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## **No Longer a Personal Inconvenience: Chapter 266 and the Temporary Exemption of Nursing Mothers from Jury Duty**

*Amelia Burroughs*

### *Code Section Affected*

Code of Civil Procedure § 210.5 (new).

AB 1814 (Lempert); 2000 STAT. Ch. 266

*“[W]ean the bab[ies] and leave them with a relative . . . or a neighbor[.]”<sup>1</sup>*

### I. INTRODUCTION

The American Academy of Pediatrics recommends that infants breast-feed for the first twelve months of their lives.<sup>2</sup> While the only acceptable alternative to breast milk is formula, there are at least 100 ingredients in breast milk not found in formula.<sup>3</sup> Research from the medical community has established that breast milk nourishes infants and protects them from disease.<sup>4</sup> Babies receive disease-fighting antibodies to disease from a mother’s breast milk, including antibodies known to protect against pneumonia, botulism, bronchitis, staphylococcal infections, influenza, ear infections, and German measles.<sup>5</sup> Mothers also pass antibodies against other diseases within their environment through breast milk.<sup>6</sup> Thus, breast milk has proven to be the best source of nutrition for newborns.<sup>7</sup>

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1. Jury Commissioner’s response to Peggy Lambert’s request for exemption to jury service because she was nursing her premature twins. Letter from Peggy Lambert to Assemblymember Ted Lempert (Mar. 22, 2000) (copy on file with the *McGeorge Law Review*).

2. U.S. Food & Drug Administration, *Breast Milk or Formula: Making the Right Choice for Your Baby* (Sept. 1998), available at <http://www.fda.gov/opacom/catalogue/breastfed.html>. The Academy also asserts that there are no hard and fast rules about when to cease breastfeeding. *Id.*

3. *Id.*

4. Rebecca D. Williams, *Breast-Feeding Best Bet for Babies*, FDA CONSUMER (Oct. 1995), available at [http://www.fda.gov/fdac/features/895\\_brstfeed.html](http://www.fda.gov/fdac/features/895_brstfeed.html).

5. *Id.*

6. *Id.*

7. See Letter from Ruth Haskins, M.D., The American Academy of Obstetricians and Gynecologists, to Assemblymember Sheila J. Kuehl (Mar. 22, 2000) (copy on file with the *McGeorge Law Review*) (noting that breastfed babies have fewer allergies and feeding problems).

While the primary benefit of breast milk is nutritional, nursing may also create the psychological benefit of an attachment between mother and child.<sup>8</sup> Babies, who usually can see only twelve to fifteen inches away, may recognize the scent of their mother's own milk.<sup>9</sup> The child may also benefit from skin-to-skin contact with the mother, and a sense of warmth and comfort.<sup>10</sup> Furthermore, a breastfeeding mother separated from her child for an extended period of time is at risk for engorgement,<sup>11</sup> mastitis,<sup>12</sup> reduced milk supply, and emotional and physical distress.<sup>13</sup> Finally, newborns may need to nurse at least every two hours.<sup>14</sup> This may become impossible if a breastfeeding mother is called to jury service, and is separated from her nursing child.

In California, the practice of temporarily exempting nursing mothers from jury duty has been inconsistently applied from county to county.<sup>15</sup> Angela Ponzini, a breastfeeding mother called to jury duty in San Mateo County, requested an excuse from service until she was no longer breast-feeding her infant, but was told by the jury commissioner that "[p]ersonal inconvenience" . . . is not an acceptable reason to avoid jury duty.<sup>16</sup> In Belmont, Colleen McPeel-Bechtold was nursing an eight month-old infant receiving chemotherapy when the jury summons arrived.<sup>17</sup> She wrote to the jury commissioner requesting an excuse from service, but was told in response, that "[she] was not excused because breastfeeding [her] infant was considered a personal inconvenience."<sup>18</sup> According to Assemblymember Ted Lempert, the Jury Commissioner in San Mateo County was "operating in a manner consistent with the Rules of Court. [Jury Commissioners] may excuse a juror for undue hardship for care of a child, but they do not have to."<sup>19</sup> In enacting Chapter

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8. Williams, *supra* note 4, at 1.

9. *Id.*

10. American Academy of Family Physicians, *Breast Feeding and Bottle Feeding*, 54 AM. FAM. PHYSICIAN 1 (Jul. 1996), available at <http://www.aafp.org/patientinfo/breastfed.html> (copy on file with the *McGeorge Law Review*).

