

Moving Cases from Juvenile to Family Court: How Mediation Can Help

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I. Introduction

Legal cases involving custody of children can arise in a number of different superior court divisions. Family court, probate court, juvenile dependency court, and juvenile delinquency court can each create a child custody order.¹ Both the probate and juvenile dependency courts can create a guardianship.² Moreover, cases involving the same child and family can move from one court to another. Just as a juvenile delinquency case can move to the juvenile dependency court,³ a probate guardianship case can move to juvenile dependency court,⁴ and a child's juvenile dependency case can move to the juvenile delinquency court. Similarly, a custody dispute in family court can move to the juvenile dependency court⁵ and a juvenile dependency case can move to family court.⁶

Moving cases between court divisions can create problems because the law differs from division to division. For example, the parties may be different in these courts.⁷ Some litigants may choose to move a case to another division where they believe the law and procedures favor their

¹ CAL. FAM. CODE § 3022 (West 2012); CAL. PROB. CODE §1510 (West 2012); CAL. WELF. & INST. CODE §§ 362.4, 727 (West 2012)

² CAL. WELF. & INST. CODE § 360 (West 2012) and CAL. PROB. CODE §§ 1510-1539 (West 2012).

³ CAL. WELF. & INST. CODE § 241.1 (West 2012).

⁴ CAL. PROB. CODE §1513(c) (West 2012); *In re* Guardianship of Christian G., 195 Cal. 4th 581, 602 (2011).

⁵ See CAL WELF. & INST. §§ 329, 331 (West 2012); *In re* M.C., 199 Cal. 4th 784, 709 (2011).

⁶ CAL. WELF. & INST. CODE §§ 361.2(b)(1), 362.4 (West 2012).

⁷ The social services agency is the moving party in juvenile dependency proceedings. CAL. WELF. & INST. CODE § 311(a) (West 2012). That agency is not a party in Family Court or Probate Court proceedings. Parents are entitled to counsel at state expense in juvenile dependency proceedings, but not in family or probate proceedings. CAL. PROB. CODE §1516.5 (West 2012); *Lassiter v. State Department of Social Services*, 42 U.S. 18 (1981); Leonard Edwards, *The Relationship between Juvenile and Family Court in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201 (1987); GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS: PRACTICE AND PROCEDURE § 217[6][b] (Matthew Bender 2011).

position.⁸ Judges and court administrative staff must be involved in these movements because a file may have to be moved and new parties noticed. On occasion, the court clerk may have legal responsibilities to create a new file and keep track of legal papers created in the juvenile court.⁹

Some of the most interesting and complex case movements in California child custody law involves juvenile dependency cases that are dismissed with 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.”¹⁰ The orders 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 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.¹¹ If there is no such pending proceeding, the clerk of the court opens a file, without a filing fee,

⁸ For example, some litigants may prefer to have their child custody cases appear in juvenile dependency proceedings where the parents will receive family reunification services. Others may prefer to avoid juvenile dependency court where there is a possibility of losing parental rights.

⁹ CAL. WELF. & INST. CODE § 362.4 (West 2012).

¹⁰ See GARY C. SEISER & KURT KUMLI, CALIFORNIA JUVENILE COURTS: PRACTICE AND PROCEDURE § 2.1272.127[1][a], practice tip at 2-340 (Matthew Bender, 2011). The California Fourth District Court of Appeal appeared to approve reluctantly the term “exit order.” In re John W., 41 Cal. App. 4th 961 (1996).

¹¹ CAL. WELF. & INST. CODE § 362.4 (West 2012).

and assigns a case number.¹²

Juvenile court judicial officers issue these orders frequently. Based on statistics from several courts, judicial officers make well over 300 such orders statewide each month.¹³

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.

II. The Importance of Juvenile Court Custody Orders

For Juvenile court custody orders differ from family court custody orders because they can condition parental access to the child in ways unavailable to the family court. This is understandable since these are typically some of the highest risk cases in the court system.¹⁴ They involve abused and neglected children who have been placed under the protection of the juvenile court. The juvenile court would have maintained jurisdiction over a particular 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 before the court. At the time of dismissal, the juvenile court has concluded that the child currently

¹² *Id.*

¹³ In Los Angeles alone, the average is over 200 a month. Email from Megan Orlando, Director of Los Angeles Juvenile Court Mediation (Sept. 5, 2011) (on file with author).

¹⁴ In a juvenile dependency case a juvenile court judge has found that a child has been abused or neglected as described in section 300 of the California Welfare and Institutions Code.

resides in a safe environment, but the court must acknowledge the danger of re-abuse or neglect. Thus, the juvenile court can make a custody order that conditions parental access to the child on a parent's future conduct.¹⁵

The California Supreme Court recognized the special nature of juvenile court custody orders in the case of *In re Chantal S.* In that case, the juvenile court judge found the child needed protection from the father because of his violence and because the mother was unable to protect the child.¹⁶ 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. The court delegated the decision concerning when visitation would occur to the father's therapist and the child's therapist.¹⁷ 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

¹⁵ For a comprehensive discussion of the relationship and differences between the juvenile and family courts, see Leonard Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201 (1987).

¹⁶ *In re Chantal S.*, 13 Cal. 4th 196, 201 (1996). The trial court also found that father's alcohol abuse "significantly impaired his ability to parent Chantal," that she was at substantial risk of "suffering severe emotional damage as revealed by severe anxiety and withdrawal towards her father," and that she had been exposed to domestic violence during visits with her father. *Id.* at 212.

¹⁷ *See id.* at 202.

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.¹⁸

The father appealed the trial court's orders arguing that Family Code section 3190¹⁹ 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 with regards to all issues, noting that dependency proceedings are special proceedings governed by their own set of rules and statutes, and not necessarily by the Family Code.²⁰ The Court stated that family court is a part of the superior court performing its duties under the Family Code.²¹ On the one hand, family court presumes the parents to be fit and capable of raising their children.²² 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."²³ Thus, the presumption of parental fitness that underlies custody law in family court does not apply to dependency cases decided in 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 court gives the parent notice and an opportunity

¹⁸ *In re Chantal S.*, 13 Cal. 4th at 202.

¹⁹ 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 *Chantal* case did not make. It does not authorize open ended counseling orders.

²⁰ *In re Chantal S.*, 13 Cal. 4th at 201.

²¹ *Id.*

²² CAL. FAM. CODE § 3061 (West 2012).

²³ *In re Chantal S.*, 13 Cal. 4th at 201.

to be heard.²⁴ For example, the parents have the right to a contested hearing where the court may find a particular order is necessary to protect the child and serve the child's best interest. The court must base its determination on competent evidence, and must draw the order narrowly to respect both the parent's rights and the child's needs.²⁵ In making a custody order, the juvenile court is not bound by the presumption in Family Code section 3080 for joint custody,²⁶ 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.²⁷

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 issue that might arise in juvenile court proceedings. In *Chantal S.*, the Supreme Court specifically addressed sexual abuse therapy holding that the court could create a custody order conditioning one parent's contact with the child on counseling for an indefinite period.²⁸ In *Nicholas H.*, the Court of Appeals 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.²⁹ 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.

²⁴ *Id.*

²⁵ *Id.* at 210-11.

²⁶ In ruling the supreme court approved of the holding in *In re Jennifer R.*, 14 Cal. App. 4th 704 (1993), 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.

²⁷ *Id.*, 13 Cal. 4th at 207 (the court specifically found that “application of Family Code section 3910 to juvenile courts would produce results inconsistent with the purpose of juvenile court law.”)

²⁸ *Id.* at 208 (citing the cases of *In re Daniel C.H.*, 220 Cal. App. 3d 814, 837-38 (1990), and *In re Elizabeth M.*, 232 Cal. App. 3d 553, 569 (1991).

²⁹ *In re Nicholas H.*, 112 Cal. App.4th 251, 270 (2003).

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. Careful attention to the potential orders that a juvenile court can create at the time of dismissal could result in earlier dismissal of juvenile court jurisdiction.

III. 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 arises depending on the transfer process and depending on whether the juvenile court custody order is available to the family court judge. On occasion, the juvenile court custody order never reaches the family court file. Even if it does, the family court judge may not be aware of its existence within the file.³⁰

To address these problems, some family courts mark 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.³¹ 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

³⁰ The author is aware of these problems from personal experience as a judge in both family and juvenile court and based on discussions with family and juvenile court judges.

³¹ CAL. WEL. & INST. CODE § 827.10 (West 2012).

judge for the custody hearing.³² 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 expose the child to further abuse or neglect. After dismissal of the juvenile court case, the parents will occasionally 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, 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 the Authority of Juvenile Court Custody Orders

Second, some family court judges have not understood the authority of juvenile court custody orders. For a number of years, some family court and appellate judges held that they were *pendent lite* orders and not equivalent to permanent custody orders.³³ However, juvenile court custody orders are not similar to *pendente lite* orders under family law. Instead, they are equivalent to a permanent custody order.³⁴ As such, a

³² 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." E-mail from Judge Schwarz to author (Oct. 26, 2011) (on file with author) (emphasis in the original).

³³ See *In re John W.*, 41 Cal. App. 4th 961, 970-73 (1996).

³⁴ *Speelman v. Superior Court*, 152 Cal. App. 3d 124, 129 (1983).

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.³⁵ 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 388.³⁶ 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 its findings based upon competent evidence, the order is “tailored as narrowly as possible to respect the parent’s rights and yet still protect the child,” the order will be considered a final judgment.³⁷ Consequently, failure to provide the parties an opportunity to present evidence will render the juvenile court custody order null and void.³⁸ This failure may result in the case returning to the juvenile court for a full custody hearing.³⁹

There are limitations on the authority of some juvenile court custody orders. In one case, the juvenile court judge ordered that the juvenile court custody order not be modified

³⁵ *Id.* (emphasis added).

³⁶ GARY C. SEISER & KURT KUMLI, *supra* note 10, at 2.127[1][a].

³⁷ *In re Chantal S.*, 13 Cal. 4th 196, 210-11 (1996).

³⁸ *In re Michael W.*, 54 Cal. App. 4th 190 (1997); *In re Roger S.*, 4 Cal. App. 4th 25 (1992).

³⁹ *In re T.H.*, 190 Cal. App. 4th 1119 (2010).

for approximately a year.⁴⁰ On appeal, the appellate court declared this an unwarranted extension of juvenile court jurisdiction. Further, the appellate court noted that the juvenile court had 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.”⁴¹ The correct test, noted the appellate court, is the best interests of the child.⁴² 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.⁴³ 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.⁴⁴

Judge Grilli’s comments are understandable as social workers preparing recommendations for the juvenile court

⁴⁰ *In re John W.*, 41 Cal. App. 4th 961 (1996).

⁴¹ *Id.* at 965.

⁴² *Id.*

⁴³ 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”.

⁴⁴ Email from Judge Grilli to author (Aug. 27, 2011) (on file with author). Also see the comment of Judge Shawna Schwarz. Schwarz, *supra* note 32.

