

## Emotional and Legal Issues When a Child's Parent Dies

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**A** family facing the death of a parent confronts many challenges and struggles even when there are no legal proceedings. To have a child or children grieving over the loss of a parent, with the concurrent economic and other problems that often arise, and then to add the bitterness of litigation on top of that is an ordeal not to be wished on anyone, much less a child. Fortunately, because parents raising children tend to be on the younger side, it is not a frequent occurrence. But, when it does happen, a variety of complications can arise.

In the articles below, a mental health professional and a family law attorney each provide insights as to the psychological and legal issues, respectively, that may arise when a parent dies. For example, it may make a difference as to whether there is a Family Law proceeding or a Probate proceeding filed. The articles are based upon a presentation the authors participated in at the annual conference of the Association of Family and Conciliation Courts held in Santa Monica, California in 2010.

### I. Psychological Reactions of Children to Parental Loss—Angus Strachan, Ph.D.

The death of a loved one is a traumatic event for anyone and even more so for a child who is losing an attachment to a parent. It can also be challenging knowing how to help a child with their grief. This article provides some pointers as to how to help children confront this crisis in a healthy way so they can emerge from it with fewer scars.

#### The changing legal landscape

First, it is important to understand not only the nature of the child's relationship with the parent who died, but also his or her relationship with other important attachment figures who the child relies on for emotional support. Maintaining or building on these relationships is crucial to the child's development and, increasingly, California courts appear to be giving greater weight than in the past to attachment relationships in comparison with biological relationships. Another way of saying this is that the courts are increasingly recognizing that children benefit from continuing their attachments to stable parental figures and that they may be harmed by the disruption of such bonds, whether they are biological or non-biological bonds.

Children think differently about death than adults do.



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This article will describe how children of various ages think differently about death. This will be followed by suggestions gleaned from direct research to show what works to help children who are dealing with grief.

#### Main themes:

- Conceptualizing the risk: how are kids affected?
- Not all deaths are equal
- Children's understanding of death is different from adults
- Stages of emotional development

## How to help children through their grief:

### Do's and Don'ts

- Conceptualizing the risk: how are children affected by the loss of a parent?

It has been estimated that 3.5% of children under 18 have experienced the death of a parent which is about 2.5 million in the US (Social Security Administration, 2000, cited by Haine et al., 2008). Many children adapt well; some don't.

Children who do experience a parental death are at risk for depression, anxiety, increased physical complaints, traumatic grief (which includes yearning and lack of acceptance), low esteem, lowered academic success, and a tendency to blame others.

It is useful to recognize that parental loss is not just one event: there is a cascade of stressful events, which often include separation from familiar family members and neighborhoods, parental distress among the surviving family members, sudden financial difficulties, and the likelihood of a decrease in good parenting as the adults around struggle to cope.

Overall, the major factor that predicts how children will fare is how well the adults around them cope and orient to the children's needs.

#### Not all deaths are equal

Consider these different scenarios:

- A parent who has been sickly for a long time and dies;
- A parent who dies in a car accident;
- A parent who goes off to war and doesn't come back;
- A parent who commits suicide.

The impact of these losses will be different. Consider further the nature of the relationship the child has with the parent: Is it close or distant? I posit that the impact of the loss depends on three factors: How emotionally close the child is to a parent; whether the death is expected or not; and whether the death is traumatic or not. It is easier to cope with the loss of someone who is distant and in which the death is benign and expected; it is harder to cope with the loss of someone who is close and where the death is unexpected and traumatic.

Such differences elicit differing emotional reactions and demand different approaches to providing care for the child in the aftermath of the death.

Another factor is that, sometimes, non-custodial parents are thrust into a parental role suddenly. There can be

a disconnect between the feelings of the new parent and the child: the child may be going through grief that the non-custodial parent may not be experiencing.

### Children's understanding of death is different from adults

We all know that when people die, they can't come back. Everything stops, including their bodily functions, their brains and their consciousnesses. An irreversible biological process has occurred. Everyone, including all living things, and even ourselves must die. But this is adult thinking.

Children don't necessarily think like this.

Children develop concepts about these aspects of death more or less in this order (Cotton & Range, 1990; Slaughter, 2005):

- **Irreversibility:** Children may think that Heaven is too far away to get back, that you are dead because the coffin is nailed shut but you could return to life. Cartoons celebrate this with characters falling off cliffs, being squashed by anvils and coming back to life. The truth: Once you are dead, you are dead and can't come back.
- **Finality:** Children may believe that the person is 'sleeping' and will awake. The truth: That's it folks. There's nothing more. Everything stops.
- **Causality:** Children may believe that the 'bogey man' or the 'grim reaper' comes to get you. The truth: You died because of a breakdown of bodily function, an unseen biological process.
- **Universality:** Not me!!! The truth: Everyone dies eventually, however much you are a good person, judge, attorney or mental health professional, even if you exercise/eat good things/are nice etc. Further, all plants, animals and all living things eventually die. •

These stages correspond to the qualitative leaps in understanding about the world that Piaget made famous when he showed that children's thinking suddenly shifts first to an understanding of object permanence (remember 'peek-a-boo?'), then through stages of pre-operational, concrete and finally formal operational thinking, in which children can understand abstract thought (see table 1) (Sylva & Lunt, 1982).

### Children advance through various stages of emotional development

In parallel with their cognitive development, children advance emotionally and socially (Baker, Sedney &

Gross, 1992; Steinberg, 2009):

- At first, it is all about ME! I control everything.
- Later, children develop empathy.
- Eventually, they develop a societal perspective. •

I summarize these parallel emotional developments also in Table 1.

In conclusion, we can help children cope with parental loss by providing continuity with other attachment figures, understanding their cognitive and emotional development and helping them face the inevitable confusing and sometimes contradictory feelings they may have, while honoring the memory of their loved parent.

