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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 29, 2010

Title	Agenda Item Type
Juvenile Law: Consideration of Parent's Incarceration or Institutionalization in Extending Services	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 5.710	January 1, 2011
Recommended by	Date of Report
Family and Juvenile Law Advisory Committee	September 14, 2010
Hon. Jerilyn L. Borack, Cochair	Contact
Hon. Susan D. Huguenor, Cochair	Melissa Ardaiz, 415-865-7567 melissa.ardaiz@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends amending the 6-month review hearing rule applicable to dependent children who have been removed from their parent or legal guardian. Effective January 1, 2010, the California Legislature adopted new Welfare and Institutions Code section 366.215, which requires the court, in determining whether court-ordered services may be extended to the 12-month point for a child who is under three years of age or is a member of a sibling group, to take into account any particular barriers to a parent's ability to maintain contact with his or her child due to the parent's incarceration or institutionalization. The proposed rule amendment is necessary to promote legal compliance with section 366.215.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2011, amend rule 5.710 of the California Rules of Court to comply with current statutory mandates and to ensure consistency.

The proposed rule text is attached at pages 5–6.

Previous Council Action

This rule was adopted as rule 1460 effective January 1, 1990. It has been amended many times since 1990 and was renumbered to rule 5.710 effective January 1, 2007. It was most recently amended effective January 1, 2010 to incorporate legislative changes relevant to review and permanency hearings in juvenile dependency, as mandated by Assembly Bill 2070 (Bass; Stats. 2008, ch. 482).

Rationale for Recommendation

Effective January 1, 2010, the California Legislature adopted Welfare and Institutions Code section 366.215, which requires the court, in determining whether court-ordered services may be extended to the 12-month point for a child who is under three years of age on the date of the initial removal or is a member of a sibling group described in Welfare and Institutions Code section 361.5(a)(1)(C), to take into account any particular barriers to a parent’s ability to maintain contact with his or her child due to the parent’s incarceration or institutionalization. The Family and Juvenile Law Advisory Committee recommends amending rule 5.710, Six-month review hearing, to bring it into compliance with the new law.

Welfare and Institutions Code section 366.215 was included in Senate Bill 597 (Liu; Stats. 2009, ch. 339), which was “clean-up” legislation to clarify statutory changes mandated by Assembly Bill 2070 (Bass; Stats. 2008, ch. 482). AB 2070 required the court to consider the circumstances of parents or legal guardians who are incarcerated, institutionalized, or in residential substance abuse treatment when determining whether to extend the time period for reunification services at the 12- and 18-month review hearings. Section 366.215 imposes a similar requirement for 6-month review hearings. The legislative changes mandated by AB 2070 were incorporated into new and revised rules relevant to review and permanency hearings in juvenile dependency, effective January 1, 2010.

The Family and Juvenile Law Advisory Committee proposes revising rule 5.710 to include the requirements in new section 366.215. These requirements are in new subdivision (c)(1)(D)(ii) of the rule. The language in new subdivision (c)(1)(D)(ii) is modeled after a similar requirement applicable at 12-month review hearings found in Welfare and Institutions Code section 361.5(a)(3) and rule 5.715(b)(4)(A)(ii) of the California Rules of Court.

The proposed revisions are necessary to incorporate new legal requirements. The new language will assist the court in determining whether it is appropriate, under the circumstances, to extend court-ordered services to the 12-month point for a parent who may have experienced barriers to maintaining contact with his or her child due to the parent’s incarceration or institutionalization or barriers to the parent’s access to services. The proposed revisions will also assist incarcerated or institutionalized parents who are trying to navigate the juvenile dependency system by

furthering their opportunities to maintain contact with their children and receive access to services despite personal barriers.

Following the comment period, the committee also proposes revising the language in rule 5.710(c)(1)(D). The committee recommends breaking the sentence in subdivision (c)(1)(D) into two sentences to promote clarity. This change is non-substantive.

