



Judicial Council of California

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INVITATION TO COMMENT

SPR23-16

Title

Family Law: Child Custody and Visitation
Orders Involving Gender-Affirming Health
Care

Action Requested

Review and submit comments by May 12,
2023

Proposed Effective Date

January 1, 2024

Proposed Rules, Forms, Standards, or Statutes

Amend Cal. Rules of Court, rule 5.151

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Proposed by

Family and Juvenile Law Advisory
Committee

Hon. Stephanie E. Hulse, Cochair

Hon. Amy M. Pellman, Cochair

Executive Summary and Origin

The Family and Juvenile Law Advisory Committee proposes amending one rule of court, effective January 1, 2024, to implement Senate Bill 107 (Stats. 2022, ch. 810). SB 107 amends Family Code sections 3421 and 3424 and adopts a new public policy in Family Code section 3453.5 that supports a parent's ability to seek gender-affirming health care and gender-affirming mental health care for a child in the state of California without penalty. The proposed amendments to the rule would provide procedures for situations in which a parent seeks emergency child custody orders in family court because the laws of another state prohibit that parent from providing gender-affirming health care or gender-affirming mental health care for their child.

Background

SB 107 adds subdivision (d) to Family Code section 3421 and extends the court's jurisdiction (under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)) to make initial child custody determinations if

[t]he presence of a child in this state for the purpose of obtaining gender-affirming health care or gender-affirming mental health care, as defined by Section 16010.2

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

of the Welfare and Institutions Code, is sufficient to meet the requirements of paragraph (2) of subdivision (a).

In addition, the bill amends Family Code section 3424 to provide that

[a] court of this state has temporary emergency jurisdiction if the child is present in this state ... because the child has been unable to obtain gender-affirming health care or gender-affirming mental health care, as defined by Section 16010.2 of the Welfare and Institutions Code.

Further, it adds section 3453.5 to the Family Code, which provides (in part) that:

(a) A law of another state that authorizes a state agency to remove a child from their parent or guardian based on the parent or guardian allowing their child to receive gender-affirming health care or gender-affirming mental health care is against the public policy of this state and shall not be enforced or applied in a case pending in a court in this state.

The Proposal

In response to SB 107's changes to the UCCJEA, the committee proposes that the Judicial Council amend rule 5.151 to specify the procedures and forms that a parent or guardian must use to ask the court for temporary emergency orders when the issue relates to gender-affirming health care or gender-affirming mental health care—care that is prohibited by the law of another state or unavailable in another state. The rule with proposed amendments is provided in its entirety for context at pages 7–11.

Generally, the procedures specified in rule 5.151(d)(5) cover requests for temporary emergency orders involving child custody or visitation (parenting time). The proposal would add subdivision (d)(6), titled “Applications for child custody or visitation (parenting time) when the child is in the state for gender-affirming health care or gender-affirming medical care.”

Cases with no out-of-state child custody orders

Under Family Code sections 3421(d) and 3424(c) the courts of this state have jurisdiction to make an initial child custody determination if (1) the child is in this state for the purpose of obtaining gender-affirming health care or gender-affirming mental health care and (2) there is no previous child custody determination that is entitled to be enforced in this state. The party seeking child custody orders would file an action in family court and then seek this specific relief as part of a request for child custody orders.

Cases with out-of-state child custody orders

Generally, under Family Code section 3446(b), a California court must recognize and enforce a registered child custody determination of a court of another state but may not modify the order. The same statute, however, makes an exception: “except in accordance with Chapter 2 (commencing with Section 3421).”

The exceptions to the prohibition on modifying an out-of-state child custody order are noted in Family Code sections 3424, 3427, and in case law.

