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FOREVER TORN ASUNDER: CHARTING EVIDENTIARY PARAMETERS, THE RIGHT TO COMPETENT COUNSEL AND THE PRIVILEGE AGAINST SELF-INCrimINATION IN CALIFORNIA Child Dependency And Parental Severance Cases

William Wesley Patton*

I. INTRODUCTION

The California child welfare dependency system is in the throes of a dilemma. Between 1980 and 1985, the number of child abuse petitions filed in Los Angeles County doubled. In response to the Federal Adoption Assistance and Child Welfare Act of 1980, California streamlined its dependency system to provide expedited determination of whether families temporarily separated, based upon findings of abuse or neglect, can be reunited.

1. In 1985, 17,913 child abuse or neglect petitions were filed with the Department of Public Social Services Department of Children’s Services (D.P.S.S./D.C.S.) in Los Angeles County alone. In contrast, in 1980 only 8,192 cases were filed, representing over a 100% increase in filings between 1980 and 1985 in Los Angeles County. Letter from Diana R. Bichler, Director of Juvenile Court Services, to William Patton (July 7, 1986) (on file in the Whittier College School of Law (WCSL) Library). In 1963 there were only 150,000 reports of child abuse nationally. In 1971 the number of reports jumped to 610,000, and in 1981 they escalated to 1.3 million. However, “up to 65 percent of all reports are now determined to have been made inappropriately.” Besharov, Deliverance: The Duty to Report Child Abuse, L.A. Daily J., Sept. 4, 1986, § I, at 4, col. 5 (Douglas J. Besharov was Director of the U.S. National Center on Child Abuse and Neglect from 1975-1979).


14 cut in half the time period within which courts determine whether families could be reunited or whether children should be permanently placed outside the home. The expedited determination would be made possible by providing increased funds to help families quickly resolve their problems and become reunited. However, California implemented only half of its objective. Although families now have one year, instead of two years, to resolve their problems, the State did not provide increased funding or resources to assist family reunification.

Expedited judicial decisions concerning the future of families are severely impeded by "a state of chronic system overload." In 1985, Los Angeles County alone received approximately 5,500 reports of suspected child abuse or neglect per month. Of these reports, about 1,200 cases per month were serious enough to require court proceedings. Between 1979 and 1983 the number of child abuse and neglect referrals rose by 46% and the number of dependent children under court supervision rose by 62%. Child dependency funding between fiscal years 1980-81 and 1984-85 rose only 24%, while referrals accepted by the Department of Children's Services rose 37% and dependency investigations rose 120%. Further, the budget for dependency courts rose 65% while the number of cases rose by 100%.

4. Instead of continuing the two-year period for family reunification, S.B. 14 provided a one-year period. California Welfare and Institutions Code section 361(f)(1) now provides that, "the juvenile court shall order the probation officer to provide child welfare services to the minor and the minor's parents or guardians for the purpose of facilitating reunification of the family within a maximum time period not to exceed 12 months." CAL. WELF. & INST. CODE § 361(f)(1) (West 1984). Welfare and Institutions Code section 366.25(a) requires the court within 12 months after the original detention hearing to determine whether the reunification plan will permit return of the child to his family or whether a Civil Code section 232 parental severance trial to free the child for adoption should be pursued. Id. at § 366.25(a).

5. [D]etailed examination of the budget reveals the virtual absence of funding for one crucial area, namely specific in home services aimed at enabling at-risk children to remain in — or be returned to — their own families but under safe conditions. These services were mandated by State legislation, but the State failed to provide adequate funding to implement them. Roundtable, 1986, supra note 3, at 15. In In re James B., 184 Cal. App. 3d 524, 229 Cal. Rptr. 206 (1986), there was a delay of several months between recommended child counseling and therapy because of "a shortage of qualified counselors" and "the lack of sufficient staff at Mental Health Services." Id. at 528-29, 229 Cal. Rptr. at 207-08.


9. Roundtable, 1986, supra note 3, at 15, 119. The dramatic increase in child abuse and neglect cases is illustrated in the following table:
juvenile dependency courts' case loads are unmanageable; each Los Angeles County dependency judge hears five to ten new cases and as many as 25 reviews a day of cases already under court jurisdiction. The budget constraints and increase in child dependency cases have infected the probation officers' reports, the single most influential data used to determine whether abuse or neglect occurred and whether temporary separation or permanent severance of parental ties is necessary. In Los Angeles County, each social worker handles between 60 and 100 active cases, the highest caseload in the nation. Grand juries across California have recently reported that probation officers lack the training, education and skills required to work with abused or neglected children. The combination of high case loads and minimal expertise have forced some probation officers to violate statutorily mandated procedures to ensure that court intervention into family life is necessary; required probation officer family services are frequently not given. Further, the probation reports

