#30 11/18/70

Memorandum 70-116

Subject: Study 30 - Custody Jurisdiction

In 1956, the Law Revision Commission was authorized to study whether the law respecting jurisdiction of courts in proceedings affecting the custody of children should be revised. We retained Brigitte M. Bodenheimer, Research Professor of Law, University of California, Davis, to prepare a background research study. A copy of her study is attached.

The staff believes that the study is an excellent one. You will need to read it thoughtfully prior to the meeting.

We do not attempt in this memorandum to summarize the study or to outline the policy questions because to do so would merely duplicate the fine job the consultant has done in stating her general conclusions and specific recommendations. Beginning on page 53, the consultant summarizes her general conclusions. Specific recommendations are found on pages 63-69. (Footnotes to the specific recommendations refer you back to the pertinent portion of the study where the particular problem is discussed in more detail.)

At the meeting, we plan to discuss the consultant's general conclusions and then go to the specific recommendations and make the tentative policy decisions needed so that the staff can commence drafting any needed legislation.

At some point, we will have to bring in the adoption agencies (public and private) if we plan to provide any remedy for foster parents who have provided long-time care to children released to adoption agencies but not put out for adoption. This recommendation of the consultant might be extremely controversial. The staff thought, however, that the Commission should initially review the consultant's report before any general announcement is made concerning this study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

#30 11/17/70

THE MULTIPLICITY OF CHILD CUSTODY PROCEEDINGS--

PROBLEMS OF CALIFORNIA LAW*

*This study was prepared for the California Law Revision Commission by Brigitte M. Bodenheimer, Research Professor of Law, University of California, Davis. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

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THE MULTIPLICITY OF CHILD CUSTODY PROCEEDINGS— PROBLEMS OF CALIFORNIA LAW

Brigitte M. Bodenheimer*

California courts and attorneys have for some time been painfully aware of the harm done to children through protracted or repeated litigation concerning their custody.[1] Although some steps have been taken to improve the situation,[2] much remains to be done. It is not uncommon for a young child to be drawn into multiple court proceedings concerning the most elementary needs of his existence - a secure place to call home and a continuing attachment to adult persons.[3]

Richard's case may serve as an illustration. When he was one year old, his custody was awarded to his mother in a divorce proceeding. A year later the decree was modified because of the mother's severe alcoholism, and Richard's custody was given to his father. After some turbulent months with his father, a neighbor referred the boy to the juvenile court where he was declared a dependent child because of his father's mental instability and drug addiction.[4] From then on Richard lived in several foster

homes in succession. When he was four years old, an aunt who had heard of Richard's plight petitioned the juvenile court for his custody, and after investigation by the probation staff Richard was placed in her home. After an episode with his mother who had taken him from his new home, the probate court appointed the aunt guardian of the boy. In a subsequent proceeding Richard was declared free from the custody and control of his parents, and finally, when he was six years old, adoption proceedings were instituted and he was legally adopted by his aunt and her husband. This is a rather "normal" case, ~~un~~not complicated by habeas corpus proceedings, time consuming appeals, or the child's removal to another state and legal proceedings there.

This article will examine the extent to which the sheer variety of available procedures and jurisdictional problems connected with them contribute to the uncertainties which plague the lives of innumerable children who depend upon the courts for basic decisions about their future; also, whether the judicial process itself is unduly burdened by the multiplicity of these proceedings. The article will also consider

whether in the midst of this multitude of remedies there may nevertheless be gaps in the law which leave some legitimate claims or grievances without adequate legal recourse. The study will not deal with the ~~appropriateness of~~ standards and guidelines for custody decisions which have recently been the subject of extensive discussion[5] in connection with the enactment of the child custody provisions of the Family Law Act of 1969.[6] Major problem areas will be pointed out and recommendations will be made to alleviate or eliminate them.

I. THE VARIETY OF CUSTODY PROCEEDINGS

The Family Law Act declares that in "any proceeding where there is at issue the custody of a minor child",[7] certain rules are to apply. Despite this call for unity in basic custody law, California continues to have three major bodies of law which have grown side by side and at different periods in history, concerned with the custody of children, governed by separate sets of provisions contained in three California Codes and administered in three different departments of the superior courts. These bodies of law are the law of guardianship of the

person,[8] the law of juvenile dependency,[9] and what may be termed general custody law applied most frequently in marriage dissolution[10] proceedings.

All three procedures have the common purpose to obtain a judicial determination as to where and with whom a child should live when something has occurred to disrupt family unity or balance. "The same basic question is before the court whether a guardianship proceeding or a custody proceeding is presented," Professor Armstrong said;[11] and the same is true for juvenile court proceedings which declare a child to be a dependent child and give custody to a parent, relative, foster parent or an agency.[12] In fact, we find divorce custody law borrowing statutory principles and precedents from guardianship law and vice versa,[13] and we find dependency and neglect cases relying on divorce or guardianship decisions.[14] The circumstances which bring the child before the court may differ somewhat in the three proceedings, but the core question is the same.[15] If we add the special cause of action of a spouse to obtain exclusive custody without marriage dissolution,[16] habeas corpus to obtain physical custody of a child,[17]

suits in equity to settle custody controversies,[18] proceedings for freedom from parental custody and control,[19] and adoption proceedings,[20] there are eight different legal remedies all of which raise the basic custody issue.

Although the courts have developed some common standards to guide them in all of these proceedings and the Family Law Act has codified some of these standards,[21] the unrepealed statutory law contains many divergencies in substantive law and procedure. To name some of the major discrepancies, the Family Law Act instructs the judge to consider a child's preference if he is old and mature enough;[22] but the Probate Code permits a 14-year old to nominate his own guardian,[23] and adoption law requires the consent of a child over twelve.[24] The Family Law Act sets up a list of priorities; but guardianship law has different priorities.[25] In dependency proceedings, nonagency adoptions, and proceedings to terminate parental rights, custody investigations are required;[26] but in marriage dissolution and other cases under the Family Law Act investigations are discretionary with the court;[27] and in guardianship proceedings custody investigations are mandatory

in the case of a child two years of age or under if the petitioner is not a relative, and are otherwise discretionary.[28] The investigations are conducted by county probation officers and in some cases by domestic relations investigators on the court staff;[29] but most nonagency adoptions are investigated by the State Department of Social Welfare or a licensed county adoption agency.[30]

Further important differences are that in divorce proceedings husband and wife are normally the only parties before the court,[31] whereas guardianship proceedings, suits to terminate parental rights, and dependency cases may be initiated by any interested person[32] ~~and may subsequently include others besides the original petitioners.~~ And finally, provision for the appointment of counsel for the child independent of legal representation of his parents is made in dependency proceedings and actions to terminate parental rights,[33] whereas the child has no attorney in any of the other custody proceedings.

In addition to section 4600 of the Family Law Act which will unify the guiding principles and priorities underlying

custody decisions to some extent[34], there is one provision in the law, section 917.7 of the Code of Civil Procedure, which applies to all custody proceedings. It provides that an appeal does not ordinarily stay proceedings "as to those provisions of a judgment or order which award, change or otherwise affect the custody, including the right to visitation, of a minor child in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding.. ."[35] There are large areas of custody law which lend themselves to equal unification and simplification.

II. PROBLEMS OF JURISDICTION

With eight proceedings to determine custody, there are naturally occasions when an attorney may initially select one of several concurrent remedies. "It is quite possible to have a choice between habeas corpus, guardianship or dependency proceedings, for example."[36] And often a variety of proceedings may be used in succession, as is demonstrated by the illustrative case at the beginning of this article. Does this mean duplication of actions, attempts of the loser in a custody

battle to obtain custody in another county, and perhaps contradictory awards? There was a time when serious conflicts of jurisdiction could and did arise within California in inter-county cases as well as between several departments of a superior court.[37] The problem is particularly acute in custody cases because jurisdiction once acquired is a continuing one beyond the time of the original judgment in most custody proceedings. Great strides have been made, particularly within the last two decades, in ironing out these jurisdictional problems, but some questions have remained unresolved and new ones have arisen.

A. Resolved Questions

It is now clear that the continuing jurisdiction of a divorce court over the custody of children is normally exclusive and that no other court or court department (except a juvenile court) has jurisdiction to modify the custody decree or to appoint a guardian.[38] This rule was laid down in Greene v. Superior Court,[39] a case in which a former wife sought to have a divorce custody award changed by applying to the probate court

of another county for appointment as guardian. Two practical suggestions of the Court are as significant as the rule itself: (1) "If change of residence within the state makes it desirable that the court of another county have jurisdiction to modify the decree, the objective may be attained by a change of venue."[40] And (2) "If it is still necessary or convenient that a guardian be appointed, despite the custody award . . . , conflict in jurisdiction may be avoided by bringing proceedings in the court having jurisdiction over the original custody decree."[41] The cases cited by the Court in connection with the second proposition suggest that once divorce and guardianship proceedings are pending in two court departments of the same county, there is a good chance that conflict can be avoided, particularly through the device of consolidation of actions.[42]

As this second suggestion implies, the Greene rule could not settle all potential conflict between divorce and guardianship jurisdiction, especially in instances when persons not parties to the divorce proceeding apply for guardianship.[43] One major conflict of this type was largely set to rest by

Guardianship of Kentera.[44] In this case the son of divorced parents, when he reached the age of 14, sought to have his grandmother appointed as his guardian to replace his mother who had custody under the divorce decree.[45] A 14-year old, the court declared, must make out an exceedingly strong case of necessity or convenience before a guardianship court will permit his nominee to be appointed guardian to replace a parent. Under the rule of this case a probate court will normally refuse to appoint a guardian in such a situation since the guardianship "provisions were not intended to upset the normal relationship of parent and child" or to allow "the 14-year old minor to withdraw from the family circle at his whim."[46]

It is also settled law that once a probate court has appointed a guardian of the person, that court retains continuing and exclusive jurisdiction to the extent that no other court has jurisdiction in habeas corpus or guardianship proceedings to interfere with the guardian's custody.[47] The question whether this continuing jurisdiction of the probate court also excludes subsequent jurisdiction of a divorce court to determine

custody remains unanswered.[48]

Further, it is clear ~~now~~ that guardianship proceedings may coexist with independent adoption proceedings[49]; that in the case of agency adoptions guardianship is excluded under the rule of Henwood[50] while agency procedures are running their proper course, but a guardian may be appointed if the agency is unfit or adoption is improbable resulting in "continued waiting-room custody" of the agency[51]; and that an order of adoption supplants a guardian of the person.[52]

The juvenile courts occupy a preferred position.[53] Although a divorce court or probate court has made a custody order, a Juvenile Court department of a superior court may nevertheless assume jurisdiction to declare a child a dependent child and may issue a custody order inconsistent with the prior decree.[54] Thus juvenile courts have exclusive and supervening jurisdiction in custody cases.[55]

B. Remaining Questions

1. Guardianship Petitions by Persons not Parties to Divorce Proceedings.- As has been mentioned, the Greene rule

does not answer the question whether a probate court may assume jurisdiction to consider the guardianship petition of a third person while a divorce court has initial or continuing jurisdiction over the custody of the child.[52] A foster parent, for example, in whose home a child has lived for a number of years before and after custody was awarded to one of the parents in a marriage dissolution proceeding may seek an appointment as guardian.[57] This question is of great practical importance, especially since the Family Law Act has codified the law with respect to custody awards to "nonparents" under certain conditions.[58]

Since hurried divorce judges often give custody to either parent without being informed by either side that the child does not or will not live with the custodial or the other parent, it is necessary to have a proceeding or procedural device which will bring the facts before the court. The outsider may turn to the juvenile court and have the child declared a dependent child or he may bring guardianship proceedings. If he approaches the juvenile court there will be no conflict of jurisdiction since the juvenile court's jurisdiction supersedes that of the

divorce court. If he seeks letters of guardianship which award him custody of the child, there would be a direct contradiction between the order of the probate court and the divorce custody decree. However, this appears to be one of the situations referred to in Greene when a probate court may find it necessary or convenient to appoint a guardian despite the divorce court's prior jurisdiction.[57] There is no question that under present law both courts have jurisdiction and that conflicting custody decrees could result.

This type of conflict is generally avoided today by consolidation of the two proceedings in one of the two court departments after consultation and agreement among the judges of the departments concerned.[58] When inter-county cases are involved, a combination of change of venue and consolidation of actions would be required.[59]

While jurisdictional conflict is avoided in this fashion, this 3-step procedure of divorce, guardianship petition, and consolidation of actions is by no means the best solution of the over-all problem which is not solely one of jurisdiction.

In the first place, the priorities for child custody established by the Family Law Act differ from those of the Probate Code. For example, relatives are preferred under guardianship law whereas all nonparents are in the same category under section 4600 of the Civil Code.[62] Secondly, it is not one of the central purposes of guardianship proceedings under the Probate Code to settle custody controversies between divorced parents and third persons. The Probate Court is primarily concerned with property matters and guardianships of the estate and only incidentally with guardianship of the person. And finally and most important, this mode of proceeding is round-about, wastes court time and money, and causes children to be moved from one home to another perhaps more than once unnecessarily[63] and postpones the time when they can be settled in one stable surrounding.

A better solution seems to be in the making under the Family Law Act as it has been amended in 1970.[64] The Family Law

Rules issued under the original Family Law Act had prescribed with respect to marriage dissolution that "the only persons permitted to be parties to the proceedings, are the husband and wife;"[65] and further that if any other person claims an interest in the controversy, "the court may reserve jurisdiction over the particular issue until such time as the rights of such person and the parties to the proceeding under the Family Law Act have been adjudicated in a separate action or proceeding."[66] Under these rules a foster parent would have had to institute a separate action to assert a custody claim under section 4600(b) of the Family Law Act. Fortunately, the 1970 Legislature added a section to that Act which provides that "[T]he court may order that a person who claims an interest in a proceeding under this part be joined as a party to the proceeding in accordance with rules adopted by the Judicial Council pursuant to Section 4001."[67] Depending upon the nature of the rules issued under this provision, it is possible that third persons claiming custody can become parties to a divorce proceeding so that the custody issue can be settled without

unnecessary delay and without additional separate litigation.

This does not mean that the interlocutory judgment or even the final judgment of marriage dissolution must necessarily be postponed until the custody issue is settled. Although a speedy custody determination is essential, a court can, if necessary, reserve a decision on this matter beyond the initial and the final judgment.[68]

The amendment to the Family Law Act does not solve the whole problem, however. As has been mentioned before, present marriage dissolution procedures which are highly routinized do not always alert the court to the possibility that nonparents may have physical custody of the child or may claim custody. If the custody issue is to be settled at the earliest possible time and in the earliest possible proceeding - which in the majority of cases is the divorce proceeding - additional regulation by rule and legislation is needed. Husband and wife should be required to enter on their petition and response form with whom the child is living, and whether there are other persons who claim custody (including visitation

rights) with respect to the child.[69] The persons so named should be notified of the pendency of the action involving custody and be given an opportunity to assert a claim to custody if they so desire. If rights to custody or visitation are claimed, it should be mandatory for the court to join the claimants as parties.[70] Furthermore, it should be possible for a person who for any reason has not been notified or joined, to be made a party by way of intervention.[71] Finally, it should be made clear that parties can be added at any time before the final hearing on the custody issue, and again after judgment while the case is held under the continuing jurisdiction of the divorce court.[72]

2. Guardianship Followed by Divorce Proceedings.- The reverse constellation that a child already has a guardian of the person when marriage dissolution proceedings are begun is not as common, but does occur occasionally. Usually when there are parents(who are the "natural" guardians of the child)a probate court will not find it necessary or convenient to appoint a guardian of the person, as distinguished from a guardian of the

estate.[73] But there are such cases, and the question has never been answered whether the guardianship court's continuing jurisdiction is exclusive under an extension of the Greene rule barring subsequent jurisdiction of a divorce court over the custody issue.

The courts have wisely avoided the issue. In Guardianship of Walls,[74] for example, a father had been appointed guardian of his daughter when the mother was confined in a sanitarium. In a divorce proceeding which followed the mother petitioned for custody of the girl and simultaneously applied to the probate court for removal of her husband as guardian. The two proceedings were consolidated,[75] but in fact the probate judge yielded jurisdiction to the divorce judge by terminating the guardianship as no longer necessary. The judge reasoned, among other things, that the question of custody could be better determined in the divorce court where custody could be considered along with the question of child support.[76]

It would seem to be desirable, as this case suggests, that the divorce court have the opportunity under ~~these~~ such circumstances

to consider the entire marital situation, including the custody of children. On the other hand, it is not in the interest of children that the prior custody inquiry in the guardianship proceedings be disregarded and probate court jurisdiction be simply ousted when marriage dissolution proceedings begin. It is necessary in child custody law to have a continuity of proceedings to the fullest extent feasible to afford the adjudicating court the benefit of any prior findings and background information available in a court file.[77] The best solution would therefore be that the two proceedings be consolidated, that the divorce court assume jurisdiction of the consolidated case and that that court approach the custody question as if it had before it a motion for modification of a custody award. The divorce court would ask itself the question, whether considering the custody decision made by the guardianship court and the child's settlement in the guardian's home, there are any facts brought to light in the divorce proceedings by custody investigation or otherwise which so change the situation that the guardian should be removed and custody be awarded to another person.

This approach would be in accord with a growing trend of opinion in legal and non-legal circles that custody changes should not be made except for ~~very~~ serious reasons bordering on necessity.[78]

If both proceedings are pending prior to any custody decree or guardianship appointment, again it would be desirable to consolidate the two in the domestic relations department of the court even though the guardianship petition may have been first in time of filing. And if the proceedings, whether newly pending or held under continuing jurisdiction, are in the courts of two different counties, consolidation would require prior transfer of the case to the county where the marriage dissolution is pending.[79]

There are two additional reasons why it is suggested that cases of this kind be consolidated and heard in the divorce court rather than the probate department. In the first place, jurisdiction and procedure of the superior courts sitting in matters of probate are limited by the provisions of the Probate Code. The probate courts have no powers except those specifically enumerated in that Code.[80] ~~They do not have power to hear any~~

~~other matters involved in divorce proceedings besides the custody issue~~. The ordinary departments of the superior court, however, ~~which~~ seem to have more leeway to exercise general jurisdiction may handle certain matters ordinarily reserved to the probate departments, especially when these are necessary connected with issues under the jurisdiction of the particular department.[3] Secondly, as has been stated before, it is somewhat out of character for a probate court to assume the functions of a full-fledged domestic relations or custody court. Although guardianship proceedings are used at times to adjudicate all-out custody contests for want of another remedy, guardianship of the person is a matter incidental rather than central to the main functions of a busy modern probate court.

3. Exclusive Custody Without Marriage Termination Followed by Divorce or Guardianship Proceedings.- Another unanswered question is whether a court which issued a custody decree under section 4603 of the Civil Code granting custody to one parent without divorce retains exclusive jurisdiction to modify the decree notwithstanding a subsequent divorce proceeding.

This situation is similar to the one just discussed, a

guardianship appointment followed by divorce proceedings, except that the two actions will be pending in the ordinary departments - often the same department - of the superior court.

Again, the best answer would seem to be that the two proceedings be consolidated and that the divorce court consider the custody question from the viewpoint of modification rather than initial determination of custody.

As to the question whether continuing section 4603 jurisdiction prevails over an attempt of one of the spouses to change the custody award through a guardianship appointment in another county, it would seem that this matter is so similar to the question decided in Greene that an extension of the rule of that case to this situation would be warranted. In other words, jurisdiction under section 4603 is exclusive to the extent of barring subsequent guardianship jurisdiction on petition of husband or wife. If, however, guardianship is applied for by a nonparent, who was not a party to the 4603 proceedings, the problem is practically identical with the problem discussed earlier with respect to divorce followed by guardianship proceedings upon

petition of a nonparent, and is best solved in the same manner.[82]

C. Additional Problem Areas

There are other problems of custody jurisdiction, most of them of recent origin and an outgrowth of the very rules which were designed to avoid jurisdictional conflict among the various custody proceedings.

