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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

EMILY NEWDOW et al.,

Plaintiffs and Appellants,

v.

EDMUND G. BROWN, JR., as Governor,
etc., et al.,

Defendants and Respondents.

C069557

(Super. Ct. No.
34201000085550CLCRGDS)

In this taxpayer action under Code of Civil Procedure section 526a,¹ plaintiffs seek (primarily) to enjoin the use of

¹ "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." (Code Civ. Proc., § 526a.)

All further section references are to the Code of Civil Procedure unless otherwise noted.

the best-interest-of-the-child standard in contested child custody proceedings on the ground that the application of that standard results in the illegal expenditure and waste of public money. In substance, plaintiffs seek to have the courts, by means of the relief granted in this action, judicially supplant the best-interest-of-the-child standard promulgated by the California Legislature with an alternate standard they believe would be better for parents and for children, namely, that every "fit" parent is entitled to equal custody (i.e., 50 percent of the custodial time with the child).

As we will explain, plaintiffs are seeking relief from the wrong branch of government. The judicial branch does not have the power, under the guise of enjoining allegedly illegal and wasteful government spending, to fundamentally rewrite California family law in the way plaintiffs ask us to do. The trial court here was correct in concluding on demurrer that plaintiffs' action "is not a proper invocation of [section] 526a." Because plaintiffs have failed to allege specific facts and reasons supporting their claim that the best-interest-of-the-child standard (and the other aspects of California family law that plaintiffs challenge) results in the illegal expenditure or waste of public money, we will affirm the judgment of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

"As this appeal is from a judgment of dismissal after the trial court sustained without leave to amend [defendants'] demurrer[s], we [must] state the facts as alleged in

plaintiff[s'] complaint." (*Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 7, fn. 4.) Unfortunately, the "facts" alleged in plaintiffs' complaint are few and far between. Ignoring -- as we must -- the contentions, deductions and conclusions of fact or law that fill the 63-page first amended complaint, and treating only the material facts properly pleaded therein as having been admitted by the demurrers (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), we discern that this action is predicated almost entirely on the fact that the California Legislature has decided that in proceedings involving the right to custody of a minor child, custody is to be granted "according to the best interest of the child."² (Fam. Code, § 3040, subd. (a).) According to plaintiffs, this "arbitrary and vague" standard is unconstitutional for a number a reasons, and "as

² In their complaint, plaintiffs traced the best-interest-of-the-child standard to 1972, citing *In re Marriage of Carney* (1979) 24 Cal.3d 725, 730. The best-interest-of-the-child standard has been part of California law far longer than that, however. (See, e.g., *Taber v. Taber* (1930) 209 Cal. 755, 756, citing former Civ. Code, § 246.) In fact, it dates back at least to the enactment of Civil Code section 246 as part of the original Civil Code in 1872. (See Historical and Statutory Notes, 6A West's Ann. Civ. Code (2007 ed.) foll. § 246, p. 140.)

What *Carney* noted was that in 1972 the Legislature eliminated the tender years presumption, which favored the mother in determining custody of a child "'of tender years.'" (*In re Marriage of Carney, supra*, 24 Cal.3d at p. 730.) Even when the tender years presumption was in place, however, the primary statutory consideration in awarding the custody of a child was "'the best interests of the child'"; the tender years presumption applied only if, after considering the child's best interests, "'other things [were] equal.'" (*Taber v. Taber, supra*, 209 Cal. at p. 756.)

family law courts attempt to divvy up custody of children according to [this] standard," the result is the illegal expenditure and waste of public money. Plaintiffs seek not only a judgment declaring that the best-interest-of-the-child standard is unconstitutional and that funds spent on proceedings applying that standard are spent "illegally and wastefully," but also a judgment requiring defendants,³ "absent a compelling interest to the contrary, [to] ensure that all fit parents have a right to 50% custody of their children when custody is to be split between two fit parents."⁴ Stated more broadly, plaintiffs seek "[t]o enjoin Defendants from utilizing its [sic] Family Court system in its current guise, in which the aforementioned constitutional and statutory violations occur."

