

Memorandum 92-60

Subject: Study F-1090 - Child Custody Issues

This memorandum discusses child custody issues that involve technical and minor substantive changes. These issues are drawn from "The List" compiled by the staff during the drafting of the code and from meetings with interested persons. A draft tentative recommendation proposing legislation to address these issues is attached.

In this memo and the draft legislation, a reference to an "existing" Family Code Section means a section in the code as enacted by Chapter 162 of the Statutes of 1992. A reference to a "proposed" Family Code section means a section proposed in the draft legislation attached to this memo. References to "former" sections of other codes mean sections repealed or amended by the Family Code legislation.

Amendment and Reorganization of Custody Investigation Provisions
(existing Sections 3110-3114, proposed Sections 3110-3116)

The staff proposes revising the provisions governing custody investigations to restore parts of former Code of Civil Procedure Section 263. The existing provisions in the custody investigation chapter continue former Civil Code Section 4602. Former Code of Civil Procedure Section 263 describes the duties of a domestic relations investigator. Because the more recent provisions of former Civil Code Section 4602 appeared to supersede former Code of Civil Procedure Section 263, it was not continued in the new code. However, this issue was marked for further study.

Restoration of provisions from former Code of Civil Procedure Section 263. Several parts of former Code of Civil Procedure Section 263 should be restored to the Family Code:

(1) Proposed Section 3114. The time requirement for filing a report with the court (subdivision (a)) and the statement as to the competency of evidence in a report (subdivision (c)), continue parts of

former Code of Civil Procedure Section 263. Former Civil Code Section 4602 is silent on these matters; therefore, former Code of Civil Procedure Section 263 does not appear to have been superseded as to these.

(2) Proposed Section 3115. This proposed section continues the requirement in former Code of Civil Procedure Section 263 that an investigator be available for examination at trial. It appears that this provision was not superseded. In *Wheeler v. Wheeler*, 34 Cal. App. 3d 239, 242 (1973), the court held that it was a denial of due process for the lower court to refuse a party's request to cross-examine an investigator. The court stated: "Civil Code [S]ection 4602 authorizes the court to direct a custody investigation. It does not require the presence of the . . . officer in court, but the omission does not necessarily conflict with the provisions of Code of Civil Procedure [S]ection 263."

(3) Proposed Section 3116. This proposed section continues and generalizes a provision of former Code of Civil Procedure Section 263, as to which former Civil Code Section 4602 was silent.

Elimination of duplicative language. The staff proposes adding a definition of "court-appointed investigator" to the chapter, allowing elimination of duplicative language throughout. See proposed Section 3110 ("court-appointed investigator" defined). Use of this new term in proposed Sections 3114-3116 reconciles an inconsistency between former Code of Civil Procedure Section 263 and former Civil Code Section 4602. The former Code of Civil Procedure section refers to a domestic relations investigator, but the former Civil Code section refers to "probation officer, domestic relations investigator, or court appointed evaluator."

Consolidation and Reorganization of Mediation Provisions (existing Sections 3155-3183, proposed Sections 3160-3185)

The mediation chapter continues former statutes providing for mediation when a stepparent or grandparent requests custody and when issues of custody or visitation are contested. The existing mediation chapter consolidates duplicative provisions from the former statutes. In addition, the chapter generalizes some sections that appeared

equally applicable to both types of mediation. The provisions were marked for further study, since it appeared that the remaining differences might also be reconciled and eliminated. This seems especially desirable, since the Legislature directed the Judicial Council to draft uniform standards of practice for mediators. See Cal. R. Ct. App. Div. I, § 26, effective Jan. 1, 1991.

After reviewing the existing sections and the uniform rules of practice, the staff believes that remaining differences between the two types of mediation can be eliminated as follows:

Generalization of provisions substantially similar to Judicial Council rules. Proposed Sections 3173 (mediation of existing custody or visitation order), 3181 (separate mediation where case involves domestic violence), and 3184 (recommendation that counsel be appointed for child) generalize provisions of the "contested issues" mediation statute. In each case, the uniform rules of practice include a substantially similar provision. See Cal. R. Ct. App. Div. I, §§ 26(c)(2), (h)(4), (i). Since the rules are intended to provide for uniformity, making these provisions applicable to both types of mediation should not be controversial.

Generalization of procedural provisions. Proposed Sections 3175 (mediation to be set before or concurrent with hearing), 3176 (notice of mediation or hearing), and 3185 (hearing on issues not settled by mediation) generalize procedural rules. Generalizing these rules creates a more complete and consistent set of procedures. These are minor substantive changes and should not be controversial.

Generalization of requirement that mediation settlement be in best interest of child. Proposed Section 3180(b) generalizes a provision contained in the "contested issues" mediation statute. Generalizing this to apply to mediation of stepparent or grandparent visitation is not a substantive change, since the purpose of this type of mediation is to effect a settlement that is in the best interest of the child. See proposed Section 3161(c) (purpose of mediation proceeding).

Scope of Provisions in Part 2 of Division 8 (existing and proposed Sections 3020-3192)

The staff proposes refinements to meet concerns raised by practitioners in the meetings held by the staff during the drafting of

the code. The practitioners are concerned that some existing custody sections are limited to proceedings for dissolution, nullity, or legal separation and they suggest a more unified set of custody rules. One attorney who handles Uniform Parentage Act cases stated that courts use these provisions, as a matter of practice, in proceedings to determine custody or visitation in a Uniform Parentage Act action.

Scope of existing provisions. All of the sections in existing Part 2 of Division 8 continue provisions of the former Family Law Act. A number of the former provisions contained references to "proceedings under this part," meaning under the former act. Since the former act has been integrated into the code, substitutions for these references are required. The overall approach of the code is to generalize these provisions, where appropriate. Where generalization is not appropriate, the phrase "proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties" is substituted. This substitution continues the former application of these sections, since these are the primary proceedings provided in the former act.

The provisions in existing Part 2 that have been generalized are: Sections 3026 (family reunification services), 3027 (monetary sanction for false accusation of child abuse or neglect), and 3028 (compensation for failure to assume caretaker responsibility or for thwarting other parent's custody or visitation rights).

The provisions in existing Part 2 that are limited to proceedings for dissolution, nullity, or legal separation are: Sections 3060 (petition for temporary custody order), 3101 (visitation rights of stepparent or grandparent), 3110 (custody investigation and report), 3150 (appointment of private counsel to represent child in custody or visitation proceeding), and 3190 (order requiring counseling).

A second and related scope issue concerns substitutions for cross-references to former Civil Code Section 4600. Former Civil Code Section 4600 is the seminal section of the former Family Law Act custody title. Former Civil Code Section 4600 is divided into smaller sections and integrated into existing Part 2 of Division 8. Again, the approach of the existing sections is to expand the reference, where appropriate. For example, existing Family Code Section 2253, providing

for custody in a nullity proceeding contains a cross-reference to Division 8. However, since the custody provisions in the former act were applicable to proceedings under the act and since nullity is a proceeding under the act, the reference to Division 8 was appropriate.

References to former Family Law Act custody provisions were also expanded in existing Family Code Section 7604, providing for issuance of a temporary custody order in an action under the Uniform Parentage Act. In this section, a reference to Part 2 (commencing with Section 3020) of Division 8 was substituted for references to former Civil Code Sections 4600 and 4601. (Former Civil Code Section 4601 states the basic authority of a court to award visitation.)

Problems created by existing approach. The existing approach to these scope issues resolves some problems in the former statutes, but may create new problems:

(1) Application to action for exclusive custody. Substitution of the reference to dissolution, nullity, or legal separation excludes application to an action for exclusive custody, though the custody provisions appear to have applied to such an action under former law.

(2) Application to custody proceeding under Uniform Parentage Act. The cross-reference to Part 2 in existing Section 7604 conflicts with the limitation of some provisions in the part to a proceeding for dissolution, nullity, or legal separation.

(3) Application to other proceedings under code. Expanding provisions to apply to any proceeding under this code, could cause confusion. For example, should existing Section 3027, providing a monetary sanction for a false accusation of child abuse or neglect apply to a proceeding to terminate parental rights? If the juvenile dependency statutes are added to the code, would this section apply to those proceedings? If "child custody proceeding" is given a broad interpretation, the section could be found applicable to these situations.

Refinement of existing approach to resolve problems. The staff would remedy these problems by refining the existing approach to the application of this part as follows:

(1) Addition of provision stating application of part. Proposed Section 3021 contains a single, unified statement of the applicability

of the sections in Part 2. The proposed section makes clear that the part applies to an action for exclusive custody and to a proceeding to determine custody or visitation under the Uniform Parentage Act, as well as to proceedings for dissolution, nullity, and legal separation.

(2) Provisions requiring narrower application. References to a proceeding "under this code" are eliminated from proposed Sections 3026 (family reunification services), 3027 (monetary sanction for false accusation of child abuse or neglect), and 3028 (compensation for failure to assume caretaker responsibility or for thwarting other parent's visitation or custody rights). This revision narrows application of the sections to the proceedings listed in proposed Section 3021.

(3) Provisions requiring broader application. References to proceedings for dissolution, nullity, or legal separation are eliminated from proposed Sections 3060 (petition for temporary custody order), 3101 (visitation rights of stepparent or grandparent), 3114 (filing, service, and use of custody investigation report), 3150 (appointment of private counsel to represent child in custody or visitation proceeding), and 3190 (order requiring counseling). This revision expands application of the sections to the proceedings listed in proposed Section 3021.

The staff believes that these revisions clarify application of these provisions, without making controversial changes. The result is a more unified set of custody rules.

Staff Recommendation

The staff recommends that the draft legislation be approved for circulation as a tentative recommendation, subject to changes made by the Commission.

Respectfully submitted,

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Family Code:
Child Custody Issues

October 1992

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN November 25, 1992.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
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SUMMARY OF RECOMMENDATION

This tentative recommendation would make technical and minor substantive changes in three areas of child custody law.

First, the provisions for custody investigations are revised to restore parts of Code of Civil Procedure Section 263 to the Family Code. These sections are reorganized for clarity.

Second, the provisions for mediation are consolidated to eliminate inconsistencies between mediation of stepparent or grandparent visitation and mediation of contested issues of custody or visitation. These sections are reorganized for clarity.

Third, the scope of Part 2 of the custody division is clarified. A section is added to that states the scope of application of the sections in Part 2. The section makes clear that the provisions of Part 2 apply to proceedings for dissolution, nullity, legal separation, and actions for exclusive custody. The section also expands, where necessary, the scope of the provisions to apply to determinations of custody and visitation under the Uniform Parentage Act.

CHILD CUSTODY ISSUES

The Family Code was enacted during the 1992 legislative session on recommendation of the Law Revision Commission.¹ The code is subject to a delayed operative date of January 1, 1994.² The new code consolidates provisions relating to family law dispersed in several existing codes, including the Civil Code, Code of Civil Procedure, Evidence Code, Probate Code, and Welfare and Institutions Code.³ In the course of reviewing the new code, the Commission has identified certain projects that merit further study.⁴ This tentative recommendation is the result of further study of the Family Code provisions dealing with child custody. The legislation proposes technical and minor substantive changes in three areas of child custody law.

Amendment and reorganization of custody investigation provisions. The provisions for custody investigations are revised to restore parts of Code of Civil Procedure Section 263 to the Family Code. Code of Civil Procedure Section 263 was repealed by the 1992 Family Code legislation,⁵ and not continued in the Family Code, because it appeared to be superseded by the more recent provisions of Civil Code Section 4602. However, it appears that several parts of the Code of Civil Procedure section have not been superseded and the proposed legislation restores them to the Family Code.⁶

In addition, the provisions for custody investigation are reorganized to improve the clarity of the chapter. Proposed Family Code Section 3110 adds a definition of "court-appointed investigator" so that duplicative language in the remaining sections of the chapter can be eliminated. Use of the new term reconciles a discrepancy between Code of Civil Procedure Section 263 and Civil Code Section 4602.⁷

Consolidation and reorganization of mediation provisions. The provisions for mediation are consolidated and reorganized. The mediation chapter continues existing statutes providing for mediation when a stepparent or grandparent requests visitation⁸ and when issues of custody or visitation are contested.⁹ The 1992 Family Code legislation consolidates the parts of these two provisions that

1. 1992 Cal. Stat. ch. 162, § 10.

2. 1992 Cal. Stat. ch. 162, § 13.

3. *Family Code*, 22 Cal. L. Revision Comm'n Reports 1, 7 (1992).

4. *Family Code*, 22 Cal. L. Revision Comm'n Reports 1, 12 (1992).

5. 1992 Cal. Stat. ch. 163, § 15.

6. See proposed Fam. Code §§ 3114-3116.

7. See Code Civ. Proc. § 263 (referring only to "domestic relations case investigator"); Civ. Code § 4602 (referring to "probation officer, domestic relations investigator, or court appointed evaluator.")

8. See Civ. Code § 4351.5.

9. See Civ. Code § 4607.

are duplicative and generalizes other parts. However, some differences between the rules governing the two types of mediation are continued.

After further study of these sections it appears that these rules can be fully consolidated and the remaining differences eliminated.¹⁰ This seems especially desirable, since the Legislature directed the Judicial Council to draft uniform standards of practice for mediators.¹¹ The following sections are proposed to be generalized.

Scope of provisions in Part 2 of custody division. The tentative recommendation proposes minor substantive changes relating to the scope of application of the sections in Part 2 of the custody division.

All of the sections in Part 2 of Division 8 of the Family Code continue provisions of the Family Law Act.¹² A number of these sections contain references stating that the section applies to a "proceeding under this part," meaning under the act. Since the act has been integrated into the new code, substitutions for these references are required. In the 1992 Family Code legislation, some sections in this division are generalized¹³ Other sections are limited to proceedings for dissolution of marriage, nullity of marriage, or legal separation of the parties.¹⁴

The tentative recommendation proposes a unified statement of the scope of the part.¹⁵ The new section states that the part applies to proceedings for dissolution of marriage, nullity of marriage, legal separation of the parties, an action for exclusive custody, and determinations of custody or visitation in a Uniform Parentage Act action. Each generalized section and each section limited to proceedings for dissolution, nullity, or legal separation is revised and made applicable in these actions and proceedings.

