A Primer on Family Law

Fundamentals and Resources for Legislative Staff

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by Kate Sproul

California laws affecting marriage, domestic partnerships, divorce, and children are varied and, in many cases, complex. This primer provides a brief overview of the key state laws that govern California families today. For those who want additional information on a particular issue related to family law, turn to page 9 for a list of resources.

Marriage, Domestic Partnerships, and Divorce

Marriage

Under current law, marriage is a contractual relationship and an economic partnership between a woman and a man. Spouses are expected to act in "good faith" and not take unfair advantage of one another.[1]

The California Family Code states that a valid marriage must be a marriage between a woman and a man.[2] The constitutionality of these Family Code provisions that define marriage as a heterosexual union is now before the California Supreme Court.[3] The ruling will affect the future possibility of same-sex marriages in California.

Domestic Partnerships

Since 2000, California has allowed unmarried heterosexual couples with one partner over 62 years of age,[4] and same-sex couples who are both 18 years of age or older, to register with the secretary of state's office as domestic partners. Today, after a series of legislative changes, domestic partners have nearly identical rights and obligations as married couples in California.[5] From 2000 to 2004, 29,292 domestic partners registered with the secretary of state and 3,747 registrations were terminated.[6]

Marriage Licenses

Before entering a marriage or domestic partnership, a couple must obtain a marriage license or file a form to establish a domestic partnership. There are two kinds of marriage licenses: public and confidential. Confidential marriage licenses are available to unmarried men and women living together as "husband and wife," and are not open to public inspection. Of the fees paid for a marriage license or a domestic partnership registration, $23 goes toward domestic-violence services.[7]

Community and Separate Property

California is a community property state, which means that earnings and debts acquired during a marriage or domestic partnership belong to both spouses, but assets or debts acquired before the union are considered separate property. Assets given to or inherited by one spouse during the union are separate as well. If the union is legally terminated, then the couple evenly divides the community property, and special rules sometimes apply to the disposition of the family home.[8]

Premarital and Post-Marital Agreements

All couples may voluntarily enter into premarital agreements (also known as prenuptial agreements) regarding their community and separate property before they marry.[9] And even after marriage, couples can agree to community and separate property transfers.[10]

Marriage and Divorce Data

Marital research experts predict that more than one-half of all first marriages will end in divorce. We do not know the exact divorce rate for California, but we can provide a snapshot in time. In the 2004–2005 fiscal year:

- 230,889 marriage licenses were issued;
- 155,600 couples filed for divorce; and
- 117,689 couples legally ended their marriage.[11]

Policies Supporting Marriage

With the rising divorce rate, policymakers have become increasingly concerned about its impact on society and, perhaps especially, on children. Research indicates that nearly four in 10 children in the U.S. will have divorced parents before their 18th birthday. Legislative attempts to address this issue include proposing bills to (1) encourage premarital education and counseling, (2) make it more difficult to legally end a marriage, and (3) educate and counsel parents considering or filing for a divorce. Since February 2006, the federal government has provided states with welfare grants for the promotion of healthy marriage and responsible fatherhood.

No-Fault Divorce

Before 1970 a divorce was only granted if there was a reason or “fault” (such as adultery) justifying the end of a marriage. Today, California has a no-fault system and “irreconcilable differences” and “incurable insanity” are the only grounds for ending a marriage.[12] In addition, a divorce must be approved by the courts. To navigate the divorce process many couples hire attorneys or do their own legal work, some work with a mediator, and others turn to a relatively new process called collaborative law.[13] Collaborative law is a form of assisted mediation; each divorcing spouse has an expert collaborator to help reach an agreement on any disputed issues.

Self-Representation

Approximately 85 percent of family law cases involve one or more clients who are representing themselves as they navigate the divorce proceedings. To help these self-represented or "pro per" clients, California established family law facilitators in every county's superior court to provide free legal assistance,[14] and the Judicial Council of California maintains an on-line Self-Help Center with an extensive family law section.[15] Due to funding limitations, however, many of these family law facilitators have been unable to meet the great demand for services.

