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The Relationship of Family and Juvenile Courts in Child Abuse Cases

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THE RELATIONSHIP OF FAMILY AND JUVENILE COURTS IN CHILD ABUSE CASES

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When Harry and Mary Jones separated, their two children, Tom and Jane, remained with Mary. Harry visited with the children regularly. Mary filed for dissolution of their marriage and asked for exclusive custody of the children. In his answer, Harry asked for exclusive custody. The dissolution proceedings were bitter with quarrels over money and the children. The parties were unable to reach an agreement even after several meetings with a mediator. The court initiated a custody investigation and each parent started making allegations against the other. Harry claimed that Mary was an alcoholic and that she was letting a day-care center raise the children. Mary said that Harry used drugs and that his girlfriend cared for the children whenever visitation took place.

Mary said that after one particular visit with the father, Jane complained that her "privates" hurt. Jane said Harry touched her there, and she wished he would stop. Mary took Jane to a therapist who concluded that Jane had been sexually molested by her father. The therapist reported her conclusions to the Child Protection Agency, and an agency investigative worker is now considering filing a juvenile court dependency petition. Mary also applied to the family court for termination of Harry's visitation with both children. The district attorney was consulted and filed criminal charges against Harry. All of this information was given to the family court custody evaluator.

Harry denied the allegations and claimed that Mary was programming Jane in order to gain an advantage in the dissolution proceedings. He intends to have an independent therapist examine Jane.

These facts set the scene for a frequently recurring situation in

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the superior courts of California and many other states:[1] a child abuse allegation[2] made in the context of a family law proceeding. This situation raises a series of perplexing questions. Should the family court[3] maintain exclusive jurisdiction over the case or refer it to the juvenile court?[4] If each court hears the case, what coordination is required between the courts? If both courts decide similar issues, which order should take precedence?

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1. Approximately 2-10% of all family court cases involving custody and/or visitation disputes involve a charge of sexual abuse. Thoennes & Pearson, *Summary of Findings from the Sexual Abuse Allegations Project* (Draft), ASSOCIATION OF FAMILY AND CONCILIATION COURTS RESEARCH UNIT (1986) [hereinafter *Summary of Findings*]. This figure is a sharp increase from the years before 1980. This conclusion is based upon the summary of findings and the author's interviews with Family Court Services personnel in California. Moreover it appears that only a small percentage (8%) of all child abuse reports are demonstrably false. The large majority of reports are either true or unsubstantiated. Jones, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, to be published in the JOURNAL OF INTERPERSONAL VIOLENCE (1987).

2. "Child abuse" means a physical injury which is inflicted by other than accidental means on a child by another person. "Child abuse" also means the sexual abuse of a child or any act or omission proscribed by Penal Code section 273a (willful cruelty or unjustifiable punishment of a child) or section 273d (corporal punishment or injury). "Child abuse" also means the neglect of a child or abuse in out-of-home care, as defined in this article. *See* CAL. PENAL CODE § 11165 (West Supp. 1987).

3. Family court refers to the activities of one or more superior court judge, referee or commissioner while he is handling litigation arising out of the Family Law Act (CAL. CIV. CODE §§ 4000-5317 (West 1985 & Supp. 1987)), and the Family Conciliation Court Law (CAL. CIV. PROC. CODE §§ 1730-33 (West 1982)). Technically these proceedings are all part of the general duties of the superior court. In large counties with more than 10-15 judges, the court often assigns one or more judges to handle all of the cases arising under the Family Law Act. This is referred to as the family court. It is not a "court" with a special statutory jurisdiction, but is "an ordinary numbered department of a multi-judge court, exercising jurisdiction over cases divided into classes for convenience of trial and other disposition." 2 WITKIN, CALIFORNIA PROCEDURE § 172, at 98 (3d ed. 1985) [hereinafter 2 WITKIN].

In smaller counties, one judge may have all of those responsibilities. In very small counties (1-2 judges), the work may only take a portion of one judge's day each week.

In some of the larger counties, the superior court has included other types of cases within the purview of the family court division. Thus, such actions as paternity (Uniform Parentage Act, CAL. CIV. CODE §§ 7000-21 (West 1983 & Supp. 1987)), termination of parental rights (CAL. CIV. CODE §§ 232-39 (West 1982 & Supp. 1987)), adoption (CAL. CIV. CODE §§ 221-30.8 (West 1983 & Supp. 1987)), contested guardianships (CAL. PROB. CODE §§ 1500-1601 (West 1981)), and civil injunctions involving harassment (CAL. CIV. PROC. CODE § 527.6 (West Supp. 1987)), may be heard in the family court. Such inclusions are a matter of local court policy and permit certain economies of scale as well as enabling the assigned judges to develop an expertise in the subject matter. *See* 2 WITKIN § 172, at 197-98.

4. Juvenile court is any superior court sitting in the exercise of jurisdiction over any person described in the law relating to children (CAL. WELF. & INST. CODE § 200-22 (West 1984 & Supp. 1987)). The issues addressed in this article are of relevance primarily in dependency cases (CAL. WELF. & INST. CODE § 300 (West 1984), not delinquency matters (CAL. WELF. & INST. CODE § 602 (West 1984)) or status offenses (CAL. WELF. & INST. CODE § 601 (West 1984)). Reference to juvenile court throughout this article will refer only to juvenile court dependency matters.

I. INTRODUCTION

Legal proceedings arising from child abuse allegations have risen dramatically in the 1980's.[5] Legal actions involving child abuse include criminal prosecutions, petitions filed in juvenile court, and allegations made by one parent against the other in family law custody litigation. Consequently, the public agencies which investigate, petition and supervise child abuse cases have been overwhelmed by this sharp increase.

There are two principle reasons for the rise. First, the California Legislature passed a mandatory reporting law,[6] which was enacted in 1980 and has been strengthened several times by subsequent legislation.[7] The classes of persons who must report suspected child abuse have been expanded, the penalties for failing to report are serious, and civil liability for failing to report has been clearly established.[8]

Second, heightened public awareness has also contributed to the rising level of reported child abuse cases. Child abuse, both physical and sexual, has been the subject of national television productions,[9] and the media regularly reports child abuse cases. In addition, children from pre-school to high school years are now educated in school about the dangers of child abuse. The Child Abuse Prevention Training Act of 1984 funded training programs in schools to teach child abuse prevention techniques.[10]

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5. For example, the California Department of Social Services received reports of 175,200 child abuse cases in 1980, and 295,769 cases in 1985. Memorandum from Department of Social Services to David Foster, Office of Child Abuse Prevention (Dec. 3, 1986). Similarly, on a national level, estimates of sexual abuse cases per thousand children was believed to be 1.87 in 1978, compared to 5.76 per thousand in 1980, 9.0 in 1982, and 15.88 in 1984. AMERICAN ASSOCIATION FOR PROTECTING CHILDREN, INC., HIGHLIGHTS OF OFFICIAL NEGLECT AND ABUSE REPORTING (1984) (1986) (American Humane Association, Denver, Colorado). Ten to fifteen percent of all divorce/dissolution cases with children are contested. Two to ten percent of family court cases involve custody/visitation issues with allegations of sexual abuse. Thus, two to fifteen cases out of each 1000 divorce filings nationally involve allegations of sexual abuse by a parent against a child. *Summary of Findings*, *supra* note 1.

6. CAL. PENAL CODE § 11166 (West Supp. 1987).

7. *Id.* at §§ 11166-74.5.

8. *See, e.g.*, Landeros v. Flood, 17 Cal. 3d 399, 552 P.2d 389, 131 Cal. Rptr. 69 (1976).

9. *60 Minutes*, (CBS television broadcast, Vol. 17, No. 36, Sunday, May 18, 1986), included a segment on sexual abuse allegations between parents. *The Burning Bed* and *Something About Amelia* were two movies shown to a national television audience. In addition, a number of serialized productions have had episodes on child sexual abuse, including *Webster*, *L.A. Law*, and *Hill Street Blues*.

10. 1984 Cal. Legis. Serv. 116 (West) (A.B. 2443, M. Waters). *See also* CAL. WELF. & INST. CODE § 18950 (West 1980 & Supp. 1987).

The sharp increase in these cases has had a dramatic impact on the legal system. Child abuse allegations have appeared with greater regularity throughout the courts in a variety of different legal contexts.[11] In juvenile court, dependency cases focus upon protection of the abused child;[12] delinquency cases can involve abuse of one child by another;[13] in criminal court, the alleged abuser is prosecuted for his acts;[14] in family court, parents can allege child abuse against each other;[15] and the abused child can bring a civil suit against the alleged abuser for damages and other relief.[16] Additionally, a myriad of statutes has been promulgated addressing some of the problems raised by cases involving child abuse allegations.[17]

The same cases with the same parties frequently appear in more than one court setting simultaneously. The most difficult and recurring situations arise in the family and juvenile courts.[18] This article focuses on the relationship of these concurrent and sometimes competing actions. The article describes the family and juvenile courts and the ways in which each deals with child abuse cases. The author compares the structure and procedures in each court and the ways in which the same case can move from one to the other or be in both simultaneously. The article also reviews the case law and statutes which address the relationship of the two courts in abuse cases.

The article concludes that each court was designed for a specific purpose. Family court was designed to provide litigants with a forum in which to resolve the issues relating to the custody, care and control of children. Juvenile court was created to protect children from parental abuse or neglect. The author suggests that, given the present structure of the two courts, the child protective agency worker who is investigating child abuse allegations is in the best position to decide whether the juvenile court should intervene in

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11. *See supra* note 2.

12. *See, e.g.*, *In re* Courtney S., 130 Cal. App. 3d 567, 181 Cal. Rptr. 843 (1982); CAL. WELF. & INST. CODE § 300(a), (d) (West Supp. 1987).

13. CAL. WELF. & INST. CODE § 602 (West 1984); *In re* Gladys R., 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970).

14. CAL. PENAL CODE §§ 999g-u (West 1985 & Supp. 1987); People v. Roscoe, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985); People v. Burton, 55 Cal. 2d 328, 359 P.2d 433, 11 Cal. Rptr. 65 (1955).

15. *See, e.g.*, *In re* William T., 172 Cal. App. 3d 790, 218 Cal. Rptr. 420 (1985).

16. *Landeros*, 17 Cal. 3d at 399, 551 P.2d at 389, 131 Cal. Rptr. at 69.

17. *E.g.*, CAL. CIV. CODE § 4608(b) (West Supp. 1987); CAL. EVID. CODE §§ 240(c), 1228 (West Supp. 1987); CAL. WELF. & INST. CODE § 350 (West 1984), § 356.5 (West Supp. 1987); CAL. PENAL CODE §§ 999q, 868.5, 868.6, 868.8, 1347 (West Supp. 1987).

18. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. Summer 1975, at 226.

pending family law custody litigation. This determination should be made at the earliest possible time. The article also concludes that adherence to established guidelines would allow both courts to manage child abuse cases more effectively and efficiently.

II. COMPARISON OF FAMILY AND JUVENILE COURT

A. *The Functions of Family and Juvenile Courts*

Family and juvenile courts were created for different reasons. Family court primarily provides a private dispute settlement function for its participants[19] while juvenile court involves application of the court's child protection function.[20] Both courts involve family and child custody issues, but family court is designed to provide a forum in which litigants can resolve the issues relating to their marriage or other relationship which resulted in the birth of a child. Parents are presumed to be capable of making decisions regarding their children without state intervention or oversight.[21] When parents cannot resolve child custody differences the court must decide these issues under state guidelines.[22] Other interested parties may also assert rights regarding access to the child.[23]

In the family court forum, the state minimally intrudes into the custody decision making process. The government has an interest in the outcome, and has established a number of rules that the court must employ in deciding child custody issues.[24] These rules are based principally upon policies established by the Legislature to promote the best interests of the child and to preserve parental sharing of rights and responsibilities.[25]

Juvenile court was also created to protect children and to pre-

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19. *See* CAL. CIV. CODE § 4600.1 (West Supp. 1987).

20. *See* CAL. WELF. & INST. CODE § 202 (West Supp. 1987).

21. The court in *In re* Jennifer P., stated that "our system, for better or worse, presumes that parents are the best judges of their children's best interests." 174 Cal. App. 3d 322, 327, 219 Cal. Rptr. 909, 912 (1985). *See* CAL. CIV. CODE § 4600.1 (West Supp. 1987). *See also* Stanley v. Illinois, 405 U.S. 645 (1972). "So fundamental are the rights of parenthood that infringements thereof have been held to constitute an encroachment on the personal liberty of the parent forbidden by the Constitution." 39 AM. JUR. *Parent and Child* § 6 (1942).

22. The guidelines are set out in Civil Code sections 4600 (a) and (b), 4600.5 (a), (b), (c) and (f), 4601, 4601.5, 4607, and 4608.

23. CAL. CIV. CODE § 4601 (West 1983). *See also id.* at §§ 197.5, 4351.5 (regarding grandparent visitation).

24. *See supra* note 22.

25. *See Courtney S.*, 130 Cal. App. 3d at 567, 181 Cal. Rptr. at 843; CAL. WELF. & INST. CODE § 300(a), (d) (West Supp. 1987).

serve and strengthen the child's family ties.[26] However, in juvenile court, the state takes formal action to restrict parental behavior regarding children,[27] to provide services to children and their families,[28] and, if necessary, to remove children from the custody of their parents or guardians.[29] The state takes an assertive role in the juvenile court. The government is a party to the proceedings, seeking to prove that a child needs protection because of some action or inaction by the parents.[30] The state may ask for removal of a child from parental custody or control and then propose a plan for reuniting the child with the parent. If the plan is not successfully completed, the child will not be returned to a parent and the state will seek a permanent home for the child in another setting.[31]

Both the family and juvenile courts perform more than the primary function ascribed to them. The family court is often called upon to make protective orders relating to the child or one of the parents. The juvenile court often makes custody orders regulating parental powers with respect to the child, including issues of access and time sharing.[32]

B. *Perspective of the Two Courts*

1. *Family Court*

In family law the parents are presumed to be fit and proper persons to care for their child.[33] The family court process permits parents to determine how they will share the responsibilities of raising the child, including issues such as school, medical treatment, religious upbringing, allocated time with the child, and financial

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26. Welfare and Institutions Code section 202 provides, in part, that "[m]inors under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment and guidance consistent with their best interests and the best interest of the public." CAL. WELF. & INST. CODE § 202(b) (West Supp. 1987).

The court in *In re* A. J., 274 Cal. App. 2d 199, 202, 78 Cal. Rptr. 880, 882 (1969), stated that, "[j]uvenile court law is designed not primarily for the reproof and improvement of erring parents; its purpose is to provide protection, guidance and discipline to children who, for reasons mentioned in the statute, may become dependents of the juvenile court acting *in loco parentis*." *Id.*

27. *See* CAL. WELF. & INST. CODE § 361 (West Supp. 1987).

28. *See id.* at § 362(c).

29. *Id.* at § 202(a).

30. *Id.* at §§ 306, 309, 311 (West 1984).

31. *Id.* at §§ 360-62, 366, 366.2, 366.25 (West Supp. 1987).

32. *E.g.*, *In re* Brendan P., 184 Cal. App. 3d 910, 230 Cal. Rptr. 720 (1986); *In re* William T., 172 Cal. App. 3d 790, 281 Cal. Rptr. 420 (1985). *See infra* notes 48-52 and accompanying text.

33. *See* CAL. CIV. CODE § 4600.1 (West Supp. 1987); *see also supra* note 21.

contributions.[34]

The Legislature and courts prefer that parents decide these issues without state involvement.[35] Unless parental child rearing falls below a minimal societal standard, the state should not intervene in the parents' decision making process.[36] In marital dissolution proceedings, most parents reach an agreement on child custody issues without going through contested hearings and then submit the agreement to the court for judgment. The state does not ordinarily supervise or interfere with family decisions during the marriage. The Legislature has concluded that the court must affirm the agreement reached by the parents at the time of marital dissolution or modification absent "exceptional circumstances."[37]

If custody issues are contested, the state has greater control over the decision making process. Recognizing that custody disputes may create special problems for the parents and the child, the Legislature has established a number of rules and guidelines that govern the child custody determination process.[38] Parents must participate in mediation[39] and are encouraged to share the rights and responsibilities of child rearing.[40] Child custody determinations are based upon the best interests of the child and require an examination of such factors as the health, safety and welfare of the child, any history of abuse against the child, and the nature and amount of contact with both parents.[41] The Legislature also provided that other significant persons in the child's life have a right of access to her.[42]

The state's position of minimal intervention into parental custody agreements leads to several problems. What if the parents agree to something that a court finds is not in the best interests of the child? For example, the parents might agree that one parent will not

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34. CAL. CIV. CODE §§ 4600.1, 4600.5 (West Supp. 1987).

35. *Id.* at §§ 4600.1, 4728.

36. *Id.* at § 4600.1(b).

37. The text of Civil Code section 4600.1(b) provides:

> If the parties have agreed to or reached an understanding on the custody or temporary custody of their children, a copy of the agreement or an affidavit as to their understanding shall be attached to the petition or action as promptly as possible after this filing. The court shall, except in exceptional circumstances, enter an order awarding temporary custody in accordance with the agreement or understanding, or in accordance with any stipulation of the parties.

Id. at § 4600.1(b).

38. *Id.* at §§ 4600, 4600.5, 4608.

39. *Id.* at § 4607.

40. *Id.* at § 4600.

41. *Id.* at § 4608.

42. *Id.* at §§ 4351.5, 4602. Neither of these legislative mandates applies to the intact marriage, only to parties who are dissolving their marriage.

pay child support, or that the child will move from one parent to the other every day, or that one parent will never have contact with the child. Should the court permit such an agreement?[43]

Married parents who separate and enter into private agreements avoid court involvement. Since there is no occasion for the court to become involved in these private agreement situations, there is no interference in the private decision making process. During the dissolution process, however, courts may learn of such agreements and may refuse to confirm them.[44] In some of these situations, the court acts as a voice for the child. The court may insist that a parent pay child support and may question the parents about the wisdom of a particular agreement. Sometimes the court will approve the agreement because it has no means to supervise or enforce orders with which neither parent is willing to comply.[45]

While family court judges may occasionally detect a custody stipulation that is contrary to the child's best interests and refuse to approve it, they are not equipped to do this systematically. Even if courts intervene, family court judges may be limited to the force of their persuasion in the court setting because they do not have authority to monitor cases which leave the family court. If both parents oppose the court's suggestion, neither parent is likely to bring violations to the court's attention.[46]

In short, the family court is poorly equipped to speak for or protect the child. The presumption of parental fitness means the court need not and should not be concerned with the child. The court assumes the parents will see to the child's needs.[47]

2. *Juvenile Court*

In juvenile court the proceedings focus upon whether the minor is or might be a dependent child of the court. Dependency denotes the status of a minor who has been abused, neglected, inadequately cared for or who is physically dangerous to the public because of a mental or physical deficiency or disorder.[48] Section 300 of the Welfare and Institutions Code sets out the conditions which may result

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43. These may be considered "exceptional circumstances" referred to in Civil Code section 4600.1(b).

44. CAL. CIV. CODE § 4600.1(b) (West Supp. 1987).

45. *See infra* text accompanying notes 173-214, discussing supervision of court orders.

46. *Id.*

47. *See supra* note 21.

48. *See infra* note 49.

in the court's intervention on behalf of the minor.[49] If the minor is not found to be a person described by the code, the juvenile court does not have jurisdiction over him.

In juvenile court the petition focuses upon the conditions to which the child was allegedly subjected. The issue of the parents' ability to protect and provide for the child is central to the proceed-

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49. Welfare and Institutions Code section 300 provides:

Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

(a) Who is in need of proper and effective parental care or control and has no parent or guardian, or has no parent or guardian willing to exercise or capable of exercising care or control, or has no parent, guardian or custodian actually exercising care or control.

(b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode, except that no person may be adjudged a dependent child solely due to the lack of an emergency shelter for the family.

(c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality.

(d) Whose home is an unfit place for him or her by reason of neglect, cruelty, depravity, or physical abuse of either his or her parents, or his or her guardian or other person in whose custody or care he or she is.

(e) Who is under the age of three and whose home is an unfit place for him or her as a result of severe physical abuse of the minor by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that that person was physically abusing the minor. For the purpose of this section, "severe physical abuse" means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, it would cause permanent physical disfigurement, permanent physical disability, or death; any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness.

(f) Who has been freed for adoption from one or both parents for 12 months by either relinquishment or termination of parental rights and for whom an interlocutory decree has not been granted pursuant to Section 224n of the Civil Code or an adoption petition has not been granted.

(g) It is the intention of the Legislature in enacting the amendments to subdivision (a) enacted at the 1985-86 Regular Session, to assure that courts, in making a determination pursuant to subdivision (a) shall not focus upon the fact that a parent has a physical disability. The Legislature declares that a physical disability, such as blindness or deafness, is no bar to the raising of happy and well-adjusted children and that a court's determination pursuant to subdivision (a) should center upon whether a parent's disability prevents him or her from exercising care and control.