10. For provisions that are generalized, see proposed Fam. Code §§ 3173 (mediation of existing custody or visitation order), 3175 (mediation to be set before or concurrent with hearing), 3176 (notice of mediation or hearing), 3180(b) (mediator to effect settlement in best interest of child), 3181 (separate mediation where case involves domestic violence), 3184 (recommendation that counsel be appointed for child), 3185 (hearing on issues not settled by mediation).

11. See Cal. R. Ct. App. Div. I, § 26 (effective Jan. 1, 1991).

12. Part 5 (commencing with Section 4000) of Division 4 of the Civil Code.

13. See Fam. Code §§ 3026 (family reunification services), 3027 (monetary sanction for false accusation of child abuse or neglect), 3028 (compensation for failure to assume caretaker responsibility of for thwarting other parent's custody or visitation rights) in 1992 Cal. Stat. ch. 162.

14. See Fam. Code §§ 3060 (petition for temporary custody order), 3101 (visitation rights of stepparent or grandparent), 3110 (custody investigation and report), 3150 (appointment of private counsel to represent child in custody or visitation proceeding), 3190 (order requiring counseling) in 1992 Cal. Stat. ch. 162.

15. See proposed Fam. Code § 3021 (scope of part).

RECOMMENDED LEGISLATION

Outline

FAMILY CODE

DIVISION 8. CUSTODY OF CHILDREN

PART 1. DEFINITIONS AND GENERAL PROVISIONS

CHAPTER 2. GENERAL PROVISIONS

§§ 3010-3018 (repealed). General Provisions

§ 3010 (added). Right of parent to custody of unemancipated minor child

§ 3011 (added). Factors considered in determining best interest of child

PART 2. RIGHT TO CUSTODY OF MINOR CHILD

CHAPTER 1. GENERAL PROVISIONS

§ 3020 (technical amendment). Legislative findings and declarations

§ 3021 (added). Application of part

§ 3022 (amended and renumbered). Authority of court to make custody order

§ 3022 (repealed). Factors considered in determining best interest of child

§ 3023 (amended). Preference for trial on issue of custody

§ 3024 (unchanged). Notice to other parent of change of residence of child

§ 3025 (unchanged). Parental access to records

§ 3026 (amended). Family reunification services

§ 3027 (amended). Monetary sanction for false accusation of child abuse or neglect

§ 3028 (amended). Compensation for failure to assume caretaker responsibility or for thwarting other parent's custody or visitation rights

§ 3029 (added). Order for support where custodial parent receiving public assistance

CHAPTER 2. MATTERS TO BE CONSIDERED IN AWARDING CUSTODY

§ 3040 (technical amendment). Order of preference in awarding custody

§ 3041 (unchanged). Additional requirements for custody award to nonparent

§ 3042 (unchanged). Wishes of child

§ 3043 (unchanged). Nomination of guardian by parent

§ 3044 (unchanged). Parent convicted under Penal Code provisions

CHAPTER 3. TEMPORARY CUSTODY ORDER DURING PENDENCY OF PROCEEDING

§ 3060 (amended). Petition for temporary custody order

§ 3061 (unchanged). Order for temporary custody in accordance with agreement or understanding of parties

§ 3062 (unchanged). Ex parte order and order to show cause

§ 3063 (unchanged). Order restraining removal of child from state

§ 3064 (unchanged). Limitation on ex parte order granting or modifying custody order

CHAPTER 4. JOINT CUSTODY

§ 3080 (amended). Presumption for joint custody where parents agree to joint custody

§ 3081 (technical amendment). Award of joint custody absent agreement of parents

§ 3082 (unchanged). Statement by court of reasons for grant or denial of joint custody request

§ 3083 (unchanged). Content and effect of joint legal custody order

§ 3084 (unchanged). Content of joint physical custody order

§ 3085 (unchanged). Awarding joint legal custody without joint physical custody

§ 3086 (unchanged). Order may specify one parent as primary caretaker of child

§ 3087 (unchanged). Modification or termination of joint custody order

§ 3088 (amended). Modification to make custody order a joint custody order

Family Code continued

§ 3089 (unchanged). Consultation with conciliation court

CHAPTER 5. VISITATION RIGHTS

§ 3100 (technical amendment). Visitation rights generally

§ 3101 (amended). Visitation rights of stepparent or grandparent

§ 3102 (unchanged). Visitation rights where parent of unmarried minor child is deceased

CHAPTER 6. CUSTODY INVESTIGATION AND REPORT

§§ 3110-3113 (repealed). Custody investigation and report

§ 3110 (added). "Court-appointed investigator" defined

§ 3111 (added). Inquiry into ability of parent to repay county expenses

§ 3112 (added). Separate meetings where domestic violence

§ 3113 (added). Recommendation for appointment of counsel for minor child

§ 3114 (added). Filing, service, and use of report

§ 3115 (added). Testimony of investigator

§ 3116 (added). Chapter not limitation on investigator's duty to assist court

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CHAPTER 10. APPOINTMENT OF COUNSEL TO REPRESENT CHILD

§ 3150 (amended). Appointment of private counsel to represent child in custody or visitation proceeding

§ 3151 (unchanged). Rights and duties of appointed counsel

§ 3152 (unchanged). Release to counsel of reports and files of child protective agency

§ 3153 (unchanged). Compensation of appointed counsel

CHAPTER 11. MEDIATION OF CUSTODY AND VISITATION ISSUES

§§ 3155-3183 (repealed). Mediation of visitation or custody issues

Article 1. General Provisions

§ 3160 (added). Superior courts to provide mediation services

§ 3161 (added). Purpose of mediation proceeding

§ 3162 (added). Uniform standards of practice for mediation

§ 3163 (added). Local court rules

§ 3164 (added). Qualifications of mediator

Article 2. Availability of Mediation

§ 3170 (added). Mediation required where custody or visitation contested

§ 3171 (added). Mediation where visitation order requested by stepparent or grandparent

§ 3172 (added). Mediation available where paternity is at issue

§ 3173 (added). Mediation of dispute concerning existing order

Article 3. Mediation Proceedings

§ 3175 (added). Mediation to be set before or concurrent with hearing

§ 3176 (added). Notice of mediation or hearing

§ 3177 (added). Confidentiality of mediation proceeding

§ 3178 (added). Issues that may be resolved by agreement as result of mediation

§ 3179 (added). Modification of agreement resulting from mediation

§ 3180 (added). Assessment of needs and interests of child

§ 3181 (added). Separate mediation where domestic violence

§ 3182 (added). Exclusion of counsel from mediation proceeding

§ 3183 (added). Recommendations to court

§ 3184 (added). Recommendations that counsel be appointed for minor child

§ 3185 (added). Hearing on issues not settled by mediation

§ 3186 (added). Confirmation of agreement reached by parties as result of mediation

CHAPTER 12. COUNSELING OF PARENTS AND CHILD

§ 3190 (amended). Order requiring counseling

§ 3191 (technical amendment). Purpose of counseling

§ 3192 (unchanged). Separate counseling where protective order against domestic violence

CONFORMING REVISIONS

EVIDENCE CODE

1152.5 (technical amendment). Mediation

FAMILY CODE

§ 1816 (technical amendment). Continuing instruction programs

§ 1850 (technical amendment). Judicial Council duties

§ 3684 (technical amendment). Objection and request for hearing

§ [5513] (technical amendment). Order limiting visitation to situations where third person present

§ 7604 (technical amendment). Custody and visitation orders during pendency of proceeding

§ 7807 (technical amendment). Inapplicability of certain statutory provisions in proceeding under this part

§ 7891 (technical amendment). Hearing in chambers to determine wishes of child

§ 20010 (technical amendment). Procedure for motions filed under this part

GOVERNMENT CODE

§ 26840.3 (technical amendment). Fee increase to support family conciliation court and mediation services

§ 27752 (technical amendment). Financial evaluations and collections

Appendix: Revised Comments

CODE OF CIVIL PROCEDURE

§ 263. Domestic relations investigator

FAMILY CODE

§ [55]. "Abuse"

§ [75]. "Domestic violence prevention order"

§ 211. Judicial Council rules of practice and procedure

§ 270. Costs and attorney's fees during pendency of proceeding

§ 1830. Jurisdiction of family conciliation court

§ 1831. Purpose of petition

§ 1840. Stay of right to file other proceeding

§ 2335. Evidence of specific acts of misconduct

§ 3041. Additional requirements for custody award to nonparent

§ 3082. Statement by court of reasons for grant or denial of joint custody request

§ 3102. Visitation rights where parent of unmarried minor child is deceased

§ 3113. Recommendation for appointment of counsel for minor child

§ 3120. Independent action for exclusive custody

§ 3133. Temporary custody order upon request of district attorney

§ 3191. Purpose of counseling

§ 3403. Jurisdictional requirements

§ 3585. Support order based on agreement between parents

§ 3586. Court order to effectuate family support agreement

§ 3600. Order for support during pendency of proceeding

§ 4000. Civil action to enforce parent's duty to support

§ 4001. Order for child support

§ 4002. Enforcement by county on behalf of child

§ 4004. Child receiving public assistance

§ 4005. Factors in determining amount of child support

§ 4101. Order for cost of support before filing proceeding

§ 4200. Child support payable to parent receiving welfare

§ 7637. Other provisions of judgment

DIVISION 8. CUSTODY OF CHILDREN

PART 1. DEFINITIONS AND GENERAL PROVISIONS

Staff Note. This tentative recommendation includes both "Comments" and "Interim Comments." The comments explain the section as if it were enacted. The interim comments are temporary and are included, where necessary, to explain differences between the 1992 Family Code legislation and the changes proposed in this tentative recommendation. Reference to an "existing" Family Code section means a section as enacted by the 1992 Family Code legislation. Reference to a "proposed" Family Code section means a section proposed in this tentative recommendation.

Fam. Code §§ 3010-3018 (repealed). General Provisions

Staff Note. These sections are repealed in the draft legislation attached to Memorandum 92-74 (Miscellaneous Revisions).

Fam. Code §§ 3010-3011 (added). General Provisions

SEC. ____ Chapter 2 (commencing with Section 3010) is added to Part 1 of Division 8 of the Family Code, to read:

CHAPTER 2. GENERAL PROVISIONS

Fam. Code § 3010 (added). Right of parent to custody of unemancipated minor child

3010. (a) The mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are equally entitled to the custody of the child.

(b) If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to custody of the child.

Comment. Section 3010 restates the general right to custody in former Civil Code Section 197 without substantive change. The word "unemancipated" has been substituted for "unmarried." This is not intended as a substantive change, but resolves a conflict with the rules governing emancipation of minors. See Section 7002 (conditions of emancipation).

The abandonment standard in former Civil Code Section 197, which referred to abandonment of the family, has been revised in subdivision (b) to refer to abandonment of the child. This is not intended as a substantive change, but recognizes that where child custody is the issue, abandonment of the child is the relevant consideration. This change is also made for general consistency with judicial standards stated elsewhere concerning parental rights and child custody. See Sections 3011 (factors considered in determining best interest of child), 3040 (preference in awarding custody), 7822 (proceeding to declare child free from parental custody and control on ground of abandonment); see also *In re Guardianship of Schwartz*, 171 Cal. 633, 635, 154 P. 304 (1915); *Guardianship of Case*, 57 Cal. App. 2d 844, 848, 135 P.2d 681 (1943).

For additional rights dependent on the right to custody, see [Part 1 (commencing with Section 7500) of Division 12].

Interim Comment. Proposed Section 3010 continues existing Section 3010 without substantive change, insofar as it relates to custody. In subdivision (b), the reference to abandonment of the "child" is substituted for the reference in the existing section to abandonment of the "family." This is not a substantive change, as is explained in the Comment above.

The part of existing Section 3010 that is not continued in this proposed section is continued in Division 12. See draft legislation attached to Memorandum 92-74 (Miscellaneous Revisions).

Fam. Code § 3011 (added). Factors considered in determining best interest of child

3011. In making a determination of the best interest of the child, the court shall, among any other factors it finds relevant, consider all of the following:

(a) The health, safety, and welfare of the child.

(b) Any history of abuse by one parent against the child or against the other parent. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, "abuse against the child" means child abuse as defined in Section 11165.6 of the Penal Code and "abuse against the other parent" means abuse as defined in Section [55] of this code.

(c) The nature and amount of contact with both parents.

Comment. Section 3011 continues former Civil Code Section 4608 without substantive change. The former reference to a "proceeding under this title," which referred to former Title 4 (commencing with former Civil Code Section 4600) of the former Family Law Act has been omitted. This is not intended as a substantive change.

For provisions adopting this section by reference, see Sections 3020 (legislative findings and declarations), 3040 (order of preference in awarding custody), 3080 (presumption for joint custody where parents agree to joint custody), 3081 (award of joint custody absent agreement of parents), [5513] (order limiting visitation to situations in which third person is present).

For provisions in this division referring to the best interest of the child, see Sections 3041 (additional requirements of custody award to nonparent), 3082 (statement by court of reasons for grant or denial of joint custody request), 3087 (modification or termination of joint custody order), 3100 (visitation rights generally), 3101 (visitation rights of stepparent or grandparent), 3102 (visitation rights where parent of unmarried minor child is deceased), 3113 (recommendation for appointment of counsel for minor child), 3120 (Independent action for exclusive custody), 3133 (temporary custody order upon request of district attorney), 3150 (appointment of private counsel to represent child in custody or visitation proceeding), 3161 (purpose of mediation), 3162 (uniform standards of practice for mediation), 3184 (recommendations that counsel be appointed for minor child), 3190 (order requiring counseling), 3191 (purpose of counseling), 3403 (jurisdictional requirements).

For provisions in the Uniform Parentage Act to which this section is applicable, see Sections 7604 (custody and visitation orders during pendency of proceeding), 7637 (other provisions of judgment).

