



Judge Leonard Edwards  
Santa Clara Superior Court (Ret.)

## Placement with a Non-Custodial Parent

A child is removed from her mother's care because of the mother's substance abuse and neglect. The father appears in the juvenile court proceedings and asks for custody. He had moved out of state after the parents separated and has had little contact with the child. The mother opposes placement with the father as she wishes to participate in reunification services and regain custody of the child. The child does not want to move away from her home, her school, and the community where she has spent most of her life. The judge must decide a number of issues related to this situation. Appellate case law reveals that trial court judges have struggled with these issues and have been reversed on numerous occasions.<sup>1</sup>

How should the petition be framed with regards to the non-custodial parent? What allegations, if any, will relate to the father? Does the father have an immediate right to custody? If so, what evidence must be produced to deny the father custody? Third, if the child is placed with the non-custodial parent, is continued dependency necessary? Finally, what role do the child's wishes play in these cases?

One parent's abusive or neglectful conduct is sufficient

for juvenile court jurisdiction over a child. After describing the custodial parent's actions, the petition often simply states that the non-custodial parent has had limited contact with the child. To deny custody to the non-custodial parent, the petition must allege and proof must be presented that placement with him would be detrimental to the child. This must be proven by clear and convincing evidence. Possible grounds for denying father custody might be that he knew of the mother's behavior and did not intervene to protect the child. It could be that the father is a violent or abusive man and evidence can demonstrate that it would be contrary to the interests of the child to place with him. Or the father may not have an adequate home for the child.

Assuming that the father had no knowledge of the problems in the child's home that led to the abuse or neglect, does not have a record for behavior that would be detrimental to the child, and has an adequate home, he should be granted custody. Numerous cases have affirmed this conclusion. Moreover, even if the father resides out of state, a referral to the Interstate Compact on the Placement of Children (ICPC)

is not necessary. Such a referral is discretionary in California.<sup>2</sup>

Federal constitutional and California statutory law support the conclusion that a non-custodial parent has the right to custody. "A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood."<sup>3</sup> California law as embodied in W & I Code §361.2 is consistent with this conclusion. W & I Code §361.2(a) reads

*When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.*

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The only California appellate case that denied the non-custodial parent custody is *In re Luke M.*<sup>4</sup> In that case the court found that the two children's strong relationship with their two siblings would make it detrimental to place them with their out-of-state father.

Once the child has been placed with the non-custodial parent, is continued court jurisdiction over the child necessary? Welfare and Institutions Code §361.2(b) states that the court has several options: (1) Order that the parent become the legal and physical custodian of the child and then terminate jurisdiction. The court may make provisions for reasonable visitation with the former caretaking parent;<sup>5</sup> (2) assume jurisdiction and require a home visit within three months of the placement with a social worker report to the court about any concerns with the placement. The court can then take either action described in (1) or (3); (3) order custody with the non-resident parent with supervision by the court. In this third option the trial court may order reunification services for the parent from

whom the child was removed or services for the custodial parent or services for both.<sup>6</sup> The trial court must make a finding in writing or on the record regarding the basis for its determination.<sup>7</sup>

In choosing one of the three options, the trial court will have to decide whether the former custodial parent should receive reunification services. The new custodial parent frequently would like jurisdiction terminated while the other parent may want to receive services in order to be in a position to request custody in the future. If the court terminates jurisdiction, the original custodial parent will have to find services on her own and then move to the Family Court to try to modify the custody order.<sup>8</sup>

Finally, how much weight should be given to the child's wishes in these cases? In none of the reported cases did the child's wishes influence the outcome. This has led one commentator to argue that children should not be treated as chattel.<sup>9</sup> In the case of *In re C.M.*, 232 Cal.App.4th 1394

(2014), a 14-year-old strongly objected to being placed with her father and gave substantial reasons for her opinion. The appellate court found that her reasons were inadequate and placed her with her father. The commentator suggests that the legislature should revise the law so that more deference is given to an older child's wishes.

### CONCLUSION

Dealing with the non-custodial parent presents a number of challenging issues for the juvenile court judge. Circumstances often indicate that it would be in the child's interests to remain in the local community after removal from the custodial parent. But the appellate courts have reminded us that there are constitutional and statutory issues involved when a non-custodial parent requests custody. Unless there is proof by clear and convincing evidence that placement with the non-custodial parent would be detrimental to the child, that parent has a constitutional right to custody. 🗳️

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### ENDNOTES

- 1All of these cases are reversals:  
*In re Marquis D.*, (1995) 28 Cal. App.4th 1813  
*In re John M.*, (2006) 141 Cal. App.4th 1564  
*R.S. v Superior Court*, (2007) 154 Cal.App.4th 1262  
*In re V.F.*, (2007) 157 Cal.App.4th 962  
*In re Patrick S.* (2013) 218 Cal. App.4th 1254  
*In re Abram L.*, (2013) 219 Cal. App.4th 452  
*In re Suhey G.*, (2014) 221 Cal. App.4th 732  
*In re Jonathan P.*, (2014) 226 Cal. App.4th 1240  
*In re C.M.*, 232 Cal. App. 4th 1394 (2014)
- 2*In re John M.*, 141 Cal.App.4th 1546 (2006); *In re Johnny S.*, 40 Cal. App.4th 969, 979 (1995); *Tara S. v Superior Court*, 13 Cal.App.4th 1834, 1837 (1993).
- 3*In re Carmalita B.*, (1978) 21 Cal.3d 482, 489; and see *Stanley v Illinois*, 405 U.S. 645 (1972).  
 4107 Cal.App.4th 1412(2003).
- 5The custody order created in this situation "shall be filed in any domestic relation proceeding between the parents."
- 6Welfare and Institutions Code §361.2(b)
- 7Welfare and Institutions Code §361.2(c)
- 8In a recent case the trial court took the action described in this article and was affirmed on all issues. See *In re K.B.*, E061803 (8/7/15) Fourth Appellate District.
- 9Silberman, D., "We shouldn't treat children as chattel," San Francisco Daily Journal, February 12, 2015, at p.9.