

LITIGATING TRUST & ESTATE DISPUTES BEFORE PRIVATE JUDGES

By Ryan J. Szczepanik and John D. Minton

It is not surprising that trust and estate disputes continue to increase. The number of people entering retirement age is increasing. The mobility and transience of American society are accelerating. The amount of people who have remarried with children from a prior marriage is expanding. Those trends mean that more people than ever are becoming elderly with diminishing capacity, an absence of close family members nearby to care for them, and the potential for disfavoring heirs in asset distribution.

Less evident but no less surprising is the increased frequency with which parties are choosing to litigate trust and estate disputes with a private judge. The primary reason parties select a private judge is to avoid delay in adjudicating their dispute in a congested judicial system. The congestion has grown exponentially worse from court closures during the COVID-19 period. The parties must choose to either endure the inevitable delay in the superior court where the case was filed or expedite the proceeding with a private judge.

Experienced and knowledgeable retired judicial officers offer their service as private judges to determine disputed issues in a case. The parties compensate the private judge at an hourly fee ranging from approximately \$400 per hour to \$700 per hour.

The initial reaction of many parties is that the cost of a private judge is prohibitive. That cost, however, may turn out to be less than the cost of proceeding in the superior court. The parties to a private judge proceeding can agree to a trial on consecutive days for longer periods than a superior court would make available. It is common for the superior court to hear the trial on non-consecutive days and to continue trial dates. The expense due to delays from trial continuances and trial on non-consecutive days, attributable to inevitable additional work and continued “re-preparing” for trial by lawyers and experts, can be great.

A private judge proceeding is commenced by the parties’ written stipulation to opt out of the superior court with the judge assigning the case to a private judge. The California Constitution, Article 6, Section 21 states: “On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.”

The stipulation should specify the private judge’s role. “The parties have the power to define and circumscribe the authority of a temporary judge.” *In re Steven A.*, 15 Cal. App. 4th 754, 768 (1993). The parties may authorize the private judge to hear evidence and render a decision on all issues in the case. The private judge has all powers of a sitting judge with a few exceptions, e.g., sealing a file or approving a confidentiality agreement.

The rules applicable to the private judge proceeding are the same rules applicable to a case proceeding in the superior court — the Code of Civil Procedure, rules of evidence, and local rules of the county in which the case is pending. Pleadings submitted to the private judge must be filed with the superior court in which the case is pending. A private judge ruling is subject to the same broad appeal rights as a superior court judge ruling. “A judgment entered by a temporary judge is a judgment subject to appeal.” See *City of Shasta Lake v. County of Shasta*, 75 Cal. App. 4th 1, 11 (1999).

Private judges typically are flexible and will defer to the parties’ preferences. Most private judges encourage the parties to stipulate to the presentation of evidence, order of witnesses,

undisputed facts and law, and authenticity of evidence. The parties may agree to long daily sessions on the record to expedite the trial and ensure uninterrupted attention to the case from the parties, counsel and private judge. A superior court judge, in contrast, may be interrupted by emergencies arising in other matters on its docket.

The parties can select an informal setting for the trial, such as a conference room at a dispute resolution center, an attorney's office, or a court reporter's office. If the trial is by remote video, the parties can select the type of technology to use. Informal settings may provide greater access to computers, client files, break-out rooms for preparing testimony and receiving communications, printers and copy machines, and adequate cellphone reception and internet access. Informal settings may better facilitate the use of technology for trial testimony and ease tensions among the parties. Those potential benefits should be balanced against the risk that an informal setting may lead to less decorum and inappropriate behavior by parties or witnesses.

It is unlikely the private judge will continue the date set for the trial unless the parties stipulate to a continuance. A set trial date encourages parties to get serious about settlement. A set trial date also avoids inconvenience to witnesses associated with moving trial dates and the emotional toll on parties from delays. To ensure greater privacy, the parties can choose a more remote locale that decreases the likelihood the public will attend, and that trial testimony will go viral in the community where the party resides. If the trial is by remote video, the parties can agree upon a secure video line.

Trust and estate disputes often involve complex issues unique to trust and probate law. A private judge may have greater expertise in trust and probate law than an assigned superior court judge. Most private judges are trained in alternative dispute resolution, which enables them to quickly transition to settlement promotion if the parties desire.