See also Sections [70] ("domestic violence" defined), 3040 (order of preference in awarding custody), 3041 (additional requirements for custody award to nonparent), 3042 (consideration of wishes of child in custody case), 3043 (nomination of guardian by parent), 3044 (parent convicted under certain Penal Code provisions not allowed unsupervised custody or visitation), 3080 (presumption for joint custody where parents agree to joint custody).

Interim Comment. Proposed Section 3011 continues existing Section 3022 without substantive change. The reference in the existing section to a "proceeding under this division" is omitted.

Staff Note. The bracketed references will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.

PART 2. RIGHT TO CUSTODY OF MINOR CHILD

CHAPTER 1. GENERAL PROVISIONS

Fam. Code § 3020 (technical amendment). Legislative findings and declarations

SEC. _____. Section 3020 of the Family Code is amended to read:

3020. The Legislature finds and declares that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as set forth in Section ~~3022~~ 3011.

Comment. Section 3020 continues the first paragraph of former Civil Code Section 4600(a) without substantive change. See also Sections 2253 (determining custody in nullity proceeding), 3021 (proceedings in which section applicable).

Fam. Code § 3021 (added). Application of part

SEC. _____. Section 3021 is added to the Family Code, to read:

3021. This part applies in any of the following:

- (a) A proceeding for dissolution of marriage.
- (b) A proceeding for nullity of marriage.
- (c) A proceeding for legal separation of the parties.
- (d) An action for exclusive custody pursuant to Section 3120.
- (e) A proceeding to determine custody or visitation in an action pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).

Comment. Section 3021 is a new provision that generalizes the parts of former Civil Code Sections 4351.5, 4600.1, 4600.5, 4602, 4606, 4608.1, 4609, and 4611 stating the scope of application of the former sections. The former provisions applied to proceedings under the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code), which included proceedings for dissolution of marriage, nullity of marriage, and legal separation of the parties, and actions for exclusive custody.

This section expands the scope of the part to include proceedings in which custody or visitation is determined in an action pursuant to the Uniform Parentage Act. This provides a complete set of rules for proceedings in which custody or visitation are determined in a Uniform Parentage Act action. Formerly the Uniform Parentage Act did not provide a complete set of rules regarding determination of custody or visitation. For example, former Civil Code Section 7004.5 made former Civil Code Sections 4600 and 4601 applicable to temporary orders for custody or visitation under the Uniform Parentage Act. However, the former Uniform Parentage Act did not specify the standards to be applied by the court when making a permanent custody or visitation order. In addition, specific custody sections in the former Family Law Act were made applicable to custody proceedings under the Uniform Parentage Act. These former sections are continued at Family Code Sections 3140 (submission of child's birth certificate to determine if child is missing person) and 3172 (mediation may not be denied on basis that paternity is at issue).

See also Prob. Code § 1514 (Sections 3040-3043 applicable in proceeding to establish guardianship of the person). For provisions excluding application of provisions of this part, see Section 7807 (specific provisions not applicable in proceeding to terminate parental rights pursuant to Uniform Parentage Act); Welf. & Inst. Code § 366.26 (specific provisions not applicable to dependency proceedings).

Interim Comment. Proposed Section 3021 is added to clarify the application of the provisions of this part. Some of the existing sections in Part 2 contain language stating the scope of the section and others do not. In addition, the application of existing sections in Part 2 to an action for exclusive custody is unclear. Finally, the rules to be applied where custody or visitation is determined in a Uniform Parentage Act action are incomplete. Proposed Section 3021 clarifies each of these matters.

Fam. Code § 3022 (amended and renumbered). Authority of court to make custody order

SEC. ____ Section 3021 of the Family Code is amended and renumbered to read:

~~3021~~ 3022. ~~In any proceeding where there is at issue the custody of a minor child, the~~ The court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper.

Comment. Section 3022 continues without substantive change the first sentence of the second paragraph of former Civil Code Section 4600(a). The former reference to "any proceeding where there is at issue the custody of a minor child" has been omitted. See Section 3021 (proceedings in which section applicable) As to the court's jurisdiction, see Sections 3400-3425 (Uniform Child Custody Jurisdiction Act). See also Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Interim Comment. Proposed Section 3022 continues existing Section 3021 without substantive change. The existing section is amended to omit the reference to "any proceeding where there is at issue the custody of a minor child" to conform the section to proposed Section 3021 stating the scope of this part.

Fam. Code § 3022 (repealed). Factors considered in determining best interest of child

SEC. ____ Section 3022 of the Family Code is repealed.

~~3022. In making a determination of the best interest of the child in a proceeding under this division, the court shall, among any other factors it finds relevant, consider all of the following:~~

~~(a) The health, safety, and welfare of the child.~~

~~(b) Any history of abuse by one parent against the child or against the other parent. As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, "abuse against the child" means child abuse as defined in Section 11165.6 of the Penal Code and "abuse against the other parent" means abuse as defined in Section 55 of this code.~~

~~(c) The nature and amount of contact with both parents.~~

Interim Comment. Existing Section 3022 is continued in proposed Section 3011 without substantive change.

Fam. Code § 3023 (amended). Preference for trial on issue of custody

SEC. ____. Section 3023 of the Family Code is amended to read:

3023. (a) ~~In any case in which a contested issue of~~ **Where** custody of a minor child is the sole contested issue, the case shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date and shall be given an early hearing.

(b) ~~In any case in which~~ **Where** there is more than one contested issue and one of the issues is the custody of a minor child, the court, as to the issue of custody, shall order a separate trial. The separate trial shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date.

Comment. Section 3023 continues former Civil Code Section 4600.6 without substantive change. The former reference to "any case in which a contested issue of custody" has been omitted as unnecessary. See Section 3021 (proceedings in which section applicable)

See also Sections 3041 (excluding public from hearing on award of custody to nonparent), 4003 (separate trial on issue of child support).

Interim Comment. Existing Section 3023 is amended to conform the section to proposed Section 3021 stating the scope of the provisions in this part.

Fam. Code § 3024 (unchanged). Notice to other parent of change of residence of child

Fam. Code § 3025 (unchanged). Parental access to records

Fam. Code § 3026 (amended). Family reunification services

SEC. ____. Section 3026 of the Family Code is amended to read:

3026. Family reunification shall not be ordered as a part of a child custody or visitation rights proceeding ~~brought under this code~~. Nothing in this section affects the applicability of Section 16507 of the Welfare and Institutions Code.

Comment. Section 3026 restates former Civil Code Section 4609 without substantive change. The reference to a custody or visitation rights proceeding "brought under this part," meaning the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code) has been omitted as unnecessary. See Section 3021 (proceedings in which section applicable)

Interim Comment. Proposed Section 3026 narrows the scope of the section's application. Existing Section 3026 applies to the whole Family Code, whereas the Civil Code section applied only to proceedings brought under the Family Law Act. Proposed Section 3026 applies to the proceedings set forth in proposed Section 3021, which includes the Family Law Act proceedings and custody and visitation determinations in an action pursuant to the Uniform Parentage Act.

Fam. Code § 3027 (amended). Monetary sanction for false accusation of child abuse or neglect

SEC. ____. Section 3027 of the Family Code is amended to read:

3027. (a) If a court determines that an accusation of child abuse or neglect made during a child custody proceeding ~~under this code~~ is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed one thousand dollars (\$1,000) and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For the purposes of this section, "person" includes a witness, a party, or a party's attorney.

(b) Upon motion by any person requesting sanctions under this section, the court shall issue its order to show cause why the requested sanctions should not be imposed. The order to show cause shall be served upon the person against whom the sanctions are sought and a hearing thereon shall be scheduled by the court to be conducted at least 15 days after the order is served.

(c) The remedy provided by this section is in addition to any other remedy provided by law.

Comment. Section 3027 continues former Civil Code Section 4611 without substantive change. The former reference to a "proceeding under this title," meaning former Title 4 (commencing with former Civil Code Section 4600) of the former Family Law Act has been omitted as unnecessary. See Section 3021 (proceedings in which section applicable)

Interim Comment. Proposed Section 3027 narrows the scope of the section's application. Existing Section 3027 applies to the whole Family Code, whereas the Civil Code section applied only to proceedings brought under the Family Law Act. Proposed Section 3027 applies to the proceedings set forth in proposed Section 3021, which includes the Family Law Act proceedings and custody and visitation determinations in an action pursuant to the Uniform Parentage Act.

Fam. Code § 3028 (amended). Compensation for failure to assume caretaker responsibility or for thwarting other parent's custody or visitation rights

SEC. ____ Section 3028 of the Family Code is amended to read:

3028. (a) The court may order financial compensation for periods when a parent fails to assume the caretaker responsibility or when a parent has been thwarted by the other parent when attempting to exercise ~~visitation or custody~~ or visitation rights contemplated by a custody or visitation order ~~entered under this code~~, including, but not limited to, an order for joint physical custody, or by a written or oral agreement between the parents.

(b) The compensation shall be limited to (1) the reasonable expenses incurred for or on behalf of a child, resulting from the other parent's failure to assume caretaker responsibility or (2) the reasonable expenses incurred by a parent for or on behalf of a child, resulting from the other parent's thwarting of the parent's efforts to exercise ~~visitation or custody~~ or visitation rights. The expenses may include the value of caretaker services but are not limited to the cost of services provided by a third party during the relevant period.

(c) The compensation may be requested by noticed motion or an order to show cause, which shall allege, under penalty of perjury, (1) a minimum of one hundred dollars (\$100) of expenses incurred or (2) at least three occurrences of failure to exercise ~~visitation or custody~~ or visitation rights or (3) at least three occurrences of

the thwarting of efforts to exercise ~~visitation or custody~~ or visitation rights within the six months before filing of the motion or order.

(d) Attorney's fees shall be awarded to the prevailing party upon a showing of the nonprevailing party's ability to pay.

Comment. Section 3028 continues former Civil Code Section 4700(b) without substantive change. In subdivision (a), the former reference to an order "entered pursuant to this part," meaning the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code has been omitted as unnecessary. See Section 3021 (proceedings in which section applicable)

See also Sections 3003 ("joint legal custody" defined), 3004 ("joint physical custody" defined), 3556 (custodial parent's failure to implement noncustodial parent's custody or visitation rights does not affect noncustodial parent's duty of support).

Interim Comment. Proposed Section 3028 narrows the scope of the section's application. Existing Section 3028 applies to the whole Family Code, whereas the Civil Code section applied only to proceedings brought under the Family Law Act. Proposed Section 3028 applies to the proceedings set forth in proposed Section 3021, which includes the Family Law Act proceedings and custody and visitation determinations pursuant to the Uniform Parentage Act.

Fam. Code § 3029 (added). Order for support where custodial parent receiving public assistance

SEC. ____. Section 3029 is added to the Family Code, to read:

3029. An order awarding custody to a parent who is receiving, or in the opinion of the court is likely to receive, assistance pursuant to the Family Economic Security Act of 1982 (Chapter 2 (commencing with Section 11200) of Part 3 of Division 9 of the Welfare and Institutions Code) for the maintenance of the child shall include an order pursuant to Chapter 2 (commencing with Section 4000) of Part 2 of Division 9, directing the noncustodial parent to pay any amount necessary for the support of the child, to the extent of the noncustodial parent's ability to pay.

Comment. Section 3029 continues former Civil Code Section 4600.2 without substantive change. A reference to sections in the Family Code has been substituted for the narrower references in former Civil Code Section 4600.2. This is not intended as a substantive change. See also Sections 3021 (proceedings in which section applicable), 4200-4203 (payment of child support to court-designated county officer).

Interim Comment. Proposed Section 3029 continues without change existing Section 3017.

CHAPTER 2. MATTERS TO BE CONSIDERED IN AWARDING CUSTODY

Fam. Code § 3040 (technical amendment). Order of preference in awarding custody

SEC. ____. Section 3040 of the Family Code is amended to read:

3040. (a) Custody should be awarded in the following order of preference according to the best interest of the child pursuant to Section ~~3022~~ 3011:

(1) To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, subject to Section

~~3022~~ 3011, and shall not prefer a parent as custodian because of that parent's sex. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) 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.

(b) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan ~~which~~ that is in the best interest of the child.

Comment. Section 3040 continues former Civil Code Section 4600(b) and (d) without substantive change. The reference to "children" has been omitted as surplus. See Section 10 (singular includes the plural). See also Sections 2253 (determination of custody in nullity proceeding), 3003 ("joint legal custody" defined), 3004 ("joint physical custody" defined), 3021 (proceedings in which section applicable), 3131 (action by district attorney where child taken or detained in violation of custody order).

Interim Comment. Existing Section 3040 is amended to correct a cross-reference.

Fam. Code § 3041 (unchanged). Additional requirements for custody award to nonparent

Fam. Code § 3042 (unchanged). Wishes of child

Fam. Code § 3043 (unchanged). Nomination of guardian by parent

Fam. Code § 3044 (unchanged). Parent convicted under Penal Code provisions

CHAPTER 3. TEMPORARY CUSTODY ORDER DURING PENDENCY OF PROCEEDING

Fam. Code § 3060 (amended). Petition for temporary custody order

SEC. ____ Section 3060 of the Family Code is amended to read:

~~3060. In any proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, where there are minor children of the marriage, and in any action for exclusive custody under Section 3120, a~~ A petition for a temporary custody order, containing the statement required by Section 3409, may be included with the initial filing of the petition or action or may be filed at any time thereafter.

Comment. Section 3060 continues former Civil Code Section 4600.1(a) without substantive change. The language making this section applicable to proceedings for dissolution, nullity, legal separation, and exclusive custody has been omitted as unnecessary. See Section 3021 (application of part) & Comment. See also Sections 3131 (action by district attorney where child taken or detained in violation of custody order), 3133 (temporary custody order at request of district attorney). As to the court's jurisdiction, see Sections 3400-3425 (Uniform Child Custody Jurisdiction Act).

Interim Comment. Existing Section 3060 is amended to omit the reference to specific proceedings, conforming the section to proposed Section 3021 stating the scope of this part.

