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MINUTES OF MEETING

OF

SOUTHERN COMMITTEE

July 27, 1957
Los Angeles

Members

Mr. Stanford C. Shaw
Mr. John D. Babbage

Research Consultants

Dean Robert Kingsley
Professor James H. Chadbourn

Staff

Mr. John R. McDonough, Jr.

STUDY NO. 30 - CUSTODY PROCEEDINGS

The Committee discussed with Dean Kingsley his study and the recommendations made therein. The Committee decided to make the following recommendations to the Commission:

1. That Civil Code Sections 199, 203 and 214 be repealed as unnecessary. This would reduce the present number of overlapping types of custody proceedings.

2. That Civil Code Section 84, which provides for custody determinations in connection with annulment proceedings be amended to (a) incorporate the same statement of standards to be applied as is found in Civil Code Section 138 and (b) provide expressly for the modifiability of custody orders made in such proceedings.

3. That subsection 5 of Section 397 of the Code of Civil Procedure be amended to authorize a court in a divorce action to make temporary orders relating

to custody before determining a motion to change the place of trial to defendant's residence. [Query: should a similar amendment be made to C.C.P. § 396b?]

4. That a new Section 216 be added to the Civil Code to limit custody proceedings to those provided by statute - thus eliminating proceedings now occasionally entertained under "inherent equity power".

5. That the Probate Code and the Welfare and Institutions Code be amended to give the courts power to order support in guardianship proceedings and proceedings to deprive a parent of custody of a child, respectively.

The Committee was unable to agree concerning Dean Kinsley's recommendation that orders made pursuant to Section 701 et seq. of the Welfare and Institutions Code depriving a parent of the custody of a child be made modifiable. Dean Kinsley suggested that the reason that they are not presently modifiable (Welfare & Institutions Code Section 786) may be that such an order is sometimes made as a preliminary step in an adoption situation in order to eliminate the necessity of obtaining the consent of the parent concerned and that modification of the order might interfere with the later adoption proceedings. There was a discussion of whether if such an order were to remain nonmodifiable, the parent deprived of custody could later petition for guardianship, not as a parent but as a nonparent; no conclusion was reached on this point. At the end of the discussion Mr. Babbage was disposed to leave the law as it stands. Mr. Shaw was disposed to make orders depriving a parent of custody modifiable with two exceptions (a) during the pendency of a petition for adoption which is definitely prosecuted and (b) while a valid decree of adoption is in effect.

The Committee discussed whether the exclusive jurisdiction principle exemplified in the Green case should apply to custody proceedings so that once a court has entered a guardianship or custody decree no other court should have power to entertain a different proceeding involving custody of the same child, the parties being required to go back to the original court for a modification of the decree if they are not satisfied with it. There seemed to be no disposition on the part of the Committee to recommend any change in the present law on this matter as outlined in Dean Kingsley's report.

The Committee did not discuss Dean Kingsley's recommendation that Civil Code Section 138 be modified to make it clear that the divorce court, then having jurisdiction of the child, may make orders affecting custody after the divorce proceeding even though the court did not have jurisdiction of the child at the time of the divorce proceeding.

STUDY NO. 34 - UNIFORM RULES OF EVIDENCE

The Committee discussed with Professor Chadbourn his memoranda on Rule 63 and on subdivision 1 of Rule 63. Its recommendations are as follows:

Rule 63 - Mr. Babbage would recommend that URE 63 be adopted in California. Mr. Shaw has some doubt about the Rule insofar as it would (in conjunction with Rule 62(1))take out of the realm of hearsay - and thus make admissible whenever relevant - evidence of nonverbal conduct not intended by the action as a substitute for words in expressing himself. In other words, insofar as Rules 63 and 62(1) so define hearsay that nonassertive conduct is excluded therefrom - and thereby departs from the present law - Mr. Shaw is not convinced that the change is a desirable one.

Rule 63, subdivision (1). The Committee recommends that this part of the URE be adopted in substance in California. It was noted, however, that the meaning of the term "available for cross-examination" is not clear. The Committee agrees with Professor Chadbourn that this should mean not only that the person in question must be in the courtroom but also that he must be called by the person offering the hearsay statement, made his witness, and then offered for cross-examination. The Committee recommends that subdivision (1) of Rule 63 be amended to make this clear.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary