

**THE PERPETUATION OF SHATTERED HEARTS:
THE DISTURBING CONFLICT BETWEEN DEPENDENCY COURT
AND FAMILY LAW JURISDICTION**

By

MARSHALL S. ZOLLA, ESQ.

LISA HELFEND MEYER, ESQ.

Mr. Zolla and Ms. Meyer are partners in the Century City law firm of Zolla and Meyer; both are Certified Specialists in the field of Family Law.

Appreciation is expressed to Jonathan E. Johnson, Esq. and Jo Kaplan, Esq. for preparation of Appendix A to this Article and to Michael I. Levanas, Esq. for his expertise concerning the Dependency Court System.

© 1992 by MARSHALL S. ZOLLA and LISA HELFEND MEYER

INTRODUCTION

There exists a fundamental difference between marital dissolution proceedings involving custody of minor children and proceedings for Dependent children in the Juvenile Court under and pursuant to Welfare and Institutions Code, Section 300. As reviewed and explained in the recent case of Seaman and Menjou, 1 Cal.App.4th 1489, 2 Cal.Rptr.2d 690 (1991), in a dissolution proceeding, parents and other interested parties invoke the court's jurisdiction to determine rights to custody and visitation in accordance with the best interests of the child. Civil Code, Sections 4351, 4351.5, 4600; Burchard v. Garay, 42 Cal.3d 531, 535, 229 Cal.Rptr. 800 (1986). By contrast, in a dependency proceeding, the state acts to protect children who have been or are at risk of being harmed in specific ways as enumerated in Welfare and Institutions Code, Section 300. In re Benjamin D., 227 Cal.App.3d 1464, 1469-1470, 278 Cal.Rptr. 468 (1991).¹

The Superior Court in each county is empowered to exercise the jurisdiction of the Juvenile Court. Welfare and Institutions Code, Section 245. The Dependency Court is the Department of the Juvenile Court that handles cases dealing with Dependent Children. Welfare and Institutions Code, Section 300 et seq.

The differences between the two forums are vast and substantively significant. The chart set forth in Appendix A identifies and summarizes the wide array of issues and the respective differences between Dependency Court and the Family Law Court.

California statutory and case law have addressed the issue of the conflicting jurisdictional claims between the juvenile court and the family law court; however, neither

a coherent policy nor a reliably consistent answer to the question of whether an order of the Dependency Court takes precedence over an order of the Family Law court has been established. Into this uncertain judicial arena has been delivered the confused and complex disputes of a diverse, troubled society.²

A brief review of the inconsistent evolution of California case and statutory law will help place the continuing and disturbing conflict between Dependency Court and Family Law proceedings into historical perspective.

Dupes v. Superior Court, 176 Cal. 440, 168 P. 888 (1917)

In Dupes v. Superior Court, a father was awarded custody of his two children in a divorce proceeding. The children resided with their mother pursuant to court order pending her appeal of the divorce judgment. The children's paternal uncle filed a petition with the juvenile court alleging that the children's mother was immoral and depraved. The mother obtained an alternative writ of prohibition halting the juvenile court's proceedings while the California Supreme Court determined whether the juvenile court had jurisdiction. In the Dupes opinion, the Supreme Court held that the divorce court's prior jurisdiction did not defeat the jurisdiction of the juvenile court. Initially, the court cited the fundamental difference between divorce and juvenile proceedings, explaining that the purpose of the divorce court was to determine whether a marriage should be dissolved and to provide for the custody of children of the marriage, while the juvenile court was charged, as *parens patriae*, with the protection of children who were endangered by bad influences or

surroundings. As pointed out in the recent case of In re Travis C., 233 Cal.App.3d 492, 284 Cal.Rptr. 469 (1991), the California Supreme Court has never overruled Dupes "and it stands today in California as the single exception to the general rule that among courts of concurrent jurisdiction, that which takes jurisdiction first in time has exclusive jurisdiction."

In re William T., 172 Cal.App.3d 790, 218 Cal.Rptr. 420 (1985)

This case concerned a dispute between parents over custody of their minor child. The parents had joint legal custody, with primary physical custody to father. Father moved from Stanislaus County to Solano County and, believing that mother had abused the child contacted the Solano County juvenile authorities who filed a dependency petition on behalf of the child. A detention hearing was held, a guardian ad litem was appointed for the child, and mother and grandmother were ordered to have no contact with the child. The issue of custody arose two months later in the Stanislaus County family court where the matter had been pending. The family law court issued a conflicting order, granting mother and grandmother limited visitation rights. Father, adhering to the Solano County Juvenile Court order, refused visitation to mother and grandmother and was brought before the Stanislaus family court on a contempt citation. He was convicted but the Court of Appeal reversed. The Court, citing Welfare and Institutions Code, Section 304.5, stated that concurrent jurisdiction can exist between family and juvenile courts in custody issues. The Court held that the special nature of juvenile court proceedings and the focus upon the protection of the child, make juvenile court orders paramount to family court orders. The majority noted

that there exists a long line of authority holding that juvenile court orders take precedence over orders from other branches of the superior court, citing Dupes v. Superior Court, *supra*, 176 Cal. 440, 168 P. 888 (1917).

