

#30

10/31/69

Memorandum 69-141

Subject: Study 30 - Custody Jurisdiction

This Memorandum provides background information on the status of Study 30 (Custody Jurisdiction). Exhibit I sets forth the original statement requesting authority to study this topic.

In 1956, the Commission retained a research consultant to prepare a background study on the topic. In 1957, the study was submitted, but it proved to be inadequate. The study has not been revised and is now both inadequate and obsolete.

From time to time since 1957, the Commission has determined that this topic should be continued on the agenda but that preparation of a research study on the topic should be deferred because other topics were given priority and because the area of family law had come under intense study by both gubernatorial and legislative committees.

I made a quick review of the problems discussed in the statement requesting authority to study this topic and discovered that the Family Law Act of 1969 eliminated some of the problems. I then wrote to Professor Herma H. Kay (Boalt Hall), who is an expert in family law, and asked her whether the remaining problems in this topic were of any significance. Her reply (attached as Exhibit II) confirms that the 1969 Family Law Act has partially eliminated the problems and expresses the view that this area of the law nevertheless remains troublesome.

It appears that the topic is one that merits study by the Commission. Moreover, it is one that would be ideal for a research consultant. We would suggest that we use Professor Bridget Bodenheimer, presently at the Davis Law School, as the research consultant (if she is willing) at a

compensation of \$1,500 when we are in a position to go ahead on the research study.

Unfortunately, we do not have any funds at this time to finance this study. We are attempting to obtain enough funds to finance a study of the procedural aspects of eminent domain law and are having difficulty in doing that. However, we would give the custody topic next priority following condemnation in allocating research funds for 1969-70 in the unlikely event we can effect sufficient savings to finance the study by not filling vacant positions, cutting down on temporary secretarial and student legal assistance, and the like. Because of the importance of this topic, we would give it this relatively high priority. In the meanwhile, the staff will attempt to persuade a law review to write an article on the topic with the hope that we can use the article as a research study. Perhaps the Commission would approve a contract with Professor Bodenheimer for \$1,500 if she is willing and we can obtain the necessary funds.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Statement requesting authority to study custody jurisdiction.

Topic No. 12:

A study to determine whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised.

There are in this State various kinds of statutory proceedings relating to the custody of children. Civil Code Section 198 provides that in actions for divorce or separate maintenance the court may make an order for the custody of minor children during the proceeding or at any time thereafter and may at any time modify or vacate the order. Civil Code Section 199 provides that, without application for divorce, a husband or wife may bring an action for the exclusive control of the children; and Civil Code Section 214 provides that when a husband and wife live in a state of separation, without being divorced, either of them may apply to any court of competent jurisdiction for

¹ 37 Cal. 2d 610, 236 P. 2d 381 (1951).

² There is no equivalent provision for persons sentenced to the county jail as punishment for a public offense.

³ CAL. PEN. CODE Section 2686.

custody of the children. Furthermore, anyone may bring an action under Probate Code Section 1440 to be appointed guardian of a child.²⁵ These various provisions relating to the custody of children present a number of problems relating to the jurisdiction of courts, for example: (1) Do they grant the courts jurisdiction to afford an adequate remedy in all possible situations? (2) When a proceeding has been brought under one of the several statutes does the court thereafter have exclusive jurisdiction of all litigation relating to the custody of the child? (3) Do the several statutes conflict or are they inconsistent as to whether the court awarding custody under them has continuing jurisdiction to modify its award?

(1) There appear to be at least two situations in which the only remedy of a parent seeking custody of a child is through a guardianship proceeding under Probate Code Section 1440. One is when a party to a marriage obtains an *ex parte* divorce in California against the other party who has custody over the children and resides with them in another state. If the second party later brings the children to California and becomes a resident of a county other than the county in which the divorce was obtained, the only procedure by which the first party can raise the question of custody would seem to be a guardianship proceeding under Probate Code Section 1440 in the county where the children reside. Although the divorce action remains pending as a custody proceeding under Civil Code Section 138, the court cannot enter a custody order because the children are residents of another county.²⁶ A custody proceeding cannot be brought under either Section 199 or Section 214 of the Civil Code because the parents are no longer husband and wife. Another situation in which a guardianship proceeding may be the only available remedy is when a foreign divorce decree is silent as to who shall have custody of the children. If the parties later come within the jurisdiction of the California courts, it is not clear whether the courts can modify the foreign decree to provide for custody and, if so, in what type of proceeding this can be done. It would appear desirable that some type of custody proceeding other than guardianship be authorized by statute for these and any other situations in which a guardianship proceeding is now the only available remedy to a parent seeking custody of his child.

