Judicial Council of California

ADMINISTRATIVE OFFICE OF THE COURTS

OFFICE OF GOVERNMENTAL AFFAIRS

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CURTIS L. CHILD
Director, Office of Governmental Affairs

May 12, 2009

Hon. Kevin de Leon, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: AB 612 (Beall), as amended May 5, 2009 – Fiscal Impact Statement

Dear Assembly Member de Leon:

AB 612 directs the Judicial Council, effective January 1, 2010, to revise existing training requirements for child custody evaluators thereby imposing additional one-time administrative costs on the Judicial Council by requiring revisions to existing training and related forms. The costs to complete these actions are estimated to be minor and absorbable within existing resources.

Please contact me at 916-323-3121 or henry.sepulveda@jud.ca.gov if you would like further information or have any questions about the fiscal impact of this legislation on the judicial branch.

Sincerely,

Henry Sepulveda
Senior Governmental Affairs Analyst

HS/yt
cc: Ms. Kathleen Finnigan, Legislative Director, Office of Assembly Member Jim Beall, Jr.
Ms. Julie Salley-Gray, Consultant, Assembly Appropriations Committee
Mr. Allan Cooper, Consultant, Assembly Republican Office of Policy
Ms. Teresa Calvert, Budget Analyst, Department of Finance

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March 26, 2009

Hon. Mike Feuer, Chair
Assembly Judiciary Committee
State Capitol, Room 3146
Sacramento, California 95814

Subject: AB 612 (Beall), as introduced – Oppose
Hearing: Assembly Judiciary Committee – April 14, 2009

Dear Assembly Member Feuer:

I regret to inform you that the Judicial Council is opposed to AB 612 (Beall), which would limit the admissibility of child custody evaluation reports containing "nonscientific" theories, because the admissibility standard it would enact does not provide sufficient clarity or flexibility for the court in determining the evidence that can be considered in a child custody matter. Current law requires that all evaluators utilize interview, assessment, and testing procedures that are "consistent with generally accepted forensic, scientific, diagnostic, or medical standards." While this language is echoed in AB 612, and is consonant with traditional formulations on the acceptable standard for admission of expert testimony, AB 612 further qualifies the admissibility standard for theories used in child custody evaluations to require that they be "promulgated by a majority of licensed professionals in the medical, psychiatric, and psychological communities…" It is this latter part of the formulation that is unworkable for judicial officers hearing child custody matters. It will be difficult, if not impossible, in many cases for the court to determine if a theory has been endorsed by a majority of licensed professionals. This requirement goes

beyond the notion of general acceptance, and will promote extended litigation regarding the admissibility of child custody evaluations and the theories upon which the evaluations are based.

AB 612 exacerbates the negative impact of this standard by requiring the court to exclude the entire child custody evaluation if the evaluation includes a nonscientific theory. This sweeping provision is especially onerous for the litigants and their children, as these evaluations typically take months of work to complete, and cost the parties thousands and even tens of thousands of dollars. While it is certainly appropriate to require the court to refrain from considering or admitting into evidence any information in an evaluation that does not meet the existing admissibility standard for expert opinion, it is unnecessary and harmful to the interests of the child and the family to require the court to exclude the entire evaluation report. These reports are extensive, and may include voluminous factual information that would assist the court in making its custody determination. Because the standard set forth in AB 612 would be so uncertain, it would not place child custody evaluators on sufficient notice with regard to which theories might be appropriately included in their evaluations. As a result, it creates the significant likelihood that courts would be compelled to exclude child custody evaluations from consideration after the investment of significant time, effort, and money by the parties and the evaluator. Evaluators spend a significant amount of time interviewing the parties, their children, and other collateral contacts such as therapists and professionals from the child's school. It is inconsistent with the duty of the family court acting in the best interest of the child to require a court to ignore the information obtained from these efforts, or to require the child and other interested persons to be repeatedly subjected to these interviews when repetition is avoidable.

Please note that the Judicial Council takes no position on the specific question of excluding the use of Parental Alienation Syndrome or related theories from child custody evaluations. The current standard for admission of expert evidence, found in Evidence Code section 801 provides that expert testimony should be:

> Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Section 801 has a voluminous body of case law interpreting its meaning that provides guidance to the courts and expert witnesses on the standard for admission of expert testimony. In addition, it is designed to accommodate specific actions by the Legislature to preclude, for policy reasons,

the consideration of expert testimony that might otherwise meet the standard.[1] If AB 612 simply provided that Parental Alienation Syndrome must be excluded by law as a basis for an expert opinion in a child custody evaluation, the Judicial Council would defer to the Legislature and take no position on the bill. However, as currently drafted, AB 612 would create a situation in which all child custody evaluations are subject to protracted litigation regarding the possible inclusion of nonscientific theories as defined in the bill, and it would prevent courts from considering valuable information gathered in a time consuming process by licensed professionals.

For these reasons the Judicial Council opposes AB 612.

Sincerely,

Tracy Kenny
Attorney

TK/yt
cc: Members, Assembly Judiciary Committee
Hon. Jim Beall, Member of the Assembly
Ms. Leora Gershenzon, Counsel, Assembly Judiciary Committee
Mr. Michael Prosio, Legislative Affairs Secretary, Office of the Governor
Ms. Kirsten Kolpitcke, Deputy Director of Legislation, Governor's Office of Planning and Research
Mr. Mark Redmond, Consultant, Assembly Republican Office of Policy

[1] We express no view on whether Parental Alienation Syndrome (PAS) is admissible evidence under current standards for expert testimony. We are unaware of any published cases that squarely address this issue in California, and note that respected entities, such as the National Council of Juvenile and Family Court Judges have suggested that PAS is not admissible as expert testimony under evidentiary standards typically applied by state and federal courts.

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June 29, 2009

Hon. Ellen Corbett, Chair
Senate Judiciary Committee
State Capitol, Room 5108
Sacramento, California 95814

Subject: AB 612 (Beall), as amended June 28, 2009 – Oppose
Hearing: Senate Judiciary Committee – July 7, 2009

Dear Senator Corbett:

I regret to inform you that the Judicial Council must renew its opposition to the most recently amended version of AB 612 (Beall), which would specify the procedures to be used by the courts in investigating and considering allegations of physical or sexual abuse of a child, and impose a new standard for admissibility in family law, because it inappropriately constrains the discretion of the court to determine when an evaluation is necessary, and because the admissibility standard it would enact does not provide sufficient clarity or flexibility for the court in determining the evidence that can be considered in a child custody matter. Each of the issues that AB 612 seeks to address in a newly enacted section of the Family Code is currently addressed in existing law with more clarity, and more discretion for the court to tailor its actions to the individual circumstances of the case. By contrast, AB 612 layers on top of this law a number of new requirements that undermine or muddle the intent of existing law in ways that will lengthen child custody disputes, encourage protracted litigation, and result in serious confusion for litigants and the courts as they try to discern the intent of the Legislature. These results are contrary to the

overriding objective of the Family Code in child custody matters, which is to protect the best interests of the children whose custody is at stake.

Family Code section 3118 sets forth specific and extensive requirements for child custody evaluations in those cases in which the court has already appointed a child custody evaluator, and has made a determination that there is a serious allegation of child sexual abuse. AB 612 appears to effectively eliminate those requirements, making all allegations of physical or sexual abuse of a child in a child custody proceeding subject to an investigation consistent with the demands of section 3118. This is troubling because it will require the court to order extensive and burdensome child custody evaluations even in cases in which the court does not believe that such an evaluation is necessary to protect the child. In some cases this requirement may well interfere with the court's ability to protect the child in a timely manner. Furthermore, it will result in many additional and costly evaluations being ordered by the courts. Many of these burdens will fall on the parties, who are liable for these costs if they have the ability to pay. For those who cannot pay, that burden will fall to the courts, which do not have the resources to absorb these costs. A child custody evaluation is only one of the tools available to courts in child custody matters in which there are allegations of abuse. Another option is to refer the case to the local child welfare agency which is statutorily responsible for investigating claims of abuse of children and is required to take action to protect children subject to abuse. In other cases the court may be persuaded by the evidence presented to the court prior to any evaluation that a parent who is alleged to have committed abuse is in fact a danger to the child and wish to award sole custody to the other parent in order to protect the child. The provisions of AB 612 could be used by the allegedly abusive parent to demand an evaluation consistent with section 3118 in such a case. Current law carefully limits the required use of this tool, and then provides the court with broad discretion to use it when necessary. AB 612 unravels these limits in a manner that will be harmful to children and families.

Current law (Evidence Code Section 801) sets a standard for the court's consideration of expert testimony in all matters, which provides that expert testimony should be:

> Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

Section 801 has a voluminous body of case law interpreting its meaning that provides guidance to the courts and expert witnesses on the standard for admission of expert testimony. In addition, it is designed to accommodate specific actions by the Legislature to preclude, for policy reasons, the consideration of expert testimony that might otherwise meet the standard. AB 612 layers on

top of this section a specific provision regarding "unproven, nonscientific theories." AB 612 does not define what constitutes such a theory (except that it includes "alienation theories that assume that a child's report of physical or sexual abuse by one parent is influenced by or fabricated by the child"), nor does it provide any guidance as to how this standard should be reconciled with existing law. Furthermore, it is not clear how courts would be required to apply the specific exclusion set forth in AB 612. How is the court to determine if a "finding" provided by a court appointed professional is based upon such a theory? As currently drafted it is not clear whether the court would be allowed to consider the opinion of an evaluator that a parent was coaching a child to make false allegations of abuse, even if that opinion was based on an evaluator's interview with a child in which a child disclosed such influence explicitly. How is the court to determine whether the expert opinion is based solely on the child's statements or the parent's behavior, and not based in part upon the prohibited theory?

Even more confusing is the requirement that "the rules of evidence applicable in criminal proceedings shall apply whenever the court considers an allegation of physical or sexual abuse against a child…" in child custody matters. The California Evidence Code applies to all proceedings before California courts unless a statute provides otherwise. There are specific Constitutional and statutory evidence rules that apply to criminal proceedings that are designed to protect the rights of criminal defendants and to ensure that juries are not subject to undue prejudice. It would not make sense to apply these rules to child custody matters because they do not involve defendants or juries. Thus it is unclear what this provision of AB 612 is intended to accomplish, and courts would be in a difficult position trying to interpret and apply its requirements.

Finally, AB 612 requires the Judicial Council to "provide training consistent with this section." This requirement is problematic for a number of reasons. First, as outlined above, the meaning and intent of the provisions of AB 612 are not clear, such that training on its requirements would require the council to engage in significant legal interpretation of the bill's meaning. Moreover this requirement seems to assume that the Judicial Council is primarily responsible for training child custody evaluators. Under current law the Judicial Council is responsible for establishing and overseeing training *requirements* for these professionals. While the Judicial Council does provide training for court employees, training for evaluators is typically obtained from other providers. Thus it is not clear to whom the Judicial Council is required to provide the training. To the extent that AB 612 requires training beyond that which is currently offered, it would thereby create a significant unfunded training obligation for the council and the judicial branch.

For these reasons the Judicial Council opposes AB 612.

Sincerely,

Tracy Kenny
Attorney

TK/yt
cc: Members, Senate Judiciary Committee
Hon. Jim Beall, Member of the Assembly
Ms. Kathy Banuelos, Counsel, Senate Judiciary Committee
Mr. Michael Prosio, Legislative Affairs Secretary, Office of the Governor
Ms. Kirsten Kolpitcke, Deputy Director of Legislation, Governor's Office of Planning and Research
Mr. Mike Petersen, Consultant, Senate Republican Office of Policy