

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack and Hon. Susan D. Huguenor, Cochairs
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DATE: October 2, 2009

SUBJECT: Juvenile Law: Request to Change Court Order (amend Cal. Rules of Court, rule 5.570) (Action Required)

Issue Statement

The proposed amendments to rule 5.570 of the California Rules of Court promote compliance with new legal requirements in Welfare and Institutions Code section 388(c)(1), effective January 1, 2009, that allow any party, including a dependent child, to petition the court to terminate court-ordered reunification services under certain conditions.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2010, amend rule 5.570 of the California Rules of Court to comply with current law.

The proposed rule text is attached at pages 5–8.

Rationale for Recommendation

The Family and Juvenile Law Advisory Committee recommends amending rule 5.570 of the California Rules of Court to bring it into compliance with new law. (Assem. Bill 2341 [Maze]; Stats. 2008, ch. 457.)¹ Welfare and Institutions Code section 388(c)(1) includes new provisions that allow any party, including a dependent child, to petition the court during specified time periods to terminate court-ordered reunification services if (1) there exists a change of circumstances or new evidence that meets a condition of section

¹ Assembly Bill 2341 amended sections 361.5 and 388 of the Welfare and Institutions Code. Identical changes to section 361.5 were also enacted by Assembly Bill 2070, and the corresponding rule changes are covered in the rule proposal enacting that legislation (see SPR09-34, Juvenile Law: Review and Permanency Hearings in Dependency Proceedings). Only the changes to section 388 are covered by this proposal.

361.5(b) or (e) justifying termination of services; or (2) the parent's or guardian's action or inaction, including failure to visit the child or failure to make progress on his or her court-ordered treatment plan, creates a substantial likelihood that reunification will not occur. When such a petition is filed, section 388(c)(2)–(4) provides guidance to the court about factors to consider, required findings and orders, and the setting of a subsequent hearing. The proposed amendments to rule 5.570(a), (d), (e), (f), and (h) make the rule consistent with each new requirement in section 388(c).

The *Request to Change Court Order* (form JV-180) and *Court Order on Form JV-180*, *Request to Change Court Order* (form JV-183) are not being revised as part of this proposal as they are usable and legally accurate in their current state. However, the committee may subsequently recommend that the forms be modified to specifically include the new provisions in section 388(c).

Alternative Actions Considered

The proposed amendment is necessary to bring this rule into compliance with governing law and to promote clarity and ease of use. No alternative actions were considered.

Comments From Interested Parties

The invitation to comment on the proposal was circulated from April 17, 2009, through June 17, 2009, to the standard mailing list for family and juvenile law proposals as well as to the regular rules and forms mailing list. This distribution list includes judges, court administrators, attorneys, social workers, probation officers, mediators, and other family and juvenile law professionals. A total of ten comments were received. No commentators disagreed with the proposal; five commentators agreed with the proposed changes; two commentators agreed with the proposal if modified; three commentators did not indicate agreement or disagreement.

Of the two commentators who agreed with the proposal if modified, the first suggested adding language to rule 5.570(e)(2) and (e)(3) regarding the standard for terminating reunification services for an Indian child as defined in section 361.7 of the Welfare and Institutions Code. Specifically, the commentator requested additional language stating, “In the case of an Indian child, the court may terminate reunification services only if the court finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful as defined by Section 361.7.” The commentator stated that rule 5.570 does not include the requirements for active remedial efforts and that the added language would minimize the possibility of reversals resulting from termination of reunification services when active efforts have not been satisfied.

The committee agrees that, in any case involving an Indian child, the court must be mindful of the special legal requirements that apply under the Indian Child Welfare Act (ICWA). These requirements are outlined in rules 5.480-5.487. Specifically, rule 5.484(c)

covers the issue of active efforts being made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. Because rule 5.570 is intended to serve as a rule stating the *general requirements* outlined in Welfare and Institutions Code section 388 regarding petitions for modification/requests to change court order, it is neither necessary nor consistent with our current rule structure to add legal requirements that would apply in the case of an Indian child. Any issues specifically applicable to Indian children are covered in rules 5.480-5.487.