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<th>1975</th>
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<tr>
<td>Referrals</td>
<td>19,678</td>
<td>27,212</td>
<td>38,700</td>
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<tr>
<td>Dependency Petitions Filed</td>
<td>3,291</td>
<td>6,147</td>
<td>9,449</td>
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Average Number of children supervised by the court each month: 7,296, 11,325, 18,385


10. Growing Tragedy, supra note 7, at 33, col. 2.

11. The term "probation officer" will be used generically for county workers mandated to investigate and prepare reports in child dependency cases. That term includes probation officers, social workers, case workers, adoption workers, etc. See CAL. WELF. & INST. CODE §§ 280, 358, 361(d)(1), 362(d) (West 1984 & Supp. 1987); CAL. CIV. CODE §§ 232, 233 (West 1982 & Supp. 1987).

12. Children's Services, supra note 7, at A3, col. 5. On September 7, 1985, a union representing 1,600 Los Angeles County probation officers threatened to walk off their jobs because of the high caseloads and low salary; however, the strike was averted. L.A. Times, Sept. 24, 1985, § II, at 6, col. 2.


14. Jane Henderson, a consultant to the state Senate Select Committee on Children and Youth, stated that "system overload has fostered 'widespread disregard of current rules' by social workers who cannot possibly perform to standards and still service all their cases." In Child-Abuse Cases, Kids Sometimes Become Victims at the Hands of Their Guardians, L.A. Daily J., Aug. 21, 1986, at 20, col. 4. Further, Stanford Professor Michael Wald, who helped write much of the California dependency scheme, stated "[o]ur current model assumes competence, when in fact there's a lot of incompetence. It assumes trained people, when there are
are becoming less reliable and are often incomplete. In a recent case, the court concluded that there was “strong evidence the county welfare department did not provide or offer [required] services to . . . [the mother] . . . designed to overcome the problems which led to the loss of custody of her children.” Another case noted “a department ‘mind set’ to place appellant’s children for foster parent adoption as soon as possible” even though placement with relatives was a more feasible remedy which the department failed to timely explore.

Both the number of child abuse and neglect cases and public outcry have dramatically increased. Infamous cases such as the alleged McMartin pre-school sex abuse scandal have inflamed citizens’ cries for tougher laws and more certain means of protecting children. The focus in both criminal and child dependency trials is quickly shifting from the parents’ due process rights to procedural and logistic protections for children thrust into the judicial system.

In dependency cases, parents can even be excluded during their child’s testimony taken in the trial court’s chambers, thus radically altering traditional notions of cross-examination and confrontation.

Adding to the increased possibilities of unreliability in dependency cases is the United States Supreme Court’s holding that parents do not have an automatic due process right to have a court-appointed untrained people. It assumes adequate resources, when there are inadequate resources.” Id. In a recent report California State Attorney General John Van de Kamp stated that most Kern County Sheriff “deputies had little or no training in investigating child sexual abuse cases, and those assigned [to a recent investigation] did not receive the additional specialized training required by law.” L.A. Times, Sept. 30, 1986, § I, at 3, col. 3.

15. It is not surprising that, as the number of cases increases and the amount of investigative time per case decreases, the margin for error increases. A similar result is occurring in the California criminal law system. Superior Court Judge Gordon Ringer lamented the “incomplete” probation reports upon which he must rely. L.A. Times, Sept. 10, 1984, § II, at 1, col. 4. Probation officers in the California criminal justice system “[c]omplain that they rarely have time . . . to talk more than briefly with the defendant, the victim and the investigating officer and to peruse the district attorney’s file. Some say they rarely leave their offices more than to visit a defendant in jail because they don’t have time.” Id.


19. There has been a 238% increase from 1980 to 1984 in the number of criminal cases involving abuse of children in Los Angeles County. In 1980, the Los Angeles District Attorney Child Abuse and Domestic Violence Unit had 973 cases, while in 1984 the number of cases rose to 3,290. Roundtable, 1986, supra note 3, at 132.

Therefore, many dependency trials are the result of legal ignorance; there are few objections to inadmissible evidence, relevant evidence is not marshalled in the parents' behalf, parental fact investigation is often non-existent, and the state's burden is necessarily lessened in the so-called informal, non-adversarial interviews, mediations, negotiations and hearings.

In light of the increasingly inaccurate and overburdened child dependency system, this article will analyze three troubling issues: 1) whether parents have a right to competent representation when the state proceeding may result in a temporary or permanent loss of their child; 2) what burden of proof regarding the competence of counsel is applicable; and 3) how parents' fifth amendment privilege against self-incrimination affects simultaneous child dependency and criminal proceedings which are based upon the same allegations of child abuse or neglect. The article finally considers whether the current statutory scheme provides adequate protection against the trial court's consideration of irrelevant and highly prejudicial data which is contained in probation reports.