1. Conflicting Adoption Proceedings.- Morrisette v. Superior Court[83] involved three young children who lived with their grandparents in Kern County since the death of their parents. The grandparents were appointed guardians of the children. The other grandparents who resided in San Diego County filed a petition for the adoption of the children in their county, and two months later the grandparents who were the guardians petitioned the court of Kern County for adoption. In a proceeding to restrain the Court of Kern County from hearing the adoption case the appellate court said that "it is unthinkable in a unified jurisdiction, such as our state, that the same essential controversy . . . be heard and determined in two different courts at the same time", and that "rules have been set up to determine which of

two courts having fundamental jurisdiction of a given subject matter should first proceed."[54] The court then proceeded to apply the rules laid down in Browne v. Superior Court[55] and Greene v. Superior Court[56] to the effect that in case of concurrent jurisdiction the first court to assume and exercise jurisdiction is to have exclusive jurisdiction.[57] A peremptory writ of prohibition was issued restraining the Superior Court of Kern County from any further proceeding in the adoption suit until the completion of the hearing for adoption in the San Diego Court and until finality of any order made in the San Diego proceeding.

While the application of the Greene principle to this situation may be questioned since entirely different parties were involved in the two cases, the appellate court found itself in a dilemma which could not be solved with any rules of jurisdiction. It is very true that contradictory adoption orders had to be avoided at all cost; but was it necessary to cut off any opportunity of the other grandparents to have the merits of their home considered in comparison with that of

the successful grandparents? Was it not required for the sake of the children that this comparison be made by a court?[83]

The court's dilemma was brought about by the fragmentary nature of each of the adoption proceedings, a problem which is encountered throughout the law of child custody proceedings. Each set of grandparents petitioned for adoption in the only court which had jurisdiction, the superior court of the county in which the petitioners resided.[87] If this is in fact a rule of jurisdiction rather than of venue,[70] adoption proceedings concerning the same child in two different counties would be doomed to remain apart to run their inconsistent course, with open conflict ultimately avoided, as Morrisette did, by the crude rule of first come first served.

This unfortunate result can be prevented, if courts are authorized and directed to consolidate the two proceedings on their own motion or on motion of one of the petitioners. One of the cases would be transferred to another county by agreement among the two courts, and in the absence of agreement either to the county where the child is present or where the

first petition was filed.

Furthermore, adoption proceedings should like guardianship proceedings, be open to all claimants, whether two counties are involved or one. In Guardianship of Daniels, 91 for example, the facts were almost identical with those in Morrisette, except that the two sets of grandparents petitioned for guardianship rather than adoption of an orphaned child. The court held that in a situation like this the paramount consideration is the best interest of the child and that the court must make a determination as to which home is preferable from the standpoint of the child. Since adoption proceedings involve similar considerations, in fact make a much more serious custody decision, one that is final and unalterable, the law should provide the opportunity for similar comparative evaluations in adoption cases.

When parents are living and their consents to an adoption are required, the problem does not ordinarily arise, but when the parents are dead or the child has been declared free from their custody and control, competing claims to adoption - like

competing claims to guardianship - may not be isolated occurrences. It is necessary therefore for the law to cover these eventualities. Provision should be made for appropriate notifications in non-agency adoptions when the child has no parents or their rights have been terminated;[92] and the joinder of other petitioners,[93] or the simultaneous consideration of two adoption petitions, should be permitted so that the court has the whole picture before it rather than fragmentary parts of it.

2. The Relationship between Juvenile Dependency Cases and Domestic Relations Cases.- The jurisdictional rule which grants the juvenile courts supervening and exclusive jurisdiction in child custody matters raises several problems.

In the first place, the rule, according to its full import, merely suspends the jurisdiction of a court which had prior continuing jurisdiction so that the prior jurisdiction automatically revives when the juvenile court terminates its jurisdiction.[94] In Slevats v. Feustal,[95] for example, a father had been ordered to pay a monthly sum for the support of his illegitimate child. When the mother became disabled, the juvenile court assumed

jurisdiction, made support orders of its own which differed from the original ones and later discontinued support payments altogether. Two years later the juvenile court terminated its jurisdiction. The court held that the original support obligations became automatically re-operative when the juvenile court's jurisdiction ended and that the father was liable for all back payments, counted from the date of the release of the juvenile court's jurisdiction.

This doctrine which applies to custody law as well[96] has potentially harmful consequences for children. When the juvenile court terminates its jurisdiction, a prior divorce decree which had made a custody award different from that of the juvenile court may be revived, and further litigation and perhaps another change of homes may result for the child. To ward off any dire consequences of the rule, close cooperation between the juvenile court and the domestic relations department would seem to be the first requirement. But other measures to end the fragmentation of the custody issue through several independent proceedings will no doubt become necessary.[97]

Secondly, the overriding jurisdiction of the juvenile court may be used by a parent who is dissatisfied with a divorce custody decree to obtain the relief in the juvenile court which was denied him by the divorce court. Evasionary tactics of this kind are frowned upon by the courts, and juvenile courts will not consciously lend their aid to them,[95] ~~but~~ it is possible, however, that the juvenile court upon declaring a child a dependent child may give custody to the other parent for good and legitimate reasons.[97]

This opens up another, much more basic problem. It may be necessary to have the juvenile court take a second look at a case because the divorce court did not or could not take the time for an inquiry which would have brought to light facts which would have left little doubt in the divorce judge's mind that the mother, or both father and mother, could not be entrusted with the care of the child. This is an unfortunate situation which often adds years of instability to a child's life and keeps the judiciary occupied with the custody of one child for an inordinately long time, as is illustrated by the case described at the beginning of this article. This is but

one phase of a larger problem that has been encountered before in this article in connection with guardianship petitions of nonparents after custody was awarded to a parent in marriage dissolution proceedings.

If the assumption is correct that a considerable number of children who are ultimately found to be dependent ~~children~~ or who ultimately require a nonparent guardian, at the time of divorce were living under conditions under which, in the words of the Family Law Act,[100] "parental custody would be detrimental" to them, every effort should be made to detect these children during the divorce proceedings. And further, ways and means must be found to settle their custody on as permanent a basis as is humanly possible at the divorce stage[101] without disrupting the smooth and efficient functioning of the judicial marriage dissolution machinery. This matter will be discussed again toward the end of this article.[102]

3. Conflicts between Adoption and Guardianship Proceedings.- The question of the proper relationship between guardianship and agency adoptions continues to plague the courts.

In Terzian v. Superior Court[103] an attempt was made to prove, in accordance with the Henwood principle,[104] that the appointment of a guardian was required because of irregularities in the manner an adoption agency was proceeding. The case involved a young girl who had lived with a Mr. and Mrs. Boyd practically from birth until she was close to 5 years of age. The child had not been relinquished to an adoption agency, but was apparently left with the Boyds by her parents. When the girl was 3 years old, the Boyds in a prior proceeding petitioned for her adoption and to have her declared free from the custody and control of her parents. Investigations were conducted both by the probation department[105] and the county welfare department.[106] The probation department recommended that custody be given to the Boyds whereas the welfare department made the recommendation "that the child be turned over to it for placement."[107] The adoption petition was denied, parental rights were terminated, and the Boyds were ordered to deliver the child to the custody of the county welfare department which was the licensed adoption agency.[108]

With the whereabouts of the 5-year old girl unknown and

concerned about her well-being, Mrs. Boyd petitioned for guardianship. Interrogatories sent to the welfare department were left largely unanswered. All the department revealed was that the girl had been in more than one home since the Boyds gave her up and that she had been placed for adoption one week after the guardianship proceedings had begun. (According to information subsequently given to the appellate court by the department's counsel the child was later withdrawn from this adoptive home.)[10] The guardianship court thereupon ordered the department to answer all interrogatories and directed the probation department, in accordance with section 1443 of the Probate Code, to investigate the home of the Boyds as well as the home in which the child had been placed for adoption and to submit a confidential report. The report was prepared, but its transmission to the court was withheld pending the proceedings in Terzian in which the county welfare department sought mandamus and prohibition to prevent the disclosure of privileged information from confidential adoption agency records.

The Court of Appeal granted mandamus with respect to the

interrogatories but denied the writ of prohibition as to the probation report: "The crux of the matter is not jurisdictional, but is presented by the question of reconciling the well-founded public policy for confidentiality in adoption proceedings with the legitimate interest recognized in Henwood in permitting someone interested in the welfare of the child to act to prevent abuses of the adoption procedure."

Whatever is the final outcome of this particular controversy, the case reveals the depth of the conflict which can arise under the Henwood rule. Supposing that Mrs. Boyd in Terzian is appointed guardian replacing the county welfare department as custodian under orders of the probate court, the welfare department continues to be charged with the responsibility to retain custody and arrange for the adoption of the child under the ~~law and the~~ orders of the adoption court. Unless the two court departments can come to an agreement and, what is more important, the courts and the welfare departments can reach agreement in cases of this nature, the rift could continue to deepen. Moreover, legislation enacted while the Terzian case was pending strengthens the

position of the agencies in cases of this kind.[113]

It is conceivable that here as in other cases previously discussed a consolidation of the two proceedings under the continuing jurisdiction of the adoption court might ease the conflict.[114] However, in an area in which courts have by legislative mandate delegated a large portion of their traditional function to make child custody decisions to adoption agencies,[115] it is difficult for any court to settle the problem. ~~And the legislature may be reluctant to make any changes in the law as long as adoption agencies perform an important and indispensable function in our society.~~ There is, ~~however,~~ one particularly vexing element of the problem, clearly apparent in Terzian, which should be remedied.

It is an anomaly in the law that in adoption proceedings, unlike all other custody proceedings, the custody investigation is made not by the county probation department but by the State Department of Welfare or a licensed adoption agency.[116] The reasons for this anomaly appear to be historical. At the time when it became apparent that impartial evaluations of adoptive

homes were needed for the protection of children, the use of probation officers for custody investigations in the civil departments of the superior courts was not yet known.[17] The State Department of Social Welfare was the logical place to turn to at the time. The way the law has since developed is that the investigation is made, either by the State Department or a licensed adoption agency. The law now provides in section 226c of the Civil Code that whenever the court sustains the recommendation of the investigating adoption agency to reject the petition for adoption and the child is not returned to his parents, "the court shall commit the child to the care of the State Department of Social Welfare or the licensed adoption agency, <u>whichever agency made the recommendation</u>, for that agency to arrange adoptive placement or to make a suitable plan."[18]

Adoption agencies are thus given the dual role (1) of making detached and impartial inquiries into the suitability of an adoptive home not selected by the agency and (2) of placing for adoption those children against whose adoption by private arrangement they had opted. It is evident that the two functions

are not fully compatible and that their combination raises a serious question of conflict of interest. Although ideally and on principle adoption agencies acting in both capacities are guided solely by what is beneficial to the child entrusted to them, it is only natural that agencies develop certain possessive traits, including the conviction that their decisions and choices concerning a child's future are superior to those of others.[119] While this generalization may have no application whatsoever in the case of individual welfare workers, the delegation of the two described functions to adoption agencies places the agencies in a potential conflict-of-interest situation and puts them in a vulnerable position in the eyes of the public.

The best way to eliminate this problem is to follow in the footsteps of legislation under which custody investigations in step-parent adoptions and in proceedings to free a child from parental custody and control (which are pre-adoption proceedings in many instances) are conducted by county probation officers.[120] The adoption law should be amended to provide for probation officer investigations in all non-agency adoption proceedings.

Amendments to this effect should go a long way toward removing or in any event greatly reducing the incidence of the kind of conflict which arose in Terzian and to protect children from the devastating effects prolonged litigation and "continued waiting room custody by the agency" may have on their entire life.

4. Interstate Conflict.- California courts have jurisdiction to determine the custody of a child if his domicile is in California although he may not be physically present in the state, or if he lives in California, but is domiciled elsewhere. Also, if a child is merely temporarily present in the state, California courts may assume custody jurisdiction in order to protect him and guard him against maltreatment. Most other states give their own courts jurisdiction in the same or similar situations. The resulting concurrent jurisdiction in two or more states has caused a variety of problems.

A major sore point in this area of custody law in California as well as in most other states is the unpredictable attitude of the courts toward out-of-state custody decrees. Sister states'

custody judgments are sometimes recognized and respected, and at other times they are reopened and modified. This "leaves custody awards open to continual attack by scheming parents who seek redetermination of the issue in courts of other states."[124] Much has been written about this intolerable state of affairs, its damaging consequences for children, and the deplorable spectacle of head-on collision of the courts of several states in child custody cases.[125] California courts have been engaged in open feuds of this nature with the courts of New Mexico, Pennsylvania, Missouri, Texas, and Georgia, for example.[126]

California applies the "clean hands" doctrine which alleviates the problem, but does not solve it.[127] This first aid measure against child snatching and other flagrant abuses of the law denies access to California's courts to the violator of a sister state custody judgment.[128] This remedy is not always available, however,[129] nor is it always equitable, considering the child's interest rather than the punishment of his parents.[130]

There is a comparatively recent movement to call a halt to this judicial warfare between the states.[131] At least two

states, Wisconsin[131a] and North Dakota,[132] have recently decided to recognize and abide by the continuing jurisdiction of the state which rendered the prior custody decree in most situations. And Montana, overruling an earlier leading case, refused to assume jurisdiction to modify a California custody decree although most members of the family, including the children, had moved to and became domiciled in Montana.[133]

Twenty years ago California decided "to avoid interminable and vexatious litigation" in custody contests in several of its counties: " . . . the avoidance of such litigation is facilitated by holding that only one court within this state may provide for the custody of minors in divorce or guardianship proceedings. Otherwise a parent having the immediate control of a minor might move from county to county . . . in search of a court that will alter the custody provisions of a divorce decree." The case, Greene v. Superior Court[134], concluded that because of the continuing jurisdiction of the divorce court of one county a court of no other county has jurisdiction to change this decree upon application of the losing parent.

What was necessary 20 years ago to end inter-county conflict of jurisdiction in custody cases, today is needed on ~~an~~ the inter-state level. The nation has grown closer together in space, and state lines mean nothing to its mobile population. It can no longer be justified that a court in Sacramento will abide by and refuse to alter a Los Angeles custody decree but will have no hesitation to change the custody judgment of an Oregon court. The first essential step is for California to declare that it will henceforth give equal treatment to interstate and inter-county cases, in other words that it will respect the continuing jurisdiction of other states in custody cases. Emergency measures to protect a child within the borders of California would, of course, continue to be permitted.[135] Further, it will be necessary to work out an interstate system corresponding to what on the intercounty level is encompassed by change of venue, transfer of cases, transmittal of court files and consultation between courts. Provisions to cover these and related matters are contained in the Uniform Child Custody Jurisdiction Act.[136]

III. A REMEDY FOR EVERY NEED?

Despite the multitude and variety of custody proceedings the question must be asked whether California law provides a legal remedy in all situations in which child custody is at issue or requires judicial airing and settlement, and whether an opportunity to be heard is afforded to all persons who have a legitimate interest in a child custody decision.

We have already encountered some situations in which custody claimants were left without adequate or direct recourse to the law, but their problems could be solved by making certain procedural devices available to them, such as joinder or intervention of parties. There are, however, a few situations in which there is doubt about the existence of any legal remedy or of a complete remedy, including the right to appeal.

A. The Rights of Children

It is common knowledge that in the property negotiations which precede divorce, children are often part of the bargain. They are frequently disposed of in exchange for advantageous property and support terms or out of personal motivations unrelated to the well-being of the child. In the uncontested

divorce which follows, custody is automatically awarded in accordance with the parties' agreement.[137] Sometimes a spouse will enter into such an agreement with the secret reservation that in a year or two he or she may petition for modification, and can then undo the harm that may have been caused to the child.[138] ~~In one such instance a two-year old child was awarded to the father without open objection of the mother and was taken to live with his grandparents who took little interest in him. When the mother finally obtained custody four years later, the boy was afflicted with a facial tic, head bobbing, and other symptoms of emotional disturbance acquired after his placement with the grandparents.~~

Again, when there is an outright contest in a divorce or any other child custody proceeding, it is well known that the child is often fought over to pursue selfish purposes of the claimants rather than the welfare of the child.

The child has no voice in the proceedings. There is no one to speak for him. That he can express a preference under certain conditions, does not alter this fact. Being a citizen

of the United States, the child has a right to life, liberty and the pursuit of happiness, which should include the right to the best available home regardless of the wishes or whims of the parties litigating over his future.

The problem is most serious in uncontested divorces when the true facts are hidden from the court. It has been suggested to give children party status in marriage dissolution proceedings.[139] This would be a good solution. Another alternative is the appointment of independent and impartial counsel for the child, as Wisconsin does,[140] combined with custody investigations whenever there is reason for the court to be concerned about the child's proper care in a contested or uncontested proceeding.[141] Ultimately, a complete separation of the issue of child custody from other issues in marriage dissolution may be found to be not only desirable but necessary for the protection of the rights of children.

B. Petition in Equity to Settle Custody Rights

As has been mentioned, California recognizes an inherent equitable jurisdiction of its courts, independent of statute,

to inquire into and determine the custody of children.[142] It is certain that this remedy is available to parents who have been divorced outside of California with or without an out-of-state custody decree, and who can therefore not base a custody action on any specific provision of the Family Law Act.[143] The equitable remedy would also be available to parents after a California divorce without a custody decree; however, unless the divorce court specifically denied its jurisdiction as to the custody issue, it has continuing jurisdiction so that pursuant to the Greene rule the parent would have to turn to that court for a custody determination or to obtain a change of venue to another county.[144]

It is not as clear to what extent the equitable remedy is available to other persons. In many cases nonparents have turned to guardianship proceedings or to dependency proceedings in a juvenile court although they were not in fact interested in a formal grant of letters of guardianship or in a declaration of dependency. All they want is, if they are aunt and uncle, for example, or foster parents with whom a child has lived for years,

to have the assurance that the child can remain in their home and to give the child the assurance that he can stay. They wish to have the matter of custody clarified and settled rather than live in apprehension of possible habeas corpus proceedings against them at some future date.

Although a suit in equity could probably be brought under these circumstances, there is enough doubt to make it desirable, for the sake of certainty and for the sake of completeness of the California statutory law, to codify the equitable remedy. This could be accomplished, for example, by adding a brief provision in Title 4 of the Family Law Act on Custody of Children providing that when the right to the custody of a child is in doubt any person who claims custody, including visitation rights, may petition the superior court for a determination of custody rights. The petitioner would be required to name other known claimants as respondents. If another custody proceeding is pending, the petitioner would be joined or intervene in that proceeding.

C. The Right to Appeal in Habeas Corpus Cases

In California as elsewhere the writ of habeas corpus to obtain physical custody of a child has become a general remedy to settle custody rights.[145] Unlike the equitable action just discussed, habeas corpus is not available to the person in possession of the child to test his rights and is generally reserved for those who either have a parental right or a right to custody under a court decree.

This type of habeas corpus proceeding has left its criminal law origin far behind. One of the last traces of this origin is found in the fact that until recently there was no right to appeal in habeas corpus custody cases in California. This omission has been partially corrected. Today the right of appeal exists when the writ has been granted but not when it was denied.[146] Since there seems to be no rational ground why the right to appeal which exists in all other custody proceedings should be unavailable to the petitioner in this particular proceeding, this gap in the law should be closed.