Fam. Code § 3061 (unchanged). Order for temporary custody in accordance with agreement or understanding of parties

Fam. Code § 3062 (unchanged). Ex parte order and order to show cause

Fam. Code § 3063 (unchanged). Order restraining removal of child from state

Fam. Code § 3064 (unchanged). Limitation on ex parte order granting or modifying custody order

CHAPTER 4. JOINT CUSTODY

Fam. Code § 3080 (amended). Presumption for joint custody where parents agree to joint custody

SEC. _____. Section 3080 of the Family Code is amended to read:

3080. There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child, subject to Section ~~3022~~ 3011, where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of a minor child ~~of the marriage~~.

Comment. Section 3080 continues former Civil Code Section 4600.5(a) without substantive change. The former reference to a child "of the marriage" has been omitted as unnecessary. See Section 3021 (application of part). See also Sections 3002 ("joint custody" defined), 3131 (action by district attorney where child taken or detained in violation of custody order).

Interim Comment. Existing Section 3080 is amended to correct a cross-reference. The limitation in the existing section to children "of the marriage" is omitted to conform with proposed Section 3021 stating the scope of this part.

Fam. Code § 3081 (technical amendment). Award of joint custody absent agreement of parents

SEC. _____. Section 3081 of the Family Code is amended to read:

3081. Upon the application of either parent, joint custody may be awarded in the discretion of the court in ~~other cases~~ other than those described in Section 3080, subject to Section ~~3022~~ 3011. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this section, the court may direct that an investigation be conducted pursuant to Chapter 6 (commencing with Section 3110).

Comment. Section 3081 continues former Civil Code Section 4600.5(b) without substantive change. See Section 3002 ("joint custody" defined); see also Section 3131 (action by district attorney where child taken or detained in violation of custody order); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Interim Comment. Existing Section 3081 is amended to correct a cross-reference. The reference to cases "other than those described in Section 3080" is added to make the reference specific. This is not a substantive change.

Fam. Code § 3082 (unchanged). Statement by court of reasons for grant or denial of joint custody request

Fam. Code § 3083 (unchanged). Content and effect of joint legal custody order

Fam. Code § 3084 (unchanged). Content of joint physical custody order

Fam. Code § 3085 (unchanged). Awarding joint legal custody without joint physical custody

Fam. Code § 3086 (unchanged). Order may specify one parent as primary caretaker of child

Fam. Code § 3087 (unchanged). Modification or termination of joint custody order

Fam. Code § 3088 (amended). Modification to make custody order a joint custody order

SEC. ____ Section 3088 of the Family Code is amended to read:

3088. An order for the custody of a minor child ~~of a marriage~~ entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 3403 and 3414, be modified at any time to an order of joint custody in accordance with this chapter.

Comment. Section 3088 continues former Civil Code Section 4600.5(j) without substantive change. The former reference to a child "of the marriage" has been omitted as unnecessary. See Section 3021 (application of part). See also Section 3002 ("joint custody" defined).

Interim Comment. Existing Section 3088 is amended to omit language limiting the section to children "of a marriage." This revision conforms the section to proposed Section 3021 stating the scope of this part.

Fam. Code § 3089 (unchanged). Consultation with conciliation court

CHAPTER 5. VISITATION RIGHTS

Fam. Code § 3100 (technical amendment). Visitation rights generally

SEC. ____ Section 3100 of the Family Code is amended to read:

3100. (a) ~~Subject to Chapter 11 (commencing with Section 3155), in~~ In making an order pursuant to Chapter 4 (commencing with Section 3080) the court shall order reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest 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.

(b) In making an award authorizing visitation pursuant to this section, if a domestic violence prevention order has been directed to a parent, the court shall consider whether the best interest of the child requires that any visitation granted

to that parent shall be limited to situations in which a third person, specified by the court, is present. The court shall include in its deliberations a consideration of the nature of the acts from which the parent was enjoined and the period of time that has elapsed since that order. A parent may submit to the court the name of a person ~~to the court~~ that the parent deems suitable to be present during visitation.

Comment. Subdivision (a) of Section 3100 continues former Civil Code Section 4601 without substantive change.

Subdivision (b) continues former Civil Code Section 4601.5 without substantive change. [The phrase "domestic violence prevention order" has been substituted for the references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section [75] defines "domestic violence prevention order" to include these orders.]

See also Sections 3011 (factors to be considered in determining best interest of child), 3044 (parent convicted under certain Penal Code provisions not allowed unsupervised visitation with child), 3131 (action by district attorney where child taken or detained in violation of visitation order); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal). [For comparable provisions, see Sections 5513 (Domestic Violence Prevention Act), 7604(b) (Uniform Parentage Act).]

Interim Comment. Existing Section 3100 is amended to omit the reference to Chapter 11 (commencing with Section 3155) (the mediation chapter). The reference had been added for purposes of clarity and emphasis and was not intended as a substantive change. However, concerns were raised by the Family Law Executive Committee of the State Bar that the cross-reference might have unintended consequences.

Staff Note. *The bracketed references (and the statute) will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.*

Fam. Code § 3101 (amended). Visitation rights of stepparent or grandparent

SEC. ____ Section 3101 of the Family Code is amended to read:

3101. (a) ~~In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the~~ Notwithstanding any other provision of law, the court has jurisdiction to award reasonable visitation rights in a proceeding described in Section 3021 to any of the following persons if visitation by the person is determined to be in the best interest of the minor child:

(1) A person who is a party to the marriage that is the subject of the proceeding with respect to a minor child of the other party to the marriage.

(2) A person who is a grandparent of a minor child of a party to the ~~marriage proceeding~~.

(b) There is a rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child if the parties to the ~~marriage proceeding~~ agree that the grandparent should not be awarded visitation rights.

(c) Visitation rights granted to a stepparent or grandparent pursuant to this section shall not conflict with any ~~visitation or custodial right of custody or visitation of~~ a natural or adoptive parent who is not a party to the proceeding.

(d) In making an award of visitation pursuant to this section, if a domestic violence prevention order [has been directed to a stepparent or grandparent during the pendency of the proceeding, the court shall consider whether the best interest of the child requires that any visitation by that stepparent or grandparent should be denied.

Comment. Subdivision (a) of Section 3101 restates former Civil Code Section 4351.5(a)-(b) without substantive change. The reference to former Civil Code Section 4601 has been omitted as surplus. References to the "superior" court have been omitted as surplus. See Section 200 (jurisdiction in superior court). The language making this section applicable to proceedings for dissolution, nullity, or legal separation has been omitted as unnecessary. See Section 3021 (application of part) & Comment. Subdivision (b) continues former Civil Code Section 4351.5(k) without substantive change. Subdivisions (a) and (b), insofar as they apply to visitation by a grandparent, have been revised to make them applicable to a proceeding in which custody is determined under the Uniform Parentage Act.

Subdivision (c) continues former Civil Code Section 4351.5(j) without substantive change.

Subdivision (d) continues former Civil Code Section 4351.5(l) without substantive change. The phrase "domestic violence prevention order" has been substituted for the references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section [75] defines "domestic violence prevention order" to include these orders.

See also Sections 3011 (factors to be considered in determining best interest of child), 3131 (action by district attorney where child taken or detained in violation of custody order), 3133 (temporary custody order at request of district attorney); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal). As to the court's jurisdiction, see Sections 3400-3425 (Uniform Child Custody Jurisdiction Act).

Interim Comment. Subdivision (a) of existing Section 3101 is amended to omit the references to specific proceedings. Subdivisions (a)(2) and (b) are amended to omit the references limiting grandparent visitation to children of a marriage. These revisions conform the section to proposed Section 3021 stating the scope of this part.

Staff Note. The bracketed references (and the statute) will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.

Fam. Code § 3102 (unchanged). Visitation rights where parent of unmarried minor child is deceased

Fam. Code §§ 3110-3113 (repealed). Custody investigation and report

SEC. ____ Chapter 6 (commencing with Section 3110) of Part 2 of Division 8 of the Family Code is repealed.

Fam. Code §§ 3110-3116 (added). Custody investigation and report

SEC. ____ Chapter 6 (commencing with Section 3110) is added to Part 2 of Division 8 of the Family Code, to read:

CHAPTER 6. CUSTODY INVESTIGATION AND REPORT

Fam. Code § 3110 (added). "Court-appointed investigator" defined

3110. As used in this chapter, "court-appointed investigator" means a probation officer, domestic relations investigator, or court-appointed evaluator directed by the court to conduct an investigation pursuant to this chapter.

Comment. Section 3110 is a new section added to facilitate drafting by avoiding repetition of the list of persons in this chapter.

Fam. Code § 3111 (added). Inquiry into ability of parent to repay county expenses

3111. (a) When a court-appointed investigator is directed by the court to conduct a custody investigation or to undertake visitation work, including necessary evaluation, supervision, and reporting, the court shall inquire into the financial condition of the parent, guardian, or other person charged with the support of the minor. If the court finds the parent, guardian, or other person able to pay all or part of the expense of the investigation, report, and recommendation, the court may make an order requiring the parent, guardian, or other person to repay the county the amount the court determines proper.

(b) The repayment shall be made to the county officer designated by the board of supervisors, who shall keep suitable accounts of the expenses and repayments and shall deposit the collections in the county treasury.

Comment. Section 3111 continues the third paragraph of former Civil Code Section 4602 without substantive change. The reference to "court-appointed investigator" has been substituted for the former reference to specific officers. See Section 3110 & Comment. The reference to "maintenance" of a minor child has been omitted as surplus. See Section 150 ("support" when used with reference to minor child includes maintenance and education).

Interim Comment. Proposed Section 3111 continues existing Section 3112 without substantive change. The section has been subdivided and the language revised for clarity. The reference to court-appointed investigator has been substituted for the former listing of persons. This is not a substantive change. See proposed Section 3110.

Fam. Code § 3112 (added). Separate meetings where domestic violence

3112. Where there has been a history of domestic violence between the parties, or where a domestic violence prevention order is in effect, at the request of the party alleging domestic violence in a written declaration under penalty of perjury or at the request of a party who is protected by the order, the parties shall meet with the court-appointed investigator separately and at separate times.

Comment. Section 3112 continues the second paragraph of former Civil Code Section 4602 without substantive change. The reference to "court-appointed investigator" has been substituted for the former reference to specific officers. See Section 3110 & Comment. [Unlike the former section, this section does not contain a reference to the section defining "domestic violence." This is not a substantive change. See Section [70] ("domestic violence" defined). The phrase "domestic violence prevention order" has been substituted for the references to orders under specific former sections in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section [75] defines "domestic violence prevention order" to include these orders.]

Interim Comment. Proposed Section 3112 continues existing Section 3111 without substantive change. The reference to court-appointed investigator has been substituted for the former listing of persons. This is not a substantive change. See proposed Section 3021 Comment.

Staff Note. *The bracketed reference (and the statute) will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.*

Fam. Code § 3113 (added). Recommendation for appointment of counsel for minor child

3113. Nothing in this chapter prohibits the court-appointed investigator from recommending to the court that counsel be appointed pursuant to Chapter 10 (commencing with Section 3150) to represent the minor child. In making that recommendation, the court-appointed investigator shall inform the court of the reasons why it would be in the best interest of the minor child to have counsel appointed.

Comment. Section 3113 continues the last paragraph of former Civil Code Section 4602 without substantive change. The reference to "court-appointed investigator" has been substituted for the former reference to specific officers. See Section 3110 & Comment. The reference to "children" has been omitted as surplus. See Section 10 (singular includes the plural). See also Section 3011 (factors to be considered in determining best interest of child).

Interim Comment. Existing Section 3113 is amended to substitute the reference to court-appointed investigator for the former listing of persons. This is not a substantive change. See proposed Section 3110.

Fam. Code § 3114 (added). Filing, service, and use of report

3114. (a) The court-appointed investigator shall conduct a custody investigation and file a written confidential report on it. At least 10 days before the hearing, the report shall be filed with the clerk of the court in which the custody hearing will be conducted and served on the parties or their attorneys. The report may be considered by the court.

(b) The report shall not be made available other than as provided in subdivision (a).

(c) The report may be received in evidence on stipulation of all interested parties and is competent evidence as to all matters contained in the report.

Comment. Section 3114 restates without substantive change the first paragraph of former Civil Code Section 4602 and the first three paragraphs of former Code of Civil Procedure Section 263. The former reference to a proceeding "brought under this part" has been omitted. The former reference to "this part" referred to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code). See Section 3021 (application of part) & Comment. The reference to "court-appointed investigator" has been substituted for the former reference to specific officers. See Section 3110 & Comment.

See also Section 3081 (investigation concerning whether joint custody award would be appropriate). This section supersedes the first three paragraphs of former Code of Civil Procedure Section 263.

Interim Comment. Proposed Section 3114 continues existing Section 3110 without substantive change. The proposed section restores parts of former Code of Civil Procedure Section 263 repealed by 1992 Cal. Stat. ch. 163. The reference to "court-appointed investigator" is substituted for the former listing of persons. This is not a substantive change. See proposed

Section 3110 Comment. The reference to specific proceedings is omitted, conforming the section to proposed Section 3021 stating the scope of this part.

Fam. Code § 3115 (added). Testimony of investigator

3115. The court-appointed investigator who conducted the investigation pursuant to this chapter shall be present at the trial and may be called to testify by the judge or either party as to any matter that he or she has investigated. The testimony of the court-appointed investigator is subject to questions, direct and cross, that are proper, and are competent evidence.

Comment. Section 3115 continues without substantive change and generalizes the fourth paragraph of former Code of Civil Procedure Section 263. The reference to "court-appointed investigator" has been added to conform to other sections in this chapter. See Section 3110 & Comment. The former reference to "divorce" action has been omitted. See Section 3021 (application of part).

Interim Comment. Proposed Section 3115 is added. The proposed section restores a part of former Code of Civil Procedure Section 263 that was repealed by 1992 Cal. Stat. ch. 163. The reference to court-appointed investigator is added. See proposed Section 3110 Comment.