(2) The various kinds of statutory proceedings relating to custody also create the problem whether, after one of these proceedings has been brought in one court, another proceeding under the same statute or under a different statute may be brought in a different court or whether the first court's jurisdiction is exclusive. This question can be presented in various ways, such as the following: (a) If a divorce court has entered a custody order pursuant to Civil Code Section 138, may a court in another county modify that order or entertain a guardianship proceeding under Probate Code Section 1440, or—assuming the divorce was denied but jurisdiction of the action retained—entertain a custody proceeding under Civil Code Sections 199 or 214? (b) If a court has awarded custody under Civil Code Sections 199 or 214 while the parties are still married, may another court later reconsider the question in a

²⁵In addition, the Juvenile Court Law provides a procedure for declaring a minor a ward of the court. CAL. WEL. & INST. CODE SECTIONS 155-171.
²⁶Thcomb v. Superior Court, 230 Cal. 34, 29 P. 2d 306 (1934).

divorce proceeding under Civil Code Section 138 or a guardianship proceeding under Probate Code Section 1440? (c) If a guardian has been appointed under Probate Code Section 1440, may a divorce court or a court acting pursuant to Civil Code Sections 199 or 214 later award custody to the parent who is not the guardian?

A few of these matters were clarified by the decision of the California Supreme Court in *Greene v. Superior Court*,⁶⁷ holding that a divorce court which had awarded custody pursuant to Civil Code Section 138 has continuing jurisdiction and a court in another county has no jurisdiction to appoint a guardian of the children under Probate Code Section 1440. The Supreme Court stated that the general objective should be to avoid "an unseemly conflict between courts"⁶⁸ and indicated that a proper procedure would be to apply to the divorce court for a change of venue to the county where the children reside.⁶⁹

It is not clear whether the exclusive jurisdiction principle of the *Greene* case either will or should be applied in all of the situations in which the question may arise. An exception should perhaps be provided at least in the case where a divorce action is brought after a custody or guardianship award has been made pursuant to Civil Code Sections 199 or 214 or Probate Code Section 1440, on the ground that it may be desirable to allow the divorce court to consider and decide all matters of domestic relations incidental to the divorce.⁷⁰

(8) There appear to be at least two additional problems of jurisdiction arising under the statutory provisions relating to custody of children. One is whether a court awarding custody under Civil Code Section 214 has continuing jurisdiction to modify its order. Although both Sections 138 and 199 provide that the court may later modify or amend a custody order made thereunder, Section 214 contains no such provisions. Another problem is the apparent conflict between Section 199 and Section 214 in cases where the parents are separated. Section 199 presumably can be used to obtain custody by any married person, whether separated or not, while Section 214 is limited to those persons living "in a state of separation." The two sections differ with respect to the power of the court to modify its order and also with respect to whether someone other than a parent may be awarded custody.

Memo 69-141 EXHIBIT II
UNIVERSITY OF CALIFORNIA, BERKELEY

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO



SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

October 28, 1969

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford University School of Law
Stanford, California 94305

Dear Mr. DeMouilly:

In my view, the Family Law Act of 1969 alleviates the problems discussed in Topic No. 12 only in part. Section 214 was repealed and not re-enacted. Section 199 was repealed, but was re-enacted as new section 4603. There is a slight change in language: section 199 permitted either parent to bring an action for the exclusive "control" of the children of the marriage; section 4603 says the action is one for exclusive "custody." Whether this word change will ultimately be held to expand the section is unknown to me. I know of no specific legislative history to account for the change.

The guardianship sections were not changed at all. Old section 138 has now become section 4600. The changes in 4600 have to do with the standard to be applied in awarding custody, not with jurisdiction. My advice would be that whatever problems existed prior to the Family Law Act of 1969, apart from problems arising from old section 214, are still in existence.

I assume that Topic No. 12 does not extend to interstate custody jurisdiction problems. But if you were able to consider that problem as well, and if you have not already seen it, you might take a look at the Uniform Child Custody Jurisdiction Act, approved by the Commissioners on Uniform State Laws in 1968. The final draft was done by Professor Bridget Bodenheimer, presently at the Davis Law School, and I think it is a sensible approach to this troublesome problem.

If I can be of further help to you, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Herma H. Kay".

Herma H. Kay
Professor of Law