D. Legal Remedy in Agency Adoptions

Difficulties which can arise in non-agency, independent

adoptions have been discussed in connection with the Terzian case.[147] When a child has been relinquished to an adoption agency, problems factually very similar to those encountered in Terzian may appear, but the legal situation is different and different legal solutions must be found.

In re Adoption of Runyan[148] will serve as an illustration. In this case a county welfare department to whom a new-born baby had been relinquished, immediately placed him with the Callahans as a foster child and not for adoption. When it was discovered a few weeks later that the boy suffered from heart disease, the Callahans were given the option to return him. They chose to keep him, saw him through heart surgery and raised him until he was 8 years old, when the welfare department removed him from their home and placed him for adoption.[149] Thereupon the Callahans petitioned for adoption. Their petition was dismissed without hearing pursuant to section 224n of the Civil Code which permits no one but a prospective adoptive parent selected by the agency to file a petition for adoption. The appellate court affirmed, holding that section 224n did not deny the Callahans equal

protection nor the due process of the law. The court reasoned that "the agency should be free to make a determination of the suitability of a home for the child relinquished to its care . . . To allow persons not approved by the agency as prospective adoptive parents to file petitions for adoption would frustrate the pruposes of the adoption agencies and subject the child to an indefinite status, keeping him from a permanent home pending litigation that could result."[150]

This is strange language when applied to a home that must have seemed suitable enough to the agency for nursing the child through major illness and for raising him for 8 long years, a home which was permanent for all practical purposes before the events precipitating the action. The case illuminates the helplessness of the judiciary in the face of the ~~apparent~~ almost unlimited power of adoption agencies to dispose of children relinquished to them in any manner they see fit until the child reaches majority. Aggrieved persons like the Callahans are denied even the right to file a petition for adoption. Had they applied for guardianship rather than adoption under the Henwood doctrine,

they would have fared no better. Henwood applies as of the time of the guardianship petition, and there were in fact no delays or irregularities after the boy was taken from the foster parents. An adoption in another county was completed before the case reached the appellate court.[151] Also, if the foster parents had applied for guardianship earlier while the boy was still with them and had succeeded with that petition, the guardianship appointment would have been short-lived since the agency retains the unrestricted power to select the adoptive home, and an adoption order supersedes the guardianship.

There is then no legal remedy in existence among any of the eight custody actions that have been enumerated to give relief to foster parents under agency placements with whom children have lived for years and whose home the child has come to consider his true and only home.[152] This is not the type of case in which foster parents take over until a parent recovers from an illness or is rehabilitated. Parental rights are not involved. Rather than parental rights there are agency rights involved, but the agency is charged with responsibility to act in the best interest

of the child. The Legislature has specified what is in the best interest of the child in the absence of parental rights. The Family Law Act declares that "persons in whose home the child has been living in a wholesome and stable environment" are to be preferred over "any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child."[153] In agency adoption proceedings, however, the court has no power to give persons like the Callahans a hearing to determine whether theirs is the type of home that is given preference under the Family Law Act.

It is not proposed to reverse the development of adoption law at this time. Agency responsibility for adoption placements serves a definite need. On the other hand, in the words of Henwood, "we cannot assume that adoption agencies will necessarily in all cases have such wisdom and competence that they may be set apart from other custodians and given carte blanche in their control of relinquished children until a petition for adoption is before the court . . . The child is not a party to the relinquishment agreement, but it is his interest that the

court must protect . . ."[154] Judicial ingenuity cannot very well go beyond the Henwood rule, and that rule, as has been shown, if it can overcome the roadblocks involved in Terzian, provides only stopgap relief. The agency retains the power to bring about an adoption whether a guardian is appointed in the interim or not.[155] It is therefore necessary to create a new statutory remedy for families and children thus denied recourse to the courts.

When parents seriously fail in their parental responsibilities, over a period of time, "any interested person may petition the superior court . . . for an order or judgment declaring such minor person free from the custody and control of either or both of his parents."[156] When adoption agencies leave children in one foster home or move them from foster home to foster home for a long period of time, they should be subject to a similar action to declare the child free from the custody and control of the agency since "continued waiting-room custody by the agency can no longer be justified . . ."[157] There would be nothing accusatory about such a proceeding since there are often serious difficulties

to be overcome before an agency succeeds with an adoptive placement.[158] On the other hand, the agency's right to custody of the child under section 224n of the Civil Code should not obstruct every opportunity that the child may have to find a stable home if this opportunity presents itself outside of agency efforts, or, as in Runyan, through an agency foster home placement. The action for freedom from agency control would be available only to persons who at the same time petition for adoption of the child or, in the case of a non-adoptable child, are willing to given him a permanent home and seek appointment as guardians.[159] As in the case of an action against parents to terminate their rights, a strong case would have to be made of agency inactivity or failure to place the child before the proposed remedy could be granted. Long passage of time would be the main element of petitioner's proof which would have to be overcome by agency evidence not of past diligence, but of a presently available adoptive placement satisfactory to the court, when compared with the petitioner's home.[160] Agency custody would not be terminated until the petitioner had been found, after probation department

investigation, to offer a suitable home for adoption or, in the case of a non-adoptable child, for foster care of a permanent nature.

IV. GENERAL CONCLUSIONS

One gains the general insight from a study of all custody proceedings as a whole that while direct jurisdictional conflict has largely been eliminated, except in interstate cases, there is a great deal of overlap, duplication, and fragmentation of decision making concerning the same child. As a result, the judicial process of settling the custody question is too cumbersome, expensive, and slow in many instances. The most important years in a child's life may go by before the child's travails and the judicial machinery's wheels have come to a halt. Furthermore, there are a few areas, especially in adoption law, in which present legal remedies are inadequate.

The problem of duplication of effort and of piecemeal, fragmentary consideration of the question of where and with whom a child should live, is found primarily in the three major custody proceedings, that is, in marriage dissolution, dependency, and

guardianship cases. In fact, the question of the proper relationship between the domestic relations, juvenile court, and probate departments of the courts in custody cases is perhaps the most serious question that exists in custody law today from the standpoint of the welfare of children as well as judicial efficiency. The child is shuttled back and forth between these three departments, and full responsibility for a particular child rests nowhere in the judicial system.[41]

There is probably little disagreement on the goals of judicial custody determinations: that the judiciary, the bar, and all others involved should strive for as permanent a custodial arrangement for a child as is humanly feasible at the earliest possible opportunity.[42] This goal is presently far from realization.

The root of the difficulty seems to be that divorce courts where the largest number of custody cases originate, are handicapped by calendar pressures, the pressure of litigants, and the lack of sufficient non-legal aides and facilities to make the kind of calm and deliberate inquiry which custody decisions

require. Nonparents who may claim custody are rarely, if ever, brought into the proceedings. And the child himself has no spokesman. Consequently routine custody dispositions are made especially when the spouses are in agreement or prefer to avoid an open contest, and the matter is closed, with full realization that a substantial number of the cases will return or that they will move on to the next court and perhaps back again. This does not mean to say that future adjustments may not be required, particularly with respect to visitation, but there are innumerable custody decrees which are known when made to be mere stop-gap, temporary "solutions" which is to say that they are no solutions of the custody issue.

Justice Fleming of the Second District Court of Appeal of California has called for reorganization, routinization, and rationalization of the judicial process as means for "Court Survival in the Litigation Explosion."[163] He lists domestic relations as one of the three fields hardest hit by this explosion. The new marriage dissolution procedures under the Family Law Act are already making use of the device of routinization,[164] with apparent good results. As far as the child custody

issue is concerned, routinization as such does not solve the problem, but there is great need for rationalization, and ultimately for reorganization.

"The third and most necessary avenue of attack on the litigation explosion", Justice Fleming said, is "the rationalization of the legal process. Basically, this comprehends a close analysis of the functions and goals of the legal process, what it purports to accomplish, what problems it solves, what problems it fails to solve..." [115] If the goal of the legal process in custody cases is the earliest possible satisfactory and enduring settlement of the problem, it is not rational to dispose of as difficult an issue as child custody in a routine manner in the hope that it will not reappear on the court calendar. Nor is it rational, considering the named goal, to operate on the assumption that any error initially made can be corrected later, that in fact the court may have more time to concentrate on the custody matter in modification proceedings, after the marriage termination and property matters have been disposed of. While this approach may serve the short-range purposes of routinization,

it does not comport with the long-range purposes of child custody adjudications. Passage of time severely aggravates the problem from the human standpoint and the judiciary's standpoint. More and more judicial personnel, time and money becomes involved the longer the settlement of the custody problem is delayed without satisfactory solution. Finally, the problem ceases to be a custody problem and begins to be a problem of mental disturbance or mental illness, or of delinquency or crime.[166]

The judicial system has a singular opportunity at the time of divorce to play a preventive rather than corrective role.[167] It has the opportunity to detect families with serious problems which are not solved by the divorce, and which are carried over into the separate lives of one of the parents or of both, and into the lives of their children. At this stage it is necessary for the court to take a closer look at the children's future. It would be highly desirable to have an informal family conference with a court officer or consultant early in the proceedings in order to detect those contested or uncontested cases which

require a custody investigation or the appointment of a legal representative for the child, or both. Parental disagreements on custody should be resolved by counseling whenever possible, as is presently done in some of the courts.[168] If outsiders claim custody or visitation, they should be joined as parties and ~~should be~~ brought into the informal ~~family~~ conferences ~~and into counseling sessions~~ so as to settle the issue amicably, if possible. If other custody proceedings are pending or are subsequently instituted, the proceedings should be consolidated, whenever feasible.[169] There may be cases in which final settlement of the custody issue though urgent may be delayed until after final judgment of marriage dissolution; but the important matter is that a considered custody arrangement which is agreeable to the parties in as many cases as possible, has been made at the first judicial opportunity rather than pushing the problem along from court to court and the child from one place to another. The need for future modification proceedings should be greatly reduced under such a procedure and resort to the juvenile court or the probate court for post-divorce ~~dependancy~~ proceedings should become much less frequent. ~~But~~

A major limiting factor is that many domestic relations departments of the courts do not presently have sufficient staff for child custody counseling and investigations.[170] It would seem, however, that an analysis of the overall cost to the judicial system of the present fragmented procedures as compared with the proposed procedure would show considerable savings some of which should be used to add indispensable court staff.

Ultimately, it would seem to be wise, in the interest both of children and of judicial efficiency and economy, to concentrate all custody matters in one court department. This court department, which might be named the custody court,[171] would relieve the divorce judge of the custody decision, except for temporary custody pending marriage dissolution proceedings. The custody department would handle adoptions, dependency and neglect,

guardianship of the person, and all other custody proceedings. It would be equipped with a staff which would include members transferred from the juvenile court probation staff.

As for moving dependency and neglect jurisdiction from the juvenile court to a custody court, this would be but the final step in a development which began in 1961. At that time dependency cases were clearly separated from other juvenile court cases;[172] and the most serious dependency and neglect cases, that is, those in which parents are not merely deprived of custody, but lose their parental rights altogether, were lifted from the Juvenile Court Act and placed into the Civil Code to be administered by the ordinary court departments.[173] Additional legislation to insure the further segregation of children adjudged under section 600 of the Welfare and Institutions Code from those coming under the jurisdiction of sections 601 and 602 of the Code has been enacted since.[174] ~~For example, a law was recently passed to prohibit the making of a record of the detention of a dependent child by any law enforcement agency or the Bureau of Criminal Identification and Investigation.~~

Such a reorganization would not only be beneficial for the purpose of bringing together all judicial functions relating to custody ~~determinations of non-delinquent children~~, but would also seem to be in line with recent trends and developments of juvenile court practice and juvenile court thinking. The juvenile courts are tending in the direction of becoming special courts for young people charged with crime, and there is a "movement for narrowing the juvenile court's jurisdiction". Much emphasis is being placed on avoiding the "unnecessary stigma" to which children presently under the jurisdiction of the juvenile court are exposed. Proposals are under discussion to divert section 601 jurisdiction relating to runaways, truants and other uncontrollable children from the juvenile courts. It would seem to follow almost as a matter of course that section 600 jurisdiction with respect to dependent and neglected children is now out of place in the new developing Juvenile Court.

As far as guardianship of the person is concerned, a custody court department would free the probate judge of the burden of hearing contested custody cases. The probate court would retain

the function of appointing testamentary guardians and making other appointments of guardians of the person when this is a routine matter not involving controversy.

The custody court would assemble all records concerning the same child, no matter what type of proceeding is involved, in one master file. If the child's residence changes and further proceedings are necessary, the file would be transmitted to the child's new custody court.

Ending the present artificial separation between custody cases handled in the juvenile courts, the domestic relations departments, and the probate courts, would result in substantial savings in court time and money and in increased efficiency of the judicial machinery. And above all, such a reorganization - with due allowance for the human frailties of judges, lawyers, and other professionals involved - would assure to the growing number of children who must live under court-determined custody arrangements the best available and most stable home surroundings.

V. SPECIFIC RECOMMENDATIONS

This part of the article is intended primarily as a summary of recommendations made in the body of the article. It also includes a few suggestions not expressly stated before which need no further explanation. It lists only those recommendations which lend themselves to immediate, short-range legislative action.

A. Uniformity of Custody Standards under the Probate Code and the Family Law Act.

If standards for custody determinations are uniform, there will be less duplication, less frequent attempts to obtain in one custody proceeding what was denied or was impossible to obtain in another. The term "standards" is here used in a broad sense which includes not only the guiding principles and priorities, but also certain procedural aids such as custody investigations. It is particularly urgent that standards applicable to custody decisions under guardianship law be harmonized with those provided by the Family Law Act.

The provisions of the Probate Code relating to guardianship of the person should be carefully studied to determine (a) which

of them are inconsistent with the Family Law Act, (b) which of them are duplications of the Family Law Act or are antiquated law, and (c) which of the provisions not found in the Family Law Act contain /language which courts have found valuable in the past so as to "borrow" from them in non-guardianship cases.[181] The next step would be to reconcile or repeal inconsistent provisions,[182] to repeal duplications and outdated provisions, and to save valuable features of the law of guardianship of the person and incorporate them into the Family Law Act.[183] And finally, those provisions of the Probate Code which relate to standards applicable to guardianship of the person would be repealed and would be replaced by a reference section to the effect that a guardian of the person shall be selected, supervised, and removed in accordance with Title 4 on Custody of Children of the Family Law Act (commencing with section 4600 of the Civil Code).[184]

B. Joinder of All Ascertainable Custody Claimants

One of the major causes of the proliferation of custody proceedings is the inability of persons who are not the immediate parties in a divorce or other custody suit to have their own

claim to custody of the child heard and adjudicated in the original proceeding. In order to obtain a complete custody determination, the claims of all contenders should be disposed of in one proceeding to the largest extent feasible. To this end amendments to the Family Law Act and the Family Law Rules should be made which provide (1) that the parties furnish information as to the person who has physical custody of the child and as to any other person in California or elsewhere who claims custody, including visitation rights; (2) that the persons so named and others discovered by the court from other sources be duly notified of the proceedings; (3) that these persons be joined as parties by the court; and (4) that persons not so joined be permitted to intervene prior to the final hearing and again after a custody decree while the jurisdiction of the court continues.[183]

C. Consolidation of Proceedings and Changes of Venue.

Although there is general authority to consolidate actions and to transfer cases to another venue, it is of paramount importance in custody cases that these powers be widely exercised.[184] The Family Law Act or the Family Law Rules, or both, should

provide that concurrent custody proceedings concerning the same child pending under a court's initial or continuing jurisdiction should, to the maximum extent feasible, be consolidated, and if they are pending in different counties, consolidation should be preceded by a transfer of one of the cases on the court's own motion after consultation and agreement among the courts involved. This provision would be applicable to marriage dissolution and nullity proceedings, section 4603 actions, habeas corpus actions, equity suits, and guardianship proceedings.[157]

Further, it should be provided that whenever one of the pending proceedings is a divorce proceeding, the consolidated case should normally be heard in the divorce court. Finally, if a custody decree has been entered in any of the named proceedings, the divorce court or other subsequent court should request and consider the court file in the prior case and should examine the child's custody as a matter of modification of the prior decree.

It might be desirable, in order to clarify under what circumstances there is concurrent juridiction rather than exclusive jurisdiction of the prior court, to introduce this subject matter

by codifying the rule of Greene v. Superior Court, its extension to section 4603 cases, and related rules.[65]

D. Preventive Action to Avoid Juvenile Court, Guardianship, or Other Custody Proceedings Following a Divorce Custody Decree

While joinder of all ascertainable parties should reduce the number of additional custody proceedings following divorce, this does not solve the whole problem. Provisions should be added to the Family Law Act which would authorize a court officer to hold a conference with the parents and others who might be involved in order to assist the judge in determining whether a custody investigation is necessary or desirable in a contested or uncontested case. There should also be a legislative declaration to the effect that custody contests between parents, or between parents and third persons, should to the largest extent possible be amicably settled through the combined efforts of the court, the attorneys, and trained personnel of other professions.[67]

E. Recognition of Rights of Children

While courts may have inherent power to appoint counsel or a guardian ad litem for a child although under present law the

child is not formally a party in litigation concerning his custody,[190] it is desirable to authorize courts to appoint a legal representative for the child in custody proceedings.[191]

F. Revisions of Adoption Law

1. Concurrent Proceedings. The law should provide that two or more petitions to adopt the same child whether pending in the same or different counties should be consolidated, and that persons who have an interest in adopting a child may intervene and be joined in pending adoption proceedings.[192]

2. Investigations by Probation Officers.- Consideration should be given to authorizing county probation officers to investigate the homes of prospective adoptive parents in all cases of independent adoptions.[193]

3. Freedom from Agency Control.- When the relinquishment of a child to an adoption agency or the referral of a child to an adoption agency by the court has not led to a completed adoption for a certain number of years - perhaps two or three years - it should be permissible, under certain conditions, for persons not selected by the agency to give this child a permanent home. For

this purpose an action to declare the child free from the custody and control of the agency should be provided.[194]

G. Codification of Equitable Remedy

Since there is some uncertainty concerning the scope of the equitable action to determine the custody of a child, this remedy should be codified.[195]

H. Appeal in all Habeas Corpus Cases

Under present law an appeal lies from the granting of a writ of habeas corpus in custody cases, but not from the denial of the writ. The petitioner should be granted the right to appeal from a denial of the writ.[196]

I. Interstate Custody Cases

In order to end judicial strife and conflict between the states in custody cases the Legislature should declare as a first step toward solving this serious problem that this State will recognize and respect the continuing jurisdiction of out-of-state courts in custody proceedings.[197]

Footnotes

* Research Professor of Law, University of California, Davis. This article was prepared to provide the California Law Revision Commission with background information on this subject. The opinions, conclusions and recommendations contained in the article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission. Some of the major problems discussed are common to many states, but California law and California materials have been primarily consulted.

1. See, e.g., In Re Raya, 255 Cal. App.2d 260, 266, 63 Cal. Rptr. 252, 256 (3rd Dist. 1967); Saltonstall v. Saltonstall, 148 Cal. App.2d 109, 115, 306 P.2d 492, 496 (2d Dist. 1957); Peterson v. Peterson, 64 Cal. App.2d 631, 633, 149 P.2d 206, 208 (3rd Dist. 1944); Fain, Custody of Children, 1 CALIFORNIA FAMILY

LAWYER 539, 585-86, 589 (California Continuing Education of the Bar 1961); The California Custody Decree, 13 STAN. L. REV. 108, 114, 116, 119-20 (1960).

2. For example, the rule of Greene v. Superior Court, discussed infra at notes 39 to 42, and the practice of some courts to consolidate certain custody proceedings help to reduce custody litigation.