CAL. WELF. & INST. CODE § 300 (West Supp. 1987). For purposes of this article, subsections (a) and (d) are of particular interest since child abuse allegations are charged under these sections. Subsequent reference to Welfare and Institutions Code section 300 actions will be to those subsections.

ings.[50] In each case referred to the dependency system, the threshold issue is whether the child is being abused or neglected.[51] The next issue is whether either parent is able to adequately care for and protect the child.[52]

Since both family and juvenile courts may have the same families appearing before them in cases involving alleged child abuse, it is essential to examine the differences between the two court systems. The next section of this article will discuss the critical differences between the juvenile and family courts as they relate to cases in which child abuse allegations have been made.

III. A Comparison and Contrast of Family and Juvenile Court Treatment of Child Abuse Cases

While there are numerous differences between the substantive and procedural law of the family and juvenile courts, this section will focus upon those differences which might be of significance in a case involving child abuse allegations. The topics to be covered include the initiation of legal proceedings, the time frame for litigation, the parties and attorneys, evidence and procedures, agencies supporting the courts, powers of the courts and supervision and enforcement of orders.

A. *Initiation of Legal Proceedings*

1. *Family Court*

In family court, litigation is voluntarily initiated by one of the parents in the form of a petition for either dissolution of marriage,[53] legal separation, nullity, declaration of paternity,[54] or other ancillary action related to the petition.[55] If neither parent initiates legal proceedings, no legal action will take place. Thus, if a parent seeking relief has insufficient funds, energy or resourcefulness, the legal action may never be filed.

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50. *Id.*

51. *Id.* at § 202.

52. If it is not proven that both parents are unable to adequately care for and protect the minor, there will be no juvenile court intervention.

53. Cal. Welf. & Inst. Code § 4503 (West 1983).

54. Cal. Civ. Code § 7006 (West Supp. 1987).

55. *See, e.g., id.* at § 4600.5(i), which allows for modification of a joint custody order in family court upon petition by one or both of the parents, or on the court's own motion.

2. *Juvenile Court*

In juvenile court the state initiates the legal proceedings by filing a petition to bring the minor within the description of the juvenile court law.[56] The filing usually follows an investigation undertaken by a child protective agency[57] which finds that formal action is necessary. Both parents may resist the filing.[58] Conversely, one or both parents may support the petition believing that state involvement will be beneficial for the child.

The decision to file a petition in juvenile court rests initially with the investigating probation officer or social services worker.[59] The investigator must consider whether the child has been abused or neglected and whether either parent is able and willing to protect and provide for the child pursuant to society's minimum social standards.[60]

In cases involving suspected child abuse, the investigator must determine if the child's caretaker took the steps a reasonable person would take under the circumstances.[61] Such steps might include separating the child from the abuser, securing protective court orders to insure no further contact, cooperating with any criminal prosecution against the perpetrator and arranging for counseling to assist the child in recovering from any trauma suffered.[62]

If the investigator finds that the parent's response is insufficient to protect the child, a petition will be filed on behalf of the child.[63] On the other hand, if the investigator concludes that the custodial parent did take sufficient steps to protect the child, he may choose not to initiate proceedings.

The investigator and parent may alternatively agree that the child will be placed under informal state supervision for a specified period not to exceed six months.[64] The contract usually involves providing welfare agency services in return for the parents' agreement to

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56. CAL. WELF. & INST. CODE § 311 (West 1984), § 332 (West Supp. 1987).

57. CAL. PENAL CODE § 11165(k) (West Supp. 1987).

58. An example of this is *In re* Edward C., 126 Cal. App. 3d 193, 178 Cal. Rptr. 694 (1981). An example of one parent supporting the petition and one parent resisting is *In re* William T., 172 Cal. App. 3d at 790, 218 Cal. Rptr. at 420, which is discussed in detail *infra* notes 354-86 and accompanying text.

59. CAL. WELF. & INST. CODE § 311 (West 1984).

60. *See supra* notes 2 & 49.

61. CAL. WELF. & INST. CODE §§ 307.5, 309, 328 (West 1984 & Supp. 1987).

62. *See infra* notes 242-50 and accompanying text discussing *In re* Jennifer P.

63. CAL. WELF. & INST. CODE § 309 (West 1984).

64. *Id.* at §§ 330, 16506 (West Supp. 1987); CAL. R. CT. 1307(d) (West 1987).

follow a suggested program regarding the child.[65] Such services are referred to as family maintenance services[66] and can be either ordered by the court after a finding of dependency, or can be accepted voluntarily by families who need them. These voluntary agreements often are reached only after the parent is made aware that failure to agree to the suggested terms may result in more severe corrective intervention, including removal of the child.[67]

The impetus to engage the dependency process sometimes does not originate with the police or a child protective agency worker. A parent or interested party may ask the probation officer to commence proceedings in the juvenile court.[68] If the investigating agency does not take formal action and file a petition, any parent or interested party may petition the superior court and request court-ordered intervention.[69] Once the court receives such a petition, it may affirm the probation officer's decision or order him to commence juvenile court proceedings.[70]

B. *Time Frame for Litigation*

1. *Family Court*

The time frame for the resolution of issues in the two courts is strikingly different. The parties may never choose to commence proceedings in family court. They can privately struggle over custody issues indefinitely. They can privately order their child rearing responsibilities or reach an agreement and submit it for the court's signature with reasonable confidence that there will be no investigation or interference.[71] If the parents choose to resort to the court process, they will have to abide by the court rules. Child custody issues which are contested can be heard in family court. They will receive preference over all other civil cases except those to which spe-

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65. CAL. WELF. & INST. CODE §§ 330, 16506 (West Supp. 1987).

66. *Id.* at §§ 16506, 16506.1 (West Supp. 1987). They can be offered for six months and can be extended for a six month period. CAL. R. CT. 1307(d)(3) (West 1987).

67. Parents who do not comply with the directions of a child protective agency investigation risk the possibility their child will be removed from their custody and formal proceedings will be commenced. CAL. WELF. & INST. CODE § 309 (West 1984).

68. *Id.* at § 329.

69. *Id.* at § 331.

70. *Id.* at §§ 329, 331; CAL. R. CT. 1308(e) (West 1987). Welfare and Institutions Code section 331 does not establish a time period within which the juvenile court judge must respond to the application for review. The statute should provide that the court respond within a reasonable time and in no event later than 30 days from the filing. In this way, the family court and the parties will have a timely response and be able to plan their course of action.

71. CAL. CIV. CODE § 4600.1(b) (West Supp. 1987).

cial preference is given by law.[72]

In contested custody disputes, the family court can act immediately, upon an ex parte basis by issuing temporary orders relating to the custody.[73] Most courts will not change the child's living patterns pending trial but will attempt to preserve the familial status quo.[74] Hearings on custody issues can take place a few weeks after the filing of moving papers, although the parties must first complete mediation before a contested custody hearing can be held.[75] The time required to complete mediation varies from county to county and depends upon the availability of mediators, the number of mediation sessions available and the cooperation of the parties.[76] After the completion of mediation, a contested custody issue can be scheduled for hearing. Even with preferential calendaring, the case may not be heard for months after the court's initial ruling. Once a court order is issued, it will remain in effect unless modified until the child reaches eighteen, is emancipated or dies, whichever occurs first.[77]

2. *Juvenile Court*

In juvenile court there are strict time limits for all dependency hearings. The Legislature imposed these limits to insure that dependency cases will be heard as quickly as possible because of the importance of the issues.[78] Removal from parents and placement with a non-parent requires the fastest course of action. If the child is taken from a parent, a petition must be filed within 48 hours (excluding weekends and holidays).[79] A detention hearing[80] must be

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72. *Id.* at § 4600.6.

73. *Id.* at §§ 4600.1, 4603 (West 1983 & Supp. 1987).

74. "[R]egardless of how custody was originally decided upon, after the child has lived in one parent's home for a significant period, it surely remains 'undesireable' to uproot him from his 'established mode of living,' and a substantial change in his circumstances should ordinarily be disapproved." *In re* Marriage of Carney, 24 Cal. 3d 725, 731 n.4, 598 P.2d 36, 38 n.4, 157 Cal. Rptr. 383, 385 n.4 (1979). *See also* Burchard v. Garay, 42 Cal. 3d 531, 535, 724 P.2d 486, 489, 229 Cal. Rptr. 800, 802 (1986). SANTA CLARA COUNTY SUPERIOR COURT RULES 17B2b(1)(a).

75. CAL. CIV. CODE § 4607 (West Supp. 1987).

76. The mediation process can take anywhere from a few weeks to several months. This is based upon the author's discussion with family court services directors in California.

77. The order cannot be modified absent an agreement of the parties or a court order based upon a substantial change in the parties' circumstances. CAL. CIV. CODE §§ 4600.1(b), 4603 (West Supp. 1987). *See also In re* Carrie W., 78 Cal. App. 3d 866, 144 Cal. Rptr. 427 (1978).

78. A child custody order will lose its effect when the subject child is no longer a child. If there is no removal, the jurisdictional hearing must be set within 30 days of the filing of the petition. CAL. WELF. & INST. CODE § 334 (West 1984); CAL. R. CT. 1361(a) (West 1987).

79. CAL. WELF. & INST. CODE § 313 (West 1984).

held within 24 hours of the filing of a petition.[81]

The jurisdictional hearing[82] must be held within 15 court days[83] of the detention hearing, and a dispositional hearing[84] must be held within 10 court days of that time.[85] Continuances are permitted only under very strict guidelines thereafter.[86] Under no circumstances may the dispositional hearing be held more than six months after the detention hearing.[87] Thereafter, review hearings[88] must be held within six months of the dispositional hearing or previous review.[89] If the child is in out-of-home placement, a permanency planning hearing[90] must be held within one year or eighteen months from the dispositional hearing.[91] Juvenile court cases involving allegations of dependency receive preferential calendaring over all other cases.[92]

The strict time limits outlined above do not apply when a child is placed with one parent on the condition that the other parent have no contact with the child.[93] Usually, a parent or child protective agency learns of suspected child abuse by the other parent. An

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80. At the detention hearing the court determines whether the child shall be returned to the care of a parent or whether out-of-home placement pending trial is necessary. The grounds for detention are listed in Welfare and Institutions Code section 319 and California Rules of Court rule 1337.

81. CAL. WELF. & INST. CODE § 319 (West Supp. 1987); CAL. R. CT. 1336, 1337 (West 1987).

82. The jurisdictional hearing is the trial or adjudication hearing at which the court determines whether the allegations in the petition are true and whether the child is a dependent child of the court. CAL. WELF. & INST. CODE §§ 355, 356 (West 1984 & Supp. 1987); CAL. R. CT. 1364, 1365 (West 1987).

83. CAL. WELF. & INST. CODE § 334 (West 1984); CAL. R. CT. 1361(b) (West 1987).

84. At the dispositional hearing, the court decides what is to be done with the child as a result of jurisdiction having been established. The options available to the court include dismissing the petition, returning the child to a parent on a period of supervision, or removing the child from both parents and placing him in a relative or foster home or in a private institutional setting. CAL. WELF. & INST. CODE §§ 360, 361.2, 390 (West. 1984 & Supp. 1987); CAL. R. CT. 1376, 1377 (West 1987).

85. CAL. WELF. & INST. CODE § 358 (West Supp. 1987).

86. *Id.* at § 352(a), (b). For example, there should be no continuances granted such that the dispositional hearing would be held more than 60 days after the detention hearing absent a finding of exceptional circumstances. *Id.* at § 352(b).

87. *Id.* at § 352(b). Note that there is a different time frame for out-of-custody filings.

88. At a review hearing the court must determine whether the child must remain a dependent child of the court. The court also determines the extent of compliance with the case plan, the progress of the parents in overcoming the conditions which resulted in dependency, and the data by which a permanent plan for the child shall be set. CAL. WELF. & INST. CODE § 366 (West Supp. 1987); CAL. R. CT. 1378 (West 1987).

89. CAL. WELF. & INST. CODE §§ 366(a), 366.2(a) (West Supp. 1987).

90. *Id.* at § 366.25.

91. *Id.* at § 366.25(a).

92. *Id.* at § 345.

93. *See* CAL. WELF. & INST. CODE § 16507 (West Supp. 1987).

investigating officer for the child protective agency will inform the reporting parent that the child may remain in his or her custody only if the parent suspected of abuse has no contact or only supervised contact with the child. The investigator may threaten to remove the child and place him in protective custody if that condition is violated.

If no petition is filed, the parent suspected of abuse may be unable to visit indefinitely, absent a court determination of the truth of the abuse allegation and the necessity for the no visitation rule. It is preferable to permit either parent to insist upon initiation of formal proceedings to test the investigator's determination in court. The same time lines should be followed as in a parental removal situation although some relaxation could be permitted since the child is with a parent and not in an out-of-home setting.[94]

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94. *Id. See In re* Dolly A., 177 Cal. App. 3d 195, 222 Cal. Rptr. 741 (1986); CAL. WELF. & INST. CODE § 366(a) (West Supp. 1987). Section 387 provides:

> An order changing or modifying a previous order by removing a minor from the physical custody of a parent, guardian, relative, or friend and directing placement in a foster home, or commitment to a private or county institution, shall be made only after noticed hearing upon a supplemental petition.
>
> (a) The supplemental petition shall be filed by the probation officer in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the minor.
>
> (b) Upon the filing of the supplemental petition, the clerk of the juvenile court shall immediately set the same for hearing within 30 days, and the probation officer shall cause notice thereof to be served upon the persons and in the manner prescribed by Sections 335 and 337.
>
> (c) An order for the detention of the minor pending adjudication of the petition may be made only after a hearing is conducted pursuant to Article 7 (commencing with Section 305).

Id. at § 387. Section 388 provides:

> Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require such change of order or termination of jurisdiction.
>
> If it appears that the best interests of the child may be promoted by the proposed change of order or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to such persons and by such means as prescribed by Section 386, and, in such instances as the means of giving notice is not prescribed by such sections, then by such means as the court prescribes.

Id. at § 388 (West 1984). *See also* Ansley v. Superior Court, 185 Cal. App. 3d 477, 229 Cal.

This time frame represents a balance between the parent's rights to show they can be rehabilitated, complete the reunification plan and regain custody of the child, and the need of the child to have a stable, safe, permanent home within a reasonable time.[95] Juvenile court intervention is normally restricted to the time it takes to reunify the family or permanently place the minor. In most cases the court decides whether the child will be permanently placed away from the parents within two years, and most cases are dismissed within three years.[96]

C. *Parties and Attorneys*

1. *Family Court*

The number of parties in each setting is a reflection of the differences between the two courts. In family court there are two parties: the parents. Whether the child should be a party has been discussed by some commentators,[97] but the authority for such status is questionable.[98] Under the Family Law Act grandparents and stepparents can achieve party status on the issue of visitation.[99]

In family court, each party may have an attorney, and, in addition, the court may appoint an attorney for the child.[100] Appointment of an attorney for the child has increased in frequency in recent years due in part to the increased number of contested custody cases involving child abuse allegations.[101] Parents must pay for their

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Rptr. 771 (1986).

95. *See generally* Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 683 (1976); *see also* INSTITUTE OF JUDICIAL ADMINISTRATION/ABA, BALLINGER, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT (tentative draft) (1977).

96. This is the intent of the law and general experience of the author in practice. *See generally* CAL. WELF. & INST. CODE §§ 366, 366.25, 366.3 (West Supp. 1987).

97. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody & Excessive Modifications*, 65 CALIF. L. REV. 978 (1977).

98. There is no statutory authority for such a declaration, but it is sometimes permitted in practice.

99. CAL. CIV. CODE § 4351.5(a), (b) (West Supp. 1987).

100. *Id.* at § 4606.

101. *See* Edwards, *A Proposal for the Appointment of Attorneys for Children in Marital Dissolution Cases*, 8 FAM. L. NEWS 34 (1985); *see also* Moffat v. Moffat, 27 Cal. 3d 645, 612 P.2d 967, 165 Cal. Rptr. 877 (1980); *see generally* CALIFORNIA JUVENILE COURT PRACTICE § 23:21, at 244 (CEB) (1981).

Several cases have stated that children are parties (or real parties in interest) in those family law cases involving actions where the children are the direct beneficiaries of a support

own attorneys in family court and for the child's attorney if one is appointed.[102] Some parents cannot afford an attorney and free legal services are generally not available.[103] Thus, an indigent parent may have to face family court litigation without an attorney.

2. *Juvenile Court*

In juvenile court, in addition to the parents, both the child and the state are parties.[104] The state is the petitioner, the agency with the authority to investigate and file a petition if warranted.[105] Moreover, guardians, foster parents, relatives, de facto parents and other interested persons may gain party status or at least have an opportunity to address the court at some or all of the hearings.[106]

In juvenile court, all parties have the right to an attorney.[107] The parents[108] and the child[109] may have attorneys appointed for

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decree which is being enforced or modified. *See, e.g.*, Metson v. Metson, 56 Cal. App. 2d 328, 132 P.2d 513 (1943); Allen v. Allen, 138 Cal. App. 2d 706, 292 P.2d 581 (1956); Evans v. Evans, 185 Cal. App. 2d 566, 8 Cal. Rptr. 412 (1960); *In re* Marriage of Utigard, 126 Cal. App. 3d 133, 178 Cal. Rptr. 546 (1981).

It has also been suggested that the state, as represented by the court, is in fact a party to the dissolution proceeding in two capacities: (1) to assure that the attempt to dissolve the marriage is free of fraud, collusion and imposition (Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020 (1915)); and (2) in its interest in the welfare and maintenance of the children (*Metson*, 56 Cal. App. 2d 328, 132 P.2d 513 (1943)).

102. CAL. CIV. CODE § 4606 (West Supp. 1987).

103. Legal services for indigent citizens in marital cases have been cut back drastically over the past 10 years. In Santa Clara County, legal services will not represent parents in custody cases except in extraordinary circumstances.

104. CAL. WELF. & INST. CODE § 318 (West Supp. 1987); *see also In re* Patricia E., 174 Cal. App. 3d 1, 219 Cal. Rptr. 783 (1985).

105. CAL. R. CT. 1307(f) (West 1987).

106. CAL. WELF. & INST. CODE § 349 (West 1984); CAL. R. CT. 1311(b)(2)(a) (West 1987). *See, e.g.*, Charles S. v. Superior Court, 168 Cal. App. 3d 151, 214 Cal. Rptr. 47 (1985). It is interesting, however, that Welfare and Institutions Code section 345, as amended in 1986, states in part: "[n]o person on trial, awaiting trial or under accusation of crime, other than a parent, guardian, or relative of the minor, shall be permitted to be present at any session, except as a witness," making the issue of stepparents as parties somewhat precarious. On the status of foster parents, see Brown v. County of San Juaquin, 601 F. Supp. 653 (E.D. Cal. 1985); CAL. WELF. & INST. CODE §§ 366.25(g), 362(b) (West Supp. 1987); and *In re* Christina K., 184 Cal. App. 3d 1463, 229 Cal. Rptr. 564 (1987).

107. CAL. WELF. & INST. CODE §§ 317-18 (West 1984 & Supp. 1987).

108. Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974).

109. CAL. WELF. & INST. CODE §§ 317-18 (West 1984 & Supp. 1987). If the minor is alleged to come within the provisions and description of section 300(d), the court shall appoint counsel to represent him. *Id.* at § 318(a). The minor has the right to effective assistance of counsel. *In re* Melissa S., 179 Cal. App. 3d 1046, 1054-55, 225 Cal. Rptr. 195, 199-200 (1986). Whether the parents have the right to the effective assistance of counsel is a matter of controversy. *Compare In re* Ammanda G., 186 Cal. App. 3d 1075, 231 Cal. Rptr. 372 (1986) *with In re* Christina H., 182 Cal. App. 3d 47, 227 Cal. Rptr. 41 (1986). *See also* CAL. R. CT.

them if they are indigent. The state or petitioning party is also represented by an attorney, usually a county or city attorney.[110] There is no provision for the appointment of attorneys for foster parents, relatives or guardians. In addition to attorneys, there may also be a guardian ad litem[111] or child advocate[112] or both appearing on behalf of the child.[113] If a parent is not competent, he may have a guardian ad litem appointed to represent his best interests.[114]

D. *Evidence and Procedures*

The evidentiary and procedural rules applicable in the two courts are dramatically different. It is easier to have evidence of abuse admitted in a juvenile dependency proceeding than in a family court trial. Additionally, the needs of the child are addressed with more sensitivity by the evidentiary and procedural rules employed in juvenile court than they are in the family court setting.

1. *Investigatory Report*

An important step in the decision making process in each court is the creation of an investigatory report to assist the court in its decision. The principle difference between the two courts relates to

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1134(c) (West 1987).

The minor may have the right to choose her counsel. *See* CAL. WELF. & INST. CODE § 349 (West 1984); Akkiko M. v. Superior Court, 163 Cal. App. 3d 525, 209 Cal. Rptr. 568 (1985); and *In re* Ann S., 137 Cal. App. 3d 148, 188 Cal. Rptr. 1 (1982).

110. Case law has defined the situations in which one attorney can represent more than one party. Because of actual or potential conflicts of interest, one attorney often cannot represent both parents or represent the petitioner and child. *In re* Patricia E., 174 Cal. App. 3d 1, 219 Cal. Rptr. 783 (1985). Thus, it is not uncommon for a case to have four attorneys, one for each parent, one for the child, and one for the county. With any additional parties the courtroom quickly fills with participants. Moreover, the minor has the right to the assistance of counsel. *See In re* Melissa S., 179 Cal. App. 3d 1046, 225 Cal. Rptr. 195 (1986). Whether the parents have the right to the effective assistance of counsel is a matter of controversy in the appellate courts. *Compare In re* Ammanda G., 186 Cal. App. 3d 1075, 231 Cal. Rptr. 372 (1986) *with In re* Christina H., 182 Cal. App. 3d 47, 221 Cal. Rptr. 41 (1986). *See also* CAL. R. CT. 1334(c) (West 1986).

The minor may have the right to choose her counsel. *See* CAL. WELF. & INST. CODE § 349 (West 1984); Akkiko M. v. Superior Court, 163 Cal. App. 3d 525, 209 Cal. Rptr. 568 (1985); *In re* Ann S., 137 Cal. App. 3d 148, 188 Cal. Rptr. 1 (1982).

111. CAL. WELF. & INST. CODE § 326 (West Supp. 1987).

112. *Id.* at § 358(b).

113. As a result of the presence of an attorney and a guardian ad litem in juvenile court, the child's interests are asserted by one and perhaps two participants in the legal process. There is no similar guarantee in the family court. While one or both parents may speak for the child, if the parents are caught up in their own struggle, the child's interests may be ignored or neglected.

114. *In re* Lisa M., 177 Cal. App. 3d 915, 225 Cal. Rptr. 7 (1986).

the admissibility of the content of the report.

a. *Family Court*

Pursuant to Civil Code section 4602, a custody investigation report and recommendation may be prepared and submitted to the court at trial.[115] That report may contain hearsay evidence.[116] The Civil Code provides that the court may consider this report but may not admit it into evidence absent stipulation by the parties.[117] Hearsay evidence can be stricken from the report on motion by either party.[118]

b. *Juvenile Court*

Pursuant to Welfare and Institutions Code section 280 and California Rules of Court 1376(b), a social report is prepared for each dependency hearing.[119] That report contains the facts gathered by the preparer of the report, a social worker or probation officer, including statements from other persons. California courts have held that this report is admissible as part of the petitioner's case-in-chief if the report preparer (author) is present for cross-examination.[120] Unlike the investigatory report in family court, hearsay evidence contained in the social report is admissible.[121] This rule has been sharply criticized.[122]

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115. CAL. CIV. CODE § 4602 (West Supp. 1987).

116. Dahl v. Dahl, 237 Cal. App. 2d 407, 46 Cal. Rptr. 881 (1965) (decided before the enactment of Civil Code section 4602).

117. CAL. CIV. CODE § 4602 (West Supp. 1987).

118. *In re* Marriage of Russo, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971). *See also* Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943).

119. CAL. WELF. & INST. CODE § 280 (West 1984); CAL. R. CT. 1376(b) (West 1987).

120. *In re* Biggs, 17 Cal. App. 3d 337, 94 Cal. Rptr. 519 (1971); CAL. R. CT. 1365(d) (West 1986).

121. *See* CAL. WELF. & INST. CODE § 280 (West 1984); CAL. R. CT. 1376(b) (West 1986).

122. By resort to the social report, it is possible for the preparer to include statements that would not otherwise be admissible. Three recent cases have addressed this issue with two concluding that the practice was improper. All three were ordered depublished. *In re* Amanda I., (3 Civ. 23918), 212 Cal. Rptr. 317 (1985) (depublished); *In re* Estrella R., (6 Civ. A026681), 213 Cal. Rptr. 198 (1985) (depublished); *In re* Lois P., (1 Civ. A029505), 221 Cal. Rptr. 268 (1985) (depublished).

Whether the social report should be admissible at the jurisdictional hearing places two important policies in conflict: 1) the policy that only reliable evidence be the basis for legal decisions; and 2) the policy that the trier of fact should be given all relevant information about a child protection issue even if it does not satisfy normal evidentiary standards. The appellate courts have decided that the latter should take precedence. This is the preferable position. First, it is important for the court to hear everything that the investigator has found relating to

2. *Testimony of the Child*

Children may appear as witnesses in either court. They are afforded less legal protection against exposure to the tensions of the court process in family court than in juvenile court.

a. *Family Court*

While there is no statute restricting testimony of the child, most family courts are reluctant to have a child testify in court in front of his parents.[123] First, such testimony may not be necessary. The child's statement may have been recorded in the custody evaluation report or summarized in the testimony of an expert.

Secondly, the litigants may prefer to have the child speak to the judge in his chambers. This can be done with or without attorneys or a court reporter and with any special rules to which the court and parties may agree.[124] However, a problem arises when the child gives unfavorable testimony regarding one parent. That parent may insist that she be present when the testimony is given and have the opportunity to cross-examine the child. While there are procedures in other legal settings that permit the judge, upon proper showing, to receive testimony out of the presence of the parent or parents,[125] no such provision exists in the family court setting. Thus, the court may be forced to choose between learning important information from the child and exposing the child to a potentially traumatic situation in which a parent confronts her about the testimony.[126]

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the dependency petition. Only in that way will the court have a complete picture of the child's situation. Secondly, trial judges are presumed to have the ability to distinguish between different types of evidence. Trial judges are trained to judge the weight that a piece of evidence should be given. *See generally* CAL. WELF. & INST. CODE § 701 (West 1984).

123. This reluctance has led to the practice of having the child testify in chambers. *See* Marriage of Rosson, 178 Cal. App. 3d 1094, 1100, 224 Cal. Rptr. 250, 254 (1986); *In re* Volkland, 74 Cal. App. 3d 674, 678, 141 Cal. Rptr. 625, 627 (1977); Stuart v. Stuart, 209 Cal. App. 2d 478, 481, 25 Cal. Rptr. 893, 894 (1962); Morris v. Morris, 121 Cal. App. 2d 707, 709, 264 P.2d 106, 107 (1953); Kelly v. Kelly, 75 Cal. App. 2d 408, 413, 171 P.2d 95, 98 (1946). *See also* Newman & Collester, *Children Should Be Seen and Heard: Techniques for Interviewing the Child in Contested Custody Proceedings*, 3 FAM. ADVOC. 8, 10 (1984).

124. *See infra* notes 125-26 and accompanying text.

125. *See, e.g.*, CAL. CIV. CODE § 232(b) (West Supp. 1987), § 234 (West 1984) (freedom from parental custody and control); CAL. WELF. & INST. CODE § 350 (West Supp. 1987) (dependency hearings).

126. For an example of a court which failed to secure a stipulation from the parents concerning an in-chambers hearing with the child, see Jenkins v. Jenkins, 125 Cal. App. 2d 109, 269 P.2d 908 (1958).

b. *Juvenile Court*

Children are sometimes witnesses in juvenile court dependency proceedings. Two issues facing the trial court are whether the child will testify and in what surroundings the testimony will take place. It is less likely that the child will have to testify in a juvenile proceeding because the child's statements may be contained in the social report, and the social report is admissible as part of the moving party's case-in-chief.[127] If the child is called as a witness, statutory and case law permit the child to testify outside the presence of the parent at both the jurisdictional and dispositional hearings.[128]

3. *Discovery*

a. *Family Court*

Discovery in family law cases is governed by civil discovery statutes and any local rules adopted by the superior court.[129] Two problems arise in the context of discovery which bear upon the interests of the child. First, civil discovery can be drawn out. Discovery battles can delay the trial of the custody issues for months. Given the statutory preference for hearing custody cases as soon as possible, such delay is most likely not in the child's best interests.

Second, as part of the discovery process, each of the parents and the court may wish to have the child evaluated. These evaluations usually involve meetings between a psychologist, psychiatrist, licensed marriage or family counselor or other person, and the child and possibly family members to discuss the case, including any abuse allegations. The evaluator then renders a report to the court. In family court, absent some court order, there is nothing to prevent each parent from securing one or more evaluations of the child.[130]

b. *Juvenile Court*

Civil discovery rules do not apply in juvenile court. Juvenile court discovery is governed by California Rule of Court 1341.[131]

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127. *See supra* notes 119-22 and accompanying text.

128. *See, e.g., In re* Mary S., 186 Cal. App. 3d 414, 230 Cal. Rptr. 726 (1986); *In re* Tanya P., 120 Cal. App. 3d 66, 174 Cal. Rptr. 533 (1981); *In re* Stanley F., 86 Cal. App. 3d 568, 152 Cal. Rptr. 5 (1978). *See also* CAL. WELF. & INST. CODE § 350 (West Supp. 1987).

129. There are no special discovery statutes under the Family Law Act.

130. Unless there is an order prohibiting it, a parent may take a child to a doctor, psychologist or mental health professional whenever the child is with the parent. *See* CAL. CIV. CODE § 4600.5(c), (*l*) (West Supp. 1987).

131. CAL. R. CT. 1341 (West 1987).

This rule emphasizes informal discovery and discourages formal civil discovery.[132] In dependency and criminal proceedings, it is significant that multiple evaluations of a child victim are not possible without court approval.[133]

4. *Testimony of the Parent*

Parents often testify in each of the two court settings and may be called by any party in either court.[134] Parents in family court find they have more evidentiary and procedural protection than in juvenile court. Juvenile court procedures are designed to gain the truth about child abuse allegations even if traditional evidentiary protections are overridden.[135]

a. *Family Court*

A parent may avail himself of several privileges as a witness. These include the privilege against self-incrimination,[136] the privilege against testifying against one's spouse,[137] and the privilege against revealing marital communications.[138]

b. *Juvenile Court*

In dependency proceedings, a parent can be called to the witness stand, granted immunity and ordered to testify about the facts

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132. The formal tools of discovery such as depositions and interrogatories are infrequently utilized, first because of time constraints and second, because local rules may not permit them without court approval. Juvenile law discovery is more under the control of the court than is civil discovery in family court.

133. *In re* Dolly A., 177 Cal. App. 3d 195, 222 Cal. Rptr. 741 (1986); CAL. PENAL CODE § 1112 (West 1985). Whether the non-abusing parent could take the child to multiple evaluations without court approval has not been addressed by the appellate courts. In practice, this frequently occurs. *See also* People v. Nokes, 183 Cal. App. 3d 468, 228 Cal. Rptr. 119 (1986). This does not mean that the child may have been subjected to multiple interviews or evaluations before legal proceedings commenced. It is likely that the child is exposed to the multiple interviews and evaluations regardless of the type of legal proceeding ultimately commenced.

134. *See infra* notes 136-44 and accompanying text.

135. Dependency proceedings may require that a trial court consider the results of a polygraph test when that test might be a measure of a parent's honesty regarding protections afforded the child. *See In re* Kathleen W., No. F006971 (Cal. Ct. App. Mar. 10, 1987).

Moreover, parents in a dependency proceeding may not conceal the contents of a medical report prepared by a court appointed medical expert. Such a report and the opinions contained therein are available to all parties. *See* Collins v. Superior Court, 74 Cal. App. 3d 47, 141 Cal. Rptr. 273 (1977).

136. CAL. EVID. CODE § 940 (West 1966); U.S. CONST. amend. V.

137. CAL. EVID. CODE § 970 (West 1966).

138. *Id.* at § 980.

surrounding the alleged abuse.[139] Section 355.7 provides that any such testimony cannot be used in other legal proceedings.[140] In *In re Amos L.*,[141] the court held that the trial court need not admonish a parent of her privilege against self-incrimination since the testimony is prohibited from being admitted as evidence in any other action or proceeding.[142]

In a dependency proceeding, spousal and marital communications privileges[143] are not available to a parent or guardian.[144] Thus, the parent may not resort to the privilege to avoid testifying, being called as a witness against a spouse, or to refuse to disclose confidential marital communications.

5. *Presumptions*

In juvenile court, several evidentiary presumptions have been developed to make it more likely that evidence of abuse will be received by the court and that the court will intervene on behalf of the minor. The Welfare and Institutions Code provides that, if certain facts are provided, there is a presumption of abuse or neglect unless the parent produces evidence to rebut the presumption.[145] For example, section 355.1 provides:

> Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor, of such nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, such evidence shall be prima facie evidence of the minor's need of proper and effective parental care, and such proof shall be sufficient to support a finding that the minor is described by subdivision (a) of Section 300.[146]

The code provides for other presumptions, including presumptions that the child's home is unfit by reason of neglect,[147] cruelty[148] and

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139. CAL. WELF. & INST. CODE § 355.7 (West 1984).
140. *Id.*
141. 124 Cal. App. 3d 1031, 177 Cal. Rptr. 783 (1981).
142. 124 Cal. App. 3d at 1040, 177 Cal. Rptr. at 787. ***But see In re*** Dolly A., 177 Cal. App. 3d 195, 222 Cal. Rptr. 741 (1981), which casts some doubt on this procedure.
143. CAL. EVID. CODE §§ 972(d), 986 (West Supp. 1987); CAL. R. CT. 1365(a) (West 1987).
144. CAL. WELF. & INST. CODE § 355.5 (West 1984).
145. *Id.* at §§ 355.1-355.6.
146. *Id.* at § 355.1.
147. *Id.* at § 355.2.

physical abuse.[149]

Once the petitioner produces sufficient evidence of "injury, injuries, or detrimental condition sustained by the minor"[150] that would ordinarily be the result of the unreasonable or neglectful acts of either parent or caretaker, the presumption is raised that the minor is a person described by the statute.[151] This presumption is unique to dependency proceedings and can result in the juvenile court reaching legal conclusions and taking action that is unavailable to a family court.[152]

E. *Agencies Supporting the Court*

The character of the proceedings in the two courts is reflected in the involvement of agencies and services in each court process.

1. *Family Court*

In family court the only services which are available to the parties are counseling, mediation and evaluations of child custody disputes.[153] In the larger counties, these services are provided by a branch of the probation department or by a family court service agency.[154] In the smaller counties, some of these services may be contracted out to the private sector.

Counseling and mediation services are not intended to intrude into the family. Counseling or conciliation is intended to provide the parties an opportunity to talk with one another about the impending dissolution.[155] In the past few years, most courts report that these services are rarely used.[156] Mediation services are designed to help parents focus upon the needs of their children. The Legislature recognized that parents may have a difficult time attending to their

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148. *Id.* at § 355.3.

149. *Id.* at § 355.4.

150. *Id.* at § 355.2.

151. *Id.*

152. For example, if the evidence showed that a child had been sexually abused but there was insufficient proof to show which parent or other person was responsible, the juvenile court would nevertheless be required to assert jurisdiction over the minor. *See In re* Christina T., 184 Cal. App. 3d 630, 229 Cal. Rptr. 247 (1986); *In re* La Shonda B., 95 Cal. App. 3d 593, 157 Cal. Rptr. 280 (1979).

153. *See* CAL. CIV. CODE §§ 4602, 4607 (West Supp. 1987); CAL. CIV. PROC. CODE §§ 1730-70 (West 1982 & Supp. 1987).

154. For example, Los Angeles, San Francisco, San Diego and Santa Clara counties fall in this category.

155. CAL. CIV. PROC. CODE §§ 1730, 1744 (West 1982).

156. This conclusion is based upon the author's discussion with most of the directors of family court services agencies in California.

child's needs.[157] Accordingly, the Legislature made mediation mandatory.[158] Before any custody issue can be tried, the parties must first attempt to settle the dispute through mediation.[159] Parents who reach an agreement on their own are not required to participate in mediation.[160]

Mediators attempt to help parents focus upon the child's needs and assist them in deciding how they will share child rearing responsibilities. Mediators also explain to parents what legal proceedings they face and the legal rules the court will follow if the dispute goes to trial. Mediators inject certain values into the custody decision making process. They must explain to parents that the law favors the sharing of rights and responsibilities of child rearing.[161] A mediator who detects that the child needs a voice in the legal proceedings can ask the judge to appoint an attorney to represent the child.[162]

If mediation fails, a family court may order a child custody investigation which can provide the court with a report and recommendation relating to the custody issue.[163] The investigation may include the parents' allegations of deficient parenting against each other. It also includes a statement from the child and concludes with a recommendation from the investigator.[164] Since the passage of the Family Law Act in 1970,[165] the concept of a spouse's fault has been largely removed from the dissolution process.[166] Accordingly, in this age of "no fault" dissolutions, parties focus upon the evaluation process. During the investigation, the evaluator may learn a great deal about the parents and their parenting capacities that otherwise would never have come to the attention of the court.

The evaluator attempts to determine the truth of any child abuse allegation made by one parent against the other.[167] The inves-

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157. Civil Code section 4607(a) reads in part: "The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the marriage is dissolved." CAL. CIV. CODE § 4607(a) (West 1983).

158. *Id.*

159. *Id.*

160. *Id.* at § 4600.1(b) (West Supp. 1987). Such agreements are not within the provisions of Civil Code section 4607.

161. *Id.* at § 4607(a).

162. *Id.* at § 4607(f).

163. *Id.* at § 4602.

164. *Id.*

165. *Id.* at §§ 4000-5174.

166. A marital dissolution may be granted if the court finds irreconcilable differences which have caused the irremediable breakdown of the marriage. *Id.* at §§ 4506-08. Such a finding need not carry with it the implication that either party was at fault.

167. This may occur because there was no report to a child protective services agency

tigative powers of the evaluator may differ significantly from those of an investigative worker for a child protective agency. Evaluators are usually members of a family court services staff, probation officers or private psychologists, psychiatrists or licensed marriage or family counselors. With the exception of probation officers, these evaluators do not have access to the criminal histories of the parents[168] and may not have access to other confidential records relating to the parents or child. Moreover, evaluators do not have the power to remove the child from either parent's home.[169] If an expert is needed to assist them in the evaluations of the child or parents, the parents must share in that expense,[170] unless the evaluators have the resources within their offices to pay for that expense.[171]

The superior court can charge for both mediation and evaluation services but not for counseling. Mediation services are partially paid for with the superior court filing fee. Evaluation services are frequently charged per case on a sliding scale according to the parent's ability to pay.

2. *Juvenile Court*

There are numerous agencies and services involved in the child protection process. These agencies focus upon the detection, investigation, evaluation, support and supervision of families in which child abuse or neglect is suspected. Suspected abuse or neglect may be reported by police, school authorities, medical or day-care personnel — by anyone who regularly comes into contact with children. Child protective services, probation and welfare department officials, and law enforcement personnel usually investigate these cases. In addition, evaluations are often provided by medical or psychological experts utilized by the investigators. Support services and supervision are generally provided by welfare or social service departments which may refer families to other agencies for special services.

Most of these services are paid for by the state without parental

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pursuant to the mandatory reporting law or because after a report the child services investigator chose not to intervene in the family law case. *See generally supra* notes 56-70 and accompanying text, regarding the role of the investigation worker.

168. CAL. PENAL CODE §§ 11105-07 (West 1982).

169. That power is reserved for members of a child protective agency. *See id.* at § 11165; CAL. WELF. & INST. CODE §§ 305-06 (West 1984 & Supp. 1987).

170. CAL. EVID. CODE §§ 730, 731(c) (West 1983).

171. The adequacy of the evaluator's investigatory powers and resources to investigate child abuse allegations varies from county to county depending upon the powers of the person performing the evaluation and the cooperation and coordination with the child agency investigator.

reimbursement. The court has the power to order payment for the evaluative services of psychiatrists, psychologists, physicians and surgeons, dentists, optometrists, audiologists, or other clinical experts required to determine the appropriate treatment of the minor and as may be required in the implementation of such treatment.[172] To the extent that a child has needs which must be assessed and treated, the juvenile court is in a far superior position to provide the resources to meet those needs.

F. *Power of the Court*

The power of the family and juvenile courts to make orders relating to the care, custody and control of a child are different in significant ways.

1. *Family Court*

In family law proceedings, the court most frequently approves of the parties' stipulation and enters a judgment.[173] In contested cases, the court usually allocates each parent's time with the child and each parent's responsibilities regarding the child's upbringing.[174]

In some cases, after reading the investigatory report and hearing the evidence, the court is persuaded that the child needs some form of protection from one or both parents. The court may limit contact between the child and one parent by ordering limited visitation, supervised visitation or no visitation at all between that parent and the child.[175] In order to deny a parent access to his child, the court must find that such contact would not be in the child's best interests and would be detrimental to the child.[176] The court can also issue no contact orders between that parent and the custodial parent and can prohibit that parent from contacting, annoying, molesting, harassing or disturbing the peace of the custodial parent and the child.[177] Additionally, the court can order the non-custodial parent to stay away from designated places which the custodial parent and child might

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172. CAL. WELF. & INST. CODE § 741 (West Supp. 1987).

173. CAL. CIV. CODE § 4600.1(b) (West Supp. 1987).

174. *Id.* at §§ 4600, 4600.5.

175. *Id.* at §§ 4601, 4601.5 (West 1984).

176. *In re* B.G., 11 Cal. 3d at 679, 523 P.2d at 244, 114 Cal. Rptr. at 444; *In re* Marriage of Murga, 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (1980); *In re* Marriage of Mentry, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983); CAL. CIV. CODE § 4600 (West Supp. 1987).

177. CAL. CIV. CODE § 4359 (West Supp. 1987).

visit.[178] A family court may not, however, condition a parent's contact with his child upon the parent's participation in counseling,[179] on payment of child support, or on undergoing psychotherapy.[180]

Two cases help define the family court judge's limitations in making custody and visitation orders. In *In re Marriage of Matthews*,[181] the trial court in post-dissolution of marriage proceedings made a number of orders concerning the conditions that mother, as custodial parent, must follow.[182] Specifically, the court ordered that a particular conciliation counselor[183] be empowered to supervise visitation with father and modify the visitation schedule as she may deem reasonably necessary.[184] Secondly, the court ordered mother to "undergo therapy or counseling with Dr. Zimmerman for as long as [the doctor] deemed necessary and that she 'comply and cooperate in any way requested by Dr. Zimmerman.' "[185] Thirdly, the court ordered that mother transport the children to the "place of visitation."[186]

The court of appeal reversed portions of the trial court's custodial orders. The appellate court held that while the conciliation counselor could supervise visitation, she could not modify the visitation schedule as she deemed reasonable and necessary because it would be an improper delegation of judicial power to a subordinate court attache.[187]

The appellate court found that the trial court lacked power to order mother into counseling or psychiatric therapy and that such an order would require legislative authorization with procedural safe-

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178. *Id.* With regard to the creation and enforcement of restraining orders, the family court has more power than the juvenile court. A family court judge can issue restraining orders against one or both parents, or third parties, prohibiting certain conduct when the court finds such orders necessary for the protection of the petitioning party. *Id.* Law enforcement personnel have responded to requests for enforcement of those restraining orders.

No comparable powers exist in the juvenile court. Moreover, to the extent that the juvenile court fashions a similar order, it may not be honored by law enforcement personnel. Juvenile court law should be expanded to include the powers available to the family law judge, and those orders made by the juvenile court judge should be as enforceable as family court orders.

179. *In re* Marriage of Matthews, 101 Cal. App. 3d 811, 161 Cal. Rptr. 879 (1980).

180. Camacho v. Camacho, 173 Cal. App. 3d 214, 218 Cal. Rptr. 810 (1985).

181. 101 Cal. App. 3d 811, 161 Cal. Rptr. 879 (1980).

182. *Id.* at 814-15, 161 Cal. Rptr. at 880-81.

183. The court selected Elizabeth O'Neil of the Alameda County Conciliation Court. *Id.* at 815, 161 Cal. Rptr. at 881.

184. *Id.* at 816, 161 Cal. Rptr. at 882.

185. *Id.* at 817, 161 Cal. Rptr. at 883

186. *Id.* at 818, 161 Cal. Rptr. at 883.

187. *Id.*

guards.[188] The delegation of authority to Dr. Zimmerman was also held to be invalid.[189] Finally, the court affirmed the trial court's order that mother deliver the children to the place of visitation even though visitation was a substantial distance away.[190]

The case of *Camacho v. Camacho*[191] involved a paternity and visitation action initiated by father. At trial, mother's expert witness, Dr. Kellerman, testified that father and son had no father-child attachment and that father was a psychological stranger to the child.[192] Dr. Kellerman testified that mother told him father was an irresponsible person who did not follow through on his visitation promises and concluded that it would be traumatic for the child should father discontinue permitted visitation.[193] He recommended that any visitation be gradual and monitored, that the child should not be forced to separate from his mother and that any visitation should be accompanied by psychological counseling for all three individuals involved.[194] The trial court found father to be the natural father, and conditioned visitation rights on the timely payment of child support and father's regular counseling from one of three psychotherapists recommended by Dr. Kellerman.[195] The court made a number of findings to support its orders.[196]

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188. *Id.* "Such a significant curtailment of Leslie's [mother's] liberty would, at least, require legislative authorization. Undoubtably if such legislation were enacted, it would provide for procedural safeguards which were not here accorded to her." *Id.*

189. *Id.* at 817-18, 161 Cal. Rptr. at 882-83.

190. When the order was rendered, mother lived in Walnut Creek and father had recently moved to St. Helena. *Id.* at 818, 161 Cal. Rptr. at 883.

191. 173 Cal. App. 3d 214, 218 Cal. Rptr. 810 (1985).

192. *Id.* at 217, 218 Cal. Rptr. at 811.

193. *Id.* at 217, 218 Cal. Rptr. at 812.

194. *Id.*

195. *Id.*

196. *Id.* at 217-18, 218 Cal. Rptr. at 811-12.

The court stated that the imposition of those conditions on appellant's right of visitation was required in order:

> (A) To avoid detriment to said minor child, as provided for in Civil Code Section 4601.
>
> (B) To encourage and promote the best interests and welfare of the said minor child.
>
> (C) To encourage and promote consistency and continuity in the relationship between Plaintiff and said minor child.
>
> (D) To encourage and promote responsibility, both emotionally and financially, on the part of Plaintiff with regard to Plaintiff's relationship with said minor child.
>
> (E) To encourage and promote the stabilization of Plaintiff's relationship with said minor child.
>
> (F) To encourage and promote a commitment on the part of Plaintiff in connection with and with regard to his relationship with said minor child, con-

The appellate court reversed, holding that visitation rights and child support are independent and that one cannot be used as a reason to deny the other.[197] Citing *In re Marriage of Matthews*, the court also held that the trial court could not order involuntary psychiatric therapy for an indefinite time.[198]

Matthews and *Camacho* highlight the limitations facing family court judges who may strongly believe that some intervention or supervision is necessary to protect a child, but who are unable to provide that intervention because of an insufficient legal basis. What are the options for the family court judge who concludes that one parent has or both parents have serious flaws which will have a detrimental effect upon the child? The family courts in *Matthews* and *Camacho* lacked the power believed necessary to serve the best interests of the children involved.[199] Accordingly, two alternatives to the current law seem worthwhile. One alternative is to strengthen the power of the family courts so that the judge can make restrictive orders on parental behavior as conditions of custody or visitation for that parent. The second option is to request that the juvenile court become involved.[200]

If the family court judge finds the best interests of the child

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> sistent with all of the findings and Orders contained herein, so as to have the dual purpose of not only encouraging and promoting improvement of Plaintiff's character with regard to his said relationship with said minor child, but to also, as aforesaid, encourage and promote the best interests and welfare of said minor child.
>
> (G) Finally, Plaintiff is admonished to achieve the emotional maturity expected of a father who is sincerely interested in his son.

Id.

197. *Id.* at 219-20, 218 Cal. Rptr. at 812-13.

198. *See also In re* Marriage of Jenkens, 116 Cal. App. 3d 767, 172 Cal. Rptr. 331 (1981). That case noted that "child placement decisions must take into account the law's limitations, in capacity to supervise interpersonal relationships." *Id.* at 775, 172 Cal. Rptr. at 335.

In the case of *In re* Robert D., 151 Cal. App. 3d 391, 198 Cal. Rptr. 801 (1984), the court stated:

> While counseling rather than psychiatric examination was the objective of this particular order, the most this or any other court may do is express the thought that psychological counseling of the mother and these grandparents might have a most valuable and beneficial effect of reducing intrafamily tension. But such counseling cannot be forced, no authority exists for compelling it.

Id. at 398, 198 Cal. Rptr. at 805.

199. *In re* Marriage of Matthews, 101 Cal. App. 3d 811, 161 Cal. Rptr. 879 (1980); Camacho v. Camacho, 173 Cal. App. 3d 214, 218 Cal. Rptr. 810 (1985).

200. Because of the superior resources available to the juvenile court, the non-custodial parent may have a better opportunity to re-establish or maintain a relationship with the child. Supervision of visitation, therapy for the child and for the entire family, and evaluations of the family are all more easily procured and financed in the juvenile court. For an indigent parent, this is particularly important.

require placing restrictions on a non-custodial (visiting) parent, the court should have the authority to make conditional orders after proper notice and findings.[201] Before making any such order, the court should be required to find that the restriction is in the child's best interests and that visitation would be detrimental to the child without such condition. When the conditions or restrictions relate to the custodial parent, the family court should refer the matter to the juvenile court for further proceedings. If the juvenile court concludes that there are insufficient grounds to justify juvenile court intervention, the matter should not be pursued in either court.

Whether the family court can remove a child from both parents' care and control is a puzzling issue. It appears that the family court has, on occasion, taken such action based upon the language of Civil Code section 4600, which reads in part:

> (b) Custody should be awarded in the following order of preference according to the best interests of the child pursuant to Section 4608:
>
> (1) To both parents jointly pursuant to Section 4600.5 or to either parent. . . .
>
> (2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.
>
> (3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.
>
> (c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a non-parent is required to serve the best interests of the child. . . .[202]

Chaffin v. Frye[203] presents an example of a family court judge awarding custody of a minor to relatives pursuant to section 4600. The mother and father were divorced in 1962 with mother receiving custody of the two children.[204] Mother and children resided with mother's parents, the Fryes, until 1968 when mother moved to Cali-

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201. A.B. 2791 proposed the addition of Civil Code section 4610 to permit the family court judge to order a party to participate in counseling. The bill did not pass.

202. CAL. CIV. CODE § 4600(b)-(c) (West Supp. 1987). For an example of a trial court's attempt to utilize Civil Code section 4600 as the basis for removal of a child in a dependency proceeding, see *In re* James T., No. G003648 (Cal. Ct. App. Mar. 11, 1987).

203. 45 Cal. App. 3d 39, 119 Cal. Rptr. 22 (1976).

204. *Id.* at 42, 119 Cal. Rptr. at 22.

fornia, while the Fryes and the children remained in Washington.[205] In 1973 mother petitioned the superior court in Los Angeles County for custody of the children, and the Fryes cross-complained for custody arguing that placement with mother would be detrimental to the children.[206] Noting mother's unstable life style, her disability, her homosexuality and the grandparents' stability, the probation department investigator recommended placement with the grandparents.[207] The trial court awarded custody of the children to the grandparents with reasonable rights of visitation to mother.[208] The court of appeal affirmed the trial court's finding that there was a sufficient factual basis for the findings of detriment required by section 4600.[209]

Both the ruling in *Chaffin* and the suggestion that a non-parent can use the family court as a means of depriving a parent of custody seem incorrect for several reasons. First, the person awarded custody of the child has no legal authority to assist the child in many critical life issues such as school enrollment and medical care. It is necessary to have the status of parent or legal guardian to be able to make such decisions for the child. Second, a placement with a non-relative who is not licensed as a foster home is not legal pursuant to Welfare and Institutions Code sections 16507 and 16507.4.[210] Third, this type of placement runs counter to the dependency law and, in particular, that portion of the law created by Senate Bill 14 in 1982.[211] This

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205. *Id.*

206. *Id.* at 42, 119 Cal. Rptr. at 23.

207. *Id.* at 42-44, 119 Cal. Rptr. at 23-24.

208. *Id.* at 42, 119 Cal. Rptr. at 23.

209. *Id.* at 44-45, 119 Cal. Rptr. at 24-25.

210. Parents can place children with relatives without state approval. They cannot place a child in a non-relative home without state approval. CAL. WELF. & INST. CODE §§ 16507, 16507.4 (West Supp. 1987).

211. The goals and methods of California's child welfare system were restructured by Senate Bill 14. 1982 Cal. Legis. Serv. 5144 (West) (Public Social Services - Conformance to Federal Legislation). The changes brought California into compliance with the Federal Adoption Assistance and Child Welfare Act of 1980. Pub. L. No. 96-272, 94 Stat. 500 (1980). Specifically, the new law made the following changes in California:

> — Imposed stricter legal standards governing removal of children from their homes.
>
> — Required welfare departments to attempt to maintain the natural family setting through provision of services such as counseling, respite care, homemaking classes and, where necessary, in-home caretakers.
>
> — Limited family reunification services to 18 months and required courts to conduct formal case reviews every six months.
>
> — Required courts, as part of the case review, to adopt a permanent placement plan for any child remaining in foster care for 18 months or more. First priority under this plan must be given to adoption, followed by guardianship and then long-term foster care.

law reflects several underlying policies: children should be raised by their parents; services should be provided by the state to assist the family before any removal is made; if a child is removed, immediate and intensive services should be provided to reunify the family; and, if reunification services fail, the child should be placed in a permanent home (either in long term foster care, with a legal guardian, or by means of adoption).[212] The family law statutes ignore these dependency law policies. Fourth, any of the restrictions placed on the parent or new placement by the family court are not supervised by any official of the state.[213] If this portion of section 4600 is to be utilized, the family law should be rewritten first to consider whether the language of 4600(c) should be modified and, second, to provide for coordination with the guardianship and dependency law.[214]

2. *Juvenile Court*

In juvenile dependency proceedings, the court may order services while the child remains in the home or remove the child from both parents and place him with a relative, or in a foster or private institutional setting.[215] The options available to the court are part of a complex protection scheme which is designed to result in either the return of the child to the parent or a long-term placement for the child.[216]

The juvenile court can condition return of a dependent child to a parent on any conditions reasonably related to the protection of the child.[217] Common orders include individual counseling for any or all family members, family counseling, services from a public health nurse, parenting classes, remaining drug free while caring for the child, making certain that an identified abuser has no contact with the child, providing adequate housing and providing adequate day

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— Required welfare departments to maintain written case plans for every child subject to their care, and to have worker/child contacts at least once a month. Report by the CALIFORNIA SENATE SELECT COMMITTEE ON CHILD & YOUTH, December, 1986.

212. *See supra* note 31 and accompanying text.

213. *See infra* text accompanying notes 219-23 regarding supervision; *see also In re* Marriage of Jenkens, 116 Cal. App. 3d 767, 172 Cal. Rptr. 331 (1981).

214. For guardianship law, see CAL. PROB. CODE §§ 1500-1601 (West 1981 & Supp. 1987). For juvenile dependency law, see CAL. WELF. & INST. CODE §§ 300-80 (West 1984 & Supp. 1987). *See also* Bodenheimer, *Intestate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1981).

215. CAL. WELF. & INST. CODE §§ 360-62 (West Supp. 1987).

216. *Id.* CAL. R. CT. 1377(f) (West 1987). *See also supra* note 32.

217. *See In re* W.O., 88 Cal. App. 3d 906, 152 Cal. Rptr. 130 (1979).

care. Moreover, the court can coerce parents into following its directions by ordering that a removed child will not be returned unless the parents follow through on a reunification plan which includes many of the orders listed above.[218]

G. *Supervision and Enforcement of Orders*

The power of the two courts in cases relating to children are limited by the court's ability to make certain that its orders are being followed by parents, children and others. For example, in many sexual abuse cases, it is recommended that the child victim receive therapy and that her contact with the abusing parent be limited or terminated until otherwise recommended by the therapist and approved by the court.

1. *Family Court*

Unless the custodial parent or the child informs the court, a family court has no way of learning whether the parent is taking the child to therapy sessions or whether the offending parent is visiting with the child.[219] The family court must rely upon the non-offending parent to protect the child and insure that she is receiving the treatment recommended. The court cannot order supervision by social agencies on the child's behalf. Even if the court learns that the abusing parent is having contact with the child, there is little the court can do. Judges are not well equipped to initiate legal proceedings. The family court judge's best option is referral to juvenile court or a child protective agency.[220]

2. *Juvenile Court*

The juvenile court is in a much better position to supervise and enforce the orders it makes. Each informal agreement or dependency order is supervised by an assigned worker from the welfare or probation department. Not only are these workers in contact with the

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218. CAL. WELF. & INST. CODE §§ 361.5, 362 (West Supp. 1987). The juvenile court does not, however, have available to it the powers described in Civil Code section 4359. Welfare and Institutions Code sections 213 and 245.5 are not as extensive as Civil Code section 4359. Legislation should be drafted to provide the juvenile court with at least the same powers as the family and other civil courts in this respect.

219. *See supra* notes 188 & 198 and accompanying text.

220. The judge could initiate the legal proceedings by an order to show cause. This, however, is cumbersome for two reasons: judges do not operate law offices, having neither the time nor the resources for such actions, and the judge may have to be the moving party in the order to show cause.

parents and child, they also provide services for both, pursuant to the court order or informal agreement. The supervising worker verifies that the parents are complying with their part of the order or agreement. If there is a violation of the court order, the supervising worker can quickly bring the case back to the court's attention.[221] In addition, the supervising worker can remove the child from the custody of the parents.[222] Every six months the worker must provide a report to the court describing the services offered to the family and the progress made by the family in eliminating the conditions requiring court supervision.[223]

It is evident from the discussion in this section that the juvenile court is better equipped to investigate and try child abuse allegations, and subsequently protect and supervise an abused child. Because of the extraordinary increase in the amount of child abuse cases reported, many such cases regularly appear in family courts. Some cases may appear in family court and juvenile court simultaneously. The following section of this article focuses upon the relationship between the two courts in such situations.

IV. THE RELATIONSHIP BETWEEN FAMILY AND JUVENILE COURTS

After an allegation indicating that one parent has been abusive towards his child or is unable to protect the child from further abuse, numerous issues must be addressed by the legal system. The goal is to find a protective parent with whom the child can safely live. Secondarily, the court must determine what contact, if any, the other parent should have with the child.

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221. CAL. WELF. & INST. CODE § 387 (West Supp. 1987). *See* Ansley v. Superior Court, 185 Cal. App. 3d 477, 229 Cal. Rptr. 771 (1986).

222. CAL. WELF. & INST. CODE §§ 305, 307, 309 (West 1984 & Supp. 1987). The text of section 305 reads:

> A peace officer may, without a warrant, take into temporary custody a minor:
>
> (a) Who is under the age of 18 years when such officer has reasonable cause for believing that such minor is described in Section 300,
>
> (b) Who is a dependent child of the juvenile court or concerning whom an order has been made under Section 320 or 356 when such officer has reasonable cause for believing that person has violated an order of the juvenile court or has escaped from any commitment ordered by the juvenile court, or
>
> (c) Who is under the age of 18 years and who is found in any street or public place suffering from any sickness or injury which requires care, medical treatment, hospitalization, or other remedial care.

Id. at § 305 (West 1984).

223. *Id.* at § 364 (West Supp. 1987).

Closely related to these issues is the question of which court, family or juvenile, should investigate and adjudicate the allegations. If the allegations are proven, a decision must be made as to which court should issue protective orders and, if necessary, which court should supervise the child after the orders have been made.

Resolution of the issues involving the juvenile and family courts depends upon the size and structure of the court system. The larger the court the more likely it will be divided into specialized departments performing particular assignments.[224] This division enables large courts to take advantage of economies of scale which include minimal movement of critical personnel from department to department as each successive case is heard on the calendar and the development of expertise in certain areas of the law. Most metropolitan courts have specialized subject matter departments, including juvenile and family departments. Smaller courts often do not specialize. Courts with only one or two departments have little opportunity to specialize since they must hear all varieties of cases in the same one or two departments.

In most states the family and juvenile court functions are performed by distinct courts.[225] Thus, as the number of departments in a particular jurisdiction grows, it is likely that the two courts will be separated. In a few states and cities, the family and juvenile court functions have been consolidated in one family court.[226] Whether it

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224. A court might have criminal, civil, probate, family and juvenile departments. In large metropolitan courts there may be further specialization. The juvenile court may divide its dependency and delinquency cases into separate departments. The family court may have one or more departments handling only *ex parte* requests or short cause matters, while other departments would only hear trials.

225. Only Delaware, Hawaii, New Jersey, New York, Rhode Island, South Carolina and the District of Columbia have statewide family court jurisdictions. The cities of Tuscaloosa, Alabama, Baton Rouge, Louisiana, Biloxi, Mississippi, and Philadelphia and Pittsburgh, Pennsylvania have family court jurisdiction.

226. *See supra* notes 3, 224-25. Consolidated Family Court is defined in The Standards for the Administration of Juvenile Justice, Report of the National Advisory Committee for Juvenile Justice and Delinquency, 1980, Wash. D.C. at 3.1 *The Courts*, and 3.11 *Jurisdiction* [hereinafter *Standards*]:

> Jurisdiction over matters relating to juveniles should be placed in a family court. The family court should have exclusive original jurisdiction over matters relating to delinquency as specified in Standard 3.111; noncriminal misbehavior as specified in Standard 3.112; neglect or abuse of juveniles as specified in Standard 3.113; adoptions and terminations of parental rights; appointment of a legal guardian for juveniles; admission for services for the mentally ill or mentally retarded persons and persons addicted to alcohol or narcotic drugs; the interstate compacts on juveniles and on the placement of children; divorce; separation; annulment; alimony; custody and support of children; paternity; and the uniform, reciprocal enforcement of support act; as well as intra-family criminal offenses

is preferable to have such a consolidated family court is a complex issue beyond the scope of this article.[227]

Whether large or small, separate or consolidated, similar issues of coordination are presented. If child abuse allegations arise during family law proceedings, how should the decision whether to commence proceedings pursuant to the juvenile law be made? Juvenile proceedings are distinct from family law matters involving different investigative personnel, attorneys for the child and state, and the other differences described in part I of this article. Even if the new participants were to appear in the same courtroom before the same judge, it would take time to activate them.[228] Either as a consolidated or separate court, the communication and cooperation between personnel serving the two courts will determine how well child abuse cases are managed.

The remainder of this section will focus upon California family and juvenile courts and how they coordinate court functions after child abuse allegations have been made.

A. *Family Court*

If child abuse is alleged in the context of a family proceeding, the family court services personnel,[229] a therapist[230] or someone else covered by the mandatory reporting law will probably[231] report the allegation to the local child protective agency.[232] After the initial response to the report, an investigating officer[233] must decide whether to intervene or to permit the family court to retain the case without juvenile court interference.[234]

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and contributing to the delinquency of a minor as specified in Standard 3.117. *Id.*

227. *See Standards*, *supra* note 226, at Commentary; Gordon, *Establishing a Family Court System*, 28 JUV. JUST., Nov. 1977, at 9. Other materials are available from Mr. Hunter Hurst at the National Center for Juvenile Justice, 701 Forbes Avenue, Pittsburgh, Pennsylvania 15219.

228. In large jurisdictions, if the case remains before the same judge, there is a loss of economies of scale. The same judge hears both family and juvenile cases. Participants must move from court to court depending on when juvenile cases are heard.

229. CAL. PENAL CODE § 11165(j) (West Supp. 1987); SANTA CLARA COUNTY SUPERIOR COURT RULES 17B(1)(c).

230. CAL. PENAL CODE § 11165(i) (West Supp. 1987).

231. *See id.* at § 11166(a), which describes when someone covered by the statute "shall" report child abuse allegations.

232. *Id.* at § 11165(k) (West Supp. 1987). The reporting statute has been held to be constitutional. People v. Battaglia, 156 Cal. App. 3d 1058, 203 Cal. Rptr. 370 (1984).

233. The investigating officer may be a social worker or probation officer depending on the county. CAL. WELF. & INST. CODE §§ 305, 306, 309 (West Supp. 1987).

234. In some states, such an allegation in a family law proceeding mandates transfer of

The investigator's first decision depends upon whether the abuse allegation is contested. If the abuse allegation is contested and likely to be tried, the investigating worker decides which court makes that determination. If the abuse issue is not contested, the worker decides which court makes the custody decision and any protective orders necessary for the welfare of the child.

In determining the preferable court to hear the child abuse allegation, the worker should examine a series of factors:

1. What kind of an abuse allegation has been made? Certain types of abuse are more difficult to prove in court. A sexual abuse allegation involving a young child may require more complicated evidentiary, procedural and investigative issues than a physical abuse allegation.

2. What is the strength of the child abuse allegation? Is it well documented through timely police and medical reports? Will the child be a good witness?

3. At what stage of the family court proceedings was the child abuse allegation raised? Was the allegation made at the outset, during discovery or in the middle of a contested hearing? Has the family court made a finding regarding the allegation?

4. Will it be necessary to utilize the superior investigative tools of the juvenile court investigator in order to protect the child?

5. What is the attitude of each parent, and, if applicable, the alleged abuser, toward the allegations?[235] Would the presumptions contained in Welfare and Institutions Code sections 355.1 *et. seq.* be helpful in determining the truth of the allegations?

6. Does the investigating worker believe that the family court can adequately protect the child?

7. What resources are available to the non-abusing parent to protect the child?

Based upon these considerations the investigating worker has

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the case to juvenile court for determination of the facts. *In re* Eckman, 645 P.2d 866 (Colo. Ct. App. 1982); *Ex parte* J.A.P., 546 S.W.2d 806 (Mo. Ct. App. 1977); Neal v. Washington, 158 Ga. App. 39, 279 S.E.2d 294 (1981). *See also* ATT'Y GEN'S. COMM'N ON THE ENFORCEMENT OF CHILD ABUSE LAWS, FINAL REPORT, April 1985. In that report, Prosecution Recommendation II.B.3. provides that "[t]he Commission recommends that the Attorney General sponsor legislation to require the courts to refer any allegation of child abuse arising in a family law proceeding to the county welfare department for an assessment and a report back to the court." *Id.* at 3-17.

235. For example, does a parent acknowledge that a particular third party (stepfather, boyfriend, etc.) may be responsible for the abuse? *Compare* the facts of *Jennifer P.*, 174 Cal. App. 3d 322, 219 Cal. Rptr. 909 (1985) *with In re* Angela P., 28 Cal. 3d 908, 623 P.2d 198, 171 Cal. Rptr. 637 (1981).

several options. He can initiate juvenile court proceedings by filing a Welfare and Institutions Code section 300 petition. This frequently results in suspension of the family court custody proceedings until the juvenile court petition is heard.[236] Alternatively, the investigator can reach an informal supervision agreement with the parents pursuant to Welfare and Institutions Code section 330.[237] The investigating worker can also decline to intervene pending resolution of the family court proceedings.[238] Finally, the worker can simply close the investigation.

These four options represent a continuum of intervention strategies which enable the investigator to intervene in the family according to the needs of the child. If the investigator is satisfied that a parent is protecting the child from further abuse and ensuring that the child's needs are met, formal action is less likely. If, on the other

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236. *But see In re* William T., 172 Cal. App. 3d 790, 218 Cal. Rptr. 420 (1985); *In re* Brendan P., 184 Cal. App. 3d 910, 230 Cal. Rptr. 720 (1986).

237. This type of resolution is unlikely if one of the parents denies that the abuse took place, but would be possible if the abuser was a non-parent and each parent acknowledged that person's responsibility.

If the child has been abused by a non-parent, the informal supervision contract might require that the custodial parent: (1) not permit the abuser to have any contact with the child, nor visit the child's home; (2) secure family court restraining orders to ensure police support of any violation of (1); and (3) have the child begin and continue in therapy until the therapist and social worker agree it is no longer necessary. Such an intervention would result in a social worker supervising the case for six months to ensure that the custodial parent complied with the terms of the agreement. The social worker may also assist the parent in completing the tasks outlined.

Another example in which informal supervision can be utilized involves situations of extreme family conflict after the parents separate. This typically involves fighting when the child is exchanged between parents, disparaging comments from each parent toward the other in the presence of the child, and a lack of cooperation between the parents regarding the child's needs — all resulting in the child suffering psychological trauma.

On occasion the family court will be unable to control such parents because of the intensity of the hostility and intransigence. In these situations, the informal supervision agreement can provide for more control over parental battles, perhaps including supervision of visitation exchanges and counseling for all family members. By the nature of the agreement, a social worker will supervise the progress of these agreements.

Based on the facts of the hypothetical involving Mary and Harry Jones at the beginning of the article, the factors listed suggest that the case should proceed in juvenile court. Father is contesting the allegations, and he plans to have Jane re-evaluated. The child is likely to experience multiple evaluations. Moreover, Jane should have an attorney representing her through the proceedings. It will be important to determine the truth of the child abuse allegations, and the juvenile court has the better procedures to make that determination.

238. In monitoring the case in family court, the investigating officer may inform the parent what is expected of him or her in order to avoid juvenile court intervention. The officer might notify the participants in the family court proceedings of his concerns and expectations. In Santa Clara County, investigating officers sometimes attend the family court proceedings to ensure that communication is maximized.

hand, the parent's protective measures are less effective, it is more likely the juvenile court will become formally involved.

If the child abuse allegation is not contested, the investigating worker must decide which court should address the custody questions including any orders necessary to protect the child. In making this decision the investigator should examine a second set of factors.

1. Is the identity of the abuser known? What was the custodial arrangement when the abuse was first reported? Were the parents living together? Were they separated with one parent having primary custody or was there a joint custody arrangement?

2. If one parent is the abuser, what is the relationship of the other parent to him? If the abuser is a non-parent, what is the relationship of each parent to that person?[239]

3. What steps has each parent taken to protect the child from further abuse?

4. What steps has each parent taken to respond to the child's therapeutic needs?

5. What has been the attitude of each parent toward the involvement of the juvenile court investigator and any law enforcement efforts to investigate the abuse allegation?

6. What confidence does the investigative worker have in each parent's ability to care for and protect the child?

After investigating and weighing these factors, the worker will choose one of the same four intervention options described above.

B. *Juvenile Court*

If the first referral to any court system is to the juvenile court, the investigating worker initially decides whether the abuse allegations are of sufficient gravity to warrant intervention.[240] If there is insufficient proof of abuse, or if the investigating worker chooses not to intervene, the investigating worker will not take action. Another court, probably the family court, will be the next forum chosen if the parents wish to litigate the matter.[241]

If the investigating worker determines there is evidence of abuse of sufficient gravity, he must then decide which court should hear the

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239. The critical issue for the investigating worker is the custodial parent's independence from the abuser. Many mothers may be emotionally or financially dependent upon the abuser. Even though they agree to protect their child, their resolve frequently turns to ambivalence.

240. *See supra* text accompanying notes 59-63.

241. A parent or other interested party can appeal this decision to the juvenile court judge. *See supra* text accompanying notes 34-37.

case. Normally, the case remains in the juvenile court because the allegation came to the attention of the investigating worker before any other court was involved. It is possible, however, that a non-abusing parent could take swift action and obtain protective orders from the family court while the investigation is being conducted. This sometimes occurs at the suggestion of the investigator. If this should occur, the investigator's choices are identical to his options when the case was referred from the family court after an abuse allegation was made.

In the remaining portion of this article a number of cases and statutes which exemplify the relationship between the family and juvenile courts will be studied. They will be discussed in relationship to the process outlined regarding the movement of a child abuse case between the two courts.

C. *Standards for Juvenile Court Intervention*

One important issue facing the participants in both courts is which cases belong in family court and which belong in juvenile court. Are there some cases which must be processed through one court or the other? Is there a discernible line between the two courts defining the jurisdiction of each?

The California appellate courts have issued several opinions which are helpful in deciding whether a case belongs in family or juvenile court. In the case of *In re Jennifer P.*,[242] the adoptive parents dissolved their marriage, Jennifer was living with mother, while father had reasonable visitation rights. When mother suspected that Jennifer had been sexually molested by father during visitation, she informed the social services department and cooperated with the police investigation and medical examinations.[243] Mother contacted the juvenile court and cooperated in the criminal prosecution.[244] She also went to the family court, secured a temporary restraining order prohibiting father's visitation and entry to her house, and requested a modification of the family law order to prohibit father's contact with Jennifer on a permanent basis.[245] Mother then objected to further juvenile court intervention.[246]

Testimony at the juvenile court jurisdictional hearing revealed

242. 174 Cal. App. 3d 322, 219 Cal. Rptr. 909 (1985).
243. *Id.* at 324, 219 Cal. Rptr. at 910.
244. *Id.*
245. *Id.* at 324-25, 219 Cal. Rptr. at 910-11.
246. *Id.* at 324, 219 Cal. Rptr. at 910.

that the child psychiatrist believed mother handled the entire matter superbly, and the social services department worker described mother as having "demonstrated superior care and cooperation throughout [the investigation]."[247] However, neither the family law modification proceeding nor the criminal proceeding had concluded and father had not expressed a willingness to stay away from Jennifer or mother's house.

On these facts the trial court sustained a dependency determination, only to have the court of appeal reverse that finding. The appellate court suggested that the juvenile court should have confidence in findings made by other superior courts, stating that "[w]e can hardly presume the domestic court would require or allow father-daughter contact where it would be detrimental to Jennifer's welfare."[248] The appellate court concluded by adding that "our system, for better or for worse presumes that parents are the best judges of their children's best interests."[249]

Jennifer P. stands for the proposition that a custodial parent who becomes aware of an abuse to her child can take sufficient protective steps so that juvenile court intervention will not be necessary or permitted. In *Jennifer P.* the juvenile court investigative worker decided incorrectly to have the juvenile court intervene for Jennifer's protection. Based upon the guidelines listed above, intervention was not necessary.[250] The investigative worker had a strong suspicion as to the identity of the abuser, and father apparently was not contesting the change of custody or restraining orders in family court. Mother retained custody of Jennifer throughout the proceedings, sought help from the family court, secured restraining orders and terminated father's visitation. Mother also initiated counseling for Jennifer. Finally, the investigating worker had nothing but praise for the way in which mother handled the entire situation.

While there had been an abuse, the non-abusing custodial parent took sufficient protective steps to ensure that the abuse was stopped and that Jennifer would receive appropriate therapy. The juvenile court could do no more and intervention was therefore unnecessary. The investigating worker should have declined to initiate juvenile proceedings. However, the worker might have monitored the family court and criminal court proceedings to learn their outcome and ensure that mother secured appropriate permanent protective

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247. *Id.*
248. *Id.* at 327, 219 Cal. Rptr. at 912.
249. *Id.*
250. *See supra* text accompanying notes 235-39.

orders.

In re Nicole B.[251] presents a similar factual context, yet a different result. In *Nicole B.* the parties stipulated to the facts which were submitted in support of a dependency petition.[252] Those facts included: (1) a boyfriend of mother struck Nicole while spending time with her in a park; (2) the striking was of the type contemplated by Welfare and Institutions Code section 300(d); (3) the boyfriend was subsequently taken to a psychiatric hospital; (4) mother had no knowledge of the incident and was away when it occurred; (5) the boyfriend had been residing in the house for 3 months and had known mother for 6 months; and (6) at the time of the hearing, the boyfriend no longer resided with mother and was not allowed to come in or about mother's residence.

On these facts the trial court sustained the petition and declared Nicole to be a dependent child of the court, and the court of appeal affirmed that finding.[253] The appellate court stressed the fact that the boyfriend did not express an intent to remain away from Nicole or her mother's house.[254] Given the close relationship between mother and the boyfriend, the court concluded there was a basis for inferring a potential for the boyfriend's return.[255] The court based its opinion on its overriding concern for the protection of the minor and not on parental unfitness.[256]

The court noted that the unfitness of the parent is not the determinative issue under Welfare and Institutions Code section 300(d).[257] Rather, the court must look to past events for aid in the determination of the present fitness of a child's home for the purpose of deciding whether the juvenile court should assume jurisdiction over the child.[258]

Nicole B. held that a non-abusing custodial parent whose child is abused cannot prevent juvenile court intervention when she has not taken sufficient steps to protect the child from further abuse.[259] It was mother's live-in relationship with the abuser that was of continuing concern to the investigating worker and subsequently to the

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251. 93 Cal. App. 3d 874, 155 Cal. Rptr. 916 (1979). *Nicole B.* relied heavily upon *In re* Melissa H., 38 Cal. App. 3d 173, 113 Cal. Rptr. 139 (1977).

252. 93 Cal. App. 3d at 877, 155 Cal. Rptr. at 917.

253. *Id.* at 879, 155 Cal. Rptr. at 918.

254. *Id.* at 878-79, 155 Cal. Rptr. at 918.

255. *Id.* at 879, 155 Cal. Rptr. at 918.

256. *Id.*

257. *Id.* at 878, 155 Cal. Rptr. at 918.

258. *Id.*

259. *Id.* at 881-82, 155 Cal. Rptr. at 920.

trial judge. Furthermore, although not specifically noted in the appellate court opinion, mother had taken no protective steps such as securing family court restraining orders. Finally, the opinion suggested that neither the investigating worker nor the judge had confidence in the mother's ability to protect the child from future contacts with the boyfriend.[260] The child required supervision for a period of time.[261]

A comparison of the rules enunciated in *Nicole B.* and *Jennifer P.* is instructive. If a parent, upon discovery of an abuse, takes adequate steps to protect the child from further abuse, and responds to the needs of the child, the juvenile court has no basis to sustain a dependency petition as a matter of law. If, on the other hand, the non-offending parent takes insufficient steps to protect the child or fails to respond to the needs of the child, dependency may be invoked. For example, if Nicole's mother had obtained a restraining order prohibiting the boyfriend from contacting Nicole or from coming to the house, and had indicated that her relationship with him was over, the result might have been different.

The inquiry in each case centers around mother's ability to protect the child and provide for the child's needs without state intervention and supervision. Dozens of similar decisions are made daily in cases throughout the state.[262] Usually, an investigating worker decides whether to intervene based upon considerations similar to those discussed in *Nicole B.* and *Jennifer P.* The worker also evaluates mother's attitude regarding the abuse allegations. In many of these cases, mother must make the difficult choice between protecting her child and deciding to maintain a relationship with a male who provides support for the family.[263] A worker who detects ambivalence may remove the child from the mother's custody to insure the child's protection and to prevent mother from attempting to persuade the

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260. *Id.* at 879, 155 Cal. Rptr. at 918. In *Melissa H.*, the stepfather sexually assaulted the child, and a 600(d) petition was sustained at the juvenile court jurisdictional hearing. 38 Cal. App. 3d at 174, 113 Cal. Rptr. at 140. On appeal the court of appeals affirmed the trial court's finding. *Id.* at 175, 113 Cal. Rptr. at 141. The court based its decision not on any action of the mother, but on the overriding concern for the protection of the minor. *Id.* The court noted that the stepfather's conduct as well as his stated intention to return to the family home after he completed time in a hospital was a sufficient basis for intervention. *Id.*

261. *Accord In re* Vonda M., 2 Civ. No. B019273 (Cal. Ct. App. Mar. 27, 1987). Whether Nicole, in *Nicole B.*, could have been appropriately supervised by an informal supervision agreement is open to speculation. *See supra* notes 218-23 and accompanying text.

262. *See supra* note 1.

263. *See, e.g., In re* Angela P., 28 Cal. 3d 908, 623 P.2d 198, 17 Cal. Rptr. 637 (1981); *In re* Melissa H., 38 Cal. App. 3d at 173, 113 Cal. Rptr. at 139; THOMPSON, CALIFORNIA JUVENILE COURT DESKBOOK § 9.29 (CEB) (1984).

child to change her story.

Nicole B. and *Jennifer P.* reflect situations in which juvenile court can and cannot assume jurisdiction. The case of *In re Christina T.*[264] provides an example of a situation in which the juvenile court *must* assert its jurisdiction.

In *Christina T.*, dependency proceedings were brought on behalf of the minor, a 5 year old, alleging the minor's father had subjected her to sexual abuse during the past six months (section 300(a)) and that her home was unfit due to the depravity of her father (section 300(d)).[265] The parents, pursuant to a marital dissolution agreement, shared custody of the minor; mother had nine days a month and father the remainder.[266] During time with mother, Christina complained to mother and the baby sitter that father made her take showers with him, rubbed between her legs until it hurt, touched her buttock and slept with her in the same bed.[267] Christina later made a similar statement to an investigating detective.[268] A doctor testified that the minor's hymen was not intact, and that both her anus and vagina were dilated, all of which was consistent with sexual molestation.[269] The evidence also included testimony from a psychiatric social worker who interviewed the minor utilizing anatomically correct dolls.[270] The minor took the female doll and put its face between the male doll's legs saying, "[t]hat's what little girls do."[271] The minor also told the social worker, "[t]hat's what daddy Peter [mother's cohabitating boyfriend] has me do."[272] Later, the minor retracted this statement and said it was Chris, her father, who had done it.[273] Father denied any molestation.[274]

At the conclusion of the trial, the court found both petitions untrue, stating "[t]here is no question that she has been sexually molested by somebody. . . . [But since] the allegations in this petition [have not] been proved by a preponderance of evidence, I find them both untrue."[275]

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264. 184 Cal. App. 3d 630, 229 Cal. Rptr. 247 (1986).
265. *Id.*
266. *Id.* at 631-32, 229 Cal. Rptr. at 248.
267. *Id.* at 633, 229 Cal. Rptr. at 249.
268. *Id.*
269. *Id.* at 634, 229 Cal. Rptr. at 249-50.
270. *Id.* at 634, 229 Cal. Rptr. at 250.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 635, 229 Cal. Rptr. at 251.
275. *Id.* at 636-37, 229 Cal. Rptr. at 251-52.