II. THE RIGHT TO COUNSEL IN CALIFORNIA WELFARE AND INSTITUTION CODE SECTION 300 DEPENDENCY CASES

Indigent parents do not have a statutory right to court-appointed counsel in dependency cases. However, courts have discretion to appoint counsel for indigent parents and in practice counsel is frequently appointed. But there is no automatic state or federal

22. The demographics of children living in Los Angeles County are staggering. The 1980 census listed over two million children under 18 years of age, with 61% being non-white. Therefore, "one of every thirty children in the United States" lives in Los Angeles County. This article's focus on the Los Angeles County dependency system sheds some light on the types of services and legal procedures provided to one of the most ethnically diverse populations in the United States. Roundtable, 1984, supra note 3, at 1. Although many of this article's conclusions are based upon Los Angeles County statistics, similar problems are being faced in every California county. See Grand Juries, supra note 13.
23. In re Joseph T., 25 Cal. App. 3d 120, 125-31, 101 Cal. Rptr. 606, 610-14 (1972). In limited demonstration areas, parents had an absolute right to counsel pursuant to Welfare and Institutions Code section 318.5(b) which provided in pertinent part that "the court shall appoint counsel... for the parents or guardian when it appears to the court that the parents or guardian desire counsel but are unable to afford and cannot for that reason employ counsel." CAL. WELF. & INST. CODE § 318.5(b) (West 1984). That section was repealed effective October 1, 1984.
24. "[W]hen it appears to the court that the minor or his parent or guardian desires counsel but is unable to afford and cannot for that reason employ counsel, the court may appoint counsel." CAL. WELF. & INST. CODE § 317 (West 1984).
25. In In re Brian B., 141 Cal. App. 3d 397, 190 Cal. Rptr. 153 (1983), the court
constitutional due process right to counsel.28

A. Parental Right to Counsel under the Due Process and Equal Protection Clauses

The California Supreme Court in Salas v. Cortez27 held that the due process clause guaranteed a right of counsel to indigent defendants in paternity actions initiated by the district attorney on behalf of an unwed mother.28 Salas noted that paternity actions involve more than monetary judgments; they involve the fundamental right of parenthood. Paternity actions differ from ordinary civil actions because: “in these cases the full power of the state is pitted against an indigent person. . . . Thus, appellant’s entitlement to counsel turns on whether the state has a compelling interest that would justify its insistence on denying appellants a fair opportunity to defend.”29 Salas noted that the court’s determination that the defendant is the father in a paternity action may profoundly affect several persons’ lives. “It may disrupt an established family and damage reputations.”30 Further, Salas stated that failure to provide child support may result in criminal prosecution where the question of paternity has been decided in a civil proceeding in which the defendant was unrepresented by counsel.31

Indigent parents involved in dependency cases face the same problems and potential liabilities as indigent paternity defendants. Both types of cases involve the fundamental right of parenting.32 Each case involves indigent parents who are forced to defend against the tremendous resources of governmental prosecution. Dependency judgments profoundly impact parents, disrupt families, and damage parents’ reputations.

stated in dictum that parents in severance cases “are entitled to counsel. . . .” Id. at 398, 190 Cal. Rptr. at 154. Although technically inaccurate, in practice, request for counsel is seldom denied. However, the custom of appointing counsel is clearly not the equivalent of a right to counsel. Custom can easily give way under the pressure of budgetary constraints.

26. In Lassiter v. Department of Social Serv., 452 U.S. 18 (1981), the Court held that even in a more serious case of parental severance, such as a case involving California Civil Code section 232, the right to appointed counsel is a decision based on a case-by-case analysis since the fundamental right jeopardized was not the parents’ own liberty. But see Keelson v. City of Springfield, 767 F.2d 651, 655 (9th Cir. 1985).

28. Id. at 27, 593 P.2d at 229-30, 154 Cal. Rptr. at 532-33.
29. Id. at 32, 593 P.2d at 233, 154 Cal. Rptr. at 536.
30. Id. at 28, 593 P.2d at 230, 154 Cal. Rptr. at 533.
31. Id. at 29, 593 P.2d at 231, 154 Cal. Rptr. at 534.
There is an intimate connection between dependency cases and pending or future criminal charges based upon the same alleged facts. The dependency allegations lighten the prosecution's burden of proof in the criminal case, because the prosecutor may represent the state in both the dependency and criminal trials. Since the parents do not have a right to Miranda admonitions during the probation officer's initial investigation of the dependency case, they are not informed of their fifth amendment privilege against self-incrimination. Any pre-trial admissions or confessions are admissible not only at the dependency trial, but also at the criminal trial. Although parents have a privilege against self-incrimination in the dependency trial, several sections create presumptions of abuse or neglect which shift the burden to the parents to rebut those presumptions. Consequently, parents must waive their privilege.