In re Brendan P., 184 Cal.App.3d 910, 230 Cal.Rptr. 720 (1986)

An exception to the aforementioned rule was defined in the case of In re Brendan P., 184 Cal.App.3d 910, 230 Cal.Rptr. 720 (1986). In Brendan P., the parties fought over custody of their minor child. Mother had primary physical custody with visitation to father; mother thwarted the visitation. Father then moved for enforcement and modification of the visitation order. Visitation with the father was ordered. Subsequently, mother initiated proceedings in juvenile court which assumed jurisdiction and placed the minor with the mother. Father appealed from the juvenile court order. The Court of Appeal reversed, holding that the juvenile court lacked jurisdiction to make a dependency finding under Welfare and Institutions Code, Section 300 (a), because the father had not received sufficient notice of the proceeding. The Court also discussed the issue of jurisdiction. It stated that because the family law court had already made a determination as to custody of the child based on the same factual and legal issues, the juvenile court lacked jurisdiction; it could not relitigate the identical facts. The Court distinguished the case from In re William T. on this basis and held that the order of the family law court preempted that of the juvenile court.

In re Anne P., 199 Cal.App.3d 183, 244 Cal.Rptr. 490 (1988)

Anne P. also dealt with the issue of conflicting jurisdiction between the family law court and the juvenile court. In a dissolution of marriage proceeding, the family law court awarded joint legal and physical custody of the minor child to the parents. Subsequently, the mother alleged that the father had molested the child. The family law court held that the charges were unfounded and changed custody to the father. Further charges of sexual abuse brought the case before the juvenile court. The juvenile court found that it had jurisdiction to determine the effect of the parents' dispute upon the child's psychological state. At the dispositional phase, the juvenile court ordered the minor child placed in the custody of the mother with visitation to the father to be determined. The Court of Appeal affirmed the Order of the trial court. The Court stated that it has long been established that an order awarding custody of minor children in a divorce action does not, in itself, deprive the juvenile court of jurisdiction to later litigate matters and issue orders affecting the custody of those children. The policy behind the rule is that the state may protect a child whose interests are paramount, unlike the situation in parental custody proceedings where self-interest of the parents may pervade and where the child is not ensured representation. The exception to this rule expressed by the court in Brendan P., *supra*, was found inapplicable to the facts of In re Anne P. where the factual and legal issues considered by the superior court and the juvenile court were different. In the family law court, the court determined whether the allegations of sexual abuse were valid. The juvenile court, however, focused not on the parents' allegations against one another but on the effect that the struggle between the parents was having on the minor child.

In re Benjamin D., 227 Cal.App.3d 1464, 278 Cal.Rptr. 468 (1991) [review denied 5/2/91]

In re Benjamin D. is significant in that it rejected the holding of Brendan P. The case concerned the abuse of a minor child. The child's parents were separated. Mother had primary physical custody and father had visitation rights. A petition was brought by a social worker alleging that the child had sustained physical abuse by the father during periods of visitation. The trial court entered an order declaring the minor to be a dependent child of the juvenile court under Welfare and Institutions Code, Section 300(a)(i). The Court of Appeal affirmed. The Court, citing Dupes v. Superior Court, *supra*, stated that prior consideration of the custody of a minor by a family law court cannot deprive a juvenile court of jurisdiction to make orders to protect the minor.

The Court held that despite the fact that evidence of the father's brutality had been introduced in the family law proceeding to modify his visitation rights, it was proper for the juvenile court to have considered evidence of the father's conduct with the child prior to the decision of the family law court even though that evidence had already been presented in the family law forum. That evidence, along with evidence produced after the time of the family law proceedings, established juvenile court jurisdiction. The Court held:

"It is one thing for a family law court to find a given fact true . . . It is quite another for a juvenile court to find a given set of facts makes section 300 applicable . . . A juvenile court must not shut its eyes to facts pointing to the threat of future injury just because those facts may have been previously aired in a family law forum." In re Benjamin D., *supra*, 227 CA3d at 1470.

It is important to note that the Court, in the quotation cited above, distinguished the

situation before it from a situation which would have entailed a relitigation of the facts. The Court stated that a juvenile court may properly consider evidence of a parent's past conduct, regardless of whether such evidence may have been adduced in another proceeding where the parties and issues were not the same. (Emphasis added).

Despite the Court's emphasis on the fact that the case before it did not entail a relitigation of issues already considered by the family law court, the Court rejected the Brendan P. holding that litigation by the juvenile court of issues identical to those litigated by the family law court was improper. The Benjamin D. Court stated:

"Both cases fail to take into account the statutory mandate of the juvenile court to assume jurisdiction whenever a minor comes within one of the "descriptions" of Welfare and Institutions Code, Section 300. Under section 300 it makes no difference whether there is an ongoing dispute being litigated in the family law courts. Put simply, if the minor is being abused (as defined in subds. (a) through (j) of section 300), then he or she "is within the jurisdiction of the juvenile court." Lawrence S.³ and Brendan P., by contrast, make the "jurisdiction" of the juvenile court depend on the nature of preceding family law litigation and its relation to the subsequent dependency litigation. In effect, these two cases potentially allow litigation between private parties to frustrate the operation of section 300."