The court of appeal reversed, reasoning that once the trial court found that the minor had been molested, the statutory presumptions were activated, and the burden of producing evidence shifted to the parents.[276] Since neither parent was able to establish the abuse occurred in the home of the other parent, the petition must be sustained as a matter of law.[277] The remaining question of who sexually abused the minor was relevant to the dispositional phase of the case and to any orders the court might fashion to assist the child. The appellate court remanded the case to the trial court for further dispositional proceedings.[278]

Christina T. stands for the proposition that when a child has been sexually molested and the parents cannot satisfy a court as to the identity of the perpetrator, the juvenile court must intervene on behalf of the child.[279] Where similar facts are discovered during a family court proceeding or in a juvenile court trial, the participants must recognize that the case belongs in juvenile court and appropriate action should be taken to ensure that result.

Christina T. presents facts familiar to many family and juvenile court participants: the so-called unprovable child molestation. All participants agree that something has happened to the child, but no one can prove who was responsible for the abuse. Had the appellate court upheld the trial court's dismissal, further proceedings would have taken place in the family court. That forum would have decided issues of custodial time sharing, access to the child, and other relevant issues. But the appellate court held that these facts, as a matter of law, must result in the assertion of juvenile court jurisdiction.[280]

If the juvenile court had found there was no molestation but that the child or someone else fabricated evidence of molestation or that the evidence of molestation was inconclusive, juvenile court jurisdiction would probably not have been necessary. The petitions would have been dismissed and further proceedings would have

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276. Those presumptions are contained in Welfare and Institutions Code sections 355.1, 355.2 and 355.4; Christina T., 184 Cal. App. 3d at 638 n.3, 229 Cal. Rptr. at 252 n.3.

277. 184 Cal. App. 3d at 641, 229 Cal. Rptr. at 254.

278. *Id.* at 640, 229 Cal. Rptr. at 254.

279. This result is noteworthy since both the petitions in *Christina T.* alleged that father was the abuser. *Id.* at 631-32, 229 Cal. Rptr. at 248. The court found that he was not proven to be the abuser. *Id.* at 639-40, 229 Cal. Rptr. at 253. The significance of the appellate court ruling is that even though the petitions were not true as to the perpetrator, they were true as to the child having been molested. The appellate court is indicating that trial judges in similar cases should find that the petition is true with regard to the fact of sexual molestation but not proven as to the perpetrator, and that a sufficient portion of the petition is true for the court to sustain a finding of dependency.

280. *Id.* at 639-40, 229 Cal. Rptr. at 253-54.

taken place in the family court.

If, however, the court was unsure whether a molestation had occurred, but found that the child was traumatized by something or someone and was behaving as though she had been sexually abused when there was no satisfactory explanation for her behavior, a more difficult problem would be presented. This type of case typically includes some sexualized statements by the child, inconclusive medical evidence, resistance to visitation (usually with father), and signs of extreme stress after visitation (bed wetting, nightmares, and acting out behavior). This type of case also typically involves a bitter custody battle which has followed a bitter marital dissolution. Mother often claims that father is abusing the child, while father claims nothing is wrong during visitation and that mother is programming the child to produce words and responses.

This last factual situation presents difficulties for the court process. The facts fall short of those necessary to invoke juvenile court jurisdiction while presenting complications that make it difficult, if not impossible, for the family court to meet the child's needs. Whether the juvenile court should invoke its jurisdiction should be measured by the needs of the child. In cases in which the child exhibits extreme stress and competent professional testimony declares that service or supervision is necessary, the juvenile court should assert jurisdiction.[281] In other cases the juvenile court should decline to intervene.[282]

When read together, *Nicole B.*, *Jennifer P.* and *Christina T.* help define the jurisdictional line between the family and juvenile courts. Under the facts in *Jennifer P.* the juvenile court did not have jurisdiction; the facts in *Nicole B.* were sufficient for the juvenile court to exercise its jurisdiction; and in *Christina T.* the facts *demanded* that the juvenile court exercise jurisdiction. This spectrum of factual settings and appellate rulings will be of assistance in the effort to decide how the two courts should best relate to each other.[283]

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281. *See, e.g.*, *In re Brendan P.*, 184 Cal. App. 3d 910, 230 Cal. Rptr. 720 (1986). *See also infra* text accompanying notes 387-417.

282. These cases would remain in the family court for any further custody litigation.

283. Other cases which may be of assistance in determining the difference between the two courts include *In re* Raya, 255 Cal. App. 2d 254, 63 Cal. Rptr. 252 (1967); *In re* Phillip B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979); and *In re* Jamie M., 134 Cal. App. 3d 530, 184 Cal. Rptr. 778 (1982).

D. *Custodial Parent Abuse*

A different series of problems arises when the parents are separated, either after a dissolution or without ever having been married, and the custodial parent is accused of abusing the minor. What are the rights of the non-custodial parent during the dependency proceedings? What impact does any family court order have upon the dependency proceedings?

The California appellate courts have ruled on these issues in several cases. In *In re Adele L.*,[284] the parents were married and divorced prior to any dependency proceedings. In the divorce decree, custody of Adele was awarded to mother.[285] On October 27, 1966, mother was taken to jail for hysteria, intoxication and a dirty home.[286] Adele was taken to a shelter home and dependency proceedings were initiated in juvenile court with the filing of a petition on October 31, 1966.[287] At the detention hearing on November 1st, the court placed Adele with her father.[288] On November 23rd, Adele was placed back at the shelter because her father had allegedly made derogatory comments about the mother in contravention of the court order.[289] A second petition based on this behavior was filed on November 28th.[290] On December 1st, juvenile court jurisdiction was sustained on the first petition, and the second petition was dismissed.[291] The court found Adele to be a dependent child of the court and ordered her placement outside of both parents' homes.[292]

Father appealed and the appellate court noted that since there was an existing family court order placing Adele with mother, she was the only person chargeable with the responsibility for care and control of Adele.[293] The petition alleged that "the minor has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control."[294] Thus, father did not qualify as such a parent because of the previous family court order awarding mother care, custody and control of Adele. The jurisdictional finding of the trial court was

284. 267 Cal. App. 2d 397, 73 Cal. Rptr. 76 (1968).
285. *Id.* at 400, 73 Cal. Rptr. at 78.
286. *Id.*
287. *Id.*
288. *Id.* at 400, 73 Cal. Rptr. at 78-79.
289. *Id.* at 400, 73 Cal. Rptr. at 79.
290. *Id.*
291. *Id.* at 401, 73 Cal. Rptr. at 79.
292. *Id.*
293. *Id.* at 402, 73 Cal. Rptr. at 80.
294. *Id.* at 399-400 n.1, 404, 73 Cal. Rptr. at 78 n.1, 81.

affirmed.[295]

The court also found a sufficient factual basis for removing Adele from her mother, noting mother's intoxicated condition, her drinking habits, the turmoil caused by her temper, and the unkempt condition of her residence.[296] However, the court found no basis on which an order could issue denying father custody of Adele at the dispositional hearing. The court held that, before custody could be denied to father at the dispositional hearing, placement with father must be found to be detrimental to the minor's best interests.[297]

Based upon *Adele L.*, a non-custodial parent whose custodial rights have been determined by a family court cannot prevent the juvenile court from asserting jurisdiction. The non-custodial parent may, however, participate fully at the dispositional hearing and must be treated preferentially with respect to any non-parent.[298]

In *In re Kelvin M.*,[299] father and mother were never married. On October 12, 1976, mother threatened to kill Kelvin and was placed in a psychiatric ward for two days.[300] A 600(a) petition was filed.[301] On December 10th, that petition was sustained and custody of Kelvin was awarded to a social services agency which then placed Kelvin with his father.[302] At the jurisdictional hearing father sought custody of Kelvin and asked for an opportunity to present evidence regarding his present fitness to care for Kelvin.[303] Father claimed that dependency proceedings were unnecessary because he was a fit person and the court should place Kelvin with him and dismiss the proceedings.[304] The trial court denied this request calling his offer irrelevant.[305] Father appealed both the jurisdictional and dispositional orders.[306]

The court of appeal reversed, holding that the father was entitled to be heard at the jurisdictional hearing.[307] The court distin-

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295. *Id.*

296. *Id.* at 403, 73 Cal. Rptr. at 81.

297. CAL. WELF. & INST. CODE § 728 (West 1984).

298. This result is different than a situation in which the custodial parent has immediate rights to custody and control of the child. The fact that there is a family court order is of no significance. *See In re* Donaldson, 178 Cal. App. 3d 477, 223 Cal. Rptr. 707 (1986).

299. 77 Cal. App. 3d 396, 143 Cal. Rptr. 561 (1978).

300. *Id.* at 398, 143 Cal. Rptr. at 562.

301. *Id.* Welfare and Institutions Code section 600(a) was a precursor to section 300(a).

302. 77 Cal. App. 3d at 398, 143 Cal. Rptr. at 563.

303. *Id.* at 399, 143 Cal. Rptr. at 563.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 402, 143 Cal. Rptr. at 565.

guished *Adele L.*, which involved a prior family court order awarding custody to Adele's mother and denying visitation to Adele's father.[308] The appellate court viewed Kelvin's parents equally because there was no prior family court order.[309] Thus, father had a right to appear at the jurisdictional hearing to prove his fitness to care for Kelvin.

Kelvin M. raises several interesting issues. Had the father established his paternity of Kelvin?[310] Assuming he had, if on remand the trial court found father to be a proper placement for Kelvin, what action would the court take? The court could dismiss the petition and permit father to take physical custody of Kelvin. If it did, what proof would father have to produce to show that he had legal custody? Since there was no existing custody order, if mother asked the police for assistance in regaining custody of Kelvin, the father may not be able to show that he had a superior right to custody. These concerns suggest that juvenile court should be prepared to create an order which father could use to prove his legal custody.[311]

One solution to this problem is to sustain a dependency petition based upon mother's conduct and possible future conduct towards the child. Thereafter, the court could make a custody award to father. If the court was satisfied that father could protect the child from any dangers that mother might pose, it could create a family law type order specifying the custody and visitation rights of each parent. The court could then dismiss the case.[312]

What if Kelvin's or Adele's parents had a joint custody award from a family court? What should the response of the juvenile court be? This author suggests that the previous procedures be followed. If a child is at risk because of one parent's conduct and the other parent has not taken sufficient protective measures to insure the child's

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308. *Id.* at 403, 143 Cal. Rptr. at 565-66.

309. *Id.* at 403, 143 Cal. Rptr. at 566.

310. Implicit in father's demand is the court's recognition that he is the legal father of Kelvin. The paternity issue arises regularly in juvenile court proceedings since many children are born out of wedlock. In order to participate in the proceedings, the court must find that a person is the legal father of the child in question. Even if that father is unable to care for the child, the paternity finding will enable his relations to be considered as placement possibilities for the child.

The appellate courts have approved of the juvenile court making paternity findings where necessary to complete the work of the court. *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975). Since this is such an important and recurring issue, the Legislature should establish guidelines for those determinations in the juvenile court.

311. Such an order is also necessary if mother is to have an opportunity to modify the custody status at some subsequent time.

312. *See infra* text accompanying notes 336-52.

safety, the child should be a dependent of the juvenile court.[313] Conversely, if the non-offending parent took steps similar to those taken by Jennifer P.'s mother, the juvenile court should dismiss the petition.

This appears to be the approach adopted by the Legislature in Welfare and Institutions Code section 361.2.[314] This statute provides that a dependent child shall be placed with the non-custodial, non-abusive parent if that parent desires custody and such placement would not be detrimental to the best interests of the minor. This determination is made only after the court orders removal of the minor from the custody of the custodial parent.[315] Section 361.2 leaves open the question of whether the non-abusive parent can challenge juvenile court intervention at the jurisdictional hearing,[316] but suggests that the preferable course of action is to sustain jurisdiction, create a family law order and dismiss the case.[317] If the court decides to sustain jurisdiction and place the child with the non-custodial,

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313. *See supra* notes 251-61 and accompanying text discussing *In re* Nicole B.

314. The relevant portions of the statute are as follows:

§ 361.2. PLACEMENT OF MINOR FOLLOWING COURT-ORDERED REMOVAL.

(a) When a court orders removal of a minor pursuant to Section 361, the court shall first determine whether there is a parent of the minor, with whom the minor was not residing at the time that the events or conditions arose which brought the minor within the provisions of Section 300, who desires to assume custody of the minor. If such a parent requests custody the court shall place the minor with the parent unless it finds that parent would be detrimental to the minor.

If the court places the minor with such a parent it may do either of the following:

(1) Order that such parent becomes legal and physical custodian of the child. The court may also provide reasonable visitation by the noncustodial parent. The court shall then terminate its jurisdiction over the minor. The custody order shall continue unless modified by a subsequent order of the superior court. The order of the juvenile court shall be filed in any domestic relation proceeding between the parents.

(2) Order that the parent assume custody subject to the supervision of the juvenile court. In such a case the court may order that reunification services be provided to the parent or guardian from whom the minor is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the minor.

CAL. WELF. & INST. CODE § 361.2 (West Supp. 1987).

315. *Id.* at § 361.2(a).

316. *See Kelvin M.*, 77 Cal. App. 3d at 396, 143 Cal. Rptr. at 561; *see also* notes 251-61 and accompanying text.

317. This "suggestion" is contained in the language of section 361.2(a). The implication is that the non-custodial parent will not be heard until the dispositional hearing.

non-abusing parent, it can thereafter provide services to that parent, reunification services to the other parent or services to both.[318]

There are some situations in which the non-custodial parent is unfit, as a matter of law, to take custody of a child who has been abused by the custodial parent, without at least a finding of dependency. *In re La Shonda B.*[319] presents an example of this situation.

On February 10, 1978, the Los Angeles Department of Social Services (DPSS) filed 300(a) and 300(d) petitions on behalf of La Shonda in juvenile court.[320] La Shonda was a two month old girl who allegedly suffered multiple skull fractures when her mother kicked and stomped on her.[321] On February 15th, a detention hearing was held and La Shonda was detained.[322] On March 1st, she was released to her maternal grandmother's care while mother remained in a mental hospital.[323] La Shonda's father and mother were not married and agreed to La Shonda's placement with her maternal grandmother in Texas.[324] By June, father indicated he wanted mother ultimately to have custody of the child.[325] In the meantime, father preferred to keep La Shonda himself, in spite of the fact that he had an unstable life style, traveled frequently and had no permanent residence.[326] The juvenile court judge suggested that father get a custody order from family court, but father did not do so.[327]

At the jurisdictional hearing in November, DPSS recommended that La Shonda be placed with her grandmother.[328] Father requested custody for himself.[329] The court, relying upon *Kelvin M.*, felt compelled to dismiss the petition since it found that father was a fit parent.[330]

The court of appeal reversed, finding the dismissal to be an abuse of discretion.[331] The appellate court ruled that the case was much closer to *Adele L.* than to *Kelvin M.* pointing to the Legislature's additions of Welfare and Institutions Code sections 355.1,

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318. CAL. WELF. & INST. CODE § 361.2(a)(1) (West Supp. 1987).
319. 95 Cal. App. 3d 593, 157 Cal. Rptr. 280 (1979).
320. *Id.*
321. *Id.* at 596, 157 Cal. Rptr. at 281.
322. *Id.*
323. *Id.*
324. *Id.* at 596-97, 157 Cal. Rptr. at 282.
325. *Id.* at 597, 157 Cal. Rptr. at 282.
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 598, 157 Cal. Rptr. at 282.
330. *Id.* at 598, 157 Cal. Rptr. at 283.
331. *Id.* at 599, 157 Cal. Rptr. at 283.

355.2, 355.3 and 355.4, which create presumptions relating to the need for proper and effective parental care and control, neglect, cruelty and physical abuse.[332] The court held that proof to establish dependency with regard to either parent is simplified by these statutes:

> As a result, where there are two parents with separate homes, the child can be removed from the home of the unfit parent at the adjudication hearing without prejudicing the other parent's right to gain custody of the child at the disposition hearing upon a sufficient showing that he or she is capable of providing parental care.[333]

Under the facts of the case, the court found as a matter of law, that father's living conditions provided inadequate stability and protection for the child and provided an insufficient basis for dismissal of the petition. "[The court's] failure to exercise this power, in light of our enormous concern in California that the home of a battered child needs to be proved safe, left the baby with no protection at all."[334]

La Shonda B. appears to be consistent with both *Nicole B.* and *Jennifer P.* To the extent that the juvenile court looks to the non-offending parent for protection of the child, La Shonda's father fell far short of the efforts made by Jennifer's mother. Father did not have a stable residence, did not secure a family court order which might provide legal protection for La Shonda against contact with her mother, and did not state his intentions regarding his relationship with the mother. Juvenile court jurisdiction was necessary to assure La Shonda's protection.

At the dispositional hearing, La Shonda's father would have the opportunity to prove that he could adequately provide for and protect his daughter. The court could place La Shonda with her father as a dependent child of the court and dismiss the case once satisfied that she was adequately protected. The court could also decide that La Shonda should be placed either with her maternal grandmother pursuant to the DPSS recommendation, or in another out-of-home placement. However, the court could only issue such an order after making the requisite findings pursuant to Welfare and Institutions Code section 726 and Civil Code section 4600.

Like *Christina T.*, *La Shonda B.* presents a factual situation

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332. *Id.* at 599-600, 157 Cal. Rptr. at 283-84.
333. *Id.* at 600, 157 Cal. Rptr. at 284.
334. *Id.* at 601-02, 157 Cal. Rptr. at 285.

which requires juvenile court intervention. The abuser in *La Shonda B.* was known to the court, and the non-custodial parent was unable, as a matter of law, to demonstrate adequate protection for the child. The message from *La Shonda B.* to investigating workers and juvenile courts is that there must be intervention in similar situations.

In summary, *Adele L., Kelvin M.* and *La Shonda B.* stand for the proposition that when parents are separated, a non-abusing custodial parent has the right to participate at the jurisdictional hearing on the dependency petition only if another court has not previously made an award depriving him of physical custody. If there has been no prior custodial order, the non-custodial parent can show the court at the jurisdictional hearing that she has taken sufficient steps to protect the minor, thus making juvenile court intervention unnecessary.

However, if the court finds that the non-custodial parent has not taken sufficient protective steps, it will sustain the petition and turn to the dispositional phase of the case. At the dispositional hearing, the non-custodial parent has a right to be heard and to be treated preferentially over any non-parent. If the court is satisfied that the non-custodial parent offers proper placement, it can place the child with that parent either as a dependent child or on a permanent basis, by creating a family law order and dismissing the juvenile case.[335]

In other words, a non-custodial parent has two opportunities to show that he should be granted custody of a child and that the juvenile court need not assert jurisdiction. First, at the jurisdictional hearing the parent may show that he is a fit and protective parent and that no assertion of jurisdiction is necessary. Secondly, at the dispositional hearing he may attempt to gain custody, preferably with the creation of a family court order and a dismissal of juvenile court jurisdiction. If this is not successful, he can argue for custody under juvenile court supervision.

E. *Creating a Family Law Order in Juvenile Court*

Family court custody orders remain in effect until they are modified, the child or parent dies, or the child becomes emancipated. Juvenile court jurisdiction over a child is intended to be temporary.[336] The goal of the dependency system is to return a child to his

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335. *See infra* text accompanying notes 336-52.

336. *In re* William T., 172 Cal. App. 3d 790, 218 Cal. Rptr. 420 (1985). "A reason for recognizing concurrent jurisdiction is that hopefully jurisdiction of the juvenile court is tempo-

parents or to find a permanent home for him or her within a specified time. Juvenile cases are dismissed when the court concludes that its intervention is no longer necessary. The dismissal terminates state intervention into that family's life and permits the social service agency to close its case and focus upon more important cases.

When a juvenile case is dismissed, the custodial rights of the parents are determined by the nature of the underlying family court order. In some cases there is no family court order; in other cases the underlying order is inconsistent with the findings of the juvenile court as to the preferable scheme to protect the minor.[337] In both these situations, assuming that the juvenile court has determined that the new custodial arrangement adequately protects the minor, the judge should rewrite the underlying family court order, file it in the family court and dismiss the juvenile case.

Welfare and Institutions Code sections 361.2 and 362.4 are the statutes which enable juvenile courts to make orders and thereafter dismiss the dependency case.[338] Pursuant to these statutes, juvenile courts can create a family law order redefining legal and physical custody issues consistent with the child's needs, as determined by the juvenile court. Once the order is created, the juvenile court can dismiss the case, cognizant that the newly created order will continue in full force and effect in the family court case. In some situations, the juvenile court can also add orders pertaining to restraints on conduct by the non-custodial parent.[339]

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rary." *Id.* at 799, 218 Cal. Rptr. at 425 (citing *In re* Syson, 184 Cal. App. 2d 111, 7 Cal. Rptr. 298 (1960)).