Selecting the private judge is a critical decision. The client may blame the lawyer for an adverse result if the lawyer selected the private judge. Useful approaches for researching private judges are dispute resolution center websites, conferring with lawyers in the community, and reviewing published court decisions the private judge may have issued. The private judge should have expertise in trust and probate as a practitioner, judge, or mediator. The private judge also should have expertise on subject matters at issue in the case, for instance, accounting, securities, family law, or real property.

The parties should consider the private judge's attitude toward informal resolution of discovery and other pre-trial disputes, the individual's reputation in dispute resolution (evaluative versus facilitative), and any pre-existing relationship between the private judge and counsel. The private judge may favor one side due to potential for more "repeat business" from a familiar attorney. A private judge with whom both sides are familiar may avoid hard calls and render a decision that splits the difference. The reputation and credibility of private judges, however, depend on their impartiality. For that reason, reputable private judges will bend over backwards to appear impartial.

The changes the COVID-19 pandemic have forced upon the legal industry have expanded the circumstances in which a private judge proceeding may be appropriate. The parties should weigh carefully whether a private judge is the better option for them.

Ryan J. Szczepanik is a partner with Hartog, Baer & Hand, APC in Orinda. John D. Minton is a partner with Anderson Yazdi Hwang Minton + Horn LLP in Burlingame.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF _____

CASE NO. _____

**STIPULATION AND ORDER
APPOINTING PRIVATELY
COMPENSATED TEMPORARY
JUDGE**

1 The following parties constitute all of the parties that have appeared in the
2 above-captioned matter (collectively “the Parties”):

3
4 _____
5 Party Name Party Name Party Name
6
7 _____
8 Counsel for _____ Counsel for _____ Counsel for _____
9
10 _____
11 Party Name Party Name Party Name
12
13 _____
14 Counsel for _____ Counsel for _____ Counsel for _____

15 The Parties, for themselves if unrepresented and through counsel if
16 represented, stipulate to the appointment of the following Privately Compensated
17 Temporary Judge (“PCTJ”) on the terms and for the purpose set forth below, and
18 request the Court issue an order so effectuating.

19 Temporary Judge: _____

20 Address: _____

21 Telephone Number: _____

22 Office Contact: _____

23 California State Bar Number: _____

24 Proceedings before the PCTJ shall be conducted at (address): _____

25 1. Authority: The parties, personally and through their respective attorneys, and the
26 PCTJ to be appointed, all agree to and acknowledge their full understanding of the
27 following:

28 a. In accordance with Article VI, Section 21 of the California Constitution and

1 the California Rules of Court, rules 2.400 and 2.831 through 2.835, the court will
2 order the above-entitled action to be heard by the PCTJ named above.

3 b. The parties and the PCTJ are bound by the California Rules of Court and
4 all local procedures of the _____ Superior Court that govern a cause being
5 heard by a PCTJ.

6 c. The PCTJ will remain appointed until final determination of the cause,
7 unless otherwise ordered by the court. Final determination of the cause includes all
8 matters that are the direct progeny of the stipulated cause, including, without
9 limitation, resolution on the merits of the cause, motions, discovery disputes, and *ex*
10 *parte* applications.

11 d. The PCTJ shall have and exercise all powers and duties of a Superior Court
12 Judge including but not limited to those enumerated in Code Civ. Proc. §§166, 167,
13 177, 177.5 and 187. The PCTJ must refer the following actions or motions to the
14 assigned trial court judicial officer: (1) any action for contempt which may result in
15 actual imprisonment; (2) any action or proceeding for domestic violence temporary
16 and/or permanent restraining orders; (3) any motion or application to seal records;
17 and (4) a motion for leave to file a complaint in intervention.

18 e. The PCTJ will not be compelled to testify as a witness in this proceeding
19 and has judicial immunity to the same extent as that of a judicial officer of the
20 California Superior Court.

21 2. Scope of Assignment:

22 The following matter(s) shall be assigned to the PCTJ: _____
23 _____
24 _____
25 _____

26 3. Compensation and Costs:

27 a. The PCTJ shall be compensated at a rate of _____ per hour. All fees
28 and costs of the PCTJ are the sole responsibility of the Parties. PCTJ fees and costs

1 shall be paid as follows: _____
2 _____
3 _____.

4 b. All issues regarding the payment of the PCTJ's fees and costs will be
5 determined by the PCTJ.

6 c. A certified shorthand reporter will not be present at any proceedings
7 unless arranged by and at the expense of the Parties.

