip's best interests would be served by an award of custody to the Heaths, the court stated that the mere fact that parents choose to institutionalize their handicapped child or that nonparents are able to offer the child advantages of a home life is, in itself, insufficient to meet the "detriment" requirement of section 4600.<sup>118</sup> Thus, it emphasized that it was "the *emotional abandonment of Phillip, not his institutionalization*, which inevitably has created the unusual circumstances which led to the award of limited custody to [the Heaths]."<sup>119</sup>

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115. *Id.* at 421, 188 Cal. Rptr. at 790.

116. *Id.* at 421-22, 188 Cal. Rptr. at 790.

117. *Id.* at 422-24, 188 Cal. Rptr. at 790-92. In determining whether retaining custody in the Beckers would be detrimental to Phillip, the court considered two major factors: (1) the de facto parent-child relationship with the Heaths, and (2) the Beckers' refusal to seek medical care for Phillip's heart defect. As to the first factor, the court noted that Phillip had progressed considerably since he became involved with the Heaths on a regular basis. Because Phillip showed signs of regression when he was temporarily precluded from seeing the Heaths, the court ruled that it would be detrimental to Phillip's emotional, physical, and developmental well-being if his bond with the Heaths were permanently severed. *Id.* at 423, 188 Cal. Rptr. at 791; *see supra* text accompanying notes 86-88.

As to the second factor, the court found that although the Beckers' refusal did not constitute abuse, it "reflected a dangerously passive approach to Phillip's future medical needs." *Id.* at 423, 188 Cal. Rptr. at 791-92. Although the court recognized that Phillip's congenital heart defect might no longer be correctable by surgery, it was deeply disturbed by the Beckers' "failure to obtain competent medical advice concerning the heart disease and the admitted willingness to forego medical treatment solely by reason of Phillip's retarded condition." *Id.* at 423 & n.19, 188 Cal. Rptr. at 792 & n.19.

118. *Id.* at 424, 188 Cal. Rptr. at 792.

119. *Id.*, 188 Cal. Rptr. at 792 (emphasis in original). Aside from these substantive issues raised on appeal, the Beckers also asserted several due process violations which occurred at the trial level. The court of appeal, however, rejected all the Beckers' procedural arguments. *Id.*, 188 Cal. Rptr. at 792.

First, the court held that it was not a violation of due process that the pleadings did not contain specific, detailed information alleging "detriment" since the issue of detriment was also described in the controlling statute. *Id.* at 425, 188 Cal. Rptr. at 793. Furthermore, the court stated that it had a significant interest in shielding children in custody proceedings from public disclosure of sensitive information regarding unbecoming parental conduct. *Id.* at 426, 188 Cal. Rptr. at 793. Additionally, because civil discovery procedures that may have identified and narrowed the critical issues in the case were available to the Beckers, the court refused to

## V. ANALYSIS

The story of Phillip, the Beckers, and the Heaths is well publicized throughout both the legal and nonlegal communities.<sup>120</sup> Its notoriety is largely due to the emotional drama that permeated the case. The resolution of the legal issues involved in this custody dispute was by no means novel, but the controversy and publicity surrounding the case illuminated the complexity of child custody law in California and the difficult, often impossible task courts confront in deciding what award would be in a child's best interest.

A. *Analytical Approach of Phillip B.*

The court in *Guardianship of Phillip B.* followed the analytical reasoning of the *Marino* court with one exception—the *Phillip B.* trial court expressly found that an award of custody to the Beckers would be detrimental to Phillip's well-being.<sup>121</sup> In this sense, the *Phillip B.* decision is narrower than the *Marino* decision because the court of appeal did not need to infer a finding of detriment. Because, however, *Phillip B.* in-

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require the pleadings to include specific allegations of detriment. *Id.* at 425, 188 Cal. Rptr. at 793.

The Beckers then contended that the "vagueness" of the pleadings allowed the Heaths to present issues which were litigated in a previous proceeding. *Id.* at 426, 188 Cal. Rptr. at 794. The court of appeal found this contention meritless, reasoning that the only issue previously litigated was whether or not the denial of heart catheterization constituted parental abuse. *Id.*, 188 Cal. Rptr. at 794. The custody dispute involved the broader issue of Phillip's best interest; the court therefore ruled that the controlling issue had not been previously adjudicated. *Id.*, 188 Cal. Rptr. at 794.