Plaintiffs filed their original complaint in this action in August 2010. The executive defendants and the judicial defendants filed separate demurrers to the complaint. Before the hearing on those demurrers, plaintiffs filed an amended complaint in March 2011. Again, the executive defendants and

³ Defendants here are the Governor of California, the State Controller, the California Attorney General, the presiding judge of the Sacramento County Superior Court, the supervising family law judge of the Sacramento County Superior Court, the court executive officer of the Sacramento County Superior Court, and the director of the Center for Families, Children and the Courts. For ease of reference, we will refer to the first three defendants jointly as the executive defendants and will refer to the other four defendants jointly as the judicial defendants.

⁴ Plaintiffs define fit parents as "those who are not neglectful or abusive."

the judicial defendants filed separate demurrers. Among various other arguments by both groups of defendants, the executive defendants asserted that "[t]he issues raised in the First Amended Complaint are not properly litigated by way of a taxpayer action." More specifically, they argued that "taxpayer standing does not lie where, as here, the dispute is essentially 'political' in nature and involves the exercise of governmental discretion."

The trial court agreed with this argument, concluding that "the 'best interests of the child' standard . . . is a component of the Family Code's comprehensive legislative scheme for resolving questions of child custody. As Defendants argue, the development of legal standards and procedures to be applied in making custody determinations involves consideration of numerous complex and nuanced policy concerns This weighing of policy considerations is a task within the purview of the Legislature, not the judiciary. . . . [¶] Plaintiffs' lawsuit is not a proper invocation of [section] 526a." Accordingly, the court sustained the demurrers without leave to amend and entered a judgment of dismissal in October 2011. Plaintiffs timely appealed.

DISCUSSION

On plaintiffs' appeal from the judgment of dismissal, "[o]ur review of the legal sufficiency of the complaint is de novo, 'i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.'" (*Herzberg v. County of Plumas, supra*, 133 Cal.App.4th at p. 12.)

"[G]eneral allegations and legal conclusions . . . are not sufficient to support a taxpayer action." (*Id.* at p. 23, fn. 15.) "[R]ather, the plaintiff must cite specific facts and reasons for a belief that some illegal [or wasteful] expenditure or injury to the public fisc is occurring or will occur." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240.)

At the outset, plaintiffs argue that claims of illegality and waste are distinct under section 526a and must be analyzed separately. We agree. "Waste is money that is squandered" (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 482.) "Even when 'done in the exercise of a lawful power,'" public spending may qualify as waste if it is "completely unnecessary," or "useless," or 'provides no public benefit.'" (*Ibid.*) Thus, we address separately plaintiffs' allegations that the current family law system results in the illegal expenditure of public money and the waste of public money.

I

Waste

We begin with waste. Plaintiffs contend that they have properly pleaded a claim for waste because they have alleged that the "current [family law] scheme" "cause[s] nothing but harms." We are not persuaded.

As we have previously noted, "public spending may qualify as waste if it is "completely unnecessary," or "useless," or 'provides no public benefit.'" (*Chiatello v. City and County of*

San Francisco, supra, 189 Cal.App.4th at p. 482.) Along the same lines, our Supreme Court has explained that "[t]he term "waste" as used in section 526a means something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval. On the other hand, a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power.'" (*Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138, quoting *City of Ceres v. City of Modesto* (1969) 274 Cal.App.2d 545, 555.)

Ignoring, for the moment, any claim of illegality, it is indisputable that the Legislature was vested with the widest possible discretion in determining what legal standard courts should apply in contested child custody proceedings. Thus, to state a cause of action for waste under section 526a based on the best-interest-of-the-child standard, plaintiffs would have to allege facts that, if true, would support the conclusion that the best-interest-of-the-child standard is completely unnecessary, useless, or provides no public benefit. They have not done so. There are no specific facts and reasons in the

amended complaint demonstrating that application of the best-interest-of-the-child standard results in the waste of public funds under the standard for waste previously set forth.

In their opening brief, plaintiffs advert to the allegation in their complaint that child custody "'mediation' is often a prelude to severe and prolonged conflict that results in little but increased interparental animus, increased parental distress, wasted parental time, wasted familial financial resources, and the shattering of a parent's life (as he or she is marginalized in the ability to love and nurture his or her children)." Even assuming this hyperbolic allegation is directed at the best-interest-of-the-child standard, it is far from anything like the specific facts and reasons required in a complaint under section 526a.