8 d. Other: _____
9 _____
10 _____
11 _____.

12 4. Requirements and Restrictions:

13 a. The PCTJ must file one original and one copy of a Statement of Public Access,
14 including the information required in Rule of Court 2.834(b), which the clerk will
15 post in the courthouse where the matter is pending.

16 b. All written and signed stipulations between the parties and the PCTJ must be
17 filed with the court.

18 c. All original pleadings must be filed with the court prior to submission of a file
19 stamped, conformed copy of the pleading to the PCTJ.

20 d. The parties are responsible for providing the PCTJ with file stamped copies of all
21 relevant pleadings, records, and documents necessary to adjudicate the case at their
22 own expense.

23 e. Any disputes regarding the preparation of orders after hearing or judgments for
24 orders issued by the PCTJ must be referred to the PCTJ. Any delay in the
25 preparation of orders or judgments may cause a delay or continuance of any motions
26 to modify the orders or judgments.

27 f. Any motion to withdraw a stipulation for the appointment of the PCTJ must be
28 referred to the Supervising Judge of the _____ Division.

1 g. The appointment of the PCTJ will terminate only upon a signed order from the
2 Supervising Judge of the _____ Division of the _____ County
3 Superior Court accepting the PCTJ's signed Notice of Case Completion or for other
4 good cause shown.

5 It is so STIPULATED.

6 Dated: _____

7

8

9 _____
Name: Name: Name:

10

11 _____
Name: Name: Name:

12

13

14 _____
Name (PCTJ):

15

CONSENT, CERTIFICATION, AND OATH

16

17 I, _____(name of PCTJ), do hereby solemnly swear that I am
18 an active member of the State Bar of California and that I will support and defend
19 the Constitution of the United States and the Constitution of the State of California
20 against all enemies, foreign and domestic; that I will bear truth and allegiance to the
21 Constitution of the United States and the Constitution of the State of California;
22 that I take this obligation freely, without any mental reservation or purpose of
23 evasion, and that I will well and faithfully discharge the duties upon which I am
24 about to undertake. I certify that I am aware of and will comply with the applicable
25 provisions of Canon 6 of the Code of Judicial Ethics and the California Rules of
26 Court. I consent to this appointment.

27

28 Date: _____
Signature of PCTJ

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ORDER

1. Based on the signed stipulation above, _____ (name of PCTJ) is hereby appointed as the privately compensated temporary judge in the above-captioned proceeding on the terms set forth in the stipulation, above, which is incorporated in its entirety into this order and made an order of the Court.

2. The PCTJ will remain appointed until final determination of the cause(s) indicated, unless otherwise ordered by the court. Final determination of the cause includes all matters that are the direct progeny of the stipulated cause.

3. A copy of this Stipulation and Order must be served along with the Notice of Hearing on all persons entitled to notice of the cause(s) referred to the PCTJ. Any person with standing to participate in the proceeding may object to the hearing of the matter by the PCTJ so long as such objection is made before commencement of the first properly noticed hearing before the PCTJ.

4. Other orders:

IT IS SO ORDERED.

Date: _____
Judge of the Superior Court

West's Annotated California **Codes**

Evidence Code (Refs & Annos)

Division 6. Witnesses (Refs & Annos)

Chapter 3. Expert Witnesses

Article 2. Appointment of Expert Witness by Court (Refs & Annos)

West's Ann.Cal.Evid.Code § **730**

§ **730**. Appointment of expert by court

Currentness

When it appears to the court, at any time before or during the trial of an action, that expert **evidence** is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert **evidence** is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act.

Credits

(Added by Stats.1979, c. 746, p. 2592, § 3, operative Jan. 1, 1983. Amended by Stats.1990, c. 295 (A.B.3371), § 1.)

Editors' Notes

Relevant Additional Resources

Additional Resources listed below contain your search terms.

HISTORICAL AND STATUTORY NOTES

Section 9 of Stats.1979, c. 746, p. 2594, provides:

“Sections 3, 5, and 7 shall become operative on January 1, 1983.”

The 1990 amendment added the second paragraph relating to licenses and made nonsubstantive changes.

Former Notes

Former § **730**, enacted by Stats.1965, c. 299, § 2, amended by Stats.1979, c. 746, § 2, relating to appointment of experts by the court, was repealed by Stats.1979, c. 746, § 2, operative January 1, 1983. See this section.