The Beckers further argued that the trial court erred in ordering Phillip's heart catheterization in the absence of a separate hearing solely on that issue. *Id.*, 188 Cal. Rptr. at 794. In rejecting this argument, the court stated that judicial efficiency was best served by dealing with the issue of surgery during the custody proceeding since all of the issues would have to be proved with the same evidence. *Id.* at 427, 188 Cal. Rptr. at 794.

The Beckers also made an assertion that the trial court abused its discretion in excluding testimony about the Heaths' qualifications to act as Phillip's guardians. *Id.* at 428, 188 Cal. Rptr. at 795. In fact, before making their argument, the Beckers sought leave to present testimony purporting to discredit Mrs. Heath's mental state. The trial court, however, rejected this offer of proof as untimely because although not brought to the attention of the trial court, the evidence had been known to the Beckers for at least 10 days. *Id.* at 428-29, 188 Cal. Rptr. at 795. The court commented that discretionary denial of a motion to reopen does not automatically warrant reversal. *Id.* at 428, 188 Cal. Rptr. at 795. Because the Heaths presented sufficient evidence at trial that they could adequately care for Phillip and ensure his best interests, the court could not conclusively rule as a matter of law that the trial court had erred by refusing to consider the additional evidence in reaching its decision to grant custody to the Heaths. *Id.* at 429, 188 Cal. Rptr. at 796.

120. Numerous articles about Phillip's plight appeared in the Los Angeles Times, the San Francisco Chronicle and other well-known newspapers. The story was further publicized in a segment of CBS' television news documentary, "60 Minutes."

121. 139 Cal. App. 3d at 419, 188 Cal. Rptr. at 789.

volved unique issues which appeared in neither *Marino* nor *B.G.*, the court's decision was instrumental in clarifying California's position concerning such custody disputes.

While the court had dealt with de facto parent-child relationships in the past,<sup>122</sup> the relationship between the Heaths and Phillip was quite unusual. First, most custody disputes between parents and nonparents involve parents in a legal battle with relatives,<sup>123</sup> foster parents<sup>124</sup> or close friends.<sup>125</sup> Here, the Beckers and the Heaths were complete strangers until the time of the trial.<sup>126</sup> Because psychological parenthood must be achieved by daily physical care, nourishment, comfort, affection and stimulation of a child's needs,<sup>127</sup> it is extremely odd that such a relationship could develop between a child and a nonparent without the parents' knowledge or consent. The Beckers' unawareness of the Heaths' loving interest in Phillip illustrates their lack of involvement in Phillip's life.

The second oddity involving the Phillip-Heath relationship was the manner in which it was established. While most psychological parent-child relationships are established on a twenty-four hour residency basis, the instant relationship was founded on the Heaths' daily visits to a health care facility supplemented by Phillip's frequent weekend visits to the Heaths' home.<sup>128</sup> By focusing on the quality and consistency of the interaction between a child and the nonparents rather than the number of hours spent together, the court rationally concluded that Phillip and the Heaths had established a true parent-child relationship.<sup>129</sup>

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122. See *In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973) and notes 59-65 and accompanying text; *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) and notes 48-58 and accompanying text.

123. See *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966) (father sought to regain custody of seven year old son from the boy's maternal grandparents) and notes 38-40 and accompanying text; *In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973) (father sought to regain custody of six year old son from the boy's maternal aunt and uncle) and notes 59-65 and accompanying text.

124. See *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) (mother sought to regain custody of two children from court appointed foster parents) and notes 48-58 and accompanying text.

125. *Id.*, 523 P.2d at 244, 114 Cal. Rptr. at 444 (foster parents also close friends and neighbors of father).

126. Becker, *Mourning the Loss of a Son*, NEWSWEEK, May 30, 1983, at 17.

127. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD*, 17 (1973).

128. 139 Cal. App. 3d at 420-21, 188 Cal. Rptr. at 789-90.