Moreover, it is readily apparent to us that the best-interest-of-the-child standard is far from useless. Obviously, there must be *some* standard by which courts are to resolve contested child custody issues, and the best-interest-of-the-child standard serves that purpose. Thus, by no means can expenditures of public funds on contested custody proceedings be deemed waste within the meaning of section 526a. That plaintiffs believe a different standard -- giving each fit parent the right to 50 percent custody of their children -- would be better is not sufficient to state a cause of action for waste under section 526a. At best, the claim of waste here raises a dispute that is primarily political in nature -- what standard should the courts use to decide child custody issues --

and as such the claim is not actionable under section 526a. Accordingly, the trial court did not err in concluding that plaintiffs' amended complaint failed to state a cause of action for waste.

II

Illegality

Plaintiffs contend the trial court erred in ruling on defendants' demurrers because the court "failed to address the question of 'illegality' at all." This assertion has some merit. The principle on which the trial court relied in sustaining the demurrers -- that section 526a "is not properly invoked to resolve disputes that are essentially political disagreements over a particular government policy" -- applies to claims for waste under section 526a; it does not apply to a claim that a challenged expenditure is *illegal*. This makes sense because a claim that a particular expenditure is illegal should not be subject to dismissal simply because the dispute over the expenditure can be characterized as political.

Still, we need not -- as plaintiffs contend -- reverse the judgment and send the case back to the trial court because of this flaw in the trial court's analysis. Because we review the trial court's ruling de novo, exercising our independent judgment about whether the complaint states a cause of action as a matter of law (*Herzberg v. County of Plumas, supra*, 133 Cal.App.4th at p. 12), we can, and should, affirm the judgment of dismissal if the amended complaint fails to state a cause of action for any reason. Thus, we address whether plaintiffs have

sufficiently alleged that the application of the best-interest-of-the-child standard -- or any of the other aspects of the family law system they challenge -- results in any expenditure that can be characterized as illegal. When we do so, we find that they have not.

Plaintiffs' amended complaint consists of 23 different "causes of action," each of which purports to identify a different basis on which the current family law system in California is illegal. To show that plaintiffs have failed to allege a viable cause of action for illegality under section 526a, we must address each of these claims in turn, keeping in mind that plaintiffs were bound to allege specific facts and reasons supporting their claims of illegality, and not simply general allegations, legal conclusions, and hyperbole.

Plaintiffs first allege that application of the best-interest-of-the-child standard violates the substantive due process rights of children to be free from unwarranted governmental harms by creating, exacerbating, and perpetuating interparental conflict, wasting parental time and money resources, and shattering parental lives. We conclude this cause of action does not allege the sort of specific facts and reasons necessary to state a cause of action for illegal expenditure under section 526a. Plaintiffs' allegations on this point are the height of generality: for example, "The current Family Law system provides incentives to fight"; "the Family Law system has become a legislatively-created battlefield that animates and perpetuates interparental conflict"; and

"[a]nimating and perpetuating interparental conflict harms children." These are not the type of specific facts and reasons required for a valid claim under section 526a.

Plaintiffs next allege that application of the best-interest-of-the-child standard violates the substantive due process right of parenthood. We recognize that "[u]nder the due process clause of the Fourteenth Amendment to the United States Constitution, parents have a fundamental right to make decisions concerning the care, custody, and control of their children." (*Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1476-1477.) But plaintiffs have failed to allege specific facts showing that allocating custody of a child pursuant to the best interest of that child amounts to the state impermissibly infringing on that protected liberty interest when the parents themselves are the ones who have presented the question of custodial division to the court because they cannot agree between themselves on how to allocate the custody of the child between them. Certainly plaintiffs have not offered any persuasive argument or authority that the constitutional rights of parents compel the state to award custody 50/50 in each and every disputed custody case in place of having the court determine the child's best interest. Accordingly, this claim does not state a cause of action for illegal expenditure under section 526a either.

Plaintiffs next allege that application of the best-interest-of-the-child standard violates the substantive due process right of parents to raise their children free from government-inflicted injury. This claim is a retread of the

previous claim. Plaintiffs have not shown that a court impermissibly intrudes on the protected realm of parenthood when the court uses the best-interest-of-the-child standard to determine a contested child custody dispute submitted to the court by those parents.