Another commentator suggested several changes. First, he recommended changing the main heading of rule 5.570, *Request to change court order*, to include the terms “petition” and “modification,” which are used in the body of the rule. The committee agrees, and recommends changing the title of the rule to “Request to change court order (Petition for modification),” as suggested by the commentator. Rule 5.570 does use the terms “petition” and “modification” throughout the text, and clarifying the terminology in the heading will make the rule easier for practitioners and pro per litigants to understand.

Second, the commentator suggested deleting “or (b)” in the first sentence of proposed rule 5.570(d)(1) and (e)(1), asserting that Welfare and Institutions Code section 388(b) does not require that the petitioner state a change of circumstance or new evidence. Section 388(b) requires the petitioner to demonstrate that the requested change of order is in the best interest of the child. As circulated for comment, rule 5.570(d)(1) and (e)(1) combined the requirements from sections 388(a) and (b) regarding the grounds for denying a hearing (subdivision (d)) or granting a petition (subdivision (e)) into one subdivision. To avoid confusion, the committee agrees to revise the language in these subdivisions by deleting “or (b)” from rule 5.570(d)(1) and (e)(1) and adding new sections 5.570(d)(2) and (e)(2) including the requirements for denying or granting a hearing when the petition is filed under section 388(b).

Third, the commentator suggested adding in proposed rule 5.570(h)(1)(C) that the petitioner must show by a preponderance of the evidence that reasonable services have been offered or provided if the request is for termination of court-ordered reunification services. Although this language is already included in rule 5.570(e)(4), the committee recommends making the suggested change in section 5.570(h)(1)(C) to clarify that two different burdens of proof are in effect for petitions filed under section 388(c).

Of the three commentators who did not indicate any position regarding the proposal, only one submitted narrative comments. That commentator suggested revising proposed rule 5.570(d)(2) (now renumbered as 5.570(d)(3)) to read “If the petition filed under section 388(c) fails to state facts showing that the parent has failed to visit the child or facts showing that the parent has failed to participate regularly and make substantive progress in a court-ordered treatment plan or fails to show that the requested termination of services could promote the best interests of the child, the court may deny the petition *ex parte*.” This commentator asserted that, as written, (d)(2) requires the *petition* to contain clear and convincing evidence supporting the termination of services, while the correct

interpretation of section 388(c) is that clear and convincing evidence is the standard at the hearing, not in the petition. The commentator asserts that the court should not deny the petition ex parte unless the petition fails to state facts showing that the parent has failed to visit the child or that the parent has failed to regularly participate and make substantive progress in the case plan. The committee believes that the commentator's proposed language accurately reflects the legal requirements identified in section 388(c) and agrees to incorporate this language in rule 5.570(d)(3) (rule 5.570(d)(2) as submitted for public comment).

The full text of the comments and the committee's responses is attached at pages 9–13.

The text of Welfare and Institutions Code section 388 is attached at pages 14–15.

Implementation Requirements and Costs

Implementation of the revised rule will incur standard reproduction costs.

Attachments

Rule 5.570 of the California Rules of Court is amended, effective January 1, 2010, to read:

1 **Rule 5.570. Request to change court order (petition for modification)**

2
3 **(a) Contents of petition (§§ 388, 778)**

4
5 A petition for modification must be liberally construed in favor of its
6 sufficiency. The petition must be verified and, to the extent known to the
7 petitioner, must contain the following:

8
9 (1)–(6) * * *

10
11 (7) A concise statement of any change of circumstance or new evidence
12 that requires changing the order or, for requests under section
13 388(c)(1)(B), a concise statement of the relevant action or inaction of
14 the parent or guardian;

15
16 (8)–(10) * * *

17
18 **(b)–(c) *****

19
20 **(d) Denial of hearing**

21
22 The court may deny the petition ex parte if:

23
24 (1) The petition filed under section 388(a) or section 778 fails to state a
25 change of circumstance or new evidence that may require a change of
26 order or termination of jurisdiction, or, that the requested modification
27 would promote the best interest of the child, ~~the court may deny the~~
28 ~~application ex parte.~~

29
30 (2) The petition filed under section 388(b) fails to demonstrate that the
31 requested modification would promote the best interest of the child; or

32
33 (3) The petition filed under section 388(c) fails to state facts showing that
34 the parent has failed to visit the child or that the parent has failed to
35 participate regularly and make substantive progress in a court-ordered
36 treatment plan or fails to show that the requested termination of
37 services would promote the best interest of the child.

1 (e) **Grounds for grant of petition (§§ 388, 778)**

- 2
- 3 (1) If the petition filed under section 388(a) or section 778 states a change
- 4 of circumstance or new evidence and it appears that the best interest of
- 5 the child may be promoted by the proposed change of order or
- 6 termination of jurisdiction, the court may grant the petition after
- 7 following the procedures in (f), ~~and (g)~~ and (h) or (i).
- 8
- 9 (2) If the petition is filed under section 388(b) and it appears that the best
- 10 interest of the child may be promoted by the proposed recognition of a
- 11 sibling relationship and other requested orders, the court may grant the
- 12 petition after following the procedures in (f), (g) and (h).
- 13
- 14 (3) For a petition filed under section 388(c)(1)(A), the court may terminate
- 15 reunification services during the time periods described in section
- 16 388(c)(1) only if the court finds by a preponderance of evidence that
- 17 reasonable services have been offered or provided, and, by clear and
- 18 convincing evidence, that the change of circumstance or new evidence
- 19 described in the petition satisfies a condition in section 361.5(b) or (e).
- 20 The court may grant the petition after following the procedures in (f),
- 21 (g), and (h).
- 22
- 23 (4) For a petition filed under section 388(c)(1)(B), the court may terminate
- 24 reunification services during the time periods described in section
- 25 388(c)(1) only if the court finds by a preponderance of evidence that
- 26 reasonable services have been offered or provided, and, by clear and
- 27 convincing evidence that action or inaction by the parent or guardian
- 28 creates a substantial likelihood that reunification will not occur. Such
- 29 action or inaction includes, but is not limited to, failure to visit the child
- 30 or failure to participate regularly and make substantive progress in a
- 31 court-ordered treatment program. In determining whether the parent or
- 32 guardian has failed to visit the child or to participate regularly or make
- 33 progress in a court-ordered treatment plan, the court must consider
- 34 factors including, but not limited to, the parent or guardian's
- 35 incarceration, institutionalization, or participation in a residential
- 36 substance abuse treatment program. The court may grant the petition
- 37 after following the procedures in (f), (g), and (h).
- 38

39 (f) **Hearing on petition**

40

41 If all parties stipulate to the requested modification, the court may order

42 modification without a hearing. If there is no such stipulation and the

43 petition has not been denied ex parte under section (d), ~~If it appears to the~~

1 court that the requested modification will be contested or if the court desires
2 to received further evidence on the issue, the court must order that a hearing
3 on the petition for modification be held within 30 calendar days after the
4 petition is filed.

5
6 (g) ***

7
8 (h) **Conduct of hearing (§ 388)**

9
10 (1) The petitioner requesting the modification under section 388 has the
11 burden of proof.

12
13 (A) If the request is for the removal of the child from the child's
14 home, the petitioner must show by clear and convincing evidence
15 that the grounds for removal in section 361(c) exist.

16
17 (B) If the request is for removal to a more restrictive level of
18 placement, the petitioner must show by clear and convincing
19 evidence that the change is necessary to protect the physical or
20 emotional well-being of the child.

21
22 (C) If the request is for termination of court-ordered reunification
23 services, the petitioner must show by clear and convincing
24 evidence that one of the conditions in section 388(c)(1)(A) or (B)
25 exists and must show by a preponderance of the evidence that
26 reasonable services have been offered or provided.

27
28 (D) All other requests require a preponderance of the evidence to
29 show that the child's welfare requires such a modification.

30
31 (2) The hearing must be conducted as a disposition hearing under rules
32 5.690 and 5.695 if:

33
34 (A) The request is for removal from the home of the parent or
35 guardian or to a more restrictive level of placement; or

36
37 (B) The request is for termination of court-ordered reunification
38 services; or

39
40 ~~(B)~~(C) There is a due process right to confront and cross-examine
41 witnesses.
42

1 Otherwise, proof may be by declaration and other documentary evidence, or
2 by testimony, or both, at the discretion of the court.