Derivation

Former § 730, enacted by Stats.1965, c. 299, § 2, amended by Stats.1979, c. 746, § 2.

Code of Civil Procedure § 1871, added by Stats.1925, c. 156, p. 305, § 1, amended by Stats.1941, c. 254, p. 1362, § 1; Stats.1959, c. 1408, p. 3686, § 1; Stats.1961, c. 1100, p. 2829, § 1.

CROSS REFERENCES

Definitions,

Action, see **Evidence Code** § 105. •

Evidence, see **Evidence Code** § 140. •

Interpreter or translator, appointment, see **Evidence Code** § 750 et seq.

Judicial notice, appointment of experts on matters subject to, see **Evidence Code** § 460.

Opinion testimony by expert, see **Evidence Code** § 801 et seq.

Qualification of expert, see **Evidence Code** § 720.

Trier of fact, revealing appointment of expert to, see **Evidence Code** § 722.

LAW REVIEW AND JOURNAL COMMENTARIES

Expert testimony and the opinion rule: Conforming the **Evidence Code** to the Federal Rules. Miguel A. Méndez, 37 U.S.F. L. Rev. 411 (2003).

Opinion **evidence** and expert witnesses. Allan H. McCaid, 2 UCLA L. Rev. 356 (1955).

Proposed expert **evidence** bill. 3 Cal. L. Rev. 216 (1915).

Psychiatric **evidence** and full disclosure in the criminal trial. Leonard Dieden and Chris Gasparich, 52 Cal. L. Rev. 543 (1964).

RESEARCH REFERENCES

Encyclopedias

31A Cal. Jur. 3d **Evidence** § 615, Calling of Expert by Parties.

31A Cal. Jur. 3d **Evidence** § 616, Calling of Expert by Court.

31 Cal. Jur. 3d **Evidence** § 461, Amount Allowed for Expert Witnesses--When Expert is Court-Appointed.

Other References

2009 California Family Law Report - First Alert 1390, S.R.: In Reversal, CA-3 Holds that J/CT Erred by Granting Petition to Vacate Its Order for Bonding Study Where There was No Substantial **Evidence** that Study was No Longer Required and Would Not be in Dependent Minors' Best Interests.

Treatises and Practice Aids

California Practice Guide Civil Trials & **Evidence** Ch. 1-C, Marshalling the **Evidence**.

California Practice Guide Civil Trials & **Evidence** Ch. 8C-G, Scientific **Evidence**.

California Practice Guide Civil Trials & **Evidence** Ch. 8C-H, Opinion **Evidence**.

California Practice Guide Civil Trials & **Evidence** Ch. 8C-J, Judicial Notice.

California Practice Guide Civil Trials & **Evidence** Ch. 17-D, Costs.

Federal Rules of **Evidence** (3d ed.) App I R 706, Court Appointed Expert Witnesses.

9 Handbook of Federal **Evidence** RuleHIST 706, Court Appointed Experts.

1 McCormick on **Evidence** § 18 (8th ed.), Proposals for Improving the Practices Relating to Expert Testimony.

2 McCormick on **Evidence** Appendix A (8th ed.), Federal Rules of **Evidence** for United States Courts.

Simons California **Evidence** Manual § 3:12, Interpreters in Criminal Cases--When Witness is Incapable of Understanding English.



- Simons California **Evidence** Manual § 4:35, Obtaining a Court-Appointed Expert.
Simons California **Evidence** Manual § 5:28, Which Communications Are Privileged?
Simons California **Evidence** Manual § 7:23, Procedure--Experts.
3 Wharton's Criminal **Evidence** § 13:12 (15th ed.), Court-Appointed Experts.
6 Wharton's Criminal **Evidence** § 65:6 (15th ed.), California.
1 Witkin, California **Evidence** 5th Opinion **Evidence** § 81 (2020), Any Case and Any Issue.
1 Witkin, California **Evidence** 5th Opinion **Evidence** § 82 (2020), Motion or Court's Own Motion.
1 Witkin, California **Evidence** 5th Opinion **Evidence** § 84 (2020), Compensation and Allowance as Costs.
1 Witkin, California **Evidence** 5th Opinion **Evidence** § 85 (2020), Additional Experts Called by Parties.
3 Witkin, California **Evidence** 5th Presentation at Trial § 38 (2020), Interpreters.
3 Witkin, California **Evidence** 5th Presentation at Trial § 39 (2020), Translator of Writings.
3 Witkin, California **Evidence** 5th Presentation at Trial § 95 (2020), Judge's Power to Call New Witnesses.
2 Witkin, California **Evidence** 5th Witnesses § 21 (2020), Former Rule Denying Extra Compensation.
2 Witkin, California **Evidence** 5th Witnesses § 234 (2020), In Camera Inspection.
2 Witkin, California **Evidence** 5th Witnesses § 242 (2020), Overlapping of Privileges.

Relevant Notes of Decisions (14)

[View all 95](#)

Notes of Decisions listed below contain your search terms.


Construction with other laws

Trial court's order appointing two employees of the county department of regional planning as confidential experts for parolees, in the parolees' habeas corpus action challenging sex offender residency restrictions, violated the statute requiring state employees to devote their full time and attention to state employment, since the order interfered with the department's right to direct the tasks undertaken by its employees, absent **evidence** that the department had been advised of the appointment request and had voiced no objection, and absent **evidence** that the two department employees were the only qualified individuals who could assist the parolees. *County of Los Angeles Dept. of Regional Planning v. Superior Court* (App. 2 Dist. 2012) 146 Cal.Rptr.3d 439, 208 Cal.App.4th 1264. Counties  88; Habeas Corpus  752.1

Right to appointment

Trial court is never obliged to appoint expert to assist it in making factual or legal determination as to admissibility of **evidence** unless it appears to court that expert **evidence** is required. *In re Eric A.* (App. 4 Dist. 1999) 87 Cal.Rptr.2d 401, 73 Cal.App.4th 1390, review denied. Trial  18.26

Appraisers

Action of the court in appointing an independent appraiser to ascertain damages without allowing party to rebut appraiser's opinion was not improper on ground that appraiser's report introduced new issues concerning severance damages and special benefits, where condemnor had ample opportunity to introduce **evidence** of any special benefit it desired to offset against severance damages which allegedly occurred. *Contra Costa County Flood Control and Water Conservation Dist. v. Armstrong* (App. 1 Dist. 1961) 14 Cal.Rptr. 68, 193 Cal.App.2d 206. Eminent Domain  210

Child dependency

Any error in excluding full report prepared by foster parents' bonding and attachment expert was harmless in proceedings on dependency petition filed on behalf of child, who was considered an Indian child under ICWA, in which foster parents sought to

depart from ICWA placement preferences and have child placed with them, rather than with child's extended family; court had before it ample **evidence** about extent to which child had bonded with foster parents and extent to which change in placement would have created a significant risk of serious harm, and decision to exclude portions of report were based on failure to advise expert on limitations court had placed on her activities. *In re Alexandria P.* (App. 2 Dist. 2016) 204 Cal.Rptr.3d 617, review filed, review denied, certiorari denied 137 S.Ct. 713, 196 L.Ed.2d 580. **Indians** 🔑 136

Juvenile court's allowing social worker, as a neutral observer, to observe sibling visitation and granting a bonding study by an expert witness were reasonable exercises of its discretion in child dependency proceeding; social worker was required by statute to assess the sibling relationship, report to the court and make permanency plan recommendations, and mother had access to and presented **evidence**, including expert testimony, relevant to all factors set forth in sibling relationship exception to termination of parental right. *In re Valerie A.* (App. 4 Dist. 2007) 61 Cal.Rptr.3d 403, 152 Cal.App.4th 987, review denied. **Infants** 🔑 2090

Child custody

Trial court's finding that expert child custody evaluator lost his objectivity, in considering father's ex parte application to stay the evaluation and remove the evaluator, was supported by substantial **evidence**, including **evidence** that evaluator ordered father to prepare forthwith a safety plan covering his entire house, garage and yard and to change his "perspective" with no adequate rational basis, such that evaluator presumed father's custody of son endangered son, and that evaluator made escalating demands on father based on mother's complaints against father, accompanied by unreasonable deadlines and threats. *In re Marriage of Adams & Jack A.* (App. 4 Dist. 2012) 148 Cal.Rptr.3d 83, 209 Cal.App.4th 1543. **Child Custody** 🔑 416

Eminent domain

Where both parties in condemnation proceeding produced qualified experts and trial judge visited the property in question and pictures and maps of property were introduced in **evidence**, fact that parties' experts radically differed on issue of value of property did not place a burden on the court to appoint experts to assist it in resolving the conflict. *Daly City v. Smith* (App. 1952) 110 Cal.App.2d 524, 243 P.2d 46. **Eminent Domain** 🔑 219