Plaintiffs next allege that application of the best-interest-of-the-child standard violates the substantive due process right of association between parents and their children. This claim is identical to the previous two and does not state a cause of action for illegal expenditure under section 526a for the same reasons.

Plaintiffs next allege that application of the best-interest-of-the-child standard violates the parents' constitutional rights of privacy. The same reasoning that disposed of the previous three claims disposes of this one. Parents who submit a custody dispute to the court for decision cannot complain of a government intrusion on their constitutional rights, to privacy or otherwise, simply because the court decides that dispute according to the best interest of the child.

Plaintiffs next allege that forcing parents to pay for a child custody evaluation under Family Code section 3111 "violates the Takings Clause of the Fifth Amendment." This claim is without merit because "the takings clauses of the state and federal Constitutions guarantee property owners 'just compensation' when their property is 'taken for public use.'" (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761,

770.) Plaintiffs have not alleged, or even suggested that they could allege, that a child custody evaluation qualifies as a public use for purposes of the takings analysis. They claim "[t]his 'takings' [*sic*] is 'public' in the sense that the Court, not the parent, believes the evaluation will be of some benefit," but they offer absolutely no authority supporting this claim. We conclude the cost of a court-ordered child custody evaluation does not constitute the taking of property for public use within the meaning of the takings clauses. Accordingly, plaintiffs have failed to state a cause of action for illegal expenditure under section 526a on this basis.

Plaintiffs next allege that application of the best-interest-of-the-child standard violates the Eighth Amendment's proscription on cruel and unusual punishment. They base this argument on a fleeting passage from *Santosky v. Kramer* (1982) 455 U.S. 745 [71 L.Ed.2d 599], the case in which the United States Supreme Court held that in state-initiated proceedings to terminate parental rights, due process requires that the state prove the basis for termination by clear and convincing evidence. In the course of that decision, the court noted that "Congress requires 'evidence beyond a reasonable doubt' for termination of Indian parental rights, reasoning that 'the removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty'" (*Id.* at p. 769 [71 L.Ed.2d at p. 616].) From this passage, plaintiffs unreasonably extrapolate that "the unjustified interference in the right of parenthood" qualifies as a penalty that is subject

to the Eighth Amendment. The Eighth Amendment's proscription applies only to *criminal* punishment, however. (See *Ingraham v. Wright* (1977) 430 U.S. 651, 664-671 [51 L.Ed.2d 711, 725-730] [holding that the Eighth Amendment does not apply to the paddling of schoolchildren].) The granting of less than 50 percent of a child's custody to one parent in a contested custody proceeding is simply *not* the equivalent of criminal punishment. Thus, there is no merit in this claim.

Plaintiffs next allege that the best-interest-of-the-child standard is unconstitutionally vague. The void-for-vagueness doctrine on which this claim relies, however, applies only to statutes that *prohibit* or *require* conduct. (See, e.g., *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 629 [82 L.Ed.2d 462, 478-479].) Plaintiffs offer no authority justifying extension of this doctrine beyond that context, into the realm of custody determinations in contested family law proceedings.

Plaintiffs next allege that the best-interest-of-the-child standard is unconstitutionally overbroad. This claim is based on the premise that "the Family Code presumes [judges] are better able (than [loving, devoted and fit] parents) to determine what is 'best' for the children" and that this "presumption . . . sweeps within its broad scope activities that are constitutionally protected." We perceive no such presumption underlying the Family Code in general or the best-interest-of-the-child standard in particular. When two fit parents who no longer maintain a joint household cannot decide between themselves how to share their child's custodial time,

they necessarily present that issue to the court for resolution, and the court decides that issue pursuant to the best interest of the child. There is no constitutional violation based on overbreadth in this process.

Plaintiffs next allege that the factors identified in Family Code section 3011 as relevant to determining the best interest of the child do not "have any proven value in determining what is 'best' in terms of custody arrangements" and that, more broadly, no judge or any other human being "can possibly make valid assessments in terms of what is 'best.'" Plaintiffs, however, offer no explanation of how this allegation supports a claim of illegal expenditure under section 526a. To the extent plaintiffs claim that the section 3011 factors are as vague as the best-interest-of-the-child standard itself, we have explained already that the void-for-vagueness doctrine has no application in this context.