- Family Code section 3424(a) provides that a court of this state has temporary emergency jurisdiction if, among other reasons, the child is present in this state because the child has been unable to obtain gender-affirming health care or gender-affirming mental health care.
- Under Family Code section 3424(c), if there is a previous child custody order or proceeding in another state having jurisdiction, a court of this state may issue a temporary emergency order, but the court must specify in the order a period of time that the court considers adequate until an order is obtained in the other state within the period specified or the period expires. There are different procedures for cases in which there are no previous child custody orders ¹
- Under the new provisions of Family Code section 3427(f)(1), a California court cannot determine that this state is an inconvenient forum where the law or policy of the other state limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child.
- Under Family Code section 3424(d), a California court issuing a temporary emergency order would still have to communicate with the out-of-state court to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. ²

Based on the foregoing, a court of this state is authorized to modify a child custody order issued in another state, at least temporarily.

The proposed amendment to rule 5.151 would require the party to file a case in family court and then file the documents specified in subdivision (c) of the rule to ask that the California court

¹ Section 3424(b) provides:

If there is no previous child custody determination that is entitled to be enforced under this part and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Sections 3421 to 3423, inclusive. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Sections 3421 to 3423, inclusive, a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child.

² However, “[e]ven though emergency jurisdiction ordinarily is intended to be short term and limited, [a court] may continue to exercise its authority as long as the risk of harm creating the emergency is ongoing.” (*In re Angel L.* (2008) 159 Cal.App.4th 1127, 1139.)

issue temporary emergency orders to modify an out-of-state child custody order so that the child can obtain gender-affirming health care or gender-affirming mental health care in this state. In some situations, a party might decide to file a petition for dissolution of marriage or legal separation, a petition to determine a parental relationship, or a petition for custody and support and include the out-of-state child custody order with the initial filing.

The proposed rule would, however, also account for situations in which none of the previously mentioned petitions apply. For example, a party may simply want to register the out-of-state child custody orders in this state and then ask the court to issue temporary orders that modify those orders so that their child can obtain gender-affirming health care or gender-affirming mental health care in California. To provide a pathway for this type of action, the rule would require that the party file *Registration of Out-of-State Custody Order* (form FL-580) as the initial pleading. This would reflect the procedure that is currently used if there has already been a previous custody determination in another state.

In addition, the rule (at subdivision (d)(6)(B) and (C)) would reference the forms, documents, and content that a party must provide to ask for temporary emergency orders that relate to children who are in California to obtain gender-affirming health care or gender-affirming mental health care. This subdivision would be distinguished from subdivision (d)(5) (Applications regarding child custody or visitation) in that Family Code section 3064 does not apply to these cases. Therefore, a party would not have to show in the application immediate harm to a child or an immediate risk of a child's removal from the state of California before the court can issue a temporary order involving a child who is present in this state because the child has been unable to obtain gender-affirming health care or gender-affirming mental health care. However, the proposed rule would cross-reference some of the requirements listed in (d)(5) that would apply to these case types; for example, the requirement to (1) advise the court of the existing custody and visitation arrangement and how they would be changed by the request for emergency orders and (2) include a completed form FL-105 if the form was not already filed or has changed since it was filed (see proposed subdivision (d)(6)(C)).

Alternatives Considered

The committee considered not proposing changes to rules of court or forms because SB 107 does not specifically require that the Judicial Council take any action to implement the changes to the UCCJEA. However, the committee determined that developing statewide, uniform rules in this subject area would (1) provide statewide consistency in practice and procedure, (2) acknowledge the policy rationale and legislative intent of Family Code sections 3453.5 and 3424 to assist families from other states seeking gender-affirming health care for their children, and (3) support an important judicial branch strategic plan goal: access, fairness, diversity, and inclusion.³

The committee also considered whether to develop a separate rule of court and a new form set to implement SB 107. After review, the committee, instead, decided to propose amending rule

³ *The Strategic Plan for California's Judicial Branch* (July 19, 2019) is available at www.courts.ca.gov/documents/Strategic_Plan_Companion_2022.pdf.

5.151 to include requests under SB 107. Rule 5.151 currently provides guidance to courts and to parties about the forms and procedures required to request temporary emergency orders specifically relating to child custody and visitation (parenting time). Requests for orders about a child who is in the state to obtain gender-affirming health care and gender-affirming mental health care would be a new category of temporary emergency orders that the child's parent could request, and thus, would naturally fit into rule 5.151.

