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IS THE MINOR'S COUNSEL STATUTE UNCONSTITUTIONAL?

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Family Code Section 3150 permits the court in a custody or visitation proceeding to appoint an attorney to represent the child ("minor's counsel"). Even though minor's counsel submits opinions to the court, the general rule, as stated in Family Code Section 3151(b), is that cross-examination of minor's counsel is prohibited. A persuasive argument can be made that the prohibition against cross-examination of minor's counsel is unconstitutional.

Use of minor's counsel is popular among some family law judicial officers in high conflict cases, especially when there are not sufficient financial resources to pay for a custody evaluator and when the court desires a method to quickly ascertain facts related to the issue of custody or visitation. Family Code Section 3151 states that the role of the appointed counsel "is to gather facts that bear on the best interest of the child, and present those facts to the court, including the child's wishes when counsel deems it appropriate for consideration by the court pursuant to Section 3042."

However, instead of presenting those facts to the court through witnesses or declarations, to which objection can be made by one of the parties, Family Code Section 3151(b) provides that, at the court's request, the minor's counsel shall present a "written statement of issues and contentions." This "written statement" sets forth the "facts" relating to the best interest of the child (as perceived by the minor's counsel), as well as a "summary of information received by counsel," a list of the sources of information, and the "results of the counsel's investigation," as well as such other matters as the court may direct.

Minor's counsel is therefore in the enviable position of being able to present to the court his or her own view of the totality of the results of the investigation conducted in a summary fashion. This also means that minor's counsel can omit references to facts or comments by informants that he or she may deem to be "irrelevant," even though either of the parties might consider them very relevant if they were disclosed. Moreover, the minor's counsel submits his or her summary of views and opinions is submitted for the court's consideration exactly as though it were evidence, but needing to establish any foundation or being subject to other evidentiary objections or cross-examination.

Lack of cross-examination exists because Family Code Section 3151(b) provides that "counsel shall not be called as a witness in the proceeding." In short, the "written statement of issues and contentions" is a document that consists of pure hearsay but is immune from any challenge.

Family law practitioners in custody cases are, of course, familiar with the practice of using an expert custody evaluator, either by court appointment under Evidence Code Section 730 or Family Code Section 3111, or through unilateral retention by one of the parties. Like a minor's counsel, the custody evaluator also interviews persons he or she believes have knowledge relevant to the case, reviews documentation, and provides a written report. However, the report of an expert custody evaluator, like that of any expert, is by definition hearsay, *In re Marriage of Smith*, 79 Cal. App. 3d 725, 753(1978)) and does not come into evidence for consideration by the court except pursuant to stipulation. Additionally, the testimony of an expert witness requires the laying of a proper foundation.

Moreover, a custody evaluator offered as an expert witness is subject to cross-examination. During the course of cross-examination, an expert custody evaluator can be challenged as to the “facts” upon which he or she has relied, questioned about potential statements made by informants that the evaluator has omitted from his or her report, and challenged with respect to any conclusions.

None of this is true with regard to the written statement of issues and contentions presented by the Section 3150 court-appointed minor’s counsel, who may not be called as a witness, and thus cannot be questioned about the contents of the written statement of issues and contentions, about the “facts” contained therein, or about the minor’s counsel’s interpretation concerning the “results of the investigation.”

In short, although the court-appointed minor’s counsel takes on a quasi-expert role in custody and visitation proceedings, minor’s counsel is immune from challenge through cross-examination unlike a true expert who is reporting on the results of his or her investigation and who is offering conclusions or recommendations.

Many of the statutory duties of a Section 3150 attorney are similar to those of custody evaluators. Just as Family Code Section 3151 authorizes the appointment of minor’s counsel, Family Code Section 3111 provides courts with the discretion to appoint a child custody evaluator in any contested custody or visitation proceeding. In addition, a custody evaluator may be appointed as an expert pursuant to Evidence Code Section 730. The Section 3111 custody evaluator is charged with conducting a child custody evaluation and preparing a confidential written report for the court to consider when determining custody. Thus, both a court-appointed Section 3150 minor’s counsel and a custody evaluator have the similar duties of gathering facts and presenting their findings to the court (although the Family Code Section 3111 evaluator’s report will not be received into evidence except upon stipulation of all parties. Family Code Section 3111(c).)

One major distinction between minor’s counsel and custody evaluators is the difference in their required qualifications. A child custody evaluator, whether “court connected” or “private,” must, pursuant to Rule 5.220(g), meet the stringent educational and practical requirements of Family Code Sections 3110.5 and 1816 and California Rules of Court 5.225 and 5.230.

Family Code Section 1816 requires child custody evaluators to participate in programs of continuing instruction in domestic violence, including techniques for identifying and assisting families affected by domestic violence, and interviewing, documenting, and making appropriate recommendations for families affected by domestic violence. Family Code Section 3110.5 provides for the formulation of statewide rules establishing education, experience, and training requirements for all child custody evaluators appointed by the court. The required training and experience shall include, but not be limited to, knowledge of psychological and developmental needs of children and parent-child relationships. The uniform rules also require all evaluators “to utilize comparable interview, assessment, and testing procedures for all parties that are consistent with generally accepted clinical, forensic, scientific, diagnostic or medical standards.” Family Code Section 3110.5(b)(B). All court-connected or private child custody evaluators must also receive training in the nature of child sexual abuse. Family Code Section 3110.5(b)(2). Furthermore, no person may be a court appointed child custody evaluator unless he or she qualifies as either: (1) a licensed physician who is either a board-certified psychiatrist or has completed a residency in psychiatry, (2) a licensed psychologist, (3) a licensed marriage and family therapist, (4) a licensed clinical social worker, or (5) a “court-connected” evaluator who has been certified by the court as meeting all the qualifications for court-connected evaluators specified by the

Judicial Council. Family Code Section 3110.5(c). Detailed educational and training requirements are set forth in California Rules of Court 5.225 and 5.230.

In contrast, there are apparently no requirements for a person who serves as a court appointed minor's counsel other than, presumably, being an attorney. (Section 20.5 of the Standards of Judicial Administration, contained in Division I of the Appendix to the California Rules of Court, provides guidelines consisting of factors to be considered by the court in deciding whether or not to appoint a minor's counsel. However, these guidelines contain no requirements or qualifications for the minor's counsel.)

A second major difference between custody evaluators and court-appointed minor's counsel is that, statutorily, parties must be given the opportunity to cross-examine custody evaluators while, statutorily, parties are forbidden to call minor's counsel as a witness. Family Code Section 3151(b). Another distinction between custody evaluators and minor's counsel is the extraordinary power given to the minor's counsel. The minor's counsel, besides being given the normal rights of attorneys representing parties to a proceeding, Family Code Section 3151(c)(4), is provided access to the child's medical, dental, mental health, health care, and school and educational records, as well as the "right to interview" school personnel, caretakers, healthcare providers, mental health professionals, and "others who have assessed the child or provided care to the child." The minor's counsel is also vested with the right to refuse any physical or psychological examination or evaluation on behalf of the child, except for such proceedings ordered by the court. Family Code Section 3150(c)(5),(6). The minor's counsel is thus given authority that exceeds that of a privately retained attorney or the custody evaluator. The minor's counsel might, in this respect, be analogized to a guardian, but without any of the requirements of a guardianship proceeding prior to appointment.

Prior to the enactment of Family Code Section 3111, courts often turned to the precursor of the custody evaluator, known as the court assistant or court investigator, to assist the court in custody and visitation proceedings. Court assistants were used by some courts in the capacity of "investigators of domestic relations cases" to "assist the court in the transaction of the judicial business of said court." Former Code of Civil Procedure Section 261(a). Court assistants were directed to ascertain and report evidence and make recommendations based on the evidence. In the 1943 case of *Fewel v. Fewel*, 23 Cal. 2d 431, 434 (1943), the California Supreme Court determined that an investigator gathering facts and presenting a report to the court must be subject to cross-examination.

In *Fewel*, the father instituted a proceeding to modify a previous order awarding custody of two minor children to the mother. The court appointed a court investigator to aid the court in its fact-finding. During the proceeding, the trial court precluded the mother from cross-examining the court investigator, yet modified its custody order exclusively on the recommendation of the court investigator.

The supreme court reversed the custody modification, finding that "reports of investigators should be presented in affidavit form, or otherwise under oath, and an investigator, *upon timely demand by any party, must appear like any other witness and testify subject to the rules of evidence and the right of cross-examination.*" *Id.* at 436 (emphasis added). The supreme court further held that courts may not act on either the custody evaluation reports or the recommendations made by evaluators if parties are not given the opportunity to cross-examine evaluators, stating that "evidence which was never properly before the court in the first instance cannot thus be infused into the record to support the previously appealed from order." *Id.* at 438.

The right to cross-examine custody evaluators is now codified in Family Code Section 3117(b), which specifically states that parties must receive written notification of their right to cross-examine evaluators. In addition, Family Code Section 3117(b) also provides that statewide procedural standards for cross-examination of the custody evaluator cannot limit the requirement that the evaluator be available for cross-examination.

There appears to be no difference between custody evaluators and court-appointed minor's counsel for due process purposes, and so it follows that the rules applicable to the former should apply equally to the later. However, Family Code Section 3151(b) prevents such equality of treatment.

The right to a fair hearing is an essential element of due process found in both the federal and California Constitutions. U.S. Constitution, Fourth and Fifth Amendments, and California Constitution, Article I, Section 7. Two integral features of the right to a fair hearing include the right to produce evidence and the right to confront and cross examine adverse witnesses. Family Code Section 3151(b) infringes those rights by restricting the parties' ability to cross-examine the minor's counsel.

Although the right of confrontation is most commonly asserted in criminal cases, parties in civil proceedings may also assert their due process right to cross-examine and confront witnesses. Several courts, including the California Supreme Court, have determined that "while both the federal and state Constitutions confine the express right of confrontation to criminal defendants (U.S. Const., 6th Amend.; Cal. Const., art. I, Section 15), parties in civil proceedings also have a due process right to cross-examine and confront witnesses." *In re Malinda S.*, 51 Cal. 3d 368, 382, n. 16 (1990). *See also Wilner v. Committee on Character*, 373 U.S. 96 (1963), *McLaughlin v. Superior Court*, 140 Cal. App. 3d 473, 482 (1983) (superseded by statute on other grounds).

The chief purpose of cross-examination is to assess the accuracy and credibility of a witness relative to his or her testimony on direct examination. *Clarke v. Clarke*, 133 Cal. 667, 672 (1901). Because it relates to the fundamental fairness of proceedings, cross-examination is said to represent an absolute right, not merely a privilege, and denial thereof may constitute a denial of due process. *Fost v. Superior Court*, 80 Cal. App. 4th 724, 733 (2000).

In the 1967 Fifth District case of *Long v. Long*, 251 Cal. App. 2d 732 (1967), a mother sought modification of the child custody provisions in a divorce decree. The court ordered the probation officer to make an investigation and to file a report with the court under Welfare and Institutions Code Section 582 for the purpose of advising the court on the custody issue. However, Welfare and Institutions Code Section 582 provides no procedure or guidelines requiring a probation officer's report to be served on the parties or for the probation officer to be subject to cross-examination on the contents of the report. The court of appeal found that the probation officer's report contained hearsay evidence that "accentuated the need to carefully protect the rights of the parties affected by them." *Id.* at 736. The court of appeal further found that "due process of the law requires that each party (a) receive a copy of the report, (b) *be given an opportunity to cross-examine the investigative officer* and subpoena and examine persons whose hearsay statements are contained in the report, and (c) be permitted to introduce evidence by way of rebuttal." *Id.* (emphasis added)