Fam. Code § 3116 (added). Chapter not limitation on investigator's duty to assist court

3116. Nothing in this chapter limits the duty of a court-appointed investigator to assist the appointing court in the transaction of the business of the court.

Comment. Section 3116 continues without substantive change and generalizes the last paragraph of former Code of Civil Procedure Section 263. The reference to "court-appointed investigator" has been added to conform to other sections in this chapter. See Section 3110 & Comment. The former reference to "divorce" action has been omitted. See Section 3021 (application of part). The former reference to "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court).

Interim Comment. Proposed Section 3116 is added. The proposed section restores a part of former Code of Civil Procedure Section 263 that was repealed by 1992 Cal. Stat. ch. 163. The reference to court-appointed investigator is added. See proposed Section 3110 Comment.

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CHAPTER 10. APPOINTMENT OF COUNSEL TO REPRESENT CHILD

Fam. Code § 3150 (amended). Appointment of private counsel to represent child in custody or visitation proceeding

SEC. ____ Section 3150 of the Family Code is amended to read:

3150. (a) ~~In an initial or subsequent proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties where there is in issue the custody of or visitation with a minor child, the court may, if it~~ If the court determines it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of the minor child in a custody or visitation proceeding.

(b) ~~Counsel, upon~~ Upon entering an appearance on behalf of a minor pursuant to this chapter, counsel shall continue to represent that minor unless relieved by the court upon the substitution of other counsel by the court or for cause.

Comment. Section 3150 continues former Civil Code Section 4606(a)-(b) without substantive change. The former reference to a proceeding "brought under this part," meaning the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code) has been omitted as unnecessary. See Section 3021 (application of part) & Comment. See also Section 3011 (factors to be considered in determining best interest of child).

Interim Comment. Existing Section 3150 is amended to omit the reference to specific proceedings, conforming the section to proposed Section 3021 stating the scope of this part.

Fam. Code § 3151 (unchanged). Rights and duties of appointed counsel

Fam. Code § 3152 (unchanged). Release to counsel of reports and files of child protective agency

Fam. Code § 3153 (unchanged). Compensation of appointed counsel

Fam. Code §§ 3155-3183 (repealed). Mediation of visitation or custody issues

SEC. ____. Chapter 11 (commencing with Section 3155) of Part 2 of Division 8 of the Family Code is repealed.

Interim Comment. The existing sections in this chapter are repealed to allow for unification of the provisions concerning mediation of visitation requested by a stepparent or grandparent (former Civil Code Section 4351.5) and the provisions concerning mediation of contested issues of custody or visitation (former Civil Code Section 4607). Where appropriate, rules applying to only one type of mediation are generalized. For a list of sections that have been generalized, see the Comment to proposed Section 3160.

Each of the existing sections is continued without change in the proposed Chapter 11 (commencing with Section 3160), unless noted in the Interim Comment following the proposed section. The following table indicates the disposition of each of the existing sections in proposed Chapter 11 (commencing with Section 3160).

<i>Repealed</i>	<i>Added</i>	<i>Repealed</i>	<i>Added</i>
3155 (1st & 3d snt.) . . .	3160	3173	3172
3155 (2d & last snt.) . . .	3164	3174	3184
3156	3177	3175(a)	3178
3157	3180(a)	3175(b)	3179
3158	3182(a)	3176	3181
3159	3183	3177	3181
3160	3186	3180(a)(1st snt.)	3171
3161	3162	3180(a)(last snt.)	3161
3162	3163	3180(b)	3171
3170(1st snt.)	3170	3181(a)	3178
3170(last snt.)	3175	3181(b)	3179
3171	3173	3182	3185
3172 (1st snt.)	3161	3183	3176
3172 (2d snt.)	3180(b)		

Fam. Code §§ 3160-3186 (added). Mediation of custody and visitation issues

SEC. ____ Chapter 11 (commencing with Section 3160) is added to Part 2 of Division 8 of the Family Code, to read:

CHAPTER 11. MEDIATION OF CUSTODY AND VISITATION ISSUES

Article 1. General Provisions

Fam. Code § 3160 (added). Superior courts to provide mediation services

3160. Each superior court shall make a mediator available. The court is not required to institute a family conciliation court in order to provide mediation services.

Comment. Section 3160 continues without substantive change and generalizes the first and third sentences of former Civil Code Section 4607(b). Generalizing this provision means that it is also applicable to mediation involving a stepparent or grandparent. See also Sections 3164 (qualifications of mediator).

This chapter continues the rules in former Civil Code Section 4351.5 (mediation of stepparent or grandparent visitation) and former Civil Code Section 4607 (mediation of contested custody or visitation). Where one of the former sections provided a rule, but the other did not, the chapter generalizes the rule to apply to both types of mediation. See Sections 3160 (superior courts to provide mediation services), 3162 (uniform standards of practice for mediation), 3163 (local court rules), 3164 (qualifications of mediator), 3172 (mediation available where paternity is at issue), 3173 (mediation of dispute concerning existing order), 3175 (mediation to be set before or concurrent with hearing), 3176 (notice of mediation or hearing), 3180(b) (requirement that mediator effect settlement in best interest of child), 3181 (separate mediation where domestic violence), 3183 (recommendations to court), 3184 (recommendations that counsel be appointed for minor child), 3185 (hearing on issues not settled by mediation).

Interim Comment. Proposed Section 3160 continues the first and third sentences of existing Section 3155 without substantive change. The second sentence of proposed Section 3160 is rewritten for clarity.

Fam. Code § 3161 (added). Purpose of mediation proceeding

3161. The purposes of a mediation proceeding are as follows:

- (a) To reduce acrimony that may exist between the parties.
- (b) To develop an agreement assuring the child such close and continuing contact with both parents as is in the best interest of the child.
- (c) To effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child.

Comment. Section 3161 continues without substantive change the third sentence of former Civil Code Section 4607(a) and the second sentence of former Civil Code Section 4351.5(c). The reference to "children" has been omitted as surplus. See Section 10 (singular includes the plural). See also Section 3011 (factors to be considered in determining best interest of child).

Interim Comment. Proposed Section 3161 restates the first sentence of existing Section 3172 and the last sentence of existing Section 3180(a) without substantive change.

Fam. Code § 3162 (added). Uniform standards of practice for mediation

3162. (a) Mediation of cases involving custody and visitation concerning children shall be governed by uniform standards of practice adopted by the Judicial Council.

(b) The standards of practice shall include, but not be limited to, all of the following:

(1) Provision for the best interest of the child and the safeguarding of the rights of the child to frequent and continuing contact with both parents.

(2) Facilitation of the transition of the family by detailing factors to be considered in decisions concerning the child's future.

(3) The conducting of negotiations in such a way as to equalize power relationships between the parties.

(c) In adopting the standards of practice, the Judicial Council shall consider standards developed by recognized associations of mediators and attorneys and other relevant standards governing mediation of proceedings for the dissolution of marriage.

(d) The Judicial Council shall offer training with respect to the standards to mediators.

Comment. Section 3162 continues without substantive change and generalizes former Civil Code Section 4607.1. The parts of the former section that directed the Judicial Council to adopt uniform standards of practice have been omitted as surplus. See Cal. R. Ct. App. Div. I § 26 (1992) (Judicial Council Uniform Standards of Practice for Court-Connected Mediation of Child Custody and Visitation Disputes). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

See also Sections 1819 (destruction of records of child custody or visitation mediation), 1850 (statewide coordination of family mediation and conciliation services), 3011 (factors to be considered in determining best interest of child).

Interim Comment. Proposed Section 3162 continues existing Section 3161 without change.

Fam. Code § 3163 (added). Local court rules

3163. Courts shall develop local rules to respond to requests for a change of mediators or to general problems relating to mediation.

Comment. Section 3163 continues without substantive change and generalizes former Civil Code Section 4607(g). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3163 continues existing Section 3162 without change.

Fam. Code § 3164 (added). Qualifications of mediator

3164. (a) The mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court.

(b) The mediator shall meet the minimum qualifications required of a counselor of conciliation as provided in Section 1815.

Comment. Subdivision (a) of Section 3164 continues without substantive change and generalizes the second sentence of former Civil Code Section 4607(b). Subdivision (b) continues without substantive change the last sentence of former Civil Code Section 4607(b) and the last sentence of former Civil Code Section 4351.5(c). See also Section 1816 (continuing instruction programs in domestic violence). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3164 continues the second and last sentences of existing Section 3155 without change.

Article 2. Availability of Mediation

Fam. Code § 3170 (added). Mediation required where custody or visitation contested

3170. (a) In a proceeding where it appears on the face of a petition, application, or other pleading that custody, visitation, or both are contested, the court shall set the contested issues for mediation.

(b) This section is applicable to a proceeding where custody or visitation of a minor child are contested as described in subdivision (a), including a proceeding to obtain or modify a temporary or permanent order.

Comment. Section 3170 restates the first part of the first sentence of former Civil Code Section 4607(a) without substantive change. Subdivision (b) restates the reference in the former section to cases where the issue or issues are contested "as provided in Section 4600, 4600.1, or 4601." This is not intended as a substantive change. The reference to "children" has been omitted as surplus. See Section 10 (singular includes the plural). See also Section 3175 (mediation to be set prior to or concurrent with hearing).

Interim Comment. Proposed Section 3170 restates the first sentence of existing Section 3170 without substantive change.

Fam. Code § 3171 (added). Mediation where visitation order requested by stepparent or grandparent

3171. (a) If a stepparent or grandparent has petitioned, or otherwise applied, for an order of visitation rights pursuant to Section 3101 or 3102, the court shall set the matter for mediation.

(b) A natural or adoptive parent who is not a party to the proceeding is not required to participate in the mediation proceeding, but failure to participate is a waiver of that parent's right to object to a settlement reached by the other parties during mediation or to require a hearing on the matter.

Comment. Subdivision (a) of Section 3171 continues the first two sentences of former Civil Code Section 4351.5(c) without substantive change. Subdivision (b) continues former Civil Code Section 4351.5(g) without substantive change.

In subdivision (a), a reference to Section 3102 has been added. This makes mediation available in the situations described in former Civil Code Section 197.5, now Family Code Section 3102, those being cases where grandparents (and other relatives) seek visitation of a minor child whose parent or parents are deceased. The former reference to a request for an order of "reasonable" visitation rights has been omitted. This is not a substantive change, since Sections 3101 and 3102 control the type of visitation order that may be issued and both sections require that visitation rights must be in the best interest of the child.

See also Section 3011 (factors to be considered in determining best interest of child).

Interim Comment. Proposed Section 3171 continues the first sentence of subdivision (a) and all of subdivision (b) of existing Section 3180 without change.

Fam. Code § 3172 (added). Mediation available where paternity is at issue

3172. Mediation shall not be denied on the basis that paternity is an issue in a proceeding before the court.

Comment. Section 3172 continues without substantive change and generalizes the last sentence of former Civil Code Section 4607(a). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3172 continues existing Section 3173 without change.

Fam. Code § 3173 (added). Mediation of dispute concerning existing order

3173. (a) Upon the adoption of a resolution by the board of supervisors authorizing the procedure, a petition also may be filed pursuant to this chapter for mediation of a dispute relating to an existing order for custody, visitation, or both.

(b) The mediation of a dispute concerning an existing order shall be set not later than 60 days after the filing of the petition.

Comment. Section 3173 continues without substantive change and generalizes the second sentence of former Civil Code Section 4607(a). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues). In subdivision (a), the reference to "or both" has been added. This is not a substantive change.

Interim Comment. Proposed Section 3173 continues existing Section 3171 without substantive change. In subdivision (a), the reference to "or both" is added. This is not a substantive change.

Article 3. Mediation Proceedings

Fam. Code § 3175 (added). Mediation to be set before or concurrent with hearing

3175. When a matter is set for mediation pursuant to this chapter, the mediation shall be set before or concurrent with the setting of the matter for hearing.

Comment. Section 3175 restates without substantive change and generalizes the last part of the first sentence of former Civil Code Section 4607(a). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3175 generalizes the last sentence of existing Section 3170 without substantive change.

Fam. Code § 3176 (added). Notice of mediation or hearing

3176. (a) Notice of mediation and of any hearing to be held pursuant to this chapter shall be given to the following persons:

(1) Where mediation is required settle a contested issue of custody or visitation, to each party and to each counsel of record of a party.

(2) Where a stepparent or grandparent seeks visitation rights, to the stepparent or grandparent seeking visitation rights, to each parent of the child, and to each counsel of record of a parent.

(b) Notice shall be given by certified mail, return receipt requested, postage prepaid, to the last known address.

Comment. Section 3176 continues without substantive change and generalizes former Civil Code Section 4351.5(i). The former reference to proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties has been omitted as unnecessary. See Section 3021 (application of part) & Comment. See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3176 restates and generalizes existing Section 3183 without substantive change. The section omits references to specific proceedings, conforming the section to proposed Section 3021 stating the scope of this part.

Fam. Code § 3177 (added). Confidentiality of mediation proceeding

3177. Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All verbal or written communications from the parties to the mediator made in a proceeding pursuant to this chapter are official information within the meaning of Section 1040 of the Evidence Code.

Comment. Section 3177 continues former Civil Code Sections 4351.5(d) and 4607(c) without substantive change. See also Section 1819 (destruction of records of child custody or visitation mediation).

Interim Comment. Proposed Section 3177 continues existing Section 3156 without substantive change. The language of the section is revised for clarity.

Fam. Code § 3178 (added). Issues that may be resolved by agreement as result of mediation

3178. An agreement reached by the parties as a result of mediation shall be limited as follows:

(a) Where mediation is required settle a contested issue of custody or visitation, the agreement shall be limited to the resolution of issues relating to parenting plans, custody, visitation, or a combination these issues.

(b) Where a stepparent or grandparent seeks visitation rights, the agreement shall be limited to the resolution of issues relating to visitation.

Comment. Section 3178 restates the fifth sentences of former Civil Code Sections 4351.5(f) and 4607(e) without substantive change. See also Section 3185 (hearing on issues not settled by mediation).

