RESOLUTION 08-01-2023

DIGEST
Child Custody: Receipt of Custody Evaluation Reports
Amends Family Code section 3111 to require an evaluation by a court appointed child custody evaluator to be filed at least 30 days before a hearing.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolution 3-8-2022.

Reasons:
This resolution amends Family Code section 3111 to require an evaluation by a court appointed child custody evaluator to be filed at least 30 days before a hearing. This resolution should be approved in principle because the proposed amendment will permit the parties more time to consider the report and prepare any response.

Current law provides that, whenever a party files any petition, declaration, or other pleading regarding custody, and the pleadings indicate that there is a contested issue, the court shall order mediation. (Fam. Code, § 3170.) As part of the court-ordered mediation, the mediator informs the court as to any unresolved issues (Fam. Code, § 3185), and may recommend an evaluation. (Fam. Code, § 3183.) In addition to compulsory mediation, in a contested custody proceeding and after receiving any petition and response, the court may appoint a neutral evaluator to perform a confidential evaluation if it believes that such an evaluation will assist in determining the best interest of the child. (Fam. Code, §§ 3110-3111; *Leslie O. v. Superior Court* (2014) 231 Cal.App.4th 1191, 1204; *Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1133.) The evaluation must be filed and served on the parties at least 10 days before the hearing. (Fam. Code, § 3111, subd. (a).) The court may consider the report only if the evaluation and report conform with Judicial Council standards (Fam. Code, § 3111, subd. (a)), and the court may not act upon the report unless the parties are given an opportunity to cross-examine the evaluator; the report may be received into evidence when the parties stipulate. (Fam. Code, § 3111, subd. (c); see *Nelson v. Nelson* (1968) 261 Cal.App.2d 800, 805 [failure to object to receipt of report].)

This resolution would change current law by requiring the evaluation to be submitted not less than 30 days before a hearing on a petition to modify custody or visitation involving contested issues.

The resolution should be approved in principle because the proposed modification would provide the parties with more time to address any facts and recommendations in the report. The neutral evaluator is appointed in contested custody disputes or in those cases where there are serious allegations of child sexual abuse (see Fam. Code, § 3118). Such evaluations are in addition to mandatory mediation. Further, the scope of the evaluation is limited by the order for the evaluation. (*Marriage of Seagondollar, supra*, 139 Cal.App.4th at p. 1132; Cal. Rules of Court, rule 5.220.) Further, the parties retain the ability to offer live testimony at the hearing (Fam.

Code, § 217), and to cross-examine the evaluator. However, current law mandates that the report be submitted only 10 days before the hearing. Increasing the length of time in advance of the hearing for the evaluator to file the report will provide the parties more opportunity to prepare responses to the evaluator's recommendations.

An unintended consequence of this resolution would be additional delay.

This resolution is similar to Resolution 3-8-2022, which was approved in principle.

Therefore, this resolution should be approved in principle.

RESOLUTION 08-01-2023

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommend that legislation be sponsored to amend Family Code section 3111, to read as follows:

§ 3111

(a) In a contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation, investigation or assessment, in cases where the court determines it is in the best interest of the child. The child custody evaluation shall be conducted in accordance with the standards adopted by the Judicial Council pursuant to Section 3117, and all other standards adopted by the Judicial Council regarding child custody evaluations. If directed by the court, the court-appointed child custody evaluator shall file a written confidential report on the evaluation. At least ~~10 days~~ 30 days before a hearing regarding custody of the child, unless the time is extended by the court, the report shall be filed with the clerk of the court in which the custody hearing will be conducted and served on the parties or their attorneys, and any other counsel appointed for the child pursuant to Section 3150. A child custody evaluation, investigation, or assessment, and a resulting report, may be considered by the court only if it is conducted in accordance with the requirements set forth in the standards adopted by the Judicial Council pursuant to Section 3117; however, this does not preclude the consideration of a child custody evaluation report that contains nonsubstantive or inconsequential errors or both.

