

HOW TO TACKLE THE PROBLEMS INVOLVED WHEN A CASE MOVES FROM JUVENILE TO FAMILY COURT

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One of the most peculiar aspects of California child custody law involves juvenile dependency cases that are dismissed with the creation of juvenile court child custody orders that are then transferred to the family court. Many call these creations "exit orders," but the official legal term is juvenile court custody orders.¹ They derive from Welfare and Institutions Code sections 361.2(b)(1) and 362.4. The latter code section states in part:

When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court...the juvenile court on its own motion may issue a protective order as provided for in section 213.5 or as defined in Section 6218 of the Family Code, and an order determining the custody of, or visitation with, the child.

The statute goes on to state that the custody order shall be filed in any pending proceeding for nullity, dissolution, or legal separation, or in the proceeding to establish paternity, and shall become a part thereof. If there is no such pending proceeding, the clerk of the court is instructed to open a file, without a filing fee, and assign a case number.

Juvenile court judicial officers issue these orders frequently. Based on statistics from several courts well over 300 such orders are made statewide each month.²

This article will discuss several issues that arise in the creation of juvenile court custody orders: (1) how they are different from family law custody orders and the importance of those differences; (2) common errors in making these orders; (3) how the transfer process sometimes results in these orders either being ignored by family court judicial officers or being of little use because of the lack of detail within the orders, and (4) how changes in the transfer process and the use of child protection mediation can ensure better, more comprehensive, custody orders that can avoid unnecessary litigation in family court, and save court and litigant time and resources.

The Importance of Juvenile Court Custody Orders

Juvenile court custody orders differ from family court custody orders in that they can condition parental access to the child in ways unavailable to the family court. This is understandable since these are some of the highest risk cases in the entire court system. Juvenile court custody orders arise out of a case in which the juvenile court judge found a child to have been abused or neglected. The juvenile court has maintained jurisdiction over the child for some period of time and ordered that one or both of the parents participate in services designed to address the problems that brought the child to the attention of the court. At the time of dismissal the juvenile court has concluded that the child currently resides in a safe environment, but that the danger of re-abuse or neglect must be

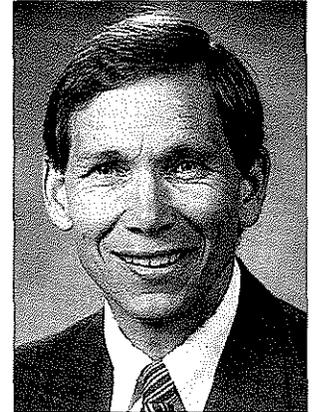
acknowledged. Thus the juvenile court can make a custody order that conditions parental access to the child on a parent's future conduct.³

The California Supreme Court recognized the special nature of juvenile court custody orders in the case of *In re Chantal S.* (1996) 13 Cal. 4th 196. In that case the juvenile court judge found that father was a violent man and that the mother could not protect the child from him. At the conclusion of dependency proceedings, the juvenile court issued a custody order granting sole custody of the child to the mother and conditioning the father's visitation on his participation in counseling, delegating the decision concerning when visitation would occur to the father's and child's therapists. The juvenile court custody order placed conditions on father's visitation rights as follows:

Visitation for father to be facilitated by Chantal's therapist, Diane Childs. Before visitation with father and his daughter can occur, father must be 1. In psychotherapy with a therapist qualified to work with issues such as father's. 2. Father must attend therapy regularly and make satisfactory progress for a time before any visits as determined by his therapist. 3. At the time that visits are scheduled to begin, father must sign a release of information to Ms. Childs to obtain information from his therapist regarding progress in therapy and to allow Ms. Childs to relay issues she sees during visits that are of a concern to her. 4. Father will be financially responsible for these visits. Payment to be at the beginning of all visits. 5. Visits will be in Ms. Child's office; familiar surroundings for Chantal. (*In re Chantal S., supra*, at p. 202)

The father appealed the trial court's orders arguing that Family Code section 3190⁴ precluded the court from conditioning visitation upon his participation in counseling and, further, that the juvenile court custody unlawfully delegated judicial authority to the therapists.

The Supreme Court affirmed the trial court noting that dependency proceedings are special proceedings governed by their own set of rules and statutes, and not necessarily by the Family Code. The court noted that the family court is a part of the superior court performing its duties under the Family Code. The parents are presumed to be fit and capable of raising their children (Fam. Code section 3061). On the other hand, the juvenile court "provides a forum to restrict parental behavior regarding children and to remove



children from the custody of their parents or guardians." *In re Chantal S.*, *supra* at p. 201. Thus the presumption of parental fitness that underlies custody law in the family court does not apply to dependency cases decided in the juvenile court.

In re Chantal S. makes it clear that the juvenile court can make orders that a family court judge cannot. This is true so long as the parent is given notice and an opportunity to be heard, including a contested hearing if desired, the court finds the order is necessary to protect the child and serve the child's best interest, that the determination is based on competent evidence, and the order is narrowly drawn to respect both the parent's rights and the child's needs. (*In re Chantal S.* (1996) 13 Cal. 4th 196, 210-211). In making a custody order, the juvenile court is not bound by the presumption in Family Code section 3080 for joint custody⁵, nor is the juvenile court bound by the restrictions of Family Code section 3190 in limiting counseling orders to parents to a period of one year.⁶ (*In re Chantal S.* (*supra*) at pp 206, 210-211).

Given the special nature of juvenile court proceedings and the reasoning in the *Chantal S.* case, it is likely that the appellate courts would approve juvenile court custody orders that restrict parental access to a child based on almost any child protection issues that might arise in juvenile court proceedings. For instance, in *Chantal S.* the Supreme Court addressed sexual abuse therapy, specifically.⁷ In another appellate decision, the court held that the juvenile court custody order can require the parents to reach a mediated agreement about how a child will be told about his paternity.⁸ Other juvenile court custody orders might address participation in parenting classes, domestic violence intervention programs, substance abuse programs, or adherence to medication regimes prescribed by doctors. Juvenile court judicial officers, children's attorneys, and social workers should be aware of the juvenile court's unique powers when creating juvenile court custody orders and how these orders can better protect children.

Problems and Strategies Regarding Juvenile Court Custody Orders Moving to Family Court

A. Lack of Awareness of Juvenile Custody Order

The transfer process from juvenile to family court and the content of juvenile court custody orders have presented difficulties for family court judicial officers for years. First, some family court judges have not been aware that a juvenile court custody order exists. This problem has to do with the transfer of juvenile court orders to the family court and the availability of the juvenile court file to the family court judge. On occasion the juvenile court custody order never reaches the family court file, and even if it does, the family court judge may not be aware of its existence within the file. These problems relate to the physical movement of the paperwork from the juvenile court to the family court file and the failure of the judge to realize that a juvenile court order is contained within the family court file.

To address these problems some family courts have innovated by marking the files to indicate the presence of a juvenile court custody order. Other courts have developed procedures that permit the juvenile dependency file to be delivered to the family court judge. Pursuant to Welfare and Institutions Code section 827.10 the court, parties, and attorneys can receive and inspect the juvenile court file,

and the social worker can testify in the family court regarding the juvenile court proceedings. Several courts hold periodic meetings between the family and juvenile court judges and administrators to coordinate relations between the two court systems. At least one California court refers the case back to the juvenile court judge for the custody hearing.⁹ Court administrators can work with supervising judges in the family and juvenile courts to ensure that juvenile court custody orders are tracked into the family court so that family court judicial officers are alerted to their existence as well as the availability of access to the juvenile court file, if necessary. Additionally, pursuant to Family Code section 3150 the family court judge can appoint the child's attorney in the juvenile proceedings to represent the child in the family court.

Failure to alert the family court judge to the history of the juvenile court proceedings can result in the child's exposure to further abuse or neglect. After dismissal of the juvenile court case, the parents on occasion will reach a private agreement to permit contact between the child and the parent who originally abused or neglected the child. They will then request that the family court judge modify the existing juvenile court custody order. Without access to the juvenile court custody order and the juvenile court file, the social worker, or the child's attorney, the family court judge may not be able to understand fully the potential dangers to the child.

B. Misunderstanding of Authority of Juvenile Court Custody Orders

Second, some family court judges have not understood the authority of juvenile court custody orders. At first some family court and appellate judges held that they were pendent lite orders and not equivalent to permanent custody orders. (See *In re John W.* (1996) 41 Cal. App. 4th 961, 970-973). However, juvenile court custody orders are not similar to *pendente lite* orders under family law, but are equivalent to a permanent custody order. (*Speelman v Superior Court*, 152 Cal. App. 3d 124, 129). As such a later modification of a juvenile court custody order in family court must be based both upon the best interest of the child and upon a significant change in circumstances. (*Speelman v Superior Court*, *supra*). The standard of proof necessary to make a change in existing custody orders resembles the proof necessary to grant a motion pursuant to Welfare and Institutions Code section 388. The legislature confirmed this legal standard when it added Welfare and Institutions Code section 302(d) to read:

Any custody or visitation order issued by the juvenile court at the time the juvenile court terminates its jurisdiction pursuant to Section 362.4 regarding a child who has been previously adjudged to be a dependent child of the juvenile court shall be a final judgment and shall remain in effect after that jurisdiction is terminated. The order shall not be modified in a proceeding or action described in Section 3021 of the Family Code unless the court finds that there has been a significant change of circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child.

As noted above, so long as a parent receives full due process rights (notice, opportunity to be heard, contested hearing if desired) and the court makes findings based upon competent evidence, that the

order is narrowly drawn to respect both the parent's rights and the child's needs, the order will be considered a final judgment.¹⁰ Consequently, failure to provide the parties an opportunity to present evidence will render the juvenile court custody order null and void,¹¹ and will result in the case being returned to the juvenile court for a full custody hearing.¹²

In one case the juvenile court judge ordered that the juvenile court custody order could not be modified for approximately a year.¹³ On appeal the appellate court declared this to be an unwarranted extension of juvenile court jurisdiction. Further, the appellate court noted that the juvenile court had used an incorrect standard when creating its custody order. "The juvenile court judge based his decision on the false assumption that he had to split physical custody because there was no evidence one parent was any better or worse than the other."¹⁴ The correct test, noted the appellate court, is the best interests of the child. Finally, the appellate court remanded the case to the family court for a new custody determination.

C. Incomplete Custody Orders

Third, most juvenile court custody orders contain so little substance as to be of little or no use to a family court judge.¹⁵ As Judge Mary Ann Grilli, an experienced family court judge has said:

We are a large, well-coordinated court, yet we struggle somewhat with juvenile court custody orders. They are often too general. These orders are essentially judgments. As such, it is vital that they be clear and specific. Otherwise, there will be enforcement issues, as well as difficulties in ascertaining what constitutes a substantial change in circumstances. If the orders are clear at the outset, the results include far fewer court hearings and returns to mediation.¹⁶

Judge Grilli's comments are understandable as social workers preparing recommendations for the juvenile court rarely have experience in developing comprehensive custody and visitation orders. The typical juvenile court custody order might read: "Legal and physical custody to mother with reasonable rights of visitation to father." This order provides no clarification when modification motions are filed in family court.¹⁷ The parents understandably will have issues about the details of such an order, including vacations, holidays, Father's and Mother's Day, transportation, and related matters. The family court will be asked to fill in the details by referring the matter to mediation and then holding a contested custody hearing should mediation fail. This will lead to more litigation, court time, and resources spent that otherwise could be avoided by recognizing an important opportunity.¹⁸

Parents are often in a more cooperative frame of mind in the juvenile court. Their main concern is for juvenile dependency to be dismissed so that the threat of losing their parental rights is removed. They are often willing to come to an agreement on many issues just so the case is transferred out of juvenile court. They also usually have attorneys to assist them in juvenile court, while a high percentage of family litigants are unrepresented. Juvenile courts should take advantage of this opportunity to assist the parents in reaching a comprehensive mediated custody agreement before the juvenile court case is dismissed.

How Dependency Mediation Can Resolve These Issues

The most successful and efficient approach to the creation of comprehensive juvenile court custody orders has been the use of dependency mediation at the time the dependency case is dismissed. Dependency mediation can help parents reach comprehensive custody orders that resemble those that result from mediated agreements in family court. The family court judge will not have to start over if a detailed custody order has been completed.

This approach assumes that dependency mediation is available to the juvenile court. The legislature has encouraged the development of dependency mediation program [W & I section 350(a)(1)], and more than 21 courts throughout California have such programs, usually borrowing mediators from the Family Court Services mediation staff. While dependency mediation can be used to resolve any issue arising in the context of juvenile dependency cases¹⁹, most judges and practitioners believe that it should always be used when juvenile custody orders are being created.

Dependency mediation will provide the parties with the opportunity to develop a detailed plan that they have helped create and that will answer the questions they raise during the mediation process. It will help guide them after the juvenile case has been dismissed, and since they helped create the plan, it will have a greater likelihood of success. The order will provide the family court judge with essential details about the custody arrangement. The mediated juvenile court custody order will save court resources, particularly in the family court. It will serve the parties well by providing guidance for the resolution of issues that inevitably arise after the juvenile court dismisses the dependency case. Finally, and perhaps most importantly, it will further protect the child by creating a comprehensive custody order that takes into consideration the specific needs of the child in light of the dependency case.

Conclusion

Juvenile court custody orders present a number of issues for the superior court. They differ from family court custody orders because they can condition a parent's access to a child in ways family court orders cannot. The transfer of custody orders from juvenile to family court can create several problems including a failure to understand the nature of the juvenile court custody order, the family court judge's inability to know that the juvenile court order exists, the location of the order into the family court file, and the custody order's lack of specificity.

The best practice is for the juvenile court to require the parties to participate in dependency mediation in order to create the juvenile court custody order. This can be accomplished by using existing family court mediators, trained volunteers, or dependency mediators with expertise and training in drafting these orders. Family court mediators resolve family court custody issues on a daily basis so they will be able to assist parents create a detailed custody order, one that will serve the parties well and that will provide the family court with guidance should the parties return to family court for a modification. When the juvenile court custody order is transferred to the family court, court administration should ensure that the family court file is well-marked to alert the family court judge of the existence of that order. It is also good practice for the family court

judge to have access to the juvenile court file when hearing a custody modification petition or to refer the case back to the juvenile court judge for further hearing. The child's attorney from juvenile court can also assist the family court judge and help ensure that any modification of custody or visitation protects the child from future harm. Finally, the use of dependency mediation will save the court time, energy, and resources by putting into place a custody order when the parties are represented and more likely to be cooperating with one another.

**The author is the Judge-in-Residence at the Administrative Office of the Courts. The author wishes to thank Judges Shawna Schwarz and Jerilyn Borack, George Ferrick and Steve Baron for their assistance in the preparation of the article.*

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1 See Seiser, G. & Kumli, K., *California Juvenile Courts: Practice and Procedure*, 2006 Edition, section 2.127[1][a], practice tip at p. 2-239. The Fourth District Court of Appeal appeared to approve reluctantly the term "exit order" in its Order Modifying Opinion, *In re John W.*, 95 Cal. Daily Op. Serv. 736.

2 In Los Angeles alone, the average is over 200 a month. Email from Megan Orlando, Director of Los Angeles Juvenile Court Mediation. A copy is available from the author.

3 For a comprehensive discussion of the relationship and differences between the juvenile and family courts, see Edwards, L., "The Relationship of Family and Juvenile Courts in Child Abuse Cases," *Santa Clara Law Review*, Vol. 27, No. 2, Spring, 1987, at pp 201-278.

4 Family Code section 3190 restricts counseling orders to one year and requires the trial court to make a number of findings that the juvenile court in the *Chantel* case did not make. It does not authorize open ended counseling orders.

5 In ruling the supreme court approved of the holding in *In re Jennifer R.*, 14 Cal. App. 4th 704, that former Civil Code section 4600.5(a) - now Family Code section 3080 - creating a presumption in favor of joint custody does not apply to juvenile proceedings.

6 The court specifically found that "application of Family Code section 391 to juvenile courts would produce results inconsistent with the purpose of juvenile court law." *In re Chantal S.*, (*supra* at p. 207).

7 Citing the cases of *In re Daniel C.H.* (1990) 220 Cal. App 3d 814, 837-838 and *In re Elizabeth M.*, (1991) 232 Cal. App. 3d 553, 569.

8 *In re Nicholas H.*, (2003) 112 Cal. App.4th 251, 270.

9 In Santa Clara County the practice is for any modification requests in Family Court within one year of dismissal of the juvenile dependency case to be heard by the juvenile dependency judge who created the order. As Judge Shawna Schwarz of that court stated, "a judge's interest in NOT having a big custody/visitation mess on his/her hands is great incentive to spend the time to do it right in the first place." (emphasis in the original) (email from Judge Schwarz to the author - available from the author).

10 *In re Chantal S.*, *supra* at pp 210-211.

11 *In re Michael W.*, 54 Cal.App.4th 190 (1997), *In re Roger S.*, 4 Cal.App.4th 25 (1992).

12 *In re T.H.*, 190 C.A.4th 1119 (2010)

13 *In re John W.*, 41 Cal.App.4th 961; 48 Cal.Rptr.2d 898 (1996).

14 *Id.* at p. 965.

15 For example in the case of *In re A.C.*, 197 Cal. App.4th 796 (2011), the clerk's transcript differed from the court's oral statements. There was no comprehensive order - instead a box was checked indicating that visitation was to be determined by the parents. The appellate court had to make a decision about the meaning of the "order".

16 Email from Judge Grilli. A copy is available from the author.

17 A number of family court judges around the state have complained to the author that the juvenile court custody orders they review are inadequate and create significant problems in the family court. It is as though the custody issues must start over from the beginning.

18 One method of developing more detailed juvenile custody orders is to have a check list of custody/visitation issues that the social worker will fill out and then the attorneys and the judge can discuss at the time of dismissal. In this way, the specific issue such as Father's Day, Mother's Day, holidays and other details of a visitation scheme can be addressed in juvenile court prior to dismissal. Santa Clara County has developed such a list. A copy is available from that court or from the author.

19 As Justice Dawson wrote in the case of *In re Mickel* (2011) 197 Cal. App. 4th 586, 18-19, "I write to encourage the superior courts to heed the words of the California Legislature in Welfare and Institutions Code section 350, subdivision (a)(2):

"Each juvenile court is encouraged to develop a dependency mediation program to provide a problem-solving for for all interested persons to develop a plan in the best interests of the child, emphasizing family preservation and strengthening. The Legislature finds that mediation of these matters assists the court in resolving conflict, and helps the court to intervene in a constructive manner in those cases where court intervention is necessary."

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