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Family

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Family

Family; child custody—examination of child witnesses in court proceedings

Family Code § 3042 (amended).
SB 1700 (Hart); 1994 STAT. Ch. 596

Existing law mandates that a court consult with children of suitable age and discretion as to their preference before granting or altering custody of the children.[1]

Chapter 596 requires the court to control examinations of child witnesses in accordance with the California Evidence Code[2] and in such a manner that the best interests of the child are protected.[3] Furthermore, Chapter 596 authorizes the court

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1. CAL. FAM. CODE § 3042 (amended by Chapter 596); *see id.* (leaving undefined, however, standards to determine what constitutes sufficient age and capacity to reason); *see also id.* § 7891(a)(3) (West 1994) (directing children over the age of 10 to meet in the judge's chambers to discuss the child's preference as to custody); Rosson v. Rosson, 178 Cal. App. 3d 1094, 1103, 224 Cal. Rptr. 250, 256 (1986) (permitting the trial judge to consider the preferences of two children determined to be mature by a mediator, despite their being only 10 and 13 years old); Detrich v. Dorothy H., 106 Cal. App. 3d 257, 269, 165 Cal. Rptr. 646, 653 (1980) (holding that although it is not required, it is clear that the Legislature prefers a child to be interviewed as to their parental preference in child custody proceedings); Mehlmauer v. Mehlmauer, 60 Cal. App. 3d 104, 110, 131 Cal. Rptr. 325, 329 (1976) (ruling that a trial court was not bound to follow a child's preference in custody proceedings, but was merely obligated to give the child's wishes consideration); Messer v. Messer, 259 Cal. App. 2d 507, 509, 66 Cal. Rptr. 417, 418 (1968) (allowing the court to consider the preference of the minor child in a custody proceeding); Tarling v. Tarling, 186 Cal. App. 2d 8, 12, 8 Cal. Rptr. 621, 624 (1960) (finding that the trial judge's refusal to change custody despite child's preference to live with father was not an abuse of discretion). *But see* Coil v. Coil, 211 Cal. App. 2d 411, 418, 27 Cal. Rptr. 378, 383 (1962) (determining that the trial court's refusal to consider a child's preference in a custody proceeding was not an abuse of discretion); Stack v. Stack, 189 Cal. App. 2d 357, 364-65, 11 Cal. Rptr. 177, 183 (1961) (stating that consideration of a child's preference in a custody proceeding was not required). *See generally* John E. Hatherley, *The Role of the Child's Wishes in California Custody Proceedings*, 6 U.C. DAVIS L. REV. 332, 333 (1973) (discussing the effect of a child's preference during the traditional adversarial custody hearing); Lawrence A. Moskowitz, *Divorce-Custody Dispositions: The Child's Wishes in Perspective*, 18 SANTA CLARA L. REV. 427, 427 (1978) (explaining the various interests in a child custody proceeding and the historical context of such custodial litigation); D.W. O'Neill, Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R. 3D 1396, 1399 (1965) (examining cases that involved child custodial preferences and the weight to be given by the court to such wishes in coming to a proper conclusion about granting custody); Wanda E. Wakefield, Annotation, *Desire of Child as to Geographical Location of Residence or Domicile as Factor in Awarding Custody or Terminating Parental Rights*, 10 A.L.R. 4TH 827, 828 (1981) (discussing cases where the court has addressed the child's desire to remain or live in a particular location and the emphasis that should be put on such desires within the custody determination).

2. *See* CAL. EVID. CODE § 765(b) (West Supp. 1994) (ordering the court during child custody proceedings to actively guard against the unnecessary harassment or embarrassment of the child witness, and to ensure that the questions are in a form tailored specifically to the age of the child).

3. CAL. FAM. CODE § 3042(b) (amended by Chapter 596); *see id.* (dictating that the court should control the questioning of the child in order to safeguard the best interests of the child); *see also* Interview with John Myers, Professor of Law, McGeorge School of Law, Sacramento, CA (Sept. 1, 1994) (notes on file with *Pacific Law Journal*) (discussing the significance of the amendment to California Family Code § 3042 and suggesting that the use of the terms "shall control" within the statute, will place an affirmative duty on the court to take a proactive stance in safeguarding the best interests of the child witness).

to receive information regarding the child's custody preference through means other than direct testimony.[4]

INTERPRETIVE COMMENT

Chapter 596 is designed to protect children from emotional damage resulting from testifying in a court proceeding.[5] Chapter 596 accomplishes this by authorizing courts to prevent children from being called as a witnesses in a custody proceeding if the value of their testimony is outweighed by the possible emotional damage.[6]

Critics charge that the language of Chapter 596 is vague, and that it possibly violates the "best interest standard"[7] for children.[8] Furthermore, opponents claim

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4. CAL. FAM. CODE § 3042(b) (amended by Chapter 596); *see id.* (permitting the court to deny either party's attempt to call the child as a witness where the best interests of the child dictate otherwise); *see also* Okum v. Okum, 195 Cal. App. 3d 176, 183, 240 Cal. Rptr. 458, 463 (1987) (finding that there was no error in the trial court restricting the child's testimony so that neither party could interrogate the child witness and stating that since the court was specifically concerned with damaging the child's relationship with his parents, there was no abuse of discretion in keeping the child's statements from the parties); Telephone Interview with Kearse McGill, Legislative Consultant to Assemblymember Gary Hart on SB 1700 (Sept. 8, 1994) (notes on file with the *Pacific Law Journal*) (noting that the phrase "providing alternative means of obtaining information" was included to ensure that the court would have some means of obtaining information about a child's preferences and asserting that the alternative means clause was constructed specifically so as not to disturb the holdings which employ similar methods as that demonstrated in *Okum v. Okum*).

5. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1700, at 2, 4 (July 6, 1994); *see id.* (noting the goal of Chapter 596 and listing support from the Family Law Section of the California State Bar, the Joint Custody Association, and the Child Abuse Prevention Council); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1700, at 2 (June 14, 1994) (stating that the purpose of Chapter 596 is to extend courts' authority to shield children from the pressures of testifying during a custody hearing).

6. CAL. FAM. CODE § 3042 (amended by Chapter 596); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1700, at 2 (Aug. 12, 1994) (noting the author's concern that under existing law, custody hearings are conducted like any other form of litigation with regard to the treatment of child witnesses); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1700, at 2-3 (May 10, 1994) (noting the sponsor's comments that calling a child as a witness in a custody proceeding puts an inordinate amount of strain upon the child and produces evidence that may have been easily obtained through other means); *see also* Interview with John Myers, Professor of Law, McGeorge School of Law, Sacramento, CA (Sept. 1, 1994) (notes on file with *Pacific Law Journal*) (noting that California Family Code § 3042 places more responsibility for the child's protection on the judge than does California Evidence Code § 765(b)).

7. *See* CAL. FAM. CODE § 3011 (West 1994) (listing the factors to be used in determining the best interests of a child in custody proceedings, including: The health, safety, and welfare of the child; any history of verified or corroborated abuse toward the child; and the type and quantity of contact between the child and both parents); *see also id.* § 3021 (West 1994) (making California Family Code § 3011 applicable to custody proceedings involving dissolutions or nullifications of marriages, legal separations, proceedings to determine exclusive custody, and proceedings conducted pursuant to the Domestic Violence Prevention Act or the Uniform Parentage Act); *id.* § 3040 (West 1994) (establishing the order of preference for determining a child's custody); Burchard v. Garay, 42 Cal. 3d 531, 539, 724 P.2d 486, 491, 229 Cal. Rptr. 800, 805 (1986) (stating that in determining child custody under the best interest standard, a holding based on a comparison between the parent's income or economic situation was not permissible); Carney v. Carney, 24 Cal. 3d 725, 739, 598 P.2d 36, 44, 157 Cal. Rptr. 383, 391 (1979) (asserting that in deciding upon the appropriate parent to be given custody, the court must examine the emotional, ethical, and intellectual guidance provided by the parent to the child during childhood).

8. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1700, at 2 (July 6, 1994); *see id.* (noting that the use of the term "harm" is undefined, and that there is no criteria established for determining

that there is no new protection provided to children by Chapter 596 and that it only adds confusion to child custody proceedings.[9]

Sean P. Lafferty

Family; child support—methods of calculation

Family Code §§ 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694 (repealed); § 4068 (amended).
SB 1715 (Hart); 1994 STAT. Ch. 415

Prior law furnished a simplified child or spousal support modification process.[1] Chapter 415 repeals that simplified modification process.[2] Existing law authorizes the Judicial Council to develop model worksheets and a form to provide specific

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who could be the other person in the role of parent); *id.* at 2-3 (arguing that by emphasizing the relationship between the child and parent, or nonparent, the best interests of the child are not necessarily being met).

9. *Id.* at 3 (July 6, 1994); *see id.* (stating that California Evidence Code § 765(b) already provides authority for the court to tailor the line of questioning for a child witness). *But see* CAL. EVID. CODE § 765(b) (West Supp. 1994) (leaving out any provision that would authorize the court to deny either party's attempt to call the child as a witness).

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1. 1992 Cal. Legis. Serv. ch. 162, sec. 10, at 488-90 (enacting CAL. FAM. CODE §§ 3680-3694); *see id.* (enacting CAL. FAM. CODE § 3680) (stating that the purpose of the article was to provide a simplified child and spousal support modification process); *id.* (enacting CAL. FAM. CODE § 3686) (providing that the court must take into account the age increase of the child in support modification hearings); *id.* (enacting CAL. FAM. CODE § 3687) (permitting the court to increase, by a limited amount, child and spousal support without proof of changed circumstances); *id.* (enacting CAL. FAM. CODE § 3688) (establishing evidentiary criteria for the modification of support based upon the moving party's significant decrease in income); *id.* (enacting CAL. FAM. CODE § 3691) (ordering the party attempting to modify child support to send a duplicate copy of notice of motion to the district attorney's office); *cf.* ALASKA STAT. § 25.24.170(b) (Supp. 1993) (establishing that guidelines may be considered in determining modifications of support based on a material change of circumstances); D.C. CODE ANN. § 16-916.1(a) (Supp. 1994) (listing guidelines for determining and modifying child support); *id.* § 30-304 (1993) (defining the extent of duties of support); ILL. ANN. STAT. ch. 750, para. 5/510 (Smith-Hurd Supp. 1994) (providing modification of support procedures); KY. REV. STAT. ANN. § 403.212 (Baldwin 1989) (setting forth guidelines to be used in determining child support); *id.* § 403.213 (Baldwin Supp. 1993) (adding criteria for the modification of child support); MICH. COMP. LAWS ANN. § 722.3 (West 1993) (listing formula for determining child support); N.M. STAT. ANN. § 40-4-11.4(A) (Michie 1994) (permitting modification of support upon a showing of a material and substantial change in the circumstances of the person required to pay support); N.Y. FAM. CT. ACT § 413(a) (McKinney Supp. 1994) (ordering the court to make child support awards pursuant to the directives of this section). *See generally* John L. Goddard, 4 CALIFORNIA PRACTICE, *Family Law Practice* § 241.1 (3d ed. Supp. 1992) (discussing generally the simplified process for modification of support orders).