Family Code Section 3151 is constitutionally infirm because, as with Welfare and Institutions Code Section 582, it denies parties their constitutional right to cross-examine and to challenge or investigate hearsay statements contained in the minor's counsel's

report. Family Code Section 3151(b) specifically states that minor's counsel "shall not be called on as a witness" even though minor's counsel performs a role equivalent to that of the evaluator and expert and identical to that of the "court assistant" and "investigator," whom the courts have determined must be subject to cross-examination.

For example, minor's counsel may present damaging information about one of the parties based upon his or her interpretation of an interview with a child or informant. However, minor's counsel is not accessible for questioning about the examination methods used nor about the information's reliability, or even as to the exact words constituting the "facts" as reported. Thus, there is virtually no way of assessing the validity of the information presented by minor's counsel and no way to determine what information or facts may have been gathered by minor's counsel but omitted from his or her report.

The events that occurred in the 1995 case of *In re Dolly D.*, 41 Cal. App. 4th 440 (1995), are indicative of the injustices that may result from the use of minor's counsel under the provisions of Family Code Section 3151. In *Dolly D.*, the Department of Children's Services filed a dependency petition, requesting that the court remove the minor child from the custody of her parents. The trial court removed the infant from her father's care primarily on the basis of a social worker's report. During the proceeding, the father's attorney requested the opportunity to cross-examine the social worker who had prepared the report. The court denied this request.

The court of appeal found that the lower court's refusal to allow the father to cross-examine the social worker "denied appellant his right of confrontation." *Id.* at 442. The court found that "[i]n dependency proceedings, as in other civil proceedings, parties have a due process right to cross-examine and confront witnesses." *Id.* at 444. Furthermore, the court found that this error was not harmless beyond a reasonable doubt because the report was the sole evidence regarding the appellant, and cross-examination of the social worker could have demonstrated the lack of support for her statements.

Rule 1412(j) of the California Rules of Court expressly requires that the court advise the child, parent, and guardian in Welfare and Institutions Code Section 300 cases of the right to confront and cross-examine the persons who prepared reports or documents submitted to the court. By contrast, Family Code Section 3151 presents the *opposite* situation and *precludes* minor's counsel from being a witness.

Regardless of whether a statute actually makes reference to the constitutional right of confrontation, this right is an essential aspect of due process that should not be capable of being legislated away.

In the Second District case of *Estate of Buchman* the court found that an executor of an estate was denied the right to be heard after he failed to timely file an inventory of assets. The court held:

The power vested in a judge is to hear and determine, not to determine without hearing. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure. It is not for nothing that most of the provisions of the Bill of Rights have to do with matters of procedure. Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence

of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly. *Estate of Buchman* 123 Cal.App. 2d 546, 560 (1954).

In summary, Family Code Sections 3150 and 3151 provide courts with the right to appoint minor's counsel for the best interest of the child in custody and visitation proceedings. Minor's counsel may collect evidence and facts and then present that evidence, as well as the opinions of minor's counsel, to the court. In performing these tasks, minor's counsel is acting in a manner indistinguishable from that of a custody evaluation expert. However, Family Code Section 3151 prevents parties from cross-examining minor's counsel or otherwise calling on minor's counsel as a witness. Thus, this statute obstructs the parties' right of confrontation. Precluding a party's right of confrontation constitutes a denial of due process rights.

Therefore, in a custody or visitation case in which a court-appointed minor's counsel attempts to present a written statement of issues and contentions or otherwise seeks to inform the court of the results of his or her investigation, an attorney representing one of the parties should consider objecting to the court receiving or considering any such presentations on the grounds that Family Code Section 3150's prohibition of cross-examination of the minor's counsel is unconstitutional.

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