**Table 1: Children’s Development and their Understanding and Emotional Reactions to Parental Loss**

Age	Cognitive Understanding	Emotional and Social Maturity	Possible Reactions
0-2	No object permanence; out-of-sight, out-of-mind; person gone away	Developing sense of security and attachments	Anger, apathy, detachment
2-6	Pre-operational thinking: death reversible; death not final	Has developed attachments, egocentric, magical thinking	Sadness, anxiety, puzzlement, guilt
6-12	Concrete operational thinking: death is irreversible & universal; caused by outside forces; beginning to see other perspectives.	Developing empathy; simple ideas of bad/good or right/wrong.	Sadness, anxiety, simplistic explanations.
12-16	Formal operational thinking: can understand complex issues, hypothesize; understand the inevitability of death; and that an internal biological process can cause it.	Forming own sense of identity but fragile.	More comprehension but simple emotions such as anger and denial.
16-25	Intellectually like adults.	Immature socially: risk-taking, suggestible/susceptible to peer pressure, Impulsive.	Comprehension but may ‘act out’ impulsively.

**Do’s and Don’ts in Helping Children Grieve a Parental Loss**

What practically can an adult do whether they are a parent, therapist or other caregiver? Haine, Ayers, Sandler and Wolchik (2008) review evidence-based practices for parentally bereaved children and their families. This is the best summary of what you can do (See table 2).

First, you can help children by explaining that they will have a variety of feelings, including anger and guilt and they should expect to be caught off guard by these. This is a very useful intervention and helps children not feel that they are going out of control.

Second, helping them remember their lost parent is important, rather than trying to distract them. Help them identify what they cannot control and use emotion-focused coping strategies. Help them identify what they can control and use problem-focused strategies. Finally, continue to be a parent who provides both support and limits.

**II. Legal Proceedings That May Arise When a Parent Dies—Lynette Berg Robe, Esq., CFLS**

Although Family Code section 3010, subdivision (b) states that when one parent dies, “...the other parent is entitled to custody of the child,” that, unfortunately, is not always the end of the story. After the death of a parent, third parties may seek to intervene, believing themselves to be acting in the child’s best interests. These cases can become confusing as to procedure, whether the case belongs in family court or probate court, or whether even criminal proceedings may be involved.

Included with this article is a chart that outlines various legal proceedings that might arise in the context of the death of a parent. The issue is complicated because there are four major bodies of law that govern child custody proceedings in general and in the case of the death of a parent as well.<sup>1</sup> Most often, the proceedings are in Family court in marital dissolution proceedings, although parent-

**Table 2: Do's and don'ts in helping children with parental loss**

<b>Don'ts</b>	<b>Do's</b>
Don't sweep it under the rug.	Give information about the grief process.
Don't tell them to 'be strong'. 'Don't feel bad.'	Tell them they will feel all kinds of emotions, including anger and guilt.
Don't leave them in a void where they can think it is their fault.	Explain how the parent died. Tell them it is not their fault.
Don't tell them to keep busy and distract themselves.	Tell them it is OK to talk about the deceased parent.
Don't tell them not to think about the lost parent.	Tell them they may imagine they see the parent and dream about them.
Don't say, 'You will find another mother.'	Say, 'You will never forget him or her.'
Don't say, 'Let's talk about something else.'	Say, 'Let's talk about him.'
	Say, 'Let's write a letter, send a balloon, visit the grave.'
Don't tell them, 'It's up you to sort through it.'	Help them identify what they cannot control and use emotion-focused coping strategies; help them identify what they can control and use problem-focused strategies.
Don't let them think it is their job to make their parent feel OK.	Tell them, 'I can manage how I feel; your job is to do your homework.'
Don't get absorbed by your own problems.	Make one-on-one time (15 minutes is OK). Family fun.
Don't zone out or become lax.	Convey acceptance, warmth, and praise; maintain rules.

age proceedings are increasing in number each year. At other times, child custody proceedings make take place in Probate court as guardianship proceedings. (Prob. Code, §§1400 et seq.; 1500-1611.) The third body of law is in juvenile dependency court proceedings which make take place if both parents have died, a child has been abandoned by the surviving parent, or if the surviving parent is not able to adequately care for the child. (Welf. & Inst. Code, §§200 et seq.) Adoption is the fourth related proceeding, also under the Family Code (Fam.Code, §§8500-9340.) A surviving parent may also obtain a judgment for parentage and child support through the Department of Child Support Services, but we will not cover that either (Fam. Code, §17000 et seq.). This article will focus only on Family court and Probate court proceedings in which a surviving parent and third parties contest who should care for the child. It will not attempt to deal with juvenile dependency proceedings or adoption proceedings other than calling attention to the fact that sometimes the

juvenile dependency court or adoption proceedings may follow the death of a parent. The article will discuss cases involving guardianships and a relatively new law providing for adoption after the establishment of a guardianship. The author also will suggest some minor changes to statutes that would assist the surviving parent in enforcing Family Code section 3010, subdivision (b).

#### **When a Parent Dies in an Intact Family**

If there are no Family Court proceedings, and a parent in a family dies, under Family Code section 3010, subdivision (b), the surviving parent should "automatically" receive full custody. If it is an intact family and there are no family law proceedings, the surviving parent usually has the children with him or her and no one disputes custody. If, however, a third party, such as a grandparent or aunt or uncle, assumes custody of the child, it may be difficult for the surviving parent to extricate the child. This scenario might arise, for example, in the context of a

step-parent adoption or a second-parent adoption, where, although the adoption gives the step-parent/second parent full parental rights, relatives of the deceased parent believe they should rightfully raise the child because the step-parent/second parent is not a “blood” relative. It may also arise in parentage cases where the parents never married, and relatives of the deceased parent think that entitles them to raise the child.<sup>2</sup> The surviving parent can wait until the third party files a petition for guardianship in the Probate Court and contest it, or he or she can file a petition for a writ of habeas corpus to obtain a court order for immediate physical custody of the child when custody is being withheld from a person lawfully entitled thereto. (Pen. Code, §§1473-1508.)<sup>3</sup> The parent may also proceed under Penal Code section 1497 to seek a warrant where a peace officer may immediately bring a minor child before the court.

