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NON-PARENT VISITATION ISSUES

CALDA SO CAL —JULY26, 2014

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THE SOLE REASON



OF GREAT IMPORTANCE



OF LESSER IMPORTANCE

FC 218

With respect to the ability to conduct formal discovery in family law Proceedings, when a request for order or other motion is filed and served after entry of judgment, discovery shall automatically reopen as to the issues raised in the postjudgment pleadings currently before the court. The date initially set for trial of the action specified in subdivision (a) of Section 2024.020 of the Code of Civil Procedure shall mean the date the postjudgment proceeding is set for hearing on the motion or any continuance thereof, or evidentiary trial, whichever is later.

THIRD PARTY VISITATION

- Sloppy language
- Unclear concepts
- Wobbly precedents
- High emotions
- Repetitious presentation





WHAT HAPPENS AT
GRANDMA'S
HOUSE STAYS AT
GRANDMA'S
HOUSE

How many mothers-in-law does it take to ruin a marriage?

Just one ... mine!



GENERALLY

- THIS IS A DIFFICULT AREA OF THE LAW
- STRONG PRESUMPTION IS THAT FIT PARENTS ACT IN THEIR CHILDREN'S BEST INTEREST
- JUVENILE COURT ALWAYS HAS PRIORITY
- WE ARE NOT TALKING ABOUT:
 - Guardianship
 - Legal custody
 - ICWA
 - General custody
- WE ARE TALKING ABOUT
 - Grandparents
 - Step-parents
 - Family members
 - Three parents

FAMILY CODE 3100(A)

In making an order pursuant to Chapter 4 (commencing with Section 3080), the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

JURISDICTIONAL CONCERNS

- Third party visitation only as is statutorily allowed
- General theme in this area: over parental objection, visitation allowed only if clear and convincing evidence that denial of nonparent visitation would be detrimental to the child.

THIRD PARTY VISITATION ONLY

- JOINDER IN DOMESTIC RELATIONS CASE
- UPA(PRESUMED PARENT)
- DVPA if established a parent-child relationship per 6323(a)(1) (birth, adoption, stipulation....)
- Stepparent- dissolution/nullity/legal separation action ONLY
- Independent action if 1 parent dead and third person is eligible relative (sibling, aunt/uncle, grandparent, great grandparent) (3102)
- Independent action by grandparent (3104)
- Family member- military service(3047)
- Former guardian (3105)
- **NO INHERENT/EQUATIBLE POWER**

BURDENS OF PROOF

- Preponderance of the evidence
 - Weight of the evidence
- Clear and convincing
 - Substantially more likely than not that it is true
 - A high probability that the fact sought to be proved is true
- Beyond a reasonable doubt
 - Criminal standard— not all doubt—moral certainty

CONSTITUTIONAL CONCERNS

- The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court. Troxel v. Granville 530 U.S. 57 (2000)
- The "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own". Meyer vs. Nebraska 262 U.S. 390 (1923)
- The "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters 268 U.S. 510 (1925)

OVERARCHING CONCERNS

- Court must give “special weight” or a presumption of validity to a parent’s decision that visitation is not in the child’s best interest.
- The decision of fit parents regarding grandparents visitation is entitled to special weight, but not immunity from judicial review
- Family Code was not intended to disturb the longstanding inclination of California courts to defer to the jointly expressed wishes of the parents in the most unusual and extreme cases” IRMO Gayden (1991) 229 Cal App 3rd 1510
- Judicial personal feelings, as always, are not appropriate
- An evidentiary hearing is probably required following a prima face showing Fenn vs. Sheriff (2003) 109 Cal App 4th 1466

NON-CUSTODIAL PARENT BURDEN

- BURDEN ON NON-PARENT
- TWO PRONG
 - BEST INTEREST
 - DETRIMENT
- CLEAR AND CONVINCING EVIDENCE
- NO OBLIGATION TO SHOW “UNFITNESS”--
- “WILD CARD” PARENTAL AGREEMENT TO SOME VISITATION
- COURT CANNOT DENY STIPULATED VISITATION



STEPPARENTS FC 3101

(a) The court may grant reasonable visitation to a stepparent, if visitation by the stepparent is determined to be in the best interest of the minor child.

Visitation rights may not be ordered that would conflict with a right of custody or visitation of a birth parent (bio-parent or adoptive parent) who is not a party to the proceeding.

"Stepparent" means a person who is a party to the marriage that is the subject of the proceeding, with respect to a minor child of the other party to the marriage.