Divorce Court Records

The First Amendment to the U.S. Constitution generally permits public access to divorce court records, but certain identifying information, such as social security numbers, can be edited out or "redacted."[16]

Spousal Support

Financial spousal support is sometimes ordered as part of a divorce or legal separation. The goal is for a dependent spouse to become self-supporting within a reasonable period of time, defined approximately as one-half the length of the marriage. For marriages of 10 years or more, the judge is given more discretion to realistically assess the ability of the dependent spouse to become self-supporting.[17]

Custody and Visitation

Parenting Plans

Parents, married or unmarried, who separate and seek legal custody must have a written plan, approved by the courts, for living arrangements and parenting responsibilities for their children. If the parents cannot agree on a parenting plan, a judge will make the custody and visitation decisions. This is called a contested child-custody case, and judges will bring in a family court mediator and sometimes a child-custody evaluator to help.[18] The judge might also appoint a lawyer to represent the child.[19]

Parentage

Sometimes a child's parentage must be settled before there is a custody, visitation, or child-support order. Increasingly, the courts are addressing parentage issues since a large percentage of children are born outside of marriage. If parents are married or registered domestic partners when a child is born, the law assumes they are the parents, unless proven otherwise. If the parents are unmarried, then fatherhood is established through a series of presumptions including whether the father signed a Voluntary Declaration of Paternity.[20]

Types of Custody

There are two types of child custody: physical and legal. Physical custody is who the child lives with. Legal custody establishes who makes the important decisions about the child's health care, education, and welfare. Physical and legal custody can be awarded to just one parent (sole custody) or both parents (joint custody). In a contested-custody case, generally a judge will make the custody decisions based on the "best interests of the child." Custody may be awarded to a non-parent if the judge believes that giving custody to either parent would not be in the child's best interests.[21]

Grandparents

Sometimes grandparents are given custody of grandchildren. These grandparents are often the legal guardians of the grandchildren, or they may legally adopt the grandchildren. Visitation rights for grandparents are recognized under the law, but if the parent or parents oppose grandparent visitations, then the parental wishes generally prevail.[22]

Custody in Cases Involving Family Violence

Contested child-custody cases often involve family-violence issues. A 2002 study by the Judicial Council of California found that 76 percent of contested-custody mediation cases in California involved allegations of domestic violence.[23] A judge will not give custody to the person who abused the partner or any of the children except under extraordinary circumstances. In legal terms, there is a rebuttable presumption against granting custody to a perpetrator of family violence.[24]

Moving the Child's Residence

The Legislature has often debated legislation related to the so-called "move-away issue," which is when the parent with physical custody of a child wants to move a considerable distance to another city, state, or country. The general rule is that the parent with custody of the child may change residences unless it would hurt the rights or welfare of the child.[25]

Indian Child Welfare Act

Child-custody proceedings involving Native American children generally follow the requirements of the federal Indian Child Welfare Act, which protects the child's interest in maintaining a connection to the child's ancestors and tribal community.[26]

Parental Duties

A tenet of family law is that parents have the duty to support and care for their children until adulthood. This duty includes adult children who have disabilities and are unable to earn a living.[27] Caring for children also includes the obligation to supervise and control them—or otherwise face potential liability for the child's actions.

Child Support

Court Orders

If a child has two parents, both are required to financially support their child. Child support is ordered by the court:

- during a divorce proceeding;
- when an unmarried parent seeks it from the other parent; or
- when the government attempts to recoup some of the cost of the child's welfare benefits from the absent parent.

Guidelines

The amount of child support a parent without custody (or the noncustodial parent) must pay is set by guidelines in the Family Code.[28] The guideline formula is based on income and the amount of time a child is cared for by each parent. A person who owes child support and makes less than $1,000 per month is usually entitled to a low-income adjustment to the guideline.[29] Either parent may seek to modify an existing order if circumstances change.

Government Programs

The courts and federal, state, and local government agencies are involved in the process of setting and enforcing child-support orders. The federal government funds about two-thirds of the programs and California funds the rest. The California Department of Child Support Services administers California's child-support program, and county child-support offices provide services, such as locating absent parents, establishing paternity, obtaining orders, and collecting payments.

Failure to Pay

A major child-support problem is the failure of the noncustodial parent to pay court-ordered child support. Wage assignments, suspending driver's licenses, and income-tax intercepts are among the many enforcement techniques used to collect past-due child-support payments.[30] Custodial parents can get free child-support collection help from their county child-support agency or they can hire a private child-support collector. California law regulates private child-support collectors to ensure that parents are treated fairly.[31]

Statewide Automation System

The federal government requires California to have a statewide automated child-support system to track and collect court-ordered child support and locate delinquent parents. In 1988 the federal government required states to implement this requirement by October 1995, which was later extended to October 1997. Since California failed to have a system up and running by that deadline, the state has paid yearly penalties that now amount to almost

$1.2 billion. The completed program, called the California Child Support Automation System, is expected to be operational in September 2008. The federal government has started to review California's almost-completed system for compliance, a process that could take as long as a year or more. If California's system meets federal standards, then the state will get back $198 million, which is 90 percent of the penalty it paid in the 2005–2006 fiscal year.

Federal Performance Measures

Every year the state must report to the federal government on how it is performing on each of five performance measures the federal government established to assess the effectiveness of every state's child-support program. For example, California must report on its efforts to collect current and past-due child-support payments. A May 2006 report by the California Legislative Analyst's Office showed that California is doing poorly, particularly on the collections and cost-effectiveness performance measures, and improvements were recommended, such as establishing an incentive program that rewards counties for good performance on the federal measures.[32]

Adoption

Adoption creates the legal relationship of parent and child where it otherwise would not exist. The California Department of Social Services reports that 10,708 children were adopted in the 2001–2002 fiscal year:

- 82 percent of the adoptions were placed by a licensed public or private adoption agency (the birth parents may have voluntarily "relinquished" parental rights or a court might have terminated their parental rights due to child abuse or neglect);
- 13 percent were independent adoptions (the child was voluntarily placed by the birth parents in the home of the prospective adoptive parents); and
- 5 percent were international (inter-country) adoptions.[33]

Contacting Birth Parents and Siblings

California allows adopted children to obtain their birth parents' contact information when they reach 21 years of age, if the birth parents have consented to the release of this information.[34] The law allows adopted children to obtain contact information for their siblings when they reach 18 years of age. Procedures are also in place to allow some children younger than 18 with access to sibling contact information.[35]

Adoption Incentive Programs

The California Department of Social Services administers the Adoption Assistance Program to provide grants to parents who adopt children.[36] This program is jointly funded by federal and state dollars. The U.S. Department of Health and Human Services, under the Adoption Promotion Act of 2003, awards bonuses to states that increase the number of foster-care children who are adopted.

Children and the Dependency Process

California dependency laws are meant to protect children from abuse and neglect. When county child-protective services or local law enforcement receive an abuse or neglect complaint, a social worker or police officer will investigate (this process is known as a child-abuse referral). The laws are designed to keep families together, if possible.

Dependency Statistics

The Judicial Council of California's most recent data (from 2003) on juvenile dependency referrals and cases is as follows:

- 493,299 abuse or neglect referrals were made;
- 110,570 investigations found abuse or neglect;
- 72,501 abuse and neglect cases resulted in a family intervention designed to keep the child safe in the family home; and
- 38,069 abuse and neglect cases resulted in removing the child from his or her home and opening a dependency court case.[37]

Temporary Removal From the Home

When a child is removed from his or her home and a social worker files a petition to declare the child a dependent of the court, an immediate hearing is held to determine whether the child should continue to temporarily live in another home, such as a relative's home or a licensed foster-care home. During the dependency court process, "family reunification services" are often ordered for the parent or guardian. These family reunification services can take a year or longer.

Permanency Plans

If a family cannot be reunited, a "dependency judge" will develop a permanent placement plan for the child. Appointing a legal guardian for the child, placing the child in long-term foster care, or ending parental rights and placing the child for adoption are the three options for court-ordered permanency plans.

Foster Children Reaching Adulthood

Older children in the foster-care system are a source of concern to policymakers because sometimes there are no ongoing relationships with caring adults to guide and support them. Often they are jobless and even homeless after they reach adulthood. Existing law requires that when a foster youth reaches 16 years of age, the judge shall review his or her case every six months and find out what services are needed to help the youth transition from foster care to independent living. Before a judge will terminate jurisdiction over a dependent child who has reached adulthood, the county welfare department must report to the judge on what type of information, documents, and services it has provided to the youth to help with his or her transition to independence.[38] Proposals for further assisting these young adults include providing more encouragement to stay in school as well as more financial assistance during the transition period from foster-care placement to independence.

Safe-Surrender Law

California law allows the "safe surrender" of newborns by a parent or other person with lawful custody without violating the child abandonment laws.[39] Once a newborn is surrendered, the responsibility for the child's placement rests with county child-protective services and the juvenile dependency court. Between January 2001 and January 2007, 182 newborns have been safely surrendered.[40]

Resources

General Family Law

- Summaries of California family law bills since 1997: www.assembly.ca.gov/acs/newcomframeset.asp?committee=15
- Judicial Council of California's On-Line Self-Help Center: www.courtinfo.ca.gov/selfhelp

Marriage and Domestic Partnerships

- *Marriage and Child Wellbeing*, Vol. 15, No. 2 (2005), The Future of Children, www.futureofchildren.org
- "Kids and the Law: An A-to-Z Guide for Parents," 2004, State Bar of California, www.calbar.ca.gov

Divorce

- "What Should I Know About Divorce and Custody?" 2006, State Bar of California, www.calbar.ca.gov
- *Readings on No-Fault Divorce*, Charlene Wear Simmons, March 1998, California Research Bureau, www.library.ca.gov

Domestic Violence

- "Domestic Violence in Court-Based Child Custody Mediation Cases in California," November 2002, Judicial Council of California, Administrative Office of the Courts, Center for Families, Children, and the Courts, www.courtinfo.ca.gov/programs/cfcc
- "California's Response to Domestic Violence," Kate Sproul, June 2003, California Senate Office of Research, www.sen.ca.gov/sor

Child Support

- "Review of Statewide Uniform Child Support Guideline 2005: A Report to the California Legislature," March 2006, Judicial Council of California, Administrative Office of the Courts, www.courtinfo.ca.gov/programs/cfcc
- "Child Support Enforcement Program," December 2002 and March 2005, California State Auditor, www.bsa.ca.gov/bsa (two reports on the automated child-support system)
- *Annual Program Performance and Statistical Report, 2005,* and *Child Support Handbook*, California Department of Child Support Services, www.childsup.cahwnet.gov
- "Strategies for Improving Child Support Collections in California," Julie Salley-Gray, California Legislative Analyst's Office, May 2006, www.lao.ca.gov

Adoption

- *Adoptions in California: Agency, Independent, and Intercountry Adoption Programs,* California Department of Social Services, Annual Statistical Report, July 1, 2001 to June 30, 2002, and October 2003, www.cdss.ca.gov/research

Juvenile Dependency Law

- "California Juvenile Dependency Data," February 2005, Judicial Council of California, Administrative Office of the Courts, Center for Families, Children, and the Courts, www.courtinfo.ca.gov/programs/cfcc
- "Expanding Transitional Services for Emancipated Foster Youth: An Investment in California's Tomorrow," January 2007, Children's Advocacy Institute, University of San Diego School of Law, www.caichildlaw.org