#### **Suggestion for Legislation for Simpler Enforcement of Family Code Section 3010, subdivision (b)**

This author suggests that the law should provide a simpler remedy for the surviving parent under the Family Code. Rather than the arcane petition for a writ of habeas corpus or criminal proceedings<sup>4</sup>, it would seem that minor changes in Family Code section 3120 would provide standing to enable a surviving parent in a marriage or domestic partnership<sup>5</sup> to file a petition for exclusive child custody. The petition should name the third party who has possession of the child as the respondent, which would be the case in a habeas corpus proceeding, and it would eliminate the need for joinder. Then the court may make orders concerning the custody and control of the children of the marriage as described in that statute that may be “just and in accordance with the natural rights” of the parent and the best interests of the children.

Although such a situation is rare, there should be a simple remedy available under the Family Code to enforce Family Code section 3010, subdivision (b). As we are well aware, delay is the enemy in child custody proceedings. Without a speedy way to assert his or her parental rights, the surviving parent may find that so much time goes by that the third party may become a “de facto” parent, discussed further below, before the parent is able to assert his or her rights. A surviving parent should not have to wait until a third party who has possession or his or her child decides to file a guardianship petition. The Family Code favors the surviving parent, so it should also enable a simple process for that parent to be able to assert

his or her claims to the child. Family Code section 3120 has simple judicial council forms that could be modified to add the surviving parent as a petitioner when his or her spouse has died. Third parties have the right to file the guardianship proceeding, and they may be able to prove themselves to be “de facto parents” of the child. It only seems fair that a surviving parent should have a simple remedy in the Family Code.

#### **When a Parent Dies in an Active Dissolution of Marriage/Domestic Partnership Proceeding**

A seminal case, *Guardianship of Donaldson* (1986) 178 Cal.App.3d 477, discusses this issue where the custodial parent died. In a martial dissolution case, temporary custody of the two minor children had been awarded to the father. Mother had a “nomadic” existence. Apparently, no judgment was ever entered in the dissolution case. Then, two years later, the father died, and the Department of Children’s Services gave informal custody to his sister, the paternal aunt. The mother, acting through an attorney, designated that she wanted her parents in Illinois to have custody, but did not tell the aunt. Under a pretext of visitation, the maternal grandparents came out to Merced and took the children to Illinois. Subsequently, the aunt filed a guardianship in California, and the grandparents filed a guardianship petition in Illinois, with the mother’s consent and nomination, and both guardianships were granted. The mother appealed the guardianship order in California. There, California Court of Appeal, Fifth Dist., held that upon the death of the father, the mother had “an immediate right to custody.” It also held that a parent’s right to sole legal and physical custody includes the right and responsibility to make decisions relating to the health, education, and welfare of the child...which included the right to “place them in the temporary physical custody of persons who could provide them with a wholesome environment.” So, the court reversed the aunt’s guardianship order and concluded that the children were lawfully in the physical custody of the grandparents in Illinois.<sup>6</sup>

In another case, *Marriage of Jenkins* (1981) 116 Cal. App.3d 767, the mother was awarded custody of the son in an interlocutory dissolution decree in Washington, and then the father, the noncustodial parent, died. The mother’s parents then sought custody in Washington, apparently in the dissolution proceeding. The mother moved with the child to Orange County, in violation of a Washington restraining order. The grandparents sought a writ of habeas corpus and brought the child back to Washington.

The Washington court then relinquished jurisdiction, and the Orange County court assumed jurisdiction, and left custody with the mother pursuant to the interlocutory decree. Then, the grandparents sought visitation in Orange County, seeking modification of the Washington interlocutory divorce decree, to give them visitation, and the court did grant visitation, over mother's objection. Mother appealed, challenging jurisdiction, saying that the Washington case had abated when father died, before the grandparents were parties, and that they had no standing to seek modification in that matter. The court held that third parties, like mother's parents, had no right to intervene in the marital dissolution case to seek modification of the custody order after a parent has died and ordered custody to remain with mother and no visitation to grandparents. The grandparents could seek custody through a guardianship. The court discussed a number of issues in dicta, recognizing cases where if there were orders made in the dissolution of marriage case and a party died, the court retained jurisdiction to enforce the orders, but that it could not make further determinations or modifications.

In another case, *In re Marriage of Williams* (1980) 101 Cal.App.3d 507, the mother filed a petition for dissolution of marriage and sought custody of the couple's two children. The court awarded temporary custody of the children to mother and visitation to father, but, shortly thereafter, mother became critically ill, comatose and on life support. Father then petitioned for custody. On the same day, the maternal grandmother and uncle filed a motion in the dissolution case, asking to be joined into the case, while the mother was still alive. They alleged an active interest in the children's welfare, claiming custody and visitation rights and alleging father was "unfit." Mother died. The court granted sole legal and physical custody to father, without prejudice to claimants. Father then sought dismissal of the proceeding on the grounds of mother's death. The court determined that the case had abated, as the marriage was terminated by death, and that claimants had no pending action to be joined in.<sup>7</sup> It should be noted, however, that the court of appeal did not overrule the trial court's action in granting sole legal and physical custody of the two children to father after the mother died, even though he only had visitation rights previously. This case has been used to support the court making an order for sole legal and physical custody to the surviving parent after the first parent dies.

### Abatement of the Proceedings

This question of abatement of the proceedings as raised above in *Williams* and *Jenkins* is one of the complications involving these cases. As they say, "timing is everything." Much depends on when the death occurs.

### Abatement in Marital/Domestic Partner Dissolution Cases

1. If there is a case for dissolution of marriage, and there are no orders, then the case may abate because the marriage was terminated by death. The cause of action for dissolution of marriage ceases to apply, because the marriage has been terminated. The property issues and support (probate court family support and probate homestead) will be determined in probate court. Under the law, the child is to go to the surviving parent. If parties have filed for dissolution and there are no orders, and the case abates, this leaves the surviving parent in much the same situation as described above when there is no family law proceeding. If a third party then takes control of the child, and the dissolution of marriage case is deemed abated, then the surviving parent must use a petition for writ of habeas corpus or Penal Code section 1497 in order to force return of the child.

2. If the death occurs after orders have been made, after judgment for termination of marital status, after the court has rendered a decision, or post-judgment, then the law has evolved to suggest that the court retains power to enforce its orders, but it is not certain.

An old Supreme Court case, *Schammel v. Schammel* (1894) 105 Cal. 258, even held that when the Mother died post-judgment, that the action abated and refused to enforce child support orders. In that case, in the decree for dissolution, Mother received custody of their daughter, and Father was ordered to pay for her support and education. Mother then died. The daughter refused to go live with the father and stayed with her older sister, who petitioned to become her guardian in a separate case. The sister then sought to execute against property of the Father for the child support he owed within the dissolution action. The trial court granted the writ of execution. The Father appealed, and the Supreme Court overruled the trial court and court of appeal, saying that the action had abated when the Mother died, and that the court had no jurisdiction to make the order.

Since 1894, however, a number of cases have held that the court retains the power to enter judgment in conformity with matters already adjudicated before the

death or it retains the power to enforce the orders that it has made under Family Code section 3022, Family Code section 290, and 2337, subdivision (f), but it cannot make any further adjudication of issues.<sup>8</sup> For example, in *In re Marriage of Shayman* (1973) 35 Cal.App.3d 648, after a trial and written findings of fact and conclusions of law were filed by the court, but before judgment was entered, Father died. The trial court granted a motion by decedent's attorney to enter the interlocutory judgment nunc pro tunc back to the date of filing the findings and conclusions. Mother appealed contending that the court did not have jurisdiction to proceed in that manner. The court of appeal held that once the court renders a decision, it retains the power to enter judgment in conformity with its decision. That case dealt primarily with property issues.

In another case, *Marriage of Drake* (1997) 53 Cal.App.4th 1139, the court of appeal held that Mother's death after judgment of dissolution did not deprive the court of jurisdiction over attorney's fees and child support. See also *Marriage of Lisi* (1995) 39 Cal.App.4th 1578. When the person dies, the court may enter judgment only on issues already decided (Code Civ. Pro., § 669); no further orders may be made as to property rights, spousal support or attorneys' fees.

4. If there has been a status judgment or the matter has been submitted to the court for decision, then the court may substitute a personal representative to carry on the family law case. (Fam. Code § 2337, subd. (f).) Post-judgment, it seems that the court should be able to retain the power to enforce its own orders under Family Code sections 3022 and 290, including child custody orders. Unfortunately, there does not appear to be a case other than *Marriage of Williams, supra*, that deals with the court's ability to make a custody order to the surviving parent in a marital dissolution case or to enforce existing custody orders. The underlying assumption, of course, is that the surviving parent is entitled to custody and that is the end of the story.<sup>9</sup> In California Child Custody Litigation and Practice, the CEB authors advises as a "practice tip" to not initiate a habeas corpus proceeding but to seek "more common remedies, such as an order for the return of the child."<sup>10</sup> The problem is that if there is no Family Law proceeding or if the Family Law proceeding has abated, then there is no case within which to bring such a motion. A small change in the existing law, set forth below, would resolve this dilemma.

#### Abatement in Parentage Cases

Parentage cases have to be analyzed differently. In a parentage case, the causes of action are establishment of

parentage, custody and child support orders. Under Code of Civil Procedure section 377.21, even if one party dies before entry of judgment, the issue of establishment of parentage and custody must continue.

Further, if the mother dies and the biological father is not on the birth certificate because the parents did not execute a voluntary declaration of parentage, then father will have to file a petition to establish parental relationship naming mother's estate as respondent to even be deemed a father. Similarly, if the biological father dies, and he is not on the birth certificate, then mother will have to file a petition to establish parental relationship if she wishes to obtain child support from father's estate or benefits for the child through him.

If father is on the birth certificate and the parties executed a voluntary declaration of parentage, that has the full force of a judgment for parentage after two years (*Kevin Q. v. Lauren W.* (2009) 174 Cal.App.4th 557), but the biological father will still have to file a petition for parentage to have a court order for custody. Similarly, the mother will have to file the petition in order to obtain child support or work through Department of Child Support Services to make a claim against deceased father's estate, or file a claim in a probate proceeding as to father's estate.

If there is a petition to establish parentage filed, and the matter is pending, and either parent dies, then the case should not abate, because the issues of parentage and custody must still be established. Child support issues may have to be resolved against the decedent's estate after the parentage and custody are determined.

If judgment has been entered and parentage established, and a parent dies, then the court should retain power to enforce its orders as with a marital dissolution judgment. Unfortunately, there do not appear to be any published parentage cases dealing with this issue. Therefore, we must assume that cases like *Marriage of Williams, supra*, *Marriage of Drake, supra*, and *Marriage of Shayman, supra*, will apply to enable orders entered to be enforced after a parent dies, which would include making a motion to be awarded sole legal and physical custody and for a turn-over order, if necessary.

#### Need for Clarifying Legislation

In light of the fact that a petition for writ of habeas corpus is under the Criminal Code and not something many Family Law practitioners are familiar with, it seems that an enforcement provision should be written into Family

Code section 3010, subdivision (b) to clarify the situation and to provide a simple remedy to the surviving parent when there is already an existing Family Law case. It could simply be something to the effect that “(c) *In the event of the death of a parent, the Family Law Department retains jurisdiction to make any orders required in an existing case to effect the rights provided under subdivision (b).*” This would make it clear that if there is an existing case, no matter what stage of the proceeding, the proceeding shall not abate, and the court shall retain powers of enforcement, powers to award the surviving parent an order for sole legal and physical custody, and power to make a turn-over order if a third party has possession of the child as suggested by the CEB California Child Custody Litigation and Practice, p. 702.

#### The Shifting Burden of Proof When Third Parties Make Claims for Custody After a Parent Has Died

Whether the proceedings take place in Family Court or in a Probate Court guardianship proceeding, when a third party makes custody claims against a surviving parent, the proceeding will be governed by Family Code section 3041. (See Prob. Code, §1514, subd. (b).) Section 3041 provides in pertinent part that:

- (a) Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child....
- (b) Subject to subdivision (d), a finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence.
- (c) As used in this section, “detriment to the child” includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents.
- (d) Notwithstanding subdivision (b), if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding

shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.