2. 1994 Cal. Legis. Serv. ch. 415, sec. 1, at 1922 (repealing CAL. FAM. CODE §§ 3680-3694); *see also* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1715, at 2 (July 6, 1994) (noting the author's belief that the simplified modification of support process was no longer effective for parties to child support hearings).

information to assist courts in determining child support.[3] Chapter 415 mandates that the Judicial Council consult with certain agencies, groups, and organizations in order to create a simplified Income and Expense form for calculating child support.[4]

INTERPRETIVE COMMENT

Chapter 415 was enacted based on recommendations by the Judicial Council to repeal the simplified modification of support procedures, and to simplify the Income and Expense declaration form used by the courts to determine child support payments.[5]

Sean P. Lafferty

Family; child support—parental income

Family Code § 5230.5 (new); § 4057.5 (amended).
SB 279 (Calderon); 1994 STAT. CH. 1140

Existing law prohibits a court from considering the income of the subsequent spouse[1] or nonmarital partner of a parent who has a duty to provide child

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3. CAL. FAM. CODE § 4068(a) (amended by Chapter 415). *See generally* Goddard, *supra* note 1, § 241.2 (noting that Judicial Council forms approved through January 1, 1992, relating to orders for modification of child support were contained within Appendix 3 to Chapter 1 of this text).

4. CAL. FAM. CODE § 4068(b) (amended by Chapter 415); *see id.* (providing that the Judicial Council must consult with the State Department of Social Services, the California Family Support Council, the Senate and Assembly Judiciary Committees, the Family Law Section of the State Bar of California, a legal services organization on child support issues, and custodial and noncustodial parent groups in formulating a simplified income and expense form).

5. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1715, at 2 (July 6, 1994); *see id.* (citing the Judicial Council's December 1993 report regarding the statewide uniform child support guideline); *see also* SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1715, at 2 (May 26, 1994) (discussing the Judicial Council's support for Chapter 415); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1715, at 2 (Apr. 19, 1994) (reporting the Judicial Council's recommendation to repeal the simplified modification of support process); JUDICIAL COUNCIL OF CALIFORNIA, JUDICIAL COUNCIL REPORT TO THE GOVERNOR AND THE LEGISLATURE, at 17 (1994) (finding that the current simplified income and expense form is overly complex for the ordinary child support hearing); *id.* at 22 (noting that the purpose in having uniform guidelines in determining child support is to promote stability within the child support system and to initiate out of court agreements between parents over child support); *cf. National Child Support Reform, 1994: Hearings on H.R. 4605 Before the Subcommittee on Human Resources of the House of Representatives Committee on Ways and Means*, 103rd Cong., 2nd Sess. (1994) *available* in LEXIS, News Library, Curnws File (statement of Nancy Duff Campbell, Co-President of the National Women's Law Center) (testifying as to the need for national child-support reform); Cheryl Wetzstein, *Backing Grows for Child-Support Action; As Welfare Reform Package Stalls, Calls Mount to Go After Deadbeats*, WASH. TIMES, Aug. 21, 1994, at A4 (discussing child-support enforcement as included with possible welfare reform legislation).

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1. *See* CAL. FAM. CODE § 11 (West 1994) (defining spouses or married persons as including persons who are lawfully married to each other and persons who were previously lawfully married to each other, as is appropriate under the circumstances of the particular case).

support,[2] when the court determines or modifies child support, except in an extraordinary case.[3] An extraordinary case under existing law occurs when a parent voluntarily or intentionally quits work or reduces income.[4]

Chapter 1140 provides that an extraordinary case also may include a parent who intentionally remains unemployed or under-employed and relies on a subsequent spouse's income.[5] Chapter 1140 also asserts that if any portion of the

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2. *See id.* § 150 (West 1994) (defining support as referring to a support obligation, including past due support or arrearage when it exists, owing on behalf of a child, and when the term support is used with reference to a minor child, maintenance and education are also included); *id.* § 4055(a)-(b) (West 1994) (delineating the California uniform guidelines for determining child support); *id.* § 4056(a)-(b) (West 1994) (listing the information to be used in determining the California uniform guideline amount for support); *id.* § 4057(a) (West 1994) (declaring that the amount of child support established by the formula provided in California Family Code § 4055(a) is presumed to be the correct amount of child support to be ordered); *id.* § 4057(b)(1)-(5) (West 1994) (noting that the presumption of subdivision (a) of this statute is a rebuttable presumption affecting the burden of proof and may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case because one or more of the following factors is found to be applicable by a preponderance of the evidence, and the court states in writing or on the record the information required in California Family Code § 4056(a): (1) The parties have stipulated to a different amount of child support; (2) the sale of the family residence is deferred and the rental value of the family residence in which the children reside exceeds the mortgage payments, homeowner's insurance, and property taxes; (3) the parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children; (4) a party is not contributing to the needs of the children at a level commensurate with that party's custodial time; or (5) application of the formula would be unjust or inappropriate due to special circumstances in the particular case, and these special circumstances include, but are not limited to the following cases: (A) Where the parents have different time-sharing arrangements for different children; (B) where both parents have substantially equal time-sharing of the children and one parent has a much lower or higher percentage of income used for housing than the other parent; or (C) where the children have special medical or other needs that could require child support that would be greater than the formula amount).

3. *Id.* § 4057.5(a)(1)-(2) (amended by Chapter 1140); *see id.* (stating that the income of the obligor/obligee parent's subsequent spouse or nonmarital partner will not be considered when determining or modifying child support, except in an extraordinary case where excluding that income would lead to extreme and severe hardship to any child subject to the child support award, in which case the court must also consider whether including that income would lead to extreme and severe hardship to any child supported by the obligor/obligee or by the obligor's/obligee's subsequent spouse or nonmarital partner); *id.* § 4323(a)(1) (West 1994) (providing that except as otherwise agreed by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabitating with a person of the opposite sex); *id.* (noting that upon a determination that circumstances have changed, the court may modify or terminate the spousal support); *id.* § 4323(a)(2) (West 1994) (declaring that holding oneself out to be the husband or wife of the person with whom one is cohabitating does not necessarily constitute cohabitation); *id.* § 4323(b) (West 1994) (declaring that the income of a supporting spouse's subsequent spouse or nonmarital partner will not be considered when determining or modifying spousal support). *See generally* Annotation, *Change in Financial Condition or Needs of Parents or Children as Ground for Modification of Decree for Child Support Payments*, 89 A.L.R.2D 7, 7-103, (1963) (examining the instances in which courts have recognized a need to modify child support payments based on altered financial conditions); Jay M. Zitter, Annotation, *Excessiveness or Adequacy of Money Awarded as Child Support*, 27 A.L.R.4TH 864, 864-1012 (1984) (illustrating cases that contest the amount of child support for families).

4. CAL. FAM. CODE. § 4057.5(b) (amended by Chapter 1140); *see id.* § 4057.5(c) (amended by Chapter 1140) (stating that if any portion of the income of either parent's subsequent spouse or nonmarital partner is allowed to be considered pursuant to this section, discovery for the purposes of determining income will be based on W2 and 1099 income tax forms, except where the court determines that this application would be unjust or inappropriate).

5. *Id.* § 4057.5(b) (amended by Chapter 1140); *see* 1994 Cal. Legis. Serv. ch. 1140, sec. 3, at 5607 (amending CAL. FAM. CODE § 4057.5) (declaring that it is the intent of the Legislature that the restrictions, specified in California Family Code § 4075.5 on the use of a subsequent spouse or nonmarital partner's income,

income of either parent's spouse or nonmarital partner is allowed to be considered in relation to child support, the court must allow a hardship deduction based on the minimum living expenses for one or more stepchildren of the party subject to the order, and the court must comply with various statutory provisions in allowing the deduction.[6]

Existing law provides for the assignment of wages to satisfy an order to pay arrearages in child support.[7] Chapter 1140 requires an obligee alleging arrearages in child support to specify the amount thereof under penalty of perjury.[8]

INTERPRETIVE COMMENT

Chapter 1140 clarifies the intent of existing law designed to limit the court's ability to consider the income of a new mate or spouse of a parent when

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are not subject to judgment on a case-by-case basis, and it is also the intent of the Legislature that § 4075.5 prohibit the establishment or use of any formula or local court guideline devised to determine when consideration of a subsequent spouse or nonmarital partner's income is relevant).

6. CAL. FAM. CODE § 4057.5(d) (amended by Chapter 1140); *see id.* § 4057.5(e) (amended by Chapter 1140) (noting that the enactment of this section constitutes cause to bring an action for modification of a child support order entered prior to the operative date of this section); *see also id.* § 4070 (West 1994) (stating that if a parent is experiencing extreme financial hardship due to justifiable expenses resulting from the circumstances enumerated in California Family Code § 4071, on the request of a party, the court may allow income deductions under § 4059, of the same code, that may be necessary to accommodate those circumstances); *id.* § 4071(a)(1)-(2) (West 1994) (defining the circumstances evidencing hardship as including the following: (1) Extraordinary health expenses for which the parent is financially responsible, and uninsured catastrophic losses; and (2) the minimum basic living expenses of either parent's natural or adopted children for whom the parent has the obligation to support from other marriages or relationships who reside with the parent, and the court, on its own motion or on the request of a party, may allow these income deductions as necessary to accommodate these expenses after making the deductions available under paragraph (1)); *id.* § 4071(b) (West 1994) (providing that the maximum hardship deduction under paragraph (2) of subsection (a) for each child who resides with the parent may be equal to, but may not exceed, the support allocated to each child subject to the order); *id.* § 4071(c) (West 1994) (noting that the Judicial Council may develop tables to reflect the maximum hardship deduction, taking into consideration the parent's net disposable income before the hardship deduction, the number of children for whom the deduction is being given, and the number of children for whom the support award is being made); *id.* § 4072(a)(1)-(2) (West 1994) (asserting that if a deduction for hardship expenses is allowed, the court must do both of the following: (1) State the reasons supporting the deduction in writing or on the record; and (2) document the amount of the deduction and the underlying facts and circumstances); *id.* § 4072(b) (West 1994) (requiring the court to specify the duration of the deduction whenever possible); *id.* § 4073 (West 1994) (stating that the court must be guided by the goals set forth in this article when considering whether to allow a financial hardship deduction and, if allowed, when determining the amount of the deduction).

7. *Id.* § 5230(a)(1)-(2) (West 1994); *see id.* (asserting that when the court orders a party to pay an amount for support or orders a modification of the amount of support to be paid, the court must include in its order an earnings assignment order for support that requires the employer of the obligor to pay to the obligee that portion of the obligor's earnings due or to become due in the future as will be sufficient to pay an amount to cover both of the following: (1) The amount ordered by the court for support; and (2) an amount which will be ordered by the court to be paid toward the liquidation of any arrearage); *id.* § 5230(b) (West 1994) (stating that upon the filing and service of a notice of motion or order to show cause with the supporting application, an obligee or custodial parent receiving services under Title IV-D of the Social Security Act may request the court to issue an earnings assignment order for support to enforce a support order made or modified before July 1, 1990, including any arrearages, or to modify the support order).

8. *Id.* § 5230.5 (enacted by Chapter 1140).

determining child and spousal support.[9] The author notes that some courts have developed a uniform "hardship deduction" threshold or established a standard definition of when an "extraordinary case" calls for imputing new mate income, which is clearly in violation of the intent of existing law, under which a case-by-case determination should be made.[10]

Generally, statutes in other states address the situation where a parent is voluntarily unemployed or underemployed by referring to that party solely without reference to any cohabitants.[11] Prior to Chapter 1140, some nonworking parents had tried to use legal loopholes to avoid child support payments when in fact those parents had been enriched from the income of a new spouse or housemate and were able to fulfill financial obligations; the efficient collection of child support payments in general still continues to be a daunting and frustrating task for California lawmakers.[12]

Joseph A. Tommasino

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9. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 279, at 1-2 (July 6, 1994); 1993 Cal. Legis. Serv. ch. 935, sec. 2 at 4266-69 (enacting CAL. FAM. CODE § 4057.5).

10. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 279, at 2 (July 6, 1994); *see id.* (illustrating how one court, when the support ordered was below a specific amount, provided by local rule that this constituted an "extraordinary case" for purposes of imputing new mate income, regardless of the income of the parties or any balance of hardships).

11. For examples of other state statutes which discuss parental income and child support calculations, see COLO. REV. STAT. ANN. § 14-10-115(7)(a)(III)(b)(I) (West Supp. 1994) (providing that if a parent is voluntarily unemployed or underemployed, child support will be calculated based on a determination of potential income, except that a determination of potential income will not be made for a parent who is physically or mentally incapacitated or is caring for a child two years of age or younger for whom the parents are jointly responsible); KY. REV. STAT. ANN. § 403.212(2)(d) (Baldwin 1993) (stating that potential income will be determined based upon employment potential and probable earnings levels based on the obligor's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community); LA. REV. STAT. ANN. § 9:315.9 (West 1991) (asserting that if a party is voluntarily unemployed or underemployed, child support will be calculated based on a determination of his or her income earning potential, unless the party is physically or mentally incapacitated, or is caring for a child of the parties under the age of five years).

12. Dana Wilkie, *Child-support Take Is Up, but So Is Demand*, SAN DIEGO UNION-TRIB., Aug. 1, 1993, at A-1; *see id.* (reporting that in 1992, the State's independent legislative analyst ranked California 31st in the nation in its efforts to collect child support, and an earlier survey by the House Ways and Means Committee was more disturbing in its ranking of California as 48th of 50 states); *see also* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 1989 U. ILL. L. REV. 367, 367 (arguing that the child support obligation in America today reflects some disturbing trends and tensions between the following elements: (1) Society's continuing need for a functioning family infrastructure; (2) this generation's emphasis on individual's rights; (3) traditional financial responsibility for dependents such as the spouse and children; and (4) the care-giving capacity of the one-parent family). *See generally* Mary Jo Bane & David T. Ellwood, *Is American Business Working for the Poor?*, HARV. BUS. REV., Sept. 1991, at 58 (advocating the view that by collecting child support through automatic wage withholding by employers, reliable payments would be insured which are the least vulnerable to noncompliance or fraud).

Family; dependent children—notification of rights

Welfare and Institutions Code § 353.1 (new).
AB 1013 (Murray); 1994 STAT. Ch. 159

Under existing law, a juvenile court can find a minor to be a dependent child[1] of the court for a prescribed cause.[2] Furthermore, existing law authorizes a dependent child, through a guardian, to petition the juvenile court to change, modify, or set aside any order of the juvenile court previously made, or to terminate the jurisdiction of the court.[3]

Chapter 159 requires the juvenile court to inform a dependent child who is at least twelve years of age, and the guardian ad litem[4] or the legal counsel[5] of a

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1. *See* CAL. WELF. & INST. CODE § 300(a)-(j) (West Supp. 1994) (providing a means for determining which juveniles will be classified as dependent children); *see also id.* § 325 (West 1984) (requiring a probation officer to first file a petition with the court to commence the proceedings in which a minor will be declared a dependent child of the court).

2. *Id.* § 300(j) (West Supp. 1994); *see id.* (indicating that the intent of the Legislature in enacting California Welfare and Institutions Code § 300 was to provide maximum protection for children who are being physically, sexually, or emotionally abused, neglected, or exploited; to protect children who are at risk of that harm; and to preserve the family whenever possible in the minor's best interest); *see also id.* § 202(d) (West Supp. 1994) (declaring that the purpose of the juvenile courts and other public agencies is to consider the safety and protection of the public and the best interests of the minor); *cf.* 42 U.S.C.A. § 5601(a) (West Supp. 1994) (presenting the Congressional findings that at present, juvenile courts, foster and protective care programs, and shelter facilities are inadequate to meet the needs of children, who, because of the failure of these services, run the risk of becoming future delinquents and burdening the adult court system); *id.* § 5601(a)(11)-(12) (West Supp. 1994) (declaring that emphasis should be placed on preventing youths from entering the juvenile justice system in the first place and reducing delinquency by providing public recreation programs and activities designed to provide social skills, enhance self esteem, and encourage constructive use of the minor's time). *See generally In re* Walker, 159 Cal. App. 2d 463, 468, 324 P.2d 32, 35 (1958) (holding that the child's welfare is of paramount consideration in the juvenile court system).

3. CAL. WELF. & INST. CODE § 388 (West 1984); *see id.* (permitting the minor to make the stated motions upon the grounds of a change in circumstances or new evidence presented to the court); *id.* (allowing the motions to also be made by a person in the best interests of the child once the relationship of such person to the child has been determined); *see also* Ansley v. Superior Court, 185 Cal. App. 3d 477, 481, 229 Cal. Rptr. 771, 776 (1986) (upholding the requirement for new evidence with a showing of the absence of jurisdictional notice necessary to support a dependency judgment as an appropriate ground for setting aside a judicial order); *cf.* IND. CODE ANN. § 31-6-4-13 (West 1979) (describing the procedure for a delinquent juvenile court proceeding and detailing the rights to which the child is entitled); OHIO REV. CODE ANN. § 2151.314 (Anderson Supp. 1994) (describing the juvenile court procedure for detention hearings); OKLA. STAT. ANN. tit. 10, § 1109 (West Supp. 1994) (detailing the procedure for questioning children and appointing guardians and counsel for the juvenile court procedure); WASH. REV. CODE ANN. § 13.34.100 (West Supp. 1994) (relating the procedure for appointing guardians ad litem and counsel for a child); WIS. STAT. ANN. § 48.21 (West 1987) (describing the rights of dependent children in the juvenile court system).

4. *See* CAL. WELF. & INST. CODE § 356.5 (West Supp. 1994) (providing that a child advocate appointed by the court shall have the same duties and responsibilities as a guardian *ad litem*). *See generally* Nancy Neraas, Comment, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington, Experience*, 58 WASH. L. REV. 853, 853-55 (1983) (providing a general description of the role and function of the guardian ad litem in dependent child jurisdiction cases before a juvenile court in Washington).

5. *See* CAL. WELF. & INST. CODE § 356.5 (West Supp. 1994) (declaring that a child has the right to representation by counsel); *see also id.* § 317 (West Supp. 1994) (requiring the court to appoint counsel to represent the child when the child cannot afford counsel); Akkiko M. v. Superior Court, 163 Cal. App. 3d 525,

child who has not yet reached twelve years of age, both verbally and in writing, of the child's right to petition the court.[6]

In addition, Chapter 159 requires the court to inform the guardian or the counsel, depending upon the child's age, of the availability of all appropriate and necessary Judicial Council forms.[7] If the child is twelve years of age or older, the court must directly inform the child of these provisions in clear language appropriate for the child's level of cognitive learning.[8] If the child is under twelve years of age, the court must inform the child through the child's guardian ad litem or legal counsel.[9]

INTERPRETIVE COMMENT

AB 1013 was originally intended to codify a bill of rights for foster care children in order to ensure that their needs and interests are addressed by the foster care system.[10] However, opposition strongly believed that the bill would adversely affect the system since the standards were considered too strict and not likely to assist the dependent children at all.[11]

AB 1013 was amended to only require the informing of dependent children of their rights.[12] However, opponents continue to believe that the law is largely

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530, 209 Cal. Rptr. 568, 571 (1985) (upholding California Welfare and Institutions Code § 318 by requiring the court to appoint counsel and to allow counsel to continue to represent the minor unless relieved by the court upon substitution of other counsel or for other cause).

6. CAL. WELF. & INST. CODE § 353.1(b) (enacted by Chapter 159).

7. *Id.* § 353.1(a)(2) (enacted by Chapter 159); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1013, at 2 (Jan. 31, 1994) (stating that the costs attributed to the provision of the bill relating to the Judicial Council forms and the minimal reimbursable costs for the notification procedures are approximately $20,000).

8. CAL. WELF. & INST. CODE § 353.1(b) (enacted by Chapter 159); *see In re* Raymundo B., 203 Cal. App. 3d 1447, 1454, 250 Cal. Rptr. 812, 816 (1988) (holding that the burden is on the minor to prove a level of comprehension or that he or she does not understand the English language and requires an interpreter).

9. CAL. WELF. & INST. CODE § 353.1(b) (enacted by Chapter 159).

10. A.B. 1013, 1993-1994 Calif. Reg. Sess. § 1 (Mar. 1, 1993); *see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1013, at 3 (Jan. 24, 1994); *id.* (stating that the original intent of the bill was to create a children's bill of rights providing the right to humane care and the right to ethical conduct by all persons responsible for their care); *id.* at 3-4 (indicating the author's belief that foster children are in need of a means to assert their rights due to their vulnerable position in the system and that AB 1013 would provide the chance for these children to communicate their problems and assert their rights before they run away or take drastic measures); *cf.* Robert B. Gunnison & Teresa Moore, *S.F. Foster Care Called Worst in California Scathing Report Prompts State to Order Probe into 3,600 Cases,* S.F. CHRON., Mar. 3, 1994, at A1 (providing a detailed look at the decaying child welfare agencies which are over-booked, under-staffed, and virtually ineffective in protecting a child's welfare); Davan Maharaj, *Plight of Children Worsens Despite Affluence of O.C.,* L.A. TIMES, May 14, 1993, at A1 (stating that the number of cases of child abuse, neglect, and children living in poverty are at all-time high levels); Debra J. Saunders, *Nitpicking, Really,* S.F. CHRON., June 30, 1993, at A18 (relating how children virtually have no rights at all concerning their welfare and that courts are more likely to award custody to abusive, unstable parents than to stable relatives or friends).

11. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1013, at 4 (Jan. 24, 1994); *see id.* (indicating that the California Society for Clinical Social Work opposes the bill because it believes that no foster parent, or even biological parent, can undertake the responsibility of raising a child under the circumstances of the bill).

12. AB 1013, 1993-1994 Calif. Leg. Reg. Sess. § 1 (Mar. 16, 1994); CAL. WELF. & INST. CODE § 353.1(a) (enacted by Chapter 159).

redundant, and that minors are already notified of their rights through their guardians or legal counsel.[13] Despite opposition to the law, Chapter 159 ultimately ensures that dependent children will have their opportunity to voice their concerns and assert their rights to the juvenile court.[14]

Anthony J. Enciso

Family; domestic violence—statewide registration of protective orders

Family Code § 6380 (repealed and new); §§ 6381, 6383, 6385 (amended); Penal Code § 12028.5 (amended).
AB 3034 (Solis); 1994 STAT. Ch. 872

Prior law required certain procedural steps to be taken by the petitioner or the attorney for the petitioner to notify relevant law enforcement agencies of the issuance of a protective order.[1] Chapter 872 requires counties to implement a

13. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1013, at 2 (June 15, 1994); *see id.* (stating that the intent of AB 1013 is to ensure that children who are dependents of the juvenile courts are informed of their rights to petition the court, as specified, under existing law); *id.* (stating that opponents, such as Juvenile Court Judges of California, believe AB 1013 is redundant since counsel or a guardian would inform the child of these rights initially); *see also* CAL. WELF. & INST. CODE § 353 (West Supp. 1994) (requiring the judge or clerk, at the beginning of a hearing of dependency, to read the petition to those present, and afterward, upon request, the judge is to explain any term of the allegations, the nature of the hearing, its procedure, and possible consequences); *cf.* Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 257-62 (1991) (describing the various procedures enabling the child's wishes and intentions to be represented through appointed counsel or a guardian ad litem). *See generally* FED. R. CIV. P. 17(c) (directing a federal court to appoint a guardian ad litem for an infant who is not otherwise represented in the action); CAL. CT. R. 1412 (setting forth the various rights available to a dependent child in the juvenile court system).

14. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1013, at 2 (June 20, 1994); *see also* CAL. WELF. & INST. CODE § 353.1(a)(1)-(2) (enacted by Chapter 159); *cf.* U.S. CONST. amend. XIV, § 1 (ensuring that one will not be deprived of life, liberty, or property without due process of the law); CAL. CONST. art. 1, §§ 7(a), 15 (providing that the state will not deprive an individual of life, liberty, or property without due process).

1. 1993 Cal. Legis. Serv. ch. 219, sec. 154 at 1389 (enacting CAL. FAM. CODE § 6380) (requiring that a copy of the protective order and proof of service to respondent be mailed or delivered by petitioner, attorney of the petitioner, or the county clerk, by the close of the business day when the order was issued, to law enforcement agencies having jurisdiction over the residence of the petitioner or the residence of a party with care, control, or custody of a child who is to be protected from domestic violence, and other locations where domestic violence against the petitioner or other protected parties is likely to occur); *see also* CAL. FAM. CODE § 6218 (West 1994) (defining protective order as a restraining order enjoining the respondent from committing specific acts of abuse, entering a specified dwelling, or other specified behavior). *See generally* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Husband and Wife*, § 36J (9th ed. Supp. 1994) (discussing the procedures for transmission of protective orders to law enforcement agencies, and service of the protective order to the respondent).

system whereby the state Department of Justice[2] will be notified electronically of all issuances, modifications, extensions, or terminations of protective orders.[3] Upon the issuance of a protective order, certain information will be transmitted electronically to the Department of Justice.[4] Chapter 872 also requires the establishment of a Domestic Violence Protective Order Registry maintained by the Department of Justice.[5] Chapter 872 also requires that certain materials be made available at local courts to assist victims of domestic violence.[6]

Existing law provides that a protective order can be enforced by a law enforcement agency of a political subdivision only if the agency has received a copy of the order.[7] Chapter 872 allows law enforcement agencies to enforce protective orders that they have received electronically.[8]

Prior law provided certain procedures for service of a protective order by a law enforcement officer.[9] Chapter 872 requires a law enforcement officer to orally notify the respondent of the existence of a protective order at the scene of a domestic violence incident.[10]

Existing law allows certain law enforcement officials to take custody of firearms[11] or other deadly weapons[12] present at the scene of a family violence

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2. *See* CAL. GOV'T CODE § 15001 (West 1992) (providing that the Department of Justice is composed of the Office of the Attorney General and the Division of Law Enforcement).

3. CAL. FAM. CODE § 6380 (a),(f),(h) (enacted by Chapter 872); *see id.* (providing that the existing California Law Enforcement Telecommunications System (CLETS) of the Department of Justice be used for the transmission of protective orders and their modification, extension, or termination).

4. *Id.* § 6380(b) (enacted by Chapter 872); *see id.* (requiring transmission of: (1) The description of the respondent; (2) the names of the protected persons; (3) the date of the order; (4) the duration of the order; (5) the terms and conditions of the order; (6) the department or division number and address of the court; and (7) whether the order was served on the respondent); *id.* § 6380(c) (enacted by Chapter 872) (requiring that the information conveyed to the Department of Justice will also indicate whether the respondent was present in court to be informed of the order). The respondent's presence in court will constitute proof of service of notice of the terms of the protective order. *Id.*

5. *Id.* § 6380(e) (enacted by Chapter 872); *see id.* (requiring that all information regarding domestic violence restraining orders be available to clerks of the court and to appropriate law enforcement personnel).

6. *Id.* § 6380(g) (enacted by Chapter 872); *see id.* (requiring the Judicial Council to assist local courts in developing informational packets to assist those seeking domestic violence protective orders, including descriptions of procedures and maps to help locate filing windows and appropriate courts).

7. *Id.* § 6381(b) (amended by Chapter 872).

8. *Id.*

9. 1993 Cal. Legis. Serv. ch. 219, sec. 154, at 1390 (enacting CAL. FAM. CODE § 6383); *see id.* (allowing an officer to serve on the respondent a copy of a protective order when at the scene of reported domestic violence).

10. CAL. FAM. CODE § 6383(e) (amended by Chapter 872); *see id.* (providing that when an officer determines that a protective order has been issued but not served, the officer's verbal notification to the respondent of the existence of the order constitutes sufficient notice); *see also* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1006-15 (1993) (discussing the role of law enforcement in preventing domestic violence). For other state statutes concerning transmission and notification of protective orders see CONN. GEN. STAT. ANN. § 46b-15 (West Supp. 1994); TEX. FAM. CODE ANN. § 71.17 (West Supp. 1994); W. VA. CODE § 48-2A-12 (Supp. 1994).

11. *See* CAL. PENAL CODE § 12001(b) (West 1992) (defining a firearm as any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion).

incident involving a threat to human life or physical assault, as necessary for the protection of the law enforcement official or other persons at the scene.[13] Under Chapter 872, members of the California Highway Patrol are granted this authority.[14]

Existing law provides immunity from civil liability to law enforcement or Department of Justice officials, when a person who is the subject of a protective order is able to purchase or receive a firearm due to the failure of a court to provide a required notification, and another person is injured.[15] Chapter 872 extends this immunity to employees of a court.[16]

INTERPRETIVE COMMENT

Chapter 872 was enacted in order to ensure rapid entry of restraining order information into the state Department of Justice's Domestic Violence Protective Order Registry.[17] Chapter 872 was also enacted to make the process of applying for a restraining order less confusing during a time that is often exceedingly stressful.[18] This is accomplished by the distribution of informational packets to the courts.[19]

Johnnie B. Beer

12. *See id.* § 12028.5(a)(4) (amended by Chapter 872) (defining deadly weapons as weapons, the possession or concealed carrying of which is prohibited by California Penal Code § 12020).

13. *Id.* § 12028.5(b) (amended by Chapter 872); *see id.* (defining law enforcement officials with the authority to remove firearms from the scene of a domestic violence incident as sheriffs, undersheriffs, deputy sheriffs, marshals, deputy marshals, city police officers, members of the University of California Police Department, deputized or appointed personnel as defined in California Penal Code § 830.6, members of the California State University Police Department, peace officers of the Department of Parks and Recreations, housing authority patrol officers, and parole and probation officers); *id.* (requiring that the firearm or deadly weapon be discovered in plain sight or as the result of a consensual search).

14. *Id*; *see* CAL. VEH. CODE §§ 2250-2269 (West 1987 & Supp. 1994) (defining the membership, requirements, and duties of the California Highway Patrol).

15. *Id.* § 6385(d) (amended by Chapter 872); *see also* CAL. PENAL CODE § 12021(g) (West Supp. 1994) (imposing criminal penalties for the acquisition of a firearm while subject to a protective order).

16. CAL. FAM. CODE § 6385(d) (amended by Chapter 872).

17. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3034, at 3 (Apr. 20, 1994); *see id.* (noting that immediate transmission protects the petitioner in case the copy of the order or the proof of service is lost).

18. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 3034, at 4 (Aug. 12, 1994).

19. *Id.*

Family; elder abuse—provisional reorganization

Welfare and Institutions Code §§ 15610, 15610.1, 15620, 15620.5, 15630, 15631, 15632, 15633, 15633.5, 15635, 15640, 15650 (repealed); §§ 15610, 15610.05, 15610.07, 15610.10, 15610.13, 15610.15, 15610.17, 15610.20, 15610.23, 15610.25, 15610.27, 15610.30, 15610.35, 15610.37, 15610.40, 15610.43, 15610.45, 15610.47, 15610.50, 15610.53, 15610.55, 15610.57, 15610.60, 15610.63, 15610.65, 15630, 15631, 15632, 15633, 15633.5, 15636, 15640, 15650, 15653, 15654, 15656, 15658, 15659 (new); § 15600 (amended).
SB 1681 (Mello); 1994 STAT. Ch. 594

Under existing law, any care custodian,[1] health practitioner,[2] or employee of a county adult protective services agency[3] or a local law enforcement agency[4] that reasonably suspects[5] an elder[6] or dependent adult[7] is being abused must report their suspicions to the appropriate agency.[8] Chapter 594 expands the definition

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1. *See* CAL. WELF. & INST. CODE § 15610.17 (enacted by Chapter 594) (defining care custodian).
2. *See id.* § 15610.37 (enacted by Chapter 594) (defining health practitioner).
3. *See id.* § 15610.13 (enacted by Chapter 594) (defining adult protective services agency); *see also* Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 861, 869 (1990-1991) (stating that adult protective services "are traditionally defined as a system of preventative, supportive, and surrogate services for the elderly living in the community to enable then to maintain independent living and avoid abuse and exploitation" (quoting John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 GERONTOLOGIST 250, 251 (1978))).
4. *See* CAL. WELF. & INST. CODE § 15610.45 (enacted by Chapter 594) (defining local law enforcement agency).
5. *See id.* § 15610.65 (enacted by Chapter 594) (defining reasonable suspicion).
6. *See id.* § 15610.27 (enacted by Chapter 594) (defining elder as any person residing in this state, 65 years of age or older).
7. *See id.* § 15610.23 (enacted by Chapter 594) (defining dependent adult as any person residing in this state between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age).
8. *Id.* § 15630(b) (enacted by Chapter 594); 1990 Cal. Legis. Serv. ch. 241, sec. 1, at 1199-1201 (amending CAL. WELF. & INST. CODE § 15630); *see* CAL. WELF. & INST. CODE § 15610.07 (enacted by Chapter 594) (defining abuse of an elder or dependent adult as physical abuse, neglect, fiduciary abuse, abandonment, isolation, or other treatment with resulting physical harm or pain or mental suffering, or the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering); *see also id.* § 15610.30 (enacted by Chapter 594) (defining fiduciary abuse as a situation in which any person who has the care or custody of, or who stands in a position of trust to, an elder or a dependent adult, takes, secretes, or appropriates their money or property, to any use or purposes not in the due and lawful execution of his or her trust); *id.* § 15610.43 (enacted by Chapter 594) (defining isolation); *id.* § 15610.53 (enacted by Chapter 594) (defining mental suffering as fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by threats, harassment, or other forms of intimidating behavior); *id.* § 15610.57 (enacted by Chapter 594) (defining neglect); *id.* § 15610.63 (enacted by Chapter 594) (defining physical abuse); Peter J. Strauss, *Before Guardianship: Abuse of Patient Rights Behind Closed Doors*, 41 EMORY L.J. 761, 764-66 (1992) (indicating that systems protecting the patient crumble when interests exist that are separate from those of the patient); Judy Foreman, *Millions of Elder Americans Live in Fear of Abuse; Aging*, BOSTON GLOBE, Feb. 21, 1994, at 43 (listing the indications of abuse); *cf.* DEL. CODE ANN. tit. 31, § 3901 (1985); ILL.

