

RESOLUTION 03-04-2016

DIGEST

Family Law: Final Child Custody Determinations Immediately Appealable

Amends Code of Civil Procedure section 904.1 regarding the appealability of custody determination orders.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 904.1 to read as follows:

§904.1

- 1 (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other
2 than in a limited civil case, may be taken from any of the following:
- 3 (1) From a judgment, except (A) an interlocutory judgment, other than as provided in
4 paragraphs (8), (9), and (11), or (B) a judgment of contempt that is made final and conclusive by
5 Section 1222.
- 6 (2) From an order made after a judgment made appealable by paragraph (1).
- 7 (3) From an order granting a motion to quash service of summons or granting a motion
8 to stay the action on the ground of inconvenient forum, or from a written order of dismissal
9 under Section 581d following an order granting a motion to dismiss the action on the ground of
10 inconvenient forum.
- 11 (4) From an order granting a new trial or denying a motion for judgment notwithstanding
12 the verdict.
- 13 (5) From an order discharging or refusing to discharge an attachment or granting a right
14 to attach order.
- 15 (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an
16 injunction.
- 17 (7) From an order appointing a receiver.
- 18 (8) From an interlocutory judgment, order, or decree, hereafter made or entered in an
19 action to redeem real or personal property from a mortgage thereof, or a lien thereon,
20 determining the right to redeem and directing an accounting.
- 21 (9) From an interlocutory judgment in an action for partition determining the rights and
22 interests of the respective parties and directing partition to be made.
- 23 (10) From an order made appealable by the provisions of the Probate Code or the Family
24 Code.
- 25 (11) From an interlocutory judgment directing payment of monetary sanctions by a party
26 or an attorney for a party if the amount exceeds five thousand dollars (\$5,000).
- 27 (12) From an order directing payment of monetary sanctions by a party or an attorney for
28 a party if the amount exceeds five thousand dollars (\$5,000).
- 29 (13) From an order granting or denying a special motion to strike under Section 425.16.
- 30 (14) From a final child custody order or judgment in a bifurcated proceeding.
- 31 (b) Sanction orders or judgments of five thousand dollars (\$5,000) or less against a party
32 or an attorney for a party may be reviewed on an appeal by that party after entry of final

33 judgment in the main action, or at the discretion of the court of appeal, may be reviewed upon a
34 petition of extraordinary writ.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: In a family law proceeding, Family Code section 2025 allows a discretionary appeal from an order or judgment on an issue bifurcated for separate trial or hearing. The trial court must certify the issue for appeal, and the appellate court must grant a motion to appeal. *Id.*; Cal. Rules of Court, rule 5.392.

A final judgment or order for child custody is appealable. *Sarah B. v. Floyd B.* (2008) 159 Cal.App.4th 938. Recent unpublished cases, however, hold that a final child custody order or judgment in a bifurcated proceeding may not be immediately appealed except as allowed in § 2025 and rule 3.592. *In re Marriage of Rubtsova dn Rubtsov* (2015) 2015 WL 4511298 at *4, fn. 4; *In re Marriage of Lee-Masis and Barrett* (2015) 2015 WL 7075302 at *3. *In re Marriage of Lee-Masis and Barrett* (2015) 2015 WL 7075302 at *3.

If a final order or judgment for child custody in a bifurcated proceeding is not immediately appealable, the parent challenging the order or judgment will have to await entry of a final judgment on all other disputed issues in the case. That can delay appeal of the custody determination literally for years.

The Solution: This resolution would amend Code of Civil Procedure section 904.1(a), by adding to the list of appealable judgments and orders a final judgment or order for child custody in a bifurcated proceeding.

In *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 565, the court held that a *temporary* child custody order is not immediately appealable; appellate review must be sought by a writ petition. The court reasoned that the longer the child is with the primary custodial parent, the stronger the child's bond with that parent is likely to grow, and the longer it takes to obtain appellate review, the more likely the trial court will find on remand "that the child's best interest requires preserving that bond to maintain stability in the child's life." *Id.*

"The very nature" of an order for temporary child custody, the court held, "compels the swiftest possible review of any challenge." *Id.* The same is true of a final child custody determination, even when child custody has been bifurcated for separate trial or hearing.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESPONSIBLE FLOOR DELEGATE: Jay-Allen Eisen

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RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 904.1 regarding the appealability of custody determination orders. This resolution should be approved in principle because it will clarify the appealability of orders that are considered final by a family court but not final for the purpose of appeal.

In many family law cases, the issues are bifurcated due to the length of the action and the needs of the parties. Bifurcated issues can include custody and other issues, as long as the bifurcation is likely to simplify the determination of the other issues. Custody is most often bifurcated from financial and property issues because the custody orders are often time-sensitive. Custody orders memorialized in a judgment are considered final by the family court when a subsequent motion to modify custody is filed by either party, and the court applies a different test to these “final” orders to determine whether a modification is appropriate. However, a party wishing to modify a bifurcated judgment on custody cannot proceed with a straight-forward appeal because the judgment does not also dispose of all issues and is not considered a final order under section 904.1.

An appeal of a bifurcated judgment is available, but the process for securing this right is convoluted and impractical particularly considering the high percentage of pro per litigants in family law proceedings. To secure the right of an immediate appeal, a party must request that the court certify in its order that there is probable cause for immediate appellate review of the issue, or a party may request such a certification by motion made 10 days after mailing of the decision. The bifurcated judgment remains subject to appeal once a judgment on all issues is entered. However, the failure to secure this immediate right does not preclude an appeal, but that appeal could be delayed by years until the remaining issues can be resolved by a judgment that is recognized in section 904.1. This resolution would clarify that a bifurcated judgment should be considered final and subject to immediate appeal of the issues disposed of in that judgment.

COUNTERARGUMENTS

FLEXCOM

Approve in Principle

Rationale:

The Resolution seeks to amend Code of Civil Procedure Section 904.1 regarding appealability of a custody determination. The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) supports the goal of developing an easier and less expensive way to appeal final custody orders.

Disclaimer:

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's Board of Trustees 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 sources.