Generally, under subsection (b), the burden of proof to take away a child from a surviving parent would be clear and convincing evidence. The third party would have to prove by clear and convincing evidence that it would be detrimental to the child for the parent to have custody and that it would be in the child’s best interest for the third party to have custody. In the limited situation, however, where the child has been with the third party for a substantial period of time such that it has become a “stable placement,” and the third party has assumed the parental role (i.e., has become a “de facto parent”) as to the child’s physical and psychological needs, then the statute provides shifting burdens of proof between (b) and (d). Under subsection (c), the nonparent first must prove that he or she is a person as described in subsection (c), a “de facto parent.” Then, if a court finds by a preponderance of the evidence that the nonparent is a person as described in subsection (c), then that in itself constitutes a finding that custody to that nonparent is in the best interest of the child and fulfills the clear and convincing standard that parental custody would be detrimental to the child.

This statute itself and the cases interpreting it show that the balance in awarding custody between a parent and a nonparent is actually toward the child and trying to sustain meaningful relationships for the child rather than simple biology. So, if a parent has not been that involved in his or her child’s life and the custodial parent dies, then the surviving parent must act swiftly to establish his or her rights under Family Code section 3010, subdivision (b). If not, they risk losing custody to a nonparent who has attained the status of a “de facto parent.”

The shifting burden of proof was the subject of a recent court of appeal case, In *re H.S. v. N.S.* (2009) 173 Cal. App.4th 1131. In that case, the constitutionality of Family Code section 3041 was challenged. The plaintiff argued that section 3041 is unconstitutional because it allows nonparental custody based on a preponderance of the evidence standard of proof rather than a clear and convincing evidence standard of proof and without requiring a finding of parental unfitness. The court of appeal rejected both of these arguments. It held that under section 3041, subdivision (d), a showing of de facto parent status creates a rebuttable presumption that it would be detrimental

to place the child in the custody of a parent and the best interest of the child requires nonparental custody. As explained in *Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 491, section 3041, subdivision (d) reflects a legislative assessment that “continuity and stability in a child’s life most certainly count for something,” and “in the absence of proof to the contrary, removing a child from what has been a stable, continuous, and successful placement is detrimental to the child.”

*In re H.S. v. N.S.*, *supra*, was a San Diego case. The father left the minor child with his brother and sister-in-law from the time the child was a baby until the time of the litigation when the child was about 5 years old. The mother was alive but mentally ill. The parents were not married. Even though no parent has died here, this case would apply in cases of a surviving parent when third parties such as grandparents, aunts and uncles, etc., make claims for custody under Family Code section 3041 in any Family Law proceeding as well as a probate guardianship proceeding. It should be noted, when a parent dies in a marital dissolution, the third parties probably cannot make claims in the family law case (*In re Marriage of Williams* (1980) 101 Cal.App.3d 507; *Marriage of Jenkins* (1981) 116 Cal.App.3d 767.), but will have to file a guardianship. Even so, the same evidentiary standard would apply in a guardianship to award custody of a child to a nonparent over the parent. (Prob. Code, §1514, subd. (b).)

According to the facts in *In re H.S. v. N.S.*, *supra*, the father visited frequently, but was otherwise content to let the child stay with the aunt and uncle. He said many times that he was not prepared to parent the child on his own. The mother appeared at various times, and then was sent to a psychiatric hospital. There was Minor’s counsel appointed. At one point, Child Protective Services became involved.

The appeal was from a family court order that awarded permanent sole physical and legal custody of the daughter to the aunt and uncle and allowed father only supervised visitation.

Among the issues that came up was Father’s exposing child to inappropriate adult-type musicals like “Gypsy” and “Chicago” where the four-year-old would talk about “dirty words” and “sexy dancing.” The father wanted to continue to have joint legal and physical custody with the aunt and uncle with unsupervised visitation. The aunt and uncle argued that a “permanent” order subject to the significant change of circumstances standard would be in the best interest of the child for her stability and continuity.

The court awarded custody to the aunt and uncle and gave Father continued supervised visitation.<sup>11</sup> Father appealed arguing that section 3041 is not constitutional because it deprived him of his fundamental right to be a parent without requiring a showing of parental unfitness. The court held, however, that because the child had been with the aunt and uncle for such a long time, that the child should not be removed from their care.

The court of appeal said this at p. 113 :

Father argues that section 3041 is unconstitutional....As we shall explain, section 3041 requires clear and convincing evidence of detriment to the child to award custody to a nonparent, which showing of detriment may be established by a rebuttable presumption in cases involving de facto parents. Further, in cases involving nonparental custody, the detriment requirement is imposed in addition to the best interest of the child requirement. These standards and criteria represent an appropriate balancing of the competing interests involved in nonparental custody cases and do not run afoul of the Constitution.

### **Family Code Section 3041 Applied Last Year by the California Supreme Court in a Guardianship Case**

Last year’s case of *In re Guardianship of Ann S.* (2009) 45 Cal. 4th 1110, is chock full of interesting legal history of probate guardianships, dependency court, and family court. It discusses how it used to be that parents were entitled to retain custody of a child unless affirmatively found to be “unfit.” The unfitness standard fell out of favor and now best interest of the child is the controlling consideration. Although it discusses Family Code section 3041, this case<sup>12</sup> is really about the constitutional of a fairly new probate code section, Probate Code section 1516.5. The challenge was as to terminating parental rights as Probate Code section 1516.5 allow parental rights to be terminated without a showing of parental unfitness. So, in this way it was similar to the challenge in *In re H.S. v. N.S.* above as to Family Code section 3041.

In *In re Ann S.*, *supra*, the child was given by the mother into the care of the father’s aunt and uncle. Mother was a heroin addict and had a lengthy criminal history. Father also a drug user. Parents each had custody for short periods of time, but when Ann was 18 months old, they gave her to the father’s brother and sister and both parents consented to a guardianship in which no visitation for mother was provided. Mother went to prison. While she

was in prison, the aunt and uncle filed a regular adoption petition, and the father consented, but the mother did not. Mother had other children, Ann's half siblings, who were in a long-term guardianship with her sister. Mother said that she wanted to keep her family together when she got out of prison. The court did not grant the termination of her parental rights under Family Code section 7822 for abandonment, so the adoption did not go through. Then, Mother got out of prison and entered into a drug treatment program. Ann was now four years of age. Shortly thereafter, the Aunt and Uncle filed a new petition to terminate her parental rights under the new Probate Code section 1516.5, which had just taken effect. They have been Ann's guardians for over two years. An adoption study made by a social worker and an evaluation by a licensed family therapist both reached the conclusion that Ann should stay with the Aunt and Uncle, that it would be detrimental to her to take her away from them and award custody to the mother.