of care custodian to include members or support staff of independent living centers, clients rights advocates,[9] court investigators, Alzheimer's Disease Day Care Resource Centers, vocational rehabilitations facilities, or any other private assistance agencies that provide health services or social services to elders or dependent adults.[10]

Under prior law, all reports by any care custodian or health practitioner of abuse or suspected abuse were made to the county adult protective services agency or the local law enforcement agency.[11] Under Chapter 594, if abuse has occurred in a long-term care facility,[12] with the exception of a state mental health hospital or a state developmental center, the report will be made to the local long-term care ombudsman[13] or the local law enforcement agency.[14] However, if the abuse occurred in a state mental health hospital or a state developmental center, the report will be made to an investigator of the State Department of Mental Health,[15] the State Department of Developmental Services,[16] or the local law enforcement agency.[17] If the abuse has not occurred in either of the instances cited above, then the abuse will be reported to a county adult protective services agency or the local law enforcement agency.[18]

Prior law required the ombudsman coordinator to report to the county adult protective services agency, who then reported monthly to the State Department of Social Services.[19] Under Chapter 594 the ombudsman program now reports monthly to the Department of Aging,[20] and the Department of Aging reports quarterly to the State Department of Social Services.[21]

ANN. STAT. Ch. 320 para. 20/3 (Smith-Hurd 1993); MO. REV. STAT. § 565.180 (Supp. 1994); MONT. CODE ANN. § 52-3-802 (1993) (providing for the protection of elderly and/or dependent adults).

9. *See* CAL. WELF. & INST. CODE § 15610.20 (enacted by Chapter 594) (defining client's rights advocate as the individual or individuals assigned by a regional center of state hospital developmental center to be responsible for clients' rights assurance for persons with developmental disabilities).

10. *Id.* § 15610.17 (enacted by Chapter 594).

11. 1990 Cal. Legis Serv. ch. 241, sec. 1, at 1199-1201 (amending CAL. WELF. & INST. CODE § 15630).

12. *See* CAL. WELF. & INST. CODE § 15610.47 (enacted by Chapter 594) (defining long-term care facility).

13. *See id.* § 15610.50 (enacted by Chapter 594) (defining long-term care ombudsman as the State Long-Term Care Ombudsman, local ombudsman coordinators, and other persons currently certified as ombudsman by the Department of Aging); *see also* CAL. EDUC. CODE §§ 9700-9719.5 (West 1984 & Supp. 1994) (defining the duties and responsibilities in the Long-Term Care Ombudsman Program).

14. CAL. WELF. & INST. CODE § 15630(b)(1) (enacted by Chapter 594).

15. *See id.* §§ 4000-4091 (West 1984 & Supp. 1994) (defining the duties and responsibilities of the State Department of Mental Health).

16. *See id.* §§ 4400-4474 (West 1984 & Supp. 1994) (defining the duties and responsibilities of the State Department of Developmental Services).

17. *Id.* § 15630(b)(2) (enacted by Chapter 594).

18. *Id.* § 15630(b)(3) (enacted by Chapter 594).

19. 1990 Cal. Legis. Serv. ch. 241, sec. 1, at 1199-1201 (amending CAL. WELF. & INST. CODE § 15630); *see also* CAL. WELF. & INST. CODE §§ 10550-10618 (West 1984) (defining the duties and responsibilities of the State Department of Social Services).

20. *See* CAL. WELF. & INST. CODE §§ 9300-9310 (West 1984) (defining the duties and responsibilities of the Department of Aging).

21. *Id.* § 15658(c) (enacted by Chapter 594).

Existing law provides specific situations in which confidential information regarding elder abuse may be revealed.[22] Chapter 594 expands this provision to include situations between members of a multidisciplinary team.[23] Chapter 594 also provides for the exchange of information between agencies that had referred or reported abuse to the county adult protective services agency, long-term care ombudsman program, or local law enforcement agency who conducted the investigation.[24]

Prior law required the State Department of Social Services to consult with the State Department of Education[25] in the development of reporting forms.[26] Chapter 594 repeals this provision and now makes it mandatory that the Department of Social Services consult with various other agencies in the development of forms.[27]

Chapter 594 also makes it a crime for any person to: (1) Cause a dependent adult to suffer; (2) inflict unjustifiable physical pain or mental suffering on a dependent adult; (3) willfully cause or permit the elder or dependent adult to be injured where the person is responsible for the adult's care or custody; or (4) cause or permit the elder or dependent adult to be placed in a situation that endangers his or her person or health.[28] In addition, Chapter 594 makes it a misdemeanor for any person who is mandated to report an instance or suspected instance of abuse and does not do so.[29]

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22. *Id.* § 15633(b)(1) (enacted by Chapter 594); *see id.* (allowing reports of suspected elder or dependent adult abuse and information to be disclosed to certain persons or agencies only where the information is relevant to the incident of abuse); *see also id.* § 15633.5(a) (enacted by Chapter 594) (elaborating on the definition of persons and agencies upon which information may be given as investigators from an adult protective services agency, a local law enforcement agency, or the bureau of Medi-Cal Fraud which is investigating a known or suspected case of elder or dependent adult abuse).

23. *Id.* § 15633(b)(2)(A)-(B) (enacted by Chapter 594); *see id.* § 15610.55 (enacted by Chapter 594) (defining multidisciplinary team).

24. *Id.* § 15640(f) (enacted by Chapter 594).

25. *See* CAL. EDUC. CODE §§ 33300-33319.5 (West 1993) (defining the duties and responsibilities of the State Department of Education).

26. 1990 Cal. Legis. Serv. ch. 241, sec. 1, at 1191-1201 (amending CAL. WELF. & INST. CODE § 15633).

27. CAL. WELF. & INST. CODE § 15658(a) (enacted by Chapter 594); *see id.* (listing the various agencies as the Department of Aging, the State Department of Developmental Services, the State Department of Mental Health, the Bureau of Medi-Cal Fraud, professional medical and nursing agencies, hospital associations, and county welfare departments).

28. *Id.* § 15656 (enacted by Chapter 594); *see id.* § 15656(e) (enacted by Chapter 594) (exempting any person found neglectful under California Welfare and Institutions Code § 15610.57(b) from prosecution); *see also id.* § 15610.57(b) (enacted by Chapter 594) (stating that no person shall be considered neglected or abused for the sole reason that he or she relied voluntarily on treatment by spiritual means through prayer alone in lieu of medical treatment); *cf.* CAL. PENAL CODE § 368(a),(b) (West 1984) (providing that a person who has inflicted pain or mental suffering or endangered the health of an elder or dependent adult may be charged with an alternate felony/misdemeanor); People v. Heitzman, 23 Cal. App. 4th 1041, 1047, 23 Cal. Rptr. 2d 199, 203 (1993) (holding that a daughter had the duty to care for her father and was criminally liable for his death under the California Penal Code), *review granted* 25 Cal. Rptr. 2d 389; People v. Manis, 10 Cal. App. 4th 110, 115-17, 12 Cal. Rptr 2d 619, 622-23 (1992) (holding that California Penal Code § 368 is not unconstitutionally vague and overbroad, and does not violate the Due Process or Equal Protection Clauses of the Constitution), *review denied*, 1993 Cal. LEXIS 718 (1993).

29. CAL. WELF. & INST. CODE § 15630(g) (enacted by Chapter 594); *see id.* (providing that a violation of this section is a misdemeanor punishable by not more than six months in the county jail or by a fine of not more than $1000, or by both that fine and imprisonment).

INTERPRETIVE COMMENT

In 1990, thirty-one million adults were over the age of sixty-five.[30] This number is expected to grow to thirty-five million by the year 2000.[31] Although statistics are relatively scarce regarding elder abuse,[32] it is estimated that the number of elder or dependent abuse victims in the nation is one to two million a year.[33] Chapter 594 was enacted to respond to this growing rate of abuse.[34] In doing so, Chapter 594 also reorganizes the elder and dependent adult abuse provisions to decrease confusion and ease interpretation.[35]

Chapter 594's provision regarding confidentiality helps to prevent, identify, and treat persons that are victims of such elder or dependent abuse.[36] However, Chapter 594 is not free from problems; namely, concerns regarding the elderly's

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30. Garfield, *supra* note 3, at 862.

31. *Id.*

32. *See* Christine A. Metcalf, *A Response to the Problem of Elder Abuse: Florida's Revised Adult Protective Services Act*, 14 FLA. ST. U. L. REV 745, 746 (1986-87) (stating that generalizations from existing data are troublesome because state definitions of abuse and of those who need protective services differ); *see also* Sandra Guthans, *Information on Abuse of Elderly is Obscure*, TIMES-PICAYUNE, May 22, 1994, at 2A1 (indicating that family violence studies frequently do not distinguish between victims that are elderly and victims of spousal abuse).

33. Foreman, *supra* note 8; *see also* Strauss, *supra* note 8 (quoting Patricia A. Young, *Home-Care Characteristics that Shape the Exercise of Autonomy*, GENERATIONS, Supp. 1990, at 17-19) (stating that elderly family members rarely will admit that abuse is happening because of their dependency and the natural bond linking parent and child); Theresa Tighe, *Abused Elders Can Get Help but Often Are Afraid*, ST. LOUIS POST-DISPATCH, Apr. 24, 1994, at 1D (stating that statistics from Missouri and Illinois demonstrates that the most common victim of abuse is the white widow and the most common abuser is the victim's child); *Violence Against Older Women on the Increase*, SAN DIEGO UNION-TRIB., June 6, 1994, at E2 (indicating that women make up 59% of the elderly population and 75% of the elder abuse victims); *cf.* Jan E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1853 (1992) (explaining that caregiving is a stressful and demanding job for which most caregivers are unequipped to handle properly (quoting Jane Clifford, *Parents Helping Their Parents*, SACRAMENTO BEE, July 1, 1990, D1, D4)); Michael Schuster, *Board and Care; How Effective Are Licensing Standards?*, CLEARINGHOUSE REV., Oct. 1993, at 600, 605 (stating that the most at-risk elderly and disabled adults live in board and care homes); *id.* at 604 (indicating that 28,000 board and care homes are unlicensed); *id.* at 600 (defining board and care as nonmedical community-based living arrangements that provide shelter, board, 24-hour supervision or protective oversight, and personal care services to residents (not related to the operator) (quoting American Association of Retired Persons, *The Regulation of Board and Care Homes: The Result of a Survey in the 50 States and The District of Columbia* 3 (1993))). *Contra* Neil Gilbert, *Miscounting Social Ills; Politically-Motivated Social Science Research; Fraud in Research*, SOCIETY, Mar. 1994, at 18 *passim* (stating that policy considerations have become muddled due to extrapolations of research and indicating that the figures reported are not entirely accurate).

34. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1681, at 2 (Apr. 4, 1994); *see also* Sandra Guthans, *Program Targets Elder Abuse, Neglect*, TIMES-PICAYUNE, June 16, 1994, at 7B1 (demonstrating other programs that are designed to help identify and report abuse such as the Gatekeepers Program in New Orleans, LA., originating from Spokane, WA., where non-traditional sources make referrals to the Elderly Protective Services). These businesses include a regional transit authority, fire department, bank, and ambulance service. *Id.*

35. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1681, at 2 (Apr. 4, 1994).

