



## FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

### ***PROPOSAL TO EXPAND AND ADD CONSISTENCY TO FAMILY LAW EXCEPTIONS TO AUTOMATIC CASE DISMISSAL***

#### **LEGISLATIVE PROPOSAL (FL-2013-08)**

TO: Office of Governmental Affairs

FROM: Michelene Insalaco, Chair of Affirmative Legislation  
Ana Storey, Vice-Chair of Affirmative Legislation

DATE: July 15, 2012

RE: Proposal to Amend CCP § 583.161 to Expand and Add Consistency to Family  
Law Exceptions to Automatic Case Dismissal

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

Date of Approval by Section Executive Committee: April 13, 2012  
Approval vote: 17-0-0

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**SUMMARY OF PROPOSAL:** To amend existing exemptions to mandatory dismissal of family law cases, expanding those exemptions and adding consistency to the statutory scheme.

#### **ISSUES AND PURPOSE:**

Code of Civil Procedure Section 583.310 mandates automatic dismissal of any case that has not been “brought to trial” within 5 years of filing. This section does not require that a case reach “judgment” within five years, but only that trial commence within the statutory period. (*Gorman v. Holte* (1985) 164 Cal.App.3d 984.) The aim of the 5-year requirement is to

“promote the trial of cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed [and] to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time.” (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 91.)

Case law has created exceptions to this rule. For instance, *People v. Evans* (2005) 132 Cal.App.4th 950, holds that the rule does not apply to petitions filed under the sexually violent predator act because such an application “would be inconsistent with the character of SVP proceedings” and “affect public safety at large.”

There are also statutory exceptions, most importantly Code of Civil Procedure Section 583.161, which provides that for petitions filed under Section 2330 of the Family Code (a case for either dissolution of marriage or legal separation) a case will not be dismissed if a support order has issued, or if the issue of status has been bifurcated for separate trial. While these exceptions make sense, it is not clear why there are no exceptions for petitions to dissolve registered domestic partnerships (Family Code Section 299), parentage cases (Family Code Section 7600), and nullity cases (Family Code Section 2250). It is also not clear why temporary or permanent custody and visitation orders issued prior to trial, temporary or permanent restraining orders, and other orders merit different treatment than pre-trial support orders.

The child support order exception to automatic dismissal was added in 1986 (c. 366, § 2). Case authority explains that the basis was “to provide a full opportunity for reconciliations to occur between spouses who have children [and to] satisfy the frequent need of children and spouses for the continuing protection and jurisdiction of the court.” (*In re Marriage of Hinds* (1988) 205 Cal.App.3d 1398 at p. 1405.) The statute was amended in 1994 to include spousal support orders (through AB 2208 which was an omnibus Assembly Judiciary Committee family law bill “containing technical and non-controversial substantive changes in family law” according to the committee reports).

It is logical to continue to expand the exceptions to encompass pre-trial custody and visitation orders, restraining orders, orders making preliminary property divisions, fee awards, and other orders routinely issued prior to trial in family law cases.

It is also not clear why a bifurcation of marital status creates an exception while bifurcation and separate trial of other issues - for instance the validity of a premarital agreement or the date of separation - does not. The exception for status bifurcation was added in 1994 (Stats.1994, c. 1269 (AB 2208) § 3) following publication of a case in 1990 holding that bifurcation and entry of status dissolution did not bar application of the automatic dismissal rule. (*Lakkees v. Superior Court* (1990) 222 Cal.App.3d 531.) Clearly the legislature saw the lack of logic in dismissing a case after trial on one of the key issues presented. Now that bifurcation and separate trial of other key issues is the norm, the exceptions should be expanded.

The proposed amendments are further supported by use of the term “brought to trial” in Code of Civil Procedure Section 583.310. An evidentiary hearing on one or several of the issues

presented in a family law case, as is now required by Family Code Section 217 (“the court shall receive any live, competent testimony that is relevant and within the scope of the hearing”) is arguably a trial on the issues presented.

In conclusion, family law cases typically proceed in a manner that differs greatly from general civil trials. Rather than moving through non-substantive motion practice and discovery to one trial, in family law important and substantive matters are decided through pre-trial motions and bifurcated proceedings. If a family law case is being actively litigated, it should not be subject to automatic dismissal. Where restraining orders have issued, a party’s safety could be jeopardized by automatic dismissal. Where custody and visitation orders have issued, the children’s well-being could be impacted by automatic dismissal. And, where an issue has already been resolved by pretrial motion or bifurcated trial, it does not serve the parties’ interests or judicial economy to dismiss the case and require new hearings and trials upon refiling of a new action.

This proposed legislation seeks to add consistency, uniformity, and logic to the family law exceptions from automatic dismissal.

**HISTORY:** See above discussion that includes the historical background of the sections discussed herein.

**IMPACT ON PENDING LITIGATION:** Certain pending family law cases would no longer be subject to automatic dismissal.

**LIKELY SUPPORT & OPPOSITION:** Family law practitioners and most family law litigants would likely support these amendments. Advocates for self-represented parties would likely support these amendments. Proponents of fast-tracking family law cases might oppose these amendments.

**FISCAL IMPACT:** None is anticipated.

**GERMANENESS:** The subject matter of this proposed legislation falls within the unique and special knowledge, training, experience and technical expertise of the members of the Executive Committee of the Family Law Section because it amends the Family Code and concerns an issue which impacts the practice of family 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 583.161 of the Code of Civil Procedure is amended to read:

583.161. No petition filed pursuant to Section 299, 2250, 2330 or 7600 of the Family Code shall be dismissed pursuant to this chapter if any of the following conditions exist:

(a) An order for child support or an order regarding child custody or visitation has been issued in connection with the proceeding and the order has not been (1) terminated by the court or (2) terminated by operation of law pursuant to Sections 3402, 3900, 3901, 4007, and 4013 of the Family Code.

(b) An order for spousal support has been issued in connection with the proceeding and the order has not been terminated by the court.

(c) A personal conduct restraining order has been issued and the order has not been terminated by the court.

~~(e) (d) The petition is for dissolution of the marriage and a~~ An issue in the case has been bifurcated and a separate trial on the issue of the status of the marriage has been conducted pursuant to Section 2337 of the Family Code or Rule 5.175 of the California Rules of Court, or an evidentiary hearing under Section 217 of the Family Code has occurred.