11. See STEDMAN'S MEDICAL DICTIONARY 514 (25th ed. 1990) (defining engorgement as a distention of the breasts with fluid).

12. See *id.* at 925-26 (defining mastitis as an inflammation of the breasts).

13. Letter from Brian Zamora, Director, San Mateo County Health Services Agency, to Assemblymember Ted Lempert (Feb. 23, 2000) [hereinafter, Zamora Letter] (on file with the *McGeorge Law Review*) (supporting AB 1814 and discussing the various dangers to inhibiting new mothers from nursing).

14. Williams, *supra* note 4.

15. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1814, at 3 (June 13, 2000).

16. Maria Alicia Gaura, *Mother of All Exemptions: Proposed Law Would Excuse Nursing Moms from Jury Duty*, S.F. CHRON., Mar. 14, 2000, at A13. See also e-mail from Angela Ponzini, to Assemblymember Ted Lempert (Sept. 24, 1999) (on file with the *McGeorge Law Review*) (stating that in response to her request for temporary exemption from the San Mateo County Jury Commissioner, she received a notice with "personal inconvenience and child care are not legal excuses" highlighted).

17. E-mail from Colleen McPeel-Bechtold, to Assemblymember Ted Lempert (Mar. 14, 2000) (copy on file with the *McGeorge Law Review*).

18. *Id.*

19. E-mail from Brad Strong, consultant to Assemblymember Ted Lempert, to author (May 31, 2000) (copy on file with the *McGeorge Law Review*).

266, however, California is the fourth state to temporarily exempt nursing mothers from jury service.<sup>20</sup>

## II. LEGAL BACKGROUND

The Sixth Amendment of the United States Constitution secures one's right to an "impartial jury" in "all criminal prosecutions."<sup>21</sup> Generally, all defendants are entitled to be "tried by a jury of his peers."<sup>22</sup> The jury must be a "cross-section of the community."<sup>23</sup> The Sixth Amendment right to a jury trial is also applicable to the states,<sup>24</sup> as is the fair cross-section requirement.<sup>25</sup>

In California, citizens are not exempt from jury service on the basis of race, color, religion, sex, national origin, occupation, or economic status.<sup>26</sup> At present, California's Code of Civil Procedure excuses a person from jury service only for "undue hardship," a term defined by the Judicial Counsel.<sup>27</sup> The Judicial Counsel instructs that an excuse on the ground of undue hardship *may*<sup>28</sup> be granted if the

20. Randy Dotinga, *Nursing Moms Want Out of Jury Duty, Seek Exemptions in California Law*, APBNEWS.CO, (Apr. 17, 2000), available at [http://www.apbnews.com/cjsystem/justicenews/2000/04/17/breastfeed0417\\_01.html](http://www.apbnews.com/cjsystem/justicenews/2000/04/17/breastfeed0417_01.html). See also IDAHO CODE § 2-209 (West 2000) (stating that jury service for nursing mothers shall be postponed until no longer nursing); IOWA CODE § 607A.5 (West 2000) (establishing that the mother of a breastfed child is excused unless the mother is regularly employed outside the household); OR. REV. STAT. § 10.050(4) (West 2000) (requiring that a court shall excuse a woman breastfeeding a child if the request is made in writing). The Minnesota Legislature has recently required the Minnesota Supreme Court jury reform task force to make recommendations regarding accommodation of nursing mothers summoned for jury service (2000 Minn. Sess. Law Serv. Ch. 269).

21. U.S. CONST. amend. VI.

22. U.S. CONST. art. III, § 2, cl.3.

23. *Glasser v. United States*, 315 U.S. 60, 85-86 (1942) (holding that the duty of jury selection "must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class").

24. *Duncan v. Louisiana*, 391 U.S. 145, 149-50, 156 (1968) (holding that the Sixth Amendment right to a jury trial is applicable to the states through the Fourteenth Amendment).

25. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (holding that petit juries must be made of a fair cross section of the community).

26. CAL. CIV. CODE § 204(a) (West 2000). However, there are exceptions for certain law enforcement personnel. See CAL. CIV. PROC. CODE § 219(b)(1)-(2) (West 2000) (exempting "peace officers" as defined in Penal Code sections 830.1 and 830.2(a)); see also Zamora Letter, *supra* note 13, at 2 (stating that the California Legislature added exemptions from jury service for Highway Patrol officers in 1992, and in 1994, exempted University of California police officers and personnel of the Department of Corrections Law Enforcement Liaison Unit).

27. CAL. CIV. PROC. CODE § 204(b) (West 2000); see also CAL. R. CT. 860(d)(1)-(7) (defining undue hardship as transportation difficulties, distance of travel problems, extreme financial burdens, undue risk to juror's property, or if the prospective juror has mental or physical disabilities impairing competency, juror's services are needed for the immediate public health and safety, or the perspective juror "has a personal obligation to provide actual and necessary care to another").

28. CAL. R. CT. 860(d).

prospective juror needs to provide personal childcare, and there is no comparable substitute available.<sup>29</sup>

Jury Commissioners in California usually honor nursing mothers' requests to be excused from jury service.<sup>30</sup> However, some California counties "are more aggressive and less sympathetic" about giving jury service postponements to breastfeeding mothers.<sup>31</sup> In Lake County, for example, Stephanie Taylor was nursing her four-month-old infant when she applied for an exemption from jury service.<sup>32</sup> The Jury Commissioner's Office responded emphatically that "breastfeeding was not a valid exemption from jury duty."<sup>33</sup> In Visalia, Peggy Lambert was nursing her premature twins, and applied for an exception from jury duty. In response to Lambert's application for jury service exemption, the Jury Commissioner's Office told her to "wean the bab[ies] and leave them with a relative . . . or a neighbor[.]"<sup>34</sup> These kinds of experiences are exactly the reasons why Assemblymember Lempert felt compelled to promulgate Chapter 266.<sup>35</sup>

### III. CHAPTER 266

Chapter 266 first requires the Judicial Council to adopt a rule of court to specifically address the postponement of jury service for nursing mothers.<sup>36</sup> Postponement would last for one year, or until the mother's child is no longer breastfeeding.<sup>37</sup> Furthermore, Chapter 266 also directs the Judicial Council to eliminate the need for a nursing mother to physically appear in court to make a postponement request.<sup>38</sup> To that end, Chapter 266 requires the Judicial Council to create a standardized jury summons that includes specific reference to postponement for breast-feeding mothers.<sup>39</sup> However, the use of the standardized summons will be voluntary unless otherwise prescribed by the California Rules of Court.<sup>40</sup>

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29. CAL. R. CT. 860(d)(7) (providing that a prospective juror must have "a personal obligation . . . to provide actual and necessary care to a child who requires the perspective juror's personal care and attention, and no comparable substitute care is either available or practical without imposing undue economic hardship on the prospective juror or person cared for").

30. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1814, at 3 (Mar. 28, 2000) (stating that Jury Commissioners do honor such requests of nursing mothers, but that Lempert "shared correspondence with the committee mentioning problems other women have apparently had in Contra Costa, Stanislaus and Tulare counties.").

31. Dotinga, *supra* note 20, at 1 (citing Paul Smith, Assemblymember Lempert's Chief of Staff).

32. E-mail from Stephanie Taylor, to Assemblymember Ted Lempert, Mar. 25, 2000 (copy on file with the *McGeorge Law Review*).

33. *Id.*

34. *Supra* note 1.

35. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1814, at 1 (Apr. 12, 2000).

36. 2000 Cal. Legis. Serv. ch. 266, sec. 1, at 2018.

37. *Id.*

38. *Id.*

39. CAL. CIV. PROC. CODE § 210.5 (enacted by Chapter 266).

40. *Id.* (stating that "[t]he Judicial Council shall adopt a standardized jury summons for use. . . ." but that, "[t]he use of the standardized jury summons shall be voluntary, unless otherwise prescribed by the rules of court.").

#### IV. ANALYSIS OF THE NEW LAW

Chapter 266 compels California's Jury Commissioners to postpone the jury service of breastfeeding mothers until their children are no longer nursing.<sup>41</sup> The United States Supreme Court has suggested that states may exempt certain groups from jury service and withstand fair cross-section challenges by defendants.<sup>42</sup> The Court has further explained that an appropriately tailored statute exempting potential jurors for the care of children would survive a Sixth Amendment challenge.<sup>43</sup> Therefore, it is highly likely that the exemption of breastfeeding mothers under Chapter 266 will pass any constitutional challenge.<sup>44</sup>