In re Travis C., 233 Cal.App.3d 492, 284 Cal.Rptr. 469 (1991)

The decision in In re Benjamin D. *supra*, was followed in In re Travis C., 233 Cal.App.3d 492, 284 Cal.Rptr. 469 (1991). In Travis, an unmarried mother was awarded primary custody of her two (2) sons. Father was awarded visitation. Mother discovered that father had been molesting the boys and sought modification of father's visitation rights. Father's visitation rights were temporarily suspended and then reinstated. The children's therapist filed a child abuse report. After taking the children into protective custody, DPSS filed a dependency petition based on father's alleged molestation. At the detention hearing, father moved to dismiss the petition on several grounds, one of which was that the same allegations had been raised and determined at a hearing in family law court. The juvenile court denied the motion. The Court of Appeal affirmed.

The Court followed William T., Benjamin D. and Dupes v. Superior Court, holding that despite the fact that there was a continued hearing pending in the family law court which involved factual allegations of sexual abuse by minor's father, the juvenile court had jurisdiction over a petition containing the same factual allegations, in its role as *parens patriae*. The Court distinguished Brendan P., on the ground that the court in Brendan P. incorrectly characterized the issues raised in the family and juvenile courts as "identical". The Travis Court held that the purpose and operation of family law court and juvenile court basically differ and that, therefore, issues before those courts can never be identical. Moreover, it observed that the court in Brendan P. incorrectly relied on Greene v. Superior Court, 37 Cal.2d 307, 231 P.2d 821 (1951), for the proposition that there are certain situations in which juvenile court jurisdiction is not paramount, even if taken after that of

family law court. The Travis opinion held that Greene did not deal with the juvenile court and did not discuss, distinguish or overrule the line of cases dealing with the issue of concurrent and conflicting jurisdiction and, therefore, does not apply to cases involving the juvenile court's jurisdiction. Additionally, Travis found no evidence of collusion between mother and DPSS to bring the dependency petition and found that, contrary to the holding in Brendan P., such collusion, even if it did exist, would not negate the statutorily conferred subject matter jurisdiction.

Seaman and Menjou, 1 Cal.App.4th 1489, 2 Cal.Rptr.2d 690 (1991)

The issue in Seaman and Menjou was whether a trial court in a marital dissolution action may order one spouse to pay a portion of the other spouse's attorney fees incurred in the course of defending a dependency proceeding under Welfare and Institutions Code, Section 300.

In September 1987, Charles Seaman filed a petition for dissolution of his marriage from his wife, Patti Anne Menjou. In May of 1987, Patti had reported to the Alameda County Children's Protective Service (CPS) her suspicion that Charles was molesting the couple's child, J. After a court-ordered psychological evaluation, the psychologist concluded that there was a low probability that J. had actually been molested but because Patti was a child victim of molestation, she was overidentifying the situation and in turn hurting the child as much as any possible molestation would. After repeated statements regarding molestation were made by J. to day-care workers, CPS filed a petition in August 1988, alleging that J. and sibling H. came within the provisions of Welfare and Institutions Code.

Section 300. The court found that the children were at substantial risk of suffering emotional damage as a result of the possible molestations and as a result of Patti's preoccupation with molestation. The children were declared dependents of the court and removed from their parents' care and custody.

In July 1989, Patti's attorney in the dissolution proceeding filed a petition to have Charles pay her fees and costs incurred during the dependency proceeding. The fees and costs exceeded \$50,000. The court found that the situation was caused by both parents but weighed more heavily on Charles; applying CC 4370, Charles was ordered to contribute \$40,000 toward Patti's fees. Charles appealed. The Court of Appeal reversed, holding that the trial court had abused its discretion in ordering Charles to pay the fees because the dependency action was not related to the dissolution proceeding.

According to CC 4370 "during the pendency of any proceeding under this part the court may order any party . . . to pay such amount as may be reasonable necessary for the costs of maintaining or defending the proceeding and for attorneys' fees. . .the court may augment or modify the original award . . . as may be reasonable necessary for the prosecution or defense of the proceeding or any proceeding related thereto." The Court of Appeal found that Civil Code Section 4370's reference to "under this part" applies only to proceedings under the Family Law Act. However, the section expands its coverage by using the words "any proceeding related" to a proceeding under the Family Law Act. Since an action under Welfare and Institutions Code, Section 300, falls under the Juvenile Court Law rather than Family Law Act, an award of fees would only be appropriate if the dependency proceeding would be considered "related to" the dissolution action. The court stated that

the language "related to" was so general that a logical connection between a given proceeding and a Family Law proceeding might be found by considering a variety of factors: type and function of the proceeding, parties to the proceeding, factual and legal matters at issue and motives for the litigation.