(b) The report shall not be made available other than as provided in subdivision (a) or Section 3025.5, or as described in Section 204 of the Welfare and Institutions Code or Section 1514.5 of the Probate Code. Any information obtained from access to a juvenile court case file, as defined in subdivision (e) of Section 827 of the Welfare and Institutions Code, is confidential and shall only be disseminated as provided by paragraph (4) of subdivision (a) of Section 827 of the Welfare and Institutions Code.

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

(d) If the court determines that an unwarranted disclosure of a written confidential report has been made, the court may impose a monetary sanction against the disclosing party. The sanction shall be in an amount sufficient to deter repetition of the conduct, and may include reasonable attorney's fees, costs incurred, or both, unless the court finds that the disclosing party

acted with substantial justification or that other circumstances make the imposition of the sanction unjust. The court shall not impose a sanction pursuant to this subdivision that imposes an unreasonable financial burden on the party against whom the sanction is imposed.

(e) The Judicial Council shall, by January 1, 2010, do the following:

(1) Adopt a form to be served with every child custody evaluation report that informs the report recipient of the confidentiality of the report and the potential consequences for the unwarranted disclosure of the report.

(2) Adopt a rule of court to require that, when a court-ordered child custody evaluation report is served on the parties, the form specified in paragraph (1) shall be included with the report.

(f) For purposes of this section, a disclosure is unwarranted if it is done either recklessly or maliciously, and is not in the best interest of the child.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Child custody proceedings involve the fundamental rights of parents and minor children. Decisions should not be made without due process of law, including the right to cross-examine an evaluator as referenced in Fam. Code, §3117.
In most cases, 10-days is an insufficient period of time to read and prepare for the hearing, which may or may not include a party's right to conduct discovery, subpoena witnesses, designate rebuttal experts and prepare for cross-examination.

The Solution: Given the fundamental rights involved, the time to receive reports should be extended to at least 30 days, and the Court should have the discretion to further extend time upon request and for good cause. The legislature has adopted statutes to protect litigants rights including the Discovery Act and the Evidence Code. Moreover, the California Supreme Court in People v. Sanchez reminds us that experts may not rely on case specific facts for their conclusions, it is hearsay. Child custody evaluations are filled with hearsay, case specific data accumulated from parties and third party witnesses, such as teachers, psychologists, educational therapists, relatives and minor children. Yet, when it comes to the most fundamental rights of parents and children, parent are often denied the right to prepare for a hearing, to conduct discovery, and to cross-examine these professionals because they are either not informed of these rights because the 10 day limitation in section 3111 is too short. Moreover, there should not be an ambiguity in the law. Family Code §3111 should not be construed as overriding the Code of Civil Procedure or the Evidence Code. Therefore, a parent/party should have the right to make sure the Court carefully considers a request to extend time on a case by case basis and has the ability to extend time in those cases when it should to protect the rights of party litigants and their minor children to prepare for their custody hearing.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known

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BANSDC Counterargument to 08-01-2023

Child Custody Evaluations are an extremely useful tool in a Judicial Officer making temporary child custody orders to provide structure to parents, and especially to the child. A litigant has the right to cross-examine the evaluator, or call other witnesses for oral testimony, pursuant to FC§217. Such a request can and must be made at the hearing and scheduled accordingly, including consideration of the number of witnesses, discovery, and preparation. Such an evidentiary hearing will likely not be available for six or more months, depending on the court's calendar. We want the Court to make the best decision with the most reasonable information under the circumstances, pending that evidentiary hearing. It is impractical to restrict the Court from making interim orders based on a custody evaluation, and such is not in the best interests of minor children. The 10-day limit is an adequate time, and the sooner the hearing after the custody evaluation is submitted, the sooner the evidentiary hearing can be put on calendar. Additionally, the 30-day window will unreasonably delay initial custody hearings. It is imperative for the Court to establish custody orders to avoid conflict, and to address serious concerns that may not rise to the level of ex parte imminent danger to the child… until it does. There is a balance of interests and practical implications which must be considered. While the resolution's goals are laudable, they are impractical, and in practice will actually delay the setting of an evidentiary hearing while inviting further conflict for a child.