Again, the Supreme Court upheld the constitutionality of a statute that supports the child maintaining relationships with third parties with whom it has established bonds over a biological parent, who has not been found unfit, but who the court has held that it would be detrimental for the child to go into the parent's custody.

The Mother had consented to the guardianship before this statute was enacted, so she had no idea that by consenting to the guardianship, she was laying the groundwork for the child to be adopted by the aunt and uncle. Nevertheless, the Supreme Court held that it was not a violation of due process for it to be retroactive. What was important was that the child had developed an interest in a stable, continuing and permanent placement with the third parties.

After *In re H.S.*<sup>13</sup> v. *N.S.*, *supra*, and *In re Ann S.*, *supra*, we all must be aware that consenting to even a temporary guardianship may have dire consequences for a parent. If left with third parties too long, the third parties may establish the bonds of a parent and that can lead to the loss of custody under Family Code section 3041. If the third parties establish a guardianship, parents must be advised that could lead to the termination of parental rights and the prospect of having the child adopted by the third parties after two years of the guardianship under Probate Code section 1516.5.

### Conclusion

The lesson to be learned from all of these cases in terms of the death of a parent, is that the surviving parent

must act quickly to claim his or her rights, particularly if the children have been in the custody of the deceased parent and the surviving parent less involved. If the surviving parent does not act, third parties may step in to care for the child. The surviving parent needs an easy and simple remedy to be able to get into court and assert his or her rights. If there is an existing Family Law case, at any stage, this article suggests that the Family Law case should not abate, and that the surviving parent should be able to obtain turnover orders and sole legal and physical custody orders within the Family Law case. If there is no case filed, if the parents are unmarried, the surviving parent needs to file a case to establish parental relationship. In the case of a marriage or domestic partnership, this article suggests that the surviving parent be allowed to file a case under Family Code section 3120 naming the third party as respondent. The rights under Family Code section 3010, subdivision (b) will not exist forever. If the surviving parent does not act to enforce those rights swiftly, third parties will step into the parent's shoes, and the law will uphold the child's right to maintain those stable and successful arrangements even if the surviving parent is a "fit" parent. ■

### Psychological references about parental loss

- Baker, Sedney, Gross, *Psychological Tasks for Bereaved Children*, American Journal of Orthopsychiatry (1992) 62 (1), pp. 105-116.
- Cotton, Range, *Children's death concepts: Relationship to cognitive functioning, age, experience with death, fear of death, and hopelessness*. Journal of Child Clinical Psychology (1990) 19 (2), pp. 123-127.
- Haine, Ayers, Sandler, and Wolchik, *Evidence-based practices for parentally Bereaved children and their families*, Professional Psychology: Research and Practice (2008) 39 (2), pp. 113-121.
- Slaughter, *Young children's understanding of death*, Australian Psychologist (2005) 40 (3), pp. 179-186.
- Steinberg, Cauffman, Wooland, Graham, and Banich, *Are adolescents less mature than adults? Minors' access to abortion, the juvenile death penalty, and the Alleged APA "Flip-Flop"*, American Psychologist (2009) 64 (7), pp. 583-594.
- Sylva, and Lunt, *Child Development: A First Course* (1982).

## Legal Endnotes

1 *In re Marriage of Jenkins* (1981) 116 Cal.App.3d 767, 775, identifies “at least eight separate Family Law procedures to obtain child custody.” Fam. Code section 3021 identifies seven, and the eighth is in Prob. Code section 1514, subdivision (b), which references Fam. Code sections 3020 et. seq. and 3040 et seq. as being applicable to guardianship proceedings. This is aside from juvenile dependency proceedings and adoption proceedings.

2 In 1972, the U.S. Supreme Court established that an unmarried father had the same parental rights as a married father, *Stanley v. Illinois* (1972) 405 U.S. 645.

3 California Child Custody Litigation and Practice (Cont.Ed.Bar 2009) pp.701-702.

4 Hogoboom & King, California Practice Guide: Family Law (2009) 7:46-48; 17:247-248; *In re Paul W.* (2007) 151 Cal.App.4th 37, 53,60; *Polin V. Cosio* (1993) 16 Cal.App.4th 1451, 1457; *Ex Parte Barr* (1952) 39 Cal.2d 25,27.

5 For the sake of space, references to dissolution of marriage hereafter includes dissolution of domestic partnerships.

6 Another issue clarified by *Donaldson*, which arises fairly often in cases where a parent has died, is the application of the UCCJA (now, UCCJEA). The UCCJA was enacted in California in 1974 to avoid jurisdictional disputes and conflict, and *Donaldson* held that it applies in guardianship cases in the Probate court as well as in Family court proceedings. In the *Donaldson* case, no UCCJA declaration was filed either in California nor Illinois, and it was the classic conflict over jurisdiction. The California court had initial, “home state” jurisdiction, but the Illinois court had initial jurisdiction too because the grandparents had lawful custody pursuant to the permission of the mother. What should have happened was that the two courts should have communicated with each other under what is now Family Code section 3424, subdivision (d) to decide where the proper forum was, thus avoiding the appeal.

7 Fam. Code section 3102 provides for a request for visitation rights for grandparents, parents, children, and siblings of a deceased party. It is not clear if “parents” in this section includes stepparents. Stepparents may request visitation under Fam. Code section 3101. These orders would be subject to *Troxel v. Granville* (2000) 530 U.S. 57. Various cases involving grandparent visitation are cited on the chart.

8 *In re Marriage of Gregory* (1991) 230 Cal.

App.3d 112. Court of Appeal held that the child support order in the marital dissolution proceeding did not abate.