Psychotherapists

Trial court violated the due process right to a fair and adequate hearing in systematically excluding mother's extensive **evidence** of spousal abuse and child abuse, in rejecting mother's "grave risk" affirmative defense to father's petition to return child to Denmark under the Hague Convention on the Civil Aspects of International Child Abduction, even if some of the trial court's rulings excluding pieces of **evidence** might have been justifiable alone or in the abstract, and even though the trial court held its own in camera interview with the child in which she said she did not recall running away from father, where the court denied mother's request for a psychologist to interview and evaluate the child to address mother's concerns that father exercised his position as an alleged custodial abuser to manipulate child's testimony directly or indirectly, and the trial court did not determine whether the Danish court that awarded custody to father actually heard and adjudicated mother's claims of abuse. *Noergaard v. Noergaard* (App. 4 Dist. 2015) 197 Cal.Rptr.3d 546, 244 Cal.App.4th 76, review filed, review denied, appeal after new trial 271 Cal.Rptr.3d 905, modified on denial of rehearing, rehearing denied, certiorari denied 209 L.Ed.2d 756, 2021 WL 1951870. **Child Custody** 🔑 822; **Constitutional Law** 🔑 4396

To the extent it was reasonably necessary to assist his counsel in preparing and presenting a defense to the wardship petition, minor in delinquency proceeding had a constitutional right to the appointment of a qualified expert, including a psychotherapist, to be part of his defense team and a corollary right to speak in confidence to that expert, and that right was further protected by both his counsel's duty to preserve the confidentiality of client information and the lawyer-client privilege as broadly defined in the **Evidence Code**. *Elijah W. v. Superior Court* (App. 2 Dist. 2013) 156 Cal.Rptr.3d 592, 216 Cal.App.4th 140. **Infants** 🔑 2590; **Privileged Communications And Confidentiality** 🔑 165

Costs

An expert witness ordered by the court is one who has been appointed by the court pursuant to section of **Evidence Code** governing appointment of experts by court or other statutory authority; in the absence of an order of the trial court appointing an expert witness, the fees of an expert witness are not recoverable as costs under statute entitling prevailing party to recover costs as matter of right. *Sanchez v. Bay Shores Medical Group* (App. 2 Dist. 1999) 89 Cal.Rptr.2d 634, 75 Cal.App.4th 946, review denied. **Costs, Fees, And Sanctions** 🔑 726

Indigent defendants

The trial court is never obliged to appoint an expert to assist it in making a factual, much less a legal, determination under the statute providing for appointment of ancillary services at public expense for indigent criminal defendants in noncapital cases, unless it appears to the court that expert **evidence** is required. *People v. Stuckey* (App. 3 Dist. 2009) 96 Cal.Rptr.3d 477, 175 Cal.App.4th 898, review denied. **Costs, Fees, And Sanctions** 🔑 1088

Review

Trial court has inherent power, independent of statute, to exercise its discretion and control over all proceedings relating to the litigation before it, including the power to obtain **evidence** upon which the judgment of the court may rest. *People v. Rodriguez* (App. 5 Dist. 2015) 183 Cal.Rptr.3d 630, 233 Cal.App.4th 1403, review granted and opinion superseded 186 Cal.Rptr.3d 360, 347 P.3d 90. **Criminal Law** 🔑 633.1

In reviewing trial court's denial of father's ex parte application to stay a child custody evaluation and remove the evaluator, and its award of sole legal custody to mother, Court of Appeal would not take judicial notice of an accusation filed by the Board of Psychology against the evaluator, since that information was not before the trial court. *In re Marriage of Adams & Jack A.* (App. 4 Dist. 2012) 148 Cal.Rptr.3d 83, 209 Cal.App.4th 1543. **Evidence** 🔑 48

Harmless error

Error by trial court in relying on superseded case law when granting prosecutor's motion for an order directing capital murder defendant to submit to a psychiatric evaluation by a prosecution expert, if she produced expert testimony of her own about her mental condition, was harmless error, as **Evidence Code** provided alternate source of authority and court expressly recognized that the interests of “fairness” and “the ascertainment of truth” required the prosecutor to be able to meet the **evidence** of the defense experts. *People v. Gonzales* (2011) 126 Cal.Rptr.3d 1, 51 Cal.4th 894, 253 P.3d 185, as modified, rehearing denied, certiorari denied 132 S.Ct. 1639, 565 U.S. 1237, 182 L.Ed.2d 238. **Criminal Law** 🔑 1166(10.10)

West's Ann. Cal. Evid. Code § 730, CA EVID § 730

Current with urgency legislation through Ch. 251 of 2021 Reg.Sess. Some statute sections may be more current, see credits for details.

