



## FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

### ***CREATING EMERGENCY JURISDICTION FOR CUSTODY AND VISITATION ISSUES WHEN A CHANGE OF VENUE HAS BEEN ORDERED BUT NOT PERFECTED***

#### **LEGISLATIVE PROPOSAL (FL-2017-01)**

TO: Office of Governmental Affairs

FROM: Avi Levy, Chair of Affirmative Legislation  
B J Fadem, Vice-Chair of Affirmative Legislation

DATE: June 17, 2016

RE: Proposal to Create Emergency Jurisdiction for Custody and Visitation Issues When a  
Change of Venue Has Been Ordered but Not Perfected

#### **SECTION ACTION AND CONTACTS:**

Date of Approval by Section Executive Committee: April 8, 2016

Approval vote: 12-1-4

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#### **SUMMARY OF PROPOSAL**

This legislative proposal would create emergency jurisdiction for child custody and visitation issues when a case has been approved for a change of venue but jurisdiction has not been perfected in the new venue.

#### **ISSUES AND PURPOSE**

There is a void in the law when a case has been ordered to a change of venue but jurisdiction has not been perfected in the new venue. This can result in a denial of access to justice because

of a procedural quirk that leaves a case in limbo. This legislative proposal would remedy that situation.

Under existing law, as soon as a court orders a change of venue that court no longer has jurisdiction to issue any further orders in the case that was transferred. However, until the new court obtains jurisdiction by perfection of the transfer of venue, it does not have jurisdiction. Often, venue is not perfected in the new court for a variety of reasons. For example, there may be no issues pending at the time and therefore no incentive to facilitate the transfer in a timely manner, which requires the payment of a transfer fee (for the superior court from which the transfer was requested) and a filing fee (for the court to which the case will be transferred). More significantly, even if a party timely seeks to perfect the transfer, it often takes months for the courts to facilitate the actual transfer. Members of the Executive Committee of the Family Law Section report, for example, that Alameda County can take up to nine months to transfer a file after a change of venue has been granted, Santa Clara County is taking from four to six months, Contra Costa is taking about four months, a transfer from Santa Barbara County to San Luis Obispo County took five months, and a transfer from Ventura County to Santa Barbara took a year.

Until the transfer has been perfected, neither court has jurisdiction to make orders, and the case can stay in limbo for months. This creates a problem if an urgent issue involving child custody or visitation arises. Most often, this comes up in the context of modification of an existing custody or visitation order, arising out of changed circumstances (e.g., the former spouse with custody has a new boyfriend/girlfriend who has moved into the house and has created a potentially dangerous situation for the child). Under existing law, the only solution is to refile the case and start all over again or wait to complete the transfer, but in some counties a transfer expires so the only option is to start the case all over again. This proposal would remedy the problem under existing law by amending Code of Civil Procedure Section 399 to provide that the court transferring jurisdiction of an action shall retain jurisdiction to issue emergency orders concerning child custody and visitation until such time as the receiving venue has acquired jurisdiction.

**HISTORY:**

The Executive Committee of the Family Law Section is not aware of any similar bill that has been introduced.

**IMPACT ON PENDING LITIGATION:**

None known.

**LIKELY SUPPORT AND OPPOSITION:**

Family law practitioners and litigants are likely to support the proposal. We are not aware of any opposition.

**FISCAL IMPACT:**

There is no anticipated fiscal impact.

**GERMANENESS**

The members of Executive Committee of the Family Law Section have a particular interest in and expertise concerning the issues raised by this proposal in that they often represent litigants in the family law system who are confronted with the problem created by existing law.

**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.

**TEXT OF PROPOSAL**

SECTION 1. Section 399 of the Code of Civil Procedure is amended to read:

(a) When an order is made transferring an action or proceeding under any of the provisions of this title, the clerk shall, after expiration of the time within which a petition for writ of mandate could have been filed pursuant to Section 400, or if a writ petition is filed after judgment denying the writ becomes final, and upon payment of the costs and fees, transmit the pleadings and papers therein (or if the pleadings be oral a transcript of the same) to the clerk of the court to which the same is transferred. When the transfer is sought on any ground specified in subdivision (b), (c), (d), or (e) of Section 397, the costs and fees thereof, and of filing the papers in the court to which the transfer is ordered, shall be paid at the time the notice of motion is filed, by the party making the motion for the transfer. When the transfer is sought solely, or is ordered, because the action or proceeding was commenced in a court other than that designated as proper by this title, those costs and fees (including any expenses and attorney's fees awarded to the defendant pursuant to Section 396b) shall be paid by the plaintiff before the transfer is made; and if the defendant has paid those costs and fees at the time of filing a notice of motion, the same shall be repaid to the defendant, upon the making of the transfer order. If those costs and fees have not been so paid by the plaintiff within five days after service of notice of the transfer order, then any other party interested therein, whether named in the complaint as a party or not, may pay those costs and fees, and the clerk shall thereupon transmit the papers and pleadings therein as if those costs and fees had been originally paid by the plaintiff, and the same shall be a proper item of costs of the party so paying the same, recoverable by that party in the event that party prevails in the action; otherwise, the same shall be offset against and deducted from the amount, if any, awarded the plaintiff in the event the plaintiff prevails against that party in the action. The cause of action shall not be further prosecuted in any court until

those costs and fees are paid. If those costs and fees are not paid within 30 days after service of notice of the transfer order, or if a copy of a petition for writ of mandate pursuant to Section 400 is filed in the trial court, or if an appeal is taken pursuant to Section 904.2, then within 30 days after notice of finality of the order of transfer, the court on a duly noticed motion by any party may dismiss the action without prejudice to the cause on the condition that no other action on the cause may be commenced in another court prior to satisfaction of the court's order for costs and fees. When a petition for writ of mandate or appeal does not result in a stay of proceedings, the time for payment of those costs shall be 60 days after service of the notice of the order.

(b) At the time of transmittal of the papers and pleadings, the clerk shall mail notice to all parties who have appeared in the action or special proceeding, stating the date on which transmittal occurred. Promptly upon receipt of the papers and pleadings, the clerk of the court to which the action or proceeding is transferred shall mail notice to all parties who have appeared in the action or special proceeding, stating the date of the filing of the case and number assigned to the case in the court.

(c) The court to which an action or proceeding is transferred under this title shall have and exercise over the same the like jurisdiction as if it had been originally commenced therein, all prior proceedings being saved, and the court may require amendment of the pleadings, the filing and service of amended, additional, or supplemental pleadings, and the giving of notice, as may be necessary for the proper presentation and determination of the action or proceeding in the court.

(d) Notwithstanding any other provision of law, the court transferring jurisdiction of an action pursuant to Code of Civil Procedure Section 398, shall retain jurisdiction to issue emergency orders concerning child custody and visitation wherein no other court has assumed jurisdiction of the action.