33. California Penal Code section 11166, one of the recent child abuse reporting laws, requires the county probation or welfare department to report to the district attorney every "known or suspected instance of child abuse" as defined in the Penal Code. CAL. PENAL CODE § 11166 (West 1982). Further, there has been a 238% increase from 1980 to 1984 in the number of criminal filings for child abuse or neglect in Los Angeles County. Roundtable, 1986, supra note 3, at 132. Criminal prosecution for child abuse is no longer a remote possibility, it is probable.

34. Welfare and Institutions Code section 351 provides that "the district attorney shall, with the consent or at the request of the juvenile court judge, appear and participate in the hearing to assist in the ascertaining and presenting of the evidence." CAL. WELF. & INST. CODE § 351 (West 1984). In People v. Superior Court (Martin), 98 Cal. App. 3d 515, 521, 159 Cal. Rptr. 625, 629 (1979), the court stated:

In enacting California Welfare and Institutions Code sections 351 and 681 calling for the juvenile court's appointment of the district attorney for a minor when its parent is "charged in a pending criminal prosecution based upon unlawful acts committed against the minor," it was palpably aware that the same district attorney would ordinarily, if not always be simultaneously prosecuting the parent.

Id. See also Kain v. Municipal Court, 130 Cal. App. 3d 499, 502-03, 181 Cal. Rptr. 751, 753 (1982).

35. It is almost certain that parents will try to explain their case to the probation officer since the interview normally takes place after the child has been taken into protective custody. Most parents, distraught at the temporary forced severance of parental ties will do whatever is available to get their child back.

36. Welfare and Institutions Code section 355 is titled, "Description of minor; reception of evidence; extrajudicial admissions or confessions; objections to evidence" (emphasis added). Section 355 states that the court may consider "any matter or information relevant and material" to the allegations. Further, in In re Amos L., 124 Cal. App. 3d 1031, 1039, 177 Cal. Rptr. 783, 787 (1981), the court held that the trial court did not abuse its discretion by compelling the mother to testify in the dependency trial without informing her of her privilege against self-incrimination since Welfare and Institutions Code section 355.7 provides use immunity from the testimony being admitted in any other proceeding. However, section 355.7 applies only to testimony during the dependency trial; it has no affect on pre-trial statements introduced at criminal or other subsequent trials. Id. See section II, infra.

37. Welfare and Institutions Code sections 355.1-355.4 create presumptions of abuse or
against self-incrimination in order to rebut the presumptions. Thus, the prosecution acquires evidence for the criminal trial which would not otherwise be available through pre-trial criminal discovery.\(^8\)

The dependency trial not only directly weakens the parents' privilege against self-incrimination, but impacts parental rights after the dependency trial as well. If a dependency petition is sustained, the court at the dispositional hearing can order the probation officer to initiate a plan for family reunification which requires parental participation.\(^9\) The parents' participation in the reunification plan is considered in periodic reports and reviews, to determine whether reunification is likely or whether permanent parental severance proceedings pursuant to California Civil Code section 232 should be initiated.\(^40\) The periodic reports contain statements made by parents participating in court ordered therapy and parent training classes. Those statements may be introduced by the prosecution in the criminal trial.

Another similarity between indigent civil litigants in paternity actions and indigent parents in dependency trials is the res judicata effect of a paternity determination. It has long been held that the juvenile dependency court has "jurisdiction to determine parentage" when the biological parentage is disputed.\(^41\) Such a determination has res judicata effect in all other proceedings.\(^42\)

\(^8\) The California Supreme Court in Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970), held that a criminal defendant does not have to give the prosecution discovery if it "conceivably might lighten the prosecution's burden of proving its case in chief." Id.

\(^9\) The court "shall order the probation officer to provide child welfare services to the minor and the minor's parents or guardians for the purpose of facilitating reunification. . . ." Cal. Welf. & Inst. Code § 361(e) (West 1984). Welfare and Institutions Code section 362(e) states that the "parents or guardians shall be required to participate in child welfare services" and section 362(d) gives the court jurisdiction to "direct any and all reasonable orders to the parents. . . ." Id. at § 362(c)-(d).

\(^40\) Id. at §§ 365, 366. The supplemental report pursuant to section 366.1(d) shall include "what actions, if any, have been taken by the parent to correct the problems which caused the child to be made a court dependent." Id. at § 366.1(d).

\(^41\) In re Lisa R., 13 Cal. 3d 636, 640, 532 P.2d 123, 125, 119 Cal. Rptr. 475, 477 (1975). Evidence Code section 892 permits the court in civil cases discretion to order blood tests to determine paternity. If an alleged parent refuses to take the test the court "may resolve the question of paternity against such party. . . ." Cal. Evid. Code § 892 (West 1986).

\(^42\) De Weese v. Unick, 102 Cal. App. 3d 100, 104-06, 162 Cal. Rptr. 259, 261-63 (1980); In re Russell, 12 Cal. 3d 229, 233, 524 P.2d 1295, 1297, 115 Cal. Rptr. 511, 513 (1974). There is a two-pronged test to determine whether the doctrine of res judicata applies. First, the court must have subject matter and personal jurisdiction. Second, the same cause of action must be fully litigated on its merits. Bernhard v. Bank of America, 19 Cal. 2d 807, 810,
Finally, a finding of abuse or neglect in the dependency trial may result indirectly in the total severance of parental ties in a subsequent non-dependency trial. California Welfare and Institutions Code section 304.5 provides that "[t]he records of any juvenile court proceedings involving a minor who is the subject of a proceeding pursuant to Section 4600 of the Civil Code may be introduced in evidence in these proceedings." Obviously, a finding of abuse or neglect by a parent in the dependency case will be strong evidence regarding the desirability of that parent's continuing contact with the child. The non-offending parent will have a very strong case against the dependency offending parent, which may result in a court order cutting off contact with the child pursuant to California Civil Code section 4600.

The preceding discussion demonstrates that indigent parents in dependency cases are similarly situated with indigent defendants in paternity actions. Thus, the equal protection clause requires equal treatment of indigent parents in dependency and paternity cases. Courts could therefore determine that there is no compelling state interest in denying counsel to dependency parents and find that counsel is required. However, even if courts find that the two

122 P.2d 892, 894-95 (1944).

In civil cases, the doctrine of res judicata bars parties or persons in privity with them from relitigating a cause of action finally determined by a court of competent jurisdiction. The collateral estoppel aspect of res judicata bars parties or their privies from relitigating in a new proceeding on a different cause of action issues actually determined in a prior proceeding.

In re Russell, 12 Cal. 3d at 233, 524 P.2d at 1297, 115 Cal. Rptr. at 513.

43. CAL. WELF. & INST. CODE § 304.5 (West 1984). Determinations of child custody of separated or divorced parents are governed by sections 4600-08. Those trials involve child support (section 4600.2), permanent and temporary custody (sections 4600 and 4600.1), and child visitation privileges (sections 4601 and 4607). CAL. WELF. & INST. CODE §§ 4600-08 (West Supp. 1987).

44. Although judgments under Civil Code section 4600 are subject to modification, the longer the parent is excluded contact with the child, the greater the likelihood that the court will permanently sever parental relations pursuant to Civil Code section 232(a)(1) if the child has been left "by one parent in the care and custody of the other parent for his support, or without communication from such . . . parent, with the intent on the part of such parent . . . to abandon such person." CAL. CIV. CODE § 232(a)(1) (West 1982 & Supp. 1987).

45. The fourteenth amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV. Similarly, under article I, section 7 of the California Constitution, "a person may not be . . . denied equal protection of the laws." CAL. CONST. art. I, § 7. The minimum requirements of the equal protection clause command that when a state scheme treats persons who are similarly situated in a different manner, there must be a compelling state interest. Furthermore, the Supreme Court has established that when classification impinges on fundamental interests, it will be strictly scrutinized to assure that there has been no violation of the equal protection clause. Thus, in Harper v. Virginia Board of Elections, 383 U.S. 663 (1966),
groups of defendants are not similarly situated, or that a compelling state interest exists for treating the two groups differently, the California due process clause requires appointment of counsel for indigent parents in dependency cases. Each of the due process policies in *Salas v. Cortez* applies equally to dependency cases. Parents in dependency cases face more grievous consequences than paternity defendants. There is simply no reason, other than saving money, for the state to deny parents counsel. Since the best interests of the child may only be determined upon a full and fair exploration of the facts, denying parents counsel detrimentally affects the fact finding process. The government's evidence may appear conclusive when not subject to the rigors of the adversarial process, but may be very different in light of defense counsel's evidence, examination and arguments.

**B. Dependency Parents' Right to Competent Counsel**

Assuming indigent parents in dependency cases have a constitutional right to appointed counsel, they should also have a right to competent counsel. Even if parents do not have a right to competent counsel in dependency cases, they should have a right to competent counsel if the court exercises its discretion by appointing counsel. Both the United States and California Supreme Courts have declared that the right to effective assistance of counsel is the most basic extension of the right to counsel. The constitutional right to the effective assistance of counsel is "among the most sacred and sensitive of our civil rights." The selection of panel attorneys involves intimate state action.

the Court stated: "we have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Id.* at 670. For a classification to withstand strict scrutiny, a state must show that the classification serves a compelling state interest and that there is no less restrictive means of achieving that purpose. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

46. *Powell v. Alabama*, 287 U.S. 45 (1932); *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 987, 34 Cal. Rptr. 863 (1963); *In re Newbern*, 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960). In dictum in *In re David C.*, the court noted in a section 232 case that "[c]ertainly, as counsel was appointed for the indigent parents in the instant case, the parents had a right to have effective assistance of counsel." 152 Cal. App. 3d 1189, 1207, 200 Cal. Rptr. 115, 126 (1984).


48. "In a county where there is no public defender the court may fix the compensation
In selecting the panel attorneys, the court determines that a particular attorney is reasonably competent and offers the attorney to the parents on that basis. Compensation for panel attorneys is determined by the court and is paid out of general county funds. Furthermore, panel attorneys "may be removed from the panel at any time without the court having to show cause for such removal." Indigent parents must accept the court's choice of "competent" counsel or proceed in propria persona. The court interviews, selects, certifies, appoints, pays and monitors panel attorneys.

The first case to decide what rights and remedies indigent parents have when their statutorily appointed counsel fails to give competent representation was In re Michael S. That case held that there is no right to effective assistance of counsel in dependency cases. The Michael S. court relied on several cases for the proposition that dependency cases are ordinary civil cases. But Michael S. relied most heavily upon the following language from Chevalier v. Dubin: "[W]e are aware of no authority, and counsel has cited us none, which would permit a trial or appellate court to grant a retrial to an unsuccessful litigant in a civil case, with or without punitive damages, on the grounds of incompetency of counsel." Thus, the court in Michael S. declared that a denial of effective assistance of counsel was not a viable right in dependency cases.

It is critical to note that Chevalier was not a dependency case
nor did it involve a fundamental right like parenting. Instead, *Chevalier* involved a defendant appealing a judgment against him for punitive damages in an assault and battery action. The *Chevalier* court merely held that a defendant in a civil case is not entitled to a new trial based on incompetent counsel where the defendant chose his own private counsel. The *Chevalier* court, however, went on to note that under due process an indigent is sometimes entitled to appointment of counsel at state expense in civil as well as criminal cases. In particular, the *Chevalier* court referred to *Salas v. Cortez* which held that due process required appointment of counsel in paternity cases.

Since *Chevalier* specifically relied on *Salas*, it was erroneous for *Michael S.* to rely on *Chevalier* for the proposition that incompetency of counsel is not a right in dependency cases merely because they had been termed "civil cases." In fact, *Chevalier* stated:

> Although *Salas* was a right to counsel case, it can be expected that the right to effective counsel will also be available to defendants in similar cases. The fact that the right of effective counsel is available to a defendant in a paternity case does not mean that it is also available to a defendant in a punitive damage case, merely because both are civil actions. Unlike a paternity case, a punitive damage case involves only a monetary judgment. Unlike a paternity case it cannot expose a defendant to a possible deprivation of his liberty. Unlike a paternity case, a punitive damage case does not involve state participation nor a substantial state interest.

It is apparent that *Chevalier* was limited to non-fundamental rights civil cases involving monetary damages where appellant chose private counsel. The *Michael S.* court, therefore, erred in relying on *Chevalier* in rejecting the right to effective assistance of counsel for indigent parents in dependency cases.

In both dependency and parental severance cases, courts recently began making a distinction between parents entitled to competent counsel under the due process clause, and parents offered

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58. *Id.* at 979, 164 Cal. Rptr. at 120.
60. *Chevalier*, 104 Cal. App. 3d at 979, 164 Cal. Rptr. at 120 (emphasis added).
61. Once the state exercises its discretion to appoint counsel for indigent parents in dependency cases, parents should have a right to due process in relation to the appointment of counsel. *See Bailey v. Loggins*, 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575 (1982). Since the indigent parents detrimentally relied upon the court's appointment of competent counsel, it would be unfair for the state to prohibit the parents from seeking the only effective remedy, setting aside the verdict. *See also* Fleming v. Nestor, 363 U.S. 603, 611 (1960).
counsel pursuant to the trial court's statutory discretion. In *In re Christina H.*, the court held that parents entitled to counsel as a due process right in a dependency trial are also entitled to effective assistance of counsel if they face a substantial likelihood of losing custody of their child. However, that case has not been extended to parents given counsel under California Welfare and Institutions Code section 317, which is a statutory discretionary right, not a constitutional due process right. Likewise, in *In re Christina P.*, the court held that parents entitled to counsel on due process grounds in a parental severance trial have a right to effective assistance of counsel.