129. *Id.*, 188 Cal. Rptr. at 789-90. In almost all other cases involving parent-nonparent custody disputes, the child had lived with nonparents on a 24-hour basis for an extended period of time. Such prolonged contact and interaction between the child and the nonparents provides the ideal atmosphere for forming a de facto parent-child relationship. See *In re Guardianship of Marino*, 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (1973) (child lived with aunt

Perhaps the strangest feature of this case was that although the Beckers actively sought custody of their son, they did not want Phillip to come into their home as an active member of their family.<sup>130</sup> In all recent custody cases, both parties seeking custody intended to provide a loving and caring atmosphere for the child in their homes. The Beckers, however, sought to have Phillip reinstitutionalized.<sup>131</sup> Moreover, they sought to deprive Phillip of the pleasures of his relationship with the Heath family by forbidding future contact with them.<sup>132</sup> They did not state whether they intended to step into the role of loving and affectionate parents that the Heaths had so carefully established.<sup>133</sup>

In viewing all the factors of the psychological parent relationship theory, the court wisely recognized the harm Phillip was likely to suffer if his parents were awarded custody.<sup>134</sup> Even if Phillip had not shown conclusive signs of regressive behavior when temporarily separated from the Heaths,<sup>135</sup> the court could have logically made a finding of detriment. Because the Beckers did not reject their past rationalization that Phillip was too severely retarded to require emotional nurturing from parent figures, the court might have found their attitude detrimental and contradictory to Phillip's best interests. Fortunately, the court did not have to rest its decision on such a tenuous basis; there were sufficient findings of emotional and developmental harm to support its conclusion.<sup>136</sup>

In discussing the physical harm Phillip would suffer if the Beckers regained custody,<sup>137</sup> the court was not constrained by the holding in *In re Phillip B.*<sup>138</sup> that the Beckers' decision to deny surgery did not constitute abuse.<sup>139</sup> At trial, the court found that the Beckers' conduct, though

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and uncle on a permanent basis from the time he was two weeks old until he was eight years old); *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) (children lived with foster parents continuously for period of almost two years).

130. 139 Cal. App. 3d at 424, 188 Cal. Rptr. at 792.

131. *Id.*, 188 Cal. Rptr. at 792.

132. *See supra* text accompanying notes 86-89.

133. *See supra* text accompanying notes 77-79.

134. *See supra* text accompanying notes 86-89.

135. *See supra* text accompanying note 88.

136. 139 Cal. App. 3d at 419-24, 188 Cal. Rptr. at 789-92. *See supra* note 117.

137. The court was concerned not only with Phillip's condition becoming progressively worse without corrective surgery, but also with the Beckers "willingness to forego medical treatment solely by reason of Phillip's retarded condition." *Id.* at 423 n.19, 188 Cal. Rptr. at 792 n.19. For example, the Beckers did not attempt to seek medical consultation when Phillip began to have undiagnosed episodes of apparent semi-consciousness. *Id.*, 188 Cal. Rptr. at 792 n.19.

138. 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979).

139. Under present California custody law, parental unfitness or abuse is not equated with "detriment." *In re Guardianship of Marino*, 30 Cal. App. 3d at 958, 106 Cal. Rptr. at 659. The *Marino* court stated:

not abusive, was nonetheless unexemplary and neglectful.<sup>140</sup> Because section 4600 no longer required a finding that parents were unfit, the court could disregard the holding of *In re Phillip B.* and hold that the Beckers' choices for Phillip's future were contrary to his best interests.<sup>141</sup>

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We find that Civil Code section 4600 makes unnecessary a finding of parental unfitness in any proceeding where there is at issue the custody of a minor child. . . . We find no legally significant reason for using a different approach in the awarding of custody in a dissolution matter from the awarding of custody of a minor child in a nondissolution situation.

*Id.*, 106 Cal. Rptr. at 659.

The court's decision not to be constrained by a finding that parents' conduct is abusive facilitates sound public policy. If courts were precluded from finding "detriment" absent child abuse, many children's best interests would be frustrated since some conduct, though overtly egregious, is not deemed legally abusive. See *In re Laura F.*, 33 Cal. 3d 826, 662 P.2d 922, 191 Cal. Rptr. 464 (1983) (although mother left her children for months at a time with mere acquaintances resulting in reports to authorities that the children were sleeping in cars and begging for food, mother's conduct was not deemed abusive). By allowing the courts to make a finding of detriment in any case where parents' conduct violates society's concept of "proper parenting," the legislature ensures that the courts will be able to protect the child's best interests in all situations.