337. *William T.*, 172 Cal. App. 3d at 799-800, 218 Cal. Rptr. at 425-26.

338. Welfare and Institutions Code section 362.4 states:

> When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the persons' attainment of the age of 18 years, and either proceedings for the declaration of the nullity or dissolution of the marriage of the minor's parents are pending in the superior court of the same county, or an order has been entered with regard to the custody of that minor, the juvenile court on its own motion, may issue an order directed to either of the parents enjoining any action specified in paragraph (2) or (3) of subdivision (a) of Section 4359 of the Civil Code or determining the custody of or visitation with the child.
>
> Any order issued pursuant to this section shall continue until modified or terminated by a subsequent order of the superior court. The order of the juvenile court shall be filed in the proceeding for nullity or dissolution at the time the juvenile court terminates its jurisdiction over the minor, and shall become a part thereof.

CAL. WELF. & INST. CODE § 362.4 (West Supp. 1987). *See also id.* at § 361.2, presented, in pertinent part, *supra* note 314.

339. *See supra* notes 319-34 and accompanying text.

For example, if a mother as custodial parent had severely beaten a child and a dependency petition had been sustained, the court might consider a dispositional placement with father. After some supervision of the child, the court might find that father is adequately protecting the minor and believe that juvenile court intervention is no longer necessary. If the court dismissed the case, the family court order awarding custody to mother would be in force. To avoid this result, the court should make a new custodial order awarding sole legal and physical custody to father and no visitation or restricted visitation to mother. The court may add to the order that mother is restrained from coming to the minor's home, school or any other place the child frequents, depending on the facts. The order could also restrain other forms of contact such as telephone calls. This order should be filed with the family court, and the juvenile case could be dismissed because the underlying family court order would then provide the protection that the court deemed necessary.[340]

The two statutes do not cover all situations that the juvenile court judge or investigating worker might encounter. Section 361.2 focuses upon situations in which the minor has been removed from the custodial parent and the non-custodial parent desires custody. The court must place the minor with that parent unless such placement would be detrimental to the child.[341] If the child is placed with that parent, the court can award the parent legal and physical custody of the child, provide for reasonable visitation for the new non-custodial parent and then terminate the juvenile court's jurisdiction over the child.[342] Section 361.2 does not explain where the newly created order should be filed upon termination of juvenile court

340. This was the kind of protection Jennifer P.'s mother secured before the jurisdictional hearing in juvenile court. It is also the type of order the juvenile court suggested to no avail that La Shonda B.'s father should receive.

341. CAL. WELF. & INST. CODE § 361.2(a) (West Supp. 1987); CAL. R. CT. 1377 (West 1987).

342. CAL. WELF. & INST. CODE § 361.2(a)(1) (West Supp. 1987). Complex problems can arise in some situations described by Welfare and Institutions Code section 361.2. If the court has sustained a dependency petition, removed the child from the custodial parent, the court may order reunification services with the original custodial parent. After six or twelve months, the original custodial parent may urge the court to place the child back with him or her. The new custodial parent will argue that the new home is a stable placement which should receive preference over the original home. Statutory policies in the juvenile court favoring reunification are in conflict with a number of child custody cases including *In re* Marriage of Carney, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979); Burchard v. Garay, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986); *In re* Marriage of Lewis, 186 Cal. App. 3d 1482, 231 Cal. Rptr. 433 (1986). It is not clear which line or reasoning the juvenile court judge should follow.

jurisdiction if there is no pending domestic relations proceeding. Without a family court proceeding in which to file the new order, the new custodial parent may have difficulty proving his superior custodial rights. As previously discussed,[343] the creation of a family court custody file may be the solution.

The process described in Welfare and Institutions Code section 362.4 can only be utilized when an action for declaration of nullity, petition for legal separation, or dissolution is pending between the child's parents in the same county, or when an order has been entered with regard to the custody of the minor.[344] Thus, under the facts of *Kelvin M.*[345] and *La Shonda B.*,[346] no such order could have been created in the juvenile court because neither case involved prior family court proceedings. In these situations, the juvenile court should first address the question of paternity where necessary for the determination of the dependency action.[347] Thereafter, the juvenile court, in cooperation with the county clerk, should facilitate the creation of a file which contains the new custody order.[348]

Welfare and Institutions Code section 362.4 requires that the paternity action be pending in the superior court of the same county as the juvenile court proceeding.[349] This may create some difficulty for parents who have an action pending in another county or state but who wish to remain in the local county. Any foreign custody order may be filed in the superior court where the child currently resides. That order is adopted by the county as its own order as if it had originated in that county.[350]

In Santa Clara County, the juvenile court typically makes a custody order along with the paternity determination. That order is labeled "custody order" and is sent to the County Clerk's office for filing in a new file under the names of the parents. The custodial parent now has a civil court order which remains in effect until the child or parent dies, until the child is emancipated or until the order is modified. A sample order is contained in Appendix A.[351] Los

343. *See supra* notes 336-42 and accompanying text.

344. CAL. WELF. & INST. CODE § 362.4 (West Supp. 1987).

345. 77 Cal. App. 3d at 396, 143 Cal. Rptr. at 561.

346. 95 Cal. App. 3d at 593, 157 Cal. Rptr. at 280.

347. *In re* Lisa D., 81 Cal. App. 3d 192, 146 Cal. Rptr. 178 (1978).

348. *See* Appendix A.

349. CAL. WELF. & INST. CODE § 362.4 (West Supp. 1987).

350. *In re* Marriage of Straeck, 156 Cal. App. 3d 617, 203 Cal. Rptr. 69 (1984). The juvenile court judge or investigating worker should insist that one parent secure any foreign custody order so that it can be filed in the local jurisdiction.

351. This procedure may have been anticipated by CAL. R. CT. 1377(f)(1) (West

Angeles County has promulgated a set of rules concerning the relationship between the family and juvenile courts.[352] A copy of these rules is contained in Appendix B. Santa Clara County's draft of rules relating to the management of child abuse cases that arise in the family and juvenile courts is contained in Appendix C.

The establishment and utilization of an effective and efficient procedure for creating a family court order in juvenile court and the subsequent dismissal of juvenile court cases is an important development for both the families involved and the agencies providing services. Custodial parents no longer have agency personnel supervising them after it becomes unnecessary to do so. Moreover, agency workers are able to reduce their caseloads, removing cases which should or would be dismissed but for the existence of the transfer mechanism described above.

F. *Relationship Between the Two Courts — Which One has Precedence?*

Different problems arise when family and juvenile courts attempt to assert jurisdiction over the same custody questions simultaneously. Often, the family and juvenile courts in the same county are asked to rule upon the same allegations of abuse. Sometimes these cases arise in the family court of one county and the juvenile court of a different county.[353]

Which court should resolve the question of abuse? How should the choice of courts be determined? Does it matter that one court has already completed its deliberations and has ruled on this issue when the other court is asked to exert its jurisdiction?

Two recent cases have addressed some of these issues. In *In re*

1987).

352. The Los Angeles County rules relate to the coordination and consolidation of child custody proceedings which may appear in both courts simultaneously. The procedures seek to avoid costly duplication of effort, delays in case resolution and increased expense to litigants and the court system. The procedures include a mechanism for terminating juvenile court jurisdiction by entering an appropriate family court order. Recognizing that Welfare and Institutions Code section 362.3 is adequate to cover all of the cases which might properly be dismissed if a family court order were in place, the local rule encourages the creation of family court orders in situations not covered by the statute.

The rules also provide for communication between the family law and juvenile departments whenever action is contemplated by one that might have an impact upon the other, such as termination of jurisdiction or suspension of proceedings and institution of proceedings in the other court.

353. If the two courts were in different states then the Uniform Child Custody Jurisdiction Act (UCCJA) would control. *See* CAL. CIV. CODE §§ 5150-74 (West 1984).

William T.,[354] father and mother began a custody battle for their daughter, Nicole, in April 1979 in the Stanislaus County family court.[355] In the dissolution proceedings, mother was granted custody of Nicole with visitation rights to father.[356] In 1983 mother was incarcerated for welfare fraud and father was granted temporary custody by the family court.[357] At a modification hearing in July 1983, the court ordered joint custody with primary physical custody to father.[358] During that hearing, father made allegations that mother had abused Nicole.[359]

In April 1984 the maternal grandmother sought visitation rights.[360] The visitation issue was joined with other issues and set for a family court hearing on October 17, 1984.[361]

In the meantime father moved to Solano County.[362] He still believed that mother had abused Nicole and referred the matter to the Solano County juvenile authorities.[363] The Solano County authorities filed a dependency petition on behalf of Nicole on August 23, 1984.[364] The detention hearing was held on August 24th, and a guardian ad litem was appointed for Nicole.[365] The mother and grandmother were ordered to have no contact with Nicole.[366]

Between October 17th and 24th, the Stanislaus County family court held a six day hearing on the pending custody issues.[367] The court noted that, "if proceedings in the Solano County find they have jurisdiction, at that time, the orders of this court would be superseded."[368] The Stanislaus County family court ruled that mother and grandmother should have limited visitation rights.[369]

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354. 172 Cal. App. 3d 790, 218 Cal. Rptr. 420 (1985).
355. *Id.* at 795, 218 Cal. Rptr. at 421-22.
356. *Id.* at 795, 218 Cal. Rptr. at 422.
357. *Id.*
358. *Id.* at 795-96, 218 Cal. Rptr. at 422.
359. *Id.* at 796, 218 Cal. Rptr. at 422.
360. *Id.* at 797, 218 Cal. Rptr. at 423.
361. *Id.* at 796, 218 Cal. Rptr. at 422.
362. *Id.*
363. He had previously referred the matter to the Stanislaus County C.P.A., but they had refused to file a petition on Nicole's behalf. "These alleged acts had already been thoroughly investigated by the Stanislaus County Child Protective Services, and the result of its investigation (recommendation that no action be taken) had been communicated to the Solano County Child Protective Services." *Id.* at 804, 218 Cal. Rptr. at 429 (Franson, J., concurring).
364. *Id.* at 796, 218 Cal. Rptr. at 422.
365. *Id.*
366. *Id.*
367. *Id.* at 797, 218 Cal. Rptr. at 412.
368. *Id.* at 796, 218 Cal. Rptr. at 423.
369. *Id.*

On December 18, 1984, the Solano County juvenile court found the 300(d) petition to be true and declared that Nicole was a dependent child of the court.[370] On January 17, 1985, the court placed Nicole with her father, terminated all visitation with mother, and permitted only supervised visits for grandmother in Solano County.[371]

When grandmother attempted to pick up Nicole for visitation pursuant to the Stanislaus County order, father refused, relying on the Solano order.[372] Mother and grandmother brought father back before the Stanislaus family court on a contempt citation.[373] At the contempt hearing, father was found in contempt of court and ordered to serve 15 days in jail.[374] The Stanislaus court refused to acknowledge the orders of the Solano court, calling that proceeding an "end run" designed to defeat the jurisdiction of the Stanislaus court.[375]

Father petitioned the court of appeal for a writ of habeas corpus to nullify the contempt conviction.[376] The court of appeal granted the writ and issued a stay of the proceedings.[377] In its opinion two justices found that the orders of the Solano juvenile court superseded those of the Stanislaus family court and that the family court orders were unenforceable in a contempt proceeding.[378] These justices recognized that concurrent jurisdiction can exist between family and juvenile courts in custody issues. They cited Welfare and Institutions Code section 304.5, which reads in part:

> The fact that a minor is a dependent of the juvenile court pursuant to section 300 shall not divest a superior court pursuant to Section 4600 of the Civil Code, from hearing proceedings between two parents regarding the custody of a minor who is within the jurisdiction of the superior court.[379]

One of the two courts must take precedence over the other, and the majority opinion recognized that the juvenile court must prevail.[380] The special nature of juvenile court proceedings and the focus upon protection of the child, make juvenile court orders paramount to

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370. *Id.* at 797-98, 218 Cal. Rptr. at 423.
371. *Id.* at 796, 218 Cal. Rptr. at 423.
372. *Id.* at 797, 218 Cal. Rptr. at 423.
373. *Id.* at 798, 218 Cal. Rptr. at 423.
374. *Id.* at 795, 218 Cal. Rptr. at 422.
375. *Id.* at 804, 218 Cal. Rptr. at 428.
376. *Id.* at 798, 218 Cal. Rptr. at 423.
377. *Id.* at 803-04, 218 Cal. Rptr. at 428.
378. *Id.* at 798-800, 218 Cal. Rptr. at 423-25.
379. *Id.* at 799, 218 Cal. Rptr. at 424.
380. *Id.* at 795, 218 Cal. Rptr. at 422.

family court orders. Family court orders which conflict or interfere with proper orders of the juvenile court are deemed void. The majority noted that there is a long line of authority holding that juvenile orders take precedence over orders from all other branches of the superior court.[381]

The third member of the panel, Justice Franson, joined in the reversal but for different reasons. Justice Franson found that father's reliance upon the Solano juvenile court order did not constitute willful disobedience of the Stanislaus family court order.[382] Justice Franson went on to disagree with the majority opinion. He perceived father's actions as a final tactic by one who was not pleased with family court developments.[383] Justice Franson pointed out that the father had first gone to the Stanislaus County child protective agency where the allegations were thoroughly investigated but no action was taken.[384] That information was communicated to the Solano County child protective agency investigator who took action only after father's change of venue motion based upon "convenience of witness and ends of justice" was denied.[385] Justice Franson stated that:

> the traditional rules of comity [should be applicable] to the end . . . where a custody (or visitation) dispute between parents *is pending* in the superior court at the time a dependency petition is filed in juvenile court, the latter court should defer to the superior court's handling of these matters unless some compelling reason is shown as to why the superior court cannot protect the safety and best interests of the minor. No such showing was made in the present case.[386]

In re Brendan P.[387] addressed many of the issues raised in *William T.* In *Brendan P.* the child's parents separated in 1982, when mother moved Brendan and his two siblings to California from Vir-

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381. Courts have occasionally noted that juvenile court jurisdiction is paramount to any other superior court orders even if the other court's jurisdiction arose before that of the juvenile courts. *See, e.g.*, Matt v. Superior Court, 114 Cal. App. 2d 527, 531-33, 250 P.2d 739, 742-43 (1952); Smith v. Smith, 31 Cal. App. 2d 272, 87 P.2d 863 (1939); *In re* Farley, 162 Cal. App. 2d 474, 478, 328 P.2d 230, 232 (1958); *In re* Syson, 184 Cal. App. 2d 111, 117, 7 Cal. Rptr. 298, 301-02 (1960); Slevats v. Feustal, 213 Cal. App. 2d 113, 117-18, 28 Cal. Rptr. 517, 519-20 (1963); *In re* Christina L., 118 Cal. App. 3d 737, 744-45, 173 Cal. Rptr. 722, 726 (1981).

382. 172 Cal. App. 3d at 805, 218 Cal. Rptr. at 428 (Franson, J., concurring).

383. He found that the father was not willful in his failure to obey the Stanislaus County orders since he was in good faith relying on the Solano County juvenile court orders. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 806, 218 Cal. Rptr. at 429 (emphasis added).

387. 184 Cal. App. 3d 910, 230 Cal. Rptr. 720 (1986).

ginia, alleging that father assaulted her and molested the children.[388] A long custody battle ensued with mother hiding Brendan and father kidnapping him.[389] The mother initiated child custody proceedings in 1982 in a San Diego family court.[390] Court orders for visitation proved fruitless as mother was consistently uncooperative with those orders.[391]

In October 1983, after a nine day custody trial, a family court judge ordered joint custody to both parents and two days a week visitation to father.[392] The judge found "no evidence that Brendan was molested by [his father]."[393] There also was no finding that father had molested Brendan's siblings.[394]

The parents continued to fight over the visitation issue. On April 2nd, the judge ordered a two day supervised visit for father, and mother went into hiding with the child.[395] A bench warrant was issued from the family court for her arrest.[396] On April 27th, mother turned herself in to the juvenile court.[397] That court recalled the warrants and referred the case for further family court proceedings on April 30th.[398] Further visitation orders were made and visitation attempts were once again thwarted.[399] On May 4th, apparently at mother's request, a dependency petition was filed, alleging in part that, because of the minor's age, he was in need of such care and control:

> On or about 5-3-84 the emotional atmosphere in the home, to wit, including but not limited to the mother in being forced to allow Brendan to visit his father, [Bernard], who has sexually molested and physically abused Brendan's half-sibling [which was] detrimental and harmful to the health and welfare of said minor.[400]

The petition also recited the "mother having custody is requesting the services of the Juvenile Court."[401]

388. *Id.* at 912, 230 Cal. Rptr. at 721.
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* at 912-13, 230 Cal. Rptr. at 721.
393. *Id.* at 913, 230 Cal. Rptr. at 721.
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*

Notice of the dependency proceedings was mailed to father on May 7th, but he contended he never received it. He was handed a copy on May 9th.[402] At the jurisdictional hearing, the father and his counsel took no part since the court noted that the petition was directed "uniquely" to the mother.[403] A dependency finding was made on her admission to the allegations of the petition.[404] Brendan was placed in a foster home and subsequently returned to his mother's care on May 24th.[405] The same visitation problems subsequently continued to plague the family.[406]

Father appealed the juvenile court's assumption of jurisdiction.[407] First, father claimed he received inadequate notice of the proceedings.[408] Second, he alleged that resort to the juvenile court was a transgression of basic rules governing situations of concurrent or overlapping jurisdiction.[409]

The appellate court reversed, finding that father received inadequate notice of the petition.[410] The court ruled that, even absent a request, the trial court should have ordered a continuance for up to seven days in order for father's counsel to acquaint himself with the case, especially since father was treated as a non-participant by the court.[411]

The appellate court then turned to the jurisdictional issue and held that the first court to assume and exercise jurisdiction acquires exclusive jurisdiction unless the welfare of the child requires assumption of control by another court.[412] It held that "relitigation of identical issues in both domestic forums is nowhere said to be

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402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.* at 915, 230 Cal. Rptr. at 722.
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.* at 920, 230 Cal. Rptr. at 726.
411. *Id.* at 915, 230 Cal. Rptr. at 722-23. The *Brendan P.* court did not comment on the trial court's peculiar statement at the jurisdictional hearing that the father need not participate since the petition was uniquely directed towards the mother. *Id.* at 913, 230 Cal. Rptr. at 721. Obviously this statement is inaccurate. Why should the case be continued for a week, as a matter of law, if the matter did not directly involve the father? The trial court seems to suggest that the father is a spectator to a proceeding in which his conduct is being judged, his custodial rights are at stake and the visitation order he gained in the family court is about to be superseded. Clearly, the father should have an opportunity to be heard and participate in the jurisdictional hearing. If there is to be a hearing, he is uniquely involved.
412. *Id.* at 917, 230 Cal. Rptr. at 721.

permissible."[413]

The court distinguished *William T.* on its facts, pointing out that the juvenile court in *William T.* assumed jurisdiction and made its visitation order before the superior court hearing and order.[414] The *William T.* court did not address the question of whether the abuse had been litigated in the family court, because the issues of res judicata and collateral estoppel had not been properly raised by the appealing party. Finally, the court held that there were different issues before the two courts in *William T.*[415]

The appellate court contrasted the facts in *Brendan P.*, pointing out that the sole justification for invoking the juvenile court's jurisdiction was dissatisfaction with the family court's order.[416] Unlike *William T.*, where the child protection agencies were found to "insulate the proceedings from self-interest and petty interferences which can pervade parental custody disputes," the petition in *Brendan P.* was prompted by the mother, "and the proceedings were not insulated from that same self-interest."[417]

Together, *William T.* and *Brendan P.* raise a number of important questions concerning the relationship between family and juvenile courts. Can a dissatisfied parent move freely from family to juvenile court in order to circumvent the family court's rulings? If so, what limitations should be placed on this procedure? Should the parties requesting initiation of juvenile proceedings be required to notice the family court or give notice to the juvenile court that family court proceedings are pending? What can courts do to insure that a case will be heard in the most appropriate forum and that judicial and other resources will be conserved.

The answer to these questions can be derived by reference to the previous description of how child abuse allegations should be managed.[418] Of particular importance is that each court knows what the other proposes to do, that they stay in close contact and cooperate with one another.

The investigating worker in juvenile court is in the best position to decide whether juvenile court jurisdiction is necessary for the child's protection. Any disagreement with that investigator's determination should be appealed through the existing statutory

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413. *Id.*
414. *Id.* at 918, 230 Cal. Rptr. at 725.
415. *Id.*
416. *Id.* at 920, 230 Cal. Rptr. at 726.
417. *Id.* at 919, 230 Cal. Rptr. at 725.
418. *See supra* notes 234-38 and accompanying text.

framework[419] if the case is not petitioned or contested in the juvenile court. Investigating workers should respect a decision not to intervene that is made by other workers in the same or a different jurisdiction. If new facts are discovered, the matter should be referred back to the original jurisdiction unless a child protection emergency exists.[420] If the litigants and courts in *William T.* or *Brendan P.* had followed these principles, protracted and unnecessary proceedings would have been avoided.