36. *Id*; *see id.* (indicating that persons who are trained and qualified to serve on a multidisciplinary team can disclose information and records that are relevant to the prevention, identification, or treatment of abuse of elderly or dependent persons).

right to self-determination that arises whenever the treatment of abuse is mandated.[37]

Marnie I. Smith

Family; relative caregiver's rights—medical care authorization

Family Code §§ 6550, 6552 (new); Education Code § 48204 (amended).
SB 592 (Russell); 1994 STAT. Ch. 98

Existing law creates a mechanism for establishing the guardianship of a minor.[1] Chapter 98 provides for a caregiver's authorization affidavit that allows a caregiver eighteen years of age or older to enroll a minor in school, consent to school-related medical care[2] and, where the caregiver is a relative[3], give the caregiver the general power to consent to and authorize medical and dental care as specified.[4]

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37. Laurie A. Lewis, *Toward Eliminating the Abuse, Neglect, and Exploitation of Impaired Adults: The District of Columbia Adult Protective Services Act of 1984*, 35 CATH. U. L. REV. 1193, 1197 (1986); *see id.* (emphasizing that elderly individuals' right to self-determination should not be overlooked because of age); *see also* Katheryn D. Katz, *Elder Abuse*, 18 J. FAM. L. 695, 719 (1979-80) (explaining that adults who have refused the services of a protective agency may find themselves in an incompetency hearing where the refusal of services proves lack of capacity to manage their own affairs and indicating that even if an adult voluntarily accepts the services, he or she may still find herself or himself removed from his or her home and institutionalized).

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1. CAL. PROB. CODE § 1510 (West Supp. 1994); *see id.* § 1510(a) (West Supp. 1994) (providing that a relative or other person on behalf of the minor, or the minor if 12 years of age or older, may file a petition for the appointment of a guardian of the minor); *see also id.* § 1513(a) (West Supp. 1994) (suggesting that a court investigator, probation officer, or domestic relations investigator may make an investigation and recommendation concerning each proposed guardianship); *id.* § 1514(a) (West Supp. 1994) (stating that the court may appoint a guardian for the minor if it appears necessary and convenient); Guardianship of Pankey, 38 Cal. App. 3d 919, 927, 113 Cal. Rptr. 858, 863 (1974) (stating that the issue of whether it is necessary and convenient to appoint a guardian of a minor who has a parent living is complex, but the crucial criterion is the best interests of the child, and a court should not be slow to recognize those who in good faith seek to assist the court in its decisions); *In re* Levy, 137 Cal. App. 2d 237, 247, 290 P.2d 320, 327 (1955) (stating that the cardinal consideration governing the court in its appointment of a guardian is how to serve most effectively the best interests and temporal, moral, and mental welfare of the child).

2. *See* CAL. FAM. CODE § 6550(i)(3) (enacted by Chapter 98) (defining school-related medical care as medical care for pupils that is required by a state or local governmental authority as a condition for school enrollment, including immunizations, physical examinations, and medical examinations conducted in schools).

3. *See id.* § 6550(i)(2) (enacted by Chapter 98) (defining relative as a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution).

4. *Id.* § 6550(a) (enacted by Chapter 98); *see id.* (eliminating the need for a guardianship to enable a relative caregiver to authorize the provision of medical and dental care to the minor child living with the relative caregiver); *id.* § 6550(b) (enacted by Chapter 98) (noting that the caregiver's affidavit will not be valid for more than one year after the date on which it was executed); *id.* § 6550(c) (enacted by Chapter 98) (adding

Chapter 98 also declares that no person who acts in good faith reliance on a caregiver's authorization affidavit to provide medical or dental care without actual knowledge of facts contrary to those stated on the affidavit is subject to any criminal or civil penalties or any professional disciplinary action for such reliance.[5] Chapter 98 provides a form of the caregiver's affidavit to be signed under penalty of perjury, and the affidavit is valid for up to one year after the date on which it is executed.[6]

Existing law lists the various circumstances under which a pupil is deemed to comply with the residency requirements for school attendance in a school district.[7] Chapter 98 mandates that the home of a relative caregiver also meets the various requirements for compliance.[8]

INTERPRETIVE COMMENT

Under Chapter 98, a nonjudicial process has been created by which "relative caregivers" have authorization to provide for the schooling or medical care of a minor child without affecting the parental rights of the child's parents.[9] Chapter

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that the decision of a caregiver to consent to or refuse medical or dental treatment for a minor will be superseded by any contravening decision of the parent or other person having legal custody of the minor, provided the decision of the parent or legal custodian of the minor does not jeopardize the life, health, or safety of the minor).

5. *Id.* § 6550(d) (enacted by Chapter 98); *see id.* (stating that even if medical or dental care is provided to a minor in contravention of the wishes of the parent or other person having legal custody of the minor, a lack of actual knowledge of that person's wishes prevents the caregiver from facing liability).

6. *Id.* §§ 6550(b), 6552 (enacted by Chapter 98).

7. CAL. EDUC. CODE § 48204 (amended by Chapter 98); *see id.* § 48204(a)-(c), (e)-(f) (amended by Chapter 98) (allowing compliance under the following circumstances: (1) When a pupil is one who is placed within the boundaries of the school district in a regularly established licensed children's institution, or a licensed foster home, or a family home pursuant to a commitment or placement; (2) when a pupil is one for whom interdistrict attendance has been approved; (3) when a pupil is one whose residence is located within the boundaries of the school district and whose parent or legal guardian is relieved of responsibility, control, and authority over the minor through emancipation; (4) when a pupil is one whose parent or legal guardian has established the residence of the pupil in a home located in the boundaries of that school district, provided that home is properly licensed if licensure is required by law; (5) when a pupil is one who resides in a state hospital within the boundaries of the school district; and (6) when an elementary school pupil has one or both parents, or a legal guardian, who is employed within the boundaries of the school district).

8. *Id.* § 48204(d) (amended by Chapter 98).

9. CAL. FAM. CODE § 6550(a) (enacted by Chapter 98); *see* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 592, at 3 (June 8, 1993) (stating that SB 592 will make it easier for minors to get the medical care they need, since the current guardianship system is time-consuming and costly for both relatives and the courts); Jennifer Cohen, *Guardians of the Grandkids—The Crack Epidemic and Other Social Problems Have Prompted an Increase in Grandparent Guardianships—A Solution to Taking Care of Kids That's Fraught with Its Own Problems*, THE RECORDER, July 15, 1993, at 1 (discussing the plight of grandparent guardians who, unlike non-family caregivers, are not eligible for state foster-care money or programs aimed at training caregivers in how to deal with the physical or emotional problems of minors); Andrew Fegelman, *Mom with AIDS Seeks Precedent—She Would Like a Guardian-in-Waiting for Her 2 Children*, CHI. TRIB., Jan. 25, 1993, at Chicagoland 3 (stating that with a terminally ill patient, no guardian can be appointed until the death of the parent, and the appointment procedure usually takes a month, during which time the child can have difficulties receiving medical care); *Guardian Denied in AIDS case—Court Rejects Mom's Request to Appoint Standby Parent*, CHI. TRIB., Feb. 2, 1993, at Chicagoland 3 (reporting that the court refused to appoint a standby guardian for a mother with AIDS, preferring to wait for the Legislature to initiate the new law); *see also*

98 also provides that a child is a resident of a school district if the home of the caregiver is in the district.[10] According to the author of Chapter 98, the new law will lighten the burden carried by thousands of relatives in California who are raising children left in their care, by establishing a simple procedure to allow them to authorize needed medical care and to enroll the children in school; many relative caregivers had been told in the past that they had to be the child's legal guardian before the child could be enrolled in school.[11] This law has the support of several important interest groups that wish to provide basic necessities to children while protecting the existing legal rights of their parents.[12] As times change, the Legislature is apparently attempting to fashion mechanisms to insure the health and welfare of the state's children.[13]

Joseph A. Tommasino

Lipscomb v. Simmons, 962 F.2d 1374, 1390 (9th Cir. 1992) (Kozinski, J., dissenting) (protesting that it is particularly perverse to conclusively deny foster-care benefits to children living with needy relatives while providing the same benefits to children living with strangers or in an institution).

10. CAL. EDUC. CODE § 48204(d) (amended by Chapter 98).

11. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 592, at 4 (May 4, 1994); *see* 1994 Cal. Leg. Serv. ch. 98 § 1, at 489 (declaring that the California Legislature is responding to its findings that there was a 40% increase in the number of children who had lived with a nonparent relative during the 1980's and that there are, according to the 1990 census, 673,563 minors living with nonparent relatives and 207,825 minors living with nonrelatives); ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 592, at 4 (May 4, 1994) (stating that guardianship proceedings are costly, time-consuming for all involved, and irritating since relative caregivers must often make numerous trips to court despite the lack of personal transportation and the presence of child-care conflicts); *id.* at 1-2 (asserting that 88% of state children lived with their own parents while the remaining children were scattered among grandparents, other relatives, nonrelatives, and group quarters); *cf.* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883 (1984) (advocating the view that states should develop options that do not presume the exclusivity of parenthood but instead recognize the other kinds of familial relationships that children have developed); Candace M. Zierdt, *Make New Parents But Keep the Old*, 69 N.D. L. REV. 497, 506 (1993) (recognizing that biology is a strong source of identity for the child and that the concept of family should be extended to grandparents, godparents, and even previous foster parents).

12. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 592, at 4-5 (May 4, 1994); *see id.* (noting the support of the following groups: (1) The California Judges Association, which believes that many caregivers do not desire full guardianship or adoption but would rather have SB 592's limited legal status; (2) Legal Services for Children, Inc., which feels that a guardianship requirement simply leaves too many children unable to be enrolled in school; and (3) Sutter Center for Women's Health, which wants the recent CAL-LEARN legislation to thrive and allow adolescents who are pregnant and/or parenting to attend school full-time).

13. Peter C. Valente & Joann T. Palumbo, *Standby Guardians*, N.Y. L.J., Mar. 31, 1993, at 3; *see id.* (explaining how the AIDS crisis has emphasized a need for an alternate approach to the appointment of a guardian for children of a parent (who in many cases is a single parent), who is faced with death or chronic incapacity); *see also* Fegelman, *supra* note 7, at Chicagoland 3 (estimating that by 1995, 45,700 children will be parentless because of AIDS, and the number will rise to 80,000 by the year 2000); *id.* (noting that advocates say a change in the law is needed not only because of the number of AIDS cases, but also to protect families affected by any terminal illness).

Family; reunification services—child conceived through molestation by parent

Welfare and Institutions Code § 361.5 (amended).
AB 1082 (Andal); 1994 STAT. Ch. 57

Existing law provides that when a minor is removed from the custody of a parent or guardian,[1] child welfare services are provided for the purpose of reunifying[2] the parent or guardian with the minor.[3] However, existing law also states that such reunification services are not provided under circumstances where the efforts would be fruitless.[4] Chapter 57 adds to this set of circumstances the situation where the minor was conceived in an act of sexual intercourse with a child under fourteen years of age.[5] Chapter 57 only applies to the parent committing the child molestation involving sexual intercourse which results in conception.[6] However, Chapter 57 also provides that reunification may be granted

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1. *See* CAL. WELF. & INST. CODE § 300 (West Supp. 1994) (placing a child in the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court when necessary to protect the child from substantial risk of physical harm, emotional damage, sexual abuse or acts of cruelty); *id.* § 361 (West Supp. 1994) (permitting the court to take physical custody of a dependent child from the parents if the court finds clear and convincing evidence of any of the following: (1) Danger to physical health; (2) severe emotional damage; (3) substantial risk of or past sexual abuse; (4) no provision for support of the child; (5) the parent has declined custody and has been notified that if the child remains out of custody for a year that the child may be declared permanently free of the parent's custody and control).