RESOLUTION 08-02-2023

DIGEST
Family Law: Parental Visitation
Amends Family Code section 3030 to allow the family court to deny custody or visitation of a parent to a child if the court finds by clear and convincing evidence that the child was the produce of rape.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
Amends Family Code section 3030 to allow the family court to deny custody or visitation of a parent to a child if the court finds by clear and convincing evidence that the child was the produce of rape. This resolution should be disapproved because the court already has discretion to deny custody to a parent perpetrating domestic violence under Family Code section 3044, 6320 and 3011.

Family Code section 3030 concerns awarding custody to a parent who is required to be registered as a sex offender or granting custody or visitation with a child if the person has been convicted of rape under section 261 of the Penal Code and the child was conceived as a result of the rape. In 2018, Family Code section 3044, was amended (underlined below) to add:

> (a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings * * *, or against any person in subparagraph (C) of paragraph (1) of subdivision (b) of Section 3011 with whom the party has a relationship, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interests of the child, pursuant to Sections 3011 and 3020. This presumption may only be rebutted by a preponderance of the evidence.

This created a presumption against awarding custody to a perpetrator of domestic violence. Additional subsections address how a party can overcome the presumption, and the showing that must be made by the perpetrator. For example, subsection (d) of section 3044 states:

> (d) (1) For purposes of this section, the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of a crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in

subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code .

The resolution would add a similar restriction even if there were no conviction of rape under section 261 of the Penal Code, if there is clear and convincing evidence of the unlawful activity prohibited by 261 of the Penal Code.

This resolution should be disapproved as the Legislature has already determined that parents who engage in child abuse and domestic violence are not acting in the best interests of their minor children as indicated in Family Code 3020 and 3044. The court already has discretion to deny custody or visitation to a parent convicted of rape or the perpetrator of domestic violence. Family Code section 3020(a) expressly provides that, "The Legislature further finds and declares that children have the right to be safe and free from abuse, and that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child."

A possible unintended consequences of the resolution would be the creation of a conflict with existing statutory authority. Currently, the Court does not need to find by clear and convincing evidence of a rape to deny custody. The Court only needs to find by clear and convincing evidence that there was a sexual assault or reproductive coercion to find against the perpetrator on custody (and visitation?). The proposed language would create duplicative language and potential confusion in the courts.

There are no similar bills pending.

This resolution should be denied.

RESOLUTION 08-02-2023

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3030, to read as follows:

§ 3030

(a) (1) No person shall be granted physical or legal custody of, or unsupervised visitation with, a child if the person is required to be registered as a sex offender under Section 290 of the Penal Code where the victim was a minor, or if the person has been convicted under Section 273a, 273d, or 647.6 of the Penal Code, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record. The child may not be placed in a home in which that person resides, nor permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record.

(2) No person shall be granted physical or legal custody of, or unsupervised visitation with, a child if anyone residing in the person's household is required, as a result of a felony conviction in which the victim was a minor, to register as a sex offender under Section 290 of the Penal Code, unless the court finds there is no significant risk to the child and states its reasons in

writing or on the record. The child may not be placed in a home in which that person resides, nor permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record.

(3) The fact that a child is permitted unsupervised contact with a person who is required, as a result of a felony conviction in which the victim was a minor, to be registered as a sex offender under Section 290 of the Penal Code, shall be prima facie evidence that the child is at significant risk. When making a determination regarding significant risk to the child, the prima facie evidence shall constitute a presumption affecting the burden of producing evidence. However, this presumption shall not apply if there are factors mitigating against its application, including whether the party seeking custody or visitation is also required, as the result of a felony conviction in which the victim was a minor, to register as a sex offender under Section 290 of the Penal Code.

(b)(1) No person shall be granted custody of, or visitation with, a child if the person has been convicted under Section 261 of the Penal Code and the child was conceived as a result of that violation

(2) Absent a conviction, no biological or alleged parent shall be granted custody of, or visitation with, a child if there is clear and convincing evidence that the child was conceived due to that person having engaged in conduct made unlawful under Section 261 of the Penal Code.

(c) No person shall be granted custody of, or unsupervised visitation with, a child if the person has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, and the victim of the murder was the other parent of the child who is the subject of the order, unless the court finds that there is no risk to the child's health, safety, and welfare, and states the reasons for its finding in writing or on the record. In making its finding, the court may consider, among other things, the following:

(1) The wishes of the child, if the child is of sufficient age and capacity to reason so as to form an intelligent preference.

(2) Credible evidence that the convicted parent was a victim of abuse, as defined in Section 6203, committed by the deceased parent. That evidence may include, but is not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of domestic abuse.

(3) Testimony of an expert witness, qualified under Section 1107 of the Evidence Code, that the convicted parent experiences intimate partner battering.

Unless and until a custody or visitation order is issued pursuant to this subdivision, no person shall permit or cause the child to visit or remain in the custody of the convicted parent without the consent of the child's custodian or legal guardian.

(d) The court may order child support that is to be paid by a person subject to subdivision (a), (b), or (c) to be paid through the local child support agency, as authorized by Section 4573 of the Family Code and Division 17 (commencing with Section 17000) of this code.

(e) The court shall not disclose, or cause to be disclosed, the custodial parent's place of residence, place of employment, or the child's school, unless the court finds that the disclosure would be in the best interest of the child.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Current law provides for termination of parental rights when the child is a result of a rape for which the parent was convicted. That is good, and could be better. Tons of rapes go unprosecuted, let alone not convicted. The safety and best interests of the child here should not solely depend on the criminal justice system, nor whether the rape can be shown beyond a reasonable doubt.

Although true that the "Best Interests of the Child" is the standard, that takes plenty for granted. Even if a rapist's requests for visitation are denied, a rape survivor can suffer extraordinary trauma from having to face the rapist in court every year and hire a lawyer. That trauma can make the survivor less effective at parenting, which is far from any best interest of the child. Although parenting often involves going against emotions for the child's sake, requiring the rape survivor interact with the rapist goes too far. A judge should not have discretion to keep the rapist in the survivor's life for the next 18 years.

The Solution: This proposal provides a solution for a parent to terminate the rights of a biological or alleged parent by showing the child is the result of a rape, by clear and convincing evidence ("unhesitating assent of every reasonable mind).

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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OCBA COUNTERARGUMENT TO RESOLUTION 08-02-2023

The OCBA adamantly opposes the proposed amendment. It invites hindsight accusation of rape that offers a winner-take-all tactic to win a custody case in a "civil" proceeding with a lower standard of proof.

The proposed amendment further invites the accusation against men/fathers where any evidence may no longer be available to defend the accusation.

To invite a criminal level accusation into family law is a dangerous precedent that will, without a doubt, be used against fathers. As people change their feelings and reflect on the history of the relationship, it is often reframed, and recast to match the current level of hurt and even hatred. Family Law is not the place for rape trials, the outcome of which means one parent is given the children to the exclusion of the other.

By way of analogy, a further issue is raised that there is no “statute of limitations” on how far back in time these allegations may have occurred, which creates its own due process issue. In other sections of the Family Code, such as in the DVPA, statutes provide that actions/incidents are relevant five years prior to the application for the restraining order. With no time restriction, this proposed amendment is fraught with the opportunity of abuse by false accusations that will only increase the complexity, cost, consumption of time, and acrimony of Family Law matters.