Notes

1 Family Code Section 721.
2 Family Code Sections 300, 301, 302, and 308.5; Family Code Section 308.5 added in 2000 with the passage of Proposition 22.
3 *In re Marriage Cases,* S147999.
4 Government Code Section 22771(b) allows access to public employee health benefits to heterosexual couples, both under age 62, who were recognized as domestic partners prior to 2000. See also "Historical and Statutory Notes" under Government Code Section 22869.
5 Family Code Sections 297-299.6. Please note that domestic partners and spouses have identical rights under the laws discussed in this primer.
6 California Secretary of State, Domestic Partners Registry, www.ss.ca.gov.
7 Family Code Sections 298, 350-360, 500-536 and Welfare and Institutions Code Section 18305.
8 Family Code Sections 3800-3810.
9 Uniform Premarital Agreement Act, Family Code Sections 1600-1617.
10 Family Code Section 850.
11 Antoinette Cabral, Staff Services Analyst, California Department of Health Services, Center for Health Statistics, e-mail to author, January 11, 2007, and the Judicial Council of California, *2006 Court Statistics Report,* Administrative Office of the Courts, 2006, p. 48, www.courtinfo.ca.gov/reference. Divorce filings include dissolution, separation, and nullity.
12 Family Code Section 2310.
13 Family Code Section 2013, AB 402 (Dymally) Chapter 496, Statutes of 2006.
14 Family Code Sections 10000-10015.
15 Judicial Council of California's Self-Help Center: www.courtinfo.ca.gov/selfhelp/family.
16 Family Code Section 2024.5, *In re Marriage of Burkle,*135 Cal.App.4th 1045 (2006).
17 Family Code Sections 4300-4360.
18 Family Code Sections 3160-3188 and 3110-3118.
19 Family Code Sections 3150-3153.
20 Paternity and parentage provisions, Family Code Sections 7540-7730.
21 Main custody provisions, Family Code Sections 3000-3465.
22 Family Code Sections 3103, 3104, *In re Marriage of Harris,* 34 Cal.4th 210 (2004).

[23] Judicial Council of California, "Domestic Violence in Court-Based Child Custody Mediation Cases in California," Administrative Office of the Courts, Center for Families, Children, and the Courts, November 2002, www.courtinfo.ca.gov/programs/cfcc.
[24] Family Code Section 3044.
[25] Family Code Section 7501, *In re Marriage of Burgess,* 13 Cal.4th 25 (1996).
[26] See, e.g., Family Code Sections 170, 175, 177, 180, 185, 3041, and 7892.5.
[27] Family Code Sections 3900-3910.
[28] Statewide Uniform Child Support Guideline, Family Code Sections 4050-4076.
[29] Family Code Section 4055.
[30] Family Code Sections 5200-5604, Welfare and Institutions Code Section 11350.6, Revenue and Taxation Code Section 19271.
[31] Family Code Sections 5610-5616.
[32] "Strategies for Improving Child Support Collections in California," Julie Salley-Gray, California Legislative Analyst's Office, May 2006, www.lao.ca.gov.
[33] California Department of Social Services, *Adoptions in California: Agency, Independent, and Intercountry Adoption Programs,* Annual Statistical Report, July 1, 2001, June 30, 2002, October 2003, www.cdss.ca.gov/research. Step-parent adoptions and adult adoptions are not included in this calculation.
[34] Family Code Section 9203.
[35] Family Code Section 9205.
[36] Welfare and Institutions Code Sections 16115-16123.
[37] Judicial Council of California, "California Juvenile Dependency Data," Administrative Office of the Courts, Center for Families, Children, and the Courts, February 2005, www.courtinfo.ca.gov/programs/cfcc.
[38] Welfare and Institutions Code Sections 366.3(e)(10) and 391.
[39] Health and Welfare Code Section 1255.7, Penal Code Section 271.5.
[40] California Department of Social Services, "Safely Surrendered Baby Law: Fast Facts," www.babysafe.ca.gov.

California Senate Office of Research

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