STEPPARENTS FC 3101

- Stepparent visitation is secondary to birth parent;
- Can't order visitation that conflicts with a birthparent who is not a party to the action;
- Court must take into consideration if there is a DV order against the stepparent;

STEPPARENT VISITATION AFTER DENIAL

"[A] stepparent cannot request a modification of a prior court order that denied visitation under [Fam. Code §3101 (a)]. Once the trial court denies on the merits a stepparent's request for visitation under section 3101, subdivision (a), no legal authority permits the court to consider a modification of this final order." Chalmers v. Hirschkop (2013) 213 Cal.App.4th 289

DECEASED PARENT FC 3102

(a) If either parent of an un-emancipated minor child is deceased, the children, siblings, parents, and grandparents of the deceased parent may be granted reasonable visitation with the child during the child's minority upon a finding that the visitation would be in the best interest of the minor child.

(b) In granting visitation pursuant to this section to a person other than a grandparent of the child, the court shall consider the amount of personal contact between the person and the child before the application for the visitation order.

(c) This section does not apply if the child has been adopted by a person other than a stepparent or grandparent of the child. 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.

DECEASED PARENT 3102

- Parent's death does not imbue relatives with parental rights
- Parent's death does not diminish the surviving parent's rights
- Non-parent—sibling, grandparent, other relative bears burden to defeat presumption of parental decision making
- Not absolutely prohibited

GRANDPARENT VISITATION

- Avenues:
 1. 3102 relative visitation after death of parent;
 2. 3103 custody proceedings between parents;
 3. 3104 independent action seeking visitation
- Rebuttable presumption that grandparent visitation not in child's best interest;
- Horns of dilemma re: voluntarily allow visitation
 - Concede visitation in C's best interest
 - Allow no visitation weigh in favor of court ordered visitation
 - Is amount meaningful? (charge? No gifts? No photos? Not talk re other parent?)
 - Good reasons to not allow??

HOAG VS. DIEDJOMAHOR (2011) 200 CAL. APP. 4TH 1008

- M and D marry, 2005, live with M's mother;
- Daughter 1 born 2006;
- Separate, 2007, M, C live with g'ma, D move out;
- Reconcile 2008, all (M,D,C,G) live together again, daughter 2 born 2008;
- 2/2009 M, C's and g'ma move out, M files for disso
- 3/09 M suddenly dies, C's live with g'ma, D visits every "couple of days";
- 5/09 g'ma threatens to file guardianship petition D demands C's return to him and says "it is over for her as far as any contact is concerned"
- 5/09 g'ma files guardianship—unable to care for C's because:
 - D a quadriplegic, undocumented (a little over stated on both scores)

HOAG CONTINUED

- DCFS investigates: “no concern”
- All sorts of nasty allegations by D
- Trial court finds sole reason for denying visitation is retaliation
- D admits in C’s best interest to visit g’ma
 - D says “court ordered” visitation detrimental
- D says he willing to allow voluntary visitation—just less than the court order
- Trial court orders visitation over D’s objection E/O weekend, Wed. O/N.
- Trial court found that D’s objections to visitation did not arise out of a genuine concern for the C’s best interest. So, presumption overcome.
- “this allowed and affirmatively required the trial court to make a visitation schedule in C’s best interest.

GRANDPARENTS FC 3103

- Grandparents must be a party
- Give notice to all parents (non-party too), stepparents, anyone with physical custody of child
 - Personal service as per CCP 415.10
- Discretionary with the court
- Child support
 - Impute grandparent time to one parent?
 - Divide time between parents?
 - May order g'parent to pay costs—transportation, day care, medical expenses and other necessities

GRANDPARENTS 3104

- Independent action by grandparent
- 3104 always govern after a judgment entered
- Give notice to parents, stepparent and person with physical custody
- If both parents object, or custodial parent objects rebuttable presumption not in child's best interest
- Can effect support
- Can't file if M and D are married, UNLESS:
 - Separated on permanent or indefinite basis
 - Parent absent for > 1 month location unknown
 - Parent joins in grandparent's petition
 - Adopted by stepparent
 - Fox add in incarcerated or involuntarily institutionalized

FC 3104

To give a grandparent reasonable visitation with a grandchild, the court has to:

1. Find that there was a pre-existing relationship between grandparent and grandchild that has “engendered a bond.” such that visitation is in best interest of the grandchild.

AND

2. Balance the best interest of the child in having visitation with a grandparent with the rights of the parents to make decisions about their child.

FORMER LEGAL GUARDIAN F C 3105

(a) The Legislature finds and declares that a parent's fundamental right to provide for the care, custody, companionship, and management of his or her children, while compelling, is not absolute. Children have a fundamental right to maintain healthy, stable relationships with a person who has served in a significant, judicially approved parental role.

(b) The court may grant reasonable visitation rights to a person who previously served as the legal guardian of a child, if visitation is determined to be in the best interest of the minor child.