Plaintiffs next complain that the presumption in Family Code section 3080 that joint custody is in the best interest of a minor child where the parents agree to joint custody disappears "if one parent decides to withhold agreement." They further claim that, in this manner, the state allows "interested adversaries the power to deprive individuals of their own basic liberties." Frankly, this claim makes no sense. Plaintiffs fail to show any unconstitutionality in giving a presumptive preference to joint custody where the parents agree on joint custody, but deferring to the best interest of the child when the parents do not agree.

Plaintiffs next allege that custody determinations must be made according to a clear and convincing evidence standard of proof, but are not. The authorities they cite in support of this claim do not support it. While such a standard must be used when the state seeks to *terminate* a parent's rights, there is no authority for the proposition that a determination of custody between two fit parents must adhere to that standard. To the extent plaintiffs' claim in this regard rests on the premise that every fit parent has a constitutional right to 50 percent custody when the parents cannot agree between themselves on how to divide the custody of their child, the law does not support this premise.

Plaintiffs next complain about the alleged unreliability and arbitrariness of custody evaluations under Evidence Code section 730, which they characterize as "nonsensical 'evidence.'" The broad and general allegations that make up this claim fall far short of the specific facts and reasoning required to support a cause of action for illegal expenditure under section 526a.

Plaintiffs next complain about mandatory custody mediation under Family Code section 3170. Again, the broad and general allegations that make up this claim fall far short of the specific facts and reasoning required to support a cause of action for illegal expenditure under section 526a.

Plaintiffs next allege that "parents . . . have a fundamental constitutional right to a trial by jury before their parental rights may be in any manner abridged." In support of

this claim they argue that "[t]he common law respecting trial by jury as it existed in 1850 is the rule of decision in this state'" and then rely on references to the phrase "the jury" in a case from 1859 involving *paternity* (*Baker v. Baker* (1859) 13 Cal. 87). Absent any authority that there was a right to trial by jury in contested child *custody* proceedings, however, plaintiffs' argument has no merit. To the extent plaintiffs claim the right to a jury trial under federal due process principles based on their contention that any interference in the right of parenthood qualifies as a penalty equivalent to criminal punishment, we have rejected that contention already.

Plaintiffs next allege that application of the best-interest-of-the-child standard denies parents equal protection of the law because it elevates the interest of the child over the interest of the parents. ""The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner."" (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.) Plaintiffs have not shown, and cannot show, that children and parents involved in a contested child custody proceeding are similarly situated. Accordingly, this claim of illegality is without merit.

Plaintiffs next contend that application of the best-interest-of-the-child standard denies parents involved in contested child custody proceedings equal protection of the law because those parents are subjected to that standard while parents who are *not* involved in contested child custody

proceedings are not. Again, however, plaintiffs have not shown, and cannot show, that these two groups are similarly situated. Accordingly, this equal protection claim has no merit.

Plaintiffs next allege that application of the best-interest-of-the-child standard denies equal protection of the laws to certain parents involved in contested child custody proceedings on the following theory: "Under the current Family Law system, a parent who is assessed as being in the 80th percentile in terms of parenting abilities may lose significant custodial time with her child if her former partner is assessed as being in the 95th percentile, since that would be in the child's 'best interests.' [¶] Yet a parent who rates at the 20th percentile might get increased custody if his former partner is assessed as being in the 5th percentile, since that would be in that couple's child's 'best interests.'" (Fn. omitted.) This equal protection claim is without merit for the same reason as the previous two: plaintiffs have not shown, and cannot show, that the two groups at issue are similarly situated.

Plaintiffs next allege that application of the best-interest-of-the-child standard denies equal protection of the laws to parents involved in contested child custody proceedings because such a parent faces the prospect of "losing parental rights to the other" parent, while a single parent "with borderline intelligence, no particular skills and dismal future prospects has no fear of the government infringing upon his parental rights even if a wealthy, established professional

couple . . . is striving to adopt that single parent's newborn." Again, this equal protection claim is without merit from the outset because the two groups plaintiffs posit (parents involved in contested child custody proceedings and single parents not involved in such proceedings) are not similarly situated.

