

SUBSTANCE ABUSE ISSUES IN CUSTODY DETERMINATIONS

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Parental use of alcohol, drugs and/or tobacco is an issue which goes directly to the heart of "the best interests of the child," the legislative standard upon which custody determinations are based in California. Family Code §3040(a). Abuse of these substances may pose risks to the physical and emotional well-being of children. Counsel involved in family law proceedings therefore need to consider this issue in the development and presentation of the custody and visitation aspects of their cases, as well as when advising their clients.

Family law courts determine the "best interests" of minor children based upon a myriad of factors, described in the shorthand of the Family Code as "the health, safety and welfare of the child." Family Code §3011. What constitutes "welfare of the child" as it relates to substance abuse issues is not solely a matter of theory. Substantial evidence is available to complement the often intangible knowledge of the judicial officer. Attorneys on each side of a custody case which involves these issues need to become familiar with the physiological and psychological aspects of substance abuse and their impact on parenting ability and on children. This knowledge will permit counsel to determine how best to effectively advocate on behalf of the client, so that philosophical legislative standards may be translated into evidence upon which informed judicial decisions may be made.

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There are no reported California decisions which apply the general custody criteria found in the Family Code to the specifics of parental alcohol or drug abuse. There are, however, two lines of California legislative and decisional authority which recognize the harmful effect of alcohol and drug abuse on parenting ability: Superior Court proceedings for termination of parental rights and Juvenile Court dependency proceedings. Although the various Family Code sections (which have replaced former Civil Code §4600 et.seq.) are expressly preempted in such proceedings, the cases interpreting the legislation in these two areas analyze and interpret "the welfare of the child" in ways which are parallel to the analysis and interpretation of criteria set forth in the Family Code, and therefore are instructive to the family law practitioner.

Civil Code §232(a)(3) provides that habitual use of alcohol or drugs by a parent is one of the reasons for declaring a child free of parental custody and control. In In re Sherman M. (1974) 39 Cal.App.3d 40, 113 Cal.Rptr 847, a four-year-old boy was made a dependent of the Juvenile Court pursuant to Civil Code § 232(a)(3) as a result of his mother's "continual, frequent and heavy" use of alcohol (Id. at 42) and consequent inability to provide him with proper care.

The Court explained:

The purpose of this statute is to protect children, not to punish a criminal offender. The interest sought to be protected is that of the welfare of a child. Its need to be raised with love, emotional security and physical safety is paramount to any right of a neglectful parent to have the custody and physical proximity of its child. Id. at 44-45.

This interpretation by the court is reminiscent of discussions of children's best interests found in reported custody decisions under former Civil Code § 4600 et seq., as for example the

seminal California Supreme Court decision in Marriage of Carney (1979) 24 Cal.3d 725, 157 Cal.Rptr. 383.

Other cases decided under Civil Code §232 include In re Ashley G. (1988) 205 Cal.App.3d 1235, 252 Cal.Rptr. 902, where it was determined to be in a three-year-old girl's best interests to terminate the parental rights of her mother, whose continual use of phencyclidine (PCP) posed immediate danger to the child; and In re Nalani C. (1988) 199 Cal.App.3d 1017, 245 Cal.Rptr. 264, in which the court upheld the termination of both parents' rights because evaluations "showed both parents so self-absorbed and involved in drug use that they could not focus on their children's needs."

Cases under Welfare & Institutions Code §300 likewise highlight problems of parental substance abuse. See, for example, In Re Corey A. (1991) 227 Cal.App.3d 339, 277 Cal. Rptr. 782 (one-year-old child with possible fetal alcohol syndrome at risk where mother abused alcohol); In Re Rocco M. (1991) 1 Cal.App.4th 814, 2 Cal.Rptr.2d 429 (eleven-year-old child at risk in environment allowing access to drugs); In re Leo M. (1993) 19 Cal.App.4th 1583, 24 Cal.Rptr.2d 253 (three-year-old and six-month old at substantial risk where mother had history of drug abuse); James v. Superior Court of Humboldt County (1995) 35 Cal.App.4th 1014, 41 Cal.Rptr.2d 762 (dependent children, suffering from fetal alcohol syndrome and considerable medical problems, were at substantial risk due to their parents' alcohol and drug problems); see, also, in contrast, In Re W.O. (1979) 88 Cal.App.3d 906, 152 Cal.Rptr. 130 (two infants found not dependent based upon parents' use and presence in the home of cocaine and marijuana) and In Re Jeannette S. (1979) 94 Cal.App.3d 52, 156 Cal.Rptr. 262 (father's alcoholism not by itself sufficient to warrant finding of dependency).

There is ample literature available to lawyers concerning these issues outside of case law. There are numerous studies examining the effects of parental alcoholism on children, most of which conclude that children of alcoholics are a high-risk group, particularly with respect to emotional and behavioral problems, social adjustment, and substance abuse. Studies discuss the tendency of these children to suffer from feelings of depression, low self-esteem, anxiety, and isolation; to behave in aggressive, rebellious, withdrawn, and sometimes unethical ways; and to have a variety of developmental problems, which include low achievement, a four times greater likelihood than others of becoming alcoholics, and more physical problems than other children. See generally, publications of the Children of Alcoholics Foundation, Inc., including Children of Alcoholics: A Review of the Literature (1985); the British Journal of Addiction; the Journal of Studies on Alcohol; Alcohol Treatment Quarterly; American Journal of Drug and Alcohol Abuse; and other journals in the social science realm. These journals are obtainable in medical libraries and on-line through computer information services. There are also available through these same types of resources studies of alcohol abuse during pregnancy that discuss effects of alcohol on the physical health of a developing fetus. See, Orford, J. and Grant, M., "The Effects on Children and Adolescents of Parents' Excessive Drinking: An International Review," 4 Public Health Reports 433-442 (1989); Van Knorring, A. L., "Annotation: Children of Alcoholics," 32 Journal of Child Psychology and Psychiatry and Allied Disciplines 411-412; Committee On Substance Abuse and Committee On Children With Disabilities, Fetal Alcohol Syndrome and Fetal Alcohol Effects," Pediatrics 1004-1006 (1993); Holzman, C., et. al., "Perinatal Brain Injury in Premature Infants Born to Mothers Using Alcohol in Pregnancy," Pediatrics 66 (January 1995).

It also appears likely that much of the information relating to children of alcoholics also describes the problems and vulnerabilities faced by children of other substance abusers. See Committee On Substance Abuse of American Academy of Pediatrics, "Drug Exposed Infants," Pediatrics 639-642 (1990); Azuma, Scott D., "Outcome of Children Prenatally Exposed to Cocaine and Other Drugs: A Path Analysis of Three Year Data," Pediatrics 396-402 (September 1993); Taylor, Mary E., "Parent's Use of Drugs As Factor In Award of Custody of Children, Visitation Rights, or Termination of Parental Rights," 20 A.L.R.5th 534 (1994).

The issue of cigarette smoking has increasingly become an issue in determining custody in cases because of the potential harmful effects parental smoking has on children. A 1990 study conducted by the National Center for Health Statistics found that children who live in smoking households have twice as many health problems as children raised in non-smoking households. The New England Journal of Medicine published an article in 1991 discussing the connection between respiratory illness in young children and exposure to cigarette smoke. Department of Respiratory Medicine, "The Influence of a Family History of Asthma and Parental Smoking on Airway Responsiveness In Early Infancy," 324 New Eng. J. Med. 1168-1173 (1991). A 1993 study by the Environmental Protection Agency ("EPA") identified secondhand smoke as a causative factor in hundreds of thousands of cases of childhood illnesses, including asthma, bronchiolitis and ear infections. Browner, Carol M., "Environmental Tobacco Smoke: EPA's Report," EPA, 18 (Oct.-Dec. 1993).

The EPA Report explained that when a cigarette is smoked, approximately one-half of the smoke generated is sidestream smoke emitted from the cigarette between puffs. According to the EPA, sidestream smoke contains essentially all of the same carcinogenic and

toxic agents that have been identified in the mainstream smoke inhaled by the smoker. The Report stated:

"26% of the U.S. adult population . . . or about 50 million Americans, are smokers, and so virtually all Americans are likely to be exposed to some amount of ETS [environmental tobacco smoke] in the home, at work, or in public places. Measurements of biomarkers for ETS in non-smokers confirm that nearly all Americans are exposed to ETS. In view of the high levels of mortality and morbidity associated with smoking, the chemical similarity between ETS and MS [mainstream smoke], and the considerable likelihood for exposure of non-smokers to ETS, passive smoking is potentially a substantial public health concern."

In ascertaining the best interests of the child, trial courts presented with the issue of parental smoking will have to consider this as a legitimate health and safety factor. In California, in De Beni Souza v. Kallweit, No. 807516 (Sacramento Sup. Ct., Oct. 11, 1990), a family law judge issued a custody modification order which prohibited a mother from smoking in her child's presence until the child reached eighteen. A 1993 Contra Costa County case raised the secondhand smoke issue when a mother sought a court order to keep her ex-husband from smoking in the presence of their two daughters, ages 10 and 7. The case ultimately settled, but the report prepared by the Family Court evaluator recommended that the father refrain from smoking when he was driving with his children or in the same room with them. Don Martinez, "Custody Battle Clouded By Secondhand Smoke," San Diego Trib., Sept. 24, 1993, at A3.

There are no published California cases as yet on the smoking issue as it relates to custody, but reported decisions from other jurisdictions are available. In a recent New Jersey

case, Unger v. Unger (1994) 274 N.J.Super. 532, the court awarded custody to the non-smoking parent, due to medical evidence that environmental tobacco smoke had contributed to the child's health problems. A New York decision in In re Lizzio (1994) 162 Misc.2d 701, 618 N.Y.S.2d 943, indicates that smoking may be an overwhelming factor in exceptional circumstances. There, a father was awarded custody of both children because second-hand cigarette smoke triggered asthmatic attacks in one child. In a Michigan case, Nocera v. Nocera (Docket #B-89-2992, Kalamazoo County, Michigan), the judge ruled that a mother had to stop smoking in her child's presence in order to retain custody. See also, Hall, J., "Secondhand Smoke As An Issue In Child Custody/Visitation Disputes," 97 W.Va.L.Rev. 115 (1994); Ezra, D., "Sticks And Stones Can Break My Bones, But Tobacco Smoke Can Kill Me: Can We Protect Children From Parents That Smoke?," 13 St. Louis U.Pub.L.Rev. 547 (1994).

In sum, custody and visitation determinations in family law cases are bound to reflect the hard reality that an available and growing body of research shows parental alcoholism, drug abuse, and even smoking can be substantially harmful to children. It is up to the attorneys in such cases to educate themselves with respect to this research in order to knowledgeably represent their clients when the best interest of children of alcoholics and other substance abusers is an issue before the court.