140. 139 Cal. App. 3d at 423, 188 Cal. Rptr. at 791.

141. Compare CAL. CIV. CODE § 4600 discussed *supra* at note 43 with N.Y. DOM. REL. LAW § 240(1) (McKinney Supp. 1984) which states in pertinent part:

In any action or proceeding . . . to obtain . . . the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, . . . as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.

While the statute purports to advance the best interests of the child, in a custody proceeding between parents and nonparents, "the question of best interest is not reached absent a showing of surrender, abandonment, unfitness, persistent neglect or other extraordinary circumstance." *Merritt v. Way*, 58 N.Y.2d 850, 853, 446 N.E.2d 776, 777, 460 N.Y.S.2d 20, 21 (1983). In essence, under New York law, a natural parent may not be involuntarily divested of the right to care and custody of a child unless a finding has been made that the parent is unfit to assume the duties and privileges of parenthood or that extraordinary circumstances exist.

The result of requiring a finding of parental unfitness or extraordinary circumstances before custody can be awarded to a nonparent is illustrated in *In re Adoption of L.*, 61 N.Y.2d 420, 462 N.E.2d 1165, 474 N.Y.S.2d 447 (1984). In *Adoption of L.*, the court awarded custody of a three year old child to the natural mother even though the child had been in the custody of foster parents since birth. The mother, a resident alien working as a domestic, tentatively agreed to the foster parents' adoption of her newborn son. Within three weeks of the infant's birth, however, the mother requested that her child be returned to her custody. The distraught foster parents refused to comply with the request and a three year battle for custody ensued. *Id.* at 423-26, 462 N.E.2d at 1166-68, 474 N.Y.S.2d at 448-50.

Despite a belief that it would be in the child's best interest to remain with the foster parents, the trial court awarded custody to the mother "under the constraint of appellate precedents" because there was no finding that the mother was unfit or had abandoned her child. *Id.* at 426, 462 N.E.2d at 1168, 474 N.Y.S.2d at 450 (quoting 115 Misc. 2d 248, 454 N.Y.S.2d 379 (1982)). A divided appellate division affirmed, holding that "absent extraordinary circumstances, not present here, the court may not intervene between the natural parent and child to determine if the latter's best interests would be better served under someone else's care." 61 N.Y.2d at 426, 462 N.E.2d at 1168, 474 N.Y.S.2d at 450. The New York Court of Appeals affirmed, reasoning that

Such judicial policy does not completely emasculate the principles of the parental rights doctrine.<sup>142</sup> It merely allows a court the necessary leverage to ensure that a child's best interests are served in the unusual situation where a parent's desires are ultimately harmful to their children.<sup>143</sup>

Similarly, the court might not have found the risks to Phillip's emo-

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[t]he State may not deprive a natural parent of her child's custody merely because a court . . . believes it can decide more wisely than the parent or believes it has found someone to better raise the child. So long as the parental rights have not been forfeited by gross misconduct . . . or other behavior evincing utter indifference and irresponsibility . . . the natural parent may not be supplanted. . . . Indeed, even where such "forfeiture" or "extraordinary circumstances" are found to exist, the best interests of the child must still thereafter be determined before the natural parent may be displaced. . . . Otherwise, the question of best interests itself is not even reached.

*Id.* at 427, 462 N.E.2d at 1168-69, 474 N.Y.S.2d at 451 (citations omitted).

Under the more restrictive New York requirements for nonparents seeking custody, the child's best interests may suffer at the expense of preserving parental rights in cases such as *Phillip B.* where parents' somewhat questionable conduct toward their child does not constitute abuse or neglect. If *Phillip B.* had been decided under New York law, the court might not have been able to consider evidence concerning Phillip's best interests since a previous court had decided that the Beckers' refusal to provide their son with corrective heart surgery did not constitute abuse. See *supra* note 85 and accompanying text. A discussion of Phillip's best interests could be properly entertained only if the court were to find that extraordinary circumstances were present.