Interim Comment. Proposed Section 3178 continues existing Sections 3175(a) and 3181(a) without substantive change.

Fam. Code § 3179 (added). Modification of agreement resulting from mediation

3179. A custody or visitation agreement reached as a result of mediation may be modified at any time at the discretion of the court, subject to Chapter 1 (commencing with Section 3020), Chapter 2 (commencing with Section 3040),

Chapter 4 (commencing with Section 3080), and Chapter 5 (commencing with Section 3100).

Comment. Section 3179 restates the last sentences of former Civil Code Sections 4351.5(f) and 4607(e) without substantive change. Broader references to Family Code sections have been substituted for the references to former Civil Code Sections 4600, 4600.5, and 4601. This is not intended as a substantive change.

Interim Comment. Proposed Section 3179 continues existing Section 3175(b) without change.

Fam. Code § 3180 (added). Assessment of needs and interests of child

3180. (a) In mediation proceedings pursuant to this chapter, the mediator has the duty to assess the needs and interests of the child involved in the controversy, and is entitled to interview the child where the mediator considers the interview appropriate or necessary.

(b) The mediator shall use best efforts to effect a settlement of the custody or visitation dispute that is in the best interest of the child, consistent with the considerations required by Section 3011.

Comment. Subdivision (a) of Section 3180 continues without substantive change the second sentence of former Civil Code Section 4351.5(e) and the second sentence of former Civil Code Section 4607(d). The reference to "children" has been omitted as surplus. See Section 10 (singular includes the plural).

Subdivision (b) continues without substantive change and generalizes the fourth sentence of former Civil Code Section 4607(a). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3180 continues existing Section 3157 and the last sentence of existing Section 3172 without change.

Fam. Code § 3181 (added). Separate mediation where domestic violence

3181. (a) In a proceeding in which mediation is required pursuant to this chapter, where there has been a history of domestic violence between the parties or where a domestic violence prevention order is in effect, at the request of the party alleging domestic violence or protected by the order, the mediator appointed pursuant to this chapter shall meet with the parties separately and at separate times.

(b) Any intake form that an agency charged with providing family court services requires the parties to complete before the commencement of mediation shall include a statement that, when a party alleging domestic violence in a written declaration under penalty or a party protected by a domestic violence prevention order so requests, the mediator will meet with the parties separately and at separate times.

Comment. Section 3181 restates without substantive change and generalizes former Civil Code Section 4607.2. The "notwithstanding" clause in the former section has been omitted as surplus. [The phrase "domestic violence prevention order" has been substituted for the former references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section [75] defines "domestic violence prevention order" to include these orders.] This section supersedes the last sentence of former Civil Code Section 4607(d), stating that mediators have the authority to meet with parties separately under the

circumstances described in this section. See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3181 restates existing Sections 3176 and 3177 without substantive change. Existing Section 3176, authorizing the mediator to hold separate meetings, is superseded. The authority to hold the meetings is inherent in the requirement that the mediator do so.

Staff Note. *The bracketed references (and the statute) will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.*

Fam. Code § 3182 (added). Exclusion of counsel from mediation proceeding

3182. (a) The mediator has authority to exclude counsel from participation in the mediation proceedings pursuant to this chapter where the mediator, in the mediator's discretion, deems exclusion of counsel to be appropriate or necessary.

(b) The mediator has authority to exclude a domestic violence support person from a mediation proceeding pursuant to Section [5519].

Comment. Subdivision (a) of Section 3182 continues without substantive change the first sentence of former Civil Code Section 4351.5(e) and the first sentence of former Civil Code Section 4607(d).

Subdivision (b) is new and is added to provide a reference to the rule regarding exclusion of a domestic violence support person. This is not a substantive change.

Interim Comment. Subdivision (a) of proposed Section 3182 continues existing Section 3158 without change. Subdivision (b) is added to cross-refer to a section in the Domestic Violence Prevention Act that provides for exclusion of a domestic violence support person from mediation proceedings.

Staff Note. *The bracketed reference will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.*

Fam. Code § 3183 (added). Recommendations to court

3183. (a) The mediator may, consistent with local court rules, submit a recommendation to the court as to the custody or visitation of the child.

(b) In cases where the parties have not reached agreement as a result of the mediation proceedings, the mediator may recommend to the court that an investigation be conducted pursuant to Chapter 6 (commencing with Section 3110) or that other action be taken to assist the parties to effect a resolution of the controversy before a hearing on the issues.

(c) In appropriate cases, the mediator may recommend that restraining orders be issued, pending determination of the controversy, to protect the well-being of the child involved in the controversy.

Comment. Section 3183 continues without substantive change the first three sentences of former Civil Code Section 4351.5(f) and the first three sentences of former Civil Code Section 4607(e). The word "submit" has been substituted for "render." This is not a substantive change. The word "child" has been substituted for "children." This is not a substantive change. See Section 10 (the singular includes the plural).

The provisions in subdivision (b) that the mediator may recommend to the court that "other action be taken" to assist the parties to effect a resolution of the controversy, and that the

investigation be conducted pursuant to Chapter 6 (commencing with Section 3110) have been generalized. The provision in subdivision (c) that restraining orders (rather than "mutual" restraining orders) may be issued has been generalized. Each of the provisions in these subdivisions formerly applied only to mediation in contested custody or visitation proceedings pursuant to former Civil Code Section 4607. See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3183 continues without substantive change existing Section 3159, but generalizes the second sentence in existing subdivision (b) stating that an investigation conducted during mediation of contested issues is conducted pursuant to the investigation chapter in this division.

Fam. Code § 3184 (added). Recommendations that counsel be appointed for minor child

3184. Nothing in this chapter prohibits the mediator from recommending to the court that counsel be appointed to represent the minor child pursuant to Chapter 10 (commencing with Section 3150). In making this recommendation, the mediator shall inform the court of the reasons why it would be in the best interest of the minor child to have counsel appointed.

Comment. Section 3184 continues without substantive change and generalizes former Civil Code Section 4607(f). The reference to "children" has been omitted as surplus. See Section 10 (singular includes the plural). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues). See also Section 3011 (factors to be considered in determining best interest of child).

Interim Comment. Proposed Section 3184 continues existing Section 3174 without change.

Fam. Code § 3185 (added). Hearing on issues not settled by mediation

3185. (a) Where issues that may be resolved by agreement pursuant to Section 3178 are not resolved by an agreement of all the parties who participate in mediation, the mediator shall inform the court in writing and the court shall set the matter for hearing on the unresolved issues.

(b) Each natural or adoptive parent and a stepparent or grandparent seeking visitation rights shall be given an opportunity to appear and be heard, except that a stepparent or grandparent seeking visitation may only be heard on the issue of visitation.

Comment. Section 3185 restates without substantive change and generalizes former Civil Code Section 4351.5(h). See Section 3160 Comment (generalization of provisions to apply both to mediation of stepparent or grandparent visitation and to mediation of contested issues).

Interim Comment. Proposed Section 3185 generalizes existing Section 3182 without substantive change. Existing Section 3182 applies only to mediation of stepparent or grandparent visitation, whereas proposed Section 3185 applies to mediation of contested issues of custody or visitation as well.

Fam. Code § 3186 (added). Confirmation of agreement reached by parties as result of mediation

3186. (a) An agreement reached by the parties as a result of mediation shall be reported to counsel for the parties by the mediator on the day set for mediation or as soon thereafter as practical, but before the agreement is reported to the court.

(b) An agreement may not be confirmed or otherwise incorporated in an order unless each party, in person or by counsel of record, has affirmed and assented to the agreement in open court or by written stipulation.

(c) An agreement may be confirmed or otherwise incorporated in an order if a party fails to appear at a noticed hearing on the issues involved in the agreement.

Comment. Section 3186 continues without substantive change the fourth, sixth, and seventh sentences of former Civil Code Section 4351.5(f) and the fourth, sixth, and seventh sentences of former Civil Code Section 4607(e). In subdivision (b), a reference to "may not" has been substituted for the former reference to "shall not." This is not a substantive change. See Section 12 (shall not and may not are prohibitory). See Section 3160 Comment (generalization of provisions to apply both to mediation stepparent or grandparent visitation and to mediation of contested issues). See also Section 1819 (destruction of records of child custody or visitation mediation).

Interim Comment. Proposed Section 3186 continues existing Section 3160 without change. The existing section is further subdivided.

CHAPTER 12. COUNSELING OF PARENTS AND CHILD

Fam. Code § 3190 (amended). Order requiring counseling

SEC. ____ . Section 3190 of the Family Code is amended to read:

3190. (a) ~~In a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, where custody of, or visitation with, a minor child is at issue, the~~ **The** court may require the parents of the child who are involved in the a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling, including, but not limited to, mental health or substance abuse services, for not more than six months, if the court finds both of the following:

(1) The dispute between the parents or between a parent and the child poses a substantial danger to the best interest of the child.

(2) The counseling is in the best interest of the child.

(b) The court shall fix the cost and shall order the entire cost of the services to be borne by the parties in the proportions the court deems reasonable.

(c) The court, in its finding, shall set forth reasons why it has found both of the following:

(1) The dispute poses a substantial danger to the best interest of the child and the counseling is in the best interest of the child.

(2) The financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations.

(d) The court shall not order the parties to return to court upon the completion of counseling. Either party may file a new order to show cause or motion after counseling has been completed, and the court may again order counseling consistent with this chapter.

Comment. Section 3190 continues the first paragraph of former Civil Code Section 4608.1(a) without substantive change. The reference to proceedings "under this part," meaning the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code) has been omitted as unnecessary. See Section 3021 (application of part) & Comment. See also Section 3011 (factors to be considered in determining best interest of child).

Interim Comment. Existing Section 3190 is amended to omit the reference to specific proceedings, conforming the section to proposed Section 3021 stating the scope of this part.

Fam. Code § 3191 (technical amendment). Purpose of counseling

SEC. ____. Section 3191 of the Family Code is amended to read:

3191. The counseling pursuant to this chapter shall be specifically designed to facilitate communication between the parties regarding their minor child's best interest, to reduce conflict regarding ~~visitation or custody~~ or visitation, and to improve the quality of parenting skills of each parent.

Comment. Section 3191 continues the last paragraph of former Civil Code Section 4608.1(a) without substantive change. See also Section 3011 (factors to be considered in determining best interest of child).

Fam. Code § 3192 (unchanged). Separate counseling where protective order against domestic violence

CONFORMING REVISIONS

EVIDENCE CODE

Evid. Code § 1152.5 (technical amendment). Mediation

SEC. ____ Section 1152.5 of the Evidence Code is amended to read:

1152.5. (a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.

(d) This section does not apply where the admissibility of the evidence is governed by Section 1818 or ~~3156~~ 3177 of the Family Code.

(e) Nothing in this section makes admissible evidence that is inadmissible under Section 1152 or any other statutory provision, including, but not limited to, the sections listed in subdivision (d). Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code.

(f) Paragraph (2) of subdivision (a) does not limit either of the following:

(1) The admissibility of the agreement referred to in subdivision (c).

(2) The effect of an agreement not to take a default in a pending civil action.

Comment. Subdivision (d) of Section 1152.5 is amended to substitute references to the Family Code provisions that replaced the former provisions of the Civil Code and Code of Civil Procedure.

FAMILY CODE

Fam. Code § 1816 (technical amendment). Continuing instruction programs

SEC. ____ Section 1816 of the Family Code is amended to read:

1816. (a) Supervising and associate counselors and mediators described in Section ~~3155~~ 3164 shall participate in programs of continuing instruction in domestic violence, including child abuse, as may be arranged and provided to them. This training may utilize domestic violence training programs conducted by nonprofit community organizations with an expertise in domestic violence issues.

(b) Areas of instruction shall include, but are not limited to, the following:

(1) The effects of domestic violence on children.

(2) The nature and extent of domestic violence.

(3) The social and family dynamics of domestic violence.

(4) Techniques for identifying and assisting families affected by domestic violence.

(5) Interviewing, documentation of, and appropriate recommendations for families affected by domestic violence.

(6) The legal rights of, and remedies available to, victims.

(7) Availability of community and legal domestic violence resources.

(c) The Judicial Council shall solicit the assistance of community organizations concerned with domestic violence and shall seek to develop a training program that will maximize coordination between conciliation courts and local agencies concerned with domestic violence.

Comment. Section 1816 continues former Code of Civil Procedure Section 1745.5 without substantive change. See also Sections [55] ("abuse" defined), [70] ("domestic violence" defined).

Staff Note. The bracketed references will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.

Fam. Code § 1850 (technical amendment). Judicial Council duties

SEC. ____ Section 1850 of the Family Code is amended to read:

1850. The Judicial Council shall do all of the following:

(a) Assist counties in implementing mediation and conciliation proceedings under this code.

(b) Establish and implement a uniform statistical reporting system relating to proceedings brought for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, including, but not limited to, a custody disposition survey.

(c) Administer a program of grants to public and private agencies submitting proposals for research, study, and demonstration projects in the area of family law, including, but not limited to, all of the following:

(1) The development of conciliation and mediation and other newer dispute resolution techniques, particularly as they relate to child custody and to avoidance of litigation.

(2) The establishment of criteria to ensure that a child support order is adequate.

(3) The development of methods to ensure that a child support order is paid.

(4) The study of the feasibility and desirability of guidelines to assist judges in making custody decisions.

(d) Administer a program for the training of court personnel involved in family law proceedings, which shall be available to the court personnel and which shall be totally funded from funds specified in Section 1852. The training shall include, but not be limited to, the order of preference for custody of minor children set forth in Chapter 2 (commencing with Section 3040) of Part 2 of Division 8 and the meaning of the custody arrangements described in ~~Section 3020 and in Chapter 2 (commencing with Section 3040)~~ Chapter 1 (commencing with Section 3000) of Part 1 and Chapter 4 (commencing with Section 3080) of Part 2 of Division 8.