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.⁴⁵ The parents understandably will have trouble understanding the details of such an order, including vacations, holidays, Father's and Mother's Day, transportation, and related matters. When the parents ask the family court to modify the order to settle disputes about custody and visitation, the judge must refer the matter to mediation and then holding a contested custody hearing should mediation fail.⁴⁶ Consequently, the failure to provide the family court with a detailed custody and visitation plan leads to more litigation, court time, and further expenditure of court resources.⁴⁷

Parents are often more cooperative in the juvenile court. Their main concern is to dismiss juvenile dependency in order to remove the threat of losing their parental rights. They are often willing to come to an agreement on many issues just so the court will transfer the case out of juvenile court. Parents usually have attorneys to assist them in juvenile court, while a high percentage of family litigants are unrepresented. Additionally, their child has legal representation in juvenile court as does the social worker. Juvenile courts should take advantage of this opportunity to

⁴⁵ 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. They state that they find it necessary to start over from the beginning in order to create a comprehensive custody order.

⁴⁶ The family court judge will not decide any custody or visitation issue until the parties have participated in mediation. CAL. FAM. CODE § 3170.

⁴⁷ 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.

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assist the parents in reaching a comprehensive mediated custody agreement before the court dismisses the juvenile court case.

IV. How Dependency Mediation Can Resolve These Issues

The most successful and efficient approach to comprehensive juvenile court custody orders has been the use of dependency mediation at the time the dependency case is dismissed.⁴⁸ Dependency mediation can help parents reach comprehensive custody orders that resemble those that result from mediated agreements in family court.⁴⁹ The family court judge will not have to start over if the juvenile court has completed a detailed custody order.

This approach assumes that dependency mediation is available to the juvenile court. The legislature has encouraged the development of dependency mediation program,⁵⁰ and twenty-three courts throughout California have such programs, usually borrowing mediators from the Family Court Services mediation staff.⁵¹ While all contested issues in juvenile dependency cases can be resolved using dependency mediation,⁵² most judges and practitioners believe that, at a

⁴⁸ This is the opinion of family court judges such as Judge Grilli. Grilli, *supra* note 44.

⁴⁹ “Dependency mediation provides a non-adversarial setting in which a mediator assists the parties in reaching a fully informed and mutually acceptable resolution that focuses on the child’s safety and best interest, and the safety of all family members.” Cal. Rules of Court 5.518(b)(1).

⁵⁰ CAL. WELF. & INST. CODE § 350(a)(1) (West 2012).

⁵¹ *Juvenile Dependency Mediation in California: An Overview*, CFCC RESEARCH UPDATE (Ctr. for Families, Children & Cts., Admin. Off. of Cts., San Francisco, Cal.), Feb. 2012, http://www.courts.ca.gov/documents/JDM_Research_Update_Final.pdf.

The survey found that of the 23 dependency mediation programs, 15 of the programs used family court services mediators.

⁵² As Justice Dawson wrote in the case of *In re Mickel O.*, 197 Cal. App. 4th 586, 623 (2011) “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

minimum, mediation should be used when juvenile custody orders are 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.⁵³ It will help guide parties after the juvenile case has been dismissed, and since they assisted in the creation of the plan, it will have a greater likelihood of success.⁵⁴ 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.

V. Conclusion

The creation of juvenile court custody orders presents a number of issues for the superior court. These orders 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 (1) a failure to understand the nature of the juvenile court custody order, (2)

program to provide a problem-solving forum 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.”

⁵³ “Dependency mediators provide a forum for all interested persons to develop a plan focused on the best interest of the child, emphasizing family preservation and strengthening and the child's need for permanency.” Cal. R. Ct. 5.518(c)(1)(C).

⁵⁴ Leonard P. Edwards, *Mediation in Child Protection Cases*, 5 J. CENTER FOR FAMILIES, CHILD. & THE COURTS 57, 64-65 (2004).

the family court judge's inability to know that the juvenile court order exists, (3) the location of the order into the family court file, and (4) 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. They will be able to assist parents create a detailed custody order 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 transfers the custody order 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. The family court judge should also have access to the juvenile court file when hearing a custody modification petition or be able to refer the case back to the juvenile court judge for further hearing. The child's attorney from juvenile court can 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 in juvenile court where the parties are represented and more likely to be cooperating with one another.