3. "...one of the critical aspects of a child's development is the need for stability in order to develop a sense of identity. When a child is kept suspended, never quite knowing what will happen to him next, he must likewise suspend the shaping of his personality. This is a devastating result and probably represents one of the greatest risks which current procedures pose for children." Watson, The Children of Armageddon: Problems of Custody Following Divorce, 21 SYRA. L. REV. 55, 64 (1969). "In the view of most child psychiatrists stability of the environment is far more crucial than its precise nature and content.

The one thing with which children have most difficulty coping is unpredictable variation, and this is especially critical between the ages of two and adolescence." Id. at 71.

4. Cf. In Re L., 267 Cal. App.2d 397, 73 Cal. Rptr. 76 (2d Dist. 1968).

5. See Dinkelspiel and Gough, The Case for a Family Court - a Summary of the Report of the California Governor's Commission on the Family, 1 FAM. L. Q. 70, 80 (Sept. 1967); Kay, A Family Court: The California Proposal, 56 CAL. L. REV. 1205, 1238-39 (1968); Lindsley, The Family Court, 5 CAL. WEST L. REV. 7, 20-24 (1968); Hammer, Divorce Reform in California, 9 S. CLARA LAW. 32, 51-65 (1968). See also Hayes, California Divorce Reform: Parting is Sweeter Sorrow, 56 A.B.A.J. 669, 662 (1970).

6. CAL. CIV. CODE §§ 4600-4603.

7. CAL. CIV. CODE § 4600 (emphasis added). In contrast, former CAL. CIV. CODE § 138 applied solely

to custody determinations in divorce and separate maintenance actions.

8. CAL. PROB. CODE §§ 1400-1410, 1440-1443, 1500, 1512, 1580, 1603.

9. CAL. WELF. & INST'NS CODE §§ 506, 600, 725-29, and other sections of the JUVENILE COURT LAW. Juvenile dependency was separated from delinquency in 1961. See CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO THE RIGHT TO COUNSEL AND THE SEPARATION OF THE DELINQUENT FROM THE NONDELINQUENT MINOR IN JUVENILE COURT PROCEEDINGS (Oct. 1960).

10. The term "divorce" will be used interchangeably with "marriage dissolution" in this article.

11. 2 ARMSTRONG, CALIFORNIA FAMILY LAW 965-66 (1953). See also Id. (1966 Supp.) at 343; Greene v. Superior Court, 37 Cal.2d 307, 311, 231 P.2d 821, 823 (1951).

12. CAL. WELF. & INST'NS CODE § 727.

13. E.g., Stewart v. Stewart, 41 Cal.2d 447,

260 P.2d 44 (1953); In Re Coughlin, 101 Cal.App.2d 727, 226 P.2d 46 (4th Dist. 1951). Cf. Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206(1934).

14. E.g., In Re Raya, supra note 1.

15. See Kay and Philips, Poverty and the Law of Child Custody, 54 CAL. L. REV. 717 (at 717) (1966).

16. CAL. CIV. CODE § 4603 (former § 199). Another special action, under former CAL. CIV. CODE § 214, has been eliminated by the Family Law Act.

17. See 3 WITKIN, SUMMARY OF CALIFORNIA LAW 2453-54(1960).

18. It is clear from cases like Titcomb v. Superior Court, supra note 13 and Stout v. Pate, 120 Cal.App.2d 699, 261 P.2d 788 (2nd Dist. 1953) that California courts recognize an inherent judicial power to settle custody questions independent of specific statutory authority. See 3 WITKIN, SUMMARY OF CALIFORNIA LAW 2436 (1970); and see generally, CLARK, THE LAW OF DOMESTIC RELATIONS 580-81 (1968).

19. CAL. CIV. CODE §§ 232-238.

20. CAL. CIV. CODE §§ 221-230.5. Adoptions and proceedings for freedom from parental custody and control include the basic custody issue and go beyond it by severing the parent-child relationship.

21. See supra note 7 and infra note 58.

22. CAL. CIV. CODE § 4600.

23. CAL. PROB. CODE §§ 1406, 1440.

24. CAL. CIV. CODE § 225.

25. Compare CAL. CIV. CODE § 4600 with CAL. PROB. CODE §§ 1407 and 1408. Also, there are serious discrepancies in the statutory law on abandonment. Compare e.g., CAL. CIV. CODE §§ 224, with CAL. CIV. CODE § 232 and CAL. PROB. CODE § 1409.

26. CAL. WELF. & INST'NS CODE §§ 581, 706; CAL. CIV. CODE § 226.6; and CAL. CIV. CODE § 233.

27. CAL. CIV. CODE § 4602.

28. CAL. PROB. CODE § 1443.

29. See supra notes 26, 27, and 28; and see

CAL. WELF. & INST'NS CODE § 582 and CAL. CIV. PROC. CODE § 263.

30. CAL. CIV. CODE § 226.6; but see § 227a, 227p.

31. See text accompanying notes 64-72, infra.

32. CAL. PROBATE CODE § 1440, CAL. CIV. CODE § 233; CAL. WELF. & INST'NS CODE §§ 653, 655.

33. CAL. WELF. & INST'NS CODE § 700 and CAL. CIV. CODE § 237.5.

34. See text accompanying note 7, supra. Section 4600 would seem to apply to the two non-statutory custody proceedings of habeas corpus and suits in equity, and to other custody proceedings which are not governed by inconsistent statutory provisions.

35. "Special proceeding" covers, for example, probate proceedings to appoint a guardian and habeas corpus actions to gain custody. See CAL. CODE CIV. PROC. §§ 22, 23; CAL. PENAL CODE Title XII.

36. CLARK, supra note 18, at 583.

37. For details see Comment, Custody of Children

in California: Jurisdictional Requirements and Conflicts, 37 CAL. L. REV. 455 (1949).

38. In any event when the parties are the same. See notes 43 and 45, infra.

39. 37 Cal.2d 307, 231 P.2d 821 (1951).

40. Id. at 312.

41. Id.

42. See e.g., In re Couglin, 101 Cal. App.2d 727, 226 P.2d 46 (1951). On consolidation of actions, see CAL. CODE CIV. PROC. § 1048, 2 WITKIN, CALIFORNIA PROCEDURE 1131-35 (1954); id., 1967 Supp., at 450-51.

43. "Several cases have held...that modification of the original [custody] order should only be made by the court in which the case was originally brought. ... This is subject to the qualification that if the parties in the second case are different, they may bring a new suit, not being bound by the former decree." CLARK, supra note 18, at 583. To the same effect, see Case Note on Greene v. Superior Court, 25 SC. CAL.

L. REV. 224, 225, 226(1952).

44. 41 Cal.2d 639, 262 P.2d 317 (1953).

45. The Greene rule was not mentioned by the court. It was inapplicable because the boy was not a party in the original divorce proceedings.

46. Guardianship of Kentera, supra note 44, at 643. See also Guardianship of Rose, 171 Cal.App.2d 677, 340 P.2d 1045 (1959). Kentera and Greene overruled a string of decisions which had permitted a person favored by a 14-year old, or the 14-year old himself, to apply to a probate court for a guardianship appointment inconsistent with the custody decree of a divorce court without a clear showing of necessity or convenience. For the earlier law see Comment, Custody of Children in California, supra note 37, at 465-467, 469-472. On Kentera see also Note, 27 SO. CAL. L. REV. 211 (1954); Cupp, McCarroll, & McClanahan, Guardianship of Minors, I CALIFORNIA FAMILY LAWYER 604, 607 (California Continuing Education of the Bar 1961).

47. See Browne v. Superior Court, 16 Cal.2d 593, 107 P.2d 1 (1940); Milani v. Superior Court, 61 Cal. App.2d 463, 143 P.2d 402, 935 (3rd Dist. 1943); Guardianship of Vierra, 115 Cal. App.2d 869, 253 P.2d 55 (3rd Dist. 1953). See also 3 WITKIN, SUMMARY OF CALIFORNIA LAW 2489 (1960). Cf. Jacobs v. Superior Court, 53 Cal.2d 187, 1 Cal. Rptr. 9 (1959).

48. See text accompanying notes 73-81 infra.

49. See in re Santos, 185 Cal. 127, 195 Pac. 1055 (1921). Cf. Guardianship of Minnicar, 141 Cal. App.2d 703, 710, 297 P.2d 105, 109 (4th Dist. 1956).

50. 49 Cal.2d 639, 320 P.2d 1 (1958). On this case see Armstrong, Family Law: Order out of Chaos, 53 CAL. L. REV. 121, 126-7 (1965). The agency obtains legal custody when a child is relinquished to it. CAL. CIV. CODE § 224 n.

51. 49 Cal.2d at 645-46.

52. In re Santos, supra note 49.

53. This is not true in all states. See CLARK,

supra note 18, at 583.

54. See In re Holt, 121 Cal. App. 2d 276, 263 P.2d 50 (1953); Slevats v. Feustal, 213 Cal. App.2d 113, 28 Cal. Rptr. 517 (1963).

55. See 3 WITKIN, SUMMARY OF CALIFORNIA LAW 2489-2490 (1960); Fain, supra note 1, at 585.

56. See text accompanying note 43 supra, and see note 43, supra.

57. Cf. e.g., Guardianship of Davis, 253 Cal. App.2d 754, 61 Cal. Rptr. 297 (1967).

58. CAL. CIV. CODE § 4600 provides in part:

> Custody should be awarded in the following order of preference:
>
> (a) To either parent according to the best interests of the child, but, other things being equal, custody shall be given to the mother if the child is of tender years.
>
> (b) To the person or persons in whose home the child has been living in a wholesome and stable environment.
>
> (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.
>
> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents,

> it must make a finding that an award of custody to a parent would be detrimental to the child, and the award to a nonparent is required to serve the best interests of the child.

59. See text accompanying note 41, supra.

60. See e.g., POLICY MEMORANDA OF LOS ANGELES COUNTY PROBATE COURT No. 708 (Revised to November 1, 1969):

> Where a petition for guardianship of the person of a minor is pending, and a custody proceeding or a writ of habeas corpus concerning the same minor is pending in any other department of the Superior Court, the Supervising Judge of the Probate Department and the Judge of the department in which such proceeding or writ is pending, will confer and determine whether or not the matters should be heard separately or consolidated.

See also Guardianship of Davis, supra note 57.

61. See text accompanying notes 40-42, supra.

62. Compare CAL. PROB. CODE § 1407 with CAL. CIV. CODE § 4600, supra note 58.

63. In the case of a foster parent, for example, with whom the child lived for many years, a divorce decree awarding the child to the mother may cause the child to be moved away from the foster family; and a

subsequent appointment of the foster parents as guardians many months later will result in a second move of the child.

64. By Cal. Laws 1970, ch. 1211.

65. Rule 1211, Family Law Rules, Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court, effective Jan. 1, 1970.

66. Rule 1213, id.

67. See note 64, supra.

68. See Rule 1287, Family Law Rules, supra note 65.

69. Rules 1281 and 1282, id. which contain the prescribed forms of petition and response in marriage dissolution proceedings should be amended to include questions as to these data.

70. Cf. UNIFORM CHILD CUSTODY JURISDICTION ACT § 10.

71. See CLARK, supra note 18, at 577.

72. See Bookstein v. Bookstein, Cal.App. 2d ,

Cal. Rptr. 495 (1970) where grandparents became parties concerning their visitation rights in a divorce modification proceeding.

73. See Cupp, McCarroll & McClanahan, supra note 46, at 607, who caution attorneys against applying for the appointment of a guardian of the person and the estate when all that is needed is a guardian of the estate.

74. 174 Cal. App.2d 578, 345 P.2d 72 (1959).

75. Id. at 579 n.1, 581.

76. Id. at 581-82. See also In re Coughlin, supra note 42, where a husband had petitioned for guardianship when a month later his wife started divorce proceedings. The court consolidated the guardianship petition with the wife's motion for temporary custody in the divorce action.

77. See Fain, supra note 1, at 586 who deplores the lack of "continuity of knowledge, interest, or purpose" in the present handling of custoday cases:

"This lack of continuity and patient understanding with respect to the problems is manifested by excessive delays and costs, as well as in terms of human tragedy." Id. See also Comment, Custody of Children in California, supra note 37, at 473: "To facilitate a wise handling of custody matters, the local court properly taking jurisdiction should have the right to demand the complete file regarding previous disposition from the court whose jurisdiction has been replaced. Thereafter, until the parties move again, the court possessing the file will be the court of continuing jurisdiction." See also Ehrenzweig, The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings, 64 MICH. L. REV. 1, 11 (1965) calling for an exchange of court files between the states in custody cases. Lack of knowledge of one court or court department of facts in the files of a prior court can be outright dangerous for the child. This is exemplified

by the Roxanne Felumero case in New York where information concerning the aggressive propensities of a stepfather was available to one court department but not to the one which returned the child from foster parents to her mother and stepfather, ending in the violent death of the 3-year old girl soon after her return. See article, State's Family Court under Study to Measure Impact of Judicial Changes Made 7 Years Ago, New York Times, June 2, 1969, p. 38(?).

78. See WATSON, PSYCHIATRY FOR LAWYERS 197 (1968); Watson, supra note 3, at 76-77, 80-82; Goldstein & Gitter, On Abolition of Grounds for Divorce: A Model Statute and Commentary, 3 FAM. L. Q. 75, 88 (1969); Foster and Freed, Child Custody, 39 N.Y.U. L. Rev. 615, 627 (1964); The California Custody Decree, 13 STAN. L. REV. 108, 116(1960). E. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 237 (1969). See also UNIFORM MARRIAGE AND DIVORCE ACT section 409

(as adopted by the National Conference of Commissioners on Uniform State Laws in August, 1970) which provides that the child's prior custodian is normally to be retained unless "the child's present environment endangers his physical health or significantly impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."

79. See text accompanying notes 41-42, supra.

80. See In re Kay's Estate, 30 Cal.2d 215, 220, 181 P.2d 1, 4 (1947); Neubrand v. Superior Court, Cal. App. 2d , 88 Cal. Rptr. 586 (2nd Dist. 1970); 1 WITKIN, CALIFORNIA PROCEDURE 203, 208-210 (1954). In Guardianship of Cantwell, 125 Cal. App.2d 866, 271 P.2d 168 (1st Dist. 1954), the Court adroitly avoided this problem when a husband petitioned for guardianship and his wife cross-petitioned for exclusive custody under sections 199 and 214 - now section 4603 - of the Civil Code. The Court took the position that the basic

question involved in the two petitions was the same, treated the wife's petition for exclusive custody as a guardianship application and appointed her guardian of the children.

81. See Schlyen v. Schlyen, 43 Cal.2d 361, 273 P. 2d 897 (1954); WITKIN, CALIFORNIA PROCEDURE, 1967 Supp., 109-110.

82. See text accompanying notes 38 to 43, supra.

83. 236 Cal. App.2d 597, 46 Cal. Rptr. 153 (5th Dist. 1965).

84. Id. at 599.

85. 16 Cal.2d 593, 107 P.2d 1 (1940).

86. Supra note 39.

87. The court also held that existing guardianship does not give preference in adoption proceedings, which is in accord with accepted principles. See note 52, supra.

88. The State Department of Social Welfare had found both sets of grandparents suitable as adoptive

parents. However, the Department, referring to what it called a "statement purportedly written" by the children's mother, recommended that the children be adopted by the Morrissettes, the mother's parents. Id. at 601. No court had the opportunity to inspect this purported statement nor to weigh all the factors to satisfy itself "that the interest of the child will be promoted by the adoption." CAL. CIV. CODE § 227.

89. CAL. CIV. CODE § 226.

90. See In re McGrew, 183 Cal. 177, 190 Pac. 804 (1920). On this case see Annot., 33 A.L.R. 3rd 176, 198-99 (1970); I CALIFORNIA FAMILY LAWYER, Adoptions 790, 798 (California Continuing Education of the Bar 1961).

91. 177 Cal. App.2d 376, 2 Cal. Rptr. 243 (1st Dist. 1960). See also Guardianship of Hall, 200 Cal. App. 2d 508, 19 Cal. Rptr. 426 (2d Dist. 1962).

92. Cf. Cal. Laws 1970 ch. 1091 amending CAL.

CIV. CODE § 235, which requires, in proceedings for freedom from parental control, that grandparents, adult brothers, sisters, uncles, aunts etc. be notified if the whereabouts of the parents are not known.

93. See Adoption of Graham, 58 Cal.2d 899, 27 Cal. Rptr. 163, 377 P.2d 275 (1962) where an adoption agency claiming relinquishment of the children to it was joined by stipulation in a nonagency independent adoption. Cf. Roquemore v. Roquemore, , Cal. App.2d , 80 Cal. Rptr. 432 (2d Dist. 1969) where grandparents were not permitted to intervene in adoption proceedings to claim visitation rights and a separate proceeding (and an appeal) was required to pursue their claim.

94. See In re Holt 121 Cal. App. 2d 276, 263 P.2d 50 (3rd Dist. 1953); In re L., 267 Cal. App.2d 397, 73 Cal. Rptr. 76 (2d Dist. 1968).

95. 213 Cal. App.2d 113, 28 Cal. Rptr. 517 (1st Dist. 1963).

96. See supra note 94.

97. See text accompanying notes 171-180 infra.

98. In re Bullock, 139 Cal. App. 664, 34 P.2d 164 (1934); Comment, Custody of Children in California, supra note 37, at 477. See also CLARK, supra note 18, at 582.

99. Louise Despert, M.D., describes such a case under the heading of "Lawyers to the Rescue". DESPERT, CHILDREN OF DIVORCE 205-207((1953). See also In Re L., supra note 94, where the juvenile court removed a girl from the mother who had custody under a divorce decree and placed her temporarily with the father; and see Gilliam & Gilliam, The State as Parens Patriae: Juvenile Versus The Divorce Courts on Questions Pertaining to Custody, 21

ROCKY MT. L. REV. 375 (1949).

100. See supra note 58. An empirical study of family histories of dependency and guardianship cases in the files of juvenile and probate courts would show the extent of the problem.

101. "...clearly there are dangers in treating a custody award as an experiment and relying upon modification as a panacea. What is needed is an approach which seeks a permanent solution at once..." The California Custody Decree, 13 STAN. L. REV. 108, 116 (1960).

102. See text accompanying notes 161-170, infra.

103. Cal. App.2d , 88 Cal. Rptr. 806 (1st Dist. 1970). The suit was brought by the Director of the Alameda County Department of Social Welfare against the Superior Court of Alameda County, with Idella Boyd as real party in interest.

104. See text accompanying notes 50-51, supra. See also Guardianship of Guidry, 196 Cal. App.2d 426, 16 Cal. Rptr. 579 (1961).

105. Pursuant to CAL. CIV. CODE § 233 in the proceedings for freedom from parental control.

106. Pursuant to CAL. CIV. CODE § 226.6 in the adoption proceedings.

107. 88 Cal. Rptr. at 809.

108. This was done in accordance with CAL. CIV. CODE § 226c.

109. 88 Cal. Rptr. at 815 n. 8.

110. But the identity and location of the prospective adoptive parents was to be blocked out of the report unless and until a prima facie showing was made that the adoption procedure is not running its proper course. Id. at 814, 815.

111. Id. at 811.

112. The appellate court assumed that the child would be removed from the custody of the county welfare department if the showing required by Henwood and Guidry is made. Id. at 811.

113. CAL. CIV. CODE § 224n was amended to provide that a petition for adoption may not be filed by anyone but adoptive parents selected by the adoption agency,

not only when the child has been relinquished to the agency by his parents, as the old law read, but also in the Terzian situation when a child, after being declared free from parental control, is "referred to a licensed adoption agency for adoptive placement." Cal. Laws, 1970, ch. 1091. And CAL. CIVIL. CODE § 227 was amended to include the "report to the court from any investigating agency" among the documents which the judge may not authorize anyone to inspect except in exceptional circumstances and for good cause approaching the necessitous. Cal. Laws 1970, ch. 655. While this provision of the adoption law does not apply to a probation officer's report prepared, as in Terzian, under the authority of § 1443 of the Probate Code, it may hamper the gathering of information by the probation officer in cases under the Henwood rule.

114. See POLICY MEMORANDA OF LOS ANGELES COUNTY PROBATE COURT (Revised to Nov. 1, 1969) No. 709: "If

an adoption proceeding is pending in Los Angeles County, involving a minor who is also the subject of a petition for guardianship, the proceedings will be transferred to the Family Law Department of the Superior Court." This rule would, however, not help in the common Henwood situation in which a child has been relinquished to an agency, and adoption proceedings have not been instituted.

115. See Katz, Foster Parents versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine, 65 MICH. L. REV. 145 (1966).

116. See supra notes 29 and 30. Probation departments, however, make the investigation in step-parent adoptions and in some adult adoption cases. CAL. CIV. CODE §§ 227a, 227p.

117. The requirement for notice to the state welfare department and an investigation of adoptive homes came into the law in 1927. Historical Note,

WEST'S ANN. CAL. CODES, CIVIL CODE § 226. CAL. PROB. CODE § 1443 with respect to guardianship investigations by probation officers was enacted in 1941, and the provision of the Juvenile Court Law which imposed the duty on probation officers to make custody investigations on request of any court was added in 1949. See CAL. WELF. & INST'S CODE § 582.

118. Emphasis added.

119. Cf. Armstrong, supra note 50, at 127; Foster & Freed, Children and the Law, 2 FAM. L. Q. 40, 53-54 (1968).

120. CAL. CIV. CODE §§ 227a, 233. In the case of stepparent adoptions parental consent to adoption is signed before a county clerk or probation officer on forms prescribed by the State Department of Social Welfare. CAL. CIV. CODE § 226.9. In other cases consent to independent adoptions must under present law be signed before an agent of the State Welfare Department or of a licensed adoption agency. CAL. CIV. CODE § 226.1.

121. Guardianship of Henwood, 49 Cal.2d 639, 646(1958).

122. The leading case in California and nationally is Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948). See also Fain, supra note 1, at 543-544; Clark supra note 18, at 319-326.

123. See e.g., Ratner, Child Custody in a Federal System, 62 MICH. L. REV. 795 (1964); Ehrenzweig, supra note 77.

124. Fain, supra note 1, at 546.

125. See supra note 123. For additional references, see Bodenheimer, The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws, 22 VAND. L. REV. 1207 (1969).

126. See Moniz v. Moniz, 142 Cal. App.2d 527, 298 P.2d 710 (1956) (conflict with New Mexico); Com. ex rel. Thomas v. Gillard, 203 Pa. Super. 95, 198 A.2d 377 (1964); Fohey v. Fohey, 152 Cal. App. 2d 820, 313 P.2d

872 (4th Dist. 1957) (conflict with Missouri); In re Walker, 228 Cal. App.2d 217, 39 Cal. Rptr. 243 (1964) (conflict with Texas); Stout v. Pate, 209 Ga. 786, 75 S.E.2d 748 (1953) and Stout v. Pate, 120 Cal. App.2d 699, 261 P.2d 788 (1953), cert. den. in both cases 347 U.S. 968, 74 S. Ct. 744 (1954).

127. See Fain, supra note 1, at 546-47.

128. See Ehrenzweig, Recognition of Out-of-State Custody Decrees in California, FAMILY LAW FOR CALIFORNIA LAWYERS 585, 590-94 (California Continuing Education of the Bar 1956); Leathers v. Leathers, 162 Cal. App.2d 768, 328 P.2d 853 (1958); Perry v. Superior Court, Cal. App.2d , 86 Cal. Rptr 607 (1970).

129. It does not apply, for example, when the child has been legally brought to California during a period of visitation authorized by the out-of-state custody decree.

130. See e.g., In re Walker, supra note 126; and see Fain, supra note 1, at 547.

131. See supra note 123 and Bodenheimer, supra note 125, at 1216-18.

131a. See Zillmer v. Zillmer, 8 Wis.2d 657, 100 N.W. 2d 564, 101 N.W.2d 703 (1960); State ex rel. Kern v. Kern, 17 Wis.2d 268, 116 N.W.2d 337, (1962). In the latter case the Supreme Court of Wisconsin refused to accept the argument that because an Iowa court had not respected a Wisconsin custody decree, Wisconsin should treat the Iowa custody judgment in similar fashion: "Logically, appellant's contention means that because Iowa has mistreated a Wisconsin judgment then Wisconsin should similarly mistreat an Iowa judgment; apparently then two wrongs would equal one right...We agree with the trial court's assertion that full faith and credit is not grounded on reciprocity...We respect the determination...made by the Iowa court on the merits and refrain from ourselves re-examining the merits. We regard this as the better policy in such circumstances." Kern v. Kern, supra

116 N.W.2d at 339-40. On Zillmer v. Zillmer, supra, see Bodenheimer, The Uniform Child Custody Jurisdiction Act, 3 FAM. L. Q. 304, 310-11 (1969).

132. See North Dakota Laws 1969, ch. 154 which enacts the Uniform Child Custody Jurisdiction Act.

133. Corkill v. Cloninger, Mont. , 454 P.2d 911 (1969) overruling Application of Enke, 129 Mont. 353, 287 P.2d 19 (1955) which was cited in Fain, supra note 1, at 545. For an international case in which a New York court refused to interfere with a Swiss custody judgment, see Application of Lang, 9 App. Div. 2d 401, 193 N.Y.S.2d 763 (1959).

134. 37 Cal.2d at 312.

135. "There must be some court with authority to protect the child's interest in the state where he is." Id.

136. See Bodenheimer, supra, notes 125 and 131.

137. See e.g., CALIFORNIA ASSEMBLY COMMITTEE ON JUDICIARY, FINAL REPORT ON DOMESTIC RELATIONS 157 (1965);

The California Custody Decree, 13 STAN. L. REV. 108, 112 n.26; Hansen, Three Dimensions of Divorce, 50 MARQ. L. REV. 1, 8-9 (1966); DESPERT, supra note , at 200-201; Watson, supra note 3, at 59.

138. In one such instance a two-year old boy was awarded to his father without open objection of the mother. He was moved to his grandparents who took little interest in him. When the mother obtained custody four years later, the boy was afflicted with a facial tic, head bobbing, and other symptoms of emotional disturbance acquired after his placement with the grandparents. Reported in Hansen & Goldberg, Casework in a Family Court, READINGS IN LAW AND PSYCHIATRY 330-32 (R. Allen, E. Ferster & J. Rubin eds. 1968).

139. See Goldstein & Gitter, supra note at 88.

140. Hansen, supra note 137, at 10-12; REPORT OF CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY 41-43 (1966); Watson, supra note 3, at 66, 77. Cf. Fain,

The Role and Responsibility of the Lawyer in Custody Cases, 1 FAM. L. Q. 36-37 (Sept. 1967). Lawyer Fain feels that a spouse's attorney can at the same time play the role of the children's advocate, Psychiatrist Watson believes that these complex role demands on lawyers are too difficult to fulfill for the majority of lawyers.

141. See Hansen, supra note 137, at 11. To have reason for concern requires some knowledge of the facts. See text accompanying notes , infra.

142. See supra note 18. See also 3 WITKIN, SUMMARY OF CALIFORNIA LAW 2436 (1960).

143. The great number of cases in which a custody determination is applied for in California after an out-of-state divorce, either to modify the out-of-state custody decree or to decide the custody question when the sister state had failed to do so, are based on the equitable cause of action. The custody actions specified in the Family Law Act presuppose marriage, including

void or voidable marriage. See CAL. CIV. CODE §§ 4454, 4502, 4600, 4603. Although § 4600 refers to "any proceeding" where child custody is at issue, it does not authorize any custody proceedings besides those just named.

144. See text accompanying notes 38-42, supra. The Greene rule supersedes the rule of Titcomb v. Superior Court, 220 Cal. 34, 29 Pac. 206 (1934) with respect to the proper county of trial.

145. See 3 WITKIN, SUMMARY OF CALIFORNIA LAW 2453-54 (1960); In re Croze, 145 Cal. App.2d 492, 302 P.2d 595 (1956); CLARK, supra note 18, at 578-580.

146. CAL. PENAL CODE § 1507, adopted in 1959.

147. Supra note 103.

148. 268 Cal. App.2d 918, 74 Cal. Rptr. 514 (1969).

149. Prior to the surgery the county welfare department had informed the Callahans "that the child was not adoptable." Id. at 515. "Not adoptable"

ordinarily means that the agency, because of a child's illness or other handicap does not plan to place him for adoption.

150. Id. at 516-17. Cf. the Liuni case in New York which had a happier ending due to the publicity it received and the Governor's request to the state Department of Public Welfare to make a complete investigation of the case. The foster parents with whom the child had been placed by the county welfare commissioner right after birth and until age 4 1/2 were ultimately permitted to adopt the child. On this case, see Foster & Freed, Children and the Law, 2 FAM. L. Q. 40, 53-54 (1968).

151. In re Runyan, 74 Cal. Rptr. at 516.

152. Note the comments of Foster and Freed on the Liuni case, supra note 150 at 54: "...the Liuni case was not merely an isolated example of bureaucratic bungling. In the background there were substantial issues relating to the social value of generally accepted

placement criteria, the unthinking and unreasonable application of such criteria and the traditional agency opposition to adoption by foster parents. Also, there were important issues regarding judicial review of agency discretion and the goal or goals of placement. In other words, the Liuni case was significant because it dramatically exposed how the relatively trivial may override the basically important unless courts check administrative discretion..."

153. CAL. CIV. CODE § 4600.

154. Guardianship of Henwood, 49 Cal.2d 639, 644 (1958).

155. The language of CAL. CIV. CODE § 224n is ironclad in this respect. But, as Professor Armstrong has said, "The zealous guarding of exclusive juriadiction over the relinquished older child which sometimes develops in agencies, no longer can claim legal justification." Armstrong, Family Law: Order Out of Chaos, 53 CAL. L. REV. 121, 127 (1965).

156. CAL. CIV. CODE § 233.

157. Guardianship of Hemwood, supra note 154, at 646.

158. See e.g., Kay & Philips, Poverty and the Law of Child Custody, 54 CAL. L. REV. 717, 738 (1966).

159. See Taylor, Guardianship or "Permanent Placement" of Children, 54 CAL. L. REV. 741 (1966).

160. Courts and agencies as well, are often "faced with the necessity of choosing in behalf of a child, the best of several not entirely satisfactory alternatives." In re A.J., Cal. App. , 78 Cal. Rptr. 880, 881 (1969).

161. If one adds the frequency with which custody decisions once made are overthrown within one of these departments themselves, the picture of the "judicial 'bouncing around'" of the child is complete. See Saltonstall v. Saltonstall, 148 Cal. App.2d 109, 306 P.2d 492 (1957) (dissent at 116).

162. "...primary emphasis in determining the custodial arrangement should be upon providing for permanency, not change." The California Custody Decree, supra note 137, at 114. "The obvious...goal is to assure a correct initial decision..." Watson, supra note 3 at 76. "Generally, the custody of children is to be established, whenever possible, on a long-term basis." Application of Lang, supra note 133, 193 N.Y.S.2d 763, 771. "Custody proceedings shall receive priority in being set for hearing." Section 406(a), UNIFORM MARRIAGE AND DIVORCE ACT, supra note 78. See also Fain, supra note 1, at 541-42; CLARK, supra note 18, at 326.

163. Fleming, Court Survival in the Litigation Explosion, 54 JUDICATURE 109 (1970).

164. See id. at 111.

165. Id. at 112.

166. See generally, THE CHALLENGE OF CRIME IN A FREE SOCIETY, REPORT BY THE PRESIDENT'S COMMISSION ON

LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 63-66 (1967).

167. "A preventive rather than a remedial approach could eliminate many of the difficulties caused by continuous change in the custodial program." The California Custody Decree, supra note 137, at 116.

168. In those counties of California which have established conciliation courts, conciliation counselors have brought about agreement on child custody arrangements in many instances.

169. See supra note . Unfortunately, it may not be possible to consolidate juvenile dependency and divorce cases under present law. See 1 WITKIN CALIFORNIA PROCEDURE 209-210, 216-17 (1954). Cf. Schlyen v. Schlyen, 43 Cal.2d 361, 371, (1954).

170. The domestic relations department of the Los Angeles Superior Court has a large staff of conciliators, investigators, etc. See Fleming, supra note 163 at 111. Many of the superior courts, however,

must depend on referrals of investigations to juvenile probation officers who already have more than a full caseload in their own court departments.

171. Cf. Ehrenzweig supra note 77, at 10-11, who speaks of a "guardianship court".

172. See CALIFORNIA LAW REVISION COMMISSION, supra note 9.

173. CAL. CIV. CODE §§ 232-238 relating to proceedings to declare a child free from parental custody and control was added by Cal. Stats. 1961, ch. 1616. See 3 WITKIN, SUMMARY OF CALIFORNIA LAW, 1969 Supp., 1355-58.

174. See e.g., amendment to CAL. WELF. & INST'S CODE § 508 by Cal. Stats. 1969 ch. 260, and to § 675 by Cal. Stats. 1969 ch. 185.

175. Among many other advantages it would eliminate the problems created by the supervening and temporary jurisdiction of the juvenile courts which cannot be resolved satisfactorily in any other manner. See text

accompanying notes 94-102, supra.

176. See the latest pronouncement of the U.S. Supreme Court on this subject, including Chief Justice Burger's dissent, in In re Winship, 90 S.Ct. 1068 (1970).

177. THE CHALLENGE OF CRIME IN A FREE SOCIETY, supra note 166, at 85.

178. Id. at 81.

179. CAL. WELF. & INST'S CODE § 601. See Lemert, The Juvenile Court - Quest and Realities, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 99 (1967); T. RUBIN, LAW AS AN AGENT OF DELINQUENCY PREVENTION, PRESENTED TO CALIFORNIA COUNCIL ON CRIMINAL JUSTICE 7 et seq, 53. (Febr., 1970).

180. See Lemert, supra note 179, at 98-99. The transformation in juvenile court thinking over the last 20 years is illustrated by the statements of two Denver

Juvenile Court judges 20 years apart. Noting the overlapping jurisdiction of the juvenile court and the divorce court in custody cases, Judge Gilliam suggested in 1949 that the juvenile courts assume the task of determining custody in divorce cases. Gilliam & Gilliam, supra note 99, at 383-84. Today Judge T. Rubin speaks of narrowing the neglect and dependency jurisdiction of the juvenile courts. T. RUBIN, supra note 179, at 55-56. See also T. RUBIN & J. SMITH, THE FUTURE OF THE JUVENILE COURT. IMPLICATIONS FOR CORRECTIONAL MANPOWER AND TRAINING, JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING 9-10 (1968).

181. See supra note 13.

182. PRORATE CODE §§ 1407 and 1408 relating to priorities, for example, should be repealed, as far as guardians of the person are concerned. As for the selection of a guardian by a 14-year old, this remnant of feudal "guardianship in socage" (See MADDEN, THE LAW OF PERSONS AND DOMESTIC RELATIONS 457-58 (1931)) could

probably be reconciled with the provisions of CAL. CIV. CODE § 4600 by giving the child over 14 a stronger voice in declaring his preference. In other words, § 4600 would be amended to state that if a child is 14 years or older the court shall give strong weight to his wishes in awarding custody.

183. For example, portions of § 1442 on temporary custody, of § 1443 on custody investigations, of § 1406 on the best interests of the child, and provisions of § 1441 with respect to notice and of § 1603 on the transfer of proceedings to another court in or out of state, should be preserved.

184. Provisions which now apply to both guardianship of the person and guardianship of the estate would be retained as to guardianship of the estate.

185. See text accompanying notes 64-72, supra. Cf. section 401(b) of the UNIFORM MARRIAGE AND DIVORCE ACT, supra note 78:

> Notice of a child custody proceeding shall be given to the

> child's parent, guardian and custodian, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause, permit the intervention of other interested parties.

186. See text accompanying notes 74-82, supra.

187. As to juvenile dependency cases, see supra note 169.

188. See text preceding note 82, supra.

189. See text accompanying notes 167-170, supra.

190. See REPORT OF CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY 42 (1966).

191. See UNIFORM MARRIAGE AND DIVORCE ACT, supra note 78, section 310; and see text accompanying notes 137-141, supra.

192. See text accompanying notes 83-93, supra.

193. See text accompanying notes 103-121, supra.

194. See text accompanying notes 148-160, supra.

195. See text accompanying and following notes 142-144, supra.

196. See text accompanying notes 145-146, supra.

197. See text accompanying notes 122-136, supra.

FAMILY LAW ACT--CHILD CUSTODY PROVISIONS

(California Civil Code Sections 4600-4603)

§ 4600. Custody order; preferences; findings; allegations; exclusion of public

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding, or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent according to the best interests of the child, but, other things being equal, custody shall be given to the mother if the child is of tender years.

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it must make a finding that an award of custody to a parent would be detrimental to the child, and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

(Added by Stats.1969, c. 1608, p. 3330, § 8, operative Jan. 1, 1970.)

§ 4601. Visitation rights

Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

(Added by Stats.1969, c. 1608, p. 3330, § 8, operative Jan. 1, 1970.)

§ 4602. Custody investigation and report

In any proceeding under this part, when so directed by the court, the probation officer or domestic relations investigator shall conduct a custody investigation and file a written confidential report thereon. The report may be considered by the court and shall be made available only to the parties or their attorneys at least 10 days before any hearing regarding the custody of a child. The report may be received in evidence upon stipulation of all interested parties.

(Added by Stats.1969, c. 1608, p. 3331, § 8, operative Jan. 1, 1970. Amended by Stats.1969, c. 1609, p. 3357, § 20, operative Jan. 1, 1970.)

§ 4603. Action for exclusive custody; order

Without filing a petition pursuant to Section 4503, husband or wife may bring an action for the exclusive custody of the children of the marriage. The court may, during the pendency of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education and control of the children of the marriage as may be just and in accordance with the natural rights of the parents and the best interests of the children. Such order or decree may be modified or revoked at any time thereafter as the natural rights of the parties and the best interests of the children may require.

(Added by Stats.1969, c. 1608, p. 3331, § 8, operative Jan. 1, 1970.)

GUARDIANSHIP OF THE PERSON

(California Probate Code Sections 1400-1410, 1440-1443, 1500, 1512, 1580, 1603)

§ 1400. Definition of relationship; applicability of trust law; control by court

A guardian is a person appointed to take care of the person or property of another. The latter is called the ward of the guardian. The relation of guardian and ward is confidential, and is subject to the provisions of law relating to trusts. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court. (Stats.1931, c. 281, p. 669, § 1400.)

§ 1401. General and special guardians defined

Guardians are either general or special. A general guardian is a guardian of the person or of the general estate of the ward within this state, or of both. Every other is a special guardian. (Stats.1931, c. 281, p. 669, § 1401.)

§ 1402. Guardian of estate; appointment by will or deed

A parent may appoint a guardian by will or by deed for the property of any child of such parent, living or likely to be born, which such child may take from such parent by will or succession, and any person may in a will appoint a guardian for the property of any minor, living or likely to be born, which such minor may take from such person by such will.

(Amended by Stats.1969, c. 563, p. —, § 1.)

§ 1403. Guardian of person and estate; appointment by will or deed; effective upon death

Either parent of a legitimate child living or likely to be born, may appoint a guardian of the person and estate, or person or estate of such child, by will or by deed, to take effect upon the death of the parent appointing, with the written consent of the other parent, or if the other parent is dead or incapable of consent. If the child is illegitimate, such appointment may be made by the mother. (Stats. 1931, c. 281, p. 669, § 1403.)

§ 1404. Guardian of person and estate of incompetent; appointment by parent or spouse

Either parent of an unmarried insane or incompetent person may appoint a guardian of the person and estate, or person or estate, of such person, by will or by deed, to take effect upon the death of the parent appointing, with the written consent of the other parent, or if the other parent is dead or incapable of consent. If the insane or incompetent person is married, such appointment may be made by the spouse. (Stats.1931, c. 281, p. 669, § 1404.)

§ 1405. General guardian of minors or incompetents; appointment by court; multiple guardians; deposit of moneys in small estates; confirmation of appointments by will or deed

The superior court shall appoint a general guardian of the person and estate, or person or estate, of minors and insane or incompetent persons, whenever necessary or convenient, and when no guardian has been appointed for the purpose by will or by deed. The court, in its discretion, may appoint more than one guardian and shall require either a separate bond from each or a joint and several bond. Where two or more guardians are appointed as coguardians, each shall be governed and liable in all respects as a sole guardian. If the estate does not exceed ten thousand dollars ($10,000), the court may require that the money in the estate be deposited in a bank or trust company or be invested in an account in an insured savings and loan association subject to withdrawal only upon the order of the court in which case no bond be required of the guardian. The court shall also confirm an appointment made by will or by deed, whenever requested, upon the same procedure and notice as in the case of appointment by the court. (As amended Stats.1959, c. 308, § 3; Stats. 1959, c. 1459, p. 3753, § 1.)

§ 1405.1 Deposited property; exclusion in computing amount of bond

Notwithstanding the provisions of Section 1405, in any proceedings for the determination of the amount of bond to be required of a guardian (whether at the time of appointment or subsequently), when it appears that the estate of the ward includes money or securities which have been, or will be, deposited in a bank or banks in this State or in a trust company authorized to transact a trust business in this State or money which has been, or will be, invested in an account or accounts in an insured savings and loan association or associations upon condition that such money or securities will not be withdrawn except on authorization of the court, the court may, in its discretion, order such money or securities so deposited or such money so invested and may exclude such deposited property from the computation of the amount of such bond or reduce the amount of bond to be required in respect of such money or securities to such an amount as it may deem reasonable.

The petitioner for letters of guardianship may deliver to any such bank or trust company any such money or securities in his possession or may deliver to any such association any such money in his possession or may allow such bank or trust company to retain any such money or securities already in its possession or may allow such association to retain any such money already invested with it; and, in either event, the petitioner shall secure and file with the court a written receipt including the agreement of the bank or trust company or association that such money or securities shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money or securities, the bank or trust company or association shall be protected to the same extent as though it had received the same from a person to whom letters of guardianship had been issued.

The term "account in an insured savings and loan association" used in this section has the same meaning as in Section 1431 of the Probate Code. (Added Stats.1961, c. 93, p. 1101, § 3.)

§ 1406. Guardian of minor; rules for appointment

In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in this state and is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court. (Stats.1931, c. 281, p. 670, § 1406.)

§ 1406.5 Nomination by minor; restriction

The right of a minor to nominate a guardian is subject to the provisions of Section 1402 of this code. (Added Stats.1941, c. 677, p. 2140, § 1.)

§ 1407. Order of preference in appointment

Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows:

(1) To a parent;

(2) To one who was indicated by the wishes of a deceased parent;

(3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;

(4) To a relative;

(5) If the child has already been declared to be a ward or dependent child of the juvenile court, to the probation officer of said court. (As amended Stats.1961, c. 1616, p. 3509, § 11.)

§ 1408. Guardian of minor; rights as between parents

As between parents claiming the guardianship adversely to each other, neither is entitled to priority; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father. (Stats.1931, c. 281, p. 670, § 1408.)

§ 1409. Abandonment of child; forfeiture of right to guardianship; preferred right of manager of orphan asylum

A parent who knowingly or wilfully abandons or, having the ability so to do, fails to maintain his minor child under fourteen years of age, forfeits all right to the guardianship of such child; and a parent or guardian who knowingly permits his child or ward to remain for one year in an orphan asylum where the child is supported by charity, without notifying the managers or officers of the asylum that he is such parent or guardian, abandons and forever forfeits all right to the guardianship of the child. The officers and managers of any orphan asylum having such abandoned child in its care have the preferred right to the guardianship of the child. (Stats.1931, c. 281, p. 670, § 1409.)

§ 1410. Marriage of guardian

The authority of a guardian is not extinguished or affected by the marriage of the guardian. (Stats.1931, c. 281, p. 671, § 1410.)

§ 1440. Authority to appoint; petition; guardianship over more than one minor; bond

When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate. The appointment may be made upon the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age.

The court may issue letters of guardianship over the person or estate, or both, of more than one minor upon the same application, in its discretion. When there is an application for more than one minor, the court may permit a joint or separate bond in such multiple application. (Stats.1931, c. 281, p. 671, § 1440, as amended Stats.1937, c. 528, p. 1537, § 1.)

§ 1441. Notice

Before making the appointment, such notice as the court or a judge thereof deems reasonable must be given to the person having the care of the minor and to such relatives of the minor residing in the state as the court or judge deems proper. In all cases notice must be given to the parents of the minor or proof made to the court that their addresses are unknown, or that, for other reason, such notice * * * cannot be given. Notice shall not be given to the parents or other relatives of a minor who has been relinquished to a licensed adoption agency or who has been declared free from the custody and control of his parents.

(Amended by Stats.1968, c. 694, p. 1294, § 2.)

§ 1442. Order for temporary custody; grounds; warrant

In such proceeding, when it appears to the court or judge either from a verified petition or from affidavits, that the welfare of the minor will be imperiled if he is allowed to remain in the custody of the person then having his care, an order may be made providing for his temporary custody until a hearing can be had on the petition. And when it appears that there is reason to believe that the minor will be carried out of the jurisdiction of the court, or will suffer some irreparable injury before compliance with such order providing for the temporary custody of the minor can be enforced, the court or judge, at the time of making the order for temporary custody, may cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or a constable of the county, commanding such officer to take the minor from the custody of the person in whose care he then is and place him in custody in accordance with such order. (Stats.1931, c. 281, p. 672, § 1442.)

§ 1443. Investigation by probation officer

The probation officer in the county in which the petition for appointment of guardian of a minor or incompetent person is pending, shall make an investigation of each case whenever he is requested so to do by a judge of the superior court. In the event that a petition for guardianship is filed for a minor of two years of age or under and the person petitioning for appointment as guardian is not a relative of the minor, the court shall require the probation officer to make an investigation.

(As amended Stats.1967, c. 827, p. 2252, § 1.)

§ 1500. Duration of guardianship; education of minor; residence of ward

Every guardian has the care and custody of the person of his ward and the management of his estate, or the care and custody of the person of his ward or the management of his estate, according to the order of appointment, until legally discharged, or until his ward is restored to capacity pursuant to Chapter 5 (commencing with Section 1470) of this division, whichever shall occur first, or, in case of the guardianship of the person of a minor, until the minor reaches the age of majority or marries, or, as to the guardianship of his estate, until the ward attains his majority as provided in Section 25 of the Civil Code. The guardian of a minor also has charge of the education of the minor. The guardian of the person of a ward may fix the residence of the ward at any place in the State, but not elsewhere without the permission of the court. (As amended Stats.1959, c. 1983, p. 4589, § 1; Stats.1961, c. 608, p. 1757, § 2.)

§ 1512. Additional conditions of guardianship; authority of court to impose

When a person is appointed guardian of a minor, the court, with the consent of such person, may insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the minor and for the care and custody of his property. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond shall be responsible. (Stats.1931, c. 281, p. 676, § 1512.)

§ 1580. Removal; causes

A guardian however appointed * * * may be removed by the court, after notice and hearing, substantially as provided in Section 1755 of this code, for any of the following causes:

(1) For waste or mismanagement of the estate, or abuse of his trust;

(2) For failure to file an inventory or to render an account within the time allowed by law, or for continued failure to perform his duties;

(3) For incapacity to perform his duties suitably;

(4) For gross immorality or conviction of a felony;

(5) For having an interest adverse to the faithful performance of his * * * trust;

(6) * * * In the case of a guardian of * * * an estate, for insolvency * * * or bankruptcy;

(7) When it is no longer necessary that the ward should be under guardianship; or

(8) In any other case in which the court shall in its discretion deem such removal to be in the best interests of the ward provided, in considering the best interests of the ward, if the guardian was appointed by will or deed, the court shall take that fact into consideration.

(Amended by Stats.1968, c. 844, p. 1625, § 1.)

Asterisks * * * indicate deletions by amendment

§ 1603. Transfer of proceeding to another county or state; application; discharge of guardian

The court in which guardianship proceedings are pending may transfer the proceedings to the superior court of any other county or to the appropriate court in any other state in which the ward resides at the time of the application for the transfer, and also may discharge the guardian, in the same manner and upon the same notice of hearing as is provided for conservatorships in Chapter 8 (commencing with Section 2051) of Division 5.

(Added by Stats.1969, c. 293, p. ——, § 5.)

DEPENDENT CHILDREN

(California Welfare and Institutions Code
Sections 506, 600, 725-729)

§ 506. Contact or association with habitual delinquents or truants; separate segregated facilities; record of arrest

No person taken into custody solely upon the ground that he is a person described in Section 600 or adjudged to be such and made a dependent child of the juvenile court pursuant to this chapter solely upon that ground shall, in any detention under this chapter, be brought into direct contact or personal association with any person taken into custody on the ground that he is a person described by Section 601 or Section 602, or who has been made a ward of the juvenile court on either such ground.

Separate, segregated facilities for such persons alleged to be within the description of Section 600, or persons adjudged to be such and made dependent children of the court pursuant to this chapter solely upon that ground shall be provided by the board of supervisors. Such separate, segregated facilities may be provided in the juvenile hall or elsewhere.

No record of the detention of such a person shall be made or kept by any law enforcement agency or the Bureau of Criminal Identification and Investigation as a record of arrest.

(Amended by Stats.1969, c. 260, p. —, § 1.)

§ 600. Persons subject to jurisdiction. Any person under the age of 21 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control.

(b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode, or whose home is an unfit place for him by reason of neglect, cruelty, or depravity of either of his parents, or of his guardian or other person in whose custody or care he is.

(c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality. (Added Stats.1961, c. 1616, p. 3471, § 2, as amended Stats.1965, c. 535, p. —, § 1.)

§ 725. Judgment; placing minor on probation; adjudging minor ward of court or dependent child of court. After receiving and considering the evidence on the proper disposition of the case, the court may enter judgment as follows:

(a) If the court has found that the minor is a person described by Sections 601 or 602, it may, without adjudging such minor a ward of the court, place the minor on probation, under the supervision of the probation officer, for a period not to exceed six months.

(b) If the court has found that the minor is a person described by Sections 601 or 602, it may order and adjudge the minor to be a ward of the court.

(c) If the court has found that the minor is a person described by Section 600, it may order and adjudge the minor to be a dependent child of the court. (Added Stats.1961, c. 1616, p. 3485, § 2, as amended Stats.1963, c. 1761, p. 3514, § 5.)

§ 726. Parental control; removal from custody. In all cases wherein a minor is adjudged a ward or dependent child of the court, the court may limit the control to be exercised over such ward or dependent child by any parent or guardian and shall by its order clearly and specifically set forth all such limitations, but no ward or dependent child shall be taken from the physical custody of a parent or guardian unless upon the hearing the court finds one of the following facts:

(a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor.

(b) That the minor has been tried on probation in such custody and has failed to reform.

(c) That the welfare of the minor requires that his custody be taken from his parent or guardian. (Added Stats.1961, c. 1616, p. 3486, § 2.)

§ 727. Order for care, supervision, custody, maintenance and support of dependent child

When a minor is adjudged a dependent child of the court, on the ground that he is a person described by Section 600, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of such minor, including medical treatment, subject to further order of the court.

The court may order the care, custody, control and conduct of such minor to be under the supervision of the probation officer or may commit such minor to the care, custody and control of:

(a) Some reputable person of good moral character who consents to such commitment.

(b) Some association, society, or corporation embracing within its objects the purpose of caring for such minors, with the consent of such association, society, or corporation.

(c) The probation officer, to be boarded out or placed in some suitable family home or suitable private institution, subject to the requirements of Chapter 1 (commencing with * * * Section 16000) of Part 4 of Division 9; provided, however, that pending action by the State Department of Social Welfare, the placement of a minor in a home certified as meeting minimum standards for boarding homes by the probation officer shall be legal for all purposes.

(d) Any other public agency organized to provide care for needy or neglected children.

(Amended by Stats.1968, c. 218, p. 524, § 1.)

§ 728. Periodic reports. The court may require the probation officer or any other agency to render such periodic reports concerning minors committed to its care, custody, and control under the provisions of paragraphs (c) or (d) of Section 727 as the court may deem necessary or desirable, and the court may require that the probation officer, or may, with the consent of such other public agency, provide that any other public agency organized to provide care for needy or neglected children, shall perform such visitation and make such periodic reports to the courts concerning minors committed under such provisions as the court may deem necessary or desirable. (Added Stats.1961, c. 1616, p. 3486, § 2.)

§ 729. Continuation of hearing; duties of probation officer; notice. Every hearing in which an order is made adjudging a minor a dependent child of the juvenile court pursuant to Section 600 and every subsequent hearing in which such an order is made, except a hearing at which the court orders the termination of its jurisdiction over such minor, shall be continued to a specific future date not more than one year after the date of such order. The continued hearing shall be placed on the appearance calendar and the probation officer shall make an investigation, file a supplemental report and make his recommendation for disposition. The court shall advise all persons present of the date of the future hearing and of their right to be present, to be represented by counsel and to show cause, if they have cause, why the jurisdiction of the court over the minor should be terminated. Notice of hearing shall be mailed by the probation officer to the same persons as in an original proceeding and to counsel of record by certified mail addressed to the last known address of the person to be notified not earlier than 30 days preceding the date to which the hearing was continued. (Added Stats.1961, c. 1616, p. 3486, § 2, as amended Stats.1963, c. 1761, p. 3515, § 7; Stats.1965, c. 539, p. —, § 1.)

FREEDOM FROM PARENTAL CUSTODY AND CONTROL

(California Civil Code Sections 232-238)

232.

An action may be brought for the purpose of having any person under the age of 21 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions:

(a) Who has been left without provision for his identification by his parent or parents or by others or has been left by both of his parents or his sole parent in the care and custody of another without any provision for his support, or without communication from such parent or parents, for * * * a period of six months with the intent on the part of such parent or parents to abandon such person. Such failure to provide * * * identification, failure to provide, or failure to communicate for * * * a period of six months * * * shall be presumptive evidence of the intent to abandon. Such person shall be deemed and called a person abandoned by the parent or parents abandoning him. If in the opinion of the court the evidence indicates that such parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by such parent or parents.

The fact that a child is in a foster care home, licensed under subdivision (a) of Section 16000 of the Welfare and Institutions Code, shall not prevent a licensed adoption agency which is planning adoption placement for the child, from instituting, under this subdivision, an action to declare such child free from the custody and control of his parents. When the requesting agency is a licensed county adoption agency, the county counsel and if there is no county counsel, the district attorney shall institute such action.

(b) Who has been cruelly treated or neglected by either or both of his parents, if such person has been a dependent child of the juvenile court, and such parent or parents deprived of his custody for the period of one year prior to the filing of a petition praying that he be declared free from the custody and control of such cruel or neglectful parent or parents.

(c) Whose parent or parents are habitually intemperate, or morally depraved, if such person has been a dependent child of the juvenile court, and the parent or parents deprived of his custody because of such intemperance, or moral depravity, for the period of one year continuously immediately prior to the filing of the petition praying that he be declared free from the custody and control of such habitually intemperate or morally depraved parent or parents.

(d) Whose parent or parents are deprived of their civil rights due to the conviction of a felony, if the felony of which such parent or parents were convicted is of such nature as to prove the unfitness of such parent or parents to have the future custody and control of the child, or if any term of sentence of such parent or parents is of such length that the child will be deprived of a normal home for a period of years.

(e) Whose parent or parents have, in a divorce action, been found to have committed adultery and been divorced on that ground, if the court finds that the future welfare of the child will be promoted by an order depriving such parent or parents of the control and custody of the child.

(f) Whose parent or parents have been declared by a court of competent jurisdiction to be mentally deficient or mentally ill, if the State Director of Mental Hygiene and the superintendent of the state hospital of which, if any, such parent or parents are inmates or patients certify that such parent or parents so declared to be mentally deficient or mentally ill will not be capable of supporting or controlling the child in a proper manner.

(g) Whose parent or parents are, and will remain incapable of supporting or controlling the child in a proper manner because of mental deficiency or mental illness, if there is testimony to this effect from two medical examiners certified under Section 5000 of the Welfare and Institutions Code. The parent or parents shall be cited to be present at the hearing, and if he or they have no attorney, the judge shall appoint an attorney or attorneys to represent the parent or parents and fix the compensation to be paid by the county for such services, if he determines the parent or parents are not financially able to employ counsel.

A licensed adoption agency may institute under this section, an action to declare a child, as described in this section, free from the custody and control of his parents. When the requesting agency is a licensed county adoption agency, the county counsel, or if there is no county counsel, the district attorney shall in a proper case institute such action.

Approved and filed Aug. 14, 1970.

§ 232.5 Liberal construction

The provisions of this chapter shall be liberally construed to serve and protect the interests and welfare of the child. (Added Stats.1965, c. 1064, p. 2710, § 1.)

232.8.

The State Department of Social Welfare, a county welfare department, a county adoption department, or a county probation department which is planning adoptive placement of a child with a licensed adoption agency, or the State Department of Social Welfare acting as an adoption agency in counties which are not served by a county adoption agency, may initiate an action under Section 232 to declare a child free from the custody and control of his parents. The fact that a child is in a foster care home licensed under subdivision (a) of Section 10000 of the Welfare and Institutions Code shall not prevent the institution of such an action by any such agency or by a licensed adoption agency pursuant to Section 232.

The county counsel or, if there is no county counsel, the district attorney of the county specified in Section 233 shall, in a proper case, institute the action upon the request of any of the state or county agencies mentioned herein.

Approved and filed Aug. 4, 1970.

§ 233. Petition; filing; investigation by probation officer; written report; recommendation

Any interested person may petition the superior court of the county in which a minor person described in Section 232 resides or in which such minor person is found or in which any of the acts constituting abandonment, neglect, cruelty or habitual intemperance occurred, for an order or judgment declaring such minor person free from the custody and control of either or both of his parents. There shall be no filing fee charged for any action instituted in accordance with this section. Upon the filing of such petition, the clerk of the court shall immediately notify the juvenile probation officer who shall immediately investigate the circumstances of said minor person and the circumstances which are alleged to bring said minor person within any of the provisions of Section 232. The juvenile probation officer shall render to the court a written report of his investigation with a recommendation to the court of the proper disposition to be made in the action in the best interests of said minor person. The court shall receive such report in evidence and shall read and consider the contents thereof in rendering its judgment.
(Added Stats.1961, c. 1616, p. 3506, § 4, as amended Stats.1967, c. 877, p. 2325, § 1.)

§ 233.5 Inspection of petition and reports

A petition filed in any superior court proceeding under this chapter and any reports of the probation officer filed in any such case may be inspected only by court personnel, the minor who is the subject of the proceeding, his parents or guardian, and the attorneys for such parties, and such other persons as may be designated by the judge of the superior court. (Added Stats.1965, c. 1530, p. 3623, § 1.)

§ 233.6 Disclosure of information to state department of social welfare and certain welfare agencies

Notwithstanding any other provision of law, the superior court and the probation officer may furnish information, pertaining to a petition under this chapter, to the State Department of Social Welfare, to any county welfare department, to any public welfare agency, or to any private welfare agency licensed by the State Department of Social Welfare, whenever it is believed that the welfare of the child will be promoted thereby. (Added Stats.1965, c. 1530, p. 3623, § 1.5.)

§ 234. Citation; issuance; contents; time for service

Upon the filing of such petition, * * * a citation shall issue requiring any person having the custody or control of such minor person or the person with whom such minor person is, to appear with such minor person at a time and place stated in the citation. Service of such citation shall be made at least 10 days before the time stated therein for such appearance. (Added Stats.1961, c. 1616, p. 3505, § 4, as amended Stats.1963, c. 493, p. 1349, § 1.)

235.

(a) The father or mother of such minor person, if his or her place of residence is known to the petitioner, or, if the place of residence of such father or mother is not known to the petitioner, then * * * the grandparents and adult brothers, sisters, uncles, aunts, and first cousins of such minor person, if there * * * are any and if * * * their residences and * * * relationships to such person are known to the petitioner, shall be notified of the proceedings by service of a citation requiring such person or persons to appear at the time and place stated in such citation. Such citation shall be served in the manner provided by law for the service of a summons in a civil action, other than by publication. If the petition is filed for the purpose of freeing the child for placement for adoption, the citation shall so state. In all cases where one parent has relinquished his child for the purpose of adoption, or has signed a consent for adoption as provided in Sections 224m and 226, no notice as herein provided need be given to the parent who has signed such relinquishment or consent. Service of such citations shall be made at least 10 days before the time stated therein for such appearance.

(b) If the father or mother of such minor person or any person alleged to be or claiming to be the father or mother cannot, with reasonable diligence, be served as provided for in subdivision (a), or if his or her place of residence is not known to the petitioner, the petitioner or his agent or attorney shall make and file an affidavit, and shall state therein the name of the father or mother or alleged father or mother and his or her place of residence, if known to the petitioner, and the name of the father or mother or alleged father or mother whose place of residence is unknown to the petitioner. Thereupon the court shall make an order that the service be made by the publication of a citation requiring such father or mother or alleged father or mother to appear at the time and place stated therein, and that the citation be published in a newspaper to be named and designated as most likely to give notice to the father or mother or alleged father or mother to be served once a week for four successive weeks. In case of publication where the residence of a parent or alleged parent is known, the court shall also direct a copy of the citation to be forthwith served upon such parent or alleged parent by mail by deposit in the post office properly addressed and with the postage thereon fully prepaid, directed to such parent or alleged parent at his or her place of residence. When publication is ordered, service of a copy of the citation in the manner provided for in subdivision (a) is equivalent to publication and deposit in the post office. Service is complete at the expiration of the time prescribed by the order for publication or when service is made as provided for in subdivision (a), whichever event shall first occur.

If one or both of the parents of such minor person be unknown or if the name of either or both of his parents be uncertain, then such fact shall be set forth in the affidavit and the court shall order the citation to be directed to either the father or the mother, or both, of the minor person, naming and otherwise describing the minor person, and to all persons claiming to be the father or mother of the minor person.

Approved and filed Sept. 14, 1970.

§ 235.5. Admission to proceedings

Unless requested by the minor concerning whom the petition has been filed and any parent or guardian present, the public shall not be admitted to a proceeding under this chapter. The judge may nevertheless admit such persons as he deems to have a direct and legitimate interest in the particular case or the work of the court. (Added Stats.1965, c. 1530, p. 3623, § 2.)

§ 236. Failure to appear; contempt

If any person personally served with a citation within the State as provided in this chapter fails without reasonable cause to appear and abide by the order of the court, or to bring such minor person before the court if so required in the citation, such failure constitutes a contempt of court. (Added Stats.1961, c. 1616, p. 3507, § 4.)

§ 237. Appointment of party to act in minor's behalf

In any proceeding to declare a minor person free from the custody and control of his parents, the court may appoint some suitable party to act in behalf of such minor person and may order such further notice of the proceedings to be given as the court deems proper. (Added Stats.1961, c. 1616, p. 3507, § 4.)

§ 237.5 Procedure; compensation for court-appointed counsel

At the beginning of the proceeding on a petition filed pursuant to this chapter, the judge shall first read the petition to the child's parents, if they are present, and may explain to the child the effect of the granting of the petition and upon request of the minor upon whose behalf the petition has been brought or upon the request of either parent the judge shall explain any term or allegation contained therein and the nature of the proceeding, its procedures, and possible consequences. The judge shall ascertain whether the minor and his parent, have been informed of the right of the minor to be represented by counsel, and if not, the judge shall advise the minor and the parents, if present, of the right to have counsel present. The court may appoint counsel to represent the minor whether or not the minor is able to afford counsel, and, if they are unable to afford counsel, shall appoint counsel to represent the parents. The court may continue the proceeding for not to exceed seven days, as necessary to make an appointment of counsel, or to enable counsel to acquaint himself with the case, or to determine whether the parents are unable to afford counsel at their own expense.

When the court appoints counsel to represent either the minor or the parents under the provisions of this section, such counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Such amount shall be paid by the real parties in interest, other than the minor, in such proportions as the court deems just. However, if the court finds that none of such real parties in interest is able to afford counsel, such amount shall be paid out of the general fund of the county.

(Added by Stats.1965, c. 1530, p. 3624, § 3. Amended by Stats.1969, c. 489, p. —, § 2.)

§ 238. Effect of order

Any order and judgment of the court declaring a minor person free from the custody and control of any parent or parents under the provisions of this chapter shall be conclusive and binding upon such minor person, upon such parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making such order and judgment, the court shall have no power to set aside, change, or modify it, but nothing in this section shall be construed to limit the right to appeal from such order and judgment. (Added Stats.1961, c. 1616, p. 3507, § 4.)

ADOPTION PROCEEDINGS

(California Civil Code Sections 221-230.5)

§ 221. Persons adoptable; definitions of "child" and "children"

Any unmarried minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter other than in Section 227p, and any adult person or married minor child may be adopted by any other adult person in the cases and subject to the rules prescribed in Section 227p.

As used in this chapter, "child" and "children" mean minor child and minor children, respectively, except in Sections 227p, 228, 229, and 230. In Sections 228, 229, and 230 "child" and "children" include both minor persons and adult persons. In Section 227p "child" means adult person or married minor child, and does not include an unmarried minor person. (Enacted 1872. As amended Stats.1951, c. 880, p. 2400, § 1; Stats.1953, c. 1220, p. 2777, § 1.)

§ 222. Age difference between adoptive parent and child

(a) Except as otherwise provided in subdivision (b), the person adopting a child * * * shall be at least 10 years older than the person adopted.

(b) If the court is satisfied that the adoption of a child by a stepparent is in the best interest of the parties and is in the public interest, it may approve such an adoption without regard to the ages of the child and such adoptive stepparent. (Amended by Stats.1968, c. 568, p. 1235, § 1.)

§ 223. Adoptive parent; consent of spouse

A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent. (Enacted 1872. As amended Code Am.1873-74, c. 612, p. 195, § 47.)

§ 224. Consent of parents; legitimate children; illegitimate children; when consent unnecessary

A legitimate child cannot be adopted without the consent of its parents if living; however, after the custody of any child has, by any judicial decree, been given to the father, and the mother for a period of one year fails to communicate with such child when able to do so, or been given to the mother, and the father for a period of one year shall willfully fail to pay for the care, support and education of such child when able to do so, then the parent to whom custody has been given alone may consent to such adoption, but only after the parent to whom custody has not been given has been * * * served with a copy of a citation * * * in the manner provided by law for the service of a summons in a civil action that requires him or her to appear at the time and place set for the appearance in court

under Section 227 * * *; failure of father to pay for the care, support and education of such child for * * * such period of one year or failure of mother to communicate with such child for * * * such period of one year is prima facie evidence that such failure was willful and without lawful excuse; * * * nor an illegitimate child without the consent of its mother if living; except that the consent of a father or mother is not necessary in the following cases:

1. When such father or mother has been judicially deprived of the custody and control of such child (a) by order of the court declaring such child to be free from the custody and control of either or both of his parents pursuant to Chapter 4 (commencing with Section 232) of Title 2 * * * of Part 3 * * * of Division 1 of this code, or (b) by similar order of the court of another jurisdiction, pursuant to any law of that jurisdiction authorizing such order; or when such father or mother has, in a judicial proceeding in another jurisdiction, voluntarily surrendered risdiction provided for such surrender.

2. Where such father or mother of any child has deserted the child without provision for its identification.

3. Where such father or mother of any child has relinquished * * * such child for adoption as provided in Section 224m * * *; or where such father or mother has relinquished * * * such child for adoption to a licensed or authorized child-placing agency in another jurisdiction pursuant to the law of that jurisdiction.

(Amended by Stats.1955, c. 758, p. 1252, § 1; Stats.1963, c. 374, p. 1164, § 1; Stats. 1965, c. 1173, p. 2972, § 1; Stats.1969, c. 1611, p. —, § 2, operative July 1, 1970.)

§ 224m. Adoption agency; relinquishment of child for adoption; rescission

The father or mother may relinquish a child to a licensed adoption agency for adoption by a written statement signed before two subscribing witnesses and acknowledged before an authorized official of an organization licensed by the State Department of Social Welfare to find homes for children and place children in homes for adoption. Such relinquishment, when reciting that the person making it is entitled to the sole custody of the minor, shall, when duly acknowledged before such officer, be prima facie evidence of the right of the person making it to the sole custody of the child and such person's sole right to relinquish.

A parent who is a minor shall have the right to relinquish his or her child for adoption to a licensed adoption agency and such relinquishment shall not be subject to revocation by reason of such minority.

In cases where a father or mother of a child resides outside the State of California and such child is being cared for and is placed for adoption by an organization licensed by the State Department of Social Welfare to place children for adoption, such father or mother may relinquish the child to that organization by a written statement signed by such father or mother before a notary on a form prescribed by the organization, and previously signed by an authorized official of the organization, which signifies the willingness of such organization to accept the relinquishment.

The relinquishment authorized by this section shall be of no effect whatsoever until a certified copy is filed with the State Department of Social Welfare, after which it is final and binding and may be rescinded only by the mutual consent of the adoption agency and the parent or parents relinquishing the child. (Added Stats.1927, c. 691, p. 1196, § 2. As amended Stats.1931, c. 1130, p. 2401, § 2; Stats. 1947, c. 530, p. 1522, § 1; Stats.1953, c. 1391, p. 2973, § 1.)

224a.

The agency to which a child has been relinquished for adoption shall be responsible for the care of the child, and shall be entitled to the custody and control of the child at all times until a petition for adoption has been granted. Any placement for temporary care, or for adoption made by the agency, may be terminated at the discretion of the agency at any time prior to the granting of a petition for adoption. In the event of termination of any placement for temporary care or for adoption, the child shall be returned promptly to the physical custody of the agency.

No petition may be filed to adopt a child relinquished to a licensed adoption agency or a child declared free from the custody and control of either or both of his parents and referred to a licensed adoption agency for adoptive placement, except by the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency. After the petition for adoption has been filed, the agency may remove the child from the prospective adoptive parents only with the approval of the court, upon motion by the agency after notice to the prospective adoptive parents, supported by an affidavit or affidavits stating the grounds on which removal is sought. If an agency refuses to consent to the adoption of a child by the person or persons with whom the agency placed the child for adoption, the superior court may nevertheless decree the adoption if it finds that the refusal to consent is not in the best interest of the child.

§ 224p. Advertising for adoption; necessity of license; offense

Any person or organization that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Social Welfare, advertises in any periodical or newspaper, by radio, or other public medium, that he or it will place children for adoption, or accept, supply, provide or obtain children for adoption, or that causes any advertisement to be published in or by any public medium soliciting, requesting, or asking for any child or children for adoption is guilty of a misdemeanor. (Added Stats.1945, c. 1317, p. 2468, § 2. As amended Stats.1951, c. 638, p. 1818, § 2.)

§ 224q. Unauthorized placement for adoption; offense

Any person other than a parent or any organization, association, or corporation that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Social Welfare, places any child for adoption is guilty of a misdemeanor. (Added Stats.1945, c. 1317, p. 2468, § 2.5.)

§ 224r. Accounting for disbursements in connection with birth and placement of child

The petitioners in any proceeding seeking the adoption of a minor child shall file with the court a full accounting report of all disbursements of anything of value made or agreed to be made by them or on their behalf in connection with the birth of the child, the placement of the child with the petitioners, any medical or hospital care received by the natural mother of the child or by the child in connection with its birth, any other expenses of either natural parent of the child, or the adoption. The accounting report shall be under penalty of perjury and shall be submitted to the court on or before the date set by the court for the hearing on the adoption petition, unless an extension of time is granted by the courts.

The accounting report shall be itemized in detail and shall show the services relating to the adoption or to the placement of the child for adoption which were received by the petitioners, by either natural parent of the child, by the child, or by any other person for whom payment was made by or on behalf of the petitioners. The report shall also include the dates of each payment, the names and addresses of each attorney, doctor, hospital, licensed adoption agency, or other person or organization who received any funds of the petitioners in connection with the adoption or the placement of the child with them, or participated in any way in the handling of such funds, either directly or indirectly.

The provisions of this section shall not apply to an adoption by a stepparent where one natural or adoptive parent retains his or her custody and control of the child. (Added Stats.1963, c. 1893, p. 3883, § 1.)

§ 225. Consent of child; necessity

CONSENT OF CHILD. The consent of a child, if over the age of twelve years, is necessary to its adoption. (Enacted 1872.)

225p.

Whenever a petition is filed for the adoption of a child who has been placed for adoption by a licensed county adoption agency or the State Department of Social Welfare, the county adoption agency or the State Department of Social Welfare may, at the time of filing a favorable report in the superior court, require the persons petitioning to become the adoptive parents to pay to the county agency, as agent of the state or the State Department of Social Welfare, a fee of five hundred dollars ($500). The county adoption agency or the State Department of Social Welfare may defer, waive or reduce the fee when its payment would cause economic hardship to the adoptive parents detrimental to the welfare of the adopted child, or if necessary for the placement of a hard-to-place child. A "hard-to-place" child is a child who because of his age, ethnic background, race, color, language, or physical, mental, emotional or medical handicaps has become difficult to place in an adoptive home.

Nothing in this section shall be construed to require the payment of such fee to a county in the case of an adoption resulting from the independent placement of a child.

Approved and filed Sept. 3, 1970.

§ 226. Petition; notice to department of social welfare

Any person desiring to adopt a child may for that purpose petition the superior court of the county in which the petitioner resides and the clerk of the court shall immediately notify the State Department of Social Welfare at Sacramento in writing of the pendency of the action and of any subsequent action taken. In all cases in which consent is required, except in the case of an adoption by a stepparent where one natural or adoptive parent retains his or her custody and control of the child, unless an agency licensed by the State Department of Social Welfare to find homes for children and place children in homes for adoption joins in the petition for adoption, the petition shall contain an allegation that the petitioners will file promptly with the department or the county adoption agency information required by the department in the investigation of the proposed adoption. The omission of such allegation from a petition so filed shall not, however, affect the jurisdiction of the court to proceed, nor shall it have heretofore affected the jurisdiction of any court to have proceeded, upon such petition omitting such allegation, in any manner provided in this chapter or otherwise, nor shall such omission have affected or affect the validity of any decree of adoption or other order heretofore or hereafter made by any court with respect to such petition omitting such allegation.

The caption of the petition for adoption of a minor shall contain the name or names of the petitioners but shall not contain the name of the minor. The petition shall contain the sex and date of birth of the minor. The name that the minor had prior to adoption shall appear in the petition or, in the case where a licensed adoption agency joins in the petition, the name may appear in the joinder signed by the adoption agency. The decree of adoption shall contain the adopted name of the minor but shall not contain the name that the minor had prior to adoption.

(Amended by Stats.1955, c. 725, p. 1216, § 1; Stats.1961, c. 1074, p. 2804, § 1; Stats. 1963, c. 676, p. 1679, § 1; Stats.1963, c. 1806, p. 3652, § 1; Stats.1965, c. 174, p. 1140, § 1; Stats.1968, c. 604, p. 1393, § 1.)

§ 226a. Withdrawal of consent of natural parents; court approval; procedure

Once given, consent of the natural parents to the adoption of the child by the person or persons to whose adoption of the child the consent was given, may not be withdrawn except with court approval. Request for such approval may be made by motion, or a natural parent seeking to withdraw such consent may file with the clerk of the superior court where the petition is pending, a petition for approval of withdrawal thereof, without the necessity of payment of any fee for the filing of such petition. The petition shall be in writing, and shall set forth the reasons for withdrawal of consent, but otherwise may be in any form.

The clerk of the court shall set the matter for hearing, and shall give notice thereof to the State Department of Social Welfare, to the persons to whose adoption of the child the consent was given, and to the natural parent or parents * * * by certified mail to the address of each as shown in the proceeding, at least 10 days before the time set for hearing.

The State Department of Social Welfare or the licensed county adoption agency shall, prior to the hearing of the motion or petition for withdrawal, file a full report with the court and shall appear at the hearing to represent the interests of the child.

At the hearing, the parties may appear in person or with counsel. The hearing shall be held in chambers, but the court reporter shall report the proceedings and his fee therefor shall be paid from the county treasury on order of the court. If the court finds that withdrawal of the consent to adoption is reasonable in view of all the circumstances, and that withdrawal of the consent will be for the best interests of the child, the court shall approve the withdrawal of the consent; otherwise the court shall withhold its approval. If the court approves the withdrawal of consent, the adoption proceeding shall be dismissed.

Any order of the court granting or withholding approval of a withdrawal of a consent to an adoption may be appealed from in the same manner as an order of the juvenile court declaring any person to be a ward of the juvenile court. (As amended Stats.1965, c. 816, p. 2408, § 1.)

§ 226k. Petition; withdrawal or dismissal; notice to department; report and recommendation; jurisdiction over child

Whenever, in any adoption proceeding, the petitioners desire to withdraw the petition for the adoption or to dismiss the proceeding, the clerk of the court in which the proceeding is pending shall immediately notify the State Department of Social Welfare of such action. The State Department of Social Welfare or the licensed county adoption agency shall file a full report with the court recommending a suitable plan for the child in every such case where the petitioners desire to withdraw the petition for the adoption or where the department or county agency recommends that the petition for adoption be denied and shall appear before the court for the purpose of representing the child. Notwithstanding such withdrawal or dismissal by the petitioners, the court may retain jurisdiction over the child for the purpose of making such order or orders for its custody as the court may deem to be in the best interests of the child.

In any adoption proceeding in which the parent has refused to give the required consent or in which the reason or cause for the withdrawal of the petition or dismissal of the proceeding is the withdrawal of the consent of the natural parent or parents, the court shall order at the hearing the child restored to the care and custody of the natural parent. (As amended Stats.1961, c. 1074, p. 2807, § 2.)