9 Interestingly, a party’s intervening death in a petition for nullity does not abate the action. The nullity cause of action survives, so the deceased party’s personal representative is property substituted into the proceeding to permit adjudication as to whether a valid marriage/domestic partnership existed. (Code Civ. Pro., § 377.21. A pending action does not abate by the death of a party if the cause of action still survives.) *Marriage of Goldberg* (1994) 22 Cal.App.4th 265.

10 California Child Custody Litigation and Practice (Cont. Ed. Bar 2009) p. 702.

11 The trial court ordered supervised visitation for the father, but court said that a therapist would decide when the supervised visitation for the father would end. Although this might seem like an improper delegation of the court’s authority (*Ruisi v. Thieriot* (1997) 53 Cal. App.4th 1197), the court of appeal noted that visitation was ordered by the court and it was only the supervision aspect left to the therapist’s discretion.

12 There is a companion case to *Ann S.* called *In re Charlotte D.* (2009) 45 Cal.4th 1140. They were both decided at the same time, both upholding the constitutionality of Probate Code section 1516.5.

13 It should be noted that in *In re H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, that proceeding took place under an existing family law parentage case. Probate Code section 1516.5 would not apply when third parties are joined into and awarded custody within a Family Law case. Also, the father has visitation rights, so it is unlikely that his parental rights would be terminated. Had the aunt and uncle in *In re H.S. v. N.S.* filed a guardianship proceeding, it might well have been transferred to the Family Court, as many courts transfer guardianship cases when there is an ongoing Family Law case. (See Los Angeles County Superior Court Rules 14.4 and 2.5.) If they were granted custody under the guardianship, then they might have been eligible to adopt the child under Probate Code section 1516.5. A very recent case, *In re Noreen G.* (2010) 181 Cal.App.4th 1359 overturned a trial court order for visitation for the parents when their parental rights were terminated for a Probate Code section 1516.5 adoption. The court of appeal said that termination of parental rights means they have ended, and there is no right to visitation.

## Chart Showing Possible Proceedings After A Parent Dies

Status Quo When Parent Dies	Custody Legal Issues	Fam. Code, § 3010, subd. (b)	Fam. Code, § 3041	Guardianship Prob. Code, §§ 1510-1514, 2250-2252
<p>I. Married, intact marriage or domestic partnership, parent dies.</p>	<p>Generally, no custody issues</p>	<p>Surviving parent entitled to custody, and it is supposed to be automatic. There is no established procedure for the surviving parent to obtain custody if the child is in the possession of third parties. Petition for writ of habeas corpus; Pen. Code, § 1427. Suggestion to amend law to authorize use of Fam. Code, § 3120 petition, name party with child as respondent or make a motion to join third party into that proceeding under Cal. Rules of Court, rules 5.150, 5.154.</p>	<p>No family law case filed, so not applicable. There are statutes for step-parent, grandparent and sibling visitation (Fam.Code, §§ 3101 and 3102 subject to Troxel v. Granville (2000) 530 U.S. 57 applied in Kyle O. v. Donald R. (2000) 85 Cal.App. 4th 848. For step-parents, also see Marriage of W. (2003) 114 Cal.App.4th 68. Also see, Punsly v. Ho (2001) 87 Calo.App.4th 1099; Fenn v. Sherriff (2003) 109 Cal.App.4th 1466.; Zasueta v. Zasueta (2002) 102 Cal.App.4th 1242; Herbst v. Swan (2002) 102 Cal.App.4th 813.). If child has been adopted after the death of the parent, grandparents can seek visitation under Fam. Code, § 3104.</p>	<p>Unusual to have third party claims, but third party must file guardianship petition to assert claims to custody or through dependency proceedings, if applicable. Even in probate, Fam. Code, § 3041 would apply.</p>

<p><b>Status Quo When Parent Dies</b></p>	<p><b>Custody Legal Issues</b></p>	<p><b>Fam. Code, § 3010, subd. (b)</b></p>	<p><b>Fam. Code, § 3041</b></p>	<p><b>Guardianship Prob. Code, §§ 1510-1514, 2250-2252</b></p>
<p>2. Post-judgment marital or domestic partnership dissolution, or judgment for severance of status entered</p>	<p>If non-custodial parent dies or if joint custody, usually no issues. (Marriage of Jenkins (1981) 116 Cal.App.3d 767.)</p>	<p>If custodial parent dies and non-custodial parent or parent with joint custody wants to assume custody, he or she has right to custody under Fam. Code, § 3010, subd. (b); Guardianship of Donaldson (1986) 178 Cal.App.3d 477. Noncustodial parent or joint custody parent may want to make motion to establish sole legal and physical custody in conformity with existing court orders. In re Marriage of Williams (1980) 101 Cal.App.3d 507 If post-judgment, or if rights have been determined prior to death of a spouse, court retains jurisdiction to enforce those rights, or, if marital status terminated, can continue case as to other issues through personal representative. (Fam. Code, §§ 290, 3022, 2337, subd. (f), &amp;. See also Code Civ. Proc., §§ 669, 377.41; In re Marriage of Lisi (1995) 39 Cal.App.4th 1573; Marriage of Drake (1997) 53 Cal.App.4th 1139. General, court retains jurisdiction post-judgment to enforce its orders: In re Marriage of Kreiss (2004) 122 Cal.App.4th 1082; In re Marriage of Armato (2001) 88 Cal.App.4th 1030</p>	<p>If surviving parent files a motion for sole custody, third party probably cannot intervene on own motion, surviving parent has to seek joinder. (In re Marriage of Williams (1980) 101 Cal.App.3d 507; Guardianship of Donaldson (1986) 178 Cal.App.477; In re Marriage of Jenkins (1981) 116 Cal.App.3d 767.) If third party has taken control of child, surviving parent may be able to make a motion to request a turn-over order under Fam. Code, § 3022 and request joinder of the third party Under Fam. Code, §§ 3022 and 290, Rules of Court, rules 5.150, 5.154, it would seem so. Otherwise, surviving parent's options are writ of habeas corpus or Pen. Code, § 1497.</p>	<p>Third party can file petition for probate guardianship if they think that custody to surviving parent detrimental to the child. Fam. Code §3041 evidentiary standard clear and convincing applies. (Prob. Code, § 1514, subd. (b)) See In Re H.S. v N.S. (2009) 173 Cal.App.4th 1131, where third parties proved de facto parent status, then the burden of proof shifts. If surviving parent has filed a motion in the family law case for turn over order, then proceedings should take place in family court, and any guardianship proceedings should be transferred to the Family Law department. (See, e.g., Superior Court, Los Angeles Local Rules 2.5 and 14.4; In re Marriage of Jenkins (1981) 116 Cal.App.3d 767; Greene v. Superior Court (1951) 37 Cal.2d 307 (the first court to take jurisdiction over an issue may determine it.)</p>