The Judicial Council's position seems to be that merely inconsistent compliance with Rule of Court 860 regarding postponement of jury service for breastfeeding mothers is not indicative of a need for a bill expressly stating that breastfeeding constitutes an undue hardship exemption.<sup>45</sup> However, the Legislature is apparently concerned that without a specific exemption provided in Rule of Court 860, the possibility for denial of an undue hardship exemption for breastfeeding mothers remains.<sup>46</sup> Chapter 266 allows for the postponement of jury service for one year, after which a mother may execute a sworn statement that her child is still breastfeeding.<sup>47</sup> Unlike other reasons for which a judge may excuse a prospective juror, the new law will specifically postpone jury service for the mother of a breastfed child.<sup>48</sup> Nursing mothers will become the only individuals specifically allowed postponement by law.<sup>49</sup>

There are two specific concerns with the language of Chapter 266. First, the adoption of Rule of Court 861, which creates the one-day/one-trial program, allows for the possibility that a mother of an older nursing child may serve one day and complete her duties under jury summons.<sup>50</sup> Even so, advocates of Chapter 266 insist

41. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1814, at 3-4 (Jun. 13, 2000).

42. Taylor, *supra* note 25, at 530-31 (writing in dicta that a jury is not made up of a representative cross-section "if large, distinctive groups are excluded from the [jury] pool" suggesting that smaller, discrete groups may be exempt without impinging upon the fair cross-section requirement). See also WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1034 (3d ed. 2000) (writing "that some groups may be so small as to not come within Taylor and some groups may be insufficiently 'distinct' to fall within the cross section requirement").

43. See Duren v. Missouri, 439 U.S. 357, 370 (1979) (holding that "a state has an important interest in assuring that those members of the family responsible for the care of children are available to do so" and suggesting that such an exemption would survive a cross-section challenge).

44. WAYNE R. LAFAVE ET AL., *supra* note 42, at 1034.

45. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1814, at 3-4 (June 13, 2000).

46. See *id.* at 4 (clarifying that a mother submits such a statement under penalty of perjury if she desires to extend her granted postponement of jury service).

47. *Id.*

48. CAL. CIV. PROC. CODE § 210.5 (enacted by Chapter 266).

49. See *id.* § 219(b)(1)-(2) (West 2000) (stating that jury service by California peace officers is excused, not postponed).

50. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1814, at § 5-6 (Mar. 28, 2000) (stating that California Rules of Court Rule 861 was created to shorten jury service time and that breastfeeding mothers could "serve one day on call and still discharge her responsibilities under the jury summons.").

that a mother being separated from her breastfeeding child at all raises concerns.<sup>51</sup> The American Academy of Pediatrics suggests that newborn babies feed at least every two hours, which is difficult if the mother is absent for an entire day.<sup>52</sup>

A second and more compelling concern is whether the standardized jury summons form, with a printed exemption for breastfeeding mothers, will be voluntarily used by the courts presently refusing to grant exemptions for nursing mothers.<sup>53</sup> Essentially, Chapter 266 requires the creation of a standardized jury summons that has a printed exception for nursing mothers, but courts are not required to use the standard form.<sup>54</sup> Requiring the mandated use of this form would make Chapter 266 more effective, as it would address the problem of rogue jury commissioners to grant exemptions to nursing mothers.<sup>55</sup>

## V. CONCLUSION

Chapter 266 is the solution for nursing mothers in counties that consider breastfeeding a “personal inconvenience.” It mandates that nursing mothers be given a postponement for a period of one year,<sup>56</sup> which coincides with the recommendation of the American Academy of Pediatrics that children be breastfed for the first year of life.<sup>57</sup> A jury summons will also contain postponement information for nursing mothers,<sup>58</sup> so as to avoid a courthouse appearance to request postponement thus, preventing the separation of mother from child. Chapter 266, it seems, is truly the “mother of all exemptions.”

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51. See Dotinga, *supra* note 20, at 2 (quoting nursing mother Emily Roysdon who, when she attempted to gain a postponement, was told “you can just pump”). One possible reason counties may be reluctant to excuse nursing mothers is that people are unfamiliar with the practicalities of nursing. *Id.*

52. Williams, *supra* note 4.

53. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 1814, at 5 (Mar. 28, 2000).

54. CAL. CIV. PROC. CODE § 210.5 (enacted by Chapter 266).

55. *Id.* at 7.

56. *Supra* note 36, 2000 Cal. Legis. Serv. ch. 266, sec. 1, at 2018.

57. *Supra* note 1 and accompanying text.

58. *Supra* note 36, 2000 Cal. Legis. Serv. ch. 266, sec. 1, at 2018.