The Appellate Court concluded there was no inherent link between the two proceedings and refused to permit an award of fees to the wife in the dissolution proceeding for attorneys fees and costs incurred by her incident to the dependency proceeding. Seaman and Menjou has been the subject of critical comment as being unduly restrictive in replacing what should be an exercise of trial court discretion as to the meaning of "related proceeding" with a jurisdictional standard of determining whether or not a case is related to a family law proceeding for purposes of a Section 4370 award of attorneys fees. Subsequently, In re Marriage of Green, ___ Cal.App.4th ___, ___ Cal.Rptr.2d ___ (1992), treated Seaman and Menjou's discussion of the "related proceeding" issue in an affirmative way to reach a different conclusion; Green held that whether another action is "related" to a marital dissolution proceeding within the meaning of Section 4370 is a factual question for the trial court and was not dissuaded by the restrictive result in Seaman and Menjou.

In re Roger S., 4 Cal.App. 25, 5 Cal.Rptr.2d 208 (1992)

In a dissolution proceeding between the parents, the Family Law Court ordered monitored visitation with the minor child. Subsequently, acting on a Petition filed by the Department of Social Services in Orange County, the Dependency Court ordered that the

mother retain custody, that the father continue with monitored visitation and that both parents undergo psychological counseling. For the next two years, the parties were supervised by the Social Services agency. In February 1991, the Dependency Court held a six month review hearing to consider the agency's recommendation that jurisdiction be terminated, with the existing visitation order to remain in effect. The father sought to present evidence to support an increase in his visitation on the ground that his mental condition had stabilized and that his former wife's behavior was the cause of the son's emotional problems relating to visitation. The Dependency Court, relying upon In re Elaine E., 221 Cal.App.3d 809, 270 Cal.Rptr. 489 (1990), ruled that any evidence with respect to a change in visitation would have to be introduced by a motion to modify an existing order under Welfare and Institutions Code, Section 388 [Petition to change, modify or set aside a Juvenile Court order]. The trial court directed its order to be filed in the existing Superior Court file dealing with the parents dissolution of marriage.

On appeal, the father contended that the Dependency Court had erred by refusing to accept evidence bearing on the visitation order without a Section 388 motion because Welfare and Institutions Code, Sections 362.4 and 364 gave it the authority to do so. The Court of Appeal agreed with that contention and reversed.

In addressing the conflict between the Dependency Court and the Family Law Court, the Roger S. court observed as follows:

"Although both the family court and the juvenile court focus on the best interests of the child, the juvenile court has a special responsibility to the child as parens patriae and must

look at the totality of the child's circumstances. 'It is one thing for a family law court to determine the best interests of the child as between two parents under title 4 of the Family Law Act (Civ. Code § 4600 et seq.). It is quite another for a juvenile court to determine the best interests of the child in a proceeding where there is the possibility both parents could lose custody or visitation rights.' (In re Benjamin D. (1991) 227 Cal.App.3d 1464, 1470, fn.4.) By empowering the juvenile court to issue custody and restraining orders, the Legislature has expressed its belief that 'the juvenile court is the appropriate place for these matters to be determined and that the juvenile court's orders must be honored in later superior court proceedings.' (Seiser, Custody and Restraining Orders in the Juvenile Court (Aug. 1990) Family Law NewsAlert (Cal.Ed.) p. 8.) The trial court here, by refusing to accept evidence relevant to the visitation order, was in danger of issuing an uninformed order which could fail to serve the best interests of the child."

CONCLUSION

That this subject is of such surpassing importance is evidenced by a statistic which many will find both surprising and disturbing: *Approximately one-third of the work of the Superior Courts in California involves children and their families.*⁴

A proposed amendment to Los Angeles Superior Court, Rule 307, states that it is the policy of the court to encourage consolidation of proceedings in different courts where the same child is involved. A copy of the proposed revised local rule is reprinted in Appendix B. The emphasis is, as it should be, on interdisciplinary training of judicial officers, notification of the pendency of multiple proceedings, chambers conferences between supervising judges and a well-coordinated process of implementing the standards involved to achieve the best possible judicial procedure for each particular case.

Local rules, however, are not sufficient. Inter-county proceedings in different courts, such as seen in Travis C., *supra*, mandate that the California legislature affirmatively act to create a statewide resolution of this continuing problem. Footnote 3 of the opinion in In Re Benjamin D., *supra*, acknowledged this issue.⁵ However, mere acknowledgment of this serious societal issue, by itself, is no longer sufficient; new legislation to implement by statute the type of rule embodied in proposed revised Los Angeles Superior Court, Rule 307, is necessary.

Even commendable local rules, such as proposed Rule 307, do not take into consideration all significant factors in determining whether a case should be litigated in the Family Law or Dependency Court system. Recently, there have been efforts in the legislature to address due process constraints inherent in the Dependency Court System. These efforts include the proposed "1992 Family Rights and Equal Protection Package" sponsored by eight California legislators. Included in the proposed legislation is AB 2719, calling for the repeal of In re Melinda S., which permits admission of hearsay testimony at a disposition hearing in Dependency Court. As noted in the Introduction to this article, the

Family Law System and Dependency Court System provide for significantly different due process rights of the parties [see Appendix A]. In addressing the conflict between the two forums, it is essential for the legislature to reconcile the disparity which occurs when parties are forced to litigate complex issues [such as alleged sexual molestation of children] in the Dependency Court without traditional due process protection as opposed to litigating those same issues in a Family Law context. As long as due process disparity continues to exist between the two systems, the legislature should also include, as essential criteria in any legislatively mandated consolidation rule, factors addressing the complexity of the litigation, discretionary permission for traditional due process discovery and established rules of evidence in order to arrive at the truth in any given case.⁶

From a policy perspective, it must be admitted that the Dependency Court system is over-burdened with a huge caseload of people who find the Dependency Court experience an unwanted involvement with the judicial system but who lack the resources to object to or combat bureaucratic injustices.⁷ On June 1, 1992, the Los Angeles County Grand Jury issued an investigative report which highlighted the staggering problems of the Dependency Court in Los Angeles County, including the enormous and growing caseload: 41,000 children, with 12,000 new children entering the system each year! When the Dependency Court system is brought into conflict with a family law dispute where economic realities and the complexities of the situation may cause the issues to be more closely scrutinized with greater legal precision, the confusion between the competing forums is exacerbated. The inconsistency of the present state of California law is, quite simply, unacceptable.⁸ The judicial system needs and must be given legislative guidance to avoid the perpetuation of

the present unsettled state of the law.

The people of the State of California, particularly the children and families involved in these heart-wrenching situations, deserve no less and will be well served only if and when the Legislature heeds the lesson found in the Psalms of biblical literature, as follows:

"He heals their shattered hearts

And binds up their wounds." ⁹

ENDNOTES

1. For a perceptive review of the relationship between family and juvenile courts in child abuse cases, see "The Relationship of Family and Juvenile Courts in Child Abuse Cases" by Judge Leonard P. Edwards, 27 Santa Clara Law Review 201 (1987). See also, "The Molestation Charge" by Judge James W. Stewart of the Santa Clara County Superior Court, California Family Law Monthly, Vol. 7, No. 9 (April 1991).
2. In "Parental Alienation Syndrome and the Difference Between Fabricated and Genuine Child Abuse" (1987), *Creative Therapeutics*, Richard A. Gardner, M.D., described the situation where one parent is consciously or unconsciously sabotaging the relationship between the child and the other parent. This can lead to extreme and conflicting accusations, one parent, e.g., claiming child abuse and the other Parental Alienation Syndrome. A vast increase in these type of family disputes has occurred in the past decade. When families in trouble turn to [or are involuntarily brought into] the judicial system, they encounter the confusion, uncertainty and heartbreak described in this Article.
3. In Re Lawrence S., 224 *Adv. Cal.App.3d* 1374, 274 *Cal.Rptr.* 560 (1990) [Juvenile Court jurisdiction improper where issues litigated were identical to those previously litigated by family law court] was ordered depublished by the California Supreme Court on May 2, 1991; however, the case was subsequently cited in In Re Benjamin D. and In Re Travis C. For an interesting comment on the unusual procedure of having a depublished opinion cited in a subsequent published opinion, see, 1991 *Cal. Fam. Law Rpt.* 4678 and 1991 *Cal. Fam. Law Rpt.* 4926-4927.

4. West's California Juvenile Laws and Court Rules, 1992, Introduction, page III, Judge Leonard Edwards, Chair, Juvenile Court Judges of California.
5. "The issue of overlapping subject matter between family law, juvenile, and other courts dealing with children has not gone unnoticed by either the Legislature or the Judicial Council of California. Recently the Legislature mandated a pilot program concerning child victim witnesses which has among its goals developing 'special relationships among different courts' when child victim witnesses are involved. (Pen. Code, §14002, subd.(c)(2).) See also Report of the Judicial Council Subcommittee on Gender Bias in Courts: Evaluation, List of Modified Recommendations, and Comments (1990), Tab 3 -- Family Law, Recommendation 14, at pages 11-12 (calling for the development of protocols for the coordination of family, juvenile, and other departments 'when a child is involved in overlapping proceedings')." [Footnote 3, In re Benjamin D., 227 Cal.App.3d 1464, 278 Cal.Rptr. 468 (1991)].
6. Los Angeles Daily Journal article entitled "Broad Reform of Dependency System Urged", March 11, 1992.
7. See, Abuse In The Name Of Protecting Children, by Robert L. Emans, Ed.D., 1991 VOCAL National Network [Victims of Child Abuse Laws]. The VOCAL National Network is an information link of parents and state and local organizations that offer emotional support, referrals and educational services to families involved with child protection agencies. This group is highly critical of what it terms the quasi-independent investigatory system of child protective agencies and what it calls "the child abuse industry".
8. See article, "Corridors of Agony", Time Magazine, January 27, 1992, page 48. Included in that article is the following poignant description of the Juvenile Courts of this country: "Like the 2500 similar Juvenile Courts across the nation, this is where the battles are being fought against some of America's toughest problems: drugs, disintegrating families, household violence. As these problems have grown worse over the past two decades, the judicial system designed to deal with them has crumbled. These courts are an indicator of the country's compassion for families and its commitment to justice, but increasingly they have neither the money nor the personnel to save most of the desperate young souls who pass through their doors. Almost no one seems to care."
9. Psalms 147:2-3. The inspiration for the title of this article came from an insightful book by Rabbi David J. Wolpe, entitled The Healer of Shattered Hearts, 1990.

taf\z&m\depct5.art

June 23, 1992

CHILD ABUSE ISSUES¹
DEPENDENCY COURT/FAMILY LAW COURT

ISSUES	DEPENDENCY LAW	FAMILY LAW
Applicable Statutory Law	Welfare and Institutions Code §300. et seq. Calif. Rules of Court, Rules 1400 et. seq.	Civil Code §4600 et seq. UCCJA, Civil Code §5150 et seq. Uniform Parentage Act, CC §7004.5.
Parties	County Counsel represents Children's Services and government interest and is an additional party to every action. Representative of Children's Services (DCS) sits in every courtroom.	Parents are parties. Court may appoint attorney for child. CC §4606.
Attorney for child	Court will have County Counsel represent child as well or will appoint independent counsel for child in event of "actual conflict."	Court may appoint attorney for child if it determines in child's best interests. CC §4606.
Depositions	Not ordinarily used; extremely difficult to obtain; courts are reluctant to order cooperation by parties.	Depositions are available as a matter of course.
Child Testimony	Child will probably have to testify, although it is likely it will be in Judge's chambers. Child will be subject to cross examination by parent's counsel.	When child of sufficient age to reason and form intelligent preference, court shall consider wishes of the child. CC §4600(a). Preference may be expressed through evaluators. Mediator may interview child. CC §4607(d).

¹ NOTE: THIS CHART IS APPLICABLE TO DEPENDENCY PROCEEDINGS IN LOS ANGELES COUNTY. PROCEDURES MAY VARY ON SOME MATTER IN OTHER JURISDICTIONS. PREPARED BY JO KAPLAN AND JONATHAN JOHNSON AND REPRINTED WITH PERMISSION OF THE BEVERLY HILLS BAR ASSOCIATION.

ISSUES	DEPENDENCY LAW	FAMILY LAW
Contempt	Rarely, if ever, used against a party. Not a tool to be counted upon.	Contempt available.
Use of Psychiatrist or Psychologist	Evidence Code §730. Not generally available before an Adjudication (Trial) without stipulation of all counsel. Court pays for it when it is ordered, usually after the Adjudication. Court will chose an expert from an approved dependency list. Can have an independent expert at contested adjudication or at a disposition as a witness, if one can afford to hire an expert or an expert has previously examined a party.	Court may order custody evaluation; parties ordered to pay cost. Parties may retain mental health professionals for private evaluation. Court may direct probation officer or domestic relations investigator to conduct a custody investigation and file a confidential report provided to the parties. CC §4602.
Confidentiality	Proceedings and reports considered confidential without a specific court order. WIC §27. Note: District Attorney can review court files by application to Presiding Judge.	Court may order file sealed; otherwise, open to public.
Evidence	Be aware you may encounter some novel theories such as Child Sexual Abuse Accommodation Syndrome (CSAS) or Complaint Doctrine; evidence which is ordinarily admissible in a civil case is the rule. Also see Malinda S. 51C3d 368 (1990) for back door manner of prosecuting agency getting otherwise inadmissible evidence before the Court, via an investigating report prepared by social worker.	<u>Frye/Kelly</u> rule may be useful in effort to exclude MHP's theory not generally accepted in the field.

ISSUES	DEPENDENCY LAW	FAMILY LAW
Use of Monitors for Visitation	DCS representatives or relatives often are monitors. No real familiarity with private monitoring services, but can be offered to court as alternative plan.	Courts may order monitored visitation. CC §4601.5. Courts may order private monitors and charge parties. Court may grant visitation rights to any person having interest in the welfare of the child. CC §4601.
Hearsay	Recent decision, <u>Malinda S. 51 C.3d 368, 272 CR 787 (1990)</u> , allows multiple hearsay to come before the court through a report by Children's Services. This report is usually prepared for the PRC (Pre-Resolution Conference), but may be prepared even if case is set for Adjudication.	Hearsay objection available. Experts may relate hearsay as basis for opinion, not truth of statement. Expert's written reports subject to hearsay objection unless waived. Courts likely to apply pressure to stipulate to admission.
Referees/ Commissioners	No requirement for attorneys to stipulate to have them hear the case. Remedy is a rehearing, after the fact. See WIC §352, Rules of Court 1418.	Parties must stipulate to commissioner, although Court can refer to commissioner for findings.
Discovery	Preference for informal discovery. Formal discovery is rare. See Rules of Court 1420.	Use of formal discovery is common.
Court Powers	Can place child in foster home or even terminate parental rights. Removal of child from both parents is option which may occur at the detention hearing or any subsequent hearing.	Court can award custody to non-parents only pursuant to stipulation or on finding (a) award to parent would be detrimental and (b) award to non-parent is in child's best interests. CC §4600(c).

ISSUES	DEPENDENCY LAW	FAMILY LAW
Counseling	Courts can and frequently do make visitation contingent on attendance at counseling. Referrals to sexual abuse counseling for everyone in family is not unusual. Request for drug counseling and testing is also very common.	Court may order parents and child to participate in counseling for up to six months if Court determines dispute poses danger to child and counseling is in best interests of child. CC §4608.1. Court cannot order use of family reunification services. CC §4609.
Limitations on Parental Control	Court can limit parents' control over issues such as educational and medical choices. WIC §245.5.	
Function of Court	Child protection. <u>Maximum intrusion into parental rights allowable to achieve goal of best interest of child.</u> Juvenile Court has priority, but see local Rule 307. Motions to consolidate may be considered where ongoing family law case is in existence.	Best interests of child. Public policy to assure continuing frequent contact with both parents after dissolution and to encourage both parents to share rights and responsibilities of child rearing. CC §4600(a).
Initiation of Action	Investigating social worker files a "Petition" at request of police, parent, mental health professional or other interested party.	Custody award part of action for dissolution, nullity or legal separation. Either parent may bring an independent action for custody. CC §4603.

ISSUES	DEPENDENCY LAW	FAMILY LAW
Time Frame	<p>Strict time limits set by legislature to get cases heard as soon as possible. You are entitled to start your hearing within weeks. <u>NOTE:</u> You may, however, spend weeks waiting in Dependency court with court hearing your case only a few of hours a day. The reality is that the court may also have to deal with thirty others cases each day. It may be difficult to get consecutive court days. Important to consider time waiver implications at detention hearing and all subsequent hearings. But caveat: May be very difficult to get a continuance in situations where counsel believes more time is needed. WIC §352.</p>	<p>Code provides that cases with contested custody as sole issue shall be given preference over other civil cases. CC §4600.6(a). When case involves more than contested custody, court to order separate trial on custody issue and give preference. CC §4600.6(b). As practical matter, this is rarely done. OSC may be set and ex parte order made on showing of immediate harm to child or immediate risk of removal from California. CC §4600.1.</p>
Testimony of Parent	<p>Can be called to the stand, granted immunity immediately, and ordered to testify. (Very limited self incrimination protection) Note: Be careful of pending or future criminal proceedings.</p>	<p>Parents can be called to testify. Privilege against self-incrimination is available.</p>
Privileges	<p>No spousal or marital communications privileges where abuse is alleged. See Evidence Code 972 and 986.</p>	<p>same</p>
Presumptions	<p>If certain facts are proved, there is a presumption affecting burden of proof of abuse or neglect unless the parent produces evidence to rebut the presumption. WIC §355.1.</p>	<p>Presumption affecting burden of proof that joint custody is in best interests of child. CC §4600.5(a).</p>
Mediation	<p>Advised and encouraged, but not mandatory. See <u>Local Court rules</u> — important new guidelines.</p>	<p>Mediation required when custody or visitation is contested. CC §4607.</p>

ISSUES	DEPENDENCY LAW	FAMILY LAW
Cost of Counsel	<p>Dependency Court will appoint counsel free of charge to parents who cannot afford to have their own counsel. Caveat: Parents may have to reimburse county for cost of their own representation and/or cost of attorney if one is appointed for child. Financial hearing may be held at end of proceeding on reimbursement issue.</p>	<p>Family law court can order party to pay all or part of other's attorneys' fee and costs. CC §§4370-4371. In nature of sanction, court can award fees and costs if conduct frustrates settlement. CC §4370.6. Court may award reasonable money sanctions (up to \$1,000) against parties, <u>attorneys</u>, and witnesses for knowingly false allegations of abuse in family law proceedings. CC § 4611. See also CCP §128.5 (frivolous action or delaying tactics), §175.5 (violation of court order), and §575.5 (failure to comply with Court Rules).</p>
Termination of Case	<p>After conclusion of Dependency Case, court can make orders regarding custody and visitation and have them included in Family Law court file; it may form basis for opening a file if no Family Law proceeding. WIC §362.4.</p>	<p>Custody/visitation orders are modifiable.</p>
Possible Please	<p>Admit, Deny, or No-Contest.</p>	