Although the due process/statutory distinction has been applied to parents' rights to effective counsel, that distinction is absent in opinions addressing the minor's right to effective representation. In *In re Patricia E.*, the court, pursuant to California Welfare and Institutions Code section 318, appointed county counsel to represent the minor in a dependency hearing. After ruling that the minor received inadequate assistance of counsel, the court stated, "[t]he minor has a statutory right to appointment of counsel. That right necessarily entails a right to effective assistance of the counsel appointed." The court did not raise the due process/statutory distinction. Further, in *In re Rico W.*, a minor alleged that the trial court in a parental severance trial abused its discretion by denying appointment of separate counsel for the minor under California Civil Code section 237.5(a). Without discussing the due process/statutory distinction has been applied to parents' rights to effective counsel, that distinction is absent in opinions addressing the minor's right to effective representation. In *In re Patricia E.*, the court, pursuant to California Welfare and Institutions Code section 318, appointed county counsel to represent the minor in a dependency hearing. After ruling that the minor received inadequate assistance of counsel, the court stated, "[t]he minor has a statutory right to appointment of counsel. That right necessarily entails a right to effective assistance of the counsel appointed." The court did not raise the due process/statutory distinction. Further, in *In re Rico W.*, a minor alleged that the trial court in a parental severance trial abused its discretion by denying appointment of separate counsel for the minor under California Civil Code section 237.5(a).

63. *Id.* However, in *In re Ammanda G.*, 186 Cal. App. 3d 1075, 231 Cal. Rptr. 372 (1986), the court clarified *Christina H.* by holding that parents granted counsel pursuant to statute in a dependency case do not have a right to effective assistance of counsel.
65. *Id.* at 128-29, 220 Cal. Rptr. at 531-32.
67. *Id.*

[When a minor who is alleged to be a person described in subdivision (d) of Section 300 appears before the juvenile court at a detention hearing the court shall appoint counsel. The court may appoint county counsel to represent the minor, if there is no conflict of interest between the county and the minor, or the district attorney pursuant to Section 351.

68. 174 Cal. App. 3d at 9, 219 Cal. Rptr. at 787-88.
70. Civil Code section 237.5(a) provides, "[i]f the court finds that the interests of the minor do require such protection, the court shall appoint counsel to represent the minor."
statutory distinction, Rico W. concluded that failure to appoint independent counsel amounts to reversible error only where there has been a miscarriage of justice, which the minor failed to prove. The court also denied the minor's claim of ineffective assistance of counsel since it was not shown that a determination more favorable to the minor was reasonably probable absent counsel's incompetence.

The fact that there was no mention of the due process/statutory distinction in cases discussing children's rights to competent counsel gives rise to two questions: 1) is the due process/statutory distinction consistent with the purposes of dependency and parental severance law; and 2) can the inapplicability of that distinction to minors survive an equal protection analysis? There is, of course, a visceral rationality to the due process/statutory distinction based upon the adage "beggars can't be choosers." If there is no right to counsel under the Lassiter due process standards, complaints about the attorney provided by the state based upon the judge's discretion are unjustified. This rationale smacks of the antiquated rights/privileges distinction frequently rejected in modern constitutional law.

The state has no interest in providing incompetent advocates or in denying parents relief from their appointed counsel's ineffective assistance. At first blush, money appears paramount; if parents have no right to review issues of counsel's incompetence, appeals will be shorter and the cost of retrials will be saved. But those immediate savings must be viewed through the long term cost of foster placement and family reunification services. In Los Angeles County in December 1982, 4,000 children were in foster care. In 1984 there were 14,584 children in court-ordered out-of-home placement and 22,965 children under dependency court protection. In Los Angeles County the "largest single service item purchased from the private sector in 1984-85 was foster care, including $73.7 million spent for Aid to Families with Dependent Children (A.F.D.C.) and $1.8 million spent by the Probation Department for non-A.F.D.C. chil-

71. In re Rico W., 179 Cal. App. 3d at 1178, 225 Cal. Rptr. at 477. The court analogized the standard of review to criminal incompetence of counsel in questioning whether "the Fosselman [People v. Fosselman, 33 Cal. 3d 572, 584, 659 P.2d 1144, 1151, 189 Cal. Rptr. 855, 862 (1983)] standard is appropriately applied in evaluating the effectiveness of counsel in proceedings to terminate parental rights. . . ." Id. See also In re K.S., 167 Cal. App. 3d 946, 969, 213 Cal. Rptr. 690, 695 (1985).


73. Roundtable, 1984, supra note 3, at 43.

74. Id. at 47.
In addition, in the 1984-85 budget, $1 million was provided for in-home counseling services and $3.3 million for professional appointments. The federal, state and local governments, therefore, have an economic interest in making certain that children are not needlessly separated from their families since years of "foster placement drift" cost thousands of dollars per child. Further, the increase in litigation costs regarding appellate review of issues of incompetency of counsel is minimal in relation to foster care and family reunification costs. The number of new appeals based exclusively upon ineffective assistance of counsel will likely be small. The probable result is that a new issue merely will be added to cases already being appealed on other grounds, thus requiring more extensive appellate review.

