



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: September 24, 2019

Title

Family Law: Duty of Judge Hearing Matter
Under Family Code Sections 4251(a),
4252(b)(7)

Agenda Item Type

Action Required

Effective Date

January 1, 2020

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 5.305(b)

Date of Report

September 6, 2019

Recommended by

Family and Juvenile Law Advisory
Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Contact

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Executive Summary

The Family and Juvenile Law Advisory Committee proposes amending the rule governing the circumstances under which a judge may hear a title IV-D matter when exceptional circumstances prevent a child support commissioner from doing so. By removing the requirement that a judge must make an “interim” order with a follow-up hearing set in front of a commissioner, costs currently incurred by the courts, parties, and local child support agencies resulting from the second hearing would be eliminated.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2020, amend California Rules of Court, rule 5.305(b) to more clearly define the roles of the judge and the court at the hearing, as authorized in Family Code sections 4521(a), 4252(b)(7).

Relevant Previous Council Action

The Judicial Council adopted California Rules of Court, rule 1280.1¹, effective July 1, 1997, to define the exceptional circumstances under which a judge may hear a title IV-D matter when a child support commissioner is unable to do so. Minor technical and formatting amendments were made to the rule effective January 1, 2003, and January 1, 2007.

Analysis/Rationale

While the Family Code allows for a judge to hear a title IV-D matter, only when a child support commissioner is unavailable due to “exceptional circumstances,” defining what constitutes “exceptional circumstances” was left to the Judicial Council. (Fam. Code, §§ 4251(a), 4252(b)(7).) (See Link A.)

In addition to defining “exceptional circumstances,” the rule also states in the subdivision entitled “Duty of judge hearing matter” that a judge “must make an interim order and refer the matter to the commissioner for further proceedings.” (Cal. Rules of Court, rule 5.305(b).) This provision has been interpreted inconsistently statewide. In some courts, the judge’s order is treated as a temporary order and the motion is subsequently calendared to be heard by a title IV-D child support commissioner when available. In other courts, the order is treated as final, and only later motions are calendared for hearing by the title IV-D child support commissioner.

Moreover, interpreting the rule as requiring the judge to only make an interim order and requiring referral to the title IV-D child support commissioner for further action places the subordinate judicial officer in the position of reviewing a judge’s order and unnecessarily incurs additional costs by the courts, parties, and local child support agency. Finally, Family Code section 4251(a) provides that a judge may hear a title IV-D matter only if a child support commissioner is unavailable “due to exceptional circumstances.” However, nothing in the statute requires that the judge only make an interim order or that a commissioner review that order at a follow-up hearing.

The committee therefore recommends amending rule 5.305(b) to clarify that the judge has the discretion to make a substantive order or to instead make an interim order and refer the matter back to the commissioner for further proceedings by deleting the term “must” and instead state the judge “may make an order or may make an interim order and refer the matter to the commissioner...when appropriate.” In addition, the committee recommends that the rule be amended to add a sentence stating “any future proceedings” must be heard by a child support commissioner, so long as the local child support agency remains a party to the case. The full text of the amended rule is attached at page 5.

Policy implications

By removing the requirement that the judge must make an “interim” order with a follow-up hearing then set in front of a commissioner, costs currently incurred by the courts, parties, and

¹ Effective January 1, 2003, this rule was renumbered to rule 5.305.

local child support agency resulting from the second hearing would be eliminated. The requirement of setting a second hearing is especially burdensome for self-represented litigants, who make up the vast majority of case participants in title IV-D matters, and often must take time off from work, arrange for childcare, and pay for transportation or parking to attend such a court hearing.

Comments

This proposal circulated for comment as part of the spring 2019 invitation-to-comment cycle, from April 12 to June 10, 2019, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, legal services attorneys, social workers, and other family law professionals. The proposal also went to the Department of Child Support Services, the Child Support Directors Association of California's Legal Practices Committee chair, and child support commissioners.

Eleven organizations and individuals provided comment: six agreed with the proposal, four agreed with the proposal if modified, and one did not agree with the proposal. A chart with the full text of the comments received and the committee's responses is attached at pages 6–16.

Included in the invitation-to-comment was the following question “[s]hould the proposed rule include a provision that states a judge has the discretion to make a temporary order and continue the matter to be heard by a commissioner?” Two commentators answered “no” and five commentators answered “yes” to this question or offered other comments that would support this position. In support of the “yes” position, one commentator stated that they believed “the judge should have discretion to make temporary orders.” This sentiment was echoed by three other commentators. The committee considered these comments, recommends that the rule be further amended to include this provision, and has made this change.