Although New York courts require that "extraordinary circumstances" be "narrowly categorized," most seem to agree that such circumstances are created by "surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time." *Bennett v. Jeffreys*, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 824 (1976). In the latter instance, New York courts are especially willing to find extraordinary circumstances where the psychological trauma of removal of a child who has long been in the custody of a nonparent is "grave enough to threaten destruction of the child." *Id.* at 550, 356 N.E.2d at 284, 387 N.Y.S.2d at 827. Accordingly, in light of the severe physical, psychological and developmental setbacks Phillip suffered when he was separated from the Heaths, the court would have little difficulty finding extraordinary circumstances sufficient to admit evidence on the issue of Phillip's best interests. See *supra* text accompanying notes 86-88.

Because extraordinary circumstances are fairly easy to justify in *Phillip B.*, the case does not effectively illustrate the problems presented by New York's custody requirements. The vulnerability of the custody laws, however, can be seen in cases where (1) parents' conduct, which borders on abuse or neglect, is not considered an extraordinary circumstance, or (2) an extended separation between the natural parent and the child does not amount to an extraordinary circumstance. See *In re Adoption of L.*, 61 N.Y.2d 420, 462 N.E.2d 1165, 474 N.Y.S.2d 447 (1984) (where natural mother was not determined unfit and had neither abandoned her child nor consented to formal adoption, extraordinary circumstances were not created when the child had been in the custody of prospective adoptive parents since birth, nearly four years earlier). In both situations, the court is powerless to determine the child's best interests and is compelled to award custody to the natural parent despite the potentially detrimental consequences the child may suffer. By prohibiting the court from even considering the child's best interest in such circumstances, the New York courts fail to provide assurance that the child's best interests will always be met.

142. See *supra* notes 7-10 and accompanying text.

143. It should be noted that courts are not attempting to punish parents who truly believe



tional, physical and developmental well-being sufficient to constitute "detriment." Viewed collectively, however, there can be little doubt that even the most objective court would equate the threatened harm with "detriment."

*B. Procedural Protections Assuring the Best Interests of the Child*

No matter how objective the *Phillip B.* court may have been, any court that deals with such an emotional and distinctly unique custody battle is open to criticism that its decision was arbitrary or biased. To avoid this appearance of partiality, courts should consider requiring both parent and nonparent petitioners for custody to participate in pre-trial mediation similar to the mandatory mediation procedure set forth in California Civil Code section 4607.<sup>144</sup> While that section was principally designed to reduce the acrimony which exists between parents in order to facilitate the best possible custodial arrangement for the child, it could equally apply to parent-nonparent custody disputes as well.<sup>145</sup>

Some critics have proposed that the court set up a panel of mediators trained in behavioral science to interview the parties and the child to determine the child's true interests. Advocates of such a proposal claim that mediation is necessary because the parties' "bad feelings" toward each other impede serious negotiations which focus on the child's best interests. Ideally, after meeting with the parties and the child, the panel could present the court with its findings as to which party was better suited to serve the child's best interests. While the panel's decision would not be binding on the court, the court could refer to it as an impartial, professional estimation of the situation. Furthermore, if accused of making an arbitrary decision, the court could cite to the panel's opinion as corroborating evidence that its decision was both rational and objective.

The major problem with this mediation proposal is that a party dissatisfied with the panel's decision would most likely seek to invalidate the finding in a separate proceeding. If one of the parties exercised his constitutional right to seek judicial relief from the panel's decision, the final resolution of the custody dispute would be considerably delayed. This additional delay would counterbalance the legislature's desire to deal

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they are making the best choice for their child. Rather, courts' main concern is seeing that a child's best interests are met.

144. CAL. CIV. CODE § 4607 (West 1983).

145. *Contra* Guardianship of M.S.W., 136 Cal. App. 3d 708, 186 Cal. Rptr. 430 (1982) (section 4607, which requires parents contesting custody of their minor child to participate in pre-trial mediation, not applicable to proceedings involving nonparents).

with custody disputes as quickly as possible in order to avoid disrupting the child's life.<sup>146</sup>

