

What Family Court Judges Want You to Know



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HON. JOYCE MARIE CRAM is a judge in the Contra Costa County Superior Court. Judge Cram was appointed to the bench in 1998 by Governor Pete Wilson. She is the supervising judge of the Family Law Division and the Probate Division of her court, is the presiding judge of the Appellate Division, and runs the court's Elder Court. She began her legal career at the law firm of Low, Ball and Lynch where she became the firm's first woman partner. After 16 years with the firm doing civil litigation, Judge Cram spent two years in Germany. When she returned in 1994, she opened a private mediation practice which continued until her appointment to the bench. She earned her B.A. degree at the University of California and her J.D. degree at the Catholic University School of Law, Washington, D.C. Judge Cram has been active in professional education, preparing and presenting courses for the Contra Costa County Bar Association, the Defense Research Institute, and The Robert G. McGrath American Inn of Court. She teaches new judges through California Center for Judicial Education and Research (CJER), and she is on the New Judge Education Committee.

HON. ALICE VILARDI is a judge in the Alameda County Superior Court. She was appointed to the bench in 2001 after serving as city attorney and general counsel for local public agencies in the San Francisco Bay area, representing public agencies in private practice, and serving as a managing attorney for the Administrative Office of the Courts, the agency serving the state Judicial Council. After joining the bench in Alameda County, Judge Vilardi heard criminal jury trials for several years before being assigned to a family law department in Pleasanton, where she also hears adoptions, contested guardianships, and miscellaneous civil cases. Judge Vilardi is active in statewide and local committees and programs teaching new and experienced judicial officers in judicial ethics and other subjects, and serves as a mentor for law students, attorneys considering judicial careers, and new judicial officers. She earned her B.A. degree at Brown University and her J.D. degree at Boalt Hall School of Law, University of California at Berkeley.

HON. JOSANNA BERKOW, a family law specialist certified by the California State Bar, has sat on the Family Law bench of the Contra Costa County Superior Court for more than 16 years hearing family law, child support and domestic violence cases. Commissioner Berkow served on the California Judicial Council Advisory Committee on Family and Juvenile Law, as well as its Family Law Education Committee. She has taught extensively for the California Center for Judicial Education and Research (CJER), Witkin Judicial College, the National Council of Juvenile and Family Court Judges, the American Academy of Matrimonial Lawyers, state and county bar associations, and other professional organizations representing accounting and mental health professionals. She is an adjunct professor at John F. Kennedy School of Law where she teaches family law and jurisprudence. Commissioner Berkow has also chaired Contra Costa County's Domestic Violence Advisory Council and she has done extensive training on domestic violence for lawyers, judges, law enforcement and mental health providers. Before her appointment to the bench, Commissioner Berkow was a California deputy attorney general where she worked in the Criminal Appeals Division and later as statewide coordinator for child support and child abduction programs. Prior to that, Commissioner Berkow was a hearing officer and staff attorney for the Federal Labor Relations Authority. She began her legal career in Washington D.C. as staff counsel to United States Senator Paul Sarbanes of Maryland. She received her J.D. degree from the University of Baltimore School of Law in 1977 and graduated with honors from Towson State University in 1974 (Sociology).

HON. JEFFREY D. HUFFAKER is a commissioner in the Contra Costa County Superior Court where he has served in a direct calendared family law assignment since 2005. He has served as a faculty member for the CJER family law overview course, as well as the CJER Family Law Institute. Commissioner Huffaker currently serves on the CJER Family Law Curriculum Committee. He has presented and taught numerous attorney continuing education programs. Commissioner Huffaker began his private practice in 1979 focusing in the areas of family law, estate planning and real estate law. He earned his B.S. and M.S. degrees at the University of California and his J.D. degree at the University of California Davis School of Law.

HON. GLENN P. OLEON is a family court commissioner in the Alameda County Superior Court. Commissioner Oleon has served as a Superior Court commissioner since 2003. He began his private law practice in 1976 emphasized family law, estate planning, and probate litigation. Additionally, Commissioner Oleon had served regularly as a judge pro tempore at the Superior Court. He earned his A.B. degree at the University of California at Berkeley and his J.D. degree at Boalt Hall School of Law, University of California at Berkeley.

HON. CHARLES SMILEY has served as a commissioner of the Superior Court of California in the County of Alameda since 2007. Commissioner Smiley is presently one of the county's two AB 1058 child support commissioners. Prior to this assignment, he presided over a family law department. Commissioner Smiley taught at University of California, Hastings College of the Law as an associate adjunct professor of trial advocacy. Before joining the Superior Court, he served as a deputy for the Alameda County Public Defender's Office. Commissioner Smiley earned his B.A. degree at the University of California at Berkeley and his J.D. degree at University of California, Hastings College of the Law.

MODERATOR - DAVID M. LEDERMAN is the managing attorney of the Law Offices of David M. Lederman where he practices in the areas of family law and immigration law. He is certified as a specialist in family law by the State Bar of California Board of Legal Specialization. Mr. Lederman received his B.A. degree from the University of California at Santa Cruz and his J.D. degree from McGeorge School of Law, University of the Pacific. He is a member of the State Bar of California, the Association of Certified Family Law Specialists, the Contra Costa Bar Association and the American Immigration Lawyers Association. Mr. Lederman is the author of "Immigration Essentials for the Family Law Practitioner," *Contra Costa Lawyer* (Vol. 13, No. 5, May 2000). He is fluent in Mandarin Chinese and served as a contributing author to *Commercial Laws of East Asia*, Sweet & Maxwell Asia (1997). Mr. Lederman also has taught a previous National Business Institute seminar.

Table Of Contents

What Family Law Judges Want You To Know!

Course Materials

Program materials by David M. Lederman Esq. and Thomas H Smith, Esq. Copr. 2010

I. CONTESTED CUSTODY MATTERS

A. Child Custody Jurisdiction

1. Generally:

1. The general grant of jurisdiction for child custody in dissolution actions is Family Code Section 2010 (c), which grants jurisdiction to determine child custody, visitation, and support. See *Perry v. Superior Court* (1980) 108 CA3d 480. Beyond that, the family law practitioner must become familiar with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) at Family Code Section 3400, et. seq.

1. Note that in reviewing child custody jurisdiction cases, the UCCJEA replaced, in its entirety, the old Uniform Child Custody Jurisdiction Act (UCCJA) as of January 1, 2000. Be sensitive to the statutory differences.
2. Note that the UCCJEA applies to conflicting jurisdiction with sister states as well as countries where those factual circumstances are in *substantial conformity* with the UCCJEA. See Family Code Section 3405. However, the UCCJEA need not apply if the child custody laws of the foreign country violates fundamental principles of human rights. See Family Code Section 3405(c).

2. Under the UCCJEA, a court of this state may make an **initial** child custody determination only if one of the following applies:
 1. California is the home state of the child on the date of the commencement of the proceedings. See Family Code Section 3421(1)(a). “Home state” means the state in which the child lived with a parent or a person acting as parent for at least six consecutive months immediately before a commencement of child custody proceedings, or in the case of a child less than six months old, the state the child lived in since birth. See Family Code Section 2402(g). Note as well that all of the provisions of the UCCJEA apply to “persons acting as a parent.” Persons acting as a parent means a person, other than a parent who: (1) has physical custody of the child or has had physical custody for at least 6 consecutive months within one year immediately preceding the commencement of a child custody proceeding and (2) has been awarded legal custody by a court or claims a right to legal custody under California law. See Family Code Section 3402(m);
 2. The home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum and
 1. The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant

- connection with the state other than mere physical presence; and
2. Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.
 3. All courts having jurisdiction as provided above have declined to exercise jurisdiction on the grounds that this state is the more appropriate forum; or
 4. No other state would have jurisdiction as specified above. See Family Code Section 3421.
3. A court of this state that has jurisdiction pursuant to Family Code Section 3421, has continuing jurisdiction until either of the following:
1. A court of this state determines that neither the child, nor the child and one parent, or a person acting as parent have a significant contact with the state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships; or
 2. A Court of this state or a Court of another state determines that the child, the child's parents, or a person acting as parent, do not presently reside in this state.
4. Declining to Exercise Jurisdiction. If California is a home state, it must decline to exercise jurisdiction if another state is exercising jurisdiction in substantial compliance with the UCCJEA unless those proceedings have been terminated or the court of the foreign court exercising jurisdiction

determines that the court of this state is the more appropriate forum. (See Family Code Section 3423, *et. seq.*)

5. In a proceeding to modify a child custody determination, a California court must determine whether there is an enforcement action pending in another state. If an enforcement action is pending in another state, the California court may do one of the following:
 1. Stay proceedings for modification pending the entry of an order of the state enforcing, denying, or dismissing the proceeding for enforcement;
 2. Enjoin the parties from continuing with the enforcement proceeding;
 3. Proceed with modification under conditions it considers appropriate. See Family Code Section 3426.
6. A California court that has home state jurisdiction, may decline to exercise that jurisdiction if, at any time, it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon a motion of a party, the court's own motion, or a request from a foreign court. See Family Code Section 3427.
 1. In determining whether to decline jurisdiction and allow a foreign court to proceed with jurisdiction, the California court must consider all relevant factors, including:

1. Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.
 2. The length of time the child has resided outside this state.
 3. The distance between the court in this state and the court in the state that would assume jurisdiction.
 4. The degree of financial hardship to the parties in litigating in one forum over the other.
 5. Any agreement of the parties as to which state should assume jurisdiction.
 6. The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.
 7. The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.
 8. The familiarity of the court of each state with the facts and issues in the pending litigation. See Family Code Section 3427(b).
2. If a California court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody

proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper. See Family Code Section 3427(c).

3. A California court may decline to exercise its jurisdiction if a child custody determination is incidental to an action for dissolution of marriage or another proceeding while still retaining jurisdiction over the dissolution of marriage or other proceeding. See Family Code Section 3427(d).
4. If it appears to the court that it is clearly an inappropriate forum, the court may require the party who commenced the proceeding to pay, in addition to the costs of the proceeding in this state, necessary travel and other expenses, including attorney's fees, incurred by the other parties or their witnesses. See Family Code Section 3427(e).

7. Unjustifiable conduct by a party:

1. If a California court has home state jurisdiction under the UCCJEA because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless one of the following are true:
 1. The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.
 2. A court of the state otherwise having home state jurisdiction determines that California is a more convenient forum.

3. No court of any other state would have home state jurisdiction. See Family Code Section 3428(a).
2. If a California court declines to exercise jurisdiction, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustified conduct, including staying the proceeding until a child custody proceeding is started in another home state's court. See Family Code Section 3428(b).
3. If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction due to the unjustifiable conduct of a party, it shall assess against the party seeking to invoke its jurisdiction any necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care incurred during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless otherwise authorized by law. See Family Code Section 3428(c).
4. In making a determination under Section 3428, a court shall not consider as a factor weighing against the petitioner any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person

who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner, as defined in Section 6211. See Family Code Section 3428 (d).

2. Modification After Issuance of an Out of State Order:

1. Temporary Emergency Jurisdiction:

1. Even if another state has exclusive continuing jurisdiction, California may exercise **temporary** child custody jurisdiction if the child is present in this state and:
 1. The child has been abandoned in this state;
or
 2. The exercise of jurisdiction in this state is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse. See Family Code Section 3424(a).
2. If no previous child custody determination has been made, the temporary order issued as described above will become a final determination should California become the home state. See Family Code Section 3424(b).
3. If there is a prior custody determination by a foreign jurisdiction or custody proceedings have been initiated in the foreign proceedings, the court must specify in the order a period that the court considers adequate to allow the person seeking an order to

obtain an order from the state having home state jurisdiction. The temporary order issued by the California court will remain effective until the home state court issues its order or the period specified by the California court expires. See Family Code Section 3424(c).

4. As soon as the California court has information that child custody proceedings have commenced in another state or that another state has issued a child custody order in substantial compliance with the UCCJEA, the California court must communicate with the other Court.

2. Non Emergency Modification Jurisdiction:

1. A California court cannot modify a child custody determination of another state unless one of the basis for initial child custody jurisdiction is present and

1. The court of the other state determines that it no longer has exclusive continuing jurisdiction or that California would be a more convenient forum; or
2. A court of this state or the issuing state determines that the child, the child's parents, and a person acting as parent, do not presently reside in the other state. See Family Code Section 3423.

B. Legal and Physical Custody defined

1. There are two types of child custody: legal custody and physical custody. Legal custody relates simply to a parent's rights and

responsibilities to make decisions related to the health, education and welfare of a child. These rights and responsibilities may rest with one parent, called sole legal custody, or shared between both parents called joint legal custody. See Family Code Sections 3003 and 3006.

2. Physical custody refers to time share. Parents will have joint physical custody if each of the parents has significant periods of physical custody in such a manner as to assure a child of frequent and continuing contact with both parents. See Family Code Section 3004. A parent will have sole physical custody when a child resides primarily with and is under the supervision of one parent, subject to the Court's power to award visitation to the other parent. See Family Code Sections 3007.

C. Best Interest of the Child

1. Legal Standard

1. The California legislature declares in Family Code Section 3020 that:

1. It is the public policy of California to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children.
2. The perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.
3. It is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or

dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011.

4. Where the above policies are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.

2. Private Mediation v. Family Court Services

1. Mediation is mandatory for child custody issues.

According to Family Code Section 3170 “if it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.”

2. All counties in California offer mediation as a service. While the professionals that provide these services are generally competent, they are hampered by time constraints and long backlogs. For example, in the last week of August, Contra Costa’s Family Court Services were scheduling mediation dates in late November – a 3 month delay. In general when a child custody matter is filed, it can be set for hearing between 30 and 45 days. Since mediation will not occur prior to the hearing the hearings will generally be continued to follow mediation. This

increases the cost of litigation by having to appear or continue the custody hearing. In addition, this delay tends to exacerbate the family problems that resulted in the need for judicial intervention in the first place. There are alternatives.

3. Private mediation. There is no master list of private mediators. However, private mediators do exist. If the parties agree, they can opt out of using Family Court Services mediation services by agreement. Unfortunately, there are no clear rules or standards of practice for private child custody mediations. The scope of the mediator's duties must be specified in the stipulation and order appointing the mediator. It is a good practice to limit the number of mediation sessions. Doing so helps control the cost of private mediation and the expectation of the parties. The author finds that 3 to 4 sessions with a private mediator is sufficient for the mediator to make understand the dynamics and attempt to reach a mediated agreement and if unsuccessful at reaching an agreement, can make a report to the Court similar to the reports provided by family court services. In Alameda County counsel should use ALA FL-002 to appoint the Child Custody Recommending Mediator.
4. Private mediation is not a "poor man's evaluation." Its purpose is to provide an alternative to Court mediation. It does not include the same level of forensic work as an evaluation. It can't. It is simply a method which the parties may use to attempt to resolve the custody issues between themselves. If a child custody evaluation becomes

necessary, the parties ought to select a different individual to conduct the evaluation.

3. Special Masters and Minors Counsel

1. Special Masters

1. Special Masters can only be appointed by stipulation (see *In re Marriage of Olson*, (1993) 14 Cal.App.4th 1, 17 Cal.Rptr.2d 480). Unlike a private mediator, the special master's job is not to develop a parenting plan.
2. The purpose of a special master is to provide a relatively quick and inexpensive method to settle fringe custody related issues as they develop, such as: minor scheduling changes, discipline, health care decisions, extracurricular activities, etc. – issues that continue to arise in moderate to high conflict cases where the parties lack the ability to work out these issues without assistance.
3. The traditional child custody special master is the first formal step in dispute resolution for parents with ongoing parenting disagreements. Where a special master is appointed, one party may contact the special master with an issue of dispute. The special master will seek input from the other parent and then simply make a decision, which, after allowing for an objection period, becomes a court order unless one of the parties object to the special master's recommendations. For a sample Stipulation and Order for the Appointment of a

Special Master see the Contra Costa County local form FAMLAW-203.

2. Minor's Counsel

1. Pursuant to Family Code Section 3150 "If the court determines that it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding."

2. The duties of minor's counsel are delineated in Family Code Section 3151, as follows:

1. Minor's counsel is charged with the representation of the child's best interests. The role of the child's counsel is to gather facts that bear on the best interests of the child, and present those facts to the court, including the child's wishes when counsel deems it appropriate for consideration by the court pursuant to Section 3042. The counsel's duties, unless under the circumstances it is inappropriate to exercise the duty, include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as counsel considers necessary to ascertain facts relevant to the custody or visitation hearings.

1. At the court's request, counsel prepares a written statement of issues

and contentions setting forth the facts that bear on the best interests of the child. The statement shall set forth a summary of information received by counsel, a list of the sources of information, the results of the counsel's investigation, and such other matters as the court may direct. The statement of issues and contentions shall not contain any communication subject to attorney-client privilege.

3. In considering whether to appoint Minor's Counsel, the Court should consider (Cal. Rule of Court 5.240):
 1. The issues of child custody and visitation are highly contested or protracted;
 2. The child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;
 3. Counsel representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;
 4. The dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child;

5. It appears that one or both parents are incapable of providing a stable, safe, and secure environment;
 6. Counsel is available for appointment who is knowledgeable about the issues being raised regarding the child in the proceeding;
 7. The best interest of the child appears to require independent representation; and
 8. If there are two or more children, any child would require separate counsel to avoid a conflict of interest.
4. Once appointed Minor's Counsel must continue to represent the child until (Cal. Rule of Court 5.240 (f):
1. The conclusion of the proceeding for which counsel was appointed;
 2. Relieved by the court;
 3. Substituted by the court with other counsel;
 4. Removed on the court's own motion or request of counsel or parties for good cause shown; or
 5. The child reaches the age of majority or is emancipated.

4. Child Custody Evaluations

1. A final tool available to help a judge determine what parenting plan is in a child's best interest is the child custody evaluation. According to Family Code Section 3111, "(a) In any contested proceeding involving child custody or visitation rights, the court may appoint a child

custody evaluator to conduct a child custody evaluation in cases where the court determines it is in the best interests of the child. The child custody evaluation shall be conducted in accordance with the standards adopted by the Judicial Council.” In almost all cases the evaluator prepares a written confidential report.

2. Cal. Rule of Court 5.225 delineates the educational requirements of the child custody evaluator. A child custody evaluator must:
 1. Complete a total of 40 hours of initial education and training in the following:
 1. The psychological and developmental needs of children, especially as those needs relate to decisions about child custody and visitation;
 2. Family dynamics, including, but not limited to, parent-child relationships, blended families, and extended family relationships;
 3. The effects of separation, divorce, domestic violence, child sexual abuse, child physical or emotional abuse or neglect, substance abuse, and interparental conflict on the psychological and developmental needs of children and adults;
 4. The assessment of child sexual abuse issues required by Family Code section 3110.5(b)(2)(A)-(F) and Family Code section 3118; local procedures for handling child sexual abuse cases; and the effect that

court procedures may have on the evaluation process when there are allegations of child sexual abuse;

5. The significance of culture and religion in the lives of the parties;
6. Safety issues that may arise during the evaluation process and their potential effects on all participants in the evaluation;
7. When and how to interview or assess adults, infants, and children; gather information from collateral sources; collect and assess relevant data; and recognize the limits of data sources' reliability and validity;
8. The importance of addressing issues such as general mental health, medication use, and learning or physical disabilities;
9. The importance of staying current with relevant literature and research;
10. How to apply comparable interview, assessment, and testing procedures that meet generally accepted clinical, forensic, scientific, diagnostic, or medical standards to all parties;
11. When to consult with or involve additional experts or other appropriate persons;
12. How to inform each adult party of the purpose, nature, and method of the evaluation;

13. How to assess parenting capacity and construct effective parenting plans;
 14. Ethical requirements associated with the child custody evaluator's professional license and rule 5.220;
 15. The legal context within which child custody and visitation issues are decided and additional legal and ethical standards to consider when serving as a child custody evaluator;
 16. The importance of understanding relevant distinctions among the roles of evaluator, mediator, and therapist;
 17. How to write reports and recommendations, where appropriate;
 18. Mandatory reporting requirements and limitations on confidentiality;
 19. How to prepare for and give court testimony;
 20. How to maintain professional neutrality and objectivity when conducting child custody evaluations; and
 21. The importance of assessing the health, safety, welfare, and best interest of the child or children involved in the proceedings.
2. Comply with the training requirements described in rule 5.230, which includes basic instruction as follows:

1. The effects of domestic violence on children.
 2. The nature and extent of domestic violence.
 3. The social and family dynamics of domestic violence.
 4. Techniques for identifying and assisting families affected by domestic violence.
 5. Interviewing, documentation of, and appropriate recommendations for families affected by domestic violence.
 6. The legal rights of, and remedies available to, victims.
 7. Availability of community and legal domestic violence resources.
3. In addition an evaluator shall also complete 16 hours of advanced training within a 12-month period. Four hours of that advanced training shall include community resource networking intended to acquaint the evaluator with domestic violence resources in the geographical communities where the family being evaluated may reside. Twelve hours of instruction, as approved by the Administrative Office of the Courts, shall include all of the following:
1. The appropriate structuring of the child custody evaluation process, including, but not limited to, all of the following:
 2. Maximizing safety for clients, evaluators, and court personnel.

3. Maintaining objectivity.
4. Providing and gathering balanced information from the parties and controlling for bias.
5. Providing separate sessions at separate times as described in Section 3113.
6. Considering the impact of the evaluation report and recommendations with particular attention to the dynamics of domestic violence.
7. The relevant sections of local, state, and federal laws, rules, or regulations.
8. The range, availability, and applicability of domestic violence resources available to victims, including, but not limited to, all of the following:
 1. Shelters for battered women.
 2. Counseling, including drug and alcohol counseling.
 3. Legal assistance.
 4. Job training.
 5. Parenting classes.
 6. Resources for a victim who is an immigrant.
 7. The range, availability, and applicability of domestic violence intervention available to perpetrators, including, but not limited to, all of the following:

8. Certified treatment programs described in Section 1203.097 of the Penal Code.
9. Drug and alcohol counseling.
10. Legal assistance.
11. Job training.
12. Parenting classes.
13. The unique issues in a family and psychological assessment in a domestic violence case, including all of the following:
 1. The effects of exposure to domestic violence and psychological trauma on children, the relationship between child physical abuse, child sexual abuse, and domestic violence, the differential family dynamics related to parent-child attachments in families with domestic violence, intergenerational transmission of familial violence, and manifestations of post-traumatic stress disorders in children.
 2. The nature and extent of domestic violence, and the

relationship of gender, class, race, culture, and sexual orientation to domestic violence.

3. Current legal, psychosocial, public policy, and mental health research related to the dynamics of family violence, the impact of victimization, the psychology of perpetration, and the dynamics of power and control in battering relationships.
4. The assessment of family history based on the type, severity, and frequency of violence.
5. The impact on parenting abilities of being a victim or perpetrator of domestic violence.
6. The uses and limitations of psychological testing and psychiatric diagnosis in assessing parenting abilities in domestic violence cases.
7. The influence of alcohol and drug use and abuse on the

incidence of domestic violence.

8. Understanding the dynamics of high conflict relationships and relationships between an abuser and victim.
9. The importance of and procedures for obtaining collateral information from a probation department, children's protective services, police incident report, a pleading regarding a restraining order, medical records, a school, and other relevant sources.
10. Accepted methods for structuring safe and enforceable child custody and parenting plans that ensure the health, safety, welfare, and best interest of the child, and safeguards for the parties.
11. The importance of discouraging participants in child custody matters from blaming victims of domestic violence for the violence and

from minimizing allegations of domestic violence, child abuse, or abuse against a family member.

9. After an evaluator has completed the advanced training described above, that evaluator shall complete four hours of updated training annually that shall include, but is not limited to, all of the following:
 1. Changes in local court practices, case law, and state and federal legislation related to domestic violence; and
 2. An update of current social science research and theory, including the impact of exposure to domestic violence on children.
3. In addition, a child custody evaluator must have the following experience requirements:
 1. Completing or supervising three court-appointed partial or full child custody evaluations including a written or an oral report between January 1, 2000, and July 1, 2003; or
 2. Conducting six child custody evaluations in consultation with another professional who meets the education, experience, and training requirements of this rule.
4. Meet the continuing education, training, and experience requirements described in Cal. Rule of Court 5.225 (h):

1. After completing the initial 40 hours of training, persons appointed as child custody evaluators must annually complete 8 hours of update training in addition to the annual 4 hours of domestic violence update training described in Cal. Rule of Court 5.230.
5. Contra Costa's Rule of Court on Child Custody Evaluators are attached as endnote ⁱ and the Alameda County Rule of Court are attached as endnote ⁱⁱ
6. Co-Parent Counselors. Another manner in which parties may attempt to resolve their child custody disputes is by using the services of a co-parent counselor. The co-parent counselor will meet with the parties to help counsel them on better parent communication and getting past the emotional dissonance that keeps them from co-parenting. In addition a co-parent counselor can help parties work out the edges on a parenting plan.
7. Pilot Project. Contra Costa County has recently started to offer workshops to help parents develop parenting plans.

D. Parenting Plans

1. As a practical matter, the main job of a court in a contested child custody dispute is to order a parenting plan. There is almost no limit to the variety of parenting plans a court may order. A court could order no visitation for one parent, supervised visitation, a fully equal time share between the parents and many, many varieties in between. In general, the Courts prefer that parties work out their custodial plans between themselves. Failing that, the parties must attend some form of mediation or evaluation so that a custody professional can make a recommendation to the Court. The court is not obligated to adopt any specific

recommendation, but must weigh the professional recommendations against their own independent judgment.

2. In developing any parenting plan preference is given to joint custody (see Family Code Section 3020 discussed above). In addition, Family Code Section 3080 specifically provides that “There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child, subject to Section 3011, where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child.”
3. Further, pursuant to Family Code Section 3082 “When a request for joint custody is granted or denied, the court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interest of the child is not sufficient to satisfy the requirements of this section.”
 1. For a discussion of age appropriate parenting plans, see Parenting After Divorce: A Guide to Resolving Conflicts and meeting your Children’s Needs by Dr. Philip M. Stahl. PhD.(2000 Impact Publishers, Inc.).
4. Other resources:
 1. Kid’s turn: www.kidsturn.org;
 2. School resources;
 3. Therapy; and
 4. Other.

E. Move-Aways

1. Temporary Orders
 1. If there is no prior order or the prior order was a temporary order, the court must make a determination based on the

child's best interest. See Montenegro v. Diaz (2001) 26 Cal.4th 249, 109 Cal.Rptr.2d 575, 27 P.3d 289

2. Orders After Judgment

1. After Judgment or after a custody trial where there has been a judicial determination of the child's best interest, the court's task is more complex.

1. Initially, the noncustodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody.

2. If the noncustodial parent makes such an initial showing of detriment, the court must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children.

3. However, a move may constitute a change of circumstances for the purposes of modifying custody.

1. See *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 12 Cal.Rptr.3d 356, 88 P.3d 81.

F. Children with Special Needs

1. There are 3 major category of special needs children:

1. Physical: Acute, life-threatening medical conditions (severe asthma, food allergies, etc.)

2. Learning Disorders such as cognitive delays, ADHD, autism, Asperger's Syndrome; and

3. Psychological and Behavior Disorders.

2. The court will weigh each parent's ability to meet the needs of a special needs child focused, again, on the child's best interest. For a discussion of methodologies to address each class of special needs, please see Special Needs Children in Family Court Cases, by Donald T. Saposnek, Heidi Perryman, Josanna Berkow, Sherrill Ellsworth, 43 Fam. Ct. Rev. 566 (2005).

G. Nonparent rights

1. As discussed above, child custody orders *between parents* are based on an assessment of the Best Interest of the Child. This is not the case for nonparents. Pursuant to Family Code Section 3041, before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall:
 1. Make a finding that granting custody to a parent would be detrimental to the child, and
 2. That granting custody to the nonparent is required to serve the best interest of the child.
 1. NB: Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.
 2. NB: A finding that parental custody would be detrimental to the child shall be supported by clear and convincing evidence. (See Family Code Section 3041(b)).
2. Grandparents and others seeking visitation. If both parents object to allowing nonparents visitation then the same rules established in Family Code Section 3041 apply. According to *In re Marriage of*

Gayden (1991) 229 CA3d 1510, 1520, 280 CR 862, 867 the code “was not intended to disturb the longstanding inclination of California courts to *defer to the jointly expressed wishes of the parents* except in the most *unusual and extreme* cases.”

3. Stepparents. However, a stepparent, based on their relationship with the child, may be considered a de facto parent. See again *Marriage of Gayden* (1991) 229 CA3d 1510, 1520, 280 CR 862, 867 (citing to *In re B.G., supra*, 11 Cal.3d at p. 692, fn. 18, 114 Cal.Rptr. 444, 523 P.2d 244, fn. 18.): “As strong as the rights of such parents must be, there may be instances in which a child would be significantly harmed by completely terminating his or her relationship with a person who has (1) lived with the child for a substantial portion of the child's life; (2) been regularly involved in providing day-to-day care, nurturance and guidance for the child appropriate to the child's stage of development; and, (3) been permitted by a biologic parent to assume a parental role. The needs of the child, which are the most important consideration, may sometimes require that a visitation award be made to such a “de facto parent.”

H. Family Court - Probate – Juvenile Court: Who Does What?

1. Family Court hears all matters related to child custody, child support (non DCSS), spousal support, marital property, and attorney's fees related to the same. With some exceptions, the family court's authority in these areas is exclusive. See *Askew v. Askew* (1994) 22 Cal.App.4th 942, 28 Cal.Rptr.2d 284. However, when the Juvenile Court exercises jurisdiction over a minor child, the Juvenile Court's jurisdiction over the child is exclusive. (See *Slevats v. Feustal* (1963) 213 Cal. App. 4th 113, Witkin California Procedure §231, 27A Cal. Jur. 3d §53, etc.)

2. Probate court

1. There are three subjects areas under probate court jurisdiction:

1. **Probate of wills, trusts, and estates:**

Probate is the court-supervised process by which your assets are distributed and debts are paid after death.

2. **Conservatorship:**

Court appoints a conservator when they determine through a court process that a person cannot take care of themselves or their finances.

3. **Guardianship:**

The Court gives someone that is not the child's parent custody of the child or the right to control the child's property, or both.

3. Juvenile Court

1. **Juvenile delinquency**

(California Welfare and Institutions Code, Section 602)

These are law violations that, if committed by an adult, would be considered crimes.

2. **Juvenile status offenses**

(California Welfare and Institutions Code, Section 601)

These include non-criminal behaviors that are illegal because of the child's age – for example, truancy (cutting school), being out of control of a parent or guardian, or running away from home.

3. **Juvenile dependency**

(California Welfare and Institutions Code, Section 300)

A child might become a dependent of the court if abused,

molested, neglected, or abandoned by parents or caretakers. In some cases, the judge may refer families to mediation. Mediation gives the family, agencies, and attorneys a chance to try and work out a plan for how a child's best interests can be protected.

I. Evidence From the Child

1. According to the Family Code Section 3042 (a) “If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody.”
2. That same section, in subpart (b) “the court shall control the examination of the child witness so as to protect the best interests of the child. The court may preclude the calling of the child as a witness where the best interests of the child so dictate and may provide alternative means of obtaining information regarding the child's preferences.”
3. Calling a child as a witness in a dissolution matter is an extremely risky proposition. Philosophically, some judges take the position that a parent willing to subject a child to examination in a custody case is showing a reckless disregard for the child’s best interest (in essence using the child as sword or shield) thus is presumed to be unfit. The mediator or an evaluator can speak with a child in a non-adversarial manner. That should be the only method by which a child’s wishes ought to be made known to a judge. One Judge in Contra Costa County, nearly 15 years ago, stated his policy in open court: ‘Any parent willing to bring his or her child into the family law proceeds is presumptively unfit.’

- J. Compare this approach to AB1050 which becomes effective January 1, 2012. AB1050 will amend Family Code Section 3042 as follows:
1. AB1050 adds the following to Section 3042:
 - (b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of a child witness so as to protect the best interests of the child.
 - (c) If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record.
 - (d) Nothing in this section shall be interpreted to prevent a child who is less than 14 years of age from addressing the court regarding custody or visitation, if the court determines that is appropriate pursuant to the child's best interests.
 - (e) If the court precludes the calling of any child as a witness, the court shall provide alternative means of obtaining input from the child and other information regarding the child's preferences.
 - (f) To assist the court in determining whether the child wishes to express his or her preference or to provide other input regarding custody or visitation to the court, a minor's counsel, an evaluator, an investigator, or a mediator who provides recommendations to the judge pursuant to Section 3183 shall indicate to the judge that the child wishes to address the court, or the judge may make that inquiry in the

absence of that request. A party or a party's attorney may also indicate to the judge that the child wishes to address the court or judge.

(g) Nothing in this section shall be construed to require the child to express to the court his or her preference or to provide other input regarding custody or visitation.

(h) The Judicial Council shall, no later than January 1, 2012, promulgate a rule of court establishing procedures for the examination of a child witness, and include guidelines on methods other than direct testimony for obtaining information or other input from the child regarding custody or visitation.

Question for consideration: How will this impact families undergoing divorce litigation?

II. ENFORCEMENT OF ORDERS

A. Contempt

1. Pursuant to Code of Civil Procedure Section 1200, et seq. a litigant who willfully fails to comply with a valid court order may be subject to contempt charges. Penalties for violating court orders can include fines, community service, or jail. Contempt proceedings are generally disfavored. The Defendant has many procedural rights and the rarely do contempt charges actually result in compliance with court orders.

B. Other Remedies

1. Writ of Execution

1. A writ of execution is a judicial process directed to a levying officer (i.e., sheriff, or other local law enforcement officer) that requires the levying officer to enforce (by

taking possession of, storing and then selling personal property) the money judgment (support order or money judgment). See Code of Civil Procedure Section 695.010.

2. Wage and Earnings Assignments

1. Child support

1. Income Withholding Order, FL-195, is the mandatory judicial council form for the enforcement by wage assignment of a child or family support order (Family Code Section 5208).

1. Pursuant to Family Code Section 5253 wage assignments are issued without notice to the obligor and REQUIRE the employer pay withheld support to the State Disbursement Unit (SDU) in Sacramento – not directly to the payee.

2. Spousal/ Partner support

1. Earnings Assignment Order for Spousal or Partner Support, FL-435. If there is no child support component to a support order, this form may be used to order the support payment to be paid directly to the payee (bypassing the SDU).

3. Abstract of Judgment

1. The filing of the Abstract of Judgment with the Court and then the county's recorder's office creates a judgment lien against the payee's real property. This procedure can be used as security for support orders or as liens for money judgments.

4. Debtor's Exam

1. A debtor's examination is an excellent post judgment enforcement tool (see Code of Civil Procedure Section 708.110 et seq.). The service of the Order to Appear for Examination (EJ-125) creates a 1 year lien on all of the debtor's nonexempt property.

1. In enforcing a family law judgment, the debtor's exam is held in the family court. As a practical matter, the Court will call the case, swear in the debtor, and allow the attorney to examine the debtor off the record. At the end of the examination, the attorney can then ask the court to order the debtor to turn over any discovered nonexempt property. It is a great tool to motivate a judgment debtor to become reasonable.

III. DOMESTIC VIOLENCE

A. Acts Which Constitute Domestic Violence

1. Family Code Section 6211 defines Domestic Violence as abuse perpetrated against on the following classes of people:

1. A spouse or former spouse.
2. A cohabitant or former cohabitant, as defined in Section 6209.
3. A person with whom the respondent is having or has had a dating or engagement relationship.
4. A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).

5. A child of a party or a child who is the subject of an action under the Uniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected.
 6. Any other person related by consanguinity or affinity within the second degree.
2. Abuse is defined as
1. Intentionally or recklessly to cause or attempt to cause bodily injury.
 2. Sexual assault.
 3. Placing a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
 4. Engaging in any behavior that has been or could be enjoined pursuant to Section 6320.
 1. Which includes molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party.

B. Ex-Parte Orders of Protection

1. The truly ex parte application is the Emergency Protective Order described in Family Code Section 6240 et seq. These orders are issued by law by the appointed on duty judge by telephone based on an oral recitation of facts by the law enforcement officer. These

orders may be issued where a law enforcement officer assets reasonable grounds to believe any of the following:

1. That a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought.
 2. That a child is in immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member.
 3. That a child is in immediate and present danger of being abducted by a parent or relative, based on a reasonable belief that a person has an intent to abduct the child or flee with the child from the jurisdiction or based on an allegation of a recent threat to abduct the child or flee with the child from the jurisdiction.
 4. That an elder or dependent adult is in immediate and present danger of abuse as defined in Section 15610.07 of the Welfare and Institutions Code, based on an allegation of a recent incident of abuse or threat of abuse by the person against whom the order is sought, except that no emergency protective order shall be issued based solely on an allegation of financial abuse.
 5. EPOs expire the earlier of 5 court days or 7 calendar days (see Family Code Section 6256).
 6. Burden of Proof: Reasonable grounds of immediate and present danger of abuse.
2. Family Court Ex Parte Temporary Restraining Orders
 1. Family Code Section 6300 et seq.

1. Available to protect against abuse as defined by Family Code Section 6203
2. Available for 20 days, or if good cause shown, 25 days (Family Code Section 242).
3. Burden of Proof: Reasonable proof of past acts (See Family Code Section 6300)
4. On an *ex parte* basis the court can order:
 1. Personal conduct order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.
 2. Exclusive care, possession, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent. The court may order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering,

concealing, molesting, attacking, striking, threatening, harming, or otherwise disposing of the animal.

3. An order excluding a party from the family residence.
4. Other restraining necessary to effectuate the court's order.
5. Temporary custody of children
6. Temporary use of property and payment of debts.

C. Communication between Court departments.

1. Contra Costa Rule 13.3 sets for the specific protocol for communication between the different Court departments that may issue domestic violence restraining orders: Juvenile, Family Court, Criminal Court and Probate. These rules are as follows:

1. Prior to requesting a Criminal Protective Order involving a defendant and a victim or witness who have a relationship as defined in Family Code Section 6211, the District Attorney shall make reasonable efforts to determine whether there are any children of the relationship, whether there are any Family, Juvenile, or Probate Court orders for custody/visitation for those children, and whether there are any existing protective/restraining orders involving the defendant, the protected person, and/or the children. The District Attorney shall advise the Criminal Court of the existence of any such orders at the time the proposed Criminal Protective Order is submitted for approval and signature.

2. The Family, Juvenile or Probate Court setting terms of custody or visitation shall make reasonable efforts to determine whether any person requesting custody or visitation is subject to a Criminal Protective Order, including inquiring of the parties whether there are any existing protective/restraining orders involving that person, another person seeking custody or visitation, and/or the children.
3. When the Criminal Court issues a Criminal Protective Order protecting a victim or witness who has children with the defendant, the Criminal Court shall consider whether peaceful contact with the protected person should be allowed for the purpose of allowing defendant to have visitation with the children.
4. When the Criminal Court issues a Criminal Protective Order that lists the defendant's minor children as protected persons, the Criminal Court shall fax a copy of its Order to the Supervising Judge of the Family Court (or his or her designee) or, if the Criminal Court is aware that a Juvenile or Probate Court proceeding concerning the family is pending, to the applicable Juvenile or Probate Court (or his or her designee), for filing in the appropriate Family, Juvenile or Probate file.
5. If any person named in a Criminal Protective Order also is before the Family, Juvenile, or Probate Court in proceedings concerning custody or visitation, a court-employed mediator serving the Family, Juvenile or Probate Court shall have access to and review the Criminal Court file, as permitted by applicable law. Confidential

information reviewed under this rule remains confidential and shall not be further released except as provided by law or court order.

6. When modification a Criminal Protective Order:
 1. A party seeking to modify a Criminal Protective Order may calendar the matter for hearing before the Criminal Court, after giving notice to the District Attorney. If the defendant and the protected person do not have any minor children in common, the motion shall be heard by the Criminal Court before which the matter then is pending.
 2. If a party seeking to modify a Criminal Protective Order also is before the Family, Juvenile or Probate Court with the protected person in proceedings concerning custody or visitation, the motion to modify the Criminal Protective Order shall be noticed and heard on the Domestic Violence Friday morning calendar in Martinez. The party seeking to modify the Criminal Protective Order must give notice of the hearing to the Family, Juvenile, or Probate Court, and to all counsel and parties in the criminal action and the Family, Juvenile, or Probate matter.
 3. The Family, Juvenile, or Probate Court may, on its own motion or at the request of a defendant, protected person or other interested party, calendar a hearing before the Criminal Court, on the Domestic Violence Friday morning calendar, for a motion to modify a Criminal Protective Order.

Notice of the hearing shall be given to all counsel and parties in the criminal action and the Family, Juvenile, or Probate matter.

4. When the Family, Juvenile, or Probate Court calendars a hearing on a motion to modify a Criminal Protective Order, or receives notice that a party with a pending Family, Juvenile, or Probate matter involving minor children seeks to modify a Criminal Protective Order, the Court shall provide the Criminal Court with copies of existing or proposed Orders relating to protection, custody and/or visitation in the pending Family, Juvenile, or Probate matter.
2. Alameda County's Rule related to inter division communication regarding domestic violence restraining orders can be found at Rule 1.1 and are as follows:
 1. Criminal protective orders take precedence over all other protective orders issued by the civil, family, juvenile and probate courts, subject to the provisions below.
 1. Criminal court procedure:
 1. When the criminal court issues criminal protective orders protecting victims, the criminal court shall determine whether there are any minor children of the relationship between the defendant/restrained person and the victim/protected person, and whether there are any court orders for custody/visitation for those minor children.

2. If there are minor children, the criminal court shall consider whether peaceful contact with the victim/protected person should be allowed for the purpose of allowing defendant/restrained person to visit the minor children. The court shall give the defendant/restrained person an information packet concerning his or her rights to request custody and/or visitation through the family or juvenile court, along with directions to the Self-Help Center.
3. The criminal court shall also determine whether there are any existing protective/restraining orders involving the defendant/restrained person, the victim/protected person, and/or the minor children. Subject to available resources, the court shall examine available databases for existing protective or restraining orders before issuing permanent criminal protective orders.
4. If the criminal court order includes minor children as named protected parties, the order may be made explicitly subject to modification by a civil, family, juvenile, or probate judge. If this qualifying clause is not included in the criminal court order, the order may not be modified without

notification and consent of the issuing criminal court.

5. When the criminal court issues criminal protective orders that list the defendant/restrained person's minor children as protected persons, the criminal court shall forward a copy of its order to the family court. If a civil, juvenile, or probate court proceeding concerning the family is pending, a copy of the order shall be faxed to the applicable court.

2. Modification of criminal protective orders

1. Any court responsible for issuing custody or visitation orders involving minor children of a defendant/restrained person subject to a criminal protective order may modify the criminal protective order if all of the following circumstances are applicable:
 1. Both the defendant/restrained person and the victim/protected person are subject to the jurisdiction of the family, juvenile, or probate court; and both parties are present before the court.
 2. The defendant/restrained person is on probation (formal or court) or has a case pending for a domestic violence offense in Alameda County.

3. The family, juvenile, or probate court identifies a criminal protective order issued against the defendant, which is inconsistent with a proposed family, juvenile, or probate court order, such that the family, juvenile, or probate order is/will be more restrictive than the criminal protective order.
 4. Both the victim/protected person and the defendant/restrained person agree that the criminal protective order may be modified to a less restrictive order.
 2. A criminal protective order may not be modified to a less restrictive order or to one permitting proposed visitation or custody unless a clause specifically allowing such a modification or amendment is included in the criminal protective order.
 3. If the aforementioned clause allowing modification of a criminal protective order does not appear on the face of the order, or if any party objects to the modification of the criminal protective order, the family, juvenile, or probate court shall, at the request of an interested party or on its own motion, calendar a hearing before the criminal court on the issue of whether a

criminal protective order should be modified. The family, juvenile, or probate court shall provide the criminal court with copies of existing or proposed orders relating to the matter. Notice of the hearing will be provided to all counsel and parties. Any modification of a Criminal Court Protective Order must be communicated to the Alameda County District Attorney's Office.

3. Family, juvenile, probate, civil court restraining orders involving child custody and visitation orders.
 1. All personal conduct and stay away restraining orders in a judgment must include the date of expiration of such orders and good cause for granting such order(s) shall be set forth in attached declaration(s). In addition, all such restraining orders must be separately set forth on a CLETS or other applicable Judicial Council form.
 2. Subject to available resources, the family, juvenile, and probate courts shall examine appropriate available databases for existing restraining or protective orders involving the same restrained and protected parties before issuing permanent CLETS civil restraining orders. In the event that this information is not available to the judicial officer, inquiry

shall be made of the parties before issuing permanent CLETS civil restraining orders.

3. Any order of the family, juvenile, or probate court that permits contact between a defendant/restrained person subject to either CLETS civil restraining orders or criminal protective orders and his or her minor children, shall contain specific language setting forth the time, day, place, and manner of the transfer of the minor children, including the safe exchange of the minor children, in accordance with Family Code Section 3100. Such an order shall not contain language that conflicts with a criminal protective order. Safety of all parties shall be the court's paramount concern. The court or a court-related agency may recommend safe and specific contact with the minor children and direct the defendant/restrained person and/or the victim/protected person to the process for modification of protective orders.

3. Restraining Orders after hearing.

1. Available Orders:

1. Same as TRO
2. Plus: Child support, spousal support, restitution for out of pocket expense, Batter's treatment program, attorney's fees and costs.

2. Burden of proof: Preponderance of the evidence.

3. Duration: up to 5 years. Renewable without a showing of further abuse (Family Code Section 6345)
4. Impact of DVPA findings on child custody matters (see Family Code Section 3044)
 1. Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, 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 interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.

D. Civil Harassment Restraining Orders (compare DVPA ROs)

1. Pursuant to Cal. Code of Civil Procedure Section 527.6 a person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section.
 1. For the purposes of this section, "harassment" is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.

2. The burden of proof for civil harassment is clear and convincing evidence that unlawful harassment exists, an injunction shall issue prohibiting the harassment.

IV. ATTORNEY'S FEES

A. Statutory Framework

1. Most common basis for fee awards: Family Code section 271 et seq. and section 2030 et seq.; Discovery Sanctions; C.C.P. 128.5 (and 128.7).

1. Family Code Sanctions. Section 271 provides for attorney's fees against one party based on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. However, in making such an order the court cannot impose an unreasonable financial burden on the sanctioned party.
2. Leveling the playing field. Family Code Section 2030 requires the court to order attorney's fees to ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary, based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.
 1. Attorney fee awards can be granted pretrial, at trial or for post judgment issues, post judgment.

3. Beyond the two most commonly used Family Code attorney fee provisions: fees may also be available by contract (for instance in a judgment) or by other applicable non-family code provisions, for example Code of Civil Procedure Sections 2023.030 as a discovery sanction and 128.5 (and 128.7) for frivolous pleadings.
2. Other Family Code Sections Providing for Attorney's Fees
 1. Attempted Murder of Spouse. Section 274 provides a **mandatory** award of reasonable attorney's fees and costs to the injured party as a sanction for attempted murder resulting in conviction of the sanctioned spouse pursuant to Section 4324, as long as sanctioned spouse has notice and opportunity to be heard. No financial need showing is required.
 2. Breach of fiduciary duties (Feldman) sanctions
 1. Management and Control of Marital Property. Section 1101(g) provides remedies for breach of fiduciary duty by one spouse. Award is **discretionary**, and can include 50% of any asset undisclosed or transferred, plus attorney's fees and court costs.
 3. Nullity, Dissolution and Legal Separation
 1. Judicial Determination of Void or Voidable Marriage. Section 2255 provides for **discretionary** attorney's fees and costs pursuant to section 2030 if the party is innocent of fraud or wrongdoing in inducing or entering into a marriage, and is free from knowledge of any prior marriage or other impediment.

4. Right to Custody of a Minor Child

1. Action for Exclusive Custody. Sections 3121(a) provides for **discretionary** fees, if it is found necessary based on income and need, for one party to pay reasonably necessary attorney's fees to ensure each party has access to legal representation. Such a request may be made by oral motion in open court at the hearing, or any time before judgment against a party in default. Section 3121(b) requires the determination of whether one party shall pay and in what amount to be based on (1) respective incomes and needs and (2) abilities to pay, and also provides that a party lacking the ability to hire an attorney can request the court order the other party, if found financially able, to pay a reasonable amount to allow the moving party to hire a lawyer in a timely manner. Section 3121(c) states that amounts shall be based on services rendered before, during and after the proceeding. Section 3121(d) allows for modification of the award, and 3121 (e) requires that applications for such modifications, in addition to requests for reasonable retainer to hire an attorney be made by motion on notice or order to show cause during the proceeding. Section 3121(f) requires the court to rule on all applications within 15 days.
2. Appointed Counsel of Minor Child. Section 3153(a) provides **mandatory** "reasonable" fees for counsel appointed to minors in custody or visitation

cases. The court has to determine whether the parties are financially unable to pay all or part of the fees, and if they are not able to pay, the remainder is to be paid by the county.

3. Uniform Child Custody Jurisdiction and Enforcement Act. Sections 3450 and 3452(a) provide necessary and reasonable expenses, including attorney's fees and travel expenses for enforcement of an out of state custody order. The award is **mandatory** unless the other party shows the award would be "clearly inappropriate."

5. Support

1. General. Section 3557 provides **mandatory** "reasonable" attorney's fees for child or spousal support after determining ability to pay and considering income and needs of both parties. The award is paid to the custodial parent or supported spouse, and not necessarily the prevailing party, unless "good cause" is shown. There is no statutory definition of "good cause," but could include situations where no support is due, or a meritless appeal brought by the supported party.

6. Modification, Termination or Set Aside of Support Orders

1. General. Section 3652 provides **discretionary** attorney's fees to the prevailing party, but not against a government agency, and does not preclude need-based awards under Section 2030.

7. Prevention of Domestic Violence

1. Orders Issuable After Notice and Hearing. Section 6344(a) allows for **discretionary** attorney's fees to the prevailing party after notice and hearing. Section 6344(b) provides that if the petitioner is the prevailing party that is unable to pay his or her attorney's fees, attorney's fees are **mandatory**, the amount determined by after the court determines (1) respective incomes and needs and (2) abilities to pay.
8. Determination of Parent and Child Relationship
 1. Determination of Father and Child Relationship. Section 7640, as part of the Uniform Parentage Act, provides for **discretionary** reasonable attorney's fees, experts, guardian ad litem, and other costs of the proceeding, as well as pretrial items.
 2. Freedom from Parental Custody and Control. Section 7863 provides **mandatory** payment of attorney's fees to appointed private counsel in a reasonable sum, paid by the real parties in interest in proportions the court finds just. If any of the real parties in interest are unable to afford counsel, payment will be made out of the county general fund.

V. CHILD SUPPORT

A. Child Support Guidelines and Statutes

1. Preliminary considerations:

1. Both parents have an equal obligation to support their children in a manner suitable for the child circumstances. See Family Code Section 3900. The duration of this

obligation continues to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever comes first. See Family Code Section 3901.

2. Both parents as well, have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means. See Family Code Section 3910.
2. The Statewide Uniform Guideline (Family Code Sections 4050-4076):
1. The statewide uniform child support guideline was adopted by statute effective July 1, 1992. The guideline mandatory and the court can only depart from the guideline in special circumstances.
 2. The statewide guideline is an algebraic formula adopted by statute at Family Code Section 4055. There are a myriad of support calculation programs approved by the judicial counsel for use. The most common of these programs are Dissomaster™, Xspouse™, and SupportTax™. In addition to these commercial programs, the State of California developed its own child support calculator as part of its \$801,000,000.00 Child Support Enforcement System (CSES). However, for family law practitioners the CSES program is of minimal value. It cannot run county specific spousal support calculations and it cannot be downloaded for office use. It is web based and can be found at:

<https://www.cse.ca.gov/ChildSupport/cse/guideline>
[Calculator#](#).

3. The amount of support specified under statewide uniform guideline is presumptively correct. See Family Code Section 4057(a). This presumption is a rebuttable presumption affecting the burden of proof and may be rebutted by showing, by a preponderance of the evidence, that the application of the formula would be unjust or inappropriate consistent with the goals established by establishing the guideline delineated in Family Code Section 4053. See Family Code Section 4057.
4. The court can only deviate from issuing a guideline support order if: (1) The parties have stipulated to a different amount of child support under subdivision (a) of FC 4065. (2) The sale of the family residence is deferred and the rental value of the family residence in which the children reside exceeds the mortgage payments, homeowner's insurance, and property taxes. (3) The parent being ordered to pay child support has an extraordinarily high income and the amount determined under the formula would exceed the needs of the children. (4) A party is not contributing to the needs of the children at a level commensurate with that party's custodial time. (5) Application of the formula would be unjust or inappropriate due to special circumstances in the particular case. These special circumstances include, but are not limited to, cases in which the parents have different time-sharing arrangements for different children; cases in which both parents have substantially equal time-sharing of the children and one parent has a much lower or higher percentage of income used for housing than the other parent; cases in which the children have special medical or other

needs that could require child support that would be greater than the formula amount. See Family Code Section 4057.

5. If the court deviates from the guideline formula amount, the court must state, on the record: (1) the amount of support that would have been ordered under the guideline formula; (2) the reasons the amount of support ordered differs from the guideline formula amount; (3) the reasons the amount of support ordered is consistent with the best interests of the children. See Family Code Section 4056.
6. Should the parties wish to enter into a below-guideline support amount, the parties must declare, in writing or on the record that:
 1. They are fully informed of their rights concerning child support;
 2. The order is being agreed to without coercion or duress.
 3. The agreement is in the best interests of the children involved;
 4. The needs of the children will be adequately met by the stipulated amount; and
 5. The right to support has not been assigned to the county pursuant to Section 11477 of the Welfare and Institutions Code and no public assistance application is pending.
7. Additions to Guideline:
 1. The court must order, as an add on to child support, child care costs related to employment or to reasonable necessary education or training for employment; and the reasonable uninsured health care costs for the children.
 2. The court may order, as an addition to child support, costs related to the education or other special needs of the children; as well as travel expenses for visitation.

3. **Note:** The court may adjust the child support order to take into consideration fluctuating or seasonal income. See Family Code Section 4064. However, if the court issues an order that deviates from the guideline, the court must make findings on the record in writing in compliance with Family Code Section 4056. See *Marriage of Hall* (2000) 81 CA4th 313.

B. Department of Child Support Services (DCSS) (Family Code Section 17000 et seq.)

1. Mandatory

1. When a custodial parent receives aid he or she assigns her right to child support to DCSS.

2. Voluntary

1. Non aid recipients may use DCSS to establish paternity, set, modify or collect child support orders.

3. DCSS enforcement:

1. DCSS has several tools available to enforce a support order that are not available to private counsel. These tools are:

1. Hold on issuing passports;
2. Suspending licenses (driver's, contactor's, bar, etc.);
3. FIDM (Financial Institution Data Match):
 1. Can search for an levy against bank accounts (regardless of whether there is an order for arrearages payments and compliance with such order);
4. Income Withholding Orders (wage assignments that do not need a judges signature);
5. Tax Intercepts.

C. Support of Children with Special Needs

1. Courts shall order the payment of the special needs of a child consistent with the parent's ability to pay (See FC 4053, 4062 and *Marriage of Schlafly*, 149 Cal. App 4th 747; 57 Cal Rptr. 3d. 274 (2007)).
2. Parents also have a duty to support adult children that are incapacitated from earning a living and without sufficient means. (FC 3910).

D. Determination of income for purposes of support

1. What is income for purposes of the support calculation?
 1. Family Code Section 4055 (the guideline calculator) calculates child support using the parties net monthly disposable income.
 2. Net disposable income is calculated by dividing the annual net disposable income by 12, unless such calculation does not "accurately reflect the actual or prospective earning of the parties at the time the determination of support is being made, the court may adjust the amount appropriately. (See FC 4060.
 3. Family Code Section 4059 calculates the annual net disposable income each parent by deducting from a parent's annual gross income the actual amounts attributed to the following:
 1. The state and federal income tax liability resulting from the parties' taxable income. Federal and state income tax deductions shall bear an accurate relationship to the tax status of the parties (that is, single, married, married filing separately, or head of household) and number of dependents. State and

federal income taxes shall be those actually payable (not necessarily current withholding) after considering appropriate filing status, all available exclusions, deductions, and credits. Unless the parties stipulate otherwise, the tax effects of spousal support shall not be considered in determining the net disposable income of the parties for determining child support, but shall be considered in determining spousal support.

2. Deductions attributed to the employee's contribution or the self-employed worker's contribution pursuant to the Federal Insurance Contributions Act (FICA), or an amount not to exceed that allowed under FICA for persons not subject to FICA, provided that the deducted amount is used to secure retirement or disability benefits for the parent.
3. Deductions for mandatory union dues and retirement benefits, provided that they are required as a condition of employment.
4. Deductions for health insurance or health plan premiums for the parent and for any children the parent has an obligation to support and deductions for state disability insurance premiums.
5. Any child or spousal support actually being paid by the parent pursuant to a court order, to or for the benefit of any person who is not a subject of the order to be established by the court. In the absence of a court order, any child support actually being paid, not to exceed the amount established by the

guideline, for natural or adopted children of the parent not residing in that parent's home, who are not the subject of the order to be established by the court, and of whom the parent has a duty of support. Unless the parent proves payment of the support, no deduction shall be allowed under this subdivision.

6. Job-related expenses, if allowed by the court after consideration of whether the expenses are necessary, the benefit to the employee, and any other relevant facts.
 7. Note: depreciation is NOT listed above.
4. Borrowing language from Internal Revenue Code Section 61, Family Code Section 4058 defines annual gross income to be income from whatever source derived. Income includes, but is not limited to, the following:
1. Income such as commissions, salaries, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person not a party to the proceeding to establish a child support order under this article.
 2. Income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business.
 3. In the discretion of the court, employee benefits or self-employment benefits, taking into consideration

the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts.

5. Note: The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children.
2. A support payor may also include a hardship amount in the support calculation. The amount of the hardship shall not be deducted from the amount of child support, but shall be deducted from the income of the party to whom it applies. In applying any hardship, the court shall seek to provide equity between competing child support orders.
 1. The allowable hardships are listed in Family Code Section 4071 as:
 1. Extraordinary health expenses for which the parent is financially responsible, uninsured catastrophic losses and the minimum basic living expenses of other parent's natural or adopted children for which the parent has an obligation to support.
 2. Note: The maximum amount of the hardship deduction is the support amount allocated for each child under the support order. See Family Code Section 4071(b). As a practical consideration, most courts will limit the hardship amount to $\frac{1}{2}$ of the amount of support allocated under the order if there are 2 parents available for the support of that child.
 3. Note that gross income for child support purposes is income from whatever source derived, excluding child support payments

actually received as well as need based public assistance. See Family Code Section 4058(a) and (c).

4. The court may, in its discretion, consider a parent's earning capacity, in lieu of a parent's actual income, when the exercise of this discretion is consistent with the best interest of the child. See Family Code Section 4058(b).
5. What is not income for purposes of the support calculation?
 1. Child support payments actually received and income derived from need based public assistance programs. (FC 4058(c)).

VI. SPOUSAL SUPPORT

A. Temporary Spousal Support

1. "The temporary spousal support order is an attempt, pending trial, to allocate the family income equitably between the parties, considering their individual incomes and expenses. Many California courts have adopted guidelines for temporary support. These are nothing more than a method of dividing the family income proportionately by adopting a schedule, in chart form, based upon either the net income of the person being asked to pay support or the net incomes of both parties." (see *Marriage of Burlini*, (1983)143 Cal. App. 3d 65, 68.

1. Contra Costa County has adopted the Alameda County temporary spousal support guideline. That guideline, detailed in the Alameda County Local Rules Section 5.70, states:

1. The following discretionary guideline is adopted for temporary spousal support or partner support in marital and domestic partnership dissolution cases.

1. Non-child support cases

1. In cases where there is no child support, the guideline spousal or partner support is 40% of the net income of the payor or minus 50% of the net income of the payee.
2. Child support cases:
 1. In cases where there is to be child support, the guideline spousal or partner support uses the components set forth in Family Code sections 4055 through 4069 in the following formula:
 1. $SS = [HN - (HN)(M)(K)(1 + H\%)] [.35] - [LN - (LN)(M)(K)(1 + H\%)] [.4]$ (If H% is greater than 50%, use 2-H% instead of 1+H%) (M = Fam. Code §4055 (b) (4) child multiplier.)
 1. In domestic partnership cases, the court will adjust the formula to account for tax treatment under state and federal laws if necessary.

B. Permanent/ Judgment Spousal Support

1. The purpose of Judgment¹ spousal support is “not to preserve the pre-separation status quo but to provide financial assistance, if appropriate, as determined by the financial circumstances of the parties after their dissolution and the division of their community property.” (See *In re Marriage of Murray*, (2002) 101 Cal.App.4th 581124; Cal.Rptr.2d 342).
2. Orders for Judgment Support must be made based on a judicial weighing of the Family Code Section 4320 factors. It is reversible error for the trial court to use the temporary guideline spousal support calculators to determine Judgment spousal support. (See *In re Marriage of Schulze* (1997) 60 Cal. App. 4th 519, 70 Cal. Rptr., 2d 488.

C. Post-Judgment Modification of Spousal Support

1. Judgment spousal support can be modified only on a showing of material changed circumstances. Change circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. (See *In re Marriage of Dietz*, (2009) 176 Cal.App.4th 38797 Cal.Rptr.3d 616).

VII. FINANCES AND PROPERTY DIVISION ISSUES

A. Characterization Issues

1. Classification of property as community or separate defines the rights of the spouses to manage property during marriage, divide it upon termination at death or on dissolution and the rights of third party creditors to reach it to satisfy debts.

¹ As post judgment spousal support can be modified or terminated based on a variety of factors, I use the term “Judgment Support” as opposed to “Permanent Support” to distinguish it from the temporary support available during the pendency of pre-judgment legal proceedings.

2. Presumptions: Classification basically depends upon the application of a series of statutory, non-conclusive presumptions.
 1. Community Property; Time and Source of Acquisition:
 1. Community Property – Family Code Section 760: Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.
 1. Generally includes property interest in pension & retirement plans.
 2. Generally excludes lump sum post-separation Workers' Compensation payment for pre-separation injury. See *Raphael v. Bloomfield* (2003) 113 Cal. App. 4th 617.
 2. Split opinion on evidentiary burden to overcome this presumption: generally appellate decisions hold that clear and convincing evidence is required but see *In re Marriage of Etefagh* (2007) 150 Cal. App. 4th 1578 setting a preponderance of the evidence standard.
 1. On appeal, appellate courts generally consider whether trial court's decision supported by substantial evidence. See for example *In re Marriage of Knickerbocker* (1974) 43 Cal. App. 3d 1039.
 3. Other presumptions, such as presumption of lenders' intent, family expenses paid with community property, instrument in writing, loss of identity by commingling, active management of

separate property and mixed use acquisitions are generally rebuttable by preponderance of the evidence. (Evidence Codes Sections 603 and 1150).

4. Joint form of title presumptions (Family Code Sections 2580 and 2581), as well as the presumption of separate property reimbursement (Family Code Section 2640) can be overcome only by an express, written declaration of intention.
 5. Interspousal transformations require express written declaration of intent to change classification during marriage (Family Code Section 852(a)).
 6. Where property is acquired during marriage and title is held as joint tenancy or tenancy in common, the general trend is to require clear and convincing evidence to overcome presumption of title.
 7. Personal injury awards are CP if cause of action arose during marriage; SP if after separation (Family Code Section 781).
2. Separate Property:
1. Family Code Section 770: Separate property includes:
 1. Property owned before marriage;
 2. Property acquired by gift, bequest, devise, or descent;
 3. Rents, issues and profits of SP.
 4. Party may convey SP without consent.
 2. Family Code Section 771: Earnings and accumulations after separation are SP.

3. Family living expenses presumed paid from community earnings.
 1. No reimbursement where SP used to pay community expenses without express agreement to the contrary. See *See v. See* (1966) 64 Cal. 2d 778.
4. Liability for debt:
 1. Family Code Section 913: SP of married spouse not liable for other's premarital debt or SP debt during marriage.
 2. Family Code Section 914: Reimbursement for SP used to pay community debt incurred by other spouse if non-exempt CP (or incurring spouse's SP) was available.
 3. Family Code Section 4301: Spouse shall support other from their SP (during marriage) if no CP available.
5. Commingling & Tracing:
 1. Source of property determines its classification as SP or CP; subsequent changes of form are not relevant.
 2. Direct tracing involves exact accounting.
 3. Indirect tracing, when CP and SP funds are mixed together, is achieved by circumstantial evidence (e.g., a showing that insufficient CP funds available at purchase so that item must be, in part, SP.
 4. Commingled funds that cannot be traced are presumed community.
6. Profitable Separate Property (e.g., business):

1. Time, skill, energy and talent of spouse during marriage is a community resource.
 2. Rents, issues and profits of SP are SP.
 3. *Pereira*: Capital growth formula (fair return on SP investment is SP, balance is CP). (*Pereira v. Pereira* (1909) 156 Cal. 1, 103 P. 488)
 4. *Van Camp*: Salaried services formula (fair compensation for CP labor, balance is SP). (*Van Camp v. Van Camp* (1921) 53 Cal.App. 17, 199 P. 885)
7. Acquisitions using SP and CP:
1. Family code Section 2640:
 1. (a) SP contributions to acquisitions include down payments, improvements and reductions in loan principal used to finance purchase or improvement.
 2. (b) Reimbursement to contributing party if no written waiver – requires tracing, does not include interest, cannot exceed net value at time of division.
 2. *Moore / Marsden*: CP contributions to SP accrue *pro tanto* CP interest. (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 168 Cal.Rptr. 662, 618 P.2d 208; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 181 Cal.Rptr. 910)
8. *Epstein Credits / Watts Charges*:
1. A party's post-separation SP payments to maintain CP assets can be reimbursable to SP.

2. A party's post-separation CP usage may require reimbursement to community. (*In re Marriage of Epstein* (1979) 24 Cal.3d 76, 154 Cal.Rptr. 413, 592 P.2d 1165; *In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 217 Cal.Rptr. 301).

B. Dissipation of Marital Assets – Fiduciary duties

1. Principal CP statutory restraints – during marriage:

1. Family Code Section 1100(b): Except for mutual gifts, no gifts to 3rd parties or sales for less than fair market value without written consent.
2. Family Code Section 1100(c): No sale, conveyance or encumbrance without written consent of:
 1. Family dwelling, furniture, furnishings or fittings or other spouse's or minor children's clothing.
3. Family Code Section 1100(d): Managing spouse may act alone in all transactions but shall give written notice before any sale, encumbrance, transfer, etc., of all or substantially all business assets.
4. Family Code Section 1100(e): Each spouse has a fiduciary duty (confidential relationship) to the other as set forth in Family Code Section 721.

2. FL-110 (Summons): Upon filing and serving petition and summons, neither spouse can:

1. Cash, borrow against, cancel, transfer, dispose of or change beneficiaries of insurance held for the community or the children;
2. Transfer, encumber, hypothecate, conceal or dispose of any real or personal property without the

other's written consent or court order except for the necessities of life, court costs or attorney fees.

3. Remedies – Claim for Breach of Fiduciary Duty (Family Code Section 1101):

1. Family Code Section 1101(a): A spouse has a claim against the other for any breach of the fiduciary duty that results in impairment of the claimant's undivided one-half interest in the community estate.

1. But Note (1): A managing spouse's duty is that of good faith dealing, full disclosure and accounting; thus negligence in managing assets is generally not recoverable. The mismanagement must rise to gross negligence, deliberate mismanagement, fraud or concealment. See for example, *In re Marriage of Schultz* (1980) 105 Cal. App. 3d 846.

2. Note (2): While the burden is on the spouse who did not squander the community assets, deliberate mismanagement can be found when the managing spouse cannot account for expenditures or an asset's nonexistence. See for example, *In re Marriage of Ames* (1976) 59 Cal. App. 3d 234.

2. Family Code Section 1101(b) & (c): A court may order an accounting or that title to property be reformed to reflect the community nature (except for certain partnerships, professional corporations and unincorporated businesses).

3. Family Code Section 1101(e): In any transaction affecting community property, the court may, upon motion, dispense with the requirement of the other spouse's consent if the

transaction is in the community's best interest and the consent has been arbitrarily refused or cannot be obtained.

4. Family Code Section 1101(g): Remedies for fiduciary breach shall include an award to the claimant spouse of 50 percent of the value of an undisclosed or transferred asset plus attorney's fees.

5. Family Code Section 1101(h): Where the breach malice, oppression or fraud under Civil Code §3294, the award shall include an award of 100 percent of the asset's value.

1. See also, *In re Marriage of Rossi* (2001) 90 Cal. App. 34 and *In People v. Wallace* (2004) 123 Cal. App. 4th 144 [where criminal liability may arise for intentionally causing damage to community property].

4. Remedies for Overpayments of Debts or Debts Not Legally Collectible:

1. Overpayment or payment of debts that are not legally collectible are gifts that should be recaptured for the benefit of the community under Family Code Section 1100(b).

2. The interspousal disclosure requirements of Family Code Sections 1100(e) and 1101 also provide for recapture these payments in violation of a managing spouse's fiduciary duty.

VIII. TRIAL PRACTICE TIPS IN FAMILY COURT (Space Provided for notes)

- A. Effective Discovery (and discovery alternatives)
- B. Pretrial Procedures
- C. Preparation of Witnesses
- D. Effective Use of Income and Expense Declarations
- E. Effective Use of Disclosure Documents

- F. Effective Presentation of Evidence
- G. Chambers Conferences
- H. Professionalism

IX. ETHICS:

A. Communication with the Bench

1. Methods:

1. Letter?

- 1. Never or sometimes?
- 2. Ex parte communications?

2. Motions?

- 1. Almost always acceptable?

3. Advance consent for pleading delivery?

- 1. To department;
- 2. Courtesy copies.

B. Ethical conduct and expectations in Family Law Litigation

1. Confidentiality of reports related to children:

1. Child custody evaluations and mediation reports are confidential documents and may not be:

- 1. Attached to pleadings and filed (unless placed in the confidential portion of the file);
- 2. Disseminated in public;
- 3. According to Contra Costa Local Rule 13.2(K) The [evaluation] report shall be placed in the confidential portion of the court file and may not be disclosed to anyone, except to the following persons: (a) a party to the proceeding and his or her attorney of record; (b) attorney appointed for the child pursuant to Family Code section 3150; (c) those additional persons set forth in Family Code

section 3025.5; and (d) any other person upon order of the court for good cause.

4. According to Alameda Local Rule 5.80 (d):
 1. In any proceeding involving the custody or visitation of minor children, any written report or recommendation must be marked and kept confidential and unavailable to any person except the court, minor's counsel, the parties, their attorneys and any person to whom the court expressly grants access by written order made with prior notice to all parties. No person who has gained access to this type of a confidential report may make copies of it or disclose its contents to any child or any other third party absent an order that provides for disclosure.
 5. The new FL-328 form is required to be attached to all child custody evaluation reports. Warns report readers that they may be subject to monetary sanctions for unwarranted disclosure of the report.

2. Duty to the bench

1. Rule of Professional conduct 5-200 states that in presenting a matter to a tribunal, a member:
 1. Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
 2. Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

3. Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
4. Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
5. Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

3. Duty to opposing counsel:

1. Contra Costa County has established Standards of Professional Courtesy. These standards are set forth as Appendix B to the Contra Costa County Local Rules. These largely common sense rules include:

1. Requiring counsel to communicate with opposing counsel prior to scheduling dates (such as hearings, depositions, etc.)
2. Not participate in using delaying tactics;
3. Grant reasonable extensions of time;
4. Avoid duplicative discovery;
5. Refrain from making disparaging comments about the opposing counsel, judge, parties, or witnesses.
6. Where possible stipulate to uncontested facts.

C. Keeping client informed

1. Rule of Professional Conduct 3-500 requires attorneys to keep a client reasonably informed about significant developments relating

to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

2. Practice tips: The moderator's office has a strict policy of sending a copy of all documents, incoming and outgoing to the client, electronically.

D. What to do when a client is unable to make informed decisions.

1. Guardian ad Litem for litigants (suggestions)

1. Notify the court that the client is unable to make informed decisions. Request continuance if necessary.
2. Attorney cannot disclose client's confidential information. (See Rule of Professional Conduct 3-100).
3. Seek to withdraw pursuant to Rule of Professional Conduct 3-700 (c)(1)(d)
 1. See also CA Eth. Op. 1989-112 (Cal. Bar Ethical Opinion).

E. Motions to Withdraw as attorney of record

1. Rule of Professional Conduct 3-700 addresses the issue of permissive and mandatory withdrawals.
2. Even though an attorney seeks to withdraw as counsel for a client, it is still incumbent on the attorney to protect client confidences (See Rule of Professional Conduct 3-100) and continues to have a duty to competently represent the client (see Rule of Professional Conduct 3-110).
3. An attorney must withdraw if:
 1. The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable

cause and for the purpose of harassing or maliciously injuring any person; or

2. The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
 3. The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.
4. Pursuant to Rule of Professional Conduct 3-700, an attorney may withdraw if:
1. The client:
 1. insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
 2. seeks to pursue an illegal course of conduct, or
 3. insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
 4. by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
 5. insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
 6. breaches an agreement or obligation to the member as to expenses or fees.

2. The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
3. The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
4. The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
5. The client knowingly and freely assents to termination of the employment; or
6. The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal

F. Warning for counsel: Bench officers' obligations to report misconduct under Canon 3D(2): Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge **shall** take appropriate corrective action.

IX. Local forms

A. Alameda County Local Forms can be found at

<http://www.alameda.courts.ca.gov/courts/forms/index.shtml>

1. A list of Alameda's Local forms are:

1. Stipulation and Order Appointing Private Child Custody Recommending Mediator (ALA FL-002)
2. Order Appointing Accounting Expert (ALA FL-004)
3. Order Appointing Real Estate Expert (ALA FL-006)
4. Attachment to Order Appointing Child Custody Evaluator (form fl-327) (ALA FL-008*)
5. Declaration Regarding Notice for Ex Parte Application for Order (ALA FL-010)

6. Guidelines for Child Visitation Supervision (ALA FL-015-info*)
7. Agreement for Child Visitation Supervision (ALA FL-015*)
8. Application and Order for Minor's Counsel Fees Over Cap (ALA FL-021)
9. Summary of Contested and Resolved Issues (ALA FL-030)
10. Application and Order for Continuance of Hearing or Status Conference (ALA FL-035)
11. Case Management Conference Questionnaire (ALA FL-040)
12. Status Conference Questionnaire (ALA FL-041)
13. Stipulation and Order for Voluntary Settlement Conference (ALA FL-045)
14. Request for Status Conference to Set Case for Trial (ALA FL-050)
15. Application and Order for Continuance of Long-Cause Hearing or Trial and/or Settlement Conference (ALA FL-055)

B. Contra Costa County Local forms can be found at:

1. <http://www.cc-courts.org/index.cfm?fuseaction=page.viewpage&pageid=2870>
2. The main Contra Costa County local forms are (NB: some forms have been replaced by judicial council forms) :
 1. Standard for Processing Special Master Recommendations, which includes:
 1. Attachment A - Recommendation of Special Master
 2. Attachment B - Order Adopting Special Master's Recommendation

3. Attachment C - Prof of Service (Mail)
2. Cover Sheet for "Emergency" Default/Uncontested Judgment
3. Stipulation and Order for Appointment of Joint Accounting Expert
4. Seek Work Order / Log and Declaration
5. Order Re: Appointment of Counsel for Minor
6. Declaration Re Notice Upon Ex Parte Application For Orders
7. Order for Substance Abuse Assessment
8. At-Issue Memorandum
9. Stipulation and Order Appointing Child Custody Evaluator
10. Stipulation and Order for Appointment of Special Master
11. Ex Parte Temporary Restraining Order (TRO) Intake
12. Stipulation and Order Re: Continuance of Court Hearing
13. Civil Bench Warrant

X. LOCAL RULES

A. If you practice in either county know the rules:

1. Alameda County's Local Rules can be found at:
 1. <http://www.alameda.courts.ca.gov/courts/rules/localrules2010/index.shtml>
2. Contra Costa County's Local Rules (current and proposed) can be found on the Court's Home Page at:
 1. <http://www.cc-courts.org/>

ⁱ Contra Costa County

Rule 13.2: Child Custody Evaluations

A. Court Ordered Evaluations. In all child custody and visitation evaluations ordered by the court, evaluators will be appointed under Evidence Code Section 730. (Rev. 01/01/01)

B. Custody Evaluation Witness Lists/Documents.

1. Witness Lists. Within fifteen (15) days of the appointment of an evaluator by court order, each party shall submit to the court-appointed evaluator and the other party, the name, address, and telephone number of each person that party requests be interviewed in connection with the evaluation, and a summary of the relevant information that person possesses. Upon the initial list being submitted, each party will have fifteen (15) days to submit an additional list to the evaluator and to the other party of additional witnesses it is requested that the evaluator interview under the same conditions outlined above. The evaluator is not required to interview any such person, but may use his/her judgment in determining whom to interview, and whether to interview them in person, by telephone, or in writing. The Court may in its discretion prohibit a party from calling as a witness any person whose name, relevant information and expected testimony has not been given to the evaluator.

2. Documents. Prior to accepting or reviewing any written material provided by a party, the evaluator shall confirm that the other party has received a copy of said material.

C. Evaluator Selection

Where the parties are unable to agree on an evaluator to conduct the custody evaluation, the matter shall be referred to Family Court Services ("FCS") for selection of a private evaluator in accordance with a rotational selection system. The court will issue a standard order that FCS shall designate an evaluator for the case. The court will provide a copy of the order to the parties, attorneys and FCS. The court's order will specify any areas of expertise required by the evaluator.

Where FCS is ordered to conduct the evaluation, the Director of FCS will select the evaluator from available FCS staff.

FCS will maintain a list of private child custody evaluators who have represented that they meet the training and education requirements of Rules 5.225 and 5.230 of the California Rules of Court. This list will be kept in a binder for public viewing in the department of the supervising family law judge and at FCS.

D. Scope of the Evaluation. When appropriate, in the interest of saving the parties time, expense and stress, the evaluation may be limited in scope (focused evaluation) to the question or questions that the Court requires answered.

E. Challenge of the Evaluator. (CRC 5.220(d)(1)) No peremptory challenge of evaluators shall be allowed. Parties may raise objections to a specific evaluator during the selection process. Parties may object to the conclusions of the report when the report is submitted to the Court, and may bring other appropriate expert testimony to object to the conclusions.

F. Information from Children. (CRC 5.220(d)(2)) The Court relies on the judgment of its experts in making decisions about when, how often, and under what circumstances children are interviewed. The expert shall be able to justify the strategy used in any particular case. Children will be informed that the information provided by the child will not be confidential prior to commencing the interview.

G. Impartial Expert. The Court appointed evaluator shall be impartial. Evaluators should include interviews of both parents or guardians. Exceptions to this may include geographically separated parents. In such instances, attorneys, parties and the expert are expected to make reasonable accommodation to assure that the expert has received adequate information about all parents, guardians, or parties.

Grievance Procedure. If a party alleges that an unprofessional or inappropriate act has occurred on the part of the evaluator during the course of the evaluation, he or she may discuss the complaint with the evaluator directly in order to handle misunderstandings.

Complaints or grievances concerning the evaluator will not be considered by the court until after the evaluation is completed, at the Recommendation Conference. All such complaints and grievances must be submitted to the bench officer hearing the matter no later than fifteen (15) days prior to the Recommendation Conference, with copies to the evaluator and all other parties. The evaluator shall submit a written response to all issues raised in the written complaint to the bench officer hearing the matter no later than two (2) days prior to the Recommendation Conference, with copies to all parties. The bench officer will address the complaint at the time of the Recommendation Conference. If the party submitting the complaint objects to the bench officer's resolution of the complaint, the complaint or grievance shall become an issue at trial.

H. Expectation of Settlement. The evaluator, the parties and the attorneys should make a good faith attempt to settle the disputes prior to the court hearing. Settlement efforts may include joint meet and confer conferences between the parties and counsel unless potential harm exists from this process.

I. Continuing Effort. The Court may ask the evaluator to continue to be available to the family to help resolve problems with the recommended and ordered plan.

J. Payment of the Evaluation. The Court will order payment of the evaluator at the time of the appointment. The evaluator may not withhold a report from the Court because of the parties' failure to pay. The evaluator may bring the issue of a parties' failure to pay to the attention of the Court.

K. Provision of Reports. (Rev/Eff 1/1/07) Evaluators shall prepare a written report. At least thirty (30) days before the hearing regarding custody of the child, the evaluator shall file the report with the clerk of the court in which the matter will be heard and serve it on the parties or their attorneys, and counsel appointed to the child pursuant to Family Code Section 3150.

The report shall be placed in the confidential portion of the court file and may not be disclosed to anyone, except to the following persons: (a) a party to the proceeding and his or her attorney of record; (b) attorney appointed for the child pursuant to Family Code section 3150; (c) those additional persons set forth in Family Code section 3025.5; and (d) any other person upon order of the court for good cause.

Those persons entitled to disclosure of the report shall preserve the confidentiality of the document. Use of the report shall be limited to the pending litigation and no person who has access to the report shall make copies for dissemination or disclose its contents to any child who is the subject of the report or to anyone else not entitled to access, nor shall the parties attach such document to any pleading in the pending litigation or in any other litigation or proceeding. Substantial sanctions shall be imposed for inappropriate disclosure.

(m) Rules of Court s1257. (Deleted 1/1/01)

L. Recommendation Conference. (New 1/1/07) The failure of either party or their counsel to appear at the Recommendation Conference, except upon prior leave of the court, may result in monetary or issue sanctions. If there are any objections or factual disputes regarding the recommendations, these must be in writing. Should a party assert an objection or dispute facts, these objections or factual declarations must be provided to the opposing party or their counsel,

and directly to the department at least fourteen (14) calendar days prior to the Recommendation Conference. Responses to the objections and/or declarations shall be transmitted to the opposing party and the court at least seven (7) calendar days prior to the conference. Failures to object or raise factual disputes may result in the recommendations being implemented.

This Recommendation Conference is set based on the expectation that the evaluation will be prepared and submitted to the parties and counsel at least thirty (30) calendar days prior to the Recommendation Conference as set forth in section 132 (L) above. Should the evaluator determine that it will not be possible to prepare his/her report by that time, said evaluator shall forthwith notify both counsel, and provide to counsel a date by which the evaluator expects the report will be done. Counsel shall thereupon notify the court promptly, either in writing or by telephone conference call (the preferred method). Based on the evaluator's notice of inability to timely conclude the report, the court will re-set the date of the Recommendation Conference and this order will apply to the new date for the Recommendation Conference.

M. Ex Parte Communication with Evaluator (Rev/Eff 1/1/07)

No party or attorney for a party shall initiate one-sided contact with the Evaluator, either orally or in writing prior to the first appointment of the initiating party except for the purpose of setting up that first appointment. Parties may initiate one-sided contact with the evaluator after the first appointment of the party initiating the contact. The evaluator may contact the parties at any time. Attorneys may initiate contact after the first appointment of a party only by conference call or in writing copied to the other party. Contact may be made to arrange appointments without the necessity of a conference call.

ii

Alameda County

Rule 5.80: Child Custody Evaluation

(a) Challenge of the evaluator

No peremptory challenge of a child custody evaluator appointed by the court is permitted.

(b) Withdrawal by evaluator

An evaluator may make application to the court for an order permitting the evaluator to withdraw from a case by noticed motion and may submit an ex parte application for an order shortening time for the service and hearing of such a motion.

(c) Complaints about evaluator performance

(1) For purposes of this process, "action" means the family law proceeding wherein the evaluator was appointed by the court.

(2) A party to the action, including a guardian ad litem, and any counsel appointed to represent a minor may file a complaint about the performance of an evaluator.

(3) A party who wishes to complain about the performance of an evaluator must do so in writing and serve the original of the complaint on the evaluator no later than 20 days after the event giving rise to the complaint or within 20 days of receipt of the evaluator's report, whichever is later.

(4) No later than ten court days after the receipt of a complaint, the evaluator must serve the complainant with a written response to the complaint. Without conceding the accuracy of the

contents of the complaint, an evaluator may ask the court to relieve him or her of the appointment and, if appropriate, appoint another evaluator.

(5) If the response served by the evaluator does not resolve the complaint, the complainant must serve a copy of the complaint and the response of the evaluator, if any, on the presiding judge for family law matters whose decision concerning the complaint, which may include removing the evaluator from the panel of child custody evaluators used by the court, will be final.

(d) Confidentiality of reports

In any proceeding involving the custody or visitation of minor children, any written report or recommendation must be marked and kept confidential and unavailable to any person except the court, minor's counsel, the parties, their attorneys and any person to whom the court expressly grants access by written order made with prior notice to all parties. No person who has gained access to this type of a confidential report may make copies of it or disclose its contents to any child or any other third party absent an order that provides for disclosure.

(e) Ex parte communications with evaluators

There must be no ex parte communications between the court appointed child custody evaluator and any attorney or party involved in the case except as provided in Family Code section 216. No attorney or party to the action may provide the evaluator with documents about the case without first giving the other party, and minor's counsel if any, a copy of the documents. Nothing in this rule prohibits the evaluator from contacting any person the evaluator determines is necessary to consult in order to complete the report.

Rule 5.80 amended and renumbered effective January 1, 2008; adopted as rules 11.4 and 11.6 effective May 19, 1998; previously amended effective January 1, 2004, July 1, 2006, and January 1,

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