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 8. Of the Trial and Judgment in Civil Actions (Refs & Annos)
Chapter 6. Of References and Trials by Referees (Refs & Annos)

West's Ann.Cal.C.C.P. § 639

§ 639. Appointment of referee

Effective: January 1, 2002

Currentness

(a) When the parties do not consent, the court may, upon the written motion of any party, or of its own motion, appoint a referee in the following cases pursuant to the provisions of [subdivision \(b\) of Section 640](#):

(1) When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

(2) When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

(3) When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.

(4) When it is necessary for the information of the court in a special proceeding.

(5) When the court in any pending action determines that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon.

(b) In a discovery matter, a motion to disqualify an appointed referee pursuant to [Section 170.6](#) shall be made to the court by a party either:

(A) Within 10 days after notice of the appointment, or if the party has not yet appeared in the action, a motion shall be made within 10 days after the appearance, if a discovery referee has been appointed for all discovery purposes.

(B) At least five days before the date set for hearing, if the referee assigned is known at least 10 days before the date set for hearing and the discovery referee has been assigned only for limited discovery purposes.

(c) When a referee is appointed pursuant to paragraph (5) of subdivision (a), the order shall indicate whether the referee is being appointed for all discovery purposes in the action.

(d) All appointments of referees pursuant to this section shall be by written order and shall include the following:

(1) When the referee is appointed pursuant to paragraph (1), (2), (3), or (4) of subdivision (a), a statement of the reason the referee is being appointed.

(2) When the referee is appointed pursuant to paragraph (5) of subdivision (a), the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case.

(3) The subject matter or matters included in the reference.

(4) The name, business address, and telephone number of the referee.

(5) The maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. Upon the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours subject to any findings as set forth in paragraph (6).

(6)(A) Either a finding that no party has established an economic inability to pay a pro rata share of the referee's fee or a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee. A court shall not appoint a referee at a cost to the parties if neither of these findings is made.

(B) In determining whether a party has established an inability to pay the referee's fees under subparagraph (A), the court shall consider only the ability of the party, not the party's counsel, to pay these fees. If a party is proceeding in forma pauperis, the party shall be deemed by the court to have an economic inability to pay the referee's fees. However, a determination of economic inability to pay the fees shall not be limited to parties that proceed in forma pauperis. For those parties who are not proceeding in forma pauperis, the court, in determining whether a party has established an inability to pay the fees, shall consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation.

(e) In any matter in which a referee is appointed pursuant to paragraph (5) of subdivision (a), a copy of the order appointing the referee shall be forwarded to the office of the presiding judge of the court. The Judicial Council shall, by rule, collect information on the use of these references and the reference fees charged to litigants, and shall report thereon to the Legislature by July 1, 2003. This subdivision shall become inoperative on January 1, 2004.

Credits

(Enacted in 1872. Amended by Stats.1933, c. 744, p. 1877, § 108; Stats.1951, c. 1737, p. 4117, § 94, operative Jan. 1, 1952; Stats.1977, c. 1257, p. 4764, § 23, eff. Jan. 3, 1977; Stats.1981, c. 299, p. 1429, § 1; Stats.2000, c. 644 (A.B.2912), § 2; Stats.2000, c. 1011 (S.B.2153), § 1.5; Stats.2001, c. 362 (S.B.475), § 1.)

Editors' Notes

CODE COMMISSION NOTES

1976 Main Volume

A Court cannot refer an ordinary suit at law to a referee for trial against the objection of either party; and this, whether the suit requires the examination of a long account or not. The statute, as to referring cases, applies solely to equity causes. The right of trial by jury in all common law actions is secured by the Constitution of this State.--[Grim vs. Norris, 19 Cal., p. 140](#). In an action to dissolve a partnership and obtain a settlement of the partnership accounts, the Court may order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts but it has no power, if objection is made, to order a reference of the trial of any other issue or issues in the case, nor to direct the referee to report a judgment. Where the trial of an issue of fact is involved, requiring the examination of a long account on either side, the Court may order a reference, with directions to the referee to report upon the account, or any issue of fact involved in the account.--[Williams vs. Benton, 24 Cal., p. 425](#); [Hidden vs. Jourdan, 28 Cal., p. 301](#). The Court may refer for trial the question of damages sustained by reason of an injunction issued without a cause.--[Russell vs. Elliott, 2 Cal., p. 245](#). In an action for balance of an account, the defense was payment by a promissory note. Replication, that the plaintiff was induced to receive the note by means of fraudulent representations. It was held: that the case could not be referred without the written consent of both parties.--[Seaman vs. Mariani, 1 Cal., p. 336](#).