ISSUES	DEPENDENCY LAW	FAMILY LAW
Pre-Adjudication Social Study	<p>Report which will be done by DCS after arraignment and before PRC (mediation) or Adjudication (see <u>Malinda S.</u> above) may contain hearsay, unreliable information and inaccuracies. Burden is on the contesting party to subpoena witnesses to cross examine hearsay declarants. May advise your client not to speak to Social Worker without attorney present. May want to submit favorable material to the investigating CSW (Children's Service Worker).</p>	
Basic Terms	<p>Arraignment and Detention Hearing:</p> <ol style="list-style-type: none"> 1. Parents are read charges and enter a plea; initial determination of where child will stay while proceedings are occurring is made. 2. Adjudication — Trial Stage. 3. Disposition Hearing — Decision as to where child will be placed. 4. Post-Dispositional Hearings. <ol style="list-style-type: none"> A. 6 month review. B. 12 month review. C. 18 month review - WIC §366.22. D. Permanent Plan - WIC §366.25. May result in referral to long term foster care, guardianship or adoption. 	
Modifications	<p>See WIC §388 - interested party can always bring case back before court if circumstances have changed and best interest of child is involved. This can only be done before jurisdiction is terminated.</p>	<p>Modification requires showing of change of circumstances and best interest of child. <u>Carney</u>, 24 C.3d 725 (1979); <u>Spellman</u>, 152 CA3d 124 (1984); CC §4808.</p>

PROPOSED REVISED RULE 307

(new material underlined)

307. COORDINATION OF CUSTODY PROCEEDINGS.

Section 1. Policy of the Court.

(a) The best interests of the child, litigants and court are promoted by early identification and coordination of custody proceedings involving the same child. To that end all departments involved in custody issues shall cooperate to eliminate multiple custody proceedings. Whenever possible such proceedings shall be handled in one department and consolidated for purposes of trial.

(b) The judicial officer before whom the case has been consolidated shall be vested with all the authority possessed by all of the judicial officers in any other department in which the matter was previously set.

(c) It is the policy of the Los Angeles Superior Court that family law and juvenile dependency judges shall receive training in both family law and juvenile dependency rules, laws and procedures.

(d) In family law matters all issues other than custody and visitation (including property division and support issues) shall be determined by the family law court.

(e) In any coordinated or consolidated matter, adjudication/detention hearings shall be heard in a juvenile dependency department.

Section 2. Standards — To carry out the above policy the following standards are established:

(a) Custody proceeding. As used herein the term "custody proceeding" is defined to mean one or more of the following custody proceedings:

Custody under the Family Law Act (CC §4600 et seq.); guardianship (Prob C §300); juvenile dependency (WIC §300); ~~juvenile-incorrigibility-(WIC-§601)-juvenile-delinquency-(WIC-§602)-adoption-(CC-§221-et-seq)-~~ termination of parental rights (CC §232 et seq.); emancipation (CC §60 et seq); paternity and maternity under the Uniform Parentage Act (CC §7000 et seq.); writs of habeas corpus and warrants in lieu of habeas corpus (PC §§ 1474, 1497); protective orders to prevent domestic violence (CCP §545 et seq.); ~~and-mental-health-proceedings-under-the-Bantermann-Petris-Short-Act-(WIC-§5000-et-seq)-~~.

(b) Identification. Any court hearing a matter involving the custody of a minor should determine at the earliest possible time if matters are pending in any other department which involves custody of the same minor.

Counsel and parties appearing in pro per shall notify any judicial officer before whom they appear in a custody proceeding of any other custody proceeding involving the same child or children. Such notice shall be given at the earliest possible opportunity.

Section 3. Procedures.

(a) When a judicial officer finds that another custody proceeding is pending that judicial officer shall forthwith notify the supervising judge of the juvenile dependency department of the multiple proceedings.

(b) Upon verification of the existence of multiple proceedings the supervising judge shall set a chambers conference regarding possible coordination or consolidation. At least five days notice of said conference (time not extended per CCP 1013) shall be given to all counsel of record in each custody proceeding, to any party appearing in pro per and to any other person or entity at the discretion of the supervising judge.

(c) At said chambers conference the court shall consider such arguments and evidence as the supervising judge deems appropriate.

(d) Following the chambers conference the supervising judge shall consult with all trial judicial officers who are hearing any of the pending custody proceedings.

(e) Within two weeks after the chambers conference, unless extension is required for good cause as set forth on the record or by minute order by the supervising judge, the court shall issue a minute order either declining to coordinate or consolidate, or coordinating or consolidating and assigning all pending matters to one court.

(f) The supervising judge may hold such other hearings and take such other actions not set forth herein as deemed necessary.

Section 4. Criteria. In implementing the standards set forth above the court shall/should consider the following:

(a) How long the case has been active in any particular trial department.

(b) The number and length of hearings that have taken place in such trial department.

(c) The judicial officer's familiarity with the parties and issues in the case.

(d) The stage of proceedings in each court.

(e) Whether there are allegations against both parents or only one.

(f) Whether the juvenile dependency petition is detained or nondetained.

(g) The extent to which other family law issues are tied to custody and visitation.

(h) The financial resources of the parties.

(i) The seriousness of the psychological issues raised by the case.

(j) The presence of other children not of the marriage between the parties.