Comment. Section 1850 continues without substantive change former Civil Code Section 5181. Application of subdivision (a) has been expanded to cover all mediation and conciliation proceedings under this code. The former section applied only to implementation of former Civil Code Sections 4351.5 and 4607.

In subdivision (b), the phrase "relating to proceedings brought for dissolution of marriage, for nullity of marriage, or for legal separation of the parties" has been substituted for "relating to actions brought pursuant to this part." The former reference to "this part" referred to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code). See also Sections 3160-3186 (mediation of custody and visitation issues), 3190-3192 (counseling of parents and child).

In subdivision (d), the reference to former Civil Code Section 4600 in connection with the "meaning of custody arrangements" has been omitted. This is not intended as a substantive change.

Fam. Code § 3684 (technical amendment). Objection and request for hearing

SEC. ____. Section 3684 of the Family Code is amended to read:

3684. (a) The responding party may, within 30 days after the date of service of the notice of motion pursuant to Section 3683, file an objection and request for hearing. If the responding party files an objection and request for hearing, the responding party is responsible for requesting a hearing date and giving notice of the hearing to the moving party. The responding party shall file the original proof of service of the notice of the objection and request for hearing at the same time as the filing of the objection and the request for hearing.

(b) If it appears in the response to a request for modification of a child support order pursuant to this article that an issue other than support is contested with respect to the child, the other issue shall be set for mediation under Chapter 11 (commencing with Section ~~3155~~ 3160) of Part 2 of Division 8. A separate hearing shall be scheduled for the other issue. The pendency of the mediation proceeding shall not delay a hearing on the request for modification of the support order under this article.

Comment. Subdivision (a) of Section 3684 continues without substantive change the last three sentences of the last paragraph of former Civil Code Section 4700.1(b) and the last three sentences of the last paragraph of former Civil Code Section 4801.9(b). See also Section 3690 (manner of service of notice).

Subdivision (b) continues former Civil Code Section 4700.1(k) without substantive change.

Fam. Code § [5513] (technical amendment). Order limiting visitation to situations where third person present

SEC. ____ Section [5513] of the Family Code is amended to read:

[5513]. In making an award of temporary custody of a child pursuant to this division, if a domestic violence prevention order has been directed to a parent of the child, the court shall consider whether the best interest of the child requires that the visitation granted to that parent with respect to the child shall be limited to situations in which a third person, specified by the court, is present. A parent may submit to the court the name of a person that the parent considers suitable to be present during visitation. The determination of the best interest of the child pursuant to this section shall include the considerations specified in Section 3022 3011. The court shall also consider in its deliberations the nature of the acts from which the parent was enjoined and the period of time that has elapsed since that order.

Comment. Section [5513] continues former Code of Civil Procedure Section 547.5 without substantive change. The phrase "domestic violence prevention order" has been substituted for the references to orders under specific sections formerly in the Civil Code and the Code of Civil Procedure. This is not a substantive change, since Section [75] defines "domestic violence prevention order" to include these orders. See also Sections 3044 (parent convicted under certain Penal Code provisions not allowed unsupervised visitation), 3131 (action by district attorney where child taken or detained in violation of visitation order); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Staff Note. The bracketed references will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.

Fam. Code § 7604 (technical amendment). Custody and visitation orders during pendency of proceeding

SEC. ____ Section 7604 of the Family Code is amended to read:

7604. (a) A court may order pendente lite relief, consisting of an award of custody or the grant of reasonable visitation rights pursuant to ~~Part 2 (commencing with Section 3020) of Division 8,~~ if the court finds both of the following:

(1) Based on the tests authorized by Section 7501, a parent and child relationship exists pursuant to Section 7500.

(2) The award of custody or the granting of visitation rights would be in the best interest of the child.

(b) In making an award authorizing visitation pursuant to this section, if a domestic violence prevention order has been directed to a parent, the court shall consider whether the best interest of the child requires that any visitation granted to that parent shall be limited to situations in which a third person, specified by the court, is present. The court shall include in its deliberations a consideration of the nature of the acts from which the parent was enjoined and the period of time that has elapsed since that order. A parent may submit the name of a person to the court that the parent deems suitable to be present during visitation.

Comment. Section 7604 continues the first two paragraphs of former Civil Code Section 7004.5 without substantive change. The references to former Civil Code Sections 4600 and 4601

have been omitted. This is not a substantive change. See Section 3021 (Part 2 of Division 8 applicable to Uniform Parentage Act action to determine custody or visitation) & Comment. There is no comparable provision in the Uniform Parentage Act (1973).

See also Sections [75] ("domestic violence prevention order" defined), 200 (jurisdiction in superior court), Section 3011 (factors considered in determining best interest of child), 3021 (Part 2 of Division 8 applicable to determination of custody in Uniform Parentage Act action), 3100(b) (when visitation limited to situations where third party present), 3044 (parent convicted under certain Penal Code provisions not to be allowed unsupervised visitation with child), 3131 (action by district attorney where child taken or detained in violation of visitation order), 3160-3186 (mediation of custody or visitation issues); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Staff Note. The bracketed reference will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.

Fam. Code § 7807 (technical amendment). Inapplicability of certain statutory provisions in proceeding under this part

7807. Sections 3020, ~~3021~~ 3022, 3040 to 3043, inclusive, and 3409 do not apply in a proceeding under this part.

Comment. Section 7807 continues former Civil Code Section 232(d) without substantive change.

Fam. Code § 7891 (technical amendment). Hearing in chambers to determine wishes of child

SEC. ____ Section 7891 of the Family Code is amended to read:

7891. (a) Except as otherwise provided in this section, if the child subject of the petition is 10 years of age or older, the child shall be heard by the court in chambers on at least the following matters:

(1) The feelings and thoughts of the child concerning the custody proceeding about to take place.

(2) The feelings and thoughts of the child about the child's parent or parents.

(3) The child's preference as to custody, according to Section ~~3020 and Chapter 2 (commencing with Section 3040) of Part 2 of Division 8~~ 3042.

(b) The court shall inform the child of the child's right to attend the hearing. However, counsel for the child may waive the in chambers hearing by the court.

(c) This section does not apply if the child is confined because of illness or other incapacity to an institution or residence and is therefore unable to attend.

Comment. Section 7891 continues without substantive change the second paragraph and subdivisions (a)-(c) of former Civil Code Section 234. Throughout this section, references to "child" have been substituted for the former references to "minor." This is not a substantive change. See Section 7802 Comment. The reference to specific Section 3042 has been substituted for the broader reference to former Civil Code Section 4600. This is not a substantive change, since Section 3042 continues the relevant part of the former section. See also Section 7954 (minor's right to make statement in connection with priorities for foster care placement).

Fam. Code § 20010 (technical amendment). Procedure for motions filed under this part

SEC. ____ Section 20010 of the Family Code is amended to read:

20010. (a) A motion filed under this part requesting temporary child support or another temporary order shall include all of the following:

(1) A proposed order.

(2) An income and expense declaration of the moving party, in the form adopted by the Judicial Council.

(3) A declaration, under penalty of perjury, that the facts on which the motion is based are true and correct.

(4) The following, as applicable:

(A) In the case of a motion requesting temporary child support, a child support calculation in the form of a computer printout, which the moving party shall obtain upon conferring with the child support advisor.

(B) In the case of a motion requesting temporary order other than for child support, a statement of facts in support of the motion.

(b) The moving party shall obtain a hearing date and shall cause the notice of motion, the proposed order, the child support calculation, and the accompanying documents to be served on the party from whom support is requested.

(c) The responding party shall have 15 days from the date of service of the notice within which to confer with the child support advisor and file an objection. The objection and request shall be accompanied by an income and expense declaration in the form adopted by the Judicial Council. If the responding party files an objection and request for a hearing, the responding party shall be responsible for requesting a hearing date and giving notice thereof to the moving party. The original proof of service of the notice of the objection and request shall be filed at the same time as the filing of the objection and the request for a hearing.

(d) Notice pursuant to this section shall be by personal service.

(e) Where it appears from a party's application for an order under this part or otherwise in the proceedings that the custody of, or visitation with, a minor child is contested, the court shall set those issues for mediation pursuant to Chapter 11 (commencing with Section 3155 3160) of Part 2 of Division 8. The pendency of the mediation proceedings shall not delay a hearing on any other matter for which a temporary order is requested, including child support, and a separate hearing, if required, shall be scheduled respecting the custody and visitation issues following mediation in accordance with Chapter 11 (commencing with Section 3155 3160) of Part 2 of Division 8. However, the court may grant a continuance for good cause shown.

Comment. Section 20010 continues former Civil Code Section 4770 without substantive change.

GOVERNMENT CODE

Gov't Code § 26840.3 (technical amendment). Fee increase to support family conciliation court and mediation services

SEC. ____ Section 26840.3 of the Government Code is amended to read:

26840.3. (a) The superior court in any county may, for the support of the family conciliation court or for conciliation and mediation services provided pursuant to Chapter 11 (commencing with Section ~~3155~~ 3160) of Part 2 of Division 8 of the Family Code, upon action of the board of supervisors to provide all space costs and indirect overhead costs from other sources, increase:

(1) The fee for filing a petition, except a joint petition filed pursuant to Section 2401 of the Family Code, for dissolution of a marriage, legal separation, or nullity of a marriage, and the fee for a response to such a petition, by an amount not to exceed twenty-two dollars (\$22).

(2) The fee for issuing a marriage license, by an amount not to exceed five dollars (\$5).

(3) The fee for issuing a marriage certificate pursuant to Part 4 (commencing with Section 500) of Division 3 of the Family Code, by an amount not to exceed five dollars (\$5).

(b) The funds shall be paid to the county treasury and an amount equal thereto shall be used exclusively to pay the costs of maintaining the family conciliation court or conciliation and mediation services provided pursuant to Chapter 11 (commencing with Section ~~3155~~ 3160) of Part 2 of Division 8 of the Family Code.

Comment. Section 26840.3 is amended to substitute references to the Family Code provisions that replaced the former Civil Code provisions. Subdivision (a)(1) is further amended to consolidate the fee increase provisions, making unnecessary the former reference to "the mediation services required by the amendments to [former] Section 4351.5 of the Civil Code enacted by the 1983-84 Regular Session of the Legislature."

Gov't Code § 27752 (technical amendment). Financial evaluations and collections

SEC. ____ . Section 27752 of the Government Code is amended to read:

27752. A county financial evaluation officer is authorized to make financial evaluations and collect moneys pursuant to Section ~~3112~~ 3111 of the Family Code; Sections 987.4, 987.8, 1203, 1203.1, 1203.1b, 1203.1c, 1203.1e, 1205, and 1209 of the Penal Code; and Sections 353, 353.5, 376, 700, 727, 751, 903, 903.1, 903.2, 903.3, and 903.45 of the Welfare and Institutions Code.

Comment. Section 27752 is amended to substitute a reference to the Family Code provisions that replaced former Civil Code Section 4602.

Appendix

REVISED COMMENTS

Staff Note. The following comments need to be revised in connection with the recommendations regarding custody issues.

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 263. Domestic relations investigator

Comment. Former Section 263 is replaced by continued without substantive change in Family Code Sections 3110-3113-3116.

FAMILY CODE

Fam. Code § [55]. "Abuse"

Comment. Section [55] continues former Code of Civil Procedure Section 542(a) without substantive change. For provisions adopting this definition by reference, see Section ~~3022~~ 3011 (determining best interest of child in custody proceeding); Evid. Code § 1107 (admissibility of expert witness testimony regarding battered women's syndrome).

Staff Note. *The bracketed reference will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.*

Fam. Code § [75]. "Domestic violence prevention order"

Comment. Section [75] is a new provision included for drafting convenience. The term "domestic violence prevention order" is used in Sections 213, 2335, 3100, 3101, ~~3444~~ 3112, ~~3477~~ 3181, 3192, [5501], [5513], [5519], and 7604.

Staff Note. *The bracketed references will need to be revised, if the Commission's tentative recommendation regarding the reorganization of the domestic violence provisions is approved.*

Fam. Code § 211. Judicial Council rules of practice and procedure

Comment. Section 211 continues without change and generalizes former Civil Code Section 4001. The former provision applied only to former Part 5 (commencing with Section 4000) of Division 4 of the Civil Code (the former Family Law Act), whereas Section 211 applies to the entire Family Code.

For other provisions relating to Judicial Council rules, see, e.g., Sections 2021, 2025, 2070, 2321. For provisions relating to Judicial Council forms, see, e.g., Sections 95, 115, 2043, 2062, 2250, 2331, 2401, 2402, 3417, 3634, 3668, 3694, 3772, 4506, 4732, 5295, 5512, 5520, 7710. For provisions relating to other Judicial Council matters, see, e.g., Sections 1816 (development of training program), 1850-1852 (duties in connection with statewide coordination of family mediation and conciliation services), 2400 (adjustment of dollar amounts to reflect California Consumer Price Index), 2406 (summary dissolution brochure), 3153 (guidelines for determining eligibility for county payment of counsel), ~~3464~~ 3162 (uniform standards of practice for mediation), 4005 (development of age increase formula), 4066 (study and report on child support guidelines), 4552 (duties regarding procedure for deposit of money to secure future child support payments, including development of rules and forms).

Fam. Code § 270. Costs and attorney's fees during pendency of proceeding

Comment. Section 270 continues former Civil Code Section 4370(a) without substantive change. The phrase "proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties" replaces the former reference to "proceeding under this part." The phrase "proceeding under this part" as used in former Civil Code Section 4370(a) referred to the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code).

Section 272 requires that the award of attorney's fees and costs under Section 270 be just and reasonable under relevant circumstances of the parties. See *In re Marriage of Hublou*, 231 Cal. App. 3d 956, 282 Cal. Rptr. 695 (1991).