<p>3. In process of divorce, but no judgment.</p>	<p>If either parent dies, action to terminate status abates. Court may enforce orders entered but cannot make new orders.</p>	<p>Surviving parent has right to custody under Fam. Code, § 3010, subd. (b). Court retains jurisdiction to enforce orders where there are orders entered. In re Marriage of Shayman (1973) 35 Cal.App.3d 648; Marriage of Lisi (1995) 39 Cal.App.4th 1573; In re Marriage of Williams (1980) 101 Cal. App.3d 507; Marriage of Jenkens (1981) 116 Cal.App.3d 767.</p>	<p>Third party cannot intervene on own motion. Marriage of Williams (1980) 101 Cal.App.3d 507; Marriage of Jenkens (1981) 116 Cal.App.3d 767. But, surviving parents should be able to enforce an existing order if third party has the child under Fam. Code, § 3022, California Rules of Court, rules 5.150, 5.154.</p>	<p>Same as above. Third party can seek probate guardianship. May be transferred to family court if surviving parent has filed a motion to enforce existing orders.</p>
<p>4. Parents not married. No voluntary declaration of paternity and father not on birth certificate. Or same sex couples and no DP or second parent adoption.</p>	<p>If non parent dies, mother/birth parent or custodial parent, likely just to continue with custody if she/he has the child. If mother/birthparent, custodial parent dies, nonparent has to start from square one in terms of establishing parentage and file petition to establish parental relationship with the child.</p>	<p>Unless nonparent acts and files a parentage action, he/she is not even eligible under Fam. Code, § 3010, subd. (b) as there is no legal determination that he/she is the father/mother. He/she will have to file petition, then motion for DNA tests, etc., to establish biological parentage; or proceed as presumptive father/mother under Fam. Code, § 7611, subd. (d).</p>	<p>If the nonparent has been involved with the child or lived with the mother/custodial parent and child under Fam. Code, § 7611, subd. (d), then this may depend on his/her relationship with the third parties. Even though not determined to be biological father/parent, he/she may be a presumptive father/mother. In re Nicholas H. (2002) 28 Cal.App.4th 56; In re Karen C. (2002) 101 Cal.App.4th 932. If nonparent files a petition to establish parentage he/she should serve it on anyone who has a claim for custody of the child and name the mother's/birth or custodial parent's estate as Respondent.</p>	<p>If the parties never lived together, and the nonparent has not been involved with the child, this is the likeliest scenario where a third party, such as a grandparent or aunt or uncle, might seek custody of the child under a guardianship. The burden of proof is clear and convincing evidence that custody to the nonparent would be detrimental to the child. Under In re E.S. (2009) 173 Cal. App.4th 1131, detriment can be proved by third party proving de facto parent status by preponderance, raising a presumption. If third parties file guardianship first, then proceedings may take place in probate court if nonparent has failed to do anything. Nonparent would file objection in probate court. If guardianship granted, after two years, the guardians may seek to terminate surviving parent's parental rights and adopt child under Guardianship of Ann S. (2009) 45 Cal.4th 1110 and In re Charlotte D. (2009) 45 Cal.4th 1140.</p>

<p><b>Status Quo When Parent Dies</b></p>	<p><b>Custody Legal Issues</b></p>	<p><b>Fam. Code, § 3010, subd. (b)</b></p>	<p><b>Fam. Code, § 3041</b></p>	<p><b>Guardianship Prob. Code, §§ 1510-1514, 2250-2252</b></p>
<p>5. Parents not married, parties signed voluntary declaration of paternity and father on birth certificate, but no judgment for paternity. If fathers dies, mother retains custody if she has it.</p>	<p>If mother dies, father can file a petition to establish parental relationship and seek custody of the child using voluntary declaration of paternity. After two years, this has the force of a judgment. (Kevin Q. v. Lauren W. (2009) 174 Cal. App.4th 1557.)</p>	<p>Father can claim custody under Fam. Code, § 3010, subd. (b) with voluntary declaration of paternity, but best course is probably to file petition to establish parental rights by judgment using the voluntary declaration.</p>	<p>Third parties can be joined into family law proceeding for turnover order. Grandparents and others can seek visitation under Fam. Code, § 3102 or file a guardianship for custody.</p>	<p>Third parties can file a guardianship. If father has filed petition to establish parental relationship, then proceedings should take place in Family Court. If the guardianship is filed first and no Family law proceeding, then the proceedings will likely take place in probate court. Father would file objection in probate court. If guardianship granted, guardians may be able to adopt as above.</p>
<p>6. Parents not married, voluntary declaration and father on birth certificate and has joint custody or visitation under a judgment for paternity.</p>	<p>Father can file a motion under Fam. Code, § 3010, subd. (b) for sole legal and physical custody as court retains jurisdiction to enforce orders entered per Fam. Code, § 3022, etc., Marriage of Williams (1980) 101 Cal.App.3d 507</p>	<p>Fam. Code, § 3010, subd. (b) says custody goes to surviving parent.</p>	<p>Father should be able to seek turnover order and joinder into the family law proceeding if third parties have possession of the child. Marriage of Williams (1980) 101 Cal.App.3d 507; Marriage of Jenkins (1981) 116 Cal.App.3d 767. Otherwise writ of habeas corpus or Penal Code, § 1497.</p>	<p>Third parties can file a guardianship proceeding. If father has filed a petition in Family Court, then the proceedings should take place in Family Court. (See Superior Court Los Angeles Local Rules 2.5 and 14.4.) Guardianship sill has Family Code section 3041 burden of proof standards.</p>