FORMER LEGAL GUARDIAN F C 3105

(c) In the absence of a court order granting or denying visitation between a former legal guardian and his or her former minor ward, and if a dependency proceeding is not pending, a former legal guardian may maintain an independent action for visitation with his or her former minor ward. If the child does not have at least one living parent, visitation shall not be determined in a proceeding under the Family Code, but shall instead be determined in a guardianship proceeding which may be initiated for that purpose.

MILITARY DEPLOYMENT FC 3047

[In the case of a] relocation [due to] the party's activation to military duty or temporary duty, mobilization in support of combat or other military operation, or military deployment out of state.

MILITARY DEPLOYMENT FC 3407

(b)(3)(B) Upon a motion by the relocating party, the court may grant reasonable visitation rights to a stepparent, grandparent, or other family member if the court does all of the following:

(i) Finds that there is a preexisting relationship between the family member and the child that has engendered a bond such that visitation is in the best interest of the child.

(ii) Finds that the visitation will facilitate the child's contact with the relocating party.

(iii) Balances the interest of the child in having visitation with the family member against the right of the parents to exercise parental authority.

DOES NOT ALLOW INCREASE IN VISITATION/ CHANGE IS SUPPORT

RESOURCES

- <http://courts.ca.gov/17976.htm> (self help grandparent visitation)
- <http://www.saclaw.org/pages/grandparent-visitacion.aspx> SACTO information
- JV-402

THREE PARENTS

- Uncodified part of statute
- Visitation provisions
- Child support

SB 274 UNCODIFIED

Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm.

SB 274 UNCODIFIED

It is the intent of the Legislature that this bill will only apply in the rare case where a child truly has more than two parents, and a finding that a child has more than two parents is necessary to protect the child from the detriment of being separated from one of his or her parents.

SB 274 UNCODIFIED

This bill does not change any of the requirements for establishing a claim to parentage under the Uniform Parentage Act. It only clarifies that where more than two people have claims to parentage, the court may, if it would otherwise be detrimental to the child, recognize that the child has more than two parents.

F.C. 7612

(c) In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents **if the court finds that recognizing only two parents would be detrimental to the child.** In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

F.C. 3040(D)

In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 3020.

CHILD SUPPORT

4052.5. (a) The statewide uniform guideline...shall apply in any case in which a child has more than two parents. The court shall apply the guideline by dividing child support obligations among the parents based on income and amount of time spent with the child by each parent, pursuant to Section 4053.

CHILD SUPPORT

4052.5. (b) [A]fter calculating the amount of support owed by each parent under the guideline, the presumption that the guideline amount of support is correct may be rebutted if the court finds that the application of the guideline in that case would be unjust or inappropriate due to special circumstances, pursuant to Section 4057. If the court makes that finding, the court shall divide child support obligations among the parents in a manner that is just and appropriate based on income and amount of time spent with the child by each parent, applying the principles set forth in Section 4053 and this article.

CHILD SUPPORT

[I]t may be possible to run the guideline in a multi-step process that involves first calculating all parents' net income, then running the guideline program with the high earner as one parent and the income and time share of remaining parents combined as the other parent in the program." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1476 (2011-2012 Reg. Sess.) as amended May 25, 2012, p. 6.)

CAUTION

- Do not recognize additional parents lightly;
- Attachments to 3+ parents may stretch children thin and be confusing;
- 3+ parents may truly upset child's stability;
- 3+ parents may adversely affect parenting time for parent;
- Applied correctly may prevent harm to a child.

WASHINGTON STATE LLLT UPDATE

- STARTED 1/1/13
- THROUGH THE WSBA
- FIRST PRACTICE AREA DOMESTIC RELATIONS
- EDUCATION REQUIREMENTS
 - AA DEGREE OR HIGHER
 - 45 HOURS CORE CURRICULUM
 - PRACTICE AREA COURSES
 - 15 HOURS/ ON LINE/ DEVELOPED THROUGH LAW SCHOOLS (\$3,750+ BOOKS)
- EDUCATION WAIVER
- GRANDFATHER (GRANDMOTHER??)
- EXAMINATION
- EXPERIENCE (3,000 SUPERVISED HOURS)
- FINANCIAL RESPONSIBILITY

WASHINGTON STATE LLLT

- Review documents or exhibits that the client has received from the opposing side, and explain them to the client;
- Select, complete, file, and effect service of forms...and advise the client of the significance of the selected forms to the client's case;

WASHINGTON STATE LLLT

- Perform legal research and draft legal letters and documents beyond what is permitted in the previous paragraph, if the work is reviewed and approved by a Washington lawyer;
- Advise a client as to other documents that may be necessary to the client's case, and explain how such additional documents or pleadings may affect the client's case;
- Assist the client in obtaining necessary documents, such as birth, death, or marriage certificates.

AS ALWAYS