Further, because the remedies specified in SB 107 also apply to cases filed under the Domestic Violence Prevention Act (DVPA), but the forms and procedures in rule 5.151 do not apply to DVPA cases, the committee considered two options. Option A would be a proposal to include an advisory committee comment to rule 5.151. Option B was a proposal to adopt a new rule in chapter 11, article 1 (Domestic Violence Prevention Act Cases), that would specify that applications for child custody or visitation (parenting time) involving gender-affirming health care (including gender-affirming mental health care) for a child may also be requested under the Domestic Violence Prevention Act. The majority of members voted for option A rather than expand the proposal to two rules to address the changes in the Family Code under SB 107.

Fiscal and Operational Impacts

The impact to the courts includes the cost to educate judicial officers and court staff about the changes in the law and procedures to implement the law. Courts may also need to update their case management systems and create new docket codes for this new type of filing as a request for a temporary emergency order.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

Does the proposal appropriately address the stated purpose?

What other changes, if any, would be needed to the new procedures proposed in rule 5.151 to assist parties seeking initial or modified orders for child custody and visitation?

Would this proposal make it easier or more difficult for self-represented litigants and attorneys to seek changes to an out-of-state child custody order to obtain gender-affirming health care or gender-affirming mental health care for a child?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

Would this proposal make it easier or more difficult for the courts to make orders in cases involving parties with out-of-state child custody orders who seek to modify the order and obtain gender-affirming health care or gender-affirming mental health care for a child?

Would the proposal provide cost savings? If so, please quantify.

What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?

Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

How well would this proposal work in courts of different sizes?

Attachments and Links

Cal. Rules of Court, rule 5.151, at pages 7–10

Link A: Senate Bill 107,

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB107

Link B: Fam. Code, § 3421,

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM§ionNum=3421

Link C: Fam. Code, § 3424,

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM§ionNum=3424

Link D: Fam. Code, § 3453.5,

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM§ionNum=3453.5

Rule 5.151 of the California Rules of Court would be amended, effective January 1, 2024, to read:

1 **Rule 5.151. Request for emergency orders; application; required documents**

2
3 **(a)–(b)** * * *

4
5 **(c) Required documents**

6
7 (1) *Request for Order*

8
9 A request for emergency orders must be in writing and must include all of the
10 following completed documents:

11
12 (A) *Request for Order* (form FL-300) that identifies the relief requested.

13
14 (B) When relevant to the relief requested, a current *Income and Expense*
15 *Declaration* (form FL-150) or *Financial Statement (Simplified)* (form
16 FL-155) and *Property Declaration* (form FL-160).

17
18 (C) *Temporary Emergency (Ex Parte) Orders* (form FL-305) to serve as the
19 proposed temporary order;

20
21 (D) A written declaration regarding notice of application for emergency
22 orders based on personal knowledge. *Declaration Regarding Notice*
23 *and Service of Request for Temporary Emergency (Ex Parte) Orders*
24 (form FL-303), a local court form, or a declaration that contains the
25 same information as form FL-303 may be used for this purpose.

26
27 (E) A memorandum of points and authorities only if required by the court.

28
29 (2) *Request to reschedule hearing*

30
31 A request to reschedule a hearing must comply with the requirements of rule
32 5.95.

33
34 **(d) Contents of application and declaration**

35
36 (1) *Identification of attorney or party*

37
38 An application for emergency orders must state the name, address, and
39 telephone number of any attorney known to the applicant to be an attorney
40 for any party or, if no such attorney is known, the name, address, and
41 telephone number of the party, if known to the applicant.
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(2) *Affirmative factual showing required in written declarations*

The declarations must contain facts within the personal knowledge of the declarant that demonstrate why the matter is appropriately handled as an emergency hearing, as opposed to being on the court’s regular hearing calendar.

An applicant must make an affirmative factual showing of irreparable harm, immediate danger, or any other statutory basis for granting relief without notice or with shortened notice to the other party.

(3) *Disclosure of previous applications and orders*

An applicant should submit a declaration that fully discloses all previous applications made on the same issue and whether any orders were made on any of the applications, even if an application was previously made upon a different state of facts. Previous applications include an order to shorten time for service of notice or an order shortening time for hearing.

(4) *Disclosure of change in status quo*

The applicant has a duty to disclose that an emergency order will result in a change in the current situation or status quo. Absent such disclosure, attorney’s fees and costs incurred to reinstate the status quo may be awarded.

(5) *Applications regarding child custody or visitation (parenting time)*

Applications for emergency orders ~~granting or modifying~~ **involving** child custody or visitation (parenting time) under Family Code section 3064 must:

- (A) Provide a full, detailed description of the most recent incidents showing:
 - (i) Immediate harm to the child as defined in Family Code section 3064(b); or
 - (ii) Immediate risk that the child will be removed from the **S**state of California.
- (B) Specify the date of each incident described in (A);

- 1 (C) Advise the court of the existing custody and visitation (parenting time)
2 arrangements and how they would be changed by the request for
3 emergency orders;
4
5 (D) Include a copy of the current custody orders, if they are available. If no
6 orders exist, explain where and with whom the child is currently living;
7 and
8
9 (E) Include a completed *Declaration Under Uniform Child Custody*
10 *Jurisdiction and Enforcement Act (UCCJEA)* (FL-105) if the form was
11 not already filed by a party or if the information has changed since it
12 was filed.
13

14 **(6) Applications for child custody or visitation (parenting time) when the child is**
15 **in the state for gender-affirming health care and gender-affirming mental**
16 **health care**
17

18 **When a child is in the state for the purpose of obtaining gender-affirming**
19 **health care or gender-affirming mental health care, applications for**
20 **emergency orders for child custody or visitation (parenting time) under**
21 **Family Code sections 3427, 3428, and 3453.5 must:**
22

23 **(A) Be filed with, or include after filing, either:**
24

25 **(i) A petition appropriate for the case type (for example, a petition**
26 **for dissolution of marriage or legal separation, a petition to**
27 **determine parental relationship, or a petition for custody and**
28 **support); or**
29

30 **(ii) Registration of Out-of-State Custody Order (form FL-580), if**
31 **there is a previous custody determination in another state and the**
32 **party does not intend to file a petition under (i).**
33

34 **(B) Include the documents listed in subdivision (c) of this rule.**
35

36 **(C) Include the information specified in subdivision (d)(5)(C)–(E).**
37

38 **(e) Contents of notice and declaration regarding notice of emergency hearing**
39

40 **(1) Contents of notice**
41

42 When notice of a request for emergency orders is given, the person giving
43 notice must:

- 1
2 (A) State with specificity the nature of the relief to be requested;
3
4 (B) State the date, time, and place for the presentation of the application;
5
6 (C) State the date, time, and place of the hearing, if applicable; and
7
8 (D) Attempt to determine whether the opposing party will appear to oppose
9 the application (if the court requires a hearing) or whether ~~he or she~~ **the**
10 **opposing party** will submit responsive pleadings before the court rules
11 on the request for emergency orders.
12

13 (2) *Declaration regarding notice*

14
15 An application for emergency orders must be accompanied by a completed
16 declaration regarding notice that includes one of the following statements:
17

- 18 (A) The notice given, including the date, time, manner, and name of the
19 party informed, the relief sought, any response, and whether opposition
20 is expected and that, within the applicable time under rule 5.165, the
21 applicant informed the opposing party where and when the application
22 would be made;
23
24 (B) That the applicant in good faith attempted to inform the opposing party
25 but was unable to do so, specifying the efforts made to inform the
26 opposing party; or
27
28 (C) That, for reasons specified, the applicant should not be required to
29 inform the opposing party.
30

31 **Advisory Committee Comment**

32 **Applications for child custody or visitation (parenting time), including applications involving a**
33 **child who is present in this state to obtain gender-affirming health care or gender-affirming**
34 **mental health care under Family Code sections 3427, 3428, and 3453.5, may also be requested**
35 **under the Domestic Violence Prevention Act (DVPA) (Family Code sections 6200-6460).**
36 **Different forms and procedures apply to DVPA cases.**
37
38