For this reason, perhaps the best solution for protecting against claims of arbitrariness in cases between parents and nonparents is the mandatory appointment of independent counsel for the child. As one commentary has stated, while the child is the real party in interest in any custody proceeding, he is usually the least represented party.<sup>147</sup> Parents, who tend to assume that their interests are identical to those of their children's, generally overlook their children's true interests. An appointed counsel for the child, however, is likely to "keep the focus on the child's welfare and also provide[ ] relevant information on that ultimate issue."<sup>148</sup> The authors further commented that "[a]lthough the child's advocate is not draped with the proverbial 'mantle of infallibility,' he or she may properly be viewed as less partisan than the counsel representing the parties."<sup>149</sup>

### C. Institutionalization and the Best Interests of the Child

Although the *Phillip B.* court recognized that trial courts enjoy broad discretionary power in determining a finding of detriment, it emphatically stated that "the fact of detriment *cannot* be proved solely by evidence that the biological parent has elected to institutionalize a handicapped child, or that nonparents are able and willing to offer the child the advantages of their home in lieu of institutional placement."<sup>150</sup> This aspect of the court's holding is essential in promoting "the best interest of the child" theory. If the court were to penalize a parent who was unable to cope with the daily care of a severely or moderately handicapped child, it would discourage a parent from seeking the most effective method of care for the child. In effect, this would deprive the child of securing his best possible interests. Instead, if institutionalization is the best choice, parents must be free to make that choice without the fear that they may lose control over their children.

The court's holding also illustrates that while parental rights do not end once a child is institutionalized, neither do parental obligations. The *Phillip B.* decision advocates a desirable social policy that parents not use

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146. See CAL. CIV. CODE § 4600.6 (West 1983).

147. Foster & Freed, *supra* note 101, at 141-46.

148. *Id.* at 142.

149. *Id.*

150. 139 Cal. App. 3d at 424, 188 Cal. Rptr. at 792 (emphasis in original). See *supra* notes 118-19 and accompanying text.

an institution as a place to abandon a less than perfect child.<sup>151</sup> *Guardianship of Phillip B.* stresses the importance of maintaining a parent-child relationship even though the child is confined in a health-care facility. Though an institution may be able to provide superior physical care for a handicapped child, it can never provide the emotional nurturing that doctors have found to be so instrumental in the child's progress.<sup>152</sup>

*D. Impact of Guardianship of Phillip B. on Future Child-Custody Disputes*

*Guardianship of Phillip B.* did not introduce novel legal precedent in the child-custody field. Instead, the court advocated the well known principle that decisions in custody proceedings be analyzed on a case-by-case basis in light of the best interest of the child.<sup>153</sup> Although the reasoning in most custody proceedings is similar—analysis of emotional security, parent and nonparent involvement with the child and the ability to properly care for the child—the ultimate decision of whether the circumstances constitute “detriment” turns on the particular facts of each case. It is therefore highly doubtful that the court will ever again be faced with a case like *Phillip B.*

First, general attitudes toward the treatment of Down's syndrome children have dramatically changed since Phillip's birth in 1966. Today, more parents choose to care for their children at home,<sup>154</sup> especially if

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151. It should be noted that the Beckers consulted both a physician and a social worker before placing Phillip in the health care facility. 139 Cal. App. 3d at 414, 188 Cal. Rptr. at 785. This suggests that they made an informed decision and did not simply abandon Phillip in the institution. Instead, the evidence suggests that the Beckers truly believed that institutionalization would better serve Phillip's special needs.

152. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 127, at 18-20. The authors emphasize the results of many psychological and sociological studies which focused on the effects of children deprived of a normal parent-child relationship. In almost all cases, children who never formed a parent-child bond with any individual did not develop either socially or emotionally to the average level of their counterparts who experienced a normal parent-child relationship. For further discussion see *infra* note 154.

153. 139 Cal. App. 3d at 421, 188 Cal. Rptr. at 790.

