RESOLUTION 05-01-2017

DIGEST
Family Law: Unilateral Waiver of Receipt of Financial Disclosures
Amends Family Code sections 2105 and 2107 to allow a complying party to unilaterally waive receiving disclosures from the other party in dissolution and legal separation matters.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code sections 2105 and 2107 to allow a complying party to unilaterally waive receiving disclosures from the other party in dissolution and legal separation matters. This resolution should be disapproved because the proposed timing for submitting the proposed declaration is problematic.

The exchange of preliminary financial disclosures is mandatory to ensure that both parties in a dissolution or legal separation matter are fully informed of the assets, debts and incomes of the other party. Final disclosures may be waived by both parties. This mandatory exchange ensures that no party finalizes a divorce or legal separation without knowledge of the assets and debts that existed during the marriage. It is not uncommon for one party, who is either unwilling to proceed with a divorce or who does not want to equally divide the community assets, to refuse to cooperate with the exchange of financial disclosures. Currently, the only recourse for the party wishing to proceed with the divorce or legal separation is to file a motion to have the non-complying party's lack of cooperation excused. This resolution attempts to remedy this situation by allowing for the filing and service of a written declaration requesting a waiver of the non-complying party's financial disclosures.

This resolution's proposed language requirement requesting the waiver in the declaration is not in itself problematic, and appears to address the court's concerns that a party may be forced to relinquish his or her rights unknowingly. However, because a court cannot enter a judgment without the parties first demonstrating to the court that preliminary financial disclosures have been exchanged and final disclosures have either been exchanged or waived, the timing of the submission of this declaration after the entry of judgment is problematic. This issue could be eliminated if the resolution were amended to add language to state that this declaration must be filed 45 days prior to entry of judgment or perhaps along with the judgment. Further, the resolution as currently written limits the waiver of either the preliminary or final declarations, but not both.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code sections 2105 and 2107 to read as follows:

§ 2105

(a) Except by court order for good cause or unless waived as provided in Section 2107, before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before the first assigned trial date, each party, or the attorney for the party in this matter, shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury on a form prescribed by the Judicial Council, unless the parties mutually waive the final declaration of disclosure. The commission of perjury on the final declaration of disclosure by a party may be grounds for setting aside the judgment, or any part or parts thereof, pursuant to Chapter 10 (commencing with Section 2120), in addition to any and all other remedies, civil or criminal, that otherwise are available under law for the commission of perjury.

(b) The final declaration of disclosure shall include all of the following information:

(1) All material facts and information regarding the characterization of all assets and liabilities.

(2) All material facts and information regarding the valuation of all assets that are contended to be community property or in which it is contended the community has an interest.

(3) All material facts and information regarding the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

(4) All material facts and information regarding the earnings, accumulations, and expenses of each party that have been set forth in the income and expense declaration.

(c) In making an order setting aside a judgment for failure to comply with this section, the court may limit the set aside to those portions of the judgment materially affected by the nondisclosure.

(d) The parties may stipulate to a mutual waiver of the requirements of subdivision (a) concerning the final declaration of disclosure, by execution of a waiver under penalty of perjury entered into in open court or by separate stipulation. The waiver shall include all of the following representations:

(1) Both parties have complied with Section 2104 and the preliminary declarations of disclosure have been completed and exchanged.

(2) Both parties have completed and exchanged a current income and expense declaration, that includes all material facts and information regarding that party's earnings, accumulations, and expenses.

(3) Both parties have fully complied with Section 2102 and have fully augmented the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability.

(4) The waiver is knowingly, intelligently, and voluntarily entered into by each of the parties.

(5) Each party understands that this waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled. Each party further understands that noncompliance with those obligations will result in the court setting aside the judgment.

§ 2107

(a) If one party fails to serve on the other party a preliminary declaration of disclosure under Section 2104, unless that party is not required to serve a preliminary declaration of disclosure pursuant to Section 2110, or a final declaration of disclosure under Section 2105, or fails to provide the information required in the respective declarations with sufficient particularity, and if the other party has served the respective declaration of disclosure on the noncomplying party, the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity.

(b) If the noncomplying party fails to comply with a request under subdivision (a), the complying party may do one or more of the following:

(1) File a motion to compel a further response.

(2) File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

(3) File and serve by mail a ~~motion showing good cause for the court to grant~~ declaration, executed under penalty of perjury, unilaterally waiving receipt of the noncomplying party's preliminary declaration of disclosure pursuant to section 2104 or final declaration of disclosure pursuant to Section 2105, no later than 45 days from entry of final judgment on support and property issues. The ~~voluntary waiver~~ declaration does not affect the rights enumerated in subdivision (d). The declaration shall include all of the following representations by the complying party:

(A) Complying party has complied with Family Code sections 2104 and 2105 by serving his or her preliminary and final declarations of disclosure on the noncomplying party.

(B) Complying party has made at least three attempts to have the noncomplying party produce financial disclosures as required by Family Code section 2104 and 2105, listing the dates, mode of communication and results of each attempt.

(C) As of the date of execution of the declaration, the noncomplying party has not responded to demands nor has he or she complied with Family Code sections 2104 and 2105.

(D) Complying party is advised and informed that he or she is entitled to full financial disclosure from the other party pursuant to Family Code Section 2100 et seq. and waives that right knowingly, intelligently and voluntarily.

(c) If a party fails to comply with any provision of this chapter, the court shall, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party. Sanctions shall be in an amount sufficient to deter repetition of the conduct or comparable conduct, and shall include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(d) Except as otherwise provided in this subdivision, if a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error. If the court granted the complying party's voluntary waiver of receipt of the noncomplying party's preliminary declaration of disclosure pursuant to paragraph (3) of

subdivision (b), the court shall set aside the judgment only at the request of the complying party, unless the motion to set aside the judgment is based on one of the following:

(1) Actual fraud if the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding.

(2) Perjury, as defined in Section 118 of the Penal Code, in the preliminary or final declaration of disclosure, in the waiver of the final declaration of disclosure, or in the current income and expense statement.

(e) Upon the motion to set aside judgment, the court may order the parties to provide the preliminary and final declarations of disclosure that were exchanged between them. Absent a court order to the contrary, the disclosure declarations shall not be filed with the court and shall be returned to the parties.

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

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

The Problem: Family Code section 2107 was amended in 2009 to create a process by which a party to a contested dissolution or legal separation matter relating to a marriage or domestic partnership could waive receiving mandatory financial disclosures from the other party. This was and is still a great concept as, but for the newly created waiver process, a noncomplying party could prevent final judgment from being entered simply by not serving his/her mandatory financial disclosures. However, in practice, the requirement of a noticed motion has proven to be unnecessary and burdensome as it has caused much hardship and delay for complying parties, mostly self-represented, the court and all court users since backlog for hearings is increased. These hearings are unnecessary as waivers are regularly granted and it is difficult to imagine a situation in which they would be denied. Unlike the other subsections of the affected statute, 2107(b)(1) & (2), it has become evident that this waiver needs to become self-executing with some safeguards to avoid situations where the complying party is acting in bad faith to use noncomplying party's unintended delays as a quick way to get a one-sided judgment in a contested case.

The Solution: This proposal amends Family Code section 2107 to change the mode of waiver from a noticed motion to filing and service of a declaration stating the efforts made by the complying party to obtain the disclosures from the other party while giving ample time to the other party to act in response. Family Code section 2105 must be amended accordingly to reflect the new waiver by declaration provision in section 2107.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

Family Code section 2107 was amended in 2009 to create a waiver process as stated above.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FLEXCOM - Approve if Amended

The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) approves if amended with the following amendment: At line 87 add "and/or final" after the word preliminary.

Rationale:

FLEXCOM agrees with the rationale set out by the proponent for such a self-executing waiver in these situations. This will allow the process to move more quickly toward resolution with reasonable safeguards in place.

Disclaimer:

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 05-02-2017

DIGEST
Family Law: Client's Right to Discharge Attorney
Amends Code of Civil Procedure section 285.1 to allow a client to discharge his/her attorney of record unilaterally in a family law proceeding.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Code of Civil Procedure section 285.1 to allow a client to discharge his/her attorney of record unilaterally in a family law proceeding. This resolution should be approved in principle because a client should be allowed to discharge his/her attorney in a family law proceeding without having to file a substitution of counsel signed by the attorney or proceed with a noticed motion, just like the attorney is permitted to withdraw unilaterally without the need for a signed substitution or noticed motion.

Under current law, the general rule is that a client can change his/her attorney or decide to proceed in *pro per* in any action or proceeding. This is accomplished in two ways. First, by the mutual consent of the attorney and the client, which is entered in the court's minutes or by the filing of a notice substitution of counsel. Second, by an order of the court based on the application by either the client or the attorney. (Code Civ. Proc., § 284.)

However, there is a broad and one-sided exception for attorneys representing clients in family law proceedings for the dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, or for the support, maintenance or custody of minor children. In such proceedings, the attorney can unilaterally withdraw from the representation after a judgment (other than an interlocutory judgment) becomes final, and before any other pleadings or motion papers still pending in that matter are served on him. (Code of Civ. Proc., § 285.1.) The attorney does so simply by filing and serving a notice of withdrawal. (Ibid.) The attorney does not need client consent because the judgment signals the end of the matter the attorney was retained for, e.g. to achieve a dissolution of marriage.

But the client is still bound by the general rule articulated in section 284 of the Code of Civil Procedure, and cannot unilaterally discharge his/her attorney in the same family law proceedings, even when the attorney does not respond to communications from the client. When this happens, the client often shows up to a hearing without his/her attorney expecting to be able to move the case forward in *pro per*, not knowing that he/she cannot speak for himself/herself while still represented by the attorney. But the court is powerless to help the client do so because the client is still represented by counsel until either a substitution of counsel is filed or a motion to discharge the non-responsive attorney is noticed and heard. Until then, the court can only continue the matter. Thus, the client is hamstrung by his/her attorney's non-responsiveness, and

cannot move his/her divorce forward without either obtaining a substitution of counsel (not possible, as the attorney is not responding), or filing an expensive motion to discharge his/her attorney.

This one-sided exception is harming clients and needlessly delaying family law proceedings. This resolution offers a practical solution. It makes the narrow exception to the general rule of how the attorney-client relationship is terminated in certain pending family law actions or proceedings reciprocal, allowing the client same rights as accorded his/her attorney. The solution is narrowly tailored so that it only applies in specified family law proceedings.

Resolutions Committee notes, however, that this resolution should be redrafted before it is enacted. There is no need to entirely delete the existing language of Code of Civil Procedure, section 285.1 because there is no substantive change to the exception for the attorney's unilateral withdrawal. Instead, it may be better to structure it as follows: not strike out the existing language but re-number the existing paragraph as subsection (a), change the existing subsections to (1), (2), and (3), and insert the new proposed language as subsection (b). Further, it may be better to enumerate the proceedings in which the new exception applies in the new paragraph, paralleling the enumeration in the current exception for attorneys, rather than relying on the statute numbers, because statutes get re-numbered requiring these references to be amended each time that happens.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsor to amend Code of Civil Procedure section 285.1 to read as follows:

§ 285.1

~~An attorney of record for any party in any civil action or proceeding for dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, or for the support, maintenance or custody of minor children may withdraw at any time subsequent to the time when any judgment in such action or proceeding, other than an interlocutory judgment, becomes final, and prior to service upon him of pleadings or motion papers in any proceeding then pending in said cause, by filing a notice of withdrawal. Such notice shall state (a) date of entry of final decree or judgment, (b) the last known address of such party, (c) that such attorney withdraws as attorney for such party. A copy of such notice shall be mailed to such party at his last known address and shall be served upon the adverse party.~~

Notwithstanding Section 284, in any civil action or proceeding pursuant to Family Code Section 299, 2250, 2330, 6200, and 7600, either of the following may occur:

a) A party may at any time unilaterally relieve his or her attorney of record, including when the attorney is providing limited scope representation, by filing a notice to relieve the attorney. The party shall, no later than 10 days after the filing of the notice and at least 30 days before the next scheduled hearing, serve the notice on the attorney at his or her address on record with the State Bar of California and on all parties in the action or proceeding and their attorneys of record. The Judicial Council shall revise current forms or develop new forms necessary to implement this subdivision.

b) An attorney of record for a party may withdraw at any time subsequent to the time

when any judgment in the action or proceeding, other than an interlocutory judgment, becomes final, and prior to service upon him or her of pleadings or motion papers in any proceeding that is pending in the case, by filing a notice of withdrawal. The notice shall state the date of entry of final decree or judgment, the last known address of such party, and that the attorney withdraws as attorney for the party. The attorney shall mail a copy of the notice to the party at his or her last known address and shall serve the notice on the adverse party.

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

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

The Problem: The need for this proposal stems from the significant number of clients who decide to represent themselves but cannot get the cooperation of their respective attorneys to sign the substitution form. The same problem occurs in situations where a new attorney is coming into the case. The reasons for this lack of cooperation are various such as non-payment of fees, failure to update contact information with the State Bar, retirement, and general unresponsiveness. In Santa Clara County, for example, 70-80% of litigants in family law matters are self-represented and the numbers are similar statewide. Many of these litigants do not realize that once represented they cannot proceed in pro per or hire a new attorney until their attorney of record has been substituted out pursuant to California Code of Civil Procedure 284. They usually find out at the first hearing for a motion that either they filed in pro per or to which they are responding. Since the attorney is usually not present and the court cannot remove him/her on the record, the hearing is continued until the substitution form or a motion to relieve the attorney is filed. Scheduling multiple hearings creates hardship for attorneys and parties, wastes court resources and adds to existing calendar backlogs.

The Solution: California Code of Civil Procedure section 285.1 creates an exception to section 284 for family law matters, where an attorney can unilaterally remove himself or herself from a case, with notice, upon entry of a final judgment on all issues but before any further motions are filed. This proposal creates another exception under section 285.1 for family law cases to allow a client to unilaterally discharge his/her attorney of record by way of filing a declaration with notice to the attorneys and the other parties.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FLEXCOM - Disapprove

Rationale:

The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) disapproves this resolution. The disapproval is based on concerns that the proposed "shortcut" to a formal Motion to Withdraw would put attorneys in the position of perhaps not being served appropriately and thus not knowing that they had been relieved, resulting in acting as the party's attorney after technically being relieved in this manner. It is currently possible for the consumer to get an Order from the court with a noticed hearing and this is viewed as the preferable manner for removal where the attorney, for whatever reason, refuses to be relieved by the party via a Substitution of Attorney.

Disclaimer:

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Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 05-03-2017

DIGEST
Parental Rights: Termination in Cases of Severe Sexual Abuse
Amends Family Code sections 7822 and 7823 to add severe sexual abuse as grounds for termination of parental rights.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code sections 7822 and 7823 to add "severe sexual abuse" as grounds for termination of parental rights. This resolution should be approved in principle because it would allow an action to terminate parental rights in cases where a finding of "severe sexual abuse" has already been made.

This resolution would allow a termination of parental rights action to commence upon a finding of "severe sexual abuse". Currently this cause of action does not exist. This resolution does not empower the family court to make this finding, rather, it allows the family court to consider a finding made pursuant to a separate dependency hearing under Welfare and Institutions Code sections 300 *et. seq*. A termination of parental rights allows the child to be adopted by another individual or individuals – often a step-parent. The parent whose rights have been terminated no longer has a legal right to information about the child nor any say in the health, education or religious practices of the child. Such a parent no longer has a legal obligation to support the child, and the child cannot inherit from that parent. The family court can suspend indefinitely a parent's custody rights and ability to have a say in a child's education, health and religious practices if the family court finds enough evidence that doing so would be in the child's best interests, but the family court cannot terminate a parent's rights upon such a showing. This resolution would allow such a termination.

The basis of a finding of "severe sexual abuse" is defined in Welfare and Institutions Code section 361.5, subdivision (b)(6) as "sexual intercourse, or stimulation involving genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between the parent or guardian and the child or a sibling or half sibling of the child, or between the child or a sibling or half sibling of the child and another person or animal with the actual or implied consent of the parent or guardian; or the penetration or manipulation of the child's, sibling's, or half sibling's genital organs or rectum by any animate or inanimate object for the sexual gratification of the parent or guardian, or for the sexual gratification of another person with the actual or implied consent of the parent or guardian." As such, a family court finding of such nefarious activities should be sufficient to allow a termination of parental rights. This resolution appears to resolve the disparity between protections allowed by dependency court and family court, and furthers the statewide policy of protecting children from abuse.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code sections 7822 and 7823 to read as follows:

§ 7822

(a) A proceeding under this part may be brought if any of the following occur:

(1) The child has been left without provision for the child's identification by the child's parent or parents.

(2) The child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.

(3) One parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child.

(4) One parent has been found to have inflicted severe sexual abuse against the child and/or the child's sibling and/or half-sibling as defined within Welfare and Institutions Code section 361.5(b)(6).

(b) The failure to provide identification, failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents. In the event that a guardian has been appointed for the child, the court may still declare the child abandoned if the parent or parents have failed to communicate with or support the child within the meaning of this section.

(c) If the child has been left without provision for the child's identification and the whereabouts of the parents are unknown, a petition may be filed after the 120th day following the discovery of the child and citation by publication may be commenced. The petition may not be heard until after the 180th day following the discovery of the child.

(d) If the parent has agreed for the child to be in the physical custody of another person or persons for adoption and has not signed an adoption placement agreement pursuant to Section 8801.3, a consent to adoption pursuant to Section 8814, or a relinquishment to a licensed adoption agency pursuant to Section 8700, evidence of the adoptive placement shall not in itself preclude the court from finding an intent on the part of that parent to abandon the child. If the parent has placed the child for adoption pursuant to Section 8801.3, consented to adoption pursuant to Section 8814, or relinquished the child to a licensed adoption agency pursuant to Section 8700, and has then either revoked the consent or rescinded the relinquishment, but has not taken reasonable action to obtain custody of the child, evidence of the adoptive placement shall not in itself preclude the court from finding an intent on the part of that parent to abandon the child.

(e) Notwithstanding subdivisions (a), (b), (c), and (d), if the parent of an Indian child has transferred physical care, custody and control of the child to an Indian custodian, that action shall not be deemed to constitute an abandonment of the child, unless the parent manifests the intent to abandon the child by either of the following:

(1) Failing to resume physical care, custody, and control of the child upon the request of the Indian custodian provided that if the Indian custodian is unable to make a request because the

parent has failed to keep the Indian custodian apprised of his or her whereabouts and the Indian custodian has made reasonable efforts to determine the whereabouts of the parent without success, there may be evidence of intent to abandon.

(2) Failing to substantially comply with any obligations assumed by the parent in his or her agreement with the Indian custodian despite the Indian custodian's objection to the noncompliance.

§ 7823

(a) A proceeding under this part may be brought where all of the following requirements are satisfied:

(1) The child has been neglected or cruelly treated by either or both parents. A finding of severe sexual abuse as defined in Welf. and Insti. Code §361.5(b)(6) shall be a prima facie showing that a child has been neglected or cruelly treated as defined within this subdivision.

(2) The child has been a dependent child of the juvenile court under any subdivision of Section 300 of the Welfare and Institutions Code and the parent or parents have been deprived of the child's custody for one year before the filing of a petition pursuant to this part.

(b) Physical custody by the parent or parents for insubstantial periods of time does not interrupt the running of the one-year period.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Family Code section 7822 does not permit a proceeding to terminate parental rights to occur when there has been a finding of severe sexual abuse as defined pursuant to Welfare and Institutions Code 361.5(b)(6) if the findings were made in a family law proceeding, after an evidentiary hearing where both sides were represented by counsel. Under the dependency system, a parent whom has been found to have severely sexually abused their child pursuant to the same statute may be bypassed and not offered reunification services and, in turn, become a basis for termination of parental rights. Thereafter, if all of the elements are met pursuant to Family Code 7823(a), a step-parent adoption may commence. The similarly situated abused child whom is protected by the family court is treated differently than in dependency court. We need to close the gap, as the current family code has the ability for the dependency child to have the parent-child relationship terminated to, in turn, permit a step parent adoption pursuant to Family Code 8606, however, the similarly situated child who has been protected in the family court does not, even after a full evidentiary hearing where both sides had counsel.

The Solution: First, it is proposed that Family Code section 7822 add a subdivision (a)(4) to state one parent that has been found to have inflicted severe sexual abuse against the child and/or child's sibling or half-sibling as defined in Welfare and Institutions Code section 361.5(b)(6).

Second, it is proposed that Family Code section 7823(a) add a second sentence to read "a finding of severe sexual abuse as defined in Welfare and Institutions Code section 361.5(b)(6) shall be a prima facie showing that a child has been "neglected or cruelly treated" by the offending parent.

Making these above amendments would then permit a child found to have been severely sexually abused by a parent in a family law court to be able to have parental rights over him/her terminated under the Fam. Code and then, in turn, pursuant to Family Code section 8606 to be adopted in a step parent adoption similar to a similarly situated child who was formerly in the dependency system.

IMPACT STATEMENT
This proposed resolution may affect Family Code sections 8606 and 8604, relating to the termination of parental rights.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

FLEXCOM - Disapprove

Rationale:

The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) disapproves Resolution 05-03-2017. The disapproval is based on the general concern that representation is not provided in Family Court to the parent accused of sexually abusing the child. Given that such a finding would (per this resolution) now be used to support a termination of parental rights, it appears that parent would not be given the same protection as in Juvenile Court.

Disclaimer:

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 05-04-2017

DIGEST
Family Law: Automatic Temporary Restraining Orders Contained in Summons
Amends Family Code section 2040 to include a prohibition against modifying or allowing insurance to lapse in Automatic Temporary Restraining Orders.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Family Code section 2040 to include a prohibition against modifying or allowing insurance to lapse in Automatic Temporary Restraining Orders. This resolution should be approved in principle because it ensures continuing insurance coverage and eliminates surprise lapses in coverage.

The prohibition applies to all types of insurance – health, life, automobile, renters, etc. Health insurance coverage can be one of the most valuable benefits of marriage, particularly where one party is unemployed and older, and insurance premiums can exceed $1200 per month for that individual. Often, vehicle insurance for a party's vehicle is part of a joint policy under one party's name, which often provides a discounted rate for both parties.

This prohibition precludes one party from surreptitiously cancelling all insurance coverage for the other party without that party's express knowledge and consent so there is no surprise lapse in coverage, which can result in significant debt for the uninsured party. Maintaining insurance until an agreement as to insurance coverage can be reached, or an order is in place, is paramount to protecting the assets of the parties. This prohibition on modifying or allowing insurance to lapse also would not interfere with the payor spouse's claim for reimbursement for costs incurred to maintain the insurance coverage during the relevant time period.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2040 to read as follows:

§ 2040

(a) In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order:

(1) Restraining both parties from removing the minor child or children of the parties, if any, from the state, or from applying for a new or replacement passport for the minor child or children, without the prior written consent of the other party or an order of the court.

(2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community,

or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life, and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party.

Notwithstanding the foregoing, nothing in the restraining order shall preclude a party from using community property, quasi-community property, or the party's own separate property to pay reasonable attorney's fees and costs in order to retain legal counsel in the proceeding. A party who uses community property or quasi-community property to pay his or her attorney's retainer for fees and costs under this provision shall account to the community for the use of the property. A party who uses other property that is subsequently determined to be the separate property of the other party to pay his or her attorney's retainer for fees and costs under this provision shall account to the other party for the use of the property.

(3) Restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, modifying, allowing to lapse or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their child or children for whom support may be ordered, without the written consent of the other party or an order of the court.

(4) Restraining both parties from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court.

(b) Nothing in this section restrains any of the following:

(1) Creation, modification, or revocation of a will.

(2) Revocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument, provided that notice of the change is filed and served on the other party before the change takes effect.

(3) Elimination of a right of survivorship to property, provided that notice of the change is filed and served on the other party before the change takes effect.

(4) Creation of an unfunded revocable or irrevocable trust.

(5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code.

(c) In all actions filed on and after January 1, 1995, the summons shall contain the following notice:

"WARNING: California law provides that, for purposes of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. If either party to this action should die before the jointly held community property is divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in common, or community property) will be controlling and not the community property presumption. You should consult your attorney if you want the community property presumption to be written into the recorded title to the property."

(d) For the purposes of this section:

(1) "Nonprobate transfer" means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay on death account in a financial institution, Totten trust, transfer on death registration of personal property, revocable transfer on death deed, or other instrument of a type described in Section 5000 of the Probate Code.

(2) "Nonprobate transfer" does not include a provision for the transfer of property on death in an insurance policy or other coverage held for the benefit of the parties and their child or children for whom support may be ordered, to the extent that the provision is subject to paragraph (3) of subdivision (a).

(e) The restraining order included in the summons shall include descriptions of the notices required by paragraphs (2) and (3) of subdivision (b).

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: The automatic temporary restraining orders contained in a Family Law Summons (Judicial Council Form FL-100) effective upon personal service of the petition and summons on the respondent pursuant to Family Code Section 233(a) include provisions restraining the cancelling, borrowing against, transferring, changing beneficiaries or disposing of life, health, automobile and disability insurance. However, there is no statutory restriction against allowing such insurance to lapse or modifying such insurance. This places litigants in the position of either allowing non-consented modifications to occur or allowing non-consented lapses to occur, even if within the financial ability of the party allowing the lapse to occur, or seek court relief which has its own financial implications. In addition, circumstances can arise where a modification or lapse in insurance can have significant future financial impact, such as where the covered individual is unable to obtain similar insurance, such as life insurance, due to age, health or financial circumstances. Also, other automatic temporary restraining orders contained in Family Code Sections 2040(a)(1), (2), and (4) exclude those actions to which the parties have in writing consented to or from which the court has ordered relief. In its present form Section 2040(a)(3) does not have such exclusions.

The Solution: The proposed amendment would: 1) harmonize Family Code Section 2040(a)(3) with Section 2040(a)(1), (2), and (4) and allow such section to exclude actions to which the parties have a written consent or where court relief is obtained, and; 2) include as a restrained action modifying any of the described insurance or allowing any of the described insurance to lapse.

IMPACT STATEMENT
This resolution does not have any known effect on any other law, statute or rule, aside from the Judicial Council Form FL-100 to be brought into compliance with the amended statute when it is enacted.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENT AND STATE BAR SECTION COMMENTS

FLEXCOM - Disapprove

Rationale:

The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) disapproves this resolution as drafted. FLEXCOM agrees with the proponent that there is a problem that needs to be resolved (for example, letting such insurance lapse without notice). However, FLEXCOM is concerned that adding the prohibitions against "modifying" the insurance can be problematic as there are numerous circumstances beyond a party's control that could create a "modification," the most obvious one being where an employer decides to change the health plan/aspects (e.g. deductibles) of the plan available to the employee party.

Further, the parties already have the right to go into court and raise issues of not only maintaining coverage but responsibility for payment.

Disclaimer:

This position is only that of the FAMILY LAW SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the FAMILY LAW SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

RESOLUTION 05-05-2017

DIGEST
Children: Extended Reunification Period in Child's Best Interest
Amends Welfare and Institutions Code section 366.2 to allow the court to extend reunification services from the 18-month review to a 24-month review if the parent is likely to qualify within that extended period of time.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Welfare and Institutions Code section 366.2 to allow the court to extend reunification services from the 18-month review to a 24-month review if the parent is likely to qualify within that extended period of time. This resolution should be approved in principle because it would allow a parent the opportunity to regain custody of his or her child in those cases where reunification appears probable given a broader time horizon, but due to the present circumstance unlikely in 18 months since the child was made a ward of the court.

For example, consider a parent whose incarceration at the 12-month review is expected to continue until just after the 18-month review. Under current law, reunification services must be terminated because the parent will not be able to establish that reunification will happen before the 18-month hearing – solely because the parent will be incarcerated at the 18-month hearing. Services would then be terminated at 18 months no matter how much progress the parent had made. This resolution would further the goal of allowing children to remain with their parents by permitting the court to give the parent a chance to show at the 18-month hearing that reunification will occur in the next six months, at the 24-month mark.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Welfare and Institutions Code section 366.2 to read as follows:

§ 366.2

(a) Every hearing conducted by the juvenile court reviewing the status of a dependent child shall be placed on the appearance calendar. The court shall advise all persons present at the hearing of the date of the future hearing and of their right to be present and represented by counsel.

[Subdivisions (b) through (f) remain unchanged.] [Omission of sections permitted by Chair.]

(g) If the time period in which the court-ordered services were provided has met or exceeded the time period set forth in subparagraph (A), (B), or (C) of paragraph (1) of subdivision (a) of Section 361.5, as appropriate, and a child is not returned to the custody of a

parent or legal guardian at the permanency hearing held pursuant to subdivision (f), the court shall do one of the following:

(1) Continue the case for up to six months for a permanency review hearing, provided that the hearing shall occur within 18 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following:

(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

(B) That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

(i) For purposes of this subdivision, the court's decision to continue the case based on a finding or substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interests of the child.

(ii) The court shall inform the parent or legal guardian that if the child cannot be returned home by the next permanency review hearing, a proceeding pursuant to Section 366.26 may be instituted. The court shall not order that a hearing pursuant to Section 366.26 be held unless there is clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian.

(2) Continue the case for up to six months for a permanency review hearing, provided that the hearing shall occur within 18 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian, if the parent has been arrested and issued an immigration hold, detained by the United States Department of Homeland Security, or deported to his or her country of origin, and the court determines either that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time or that reasonable services have not been provided to the parent or legal guardian.

(3) For purposes of paragraph (2), in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall find all of the following:

(A) The parent or legal guardian has consistently and regularly contacted and visited with the child, taking into account any particular barriers to a parent's ability to maintain contact with his or her child due to the parent's arrest and receipt of an immigration hold, detention by the United States Department of Homeland Security, or deportation.

(B) The parent or legal guardian has made significant progress in resolving the problems that led to the child's removal from the home.

(C) The parent or legal guardian has demonstrated the capacity or ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

(4) Continue the case for up to six months for a permanency review hearing, provided that the hearing shall occur within 18 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian, if the court determines by clear and convincing evidence that the parent may reunify with the child by the 24 month hearing and the best interests of the child would be met by the provision of additional reunification services to a parent or legal guardian who is making significant and consistent progress in a court-ordered residential substance abuse treatment program, a parent who was either a minor parent or a nonminor dependent parent at the time of the initial hearing making significant and consistent progress in establishing a safe home for the child's return, or a parent recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security and there is a substantial probability the parent will be able to make significant and consistent progress in establishing a safe home for the child's return. The court shall continue the case only if it finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within 24 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian or that reasonable services have not been provided to the parent or legal guardian. For the purposes of this section, in order to find a substantial probability that the child will be returned to the physical custody of his or her parent or legal guardian and safely maintained in the home within the extended period of time, the court shall be required to find all of the following:

(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child, taking into account any particular barriers to a parent's ability to maintain contact with his or her child due to the parent's arrest and receipt of an immigration hold, detention by the United States Department of Homeland Security, or deportation.

(B) That the parent or legal guardian has made significant and consistent progress in the prior 12 months in resolving problems that led to the child's removal from the home or the parent or legal guardian was recently discharged from incarceration, institutionalization, or the custody of the United States Department of Homeland Security and there is a substantial probability the parent will be able to make significant and consistent progress in resolving problems that led to the child's removal from the home.

(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by reports from a substance abuse provider as applicable, or complete a treatment plan postdischarge from incarceration, institutionalization, or detention, or following deportation to his or her country of origin and his or her return to the United States, and to provide for the child's safety, protection, physical and emotional well-being, and special needs.

~~(4)~~ (5) Order that a hearing be held within 120 days, pursuant to Section 366.26, but only if the court does not continue the case to the permanency planning review hearing and there is clear and convincing evidence that reasonable services have been provided or offered to the parents or legal guardians. On and after January 1, 2012, a hearing pursuant to Section 366.26 shall not be ordered if the child is a nonminor dependent, unless the nonminor dependent is an Indian child and tribal customary adoption is recommended as the permanent plan.

~~(5)~~ (6) Order that the child remain in foster care, but only if the court finds by clear and convincing evidence, based upon the evidence already presented to it, including a recommendation by the State Department of Social Services when it is acting as an adoption agency or by a county adoption agency, that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interests of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship as of the hearing date. For purposes of this section, a recommendation by the State Department of Social Services when it is acting as an adoption agency or by a county adoption agency that adoption is not in the best interests of the child shall constitute a compelling reason for the court's determination. That recommendation shall be based on the present circumstances of the child and shall not preclude a different recommendation at a later date if the child's circumstances change. On and after January 1, 2012, the nonminor dependent's legal status as an adult is in and of itself a compelling reason not to hold a hearing pursuant to Section 366.26. The court may order that a nonminor dependent who otherwise is eligible pursuant to Section 11403 remain in a planned, permanent living arrangement.

(A) The court shall make factual findings identifying any barriers to achieving the permanent plan as of the hearing date. When the child is under 16 years of age, the court shall order a permanent plan of return home, adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative, as appropriate. When the child is 16 years of age or older, or is a nonminor dependent, and no other permanent plan is appropriate at the time of the hearing, the court may order another planned permanent living arrangement, as described in paragraph (2) of subdivision (i) of Section 16501.

(B) If the court orders that a child who is 10 years of age or older remain in foster care, the court shall determine whether the agency has made reasonable efforts to maintain the child's relationships with individuals other than the child's siblings who are important to the child, consistent with the child's best interests, and may make any appropriate order to ensure that those relationships are maintained.

(C) If the child is not returned to his or her parent or legal guardian, the court shall consider, and state for the record, in-state and out-of-state options for permanent placement. If the child is placed out of the state, the court shall make a determination whether the out-of-state placement continues to be appropriate and in the best interests of the child.

[Subdivisions (h) through (k) remain unchanged.] [Omission of sections permitted by Chair.]

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

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under certain circumstances at the 18-month review hearing, parents who were in a long-term drug treatment program, incarnated, or minors when the child was removed can receive 24 months of reunification services if it is in the child's best interest. But, at the 12-month review, a parent must prove there is a substantial probability the child will be returned by the 18-month review. Therefore, the court must terminate services at the 12-month review for parents who would qualify for 24 months of services at the 18 month, because they can't show

there is a substantial probability of return by the 18-month review.

The Solution: This amendment allows the court to extend services at the 12-month review to the 18-month review for parents who qualify for 24-months of services.

IMPACT STATEMENT
The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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