Alternatives considered

Amendments to rule 5.305 are needed to ensure uniformity statewide regarding the authority of judges to hear title IV-D motions when the child support commissioner is unavailable and to eliminate the need for a second court hearing. The committee considered either taking no action at this time or circulating the rule to request specific comment on the proposed changes. The committee decided to recommend circulation of the proposal to obtain suggestions for alternative language and give courts notice regarding this change in court operations and procedures.

Fiscal and Operational Impacts

The committee anticipates that this proposal will result in some initial costs to the courts to train judicial officers and court staff regarding the amended rule. However, the committee expects that the changes will reduce costs in the long term for the courts, parties, and local child support agencies, by simplifying procedures and reducing the number of court hearings on calendar.

Attachments and Links

1. Cal. Rules of Court, rule 5.305, at page 5
2. Chart of comments, at pages 6–16
3. Link A: Fam. Code, §§ 4250–4253,
https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=FAM&division=9.&title=&part=2.&chapter=2.&article=4

Rule 5.305 of the California Rules of Court is amended, effective January 1, 2020, to read:

1 **Rule 5.305. Hearing of matters by a judge under Family Code sections 4251(a) and**
2 **4252(b)(7)**

3
4 **(a) Exceptional circumstances**

5
6 The exceptional circumstances under which a judge may hear a title IV-D support
7 action include:

- 8
9 (1) The failure of the judge to hear the action would result in significant
10 prejudice or delay to a party including added cost or loss of work time;
11
12 (2) Transferring the matter to a commissioner would result in undue
13 consumption of court time;
14
15 (3) Physical impossibility or difficulty due to the commissioner being
16 geographically separate from the judge presently hearing the matter;
17
18 (4) The absence of the commissioner from the county due to illness, disability,
19 death, or vacation; and
20
21 (5) The absence of the commissioner from the county due to service in another
22 county and the difficulty of travel to the county in which the matter is
23 pending.
24

25 **(b) Duty of judge hearing matter**

26
27 A judge hearing a title IV-D support action under this rule and Family Code
28 sections 4251(a) and 4252(b)(7) ~~must~~ may make an order or may make an interim
29 order and refer the matter to the commissioner for further proceedings when
30 appropriate. As long as a local child support agency is a party to the action, any
31 future proceedings must be heard by a commissioner, unless the commissioner is
32 unavailable because of exceptional circumstances.
33

34 **(c) Discretion of the court**

35
36 Notwithstanding (a) and (b) of this rule, a judge may, in the interests of justice,
37 transfer a case to a commissioner for hearing.

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Family Law: Duty of Judge Hearing Matter Per Family Code sections 4521(a), 4525(b)(7) (Amend Cal. Rules of Court, rule 5.305(b))

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	California Department of Child Support Services by Lucila Ledesma, Attorney	A	<p>The California Department of Child Support Services wishes to provide the following comments in support of the proposed amendment to California Rules of Court, rule 5.305(b).</p> <p><i>Does the proposal appropriately address the stated purpose?</i></p> <p>Yes, the proposal creates efficiencies for all parties involved by allowing the judge hearing the matter to make a judgment that does not require review and ratification by a IV-D commissioner and therefore eliminates the need for a second hearing on the same issue.</p> <p><i>Should the proposed rule include a provision that states a judge has the discretion to make a temporary order and continue the matter to be heard by a commissioner?</i></p> <p>No, this would essentially negate the proposed change in some cases. It could also have the effect of causing a commissioner, who is a temporary judge, to overrule the actions of a permanent judge. Any matter that a commissioner can definitively decide, a judge can definitively decide.</p>	<p>No response required.</p> <p>The committee discussed if the proposed rule should include a provision that states a judge maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that it is recommending for adoption.</p>

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2.	Orange County Bar Association by Deirdre Kelly, President	AM	<p><i>Does the proposal appropriately address the stated purpose?</i></p> <p>The proposal appropriately addresses the stated purpose. However, there is likely to be issues with the undefined term “exceptional circumstances.”</p> <p><i>Should the proposed rule include a provision that states a judge has the discretion to make a temporary order and continue the matter to be heard by a commissioner?</i></p> <p>The current state of the law regarding IF there can be a “temporary” support order is that our statutes do not provide for such an order. IRMO Goodman& Gruen (2011) 191 Cal.App.4th 627 holds for the proposition that court orders cannot be modified until/unless a party files a motion, and then retroactivity can only be to the filing date of that motion. The amendment to the Rule of Court regarding “temporary orders” creates a certain amount of confusion unless the Family Code is changed.</p>	<p>The Invitation to Comment for this proposal only included the section (b) of the rule that the committee is proposing to amend; the list of “exceptional circumstances” is set forth in rule 5.305(a).</p> <p>No response required.</p>
3.	The Executive Committee of the Family Law Section of the California Lawyers Association (FLEXCOM)	N	FLEXCOM does not agree with this proposal. FLEXCOM’s concern is that the proposal may encourage a practice of a judge making non-interim orders in a Title IV-D case as the norm, instead of as an	The committee discussed if the proposed rule should include a provision that states a judge maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that

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			exception to the rule. Such a practice could give more frequent rise to substantive and/or procedural errors by judges that are unfamiliar with Title IV-D regulations, the guideline support calculator used in Title IV-D cases, and other unique provisions and requirements of the Title IV-D program.	it is recommending for adoption.
4.	Superior Court of Orange County, Juvenile Court and Family Law Divisions	AM	<p>Rule 5.305 Hearing of matters by a judge under Family Code sections 4251(a) and 4252(b)(7)</p> <p>If possible, clarify or provide examples of what would be considered exceptional circumstances.</p> <p>“A judge...must make an order” is also somewhat vague. Is this a support order only or just an order for continuance for a commissioner to hear the case when one is available?</p> <p>Request for Specific Comments <i>Would the proposal provide a cost savings?</i></p> <p>No, there will not be a cost savings.</p> <p><i>What would the implementation requirements be for courts?</i></p> <p>Judges and staff would be informed of the changes.</p>	<p>The Invitation to Comment for this proposal only included the section (b) of the rule that the committee is proposing to amend; the list of “exceptional circumstances” is set forth in rule 5.305(a).</p> <p>The committee discussed if the proposed rule should include a provision that states a judge maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that it is recommending for adoption.</p> <p>No response required.</p> <p>No response required.</p>

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			<p><i>Would 3 months from the Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</i></p> <p>Yes, 3 months would be sufficient time to implement the changes.</p>	<p>No response required.</p>
5.	Superior Court of California, County of San Diego by Mike Roddy, Executive Director	A	<p><i>Does the proposal appropriately address the stated purpose?</i></p> <p>Yes.</p> <p><i>Should the proposed rule include a provision that states a judge has the discretion to make a temporary order and continue the matter to be heard by a commissioner?</i></p> <p>Yes.</p> <p><i>Would the proposals provide cost savings? If so, please quantify.</i></p> <p>Yes, by eliminating the need to set a further hearing and the associated work (e.g., calendar prep, case updating, etc.)</p> <p><i>What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe),</i></p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>

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			<p><i>changing docket codes in case management systems, or modifying case management systems.</i></p> <p>Notify judicial officers and staff.</p> <p><i>Would three months from Judicial Council approval of these proposals until their effective date provide sufficient time for implementation?</i></p> <p>Yes.</p> <p><i>How well would these proposals work in courts of different sizes?</i></p> <p>It appears that the proposal would work for courts of all sizes.</p>	<p>No response required.</p> <p>No response required.</p> <p>No response required.</p>
6.	Judy B. Louie, ACCESS Center, Director/Family Law Facilitator, Superior Court of San Francisco County	A	proposed language is clear	No response required.
7.	Child Support Directors Association of California by Terrie Porter	A	<p>General comment: The proposal makes the rule more clear as to the extent of a judge hearing a IV-D matter and is more cost effective to the LCSA and participants.</p> <p>Does the proposal appropriately address the stated purpose? Yes it does.</p> <p>Should the proposed rule include a provision that states a judge has the</p>	<p>No response required.</p> <p>No response required.</p> <p>The committee discussed if the proposed rule should include a provision that states a judge</p>

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			discretion to make a temporary order and continue the matter to be heard by a commissioner? The preference would be to give the judge that discretion so that if a matter has a significant history before the commissioner, or further consideration is needed, the judge can make the temporary order and set the matter for further hearing before the commissioner.	maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that it is recommending for adoption.
8.	Susan Ryan, Chief Deputy - Legal Services, Riverside Superior Court	A	<p>Does the proposal appropriately address the stated purpose? Yes.</p> <p>Should the proposed rule include a provision that states a judge has the discretion to make a temporary order and continue the matter to be heard by a commissioner? Yes, to make clear that a judge retains such discretion.</p> <p>Would the proposal provide cost savings? Given that there are likely few IV-D hearings presided over by a judge, its doubtful that this would have much impact.</p> <p>Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.</p> <p>How well would this proposal work in courts of different sizes? The size of the</p>	<p>No response required.</p> <p>The committee discussed if the proposed rule should include a provision that states a judge maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that it is recommending for adoption.</p> <p>No response required.</p> <p>No response required.</p>

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			court would have no impact.	
9.	Los Angeles Superior Court	A	<p>Does the proposal appropriately address the stated purpose? Yes, the proposal addresses the stated purpose.</p> <p>Should the proposed rule include a provision that states a judge has the discretion to make a temporary order and continue the matter to be heard by a commissioner? No, as that would replicate the process currently practiced at some courts to have the matter set in front of an IV-D commissioner, who would review the temporary order made by the judge. This is not a good use of court resources, or the parties' time.</p> <p>Would the proposal provide cost savings? If so please quantify. Yes, matters would not need to be set for duplicate hearings for the commissioner to review the order made by the judge.</p> <p>What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management</p>	<p>No response required.</p> <p>The committee discussed if the proposed rule should include a provision that states a judge maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that it is recommending for adoption.</p> <p>No response required.</p> <p>No response required.</p>

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	Commenter	Position	Comment	Committee Response
			<p>systems, or modifying case management systems? Implementation requirements include training of Judicial Officers.</p> <p>Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Three months would be sufficient for the court. Implementation time for the software developers is unknown.</p>	No response required.
10	Hon. Rebecca Wightman, Superior Court of San Francisco County	AM	<p>AGREE ONLY IF MODIFIED - I do not disagree generally with the need to modify the language in the existing rule for the reasons noted in the proposal, but the current proposed changes in the rule now <i>fail</i> to address at an important function the original language provided: to wit, to prevent incorrect orders from being made by a judicial officer, i.e. judge, who is inexperienced in the unique aspects of AB1058 proceedings. Further, the proposed directive language which now <i>requires</i> a judge to make an order, without more, could be misconstrued that it must be a substantive order. By providing options, and adding clarifying language, it can help alleviate the concerns noted.</p> <p>There are many laws and aspects of AB1058 proceedings which are unfamiliar</p>	The committee discussed if the proposed rule should include a provision that states a judge maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that it is recommending for adoption.

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			<p>to a judge, which can result in inadvertent incorrect orders being made. Such unfamiliarity can encompass jurisdictional matters (e.g. failing to recognize an original out of state registration or UIFSA matter as being limited in purpose, so no jurisdiction to modify), or involve different rules applicable in IV-D proceedings (e.g. seek work orders cannot be made against a party receiving cash public assistance), or simply making orders that are difficult to enforce (e.g. issuing off-sets to child support for variable monthly add-on expenses paid by the other parent). These are just a few of the many more situations and examples that exist. While the local child support agency may be able to point out some of these issues, the local agency often misses issues themselves, particularly the jurisdictional ones, and because they are a party to the case, it puts them in the awkward situation of trying to tell the judge what they can and cannot do.</p> <p>An alternative suggestion to address both the reasons noted in the proposal, as well as the problems that can occur when there is no direction whatsoever other than stating the obvious of “make an order” would be to keep the interim language but simply change the word “must” to “may” in 5.305(b), as well as clarifying that the judge</p>	

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			<p>can also issue an order and in either case reserve jurisdiction for a limited period of time (which would allow the parties or the court on its own to correct any problematic orders).</p> <p>(b) A judge hearing a title IV-D support action under this rule and Family Code sections 4251(a) and 4252(b)(7) must may make an interim order and refer the matter to the commissioner for further proceedings, or issue an order and reserve jurisdiction for a limited or reasonable period of time as appropriate. As long as a local child support agency is a party to the action, any future proceedings must be heard by a commissioner, unless the commissioner is unavailable because of exceptional circumstances.</p> <p>I have decades of AB1058 experience and have discussed this issue with many other AB1058 colleagues over the years. I am certain I am not alone when I say that often times after someone has covered a calendar where they do not have the experience in Title IV-D proceeding, the orders emanating from that calendar are less than ideal and have caused problems – which could no longer be easily fixed if the proposed rule is not modified. The exact language or sequence of the suggested re-wording is not as important as addressing the concerns</p>	

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	Commenter	Position	Comment	Committee Response
			raised in this comment.	
11	Child Support Directors Association of California by Ronald Ladage, Chair, CSDA Judicial Council Forms Committee, Director/Chief Attorney, El Dorado County DCSS	AM	<p>The Committee generally agrees with this proposal. We believe the proposal appropriately addresses its stated purpose; however, the Committee recommends modifying the Rule to allow for more judicial discretion as follows:</p> <p>Rule 5.305: A judge hearing a title IV-D support action under this rule and Family Code sections 4251 (a) and 4252(b)(7) must make either temporary or final orders. As long as a local child support agency is a party to the action, any future proceedings must be heard by a commissioner, unless the commissioner is unavailable because of exceptional circumstances, or the court finds that in the interests of judicial economy, the continued proceedings regarding the temporary order(s) should be heard by the same judge.</p> <p>The Committee believes that the judge should have discretion to make temporary orders along with the discretion to hear the continued matter in the interests of judicial economy until final orders are made.</p> <p>Thank you for the opportunity to provide input, express our ideas, experiences and concerns with respect to the proposed rules and form changes.</p>	The committee discussed if the proposed rule should include a provision that states a judge maintains the discretion to make a temporary order and continue the matter to be heard by a commissioner when appropriate and recommends to include such a provision into the revisions that it is recommending for adoption.