Comments, Alternatives Considered, and Policy Implications

The invitation to comment on the proposal was circulated from April 19, 2010, through June 18, 2010, 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 six comments were received.¹ All commentators agreed with the proposal, with two suggesting modifications.

One commentator suggested moving the proposed language to a different subdivision of rule 5.710 rather than including the language in rule 5.710(e) as a separate subdivision. The commentator suggested including the language in rule 5.710(c)(1)(D) as the fourth factor to consider in determining whether there is a substantial probability that the child may be returned within the applicable time period. The committee agrees to move the proposed language from subdivision (e) to subdivision (c)(1)(D) because there is overlap in the subject matter. However, rather than include the proposed language as the fourth factor in subdivision (c)(1)(D), the committee recommends including the language as new item (ii) of subdivision (c)(1)(D). The proposed language identifies factors that the court must take into account in determining whether court-ordered services may be extended, particularly any barriers the parent faced in maintaining contact with his or her child due to that parent's incarceration or institutionalization. The language in item (i) concerns factors the court must consider in order to find a substantial probability that the child may be returned within the applicable time period. While there are commonalities in the subject matter, they should be designated separately to highlight the differences.

Another commentator suggested a technical change in the proposed numbering—specifically, to eliminate the “(i)” in proposed rule 5.710(c)(1)(D)(i) since there is no “(ii)” to distinguish “(i)” from. Subdivision (c)(1)(D)(i) identifies factors for the court to consider in order to find a substantial probability that the child may be returned to the parent within the applicable time period. As submitted for public comment, the committee proposed revising the numbering in rule 5.710(c)(1)(D) by designating “(i)” as an item of (c)(1)(D) to clarify that the factors identified for consideration specifically relate to making a finding of substantial probability. The commentator correctly asserts that there was no “(ii)” to distinguish “(i)” from in the proposal as it was

¹ A chart providing the full text of the comments and the committee responses is attached at pages 7–8.

submitted for public comment. However, the committee has since added a second item to rule 5.710(c)(1)(D), as described above, so it is unnecessary to change the proposed numbering.

Alternatives considered and policy implications

The proposed amendments are necessary to bring this rule into compliance with governing law and to promote clarity and ease of use. The proposed language identifies new legal requirements for the court to consider in determining whether it is appropriate to extend court-ordered services. The committee considered including the mandated court considerations as a new, separate subdivision of rule 5.710 but eventually determined that it was best to include the requirements in existing subdivision (c)(1)(D) due to the overlap in subject matter.

Implementation Requirements, Costs, and Operational Impacts

Implementation of the revised rule will incur standard reproduction costs.

Attachments

1. Cal. Rules of Court, rule 5.710, at pages 5–6
2. Chart of comments, at pages 7–8
3. Attachment A: Welfare and Institutions Code section 366.215

Rule 5.710 of the California Rules of Court is amended, effective January 1, 2011, to read:

1 **Rule 5.710. Six-month review hearing**

2
3 (a) * * *

4
5 (b) * * *

6
7 (c) **Setting a section 366.26 hearing (§§ 366.21, 366.215)**

8
9 (1) The court may set a hearing under section 366.26 within 120 days if:

10
11 (A)–(C) * * *

12
13 (D) The child was under the age of three when initially removed, or a
14 member of a sibling group described in section 361.5(a)(1)(C), and the
15 court finds by clear and convincing evidence that the parent has failed
16 to participate regularly and make substantive progress in any court-
17 ordered treatment plan, ~~unless~~. If, however, the court finds a substantial
18 probability that the child may be returned within 6 months or within 12
19 months of the date the child entered foster care, whichever is sooner, or
20 that reasonable services have not been offered or provided, the court
21 must continue the case to the 12-month permanency hearing.

22
23 (i) In order to find a substantial probability that the child may be
24 returned within the applicable time period, the court should
25 consider the following factors along with any other relevant
26 evidence:

27
28 ~~(i)~~a. Whether the parent or legal guardian has consistently and
29 regularly contacted and visited the child;

30
31 ~~(ii)~~b. Whether the parent or legal guardian has made significant
32 progress in resolving the problems that led to the removal
33 of the child; and

34
35 ~~(iii)~~c. Whether the parent or legal guardian has demonstrated the
36 capacity and ability to complete the objectives of the
37 treatment plan and to provide for the child's safety,
38 protection, physical and emotional health, and special
39 needs.

40
41 (ii) The court, in determining whether court-ordered services may be
42 extended to the 12-month point, must take into account any
43 particular barriers to a parent's ability to maintain contact with
44 his or her child due to the parent's incarceration or
45 institutionalization. The court may also consider, among other

SPR10-36**Juvenile Law: Consideration of Parent’s Incarceration or Institutionalization in Extending Services** (amend Cal. Rules of Court, rule 5.710)

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

	Commentator	Position	Comment	Committee Response
1.	Child Welfare Services—Policy and Program Support Corey Kissel Policy Analyst	A	No narrative comments submitted.	No response required.
2.	Kern County Department of Human Services Monique Hawkins Program Director, Court Division	A	No narrative comments submitted.	No response required.
3.	Orange County Bar Association Lei Lei Wang Ekvall President	A	No narrative comments submitted.	No response required.
4.	Hon. Jon Edward Stuebbe Judge Superior Court of Kern County	AM	Move the extending services language in proposed rule 5.710(e) to rule 5.710(c)(1)(D) so that it is the fourth factor for the court to consider in determining whether there is a substantial probability that the child may be returned within the applicable time period.	The committee agrees to move the “extending services” language from new subdivision (e) to subdivision (c)(1)(D) because there is overlap in the subject matter. However, rather than include the proposed language as the fourth factor in subdivision (c)(1)(D)(i), the committee recommends including the language as new item (ii) of subdivision (c)(1)(D). The proposed language identifies factors the court must take into account in determining whether court-ordered services may be extended, particularly any barriers the incarcerated or institutionalized parent faced in maintaining contact with his or her child due to that parent’s incarceration or institutionalization. The language in item (i) concerns factors the court must consider in

SPR09-36**Juvenile Law: Presence and Participation of Child at Hearings** (amend Cal. Rules of Court, rules 5.534 and 5.725)

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

				order to find a substantial probability that the child may be returned within the applicable time period. While there are commonalities in the subject matter, they should be designated separately to highlight the differences.
5.	Superior Court of San Diego County Michael M. Roddy Executive Officer	A	<ol style="list-style-type: none"> 1. There is no need to renumber the second paragraph in rule 5.710(c)(1)(D) and designate it as “i” because there is no “ii” to distinguish it from. Technically, it can remain as the second paragraph under (D) and the enumerated factors can remain numbered (i), (ii), and (iii). 2. This commentator also submitted technical comments regarding rule 5.740, subdivisions (a)(1) and (d)(1), and form JV-365. The commentator acknowledged that neither the rule nor the form were part of the proposal, but requested that the Family and Juvenile Law Advisory Committee consider the suggestions and take action if deemed appropriate. 	<ol style="list-style-type: none"> 1. The committee agrees that it is unnecessary to designate “(i)” as an item when there is no other item to distinguish it from. However, the committee has since added a second item to rule 5.710(c)(1)(D), so the proposed numbering will remain the same. 2. The Family and Juvenile Advisory Committee will consider these comments in a future Rules and Projects cycle. It is outside of the Committee’s purview to make a recommendation on any rule or form that is not a part of this year’s cycle.
6.	Cynthia Wojan Juvenile Court Coordinator Superior Court of Solano County	A	No narrative comments submitted.	No response required.

Attachment A

Welfare and Institutions Code section 366.215

With respect to a hearing held pursuant to subdivision (e) of Section 366.21, if the child in question was under three years of age on the date of the initial removal, or is a member of a sibling group described in subparagraph (C) of paragraph (1) of subdivision (a) of Section 361.5, the court, in determining whether to schedule a hearing pursuant to Section 366.26, shall take into account any particular barriers to a parent's ability to maintain contact with his or her child due to the parent's incarceration or institutionalization.