3

4 **(i)** ***

5

SPR09-37**Juvenile Law: Request to Change Court Order** (amend Cal. Rules of Court, rule 5.570)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Seth Gorman Attorney at Law Seth Gorman Law Office	AM	<p>Rule 5.570(e)(2), (e)(3). Add: “In the case of an Indian child, the court may terminate reunification services only if the court finds by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful as defined by Section 361.7.”</p> <p>The rule fails to reconcile the requirements for active remedial efforts for Indian children pursuant to Section 361.7. Section 388 references 361.5 in terms of a condition justifying termination of court-ordered reunification services. Section 361.7 states that “[n]otwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”</p>	<p>Subdivision (e)(2) is now (e)(3), and subdivision (e)(3) is now (e)(4). The committee agrees that, in any case involving an Indian child, the court must be mindful of the special legal requirements that apply under the Indian Child Welfare Act (ICWA). These requirements are outlined in rules 5.480-5.487. Specifically, rule 5.484(c) covers the issue of active efforts being made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. Because rule 5.570 is intended to serve as a rule stating the <i>general requirements</i> outlined in Welfare and Institutions Code section 388 regarding petitions for modification/requests to change court order, it is neither necessary nor consistent with the current rule structure to add legal requirements that would apply in the case of an Indian child. Any issues specifically applicable to Indian children are covered in rules 5.480-5.487.</p>

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	Commentator	Position	Comment	Committee Response
			The proposed amendment would minimize the possibility of reversals due to termination of reunification services when active efforts have not been satisfied, and conforms with Section 361.7.	
2.	Kern County Department of Social Services Monique Hawkins Program Director—Court Services	A	No narrative comments submitted.	No response required.
3.	Bonnie L. Miller Attorney at Law Child Welfare Law Specialist	NI	No narrative comments submitted.	No response required.
4.	Julie Netchaev Saugus	A	No narrative comments submitted.	No response required.
5.	Orange County Bar Association Michael G. Yoder President	A	No narrative comments submitted.	No response required.
6.	San Diego County Probation Department Pamela Martinez, Drug Court Program Office	NI	This allows the right to petition the court for a change in court order regarding termination of reunification services or if the petitioner requests for removal of the child to a more restrictive level of placement. This can be done ex parte if all parties stipulate to the requested modification.	No response required.
7.	Janet G. Sherwood Attorney at Law Corte Madera	NI	Rule 5.570(d)(2). As written, this rule requires the <i>petition</i> to contain clear and convincing evidence supporting the	The committee agrees that the commentator's proposed language accurately reflects the legal requirements identified in section

10 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

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	Commentator	Position	Comment	Committee Response
			<p>termination of services. The purpose of the hearing is for the court to consider the evidence and decide whether it is clear and convincing. It is inappropriate to require the petition to contain all of the evidence upon which the petitioner intends to rely. The court should not deny the petition ex parte unless the petition fails to state facts showing that the parent has failed to visit the child or that the parent has failed to regularly participate and make substantive progress in the case plan.</p> <p>Suggested language: "If the petition filed under section 388(c) fails to state facts showing that the parent has failed to visit the child or facts showing that the parent has failed to participate regularly and make substantive progress in a court-ordered treatment plan or fails to show that the requested termination of services could promote the best interests of the child, the court may deny the petition ex parte."</p>	388(c). The committee will incorporate this language in rule 5.570(d)(3) (rule 5.570 (d)(2) as submitted for public comment).
8.	Superior Court of Los Angeles County	A	No narrative comments submitted.	No response required.
9.	Superior Court of Riverside County Staff	A	No narrative comments submitted.	No response required.
10.	Superior Court of San Diego County	AM	1. Rule 5.570. Main Heading. Change as	1. The committee agrees to change the main