§ 226c. Removal of child from petitioners' home; commitment, duties of agency

At the hearing, if the court sustains the recommendation that the child be removed from the home of petitioners because the agency has recommended denial or the petitioners desire to withdraw the petition or the court dismisses the petition and does not return him to his parents, the court shall commit the child to the care of the State Department of Social Welfare or the licensed county adoption agency, whichever agency made the recommendation, for that agency to arrange adoptive placement or to make a suitable plan. In those counties not covered by a licensed county adoption agency, the county welfare department shall act as the agent of the State Department of Social Welfare and shall provide care for the child in accordance with rules and regulations established by the department. (As amended Stats.1961, c. 1074, p. 2807, § 3.)

§ 226m. Private hearings

Notwithstanding the provisions of Section 124 of the Code of Civil Procedure, all superior court hearings in adoption proceedings shall be held in private, and the court shall exclude all persons except the officers of the court, the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties under the laws governing adoptions. (Added Stats.1947, c. 534, p. 1525, § 1.)

§ 226.1 Consent of parents or person with sole custody

(a) In all cases in which consent is required, the consent of the natural parent or parents to the adoption by the petitioners must be signed in the presence of an agent of the State Department of Social Welfare or of a licensed county adoption agency on a form prescribed by such department and filed with the clerk of the superior court, in the county of the petitioner's residence.

(b) Such consent, when reciting that the person giving it is entitled to the sole custody of the minor child, shall, when duly acknowledged before such agent, be prima facie evidence of the right of the person making it to the sole custody of the child and such person's sole right to consent.

(c) If the father or mother of a child to be adopted is outside the State of California at the time of signing consent, his or her consent may be signed before a notary or other person authorized to perform notarial acts, and in such case the consent of the Department of Social Welfare or of a licensed county adoption agency will also be necessary.

(d) A parent who is a minor shall have the right to sign a consent for the adoption of his or her child and such consent shall not be subject to revocation by reason of such minority. (Added Stats.1963, c. 1806, p. 3652, § 3.)

§ 226.2 Acceptance of consent; determination of adoptability; home study

In all cases of adoption in which no agency licensed to place children for adoption is a party, it shall be the duty of the Department of Social Welfare or of the licensed county adoption agency to accept the consent of the natural parents to the adoption of the child by the petitioners and to ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child, prior to filing its report with the court. (Added Stats.1963, c. 1806, p. 3653, § 4.)

§ 226.3 Consent of department or licensed county adoption agency

In all cases in which the consent of the natural parent or parents is not necessary and an agency licensed to place children for adoption is not a party to the petition, the State Department of Social Welfare or the licensed county adoption agency shall, prior to the hearing of the petition, file its consent to the adoption with the clerk of the superior court of the county in which the petition is filed. Such consent shall not be given by the Department of Social Welfare or the licensed county adoption agency unless the child's welfare will be promoted by the adoption. (Added Stats. 1963, c. 1806, p. 3653, § 5.)

§ 226.4 Appeal from department or agency

If for a period of 180 days from the date of filing the petition, or upon the expiration of any extension of said period granted by the court, the Department of Social Welfare or the licensed county adoption agency fails or refuses to accept the consent of the natural parent or parents to the adoption, or if said department or agency fails or refuses to file or to give its consent to an adoption in those cases where its consent is required by this chapter, either the natural parent or parents or the petitioner may appeal from such failure or refusal to the superior court of the county in which the petition is filed, in which event the clerk shall immediately notify the Department of Social Welfare of such appeal and the department or agency shall within 10 days file a report of its findings and the reasons for its failure or refusal or consent to the adoption or to accept the consent of the natural parent. After the filing of said findings, the court may, if it deems that the welfare of the child will be promoted by said adoption, allow the signing of the consent by the natural parent or parents in open court, or if the appeal be from the refusal of said department or agency to consent thereto, grant the petition without such consent. (Added Stats.1963, c. 1806, p. 3653, § 6.)

§ 226.5 Interview

The State Department of Social Welfare or licensed county adoption agency shall interview the parties to the adoption as soon as possible and in any event within 45 days after the filing of the adoption petition. (Added Stats.1963, c. 1806, p. 3654, § 7.)

§ 226.6 Investigation and report; time; waiver

It shall be the duty of the Department of Social Welfare or of the licensed county adoption agency to investigate the proposed adoption and to submit to the court a full report of the facts disclosed by its inquiry with a recommendation regarding the granting of the petition within 180 days after the filing of the petition. In those cases in which the investigation establishes that there is a serious question concerning the suitability of the petitioners or the care provided the child or the availability of the consent to adoption the report shall be filed immediately. The court may allow such additional time for the filing of said reports as in its discretion it may see fit, after at least five days' notice to the petitioner or petitioners and opportunity for such petitioner or petitioners to be heard with respect to the request for additional time. The report required of the Department of Social Welfare or of the licensed county adoption agency may be waived by the department in all cases in which an agency, licensed by the Department of Social Welfare to place children in homes for adoption, is a party or joins in the petition for adoption. Such waiver may be issued by the department at any time, either before or after the filing of the petition for adoption. (Added Stats.1963, c. 1806, p. 3654, § 8.)

§ 226.7 Copy of report to petitioners

Whenever any report or findings are submitted to the court by the Department of Social Welfare or by a licensed county adoption agency under any provision of the preceding section, a copy of such report or findings, whether favorable or unfavorable, shall be given to the attorney for the petitioner in the proceedings, if the petitioner has an attorney of record, or to the petitioner. (Added Stats.1963, c. 1806, p. 3654, § 9.)

§ 226.8 Review of adverse report; hearing; representation of child

If the findings of the State Department of Social Welfare or the county adoption agency are that the home of the petitioners is not suitable for the child or that the required consents are not available and it recommends that the petition be denied, or if the petitioners desire to withdraw the petition, and it recommends that the petition be denied, the county clerk upon receipt of the report of the State Department of Social Welfare or the county adoption agency shall immediately refer it to the superior court for review.

Upon receipt of such reports the court shall set a date for a hearing of the petition and shall give reasonable notice of such hearing to the agency, the petitioners, and the natural parents by certified mail to the address of each as shown in the proceeding.

The department or county agency shall appear to represent the child. (Added Stats.1963, c. 1806, p. 3654, § 10.)

§ 226.9 Consents; stepparent adopting; parents out of state; evidence; minor parent

Notwithstanding any other provisions of this chapter, in case of an adoption of a child by a stepparent where one natural or adoptive parent retains his or her custody and control of said child, the consent of either or both parents must be signed in the presence of a county clerk or probation officer of any county of this State on a form prescribed by the State Department of Social Welfare and the county clerk or probation officer before whom such consent is signed shall immediately file said consent with the clerk of the superior court of the county where the petition is filed and said clerk shall immediately file a certified copy of such consent to adoption with the State Department of Social Welfare.

If the father or mother of a child to be adopted is outside the State of California at the time of signing consent, his or her consent may be signed before a notary or other person authorized to perform notarial acts.

Such consent, when reciting that the person giving it is entitled to sole custody of the minor child, shall, when duly acknowledged before the county clerk or probation officer, be prima facie evidence of the right of the person making it to the sole custody of the child and such person's sole right to consent.

A parent who is a minor shall have the right to sign a consent for the adoption of his or her child and such consent shall not be subject to revocation by reason of such minority. (Added Stats.1943, c. 1806, p. 3657, § 11.)

§ 226.10 Concealment of child or removal from county pending adoption proceeding

During the pendency of an adoption proceeding, the child proposed to be adopted shall not be concealed within the county in which the adoption is pending; and shall not be removed from such county, unless the petitioners or other interested persons first obtain permission for such removal from the court after giving advance written notice of intent to obtain such permission to the State Department of Social Welfare or to the licensed adoption agency responsible for the investigation of the proposed adoption. Upon proof of the giving of the notice, permission may be granted by the court if, within a period of 15 days from and after the date of the giving of the notice, no objections have been filed with the court by the State Department of Social Welfare or the licensed adoption agency responsible for investigation of the proposed adoption. If objections are filed within such period by the department or the adoption agency, upon the request of the petitioners the court shall immediately set the matter for hearing and give to the objector, the petitioners, and the party or parties requesting permission for such removal reasonable notice of such hearing by certified mail to the address of each as shown in the records of the adoption proceeding. Upon a finding that the objections are without good cause, the court may grant the requested permission for removal of the child, subject to such limitations as appear to be in the best interests of the child.

This section does not apply in any of the following situations:

(a) Where the child is absent for a period of not more than 30 days from the county in which the adoption proceeding is pending, provided that a notice of recommendation of denial of petition has not been personally served on the petitioners or the court has not issued an order prohibiting the removal of the child from the county pending consideration of any of the following:

(1) The suitability of the petitioners.

(2) The care provided the child.

(3) The availability of the legally required consents to the adoption.

(b) In a proceeding for the adoption of a child by his stepparent where one natural or adoptive parent retains his or her custody and control of the child.

(c) Where the child has been returned to and remains in the custody and control of his or her natural parent or parents.

(d) Where the child has been relinquished for adoption pursuant to Section 224m and written consent for the removal of the child is obtained from the State Department of Social Welfare or the licensed adoption agency responsible for the child.

In no event, nor for any period of time, shall a child who has been relinquished for adoption pursuant to Section 224m be removed from the county in which the child was placed by any person who has not petitioned to adopt the child without first obtaining the written consent of the State Department of Social Welfare or the licensed adoption agency responsible for the child.

A violation of this section constitutes a violation of Section 280 of the Penal Code.

Neither this section nor Section 280 of the Penal Code shall be construed to render lawful any act which is unlawful under any other applicable provision of law. (Added by Stats.1969, c. 1251, p. —, § 1.)

227.

The person or persons desiring to adopt a child, and the child proposed to be adopted, must appear before the court; provided, that if said adoptive parent is then commissioned or enlisted in the military service, or auxiliary thereof, of the United States, or of any of its allies, or in the American Red Cross, so that it is impossible or impracticable, because of such person's absence from the State of California, or otherwise, for said person to make such appearance in person, and said circumstances are established by satisfactory evidence, said appearance may be made for such person by his or her counsel, commissioned and empowered in writing so to do and which said power of attorney may be incorporated in the petition for adoption. The court must examine all persons appearing before it pursuant to this section. The examination of each such person shall be conducted separately but within the physical presence of each such other person or persons unless the court, in its discretion, shall order otherwise. The party or parties adopting shall execute or acknowledge an agreement in writing that the child shall be treated in all respects as the lawful child of the party or parties. If satisfied that the interest of the child will be promoted by the adoption, the court may thereupon make and enter a decree of adoption of the child by the adopting parent or parents, and the child and the adopting parents shall thereupon and thereafter sustain toward each other the legal relationship of parent and child and have all the rights and be subject to all the duties of that relation. In a case where the adopting parent is permitted to appear by counsel, the agreement may be executed and acknowledged by such counsel for such absent party, or may be executed by such absent party before a notary public, or any other person authorized to take acknowledgments including the persons authorized by Sections 1183 and 1183.5 of this code; provided, that in any case where said adoptive parent is permitted to appear by counsel hereunder, or otherwise, the court may, in its discretion, cause such examination of said adoptive parent, other interested party, or witness to be made upon deposition, as it deems necessary, said deposition to be taken upon commission, as prescribed by the Code of Civil Procedure, and the expense thereof to be borne by the petitioner. The petition, relinquishment, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition must be filed in the office of the county clerk and shall not be open to inspection by any other than the parties to the action and their attorneys and the State Department of Social Welfare except upon the written authority of the judge of the superior court. A judge of the superior court shall not authorize anyone to inspect the petition, relinquishment, agreement, order, report to the court from any investigating agency, or power of attorney or deposition or any portion of any such documents except in exceptional circumstances and for good cause approaching the necessitous. The petitioner may be required to pay the expenses for preparing the copies of the documents to be inspected.

Upon written request of any party to the action and upon the order of any judge of the superior court, the county clerk shall not provide any documents referred to in this section for inspection or copying to any other person, unless the name of the natural parents of the child or any information tending to identify the natural parents of the child is deleted from the documents or copies thereof.

Upon the request of the adoptive parents or the child, a county clerk may issue a certificate of adoption which states the date and place of adoption, the birthday of the child, the name of the adoptive parents, and the name which the child has taken. Unless the child has been adopted by a stepparent, the certificate shall not state the name of the natural parents of the child.

The provisions of this section permitting an adoptive parent, who is commissioned or enlisted in the military service, or auxiliary thereof, of the United States, or of any of its allies, or in the American Red Cross, to make an appearance through his or her counsel, commissioned and empowered in writing to do so, are equally applicable to the spouse of such adoptive parent who resides with such adoptive parent outside of this state.

Where, pursuant to this section, neither adoptive parent need appear before the court, the child proposed to be adopted need not appear. If the law otherwise requires that the child execute any document during the course of the hearing, the child may do so by and through counsel. Where none of the parties appear, no order of adoption shall be made by the court until after a report has been filed with the court pursuant to Section 226.6.

Approved and filed Aug. 11, 1970.

§ 227a. Adoption by stepparent; investigation

Notwithstanding any other provisions of this chapter, the probation officer in the county in which the action for adoption is pending shall make an investigation of each case of adoption by a stepparent where one natural parent retains custody and control of the child. No order of adoption shall be made by the court until after such probation officer shall have filed his report and recommendation and the same shall have been considered by the court. (As amended Stats.1963, c. 1806, p. 3652, § 2.)

§ 227aaa. Information relating to adoption petition, furnishing to certain welfare agencies

Notwithstanding any other provision of law, the State Department of Social Welfare, and any holder of a license or permit to place children for adoption issued by the State Department of Social Welfare may furnish information relating to any adoption petition to the juvenile court, to any county welfare department, to any public welfare agency, or to any private welfare agency licensed by the State Department of Social Welfare whenever it is believed the welfare of a child will be promoted thereby. (Added Stats.1945, c. 1317, p. 2471, § 6.)

§ 227b. Vacating adoption; grounds; limitation of actions; notice to department

If any child heretofore or hereafter adopted under the foregoing provisions of this code shows evidence of being feeble-minded, epileptic or insane as a result of conditions prior to the adoption, and of which conditions the adopting parents or parent had no knowledge or notice prior to the entry of the decree of adoption, a petition setting forth such facts may be filed by the adopting parents or parent with the court which granted the petition for adoption. If such facts are proved to the satisfaction of the court, it may make an order setting aside the decree of adoption.

The petition must be filed within whichever is the later of the following time limits: (a) Within five years after the entering of the decree of adoption, or (b) within one year after the effective date hereof, if such a condition were manifest in the child within five years after the entering of the decree of adoption.

In every action brought under this section it shall be the duty of the clerk of the superior court of the county wherein the action is brought to immediately notify the State Department of Social Welfare of such action. Within sixty days after such notice the State Department of Social Welfare shall file a full report with the court and shall appear before the court for the purpose of representing the adopted child. (Added Stats.1937, c. 366, p. 786, § 2. As amended Stats.1947, c. 531, p. 1523, § 1.)

§ 227c. Vacation of adoption; commitment of child to institution; liability for support

Whenever the decree of adoption of any child shall have been set aside as provided in section 227b, the court making the order shall direct the district attorney, or a psychopathic probation officer, or any suitable person, to take proceedings under the respective chapter of the Welfare and Institutions Code, relating to the commitment of insane persons, or feeble-minded or epileptic persons, as the case may be. The court may also make such order relative to the care, custody, or confinement of the child pending the proceedings as it sees fit.

The county in which the proceedings for adoption were had shall be and remain liable for the support of the child until he shall have been declared sane, or restored to capacity, and in any event until he is able to support himself. (Added Stats.1939, c. 1102, p. 3035, § 1.)

§ 227d. Vacation of adoption; limitation of actions

Any action or proceeding of any kind whatsoever to vacate, set aside, or otherwise nullify a decree of adoption on the ground of any defect or irregularity of procedure in the adoption proceeding must be commenced within three years after entry of the decree. Any action or proceeding of any kind whatsoever to vacate, set aside, or otherwise nullify a decree of adoption on any ground other than a defect or irregularity of procedure must be commenced within five years after entry of the decree. In any case in which the decree of adoption was entered before the effective date of this section, the period of limitation prescribed in this section shall run from and after such effective date. (Added Stats.1951, c. 638, p. 1819, § 5.)

§ 227p. Adult adoption; agreement; consent of spouse; court procedure; adoption of married minor

Any adult person may adopt any other adult person younger than himself, except the spouse of the adopting person, by an agreement of adoption approved by a decree of adoption of the superior court of the county in which either the person adopting or the person adopted resides, as provided in this section. The agreement of adoption shall be in writing and shall be executed by the person adopting and the person to be adopted, and shall set forth that the parties agree to assume toward each other the legal relation of parent and child, and to have all of the rights and be subject to all of the duties and responsibilities of that relation.

A married person not lawfully separated from his spouse cannot adopt an adult person without the consent of the spouse of the adopting person, if such spouse, not consenting, is capable of giving such

consent. A married person not lawfully separated from his spouse cannot be adopted without the consent of the spouse of the person to be adopted, if such spouse, not consenting, is capable of giving such consent. Neither the consent of the natural parent or parents of the person to be adopted, nor of the State Department of Social Welfare, nor of any other person shall be required.

The adopting person and the person to be adopted may file in the superior court of the county in which either resides a petition praying for approval of the agreement of adoption by the issuance of a decree of adoption. The court shall fix a time and place for hearing on the petition, and both the person adopting and the person to be adopted must appear at the hearing in person, unless such appearance is impossible, in which event appearance may be made for either or both of such persons by counsel, empowered in writing to make such appearance. The court may require notice of the time and place of the hearing to be served on any other interested persons, and any such interested person may appear and object to the proposed adoption. No investigation or report to the court by any public officer or agency is required, but the court may require the county probation officer or the State Department of Social Welfare to investigate the circumstances and report thereon, with recommendations, to the court prior to the hearing.

At the hearing the court shall examine the parties, or the counsel of any party not present in person. If the court is satisfied that the adoption will be for the best interests of the parties and in the public interest, and that there is no reason why the petition should not be granted, the court shall approve the agreement of adoption, and make a decree of adoption declaring that the person adopted is the child of the person adopting him; otherwise, the court shall withhold approval of the agreement and deny the petition.

A married minor child may be adopted pursuant to the provisions of this section; provided, that such married minor child has the written consent of his or her spouse to such adoption. (Added Stats.1951, c. 880, p. 2400, § 2, as amended Stats.1953, c. 1220, p. 2779, § 3.)

§ 228. Name of child; effect of adoption

A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation. (Enacted 1872. As amended Code Am.1873–74, c. 612, p. 195, § 48.)

§ 229. Natural parents; release from rights, duties and responsibilities

EFFECT ON FORMER RELATIONS OF CHILD. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it. (Enacted 1872.)

§ 230. Illegitimate child; adoption by father

ADOPTION OF ILLEGITIMATE CHILD. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption. (Enacted 1872.)

§ 230.5 New birth certificate for adopted child; contents; effect of inclusion of name of deceased person

(a) Notwithstanding any other provision of law, an action may be brought in the superior court of the county in which the petitioner resides for the purpose of obtaining for a child adopted by the petitioner a new birth certificate which specifies thereon that a deceased spouse of the petitioner who was in the home at the time of the initial placement of the child is a parent of such child.

(b) In any action for adoption the petitioner may request that the new birth certificate specify thereon that a deceased spouse of the petitioner who was in the home at the time of the initial placement of the child is a parent of such child.

(c) The inclusion of the name of a deceased person in a birth certificate issued pursuant to a court order under this section shall not affect any matter of testate or intestate succession, and shall not be competent evidence on the issue of the relationship between the adopted child and the deceased person in any action or proceeding.

(Added by Stats.1969, c. 485, p. —, § 1.)