In *William T.*, the Solano County action never should have been initiated. The father, initially sought Stanislaus County juvenile court intervention, but the investigating worker decided that intervention was unnecessary and that the family court could adequately protect his daughter, Nicole.[421] Father could have appealed that decision and received a judicial response to his claim that Nicole needed the protection of the juvenile court. Unless there were allegations of subsequent abusive behavior, the Solano County investigating worker should have declined to intervene.

The orders of the two courts differed with respect to Nicole's contact with her mother or her grandmother. The Stanislaus court ordered grandmother to supervise visits with mother and for grandmother to have unsupervised visitation rights.[422] Solano County ordered no contact with mother and only supervised visits for grandmother in Solano County.[423] These decisions reflect different views on the same facts. Based upon the facts in the opinions it is impossible to determine which court is correct. Without explanation from the Solano County juvenile court as to the necessity of additional protection beyond the Stanislaus County family court order, the Stanislaus County order should prevail.

In *Brendan P.* it appears that, from the outset, the family court was ill-suited to control the warfare between the parents. This is surely an extraordinary case in which the family court should have considered asking the juvenile court for assistance based upon family conflict and emotional abuse to the child. Brendan's parents resisted the efforts of every court to reduce family conflict and provide a plan for parental custody sharing. Each parent was reported to be kidnapping and secreting Brendan; visitation had been thwarted; sexual

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419. *See* CAL. WELF. & INST. CODE §§ 329, 330, 331 (West 1984 & Supp. 1987).

420. *See* CAL. CIV. CODE § 5152(1)(c) (West 1983), for the UCCJA's definition of a child protection emergency.

421. 172 Cal. App. 3d at 796, 218 Cal. Rptr. at 422.

422. *Id.* at 797, 218 Cal. Rptr. at 423.

423. *Id.* at 796, 218 Cal. Rptr. at 423.

abuse of Brendan was alleged.[424] It is highly likely that all of this was detrimental to Brendan.[425]

At a minimum, an attorney should have been appointed to represent Brendan.[426] The attorney could give the court an assessment of the family dynamics before the trial, alert an investigating juvenile court worker, and help the family court get better control of the case.[427]

Both the *William T.* and *Brendan P.* courts referred to the principles of res judicata[428] and collateral estoppel[429] as means of resolving the conflicting court orders. Notably, each court came to a different conclusion about the applicability of these principles in such cases. In *William T.* the court suggested that there was neither an identity of parties nor issues, and that application of res judicata principles in the area of child custody proceedings should be approached with caution.[430] The *Brendan P.* court found that "relitigation of identical issues in both domestic and juvenile forums is nowhere said to be permissible."[431]

The *Brendan P.* court distinguished *William T.* on the res judicata issue in four ways. First, it noted that the juvenile court assumed jurisdiction and made a visitation order before completion of the domestic court's hearings.[432] Second, the court pointed out that the issue of prior determination had not been raised on appeal in *William T.*[433] Third, it stated that the *William T.* court had found

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424. *Brendan P.*, 184 Cal. App. 3d at 912-13, 230 Cal. Rptr. at 721.

425. Conflict between parents can have devastating consequences to minor children. *See* WALLERSTEIN & KELLY, SURVIVING THE BREAKUP (1980); Emery, *Interparental Conflict and the Children of Discord and Divorce,* JOURNAL OF THE AMERICAN ACADEMY OF CHILD PSYCHIATRY, September, 1985; Wallerstein, *Changes in Parent-Child Relationships During and After Divorce,* PARENTAL INFLUENCES: IN HEALTH AND DISEASE (Anthony and Pollock eds. 1986).

426. CAL. CIV. CODE § 4606 (West Supp. 1987). *See* Edwards, *supra* note 101.

427. The irony of *Brendan P.* is that in spite of the appellate court ruling, the case remained in juvenile court for many months thereafter.

428. "The doctrine of res judicata gives conclusive affect to a former judgment in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." 7 WITKIN, CALIFORNIA PROCEDURE *Judgment* § 188, at 621 (3d ed. 1985).

429. "A second action between the same parties on a different cause of action is not precluded by a former judgment. But the first judgment 'operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' " *Id.* § 253, at 691.

430. 172 Cal. App. 3d at 802-03, 218 Cal. Rptr. at 427.

431. 184 Cal. App. 3d at 917, 230 Cal. Rptr. at 724.

432. *Id.* at 918-19, 230 Cal. Rptr. at 725.

433. *Id.*

there was no identity of issues.[434] Finally, it noted that the *William T.* court based its decision on public policy grounds which were absent in *Brendan P.*[435]

This reasoning is unpersuasive. The *William T.* juvenile court did not assume jurisdiction until after the family court trial.[436] It is not clear whether the prior determination issue was raised in *William T.*, but even if it had been properly preserved on appeal, the appellate court indicated this issue would have been rejected.[437] It is difficult to understand why the *William T.* court found no identity of issues while the *Brendan P.* court found identity since each was trying the child abuse allegations in two separate courts. Finally, how the *Brendan P.* court concluded that the investigating officer in *William T.* provided some insulation from "self interest and petty interferences," while the officer in *Brendan P.* provided no such insulation, is speculation. Neither recitation provides a glimpse of the investigator's motivation or of the exchange between the investigator and the parent seeking assistance.

Reference to the concepts of res judicata and collateral estoppel is not appropriate for child abuse allegations in any case. These are technical, legal principles based upon concerns regarding forum shopping and wasting judicial resources. They reflect important policies, but those policies include only some of the factors that the family and juvenile courts consider in child abuse cases.[438] Child protection is the basis of juvenile court intervention. If juvenile court jurisdiction is necessary in order to protect a child,[439] the court should intervene irrespective of the doctrines of res judicata or collateral estoppel.

The family and juvenile courts need to develop a protocol for the management of cases involving child abuse allegations over which both courts might assert jurisdiction. The courts and the persons or

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434. *Id.*

435. *Id.*

436. The jurisdictional hearing was held on December 18, 1984. The custody trial was held for six days between October 17 and October 24, 1984. 172 Cal. App. 3d at 795, 218 Cal. Rptr. at 421-22.

437. *Id.*

438. For an example of the use of the doctrine of collateral estoppel in a criminal case based upon a dependency finding, see Lockwood v. Superior Court, 160 Cal. App. 3d 667, 206 Cal. Rptr. 785 (1984).

439. Justice Franson suggested a similar criteria: "the latter court should defer to the superior court's handling of these matters unless some compelling reason is shown as to why the superior court cannot protect the safety and best interests of the minor." *In re* William T., 172 Cal. App. 3d at 805, 218 Cal. Rptr. at 429 (Franson, J., concurring). *See also* Emerich v. McNeil, 126 F.2d 841 (D.C. Cir. 1942).

agencies serving them, must understand the strengths and weaknesses of both the family and juvenile court systems. Lines of communication must be developed between the two courts. Without this type of communication, *William T.* and *Brendan P.* situations, with courts ignorant of or indifferent to each other's actions, are inevitable. These situations lead to forum shopping and wasted resources for the parties and the courts, all to the detriment of the child.[440]

V. CONCLUSION

The juvenile and family courts were created for different reasons and perform different tasks. Certain kinds of cases, such as those involving child abuse allegations, may arise in either or both courts. When deciding which court should hear child abuse allegations, the differences between the family and juvenile courts should be considered. The courts must not assume that a case belongs in one court just because it started there. Child abuse allegations should normally be heard in the juvenile courts.

The courts must establish procedures for deciding whether a

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440. The following suggestions address the ways in which the family and juvenile courts can work more effectively together in the management of custody cases involving child abuse allegations.

1. Family Court Services staff members must understand and comply with the mandatory reporting law.
2. The family and juvenile courts should work together to develop a protocol for the handling of child abuse cases.
3. The protocol should be written and reviewed regularly at meetings between the principle participants in the two courts. The protocol should include the development of time lines by which one court or investigator will normally complete work necessary for the other court to commence or resume proceedings.
4. Family Court Services and Child Protective Agencies should have conjoint training in the detection and management of cases involving child abuse allegations.
5. The training should include explanation of the duties and powers of all the agencies involved.
6. The family and juvenile courts should develop local rules for the sharing of information important for the work of each of the courts.
7. Judges, attorneys, Family Court Services staff, Child Protective Agency workers and others working in the legal system serving children should be encouraged to remain within the system for at least two years and preferably longer. The longer a participant remains within the system the greater his/her expertise.
8. Child Advocates should be utilized in both courts in any case in which the needs of the child require it.

Many of these recommendations are developed more fully in Theonnes & Pearson, *supra* note 1 (available at the Association of Family and Conciliation Courts, Research Unit, 1720 Emerson Street, Denver, Colorado 80218).

case involving child abuse allegations should be heard in juvenile or family court. This process should involve identifying and convening the critical participants in both court systems. The process of determining which court should proceed and how the courts will coordinate with each other will help prevent the confusion and conflict created by such cases as *William T.* and *Brendan P.*

It is important to afford juvenile courts the ability to dismiss cases with the assurance that the underlying family court order will provide protection for the child. Some legislative changes are necessary to cover all the situations faced by the juvenile court.

When child protection is the issue, the courts should be prepared to work together to insure that adequate resources are available to protect the child. In most cases this means the juvenile court should have an opportunity to decide if it will intervene. If it chooses not to intervene, the family court must use all of its resources to meet the child's needs. The family court should also be prepared to turn to the juvenile court for help in extraordinary cases in which the parties are in such conflict that the child is seriously suffering.

The family and juvenile courts are necessary parts of the legal system which both provides parents a forum to litigate their differences at the time they separate, and protects the child from parental abuse. These two courts, however, must be sensitive to the strengths and weaknesses of each court system and must be prepared to work with one another when a case arises which could be heard in either forum.

APPENDIX A

SAMPLE ORDER

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

)	)	Civil Case # _____
) Civil Case	)	
)	)	Petition # _____
)	)	
) Juvenile	)	
) Case	)	
)	)	ORDER

This matter came for Hearing on _____ as a result of a regularly scheduled Six-Month Review. The Court, having read and considered the evidence, including the Supplemental Court Report for Six-Month Review and Permanency Hearing dated _____ and the recommendations contained therein, hereby makes the following Orders:

1) _____ is the father of the minor _____.

2) Legal and physical custody of the minor child _____ is awarded to (father/mother) _____.

3) Visitation is granted to (name of other parent), the minor's (natural mother/father, etc.), as follows:

   a) Frequency, e.g. Alternate Saturdays beginning (month, day, year)

   b) Other restrictions if applicable.

4) Other orders: e.g. Grandparent visitation, restraining orders, etc.

5) This Order shall be filed with the Family, or other Civil Court, Case # _____, and shall supersede all existing custody orders regarding said minor.

6) The Order of _____ issued by the Juvenile Court (Petition # _____) finding the above

minor a Dependent Child of the Court is hereby vacated and the case is hereby dismissed.

The above Order is being made pursuant to the authority vested in the Juvenile Court by Welfare and Institutions Code, section 362.4. If either party to the Family Court Case moves to modify this order in a Civil Court, the Juvenile Court may be contacted to determine the reasons for the original dependency finding, the reasons for this termination order, and any other relevant information.

DATE JUDGE OF THE JUVENILE COURT

APPENDIX B

LOS ANGELES COUNTY PROCEDURES FOR COORDINATION AND CONSOLIDATION OF MULTIPLE CHILD CUSTODY PROCEEDINGS PENDING IN BOTH FAMILY LAW DEPARTMENT AND DEPENDENCY COURT

I. Purpose:

The procedures described by this policy permits [sic] implementation of Local Rule 307 which states:

> "The best interests of the child, litigants and court are promoted by early identification and coordination of custody proceedings involving the same child. To that end, all departments involved in custody issues shall cooperate to eliminate multiple custody proceedings. Whenever possible, such proceedings shall be handled in one department and consolidated for purposes of trial."

The procedures seek to alleviate problems created by:

1. Involvement of both the Family Law Department and Dependency Court in instances where a dependency petition is filed during the course of a pending child custody action;

2. Inability of the Dependency Court to terminate court jurisdiction of a child placed with a nonoffending parent due to that parent's failure or financial inability to establish paternity or initiate a child custody proceeding in the Family Law Department.

II. Determination of More Appropriate Forum for Consideration of Pending Child Dependency Issues While a Child Custody Proceeding is Pending in the Family Law Department

1. If the Family Law Department learns that the filing of a dependency petition is contemplated or has occurred, the Family Law Department Supervising Judge will advise the Dependency Court Supervising Judge. Similarly, if at any stage of the child dependency proceeding the Dependency Court learns that a child custody proceeding is pending in the Family Law Department, the Dependency Court Supervising Judge will advise the Family Law Department Supervising Judge regarding the initiation of the dependency proceeding.

2. The two supervising judges will confer about the case, determine whether the case should be coordinated and the hearings consolidated and, if so, decide which court offers the more appropriate forum for litigating the child custody and dependency issues.

3. In determining which court offers the more appropriate forum for litigating the child custody and dependency issues, the two judges are to consider the following factors:

   a. Familiarity of respective courts with the parties as well as the custody and visitation issues;

   b. Stage of the proceedings in the respective courts;

   c. Extent to which custody and visitation represent all or only a portion of the issues considered by the Family Law Department; and

   d. Availability of County Counsel and Department of Children's Services if the Family Law Department is selected as the more appropriate forum.

4. If the supervising judges determine that the best interests of the child, convenience to litigants and court efficiency dictate coordination of the two cases and consolidation of hearings for purposes of trial, the matters will be coordinated/consolidated by agreement of the judges and transferred to the more appropriate court for further proceedings.

5. If the supervising judges are unable to reach agreement regarding the appropriate forum, the question will be resolved by the Superior Court Presiding Judge and the Juvenile Court Presiding Judge.

6. Where a determination is made to coordinate cases and consolidate hearings, the judicial officer assigned to hear the matter will sit as both a family law and juvenile court judge and is empowered to make appropriate orders in both cases.

III. Determination of More Appropriation Forum for Deciding Paternity and Custody Issues Involving Children Already under Superior Court Jurisdiction

The following procedure is provided where initiation of a child

custody or paternity action in the Family Law Department will enable the Dependency Court to terminate jurisdiction over the child.

1. If the Dependency Court determines that an award of custody in favor of the nonoffending parent with whom a child has been placed or the establishment of that parent's paternity is in a child's best interest and will enable the Dependency Court to terminate dependency status, the Dependency Court will authorize the nonoffending parent to initiate a paternity or child custody action in the Family Law Department.

    a. If the Dependency Court further determines that the nonoffending parent does not possess the financial ability to retain counsel to initiate the authorized family law action, the Dependency Court has the discretion, pursuant to WIC section 317 to appoint counsel to assist the nonoffending parent in initiating an appropriate Family Law Department proceeding;

    b. A copy of the minute order authorizing the initiation of a paternity or child custody action will be forwarded by the Dependency Court to the Family Law Department Supervising Judge.

2. After the nonoffending parent files a paternity or child custody action in the Family Law Department, counsel for the parent will file a motion in the Family Law Department to coordinate cases and consolidate proceedings.

3. When a motion to coordinate/consolidate is filed, the Family Law Department Supervising Judge will contact the Dependency Court Supervising Judge. The two judges will determine whether the family law and child dependency cases should be coordinated and the hearings consolidated and, if so, decide which court offers the more appropriate forum for litigating the paternity, child custody and dependency issues.

4. In determining which court offers the more appropriate forum for litigating the issues, the two supervising judges are to consider the following factors:

    a. Familiarity of the respective courts with the parties and issues in the case;

b. Stage of proceedings in the respective courts;

c. Extent to which paternity, custody and visitation represent all or only a portion of the issues in the Family Law Department; and

d. Availability of County Counsel and Department of Children's Services if the Family Law Department is selected as the more appropriate forum.

5. If the supervising judges determine that the best interests of the child, convenience to litigants and court efficiency dictate coordination of the two cases and consolidation of hearings, the matters will be coordinated/consolidated by agreement of the judges and transferred to the more appropriate court for further proceedings.

6. If the supervising judges are unable to reach agreement regarding the appropriate forum, the issue will be resolved by the Superior Court Presiding Judge and the Juvenile Court Presiding Judge.

7. Where a determination is made to coordinate cases and consolidate hearings in a single court, the judicial officer assigned to hear the matter will sit as both a family law and juvenile court judge and is empowered to make appropriate orders in both cases. If paternity is established and/or a child custody award is made in those proceedings, the child's dependency status will be terminated.

APPENDIX C

DRAFT PROTOCOL
SANTA CLARA COUNTY
FAMILY AND JUVENILE COURT
MANAGEMENT OF CHILD ABUSE CASES

POLICY

It is the policy of the Superior Court to identify and coordinate custody proceedings involving the same child which may appear in multiple legal settings. To this end the court and the agencies serving the court in the resolution of custody and child protective proceedings shall cooperate to eliminate multiple custody proceedings.

1. If during the pendency of a family law proceeding a child abuse allegation is made against one of the child's parents, the Family Court Services staff member or other mediator or evaluator shall first determine whether the allegation must be reported to a child protective agency pursuant to Penal Code Section 11166.

2. If the family court services staff member or other mediator or evaluator does not report the allegation pursuant to Penal Code Section 11166, any other person may do so.

3. When the child protective agency receives a report of suspected child abuse in a custody proceeding it shall investigate pursuant to Welfare & Institutions Code Section 16501 et seq. The decision to intervene or take no action shall be made as soon as possible.

4. If there is no intervention by the child protective agency, any person may apply to the probation officer pursuant to Welfare and Institutions Code Section 329. In that application the affiant shall give notice and identifying information of any pending family law proceeding.

5. The probation officer shall respond to the application as soon as possible and in no event later than 3 weeks after the submission of the application. (Welfare and Institutions Code Section 329)

6. If the child protective agency investigator decides to take no formal action except to monitor the Family Court case to ensure that the child is adequately protected in Family Court, the investigator shall inform the Family Court Services staff mem-

ber and any reporting party of his/her findings and any advice given to the parents.

7. If the probation officer decides not to initiate proceedings, the applicant may apply to the Juvenile Court to review the decision of the probation officer pursuant to Welfare and Institutions Code Section 331.

   The party reporting any child abuse or making application for Juvenile Court intervention shall indicate whether there are pending any family law or other civil proceedings involving the custody, visitation, care or control of the child.

   The Juvenile Court shall rule on the application as soon as possible and in no event later than 30 days after receipt of the application.

8. After a child abuse report has been made pursuant to Penal Code Section 11165 et seq. and before the decision whether to intervene has been made by the child protective agency there shall be no further proceedings in the Family Court without first giving notice of the proceedings to the child protective agency.

9. If a dependency petition is filed on behalf of the minor, any Family Court custody and visitation proceedings shall be suspended. The Family Court shall resume custody or visitation litigation only after written authorization is received from the Juvenile Court.

10. If the parents reach an informal agreement pursuant to Welfare and Institutions Code Section 330, a copy shall be sent immediately to the reporting party and Family Court Services.

CREATION OF A FAMILY COURT ORDER IN JUVENILE COURT

1. Whenever any interested party believes that Juvenile Court intervention on behalf of a child is no longer necessary, application may be made to the Juvenile Court pursuant to Welfare and Institutions Code Section 378 or at any regularly scheduled parte hearing to have the case dismissed. Thereafter any future litigation relating to the custody, visitation and control of the child shall be heard in the Family Court or other appropriate Superior Court Civil Department.

2. If the Juvenile Court determines that jurisdiction or [sic] the

Juvenile Court is no longer necessary for the protection of the child, the court may create a custodial order consistent with the needs of the child and thereafter dismiss the juvenile petition and case (Welfare & Institutions Code Section 361.2, 362.4). [See Appendix A].

3. In making this order the court (a) shall include any paternity determination if one has been made in the Juvenile Court; (b) shall include a visitation plan unless the court finds that it would be detrimental to the best interests of the child (Civil Code Sections 4600, 4601 and Welfare and Institutions Code Section 361.2.); (c) may include any appropriate orders restraining conduct pursuant to Civil Code Section 4359.

4. The court order shall be filed in the Juvenile Court file and in any existing family or other civil court file.

5. If no court file exists in the Family Court or other Superior Court division or in any other jurisdiction, the county clerk shall create a file under the names of the child's parents. The file shall contain a copy of the Juvenile Court order. The party awarded primary custody of the child (or both parties if there is a joint custody order) shall pay a filing fee unless that party qualifies for a waiver of such fees.