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	Michael M. Roddy Executive Officer		<p>follows: Either (1) “Request (<u>Petition</u>) to change court order (<u>modification</u>)” or (2) “Request to change court order (<u>Petition for modification</u>)”</p> <p>Reason: Although the main heading reflects the name of the corresponding form JV-180, “Request to Change Court Order,” most of the rest of the rule does not use this terminology. It still speaks of a “Petition for Modification” (e.g., subs. (a) [“A petition for modification ...”]; the petition is addressed”], (a)(9) [“A statement of the petitioner’s relationship ...”], (b) [“388 petition” (heading); “A petition under ... section 388”], et al.). These inconsistencies might be extremely confusing to a petitioner who is acting in pro per or practitioners who are not familiar with juvenile dependency law. If the heading indicates alternative terms for “request” and “change,” it might be easier to understand the rest of the rule.</p> <p>2. Rule 5.570(d)(1) & (e)(1): Delete “or (b)” in the first sentence: “If the petition filed under section 388(a) or (b) or section 778 ...”</p>	<p>heading to “Request to change court order (petition for modification).” The rule does use the terms “petition” and “modification” throughout the text and clarifying the terminology in the heading will make the rule easier for practitioners and pro per litigants to understand.</p> <p>2. The committee agrees to delete “or (b)” from rule 5.570(d)(1) and (e)(1) and to place requirements pertaining to 388(b) in new sections 5.570(d)(2) and (e)(2).</p>

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	Commentator	Position	Comment	Committee Response
			<p>Reason: WIC 388(b) does not require that the petitioner state a “change of circumstance or new evidence.”</p> <p>3. Rule 5.570(h)(1)(C): At the end of the sentence, delete period and add “and must show by a preponderance of the evidence that reasonable services have been offered or provided.”</p> <p>Reason: see WIC 388(c)(3).</p>	<p>3. Although the reasonable services requirement is already included in rule 5.570(e)(4), the committee agrees to make the suggested change to clarify the two different burdens of proof in effect for petitions filed under section 388(c).</p>

Welfare and Institutions Code § 388

(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction.

(b) Any person, including a child who is a dependent of the juvenile court, may petition the court to assert a relationship as a sibling related by blood, adoption, or affinity through a common legal or biological parent to a child who is, or is the subject of a petition for adjudication as, a dependent of the juvenile court, and may request visitation with the dependent child, placement with or near the dependent child, or consideration when determining or implementing a case plan or permanent plan for the dependent child or make any other request for an order which may be shown to be in the best interest of the dependent child. The court may appoint a guardian ad litem to file the petition for the dependent child asserting the sibling relationship if the court determines that the appointment is necessary for the best interests of the dependent child. The petition shall be verified and shall set forth the following:

- (1) Through which parent he or she is related to the dependent child.
- (2) Whether he or she is related to the dependent child by blood, adoption, or affinity.
- (3) The request or order that the petitioner is seeking.
- (4) Why that request or order is in the best interest of the dependent child.

(c)(1) Any party, including a child who is a dependent of the juvenile court, may petition the court, prior to the hearing set pursuant to subdivision (f) of Section 366.21 for a child described by paragraph (1) of subdivision (a) of Section 361.5, or within six months of the initial dispositional hearing for a child described by paragraph (2) or (3) of subdivision (a) of Section 361.5, to terminate court-ordered reunification services provided under subdivision (a) of Section 361.5 only if one of the following conditions exists:

- (A) It appears that a change of circumstance or new evidence exists that satisfies a condition set forth in subdivision (b) or (e) of Section 361.5 justifying termination of court-ordered reunification services.
- (B) The action or inaction of the parent or guardian creates a substantial likelihood that

reunification will not occur, including, but not limited to, the parent or guardian's failure to visit the child, or the failure of the parent or guardian to participate regularly and make substantive progress in a court-ordered treatment plan.

(2) In determining whether the parent or guardian has failed to visit the child or participate regularly or make progress in the treatment plan, the court shall consider factors including, but not limited to, the parent or guardian's incarceration, institutionalization, or participation in a residential substance abuse treatment program.

(3) The court shall terminate reunification services during the above-described time periods only upon a finding by a preponderance of evidence that reasonable services have been offered or provided, and upon a finding of clear and convincing evidence that one of the conditions in subparagraph (A) or (B) of paragraph (1) exists.

(4) If the court terminates reunification services, it shall order that a hearing pursuant to Section 366.26 be held within 120 days.

(d) If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, termination of jurisdiction, or clear and convincing evidence supports revocation or termination of court-ordered reunification services, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes.