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Supersedeas in Child Custody Proceedings

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NOTES

SUPERSEDEAS IN CHILD CUSTODY PROCEEDINGS

Recent years have seen an increasing number of proceedings in supersedeas for the purpose of staying during the pendency of appeal a decree of the trial court ordering a change of custody of minor children.[1] It is in the area of these interim child custody proceedings that there appears the most urgency for a re-evaluation of procedure in supersedeas.

Prior Law

Prior to 1955 the decree of a trial court in a change of custody proceeding involving a child of tender years was, in the event of an appeal, automatically stayed upon the filing of the appeal.[2] Under this procedure a writ of habeas corpus was frequently sought by the successful party to set aside the automatic stay and give immediate effect to the decree.[3] The disadvantages of the procedure were clear, as pointed out by the Senate Interim Judiciary Committee:

> The very reason for the modification [of custody] in nearly every case will be that the trial judge has determined that the welfare of the child demands a change. Yet the mere perfecting of an appeal by the losing party will delay execution of the order, sometimes for very substantial periods. As a result the child is subjected to a continuance of the same conditions which brought about the change ordered.[4]

Furthermore the system was conducive to appeals made in bad faith for no other purpose than to delay effectuation of the decree.[5]

Present Law

Consequently the legislature in 1955 passed a bill sponsored by the California Bar Association which added section 949a to the Code of Civil Procedure.[6] This section set out five provisions designed to remedy the weaknesses in interim child custody procedure. It provided first that there would no longer be an automatic stay in effect upon the filing of an appeal. The trial court, however, was granted the express authority to stay the execution of its own decree as a matter of discretion. An automatic thirty-day stay was provided for those cases in which the parent receiving custody had indicated an intent to remove the child from the jurisdiction. The section was not limited in its application to domestic relations cases, but would apply "in any civil action, action filed

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[1] On supersedeas in general, see 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* §§ 59-68 (1954), 3 CAL JUR. 2d *Appeal* §§ 200-41 (1952).

[2] *In re* Barr, 39 Cal. 2d 25, 243 P.2d 787 (1952), Lerner v. Superior Court, 38 Cal. 2d 676, 242 P.2d 321 (1952), *In re* Browning, 108 Cal. App. 503, 291 Pac. 650 (1930)

[3] *In re* Barr, *supra* note 2; *In re* Browning, *supra* note 2.

[4] 3RD PROGRESS REPORT TO THE LEGISLATURE BY THE SENATE INTERIM JUDICIARY COMMITTEE 34 (March 1955) (hereinafter cited as 3RD PROGRESS REPORT) See also *In re* Barr, 39 Cal. 2d 25, 28-29, 243 P.2d 787, 789 (1952)

[5] 3RD PROGRESS REPORT 34.

[6] See 32 CAL. S. BAR J. 506 (1957); University of California Extension, Continuing Education of the Bar, REVIEW OF 1955 CODE LEGISLATION 116-19 (1955).

under the Juvenile Court Law, or special proceeding" in which the custody of a minor child was involved.[7] Finally, the appellate court was granted specific authority to issue supersedeas or other appropriate writ in aid of its jurisdiction.

While section 949a succeeded in stemming the frontal tide, it in effect left the flanks unguarded with the result that the courts have found virtually the same problem confronting them. Prior to the adoption of the section, the successful party in the lower court petitioned for habeas corpus to set aside the automatic stay and effectuate the trial court's decree;[8] now the losing party in the lower court petitions for supersedeas to stay execution of the decree pending the appeal.[9]

Dilemma of the Appellate Courts

In considering the petition for supersedeas in a case under section 949a the appellate court is necessarily confronted with a peculiar dilemma — that is, should the court deny the petition for supersedeas, allow the child to be removed to a custody which the trial court has found more favorable, and risk the possibility that the child will once more be uprooted in the event of reversal on appeal?[10] Or should supersedeas issue, in which case the child will be allowed to remain in a custody which the trial court has found not in the best interests of the child?[11] If the latter course were followed, it would appear to run contrary to the rationale of section 949a, which was to give immediate effect to change of custody decrees.[12] Furthermore, since the court hearing the petition for supersedeas is the same court which would consider the appeal, a finding of abuse of discretion as a basis for issuing the writ would appear tantamount to a reversal of the trial court's decree before the appeal is heard, since abuse of discretion would also be grounds for reversal.[13]

Faced with this dilemma, the appellate courts have taken inconsistent and even conflicting positions on the requirements for supersedeas. In the much-cited case of *Faulkner v. Faulkner*,[14] for example, the trial court ordered a change of custody from the mother to the father. The mother appealed, but instead of applying to the trial court for stay of execution as provided by section 949a, she petitioned directly to the appellate court for a writ of

[7] See 3RD PROGRESS REPORT 35.

[8] See text at note 3 *supra*.

[9] Milne v. Goldstein, 194 Cal. App. 2d 552, 15 Cal. Rptr. 243 (1961), Sanchez v. Sanchez, 178 Cal. App. 2d 810, 3 Cal. Rptr. 501 (1960); Saltonstall v. Saltonstall, 148 Cal. App. 2d 109, 306 P.2d 492 (1957).

[10] See Faulkner v. Faulkner, 153 Cal. App. 2d 751, 315 P.2d 14 (1957); Faulkner v. Faulkner, 148 Cal. App. 2d 102, 306 P.2d 585 (1957).

[11] See Sanchez v. Sanchez, 178 Cal. App. 2d 810, 3 Cal. Rptr. 501 (1960); see also Sanchez v. Sanchez, 55 Cal. 2d 118, 10 Cal. Rptr. 261, 358 P.2d 533 (1961) (in which the order of the trial court was affirmed).

[12] Faulkner v. Faulkner, 148 Cal. App. 2d 102, 306 P.2d 585 (1957); see also Goto v. Goto, 174 Cal. App. 2d 460, 344 P.2d 808 (1959), Rude v. Rude, 148 Cal. App. 2d 793, 307 P.2d 679 (1957).

[13] See Note, 30 CALIF. L. REV. 209, 211 (1942)

[14] 148 Cal. App. 2d 102, 306 P.2d 585 (1957).

supersedeas. The petition was denied,[15] the court holding that the issuing of the writ where no application had been made to the trial court for a stay would nullify the plain statutory purpose of section 949a. Yet the more recent case of *Denham v. Martina*,[16] after citing the *Faulkner* case, held that application to the lower court was only one factor to be weighed in the appellate court's discretion. The petition was granted.

The situation becomes even more entangled when the appellate courts grapple with the problem of balancing the interests to be protected in a child custody supersedeas proceeding. The appellate courts clearly have the inherent power to protect their jurisdiction over the subject matter of the appeal by means of supersedeas.[17] But it is well established that before this power may be exercised probable error in the trial court must be made to appear.[18] The basic tenet of child custody awards is that the child will be placed in the custody which, in the discretion of the trial judge, will best serve the best interests of the child.[19] Since the awarding of custody is essentially a discretionary matter, the appellate court, in considering the question of probable error, is necessarily placed in the unsavory position of passing upon the discretion of the trial court. Reduced to its simplest terms, the review at that point pits the trial court's discretion against the discretion of the appellate court.

Some appellate courts rigidly refuse to meddle with the discretion of the trial court, unless clear and conspicuous abuse appears.[20] Others attempt to test the trial court's discretion, stating that it is a limited discretion "governed by legal rules, to do justice according to law or to analogies of the law, as near as may be."[21] Still others have concluded that abuse of discretion appears to be synonymous with insufficient evidence.[22]

[15] The denial of this petition meant that the lower court's decree was not stayed, thereby relieving the mother of custody in accordance with that decree. However, the trial court's decree was reversed on appeal, Faulkner v. Faulkner, 153 Cal. App. 2d 751, 315 P.2d 14 (1957). Thus the children in question were exposed to two changes of custody within a year.

[16] 206 Cal. App. 2d 30, 23 Cal. Rptr. 757 (1962).

[17] Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161 (1932); Hill v. Finnigan, 54 Cal. 493 (1880); Sandell, Inc. v. Bailey, 193 Cal. App. 2d 518, 14 Cal. Rptr. 347 (1961). See also 3 WITKIN, CALIFORNIA PROCEDURE *Appeal* § 59 (1954).

[18] Nuckolls v. Bank of California, 7 Cal. 2d 574, 61 P.2d 927 (1936); Rude v. Rude, 148 Cal. App. 2d 793, 799, 307 P.2d 679, 683 (1957); Faulkner v. Faulkner, 148 Cal. App. 2d 102, 306 P.2d 585 (1957).

[19] Gantner v. Gantner, 38 Cal. 2d 691, 242 P.2d 329 (1952); Milne v. Goldstein, 194 Cal. App. 2d 552, 557, 15 Cal. Rptr. 243, 247-48 (1961); Sanchez v. Sanchez, 178 Cal. App. 2d 810, 813, 3 Cal. Rptr. 501, 504 (1960).

[20] See, *e.g.*, Hoffman v. Hoffman, 197 Cal. App. 2d 805, 17 Cal. Rptr. 543 (1961); Sanchez v. Sanchez, *supra* note 19, at 813, 3 Cal. Rptr. at 504; Goto v. Goto, 174 Cal. App. 2d 460, 463, 344 P.2d 808, 810, 811 (1959); Rude v. Rude, 148 Cal. App. 2d 793, 799, 307 P.2d 679, 683 (1957).

[21] Adoption of Cox, 58 Cal. 2d 434, 442, 24 Cal. Rptr. 864, 870, 374 P.2d 832, 838 (1962), citing with approval the dissent in Saltonstall v. Saltonstall, 148 Cal. App. 2d 109, 116, 306 P.2d 492, 496 (1957).

[22] Hoffman v. Hoffman, 197 Cal. App. 2d 805, 812, 17 Cal. Rptr. 543, 547 (1961); Stack v. Stack, 189 Cal. App. 2d 357, 11 Cal. Rptr. 177 (1961).

The quandary in which the appellate courts have found themselves is perhaps best expressed by Judge Duniway in the recent case of *Stack v. Stack*:[23]

> This case illustrates the almost impossible position in which an appellate court is placed when it is called upon to review an order of the superior court transferring the custody of a child....
>
> When are "advantages" equal? How does one weigh a better house against a mother's love or, for that matter, San Francisco with the father and relatives against Kansas plus a mother's love? We confess that we do not know; no doubt that is why the books are so full of language about the broad discretion given the trial court. Except in rare cases, the appellate courts abdicate in favor of the trial court's order, because they do not know what else to do.[24]

The first supreme court case to apply section 949a is *Adoption of Cox*.[25] Although it appears that the intention of the court was to give some direction to the lower appellate courts in similar cases,[26] the supreme court seems to have been diverted by the same problems as faced the district courts. As a result, the opinion in *Cox* is able to offer little in the way of affirmative guidance. The basic rule of the controlling interest of the child was re-affirmed,[27] as was the requirement of a showing of probable error in the trial court.[28] However, in attempting to define what constitutes probable error in a custody proceeding, the court limited itself to equating probable error with abuse of discretion, and pointed out, in granting the petition, that in general a trial court's discretion is neither "plenary nor is it an arbitrary one." [29]

A Solution

It is submitted that all this ambiguity is but a symptom of a legal malady for which the courts are not responsible. Recognizing that in many child custody proceedings justice was not being done, the legislature in 1955 adopted section 949a as a corrective measure. For over six years the courts have struggled to interpret and apply this code section, and still substantial uncertainty prevails in interim custody proceedings. Perhaps the time has come for a re-evaluation of section 949a, and for new direction in the method of handling these cases.[30]

Proposed reform of the procedure in interim child custody proceedings should, it seems, seek two primary objectives. First, it should strive for some

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[23] 189 Cal. App. 2d 357, 11 Cal. Rptr. 177 (1961).

[24] *Id.* at 358, 365, 11 Cal. Rptr. at 179, 183-84.

[25] 58 Cal. 2d 434, 24 Cal. Rptr. 864, 374 P.2d 832 (1962).

[26] The reports indicate a mounting interest in these cases among the members of the supreme court. In Rude v. Rude, 148 Cal. App. 2d 793, 307 P.2d 679 (1957), two justices favored hearing by the supreme court; later, in Goto v. Goto, 174 Cal. App. 2d 460, 344 P.2d 808 (1959), the number had increased to three. Although *Adoption of Cox* was not a domestic relations case, it would fall under the same provisions of § 949a as any other case involving the custody of a minor. 3RD PROGRESS REPORT 35.

[27] 58 Cal. 2d at 441, 24 Cal. Rptr. at 870, 374 P.2d at 838.

[28] *Id.* at 442, 24 Cal. Rptr. at 870, 374 P.2d at 838.

[29] *Ibid.*

[30] See Stack v. Stack, 189 Cal. App. 2d 357, 373, 11 Cal. Rptr. 177, 188 (1961).

degree of permanency in the initial custody decree, so that future uprooting of the child is reduced to a minimum.[31] Second, the appellate courts should be relieved as far as possible of the burden of pitting their discretion against that of the trial courts in custody matters.

Since the procedure now in use is specified by section 949a of the Code of Civil Procedure, any modification would no doubt have to be accomplished by means of amendment or repeal of this section and substitution of new measures. In the light of the situations discussed above, the following points are offered as possible considerations for any proposed reform legislation.

It would appear beyond question that the trial court in its function as fact finder is in the best position among the courts to weigh the circumstances which must determine where the best interests of the child will be served. The trial court, however, should be provided with every possible tool so that its initial custody award may be as equitable and, above all, as permanent as possible. As a step in this direction the trial courts should be encouraged or even required to consider facts and recommendations provided by domestic relations investigators.[32] In many cases these investigators would be able to conduct a much more detailed inquiry into the circumstances of custody which bear upon the welfare of the child than is possible within the framework of the ordinary custody hearing.[33]

Section 949a has effectively remedied the problem of children being left in a less-favorable custody pending appeal by elimination of the automatic stay. Cases may arise, however, in which an immediate effectuation of the change of custody decree could operate to the disadvantage of the child; for example, a decree rendered during the course of the school year, where the present custody does not appear to be harmful to the child.[34] In such a case, the trial court should have the power, as provided presently by section 949a, to stay the execution of its decree until the end of the school term.

This power of the trial court to stay its own decree would be particularly appropriate if its decree were not generally subject to stay from above by supersedeas. And in view of the present dilemma in the appellate courts with regard to supersedeas, as outlined earlier, it would seem that relieving the appellate courts of this responsibility would have considerable merit. Such a modification would lend the trial court's decree a greater degree of permanence, and at the same time the appellate court would avoid being placed in the position of policing the trial court's discretion. The discretionary burden

[31] See Comment, 13 STAN. L. REV. 108, 116 (1960).

[32] The machinery for such investigators is already provided by CAL. GOV. CODE §§ 69894.1, 69900; and CAL. WELF. & INST. CODE § 638.1.

[33] In Washburn v. Washburn, 49 Cal. App. 2d 581, 122 P.2d 96 (1942), it was held an abuse of discretion for the trial judge to adopt the recommendations of a domestic relations investigator without indication that he considered other evidence. But the supreme court in Fewel v. Fewel, 23 Cal. 2d 431, 144 P.2d 592 (1943), recognized the value of such reports when considered with other evidence presented in court.

[34] "It is well settled that the court does not need to find one parent unfit before it can award a child to the other parent." Faulkner v. Faulkner, 148 Cal. App. 2d 102, 107, 306 P.2d 585, 588 (1957).

would thus be squarely upon a trial court apprised of the best possible factual information, given ample latitude in the effectuation of its decision upon that evidence, and relieved to some degree of the uncertainty appurtenant to appellate review.

It may be argued that such a provision would rob the appellate courts of the inherent power to exercise jurisdiction over the subject matter of an appeal. Even though this be true, such a provision is not entirely without precedent. A writ of habeas corpus issued by a trial court in a child custody matter, which is in many ways analogous to a custody decree, has long been held free from appellate review in California.[35]

Since the cases in which the jurisdiction of the appellate court is most seriously threatened are cases involving removal of the child from the jurisdiction,[36] the power to issue supersedeas might well be reserved for such removal cases. Retaining the automatic thirty-day stay presently provided by section 949a in these cases would provide sufficient time for filing the petition for supersedeas.

Conclusion

It cannot be said that these suggestions would completely eliminate the many inconsistencies to which the appellate courts have been driven in attempts to reach equitable decisions. However, reducing the number of custody decrees subject to review by supersedeas is certain to reduce the chance of having the child bounced around like "a human football whose possession by either parent depends upon the agility, activity, and determination of each." [37]

It must be emphasized that this proposed revision of the procedure with regard to supersedeas in child custody proceedings is not represented as a panacea. On the contrary, it seems only realistic to accept as a basic premise that no legal procedure can eliminate the bitterness and anguish precipitated by the struggle between two parents for the possession of their child. Both sides must ultimately lose. Be that as it may, the present procedure is satisfactory neither to litigants nor to the courts. If a better solution presents itself, there should be no reluctance to take off the old and put on the new.

*J. Brian Finegan**

[35] *In re* Flodstrom, 45 Cal. 2d 307, 288 P.2d 859 (1955); *In re* Bruegger, 204 Cal. 169, 267 Pac. 101 (1928); *In re* Croze, 145 Cal. App. 2d 492, 302 P.2d 595 (1956); *But see In re* Newman, 187 Cal. App. 2d 377, 9 Cal. Rptr. 746 (1961).

[36] See Lerner v. Superior Court, 38 Cal. 2d 676, 242 P.2d 321 (1952); Milne v. Goldstein, 194 Cal. App. 2d 552, 15 Cal. Rptr. 243 (1961). *But see* Stack v. Stack, 189 Cal. App. 2d 357, 367, 11 Cal. Rptr. 177, 184-85 (1961).

[37] *In re* Browning, 108 Cal. App. 503, 507, 291 Pac. 650, 651 (1930). See also Saltonstall v. Saltonstall, 148 Cal. App. 2d 109, 306 P.2d 492 (1957).

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