2. *See id.* § 16500.5(c)(2) (West Supp. 1994) (defining family reunification services as including counseling, mental health and substance abuse treatment, respite, day treatment, transportation, homemaking, and family support services); *In re* Zacharia D., 6 Cal. 4th 435, 446-47, 862 P.2d 751, 758-59, 24 Cal. Rptr. 2d 751, 758-59 (1993) (describing the policies of reunification services as first being to reunify the family, if possible within a limited amount of time, but, if not, then to provide for permanent placement of the child elsewhere); *In re* Brittany S., 17 Cal. App. 4th 1399, 1406-07, 22 Cal. Rptr. 2d 50, 54 (1993) (adopting the rule that reunification services must be tailored to the unique facts of each family's situation), *review denied*, 1993 Cal. LEXIS 6444 (1993); *cf.* THE BACKLASH: CHILD PROTECTION UNDER FIRE 34-35 (John E.B. Myers ed., 1994) (describing the federal Adoption Assistance and Child Welfare Act of 1980, which calls for removal of children only when necessary, for efforts to return children after removal, and for placement of children in permanent adoptive homes when return is not possible, as the basis for the modern child protection system in the United States).

3. CAL. WELF. & INST. CODE § 361.5(a) (amended by Chapter 57).

4. *Id.* § 361.5(b)(1)-(6) (amended by Chapter 57); *see In re* Rebecca H., 227 Cal. App. 3d 825, 837, 278 Cal. Rptr. 185, 191 (1991) (referring to the exceptions in California Welfare and Institutions Code § 361.5(b) as the Legislature's recognition that under certain circumstances reunification will be fruitless); *see also* CAL. WELF. & INST. CODE § 361.5(b) (amended by Chapter 57) (dispensing with the need for reunification services where the parent's whereabouts are unknown, where the parent has a mental disability that would make the services useless, where there has been repeated sexual or physical abuse, and other serious situations).

5. CAL. WELF. & INST. CODE § 361.5(b)(7) (amended by Chapter 57); *see* CAL. PENAL CODE § 288 (West Supp. 1994) (declaring as felonious the commission of any lewd or lascivious act with a child under the age of 14); *id.* § 288.5 (West Supp. 1994) (declaring unlawful the continuous sexual abuse of a child under the age of 14); *see also In re* Donald R., 14 Cal. App. 4th 1627, 1632, 18 Cal. Rptr. 2d 442, 444 (1993) (interpreting California Penal Code § 288 as an enactment of an outright ban against sexual contact with children under 14 years of age).

6. CAL. WELF. & INST. CODE § 361.5(b)(7) (amended by Chapter 57).

to the parent who perpetrated the offense if the court finds by clear and convincing evidence that such reunification would serve the best interests of the child.[7]

Existing law provides that when reunification services are not ordered due to specified circumstances, the court must hold a permanency planning hearing[8] within 120 days.[9] Under Chapter 57 the court must also expedite the permanency planning hearing when reunification services are denied to a parent who had molested the child's other parent.[10]

INTERPRETIVE COMMENT

Chapter 57 is intended to prevent a child molester from seeking reunification with a child conceived via child molestation.[11] Chapter 57 is aimed at men.[12] However, due to its gender-neutral language, Chapter 57 could also have the

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7. *Id.* §361.5(c) (amended by Chapter 57); *cf.* La Croix v. Deyo, 437 N.Y.S. 2d 517, 519 (1981) (granting, in a paternity proceeding brought by an alleged father, the alleged father's motion to dismiss as meritless a defense based on the allegations that at the time of the commencement of the sexual relationship, the mother was 13 years old and at the time of conception she was 15 years old despite the fact that the alleged father was thus guilty of a misdemeanor at the time of conception).

8. *See* CAL. WELF. & INST. CODE § 366.25 (West Supp. 1994) (describing a hearing where, if the child is not to be returned to his or her parents, the court is to develop a permanent plan for the child's adoption or, if adoption is not possible, long-term foster care); *id.* § 366.26 (West Supp. 1994) (describing a hearing at which the court can terminate parental rights and develop a permanent plan for the child's adoption or, if adoption is not possible, long-term foster care).

9. *Id.* §361.5(f) (amended by Chapter 57); *see In re* Rebecca H., 227 Cal. App. 3d 825, 838, 278 Cal. Rptr. 185, 191 (1991) (explaining that if reunification is denied then the minor is placed on the "fast-track" to permanency planning).

10. CAL. WELF. & INST. CODE § 361.5(f) (amended by Chapter 57).

11. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1082, at 2 (Mar. 15, 1994); *see id.* (stating that the bill's author found three cases in San Joaquin County in which a child was conceived through molestation and the molester sought reunification); *id.* (quoting the author as stating that placement of a child with a molester raises the already high risk of recidivism); *cf.* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1082, at 2 (Jan. 6, 1994) (stating that where the father of a child has been convicted of molesting the mother, such person should not be able to involve himself in the life of the mother or child). *But see* Lehr v. Robertson, 463 U.S. 248, 261 (1983) (declaring, in the context of an adult mother and an adult father, that an unwed father acquires substantial protection under the Due Process Clause when he demonstrates a full commitment to the responsibilities of parenthood); *In re* Zacharia D., 6 Cal. 4th 435, 450, 862 P.2d 751, 761, 24 Cal. Rptr. 2d 751, 761 (1994) (asserting, in the context of an adult mother and an adult father, when an unwed father promptly comes forward and demonstrates commitment to emotional, financial and other parental responsibilities, his parental relationship cannot be terminated consistent with due process absent a finding of unfitness).

12. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1082, at 2 (Jan. 6, 1994); *see id.* (mentioning sex offenses committed against the child's mother); ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1082, at 3 (May 19, 1993) (referring to the child's mother as the presumed victim of the sex offense); *see also* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1082, at 2 (Mar. 15, 1994) (presupposing that the age of the mother, only, would be determinative of whether a child molestation had occurred). *But cf.* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 1082, at 1-2 (Apr. 12, 1994) (avoiding throughout the committee analysis any use of gender-specific terms).

somewhat anomalous effect of denying reunification to a mother who conceived the child when she was over fourteen and the father was under fourteen.[13]

Owen W. Dukelow

Family; temporary removal of children from their homes

Welfare and Institutions Code §§ 306, 319 (amended).
AB 1579 (Polanco); 1994 STAT. Ch. 469

Existing law authorizes a social worker[1] to take temporary custody of a minor in special circumstances.[2] Existing law also requires the social worker, before taking custody of the child, to determine whether there were any reasonable

13. *Cf.* Kansas *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1276 (Kan. 1993) (permitting a 13-year-old father in a paternity proceeding to allege that he was a victim of statutory rape despite the fact that the 17-year-old mother plea bargained to a lesser offense). *But see* CAL. WELF. & INST. CODE § 361.5(b) (amended by Chapter 57) (permitting the court to order reunification if the court finds by clear and convincing evidence that reunification is in the best interest of the minor).

1. *See* CAL. BUS. & PROF. CODE § 4996 (West 1990) (requiring Licensed Clinical Social Workers to have a state license); *id.* § 4996.2(a)-(f) (West Supp. 1994) (listing requirements for licensure as a social worker); *see also id.* § 28 (West 1990) (stating the Legislature's findings that clinical social workers need adequate training in the assessment and prevention of child abuse, and setting out the required minimums for training to be considered adequate).

2. CAL. WELF. & INST. CODE § 306(a)(1)-(2) (amended by Chapter 469); *see id.* § 300 (West Supp. 1994) (describing the types of minors who may be determined to be a dependent child of the juvenile court, including: a minor who has or will suffer serious physical abuse inflicted by the minor's parent or guardian, a minor who has or will suffer serious physical harm as a result of the parent or guardian's neglect, and a minor who has been sexually abused); *id.* § 305 (West Supp. 1994) (authorizing a peace officer to take a minor into temporary custody in similar circumstances); *see also In re* Edward C., 126 Cal. App. 3d 193, 207, 178 Cal. Rptr. 694, 702-03 (1981) (upholding a lower court's finding that a removal of a physically abused child was proper pursuant to California Welfare and Institutions Code § 300); *In re* La Shonda B., 95 Cal. App. 3d 593, 601-02, 157 Cal. Rptr. 280, 285 (1979) (holding that the denial of the Los Angeles County's Department of Social Services petition for custody under California Welfare and Institutions Code § 300 was improper when the child was left in the joint custody of the father after the mother had severely physically abused the child); In re Nicole B., 93 Cal. App. 3d 874, 882, 155 Cal. Rptr. 916, 920 (1979) (holding that the placement of a child in the custody of her mother after she had been physically abused by a man living with them, when the mother had no knowledge of the abuse and the man had left the home and could not return, was proper); *cf.* ARK. CODE ANN. § 9-27-313(a)(3) (Michie 1993) (allowing law enforcement officers to remove a child from his or her home if the child is in immediate danger and removal is necessary to prevent serious harm to the child); FLA. STAT. ANN. § 39.401(1)(b) (West 1988 & Supp. 1994) (providing that a law enforcement officer may take a child into custody if the officer has reasonable grounds to believe the child is in danger and removal is necessary to avoid harm to the child); LA. CHILDREN'S CODE art. 621 (West 1994) (allowing a peace officer to take a child into custody without a warrant if the officer has grounds to believe the situation requires the child's immediate removal for its protection). *See generally* 27 CAL. JUR. 3D *Delinquent and Dependent Children* § 103 (1987) (describing the circumstances under which a peace officer and a social worker may take a minor into temporary custody).

services that could be provided which would allow the child to remain in the custody of his or her parents or guardians.[3]

Chapter 469 requires the social worker, when making the decision whether to remove the child from the house, to consider whether there is a person in the house who has not harmed the child and can protect and care for the child, and whether the person who has harmed the child is likely to leave the house and remain away.[4]

Existing law requires a juvenile court engaged in a dependency proceeding for a minor who had been removed from the custody of his or her parent or guardian to determine if an effort had been made to provide any available services that would have allowed the child to remain at home.[5] Chapter 469 requires that the court also determine if the social worker or peace officer attempted to find a person in the house who would protect and care for the child, and to determine if the child's abuser would leave the house and remain away.[6]

INTERPRETIVE COMMENT

The purpose of Chapter 469 is to eliminate the need to remove a child from an abusive household when it is unnecessary to do so because the child's abuser voluntarily agrees to leave the house and remain away.[7] Chapter 469 seeks to

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3. CAL. WELF. & INST. CODE § 306(b) (amended by Chapter 469); *see* CAL. WELF. & INST. CODE § 307.4(a) (West Supp. 1994) (requiring any peace officer, probation officer, or social worker who takes a child into temporary custody to immediately inform the parents or guardian of the child by the most efficient means available).