OFFICIAL FORMS

2020 Electronic Pocket Part Update

<Mandatory and optional Forms adopted and approved by the Judicial Council are set out in West's California Judicial Council Forms Pamphlet.>

[Notes of Decisions \(199\)](#)

West's Ann. Cal. C.C.P. § 639, CA CIV PRO § 639

Current with urgency legislation through Ch. 251 of 2021 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 8. Of the Trial and Judgment in Civil Actions (Refs & Annos)
Chapter 6. Of References and Trials by Referees (Refs & Annos)

West's Ann.Cal.C.C.P. § 638

§ 638. Appointment of referee; agreement of parties

Effective: January 1, 2003

[Currentness](#)

A referee may be appointed upon the agreement of the parties filed with the clerk, or judge, or entered in the minutes, or upon the motion of a party to a written contract or lease that provides that any controversy arising therefrom shall be heard by a referee if the court finds a reference agreement exists between the parties:

(a) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision.

(b) To ascertain a fact necessary to enable the court to determine an action or proceeding.

(c) In any matter in which a referee is appointed pursuant to this section, a copy of the order shall be forwarded to the office of the presiding judge. The Judicial Council shall, by rule, collect information on the use of these referees. The Judicial Council shall also collect information on fees paid by the parties for the use of referees to the extent that information regarding those fees is reported to the court. The Judicial Council shall report thereon to the Legislature by July 1, 2003. This subdivision shall become inoperative on January 1, 2004.

Credits

(Enacted in 1872. Amended by Stats.1933, c. 744, p. 1877, § 107; Stats.1951, c. 1737, p. 4117, § 93, operative Jan. 1, 1952; Stats.1982, c. 440, p. 1810, § 1; Stats.1984, c. 350, § 1; [Stats.2000, c. 644 \(A.B.2912\), § 1](#); [Stats.2001, c. 44 \(S.B.562\), § 5](#); [Stats.2002, c. 1008 \(A.B.3028\), § 4](#).)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

2001 Amendment

Section 638 is amended to delete the reference to a “docket,” because courts no longer maintain a record denominated a “docket” in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code 71614 (1953 Cal. Stat. ch. 206, 1, repealed by 1977 Cal. Stat. ch. 1257, 71) (judge of justice court shall keep a book denominated a “docket”), 71614.5 (1959 Cal. Stat. ch. 671, 2, repealed by 1977 Cal. Stat. ch. 1257, 72) (clerk or judge of justice court shall keep the “docket” and other records of

the court). Now actions taken in open court are recorded in the minutes of a superior court. [Gov't Code 69844](#); see also [Copley Press v. Superior Court](#), 6 Cal.App.4th 106, 110, 7 Cal.Rptr.2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See [Gov't Code 69845](#) (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Because the minutes are the proper record for reflecting an agreement in open court, and Section 638 already refers to the minutes, the reference to the “docket” may be deleted without substituting a reference to the register of actions.

A technical change is also made for conformity with preferred drafting style. [30 Cal.L.Rev.Comm. Reports 479 (2000)].

OFFICIAL FORMS

2020 Electronic Pocket Part Update

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[Notes of Decisions \(125\)](#)

West's Ann. Cal. C.C.P. § 638, CA CIV PRO § 638

Current with urgency legislation through Ch. 251 of 2021 Reg.Sess. Some statute sections may be more current, see credits for details.

West's Annotated California Codes
Constitution of the State of California 1879 (Refs & Annos)
Article VI. Judicial (Refs & Annos)

West's Ann.Cal.Const. Art. 6, § 21

§ 21. Temporary judges

Currentness

Sec. 21. On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause.

Credits

(Added Nov. 8, 1966.)

Notes of Decisions (157)

West's Ann. Cal. Const. Art. 6, § 21, CA CONST Art. 6, § 21

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