Plaintiffs next allege that application of the best-interest-of-the-child standard denies equal protection of the laws to parents who are not physically disabled and are involved in contested child custody proceedings because the parental rights of those parents may be limited based on "unmeasurable [*sic*] factors," while the parental rights of a parent with a "severe [physical] disability" cannot be limited based on that disability, even though that disability "has measurable and severe impediments to many of the interactions and facilities a 'normal' parent maintains in caring for a child." Plaintiffs purport to premise this argument on *In re Marriage of Carney*, *supra*, 24 Cal.3d at page 725, but they have misread that case. In *Carney*, the court concluded "that a physical handicap that affects a parent's ability to participate with his children in purely physical activities is not a changed circumstance of sufficient relevance and materiality to render it either 'essential or expedient' for their welfare that they be taken from his custody." (*Id.* at p. 740.) In other words, the onset of a physical disability that affects a parent's ability to participate in physical activities with his children is not, by itself, a sufficient basis for a change of custody to the other parent. At the same time, however, the court made it clear that

"the health or physical condition of the parents may . . . be taken into account in determining whose custody would best serve the child's interests," although "this factor is ordinarily of minor importance; and whenever it is raised--whether in awarding custody originally or changing it later--it is essential that the court weigh the matter with an informed and open mind." (*Id.* at p. 736.) Because this claim by plaintiffs is based on a mistaken understanding of California law, it has no merit.

Plaintiffs next allege that application of the best-interest-of-the-child standard "violates the statutory command of Family Law section 3010(a)." Subdivision (a) of Family Code section 3010 provides that "[t]he mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are equally entitled to the custody of the child." Plaintiffs' view that applying the best interest of the child in contested child custody proceedings violates this provision is erroneous. Since the best-interest-of-the-child standard is itself of statutory origin (see, e.g., Fam. Code, § 3040, subd. (a)), it is anomalous for plaintiffs to claim that application of one statute violates another. "Ordinarily, rules of statutory interpretation require that different sections of a code must be read together . . . and that code provisions relating to the same subject must be harmonized to the extent possible." (*Kern County Employees' Retirement Assn. v. Bellino* (2005) 126 Cal.App.4th 781, 788.) Here, the statutory best-interest-of-the-child standard can be harmonized with subdivision (a) of Family Code section 3010; indeed, this

harmony has long been recognized. In *Davis v. Davis* (1953) 41 Cal.2d 563, 565, referring to the predecessor statute to Family Code section 3020 (former section 138, consideration (2) of the Civil Code), our Supreme Court explained that “[i]n a contest between parents concerning the custody of their minor child neither is entitled to custody as a matter of right. Under the statute, . . . each is equally entitled to custody and no showing or finding of unfitness is necessary to enable the court to award custody to one or the other in accordance with what, in its sound discretion, is deemed the best interests of the child.” In other words, neither the mother nor the father is entitled to the custody of a child as a matter of right because of their status as mother or father; instead, they start out on equal footing, and when custody is contested, it is to be granted based on the child’s best interest. Read in this manner, subdivision (a) of Family Code section 3010 cannot be violated by application of the best-interest-of-the-child standard.

Plaintiffs next allege that application of the best-interest-of-the-child standard interferes with various “explicitly enunciated governmental goals” and therefore is “void as against public policy.” There is no authority, however, for the proposition that an expenditure can be deemed illegal for purposes of section 526a because it violates public policy. Absent such authority, this claim is without merit.

Finally, plaintiffs allege that application of the best-interest-of-the-child standard "violates the federal mandate of 42 U.S.C. section 1983" because "under color of state statutes . . . [d]efendants subject, or cause to be subjected, persons within the State's jurisdiction, to the deprivation of their fundamental constitutional rights of parenthood." ""Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"" (*Manta Management Corp. v. City of San Bernardino* (2008) 43 Cal.4th 400, 406.) Because we have concluded already that application of the best-interest-of-the-child standard to decide contested child custody issues does not infringe on the constitutional right parents have to make decisions concerning the care, custody, and control of their children, this cause of action has no merit either.

In summary, plaintiffs have failed to allege any cognizable illegality in the application of the best-interest-of-the-child standard or in any of the other aspects of California family law they have challenged in this proceeding. Albeit for different reasons, we agree with the trial court that this action is not a proper invocation of section 526a. Plaintiffs' remedy lies with the Legislature, not the courts.

DISPOSITION

The judgment of dismissal is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

_____ ROBIE _____, Acting P. J.

We concur:

_____ MURRAY _____, J.

_____ HOCH _____, J.