Special provisions may govern attorney's fees and costs in particular circumstances. See, e.g., Sections 916 (attorney's fees in enforcing right to reimbursement after division of community property), 1101(g) (breach of fiduciary duty), 2255 (attorney's fees and costs in proceeding for judgment of nullity of marriage), 2334 (order for attorney's fees during period of continuance for reconciliation), 3027 (attorney's fees in proceeding to recover monetary sanction for false accusation of child abuse or neglect), 3028 (attorney's fees in proceeding to recover compensation for failure to assume caretaker responsibility or for thwarting other parent's ~~visitation or custody~~ custody or visitation rights), 3113, 3150-3153, ~~3174~~ 3184 (appointment of counsel to represent child in custody or visitation proceeding), 3407 (attorney's fees where custody or visitation proceeding commenced in clearly inappropriate forum), 3408 (attorney's fees where jurisdiction declined by reason of conduct), 3416 (attorney's fees for enforcement of sister state custody order), 3652 (attorney's fees in proceeding to modify or terminate child support order), 4002 (attorney's fees for county enforcement of child support), 4303 (attorney's fees for county enforcement of spousal support), 4403 (attorney's fees for county enforcement of parent's right to support), 4803 (limitation on recovery of attorney's fees in proceeding under Uniform Reciprocal Enforcement of Support Act), 5283(d) (earnings assignment order), 5755, 5805 (attorney's fees in proceeding under Domestic Violence Prevention Act), 6602 (contract for attorney's fees for services in litigation for minor), 7640 (counsel fees and costs under Uniform Parentage Act), 7827, 7860-7864, 7895 (appointment of counsel in proceeding to declare child free from parental custody and control), 8800 (independent adoption).

Fam. Code § 1830. Jurisdiction of family conciliation court

Comment. Section 1830 restates former Code of Civil Procedure Section 1760 without substantive change. The reference to legal separation has been added to conform with other sections. See, e.g., Sections 1831, 1840, 1841. See also Sections 70 ("domestic violence" defined), 1842 (conciliation court may accept other cases where no minor children involved), ~~3155-3183~~ 3160-3186 (mediation of ~~visitation or custody~~ custody and visitation issues), 3190-3192 (counseling of parents and child).

Fam. Code § 1831. Purpose of petition

Comment. Section 1831 continues former Code of Civil Procedure Section 1761 without substantive change. See also Sections ~~3155-3183~~ 3160-3186 (mediation of ~~visitation or custody~~ custody and visitation issues), 3190-3192 (counseling of parents and child).

Fam. Code § 1840. Stay of right to file other proceeding; effect of pendency of other proceeding

Comment. Section 1840 continues former Code of Civil Procedure Section 1770 without substantive change. See also Sections ~~3155-3183~~ 3160-3186 (mediation of ~~visitation or custody~~ custody and visitation issues), 3190-3192 (counseling of parents and child).

Fam. Code § 2335. Evidence of specific acts of misconduct

Comment. The introductory part and subdivision (a) of Section 2335 continue former Civil Code Section 4509 without substantive change. The phrase "under this part," meaning under the former Family Law Act (former Part 5 (commencing with former Section 4000) of Division 4 of the Civil Code), has been omitted as surplus.

Subdivision (b) is a new provision that recognizes that evidence of specific acts of misconduct is admissible in proceedings to obtain or retain in effect a domestic violence prevention order.

See, e.g., Section 6223 (presentation of evidence of abuse or domestic violence required for mutual restraining order).

See also Section ~~3022~~ 3011 (history of abuse of child or other parent must be considered in determining best interest of child for purposes of custody).

Fam. Code § 3041 Additional requirements for custody award to nonparent

Comment. Section 3041 continues former Civil Code Section 4600(c) without substantive change. See also Sections ~~3022~~ 3011 (factors to be considered in determining best interest of child), 3021 (proceedings in which section applicable).

Fam. Code § 3082. Statement by court of reasons for grant or denial of joint custody request

Comment. Section 3082 continues former Civil Code Section 4600.5(c) without substantive change. See also Sections 3002 ("joint custody" defined), 3004 ("joint physical custody" defined), ~~3022~~ 3011 (factors to be considered in determining best interest of child).

Fam. Code § 3102. Visitation rights where parent of unmarried minor child is deceased

Comment. Section 3102 continues former Civil Code Section 197.5 without substantive change. The reference to the "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court). In subdivision (a), the word "unemancipated" has been substituted for "unmarried." This is not a substantive change. See Section 7002 (conditions of emancipation). See also Section ~~3022~~ 3011 (factors in determining best interest of child); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Fam. Code § 3113. Recommendation for appointment of counsel for minor child

Comment. Section 3113 continues the last paragraph of former Civil Code Section 4602 without substantive change. The reference to "children" has been omitted as surplus. See Section 10 (singular includes the plural). See also Section ~~3022~~ 3011 (factors in determining best interest of child).

Fam. Code § 3120. Independent action for exclusive custody

Comment. Section 3120 continues former Civil Code Section 4603 without substantive change. The reference to "decree" has been omitted as surplus. See Section 100 ("order" includes decree, as appropriate). The reference to "terminated" has been substituted for the former reference to "revoked." This is not a substantive change. See also Section ~~3022~~ 3011 (factors in determining best interest of child); Code Civ. Proc. § 917.7 (order not automatically stayed by appeal).

Fam. Code § 3133. Temporary custody order upon request of district attorney

Comment. Section 3133 continues the last two sentences of former Civil Code Section 4604(c) without substantive change. See also Sections 3007 ("sole physical custody" defined), ~~3022~~ 3011 (factors in determining best interest of child).

Fam. Code § 3191. Purpose of counseling

Comment. Section 3191 continues the last paragraph of former Civil Code Section 4608.1(a) without substantive change. See also Section ~~3022~~ 3011 (factors in determining best interest of child).

Fam. Code § 3403. Jurisdictional requirements

Comment. Section 3403 continues former Civil Code Section 5152 without substantive change. See also Section ~~3022~~ 3011 (factors in determining best interest of child).

Fam. Code § 3585. Support order based on agreement between parents

Comment. Section 3585 continues the first two sentences of former Civil Code Section 4811(a) without substantive change. A reference to "parents" has been substituted for the former reference to "parties." The phrase "based on the agreement" has been added to the second sentence. Neither change is intended to be substantive. The rule in former Civil Code Section 4811(c), limiting application of this section to property settlement agreements entered into on or after January 1, 1970, has been omitted as obsolete. See also Sections 273 (attorney's fees for enforcement of support order), ~~3017~~ 3029 (support order required where parent receiving public assistance), 3651 (modification or termination of support order based on agreement), 4013 (child support obligation discharged in bankruptcy). For a comparable provision relating to spousal support, see Section 3590.

Fam. Code § 3586. Court order to effectuate family support agreement

Comment. Section 3586 continues the first paragraph of former Civil Code Section 4811(d) without substantive change. A reference to "parents" has been substituted for the former reference to "parties." This is not intended as a substantive change. The rule in former Civil Code Section 4811(c), limiting application of this section to property settlement agreements entered into on or after January 1, 1970, has been omitted as obsolete. See also Sections 92 ("family support" defined), ~~3017~~ 3029 (support order required where parent receiving public assistance), 4500 (enforcement of support order).

Fam. Code § 3600. Order for support during pendency of proceeding

Comment. Section 3600 continues the first sentence of former Civil Code Section 4357(a) without substantive change. The language describing the support proceedings to which this section applies is drawn from the first sentence of former Civil Code Section 4700(a)(1), with the addition of language to make clear that this section applies to a child for whom support is authorized under Section 3901. This is not intended as a substantive change. The word "support" has been substituted for "support and maintenance" with reference to support of a husband or wife, since "maintenance" is surplus. The word "support" has been substituted for "support and education" with reference to support of a child. This is not a substantive change. See Section 150 (when used with reference to minor child, "support" includes education). A reference to "child" has been substituted for "children." This is not a substantive change. See Section 10 (singular includes plural). A reference to the "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court).

See also Sections 240-245 (ex parte support orders), 273 (attorney's fees for enforcement of support order), 2254 (order for support of putative spouse), ~~3017~~ 3029 (support order required where parent receiving public assistance).

Fam. Code § 4000. Civil action to enforce parent's duty to support

Comment. Section 4000 continues former Civil Code Section 4703 without substantive change. The reference to the "superior" court has been omitted as surplus. See Section 200 (jurisdiction in superior court). The reference to the duty to provide maintenance and education to a child has been omitted as surplus. See Section 150 ("support" includes maintenance and education when used in reference to child).

Section 4000 supersedes the second sentence of former Civil Code Section 196a, the second sentence of the first paragraph of former Civil Code Section 196.5, the first sentence of former

Civil Code Section 248, insofar as it gave a child the right to enforce the duty of support, and the second sentence of the first paragraph of former Civil Code Section 4704.5.

For a provision allowing a county to proceed on behalf of the child to enforce the parent's duty of support, see Section 4002. For general provisions relating to support, see Part 1 (commencing with Section 3500). For provisions relating to enforcement of support orders, see Part 5 (commencing with Section 4500). See also Sections 273 (attorney's fees for enforcement of support order), ~~3017~~ 3029 (support order required where parent receiving public assistance), 3028 (compensation for failure to assume caretaker responsibility or for thwarting other parent's ~~visitation or custody~~ custody or visitation rights), 3556 (effect of failure to implement custody or visitation rights).

Fam. Code § 4001. Order for child support

Comment. Section 4001 continues the first sentence of former Civil Code Section 4700(a)(1) without substantive change. The reference to the duty to provide maintenance and education to a child has been omitted as surplus. See Section 150 ("support" includes maintenance and education when used in reference to child). A reference to Section 3901 has been added to make clear that this section applies to a child for whom support is authorized under that section.

For general provisions relating to support, see Part 1 (commencing with Section 3500). For provisions relating to enforcement of support orders, see Part 5 (commencing with Section 4500). See also Sections 273 (attorney's fees for enforcement of support order), ~~3017~~ 3029 (support order required where parent receiving public assistance), 3028 (compensation for failure to assume caretaker responsibility or thwarting other parent attempting to exercise ~~visitation or custody~~ custody or visitation rights), 3556 (effect of failure to implement custody or visitation rights).

Fam. Code § 4002. Enforcement by county on behalf of child

Comment. Section 4002 continues former Civil Code Section 248 without substantive change to the extent that the former section related to enforcement of child support by the county.

For general provisions relating to support, see Part 1 (commencing with Section 3500). For provisions relating to enforcement of support orders, see Part 5 (commencing with Section 4500). See also Sections 273 (attorney's fees for enforcement of support order), ~~3017~~ 3029 (support order required where parent receiving public assistance), 3556 (effect of failure to implement custody or visitation rights). For comparable provisions, see Section 4303 (county enforcement of duty to provide spousal support), 4403 (county enforcement of duty to support parent).

Fam. Code § 4004. Child receiving public assistance

Comment. Section 4004 continues former Civil Code Section 4700.5 without substantive change. See also Section ~~3017~~ 3029 (support order required where parent receiving public assistance).

Fam. Code § 4005. Factors in determining amount of child support

Comment. Subdivision (a) of Section 4005 continues former Civil Code Section 246 without substantive change to the extent it related to child support. Subdivision (b) generalizes the second sentence of former Civil Code Section 4700(a)(1), which formerly applied to support of a minor child, to apply to all cases of child support, including support of a child described in Section 3910 (adult child who is incapacitated from earning a living and without sufficient means).

See also Sections 273 (attorney's fees for enforcement of support order), ~~3017~~ 3029 (support order required where parent receiving public assistance), 3028 (compensation for failure to assume caretaker responsibility or thwarting other parent attempting to exercise ~~visitation or custody~~ custody or visitation rights), 3556 (effect of failure to implement custody or visitation rights).

rights), 3805 (deferred sale of home order as child support), 4006 (health insurance as factor in child support).

Fam. Code § 4101. Order for cost of support before filing proceeding

Comment. Subdivision (a) of Section 4101 continues without substantive change former Civil Code Sections 196(b)(1)-(3), 4700(a)(2)(A)-(C), and 7010(c)(2)(A)-(C), including their introductory clauses.

Subdivision (b) continues without substantive change the second sentence of former Civil Code Section 196(c), the second sentence of former Civil Code Section 4700(a)(3), and the second sentence of former Civil Code Section 7010(c)(3).

In this section, the word "proceeding" has been substituted for the former reference to "action." This is not a substantive change. Former references to a "judgment" for support have been omitted as surplus. See Section 155 ("support order" means a judgment or order of support).

See Section 4100 (article applies only to child born after December 31, 1988). See also Sections ~~3017~~ 3029 (support order required where parent receiving public assistance), 3028 (compensation for failure to assume caretaker responsibility or thwarting other parent attempting to exercise ~~visitation or custody~~ custody or visitation rights). For a similar provision, see Section 7637(b) (Uniform Parentage Act).

Fam. Code § 4200. Child support payable to parent receiving welfare

Comment. Section 4200 continues former Civil Code Section 4702(a) without substantive change. The reference in former law to Civil Code Section 4701 has been omitted as obsolete, since Civil Code Section 4701 was repealed by its own terms on January 1, 1991. See 1989 Cal. Stat. ch. 1359, § 3.5. See also Sections ~~3017~~ 3029 (order for support required when custodial parent receiving public assistance), 3555 (forwarding of support payments paid through county officer), 4550-4573 (deposit of money to secure future child support payments), 4600-4641 (deposit of assets to secure future child support payments). For a comparable procedure for spousal support payments, see Chapter 4 (commencing with Section 4350) of Part 2.

Fam. Code § 7637. Other provisions of judgment

Comment. Subdivision (a) of Section 7637 continues former Civil Code Section 7010(c)(1) without change. This subdivision is the same as Section 15(c) of the Uniform Parentage Act (1973). Subdivision (b) restates former Civil Code Section 7010(c)(2)-(3) without substantive change. Subdivision (c) continues former Civil Code Section 7010(d) without change. ~~The "sunset provision" in former Civil Code Section 7010(e) has not been continued. The sunset provision repeals subdivisions (b) and (c)(1)-(5) as of January 1, 1993. See Section 3021 (Part 2 of Division 8 applicable to custody determination of custody in Uniform Parentage Act action).~~