

RESOLUTION 10-10-2008

DIGEST

Family Law: Trial Court Jurisdiction re Visitation and Custody

Amends Code of Civil Procedure section 917.7 to remove any action concerning child custody or visitation from automatic stays associated with the filing of an appeal.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution seeks to amend Code of Civil Procedure section 917.7 to remove any action concerning child custody or visitation from automatic stays associated with the filing of an appeal. This resolution should be disapproved because it fails to offer any substantive change in existing law.

Currently, Code of Civil Procedure section 917.7 provides that “[t]he perfecting of an appeal shall not stay proceedings as to those provisions of a judgment or order which award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, . . . However, the trial court may in its discretion stay execution of these provisions pending review on appeal. . .” Proponents argue that if existing law were amended, courts would no longer have the discretion to stay custody and visitation matters and thus these matters could move forward in the best interest of children.

This argument, however, assumes that courts are unable to exercise discretion appropriately and that advocates for children should not be required to persuade courts otherwise. Empowering courts with discretion to determine what is in the best interest of minor children is at the core of what makes family law courts unique and able to avoid mechanical application of inflexible rules and regulations. Because this resolution fails to raise any issues that can only be addressed by a substantive change in the law, it should be disapproved.

SECTION/COMMITTEE REPORTS

FAMILY LAW SECTION

DISAPPROVE

The Family Law Section Executive Committee disapproves this resolution. This Committee maintains that there are adequate remedies regarding stays concerning child custody/visitation matters under Civil Code §917. This resolution proposes to amend Code of Civil Procedure (CCP) §917.7 to remove any action from automatically being stayed. The proposed resolution further attempts to include an Anti-SLAPP provision, which has very limited application for adoption proceedings and addresses a case-specific concern.

This position is only that of the Family Law Section of the State Bar of California. This position has not been adopted by either the State Bar Board of Governors or overall membership and is not to be construed as representing the position of the State Bar of California.

Membership in the Family Law Section is voluntary, and funding for section activities, including all legislative activities, is obtained entirely from voluntary services.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 917.7 to read as follows:

1 § 917.7
2 The perfecting of an appeal shall not stay proceedings ~~as to those provisions of a~~
3 ~~judgment or order which award, change, or otherwise affect the~~ concerning custody,
4 including the right of visitation, ~~of a minor child in any civil action, in an action filed~~
5 ~~under the Juvenile Court Law, or in a special proceeding, or the provisions of a judgment~~
6 ~~or order for the temporary exclusion of a party from a dwelling, as provided in the Family~~
7 ~~Code.~~ However, the trial court may in its discretion stay execution of ~~these provisions of a~~
8 judgment or order which award, change, or otherwise affect the custody including the right
9 of visitation, of a minor child in any civil action, in an action filed under the Juvenile Court
10 Law, or in a special proceeding, or the provisions of a judgment or order for the temporary
11 exclusion of a party from a dwelling, as provided in the Family Code pending review on
12 appeal or for any other period or periods that it may deem appropriate. Further, in the
13 absence of a writ or order of a reviewing court providing otherwise, the provisions of the
14 judgment or order allowing, or eliminating restrictions against, removal of the minor child
15 from the state are stayed by operation of law for a period of seven calendar days from the
16 entry of the judgment or order by a juvenile court in a dependency hearing, or for a period
17 of 30 calendar days from the entry of judgment or order by any other trial court. The
18 periods during which these provisions allowing, or eliminating restrictions against,
19 removal of the minor child from the state are stayed, are subject to further stays as ordered
20 by the trial court or by the juvenile court pursuant to this section. An order directing the
21 return of a child to a sister state or country, including any order effectuating that return,
22 made in a proceeding brought pursuant to the Uniform Child Custody Jurisdiction and
23 Enforcement Act (Part 3 (commencing with Section 3400) of Division 8 of the Family
24 Code), the Parental Kidnapping Prevention Act of 1980 (28 U.S.C. Sec. 1738A), or the
25 Hague Convention on the Civil Aspects of International Child Abduction (implemented
26 pursuant to the International Child Abduction Remedies Act (42 U.S.C. Secs. 11601-
27 11610)) is not a judgment or order which awards, changes, or otherwise affects the custody
28 of a minor child within the meaning of this section, and therefore is not subject to the
29 automatic stay provisions of this section.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS:

Existing Law: The existing law provides that the provisions of an order or judgment that affect child custody are not automatically stayed by CCP § 916.

This Resolution: Seeks to modify CCP § 917.7 to remove any action from automatically being stayed when it concerns child custody or visitation.

The Problem: The purpose behind CCP § 917.7 is to allow the trial court to serve the best interests of the child, even if an appeal is pending. Where this can occur, as an example, is when an anti-SLAPP motion has been denied and an appellee files an appeal thus halting any action in the trial court. If the original action was brought *sua sponte* by a Petitioner, the Respondent in the action could effectively delay the trial proceedings for a good deal of time while the appeal is pending – thus unable to serve the best interests of the child.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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