4. *Id.* § 306(b)(3) (amended by Chapter 469); *see id.* § 306(b)(1) (amended by Chapter 469) (requiring a social worker, before taking a child into custody, to determine if there are any services which, if provided to the parents or guardian of the child, would eliminate the need for the child's removal); *id.* § 306(b)(2) (amended by Chapter 469) (requiring a social worker to determine if a referral to a public assistance program would remove the need to take temporary custody of the child).

5. CAL. WELF. & INST. CODE § 319 (amended by Chapter 469); *cf.* ARK. CODE ANN. § 9-27-328 (Michie 1993) (requiring the courts, before ordering the removal of a child from its home, to make specific findings whether the removal is necessary to protect the child and whether any family services were made available to prevent the removal); FLA. STAT. ANN. § ch. 39.402(2) (West 1988 & Supp. 1994) (providing that a child taken into custody may be placed into a shelter only if necessary to protect the child and it is determined that the provision of appropriate and available services will not obviate the need for the removal); *id.* § 39.402(7) (West Supp. 1994) (prohibiting the removal of a child from his or her home if the provision of appropriate and available services would allow the child to remain safely at home); MISS. CODE ANN. § 43-21-301(3)(c) (1993) (allowing judges to issue an order to a law enforcement officer to take a child into custody if there is no reasonable alternative to custody); MO. ANN. STAT. § 211.183 (Vernon Supp. 1994) (requiring that, in a juvenile court proceeding regarding the removal of a child from its home, the court make a determination whether the provision of reasonable services would have allowed the child to remain safely at home).

6. CAL. WELF. & INST. CODE § 319 (amended by Chapter 469).

7. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1579, at 2 (June 28, 1994); *see* CAL. WELF. & INST. CODE § 16500.5 (West Supp. 1994) (providing that it is the Legislature's intent to encourage the continuity of the family unit by providing family preservation services that will remove the need for removal of children from their homes, or lessen the length and impact of the removal).

remedy the source of the problem, the abuse of the child, without punishing the child by removal from his or her home.[8]

Jason Decker

Family; visitation rights for siblings of a deceased parent

Family Code § 3102 (amended).
AB 3042 (Boland); 1994 STAT. Ch. 164

Existing law provides that if either parent of an unemancipated minor[1] is deceased, the children, parents, and grandparents of the deceased parent may be granted reasonable visitation with the minor during his or her minority upon a finding that the visitation would be in the best interest of the minor, as specified.[2] Chapter 164 adds siblings of the deceased parent to those persons who may be granted reasonable visitation.[3] Chapter 164 also clarifies the use of the term "grandparents" in the statute.[4]

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8. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1579, at 2 (June 28, 1994); *see* CAL. WELF. & INST. CODE § 361.5(a) (West Supp. 1994) (providing that whenever a child is removed from a parent's or guardian's custody, the court must order the probation officer to provide child welfare services for the purpose of facilitating the reunification of the family); *id.* § 361.5(b)(5)-(6) (West Supp. 1994) (providing that the court need not order child welfare services in order to facilitate the family reunification process if the child came into the court's jurisdiction under California Welfare and Institutions Code § 300, or as a result of severe sexual or physical abuse by a parent or guardian); *id.* § 281.5 (West 1984) (providing that if a probation officer removes a child pursuant to California Welfare and Institutions Code § 300, the officer should give primary consideration to placing the child with a relative, in order to facilitate family reunification).

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1. *See* CAL. FAM. CODE § 7002 (West 1994) (defining a person under the age of 18 years as an emancipated minor if any of the following conditions are met: (1) The person has entered into a valid marriage, whether or not the marriage has been dissolved; (2) the person is on active duty with the armed forces of the United States; or (3) the person has received a declaration of emancipation pursuant to California Family Code § 7122).

2. *Id.* § 3102(a) (amended by Chapter 164); *see id.* § 200 (West 1994) (granting the superior court jurisdiction in proceedings under this code); *id.* § 3022 (West 1994) (allowing the court, during the pendency of a proceeding or at any time thereafter, to make an order for the custody of a minor that it deems necessary or proper). *See generally id.* §§ 3400-3425 (West 1994) (establishing the Uniform Child Custody Jurisdiction Act).

3. *Id.* § 3102(a) (amended by Chapter 164); *see id.* § 3102(b) (amended by Chapter 164) (requiring the court to consider the amount of personal contact between the person and the child before the application for the visitation order); *id.* § 3102(c) (amended by Chapter 164) (noting that this section does not apply if the child has been adopted by a person other than a stepparent or grandparent of the child, and any visitation rights granted pursuant to this section before the adoption of the child automatically terminate if the child is adopted by a person other than a stepparent or grandparent of the child).

4. *Id.* § 3102(b)-(c) (amended by Chapter 164). Previously, the statute referred to "grandparents of the deceased parent" in subsection (a), but subsections (b) and (c) only referred to "grandparents," thus creating an ambiguity. *Compare id. with* 1993 Cal. Legis. Serv. ch. 219, sec. 116.77, at 1363 (amending CAL. FAM. CODE § 3102).

INTERPRETIVE COMMENT

According to the author of Chapter 164, the siblings of a deceased parent are family members who, in many instances, can be positive role models for the child, and thus belong on the list of relatives of a deceased person who may obtain visitation rights with a child of a deceased person.[5] Several state legislatures have reacted to the separation of siblings from one another by enacting provisions to facilitate visitation.[6] Other states have more general

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5. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 3042, at 1-2 (May 4, 1994); *cf.* Judy E. Nathan, Note, *Visitation after Adoption: In the Best Interest of the Child*, 59 N.Y.U. L. REV. 633, 636 (1984) (discussing how both visitation and adoption statutes require that courts act to promote the welfare of the child). *See generally* Annotation, *Visitation Rights of Persons Other than Natural Parents or Grandparents*, 1 A.L.R. 4TH 1270 (1993) (examining the familial relationships which courts have recognized in the awarding of visitation rights).

6. *See* ARK. CODE. ANN. § 9-13-102 (Michie 1993) (providing for reasonable visitation for any person who is a brother or sister, regardless of the degree of blood relationship); ILL. ANN. STAT. ch. 750, para. 5/607(b)(1) (Smith-Hurd Supp. 1994) (allowing the court to grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparents or great-grandparents or on behalf of the sibling); LA. REV. STAT. ANN. § 344(C) (West Supp. 1994) (declaring that if one of the parties in a marriage dies, the siblings of a minor child or children of the marriage may have reasonable visitation rights to such child or children during their minority if the court finds that such rights would be in the best interest of the child or children); MD. FAM. LAW CODE ANN., § 5-312(e) (1991) (stating that after an adoption, if it is in the child's best interest, the adoptive parent and a nonconsenting natural parent may agree to visitation privileges between the child and the natural parent or siblings); NEV. REV. STAT. ANN. § 125A.330(1) (Michie 1993) (asserting that if a parent of an unmarried minor child is deceased or divorced or separated from the parent who has custody of the child, or his or her parental rights have been relinquished or terminated, the district court in the county in which the child resides may grant to the grandparents, parents, and other children of either parent of the child a reasonable right to visit the child during the child's minority, based on the following considerations: (1) The love, affection, and other emotional ties existing between the party seeking visitation and the child; (2) the capacity and disposition of the party seeking visitation to give the child, among other things, love, affection, and guidance; (3) the prior relationship between the child and the party seeking visitation; (4) the moral fitness of the party seeking visitation; (5) the mental and physical health of the party seeking visitation; (6) the reasonable preference of the child, if the child has a preference, and if the child is determined to be of sufficient maturity to express a preference; (7) the willingness and ability of the party seeking visitation to facilitate and encourage a close and continuing relationship between the child and the parent or parents; (8) the medical and other needs of the child related to health as affected by the visitation; and (9) any other factor considered relevant by the court to a particular dispute); N.J. STAT. ANN. § 9:2-7.1(a)-(b) (West Supp. 1994) (providing that a grandparent or any sibling of a child residing in the state may apply for an order for visitation, and requiring the applicant to bear the burden of proving by a preponderance of the evidence that the granting of visitation is in the best interests of the child, based on the following factors: (1) The relationship between the child and the applicant; (2) the relationship between each of the child's parents or the person with whom the child is residing and the applicant; (3) the time elapsed since the child last had contact with the applicant; (4) the effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing and the applicant; (5) the time sharing arrangement existing between the parents with regard to the child, if the parents are divorced or separated; (6) the good faith of the applicant in filing the application; (7) any history of physical, emotional, or sexual abuse or neglect by the applicant; and (8) any other factor relevant to the best interest of the child); *id.* § 9:2-7.1(c) (West Supp. 1994) (noting that, with regard to any application, it will be *prima facie* evidence that visitation is in the best interest of the child if the applicant, in the past, had been a full-time caretaker for the child); N.M. STAT. ANN. § 32A-4-32(H) (Michie Supp. 1994) (describing that when grounds exist for a permanent guardianship for a child, the court may incorporate into the final order, provisions for visitation with the natural parents, siblings, or other relatives of the child, and any other provision necessary to rehabilitate the child or provide for the child's continuing safety and well being); N.Y. DOM. REL. LAW § 71 (McKinney Supp. 1994) (allowing, under equitable circumstances, a brother or sister, or a proper person on behalf of a

provisions for visitation by "others," "other relatives," or "any person."[7] Chapter 164, in particular, recognizes that family members of all types need each other's strengths and associations in their common experiences, and separating them unnecessarily is likely to be traumatic and harmful since the presence of relatives together serves to nourish familial bonds that can endure for a lifetime.[8]

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child, whether by half or whole blood, to apply to the supreme court for visitation rights for such brother or sister with respect to such child); N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney 1993) (noting that placement or regular visitation and communication with siblings or half-siblings will be presumptively in the child's best interests unless such placement or visitation and communication would be contrary to the child's health, safety, or welfare, or the lack of geographic proximity precludes or prevents visitation).

7. *See* ALASKA STAT. § 25.24.150(a) (1991) (providing that a court may make, modify, or vacate an order for the custody of or visitation with the minor child that may seem necessary or proper, including an order that provides for visitation by a grandparent or other person if that is in the best interest of the child); MICH. COMP. LAWS ANN. § 722.27b (West 1993) (permitting the court to provide for reasonable visitation of the child by the parties involved, the maternal or paternal grandparents, or by others, by general or specific terms and conditions); OHIO REV. CODE. ANN. § 3109.051(B)(1) (Anderson Supp. 1993) (declaring that in a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child, the court may grant reasonable companionship or visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent, if all of the following apply: (1) The grandparent, relative, or other person files a motion with the court seeking companionship or visitation rights; (2) the court determines that the grandparent, relative, or other person has an interest in the welfare of the child; and (3) the court determines that the granting of companionship or visitation rights is in the best interest of the child).

8. *See* Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 6 CORNELL L. REV. 1187, 1190; (recognizing that courts realize the importance of the sibling relationship and are reluctant to disrupt it); *see also* Obey v. Degling, 337 N.E.2d 601, 602 (N.Y. 1975) (emphasizing that bonds between brothers and sisters are strengthened by the likelihood that parents will pass away before their children). *See generally* DAVID FANSHELL & EUGENE B. SHINN, *Children in Foster Care* (1978) (suggesting that the intellectual, psychological, and physical development of children in long-term foster care is enhanced by visitation and contact, however minimal, with the biological family, for children exposed to sustained separation from their families are most vulnerable to the development of serious cognitive and personality impairments).