154. A study, published in 1973, recognized the importance of the role that a home environment plays in the early development of a Down's syndrome child. D. SMITH & A. WILSON, *THE CHILD WITH DOWN'S SYNDROME* (1973). The study stated that on the whole, “children with Down's syndrome raised at home with the normal amount of stimulation advance more quickly than those who spend their early years in an institution for the mentally deficient.” *Id.* at 36. For example, statistics showed that although almost all Down's syndrome children learn to walk by age five, those children raised at home learned to walk much earlier than those raised in institutions. *Id.* at 36-37. Similarly, Down's syndrome children raised at home developed the ability to speak at an earlier age than institutionalized children. *Id.* at 37. The study commented that although an institutionalized child might learn a few words on his own, “it seems that stimulating a child with Down's syndrome to talk requires a much greater

the children are "high Downs" and only moderately retarded.<sup>155</sup> Even if the parents decide to institutionalize their child, it is unlikely that they would completely sever all emotional ties with the child. Slighter still is the possibility that a good-hearted volunteer would develop a psychological parent-child relationship and subsequently file a petition for custody.

The existence of such unique circumstances, however, does not make *Phillip B.* a valueless decision. *Guardianship of Phillip B.* reflects the court's willingness to find "detriment" in rare cases where a child's physical, emotional, and developmental well-being are threatened by parental retention of custody. It also demonstrates the court's willingness to find "detriment" where the parents, of their own choice, fail to pursue a loving and trusting relationship with their child. While *Phillip B.* does not establish the precise parameters of emotional involvement required to defeat a finding of detriment,<sup>156</sup> it suggests that at the very minimum parents must maintain sufficient contact with their child to develop and sustain a bonding parent-child relationship. Consequently, the court has begun to treat a parent's right to care for his or her child more like a privilege than an absolute right. If a parent neglects or abuses that privilege, the court is not obliged to enforce parental preference over the child's best interests in custody disputes.

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amount of personal contact than most institutions can provide. . . . Apparently the time and effort a mother puts into encouraging her child to say his first words simply cannot be duplicated in an institution." *Id.* at 37-38.

In sum, the authors stated:

A child with Down's syndrome, though slow, is still very responsive to his environment, to those around him, and to the affection and encouragement he receives from others. Most families, including foster families, provide a child with a great deal of attention, and they enjoy encouraging him to take his first steps or say his first words. Most institutions cannot provide this kind of constant teaching and stimulation, and on the average, the I.Q. scores of Down's syndrome children raised in institutions are 10 to 15 points lower than those children who live in a home setting. The early years are the most important ones for a Down's syndrome child because it is then that his development proceeds at its greatest pace. A child who spends his first 3 or 4 years at home usually can accomplish much more than a child who is reared in an institution from birth. If the child from home is then placed in an institution, he still usually performs better than those children raised there, but his rate of progress drops off more rapidly than if he had remained at home.

*Id.* at 40.

155. Down's syndrome children are placed in categories depending on their I.Q. scores. Average I.Q. scores of older children and adults with Down's syndrome range between 25 and 50. High Down's syndrome children may have I.Q. scores between 50 and 90 and are only moderately to slightly retarded. With early education and training in fostering the child's abilities to perform useful skills, a Down's syndrome child can learn skills or a simple trade that will enable him to live a semi-independent productive life as an adult. D. SMITH & A. WILSON, *supra* note 154, at 38-39, 40.

156. Because the *Phillip B.* court found that the Beckers had made no real effort to establish an emotional tie with Phillip, the court did not develop this issue.

The *Phillip B.* decision is not a sign that the court will be more likely to award custody to nonparents in the future. Quite the contrary, the court still expresses a preference for parental custody in the majority of situations.<sup>157</sup> Admittedly, it is socially desirable to keep the family unit together by encouraging the establishment and preservation of strong parent-child relationships.<sup>158</sup> If, however, the predominant concern in child custody law is the child's welfare, there is no reason to treat parents differently from nonparents; courts should be guided solely by the best interests of the child. This is not to say that the court should indiscriminately award custody to nonparents merely because the nonparent is more stable financially or can spend more time with the child. The factors the court deems paramount in such cases are not primarily economic but rather, the existence of a parent-child bond, stability, love and concern.<sup>159</sup> In all but the rarest cases, a parent is best suited to fill such

157. 139 Cal. App. 3d at 419, 188 Cal. Rptr. at 789.

158. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 127, at 13-16. The authors state: [T]he "family," however defined by society, is generally perceived as the fundamental unit responsible for and capable of providing a child on a continuing basis with an environment which serves his numerous physical and mental needs during immaturity. The law reflects this expectation about the family's relation to a child's well-being.

. . . .

. . . . [W]here the family exerts its influence benevolently, with consideration, understanding, and compassion for each individual child member, the balanced opportunities for a unique development and for social adaptation are maximized.

*Id.* at 13, 16.

159. In stressing its concern that economic factors not govern a finding of detriment under CAL. CIV. CODE § 4600, the *Marino* court stated:

[A]n award of custody to a parent would obviously be detrimental to the child if such parent could not provide the necessities of life or a suitable place of abode. But unfortunately there are segments of our society where children are provided neither the necessities of life nor suitable living quarters. Nevertheless, either parent might very well be the best possible custodian able to provide happiness and stability for the child. The court should not be governed only by economic factors in making a determination with respect to custody. 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.

30 Cal. App. 3d at 959, 106 Cal. Rptr. at 660 (quoting COMMITTEE ON JUDICIARY, REPORT OF 1969 DIVORCE REFORM LEGISLATION, 4 CAL. ASSEM. J. at 8061).

Compare New York's treatment of economic factors in granting custody to a nonparent.

Such socioeconomic factors, [poverty and alienage] unless sufficient to establish neglect or unfitness of the parent under the specific circumstances of a particular case, are irrelevant and impermissible considerations. . . . The comparative material advantages offered by the nonparents are emphatically not an extraordinary circumstance disqualifying the natural parent, nor can they outweigh parental rights under the guise of determining the best interests of the child. "In no case . . . may a contest between a parent and nonparent resolve itself into a simple factual issue as to which affords the better surroundings, or as to which party is better equipped to raise the child."

*In re Adoption of L.*, 61 N.Y.2d 420, 430, 462 N.E.2d 1165, 1170, 474 N.Y.S.2d 447, 452-53

demands. In the rare case where a parent has not made the attempt or is incapable of satisfying the child's physical and emotional needs, the court should not frustrate the child's best interests by requiring nonparents to meet a stricter standard of proof than parents.

While the *Phillip B.* court does not go so far as to accord parents and nonparents equal treatment, its decision is sound because it supports the strong social policy of securing the best interest of the child. *Guardianship of Phillip B.* does not change the court's general policy of preserving parents' right to custody; it merely puts parents on notice that their fundamental right to care for their children is no longer guaranteed.

## VI. CONCLUSION

Child custody disputes, as the one in *Guardianship of Phillip B.*, are by nature riddled with emotional undertones. Consequently, the members of the court must constantly resist the urge to be swayed by their inner feelings and moral convictions. Yet, when dealing with a subject that so deeply affects the lives of everyone involved in the case, the court cannot be restricted by a set of inflexible objective standards which do not take into account the special problems and needs of each case.

Section 4600 was enacted to strike a balance between the court's need to render an objective decision and the human tendency to make subjective decisions in highly emotional controversies. In theory, section 4600 does little to curb the court's subjectivity from influencing the outcome of the trial since the court has exclusive control over determining what constitutes "detriment." In practice, however, the court has not abused the exceptionally broad power given to it under section 4600. The court has recognized the great potential for abuse in dealing with such delicate family matters and has thus acted conservatively in granting custody to nonparents.

Conservative action, however, is not the most effective method for curbing judicial abuse. Instead, courts should attempt to minimize assertions that decisions in this area are arbitrary and biased by requiring the parties involved in the dispute to participate in pre-trial mediation. Optimally, this procedure would encourage pre-trial settlements and reduce the level of judicial intervention in controversial and private family matters. Even if mediation were not successful, the mediator's recommendation could be used to substantiate the court's decision, thereby refuting any claim of partiality. Alternatively, if mediation is not feasible, courts

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(citations omitted) (quoting *New York ex rel Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 194, 269 N.E.2d 787, 792, 321 N.Y.S.2d 65, 72 (1971).

should require that the minor child be appointed independent counsel to assure that his best interests are adequately represented. This way, the child's best interests would be less likely to become confused or engulfed by the parents' and nonparents' interests in gaining custody.

The result in *Phillip B.* reflects this latter concern—that the child's best interests should be served above the parents' interest in retaining custody. While the *Phillip B.* court was not insensitive to a parent's fundamental right to care for his child, it decisively advocated that when a parent's right to custody cannot be reconciled with a child's best interests, California courts will be guided by the best interests of the child.

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