Aside from the governmental economic advantage of leaving children in the custody of their parents whenever possible, the state has a specifically defined purpose of assuring that a disposition is in the child's best interests and that the core social unit, the family, is not displaced unless absolutely necessary. If the court's fact-finding was affected by the parents' incompetent counsel, the state has a compelling interest to review the case so that a child is not needlessly separated from his family. Thus far, no court has required the government to prove that a safer, better environment is available for abused or neglected children. Taking temporary custody from parents or permanently severing parental ties is no guarantee that the child will find a more loving or safer environment. Therefore, it makes good economic and social sense to provide parents with review of their claims of ineffective assistance of counsel. In addition, there is a serious due process question in permitting the state to appoint


76. Roundtable, 1986, supra note 3, at 22. Approximately 35% of the Children's Protective Services budget is paid by the county. However, the prediction is that the state and county share will dramatically increase as the federal government attempts to reduce the deficit by decreasing general revenue sharing. Id. at 31.


78. There have been increasing numbers of cases of children being abused or neglected in foster homes and county placements. Only a small percentage of children separated from their families are adopted. Foster family drift is too commonplace. Approximately 1,000 children a month in Los Angeles County are removed from their parents' homes and placed in protective custody. In August 1986, approximately 14,000 children in Los Angeles County needed placement, but only 3,500 foster homes were available. To Become a Foster Parent in L.A., L.A. Times, August 28, 1986, part V, at 17, col. 1.
counsel without providing a judicial remedy for ineffective assistance of counsel. Moreover, the equal protection question of providing review for children with statutorily appointed counsel but not for parents, leads to a single conclusion: the due process/statutory distinction is bad law. Parents with court-appointed counsel should have access to appellate review concerning allegations of incompetent assistance of counsel. Only then can the trial court adequately consider all the issues, facts and law relevant to determining if court jurisdiction is required and what placement is in the child's best interests.

C. *The Appropriate Standard of Professional Competence*

The notion that a dependency trial is merely a non-adversarial civil hearing has slowly begun to wane. Although the purpose of the proceeding is to protect the welfare of the child and not to punish the parents, recent analogies to the criminal justice system have resulted in an expansion of rights for parents in dependency cases. In *In re Brian B.*, the court held that the stringent appellate review procedures accorded to criminal defendants in *People v. Wende* are applicable to dependency appeals. *Brian B.* found "no valid reason to accord a parent in that situation [possible loss of fundamental right to rear child] a lesser degree of review than is accorded a criminal defendant." The question is whether the California standard for competency of counsel in criminal cases involving the fundamental right of liberty should be extended to dependency and parental severance cases which involve the fundamental right of parenting.

There are currently two tests in California for the competence of criminal defense counsel. First, under *People v. Pope*, "[d]efendant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent ad-

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80. *In re La Shonda B.*, 95 Cal. App. 3d at 593, 157 Cal. Rptr. at 280.
82. 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979).
83. *Brian B.*, 141 Cal. App. 3d at 398, 190 Cal. Rptr. at 154 (citing *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979)). In *Wende* the California Supreme Court held that the court of appeal must independently review the entire trial record when appellate counsel indicates there are no viable appellate issues. *See also In re Jesse H.*, 126 Cal. App. 3d 1048, 178 Cal. Rptr. 205 (1981).
84. 141 Cal. App. 3d at 399, 190 Cal. Rptr. at 154. In *Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981), the United States Supreme Court noted the similarities between child dependency cases and criminal trials. And in *Santosky v. Kramer*, 455 U.S. 745, 760-70 (1982), the court held that the state must provide parents fundamentally fair procedures.
vocates. In addition, [appellant] must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense."\textsuperscript{86} In the alternative, according to \textit{People v. Fosselman},\textsuperscript{87} a defendant can prove ineffectiveness "if he establishes that his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings."\textsuperscript{88} Furthermore, in criminal cases the identical tests for determining ineffectiveness of counsel are applicable in cases of both retained and court-appointed counsel since the right to counsel is based on both the due process clause and the sixth amendment right to counsel.\textsuperscript{89}

The alternative to the criminal \textit{Pope/Fosselman} standard for incompetency of counsel is the standard of professional competence set forth in civil malpractice cases:

The general rule . . . is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.\textsuperscript{90}

Thus, an attorney in a civil case has a duty to research the subject matter of the particular case. Even when an issue of law is uncertain, an attorney must make a reasonable effort in furtherance of her client's needs.\textsuperscript{91} The standard of reasonable care also requires the attorney to conduct a factual investigation during the early stages of representation.\textsuperscript{92} Therefore, as in the criminal \textit{Pope/Fosselman} standard, incompetence in civil malpractice cases involves both erroneous advice as well as failure to advise or investigate.\textsuperscript{93} The plain-
tiff's burden in a legal malpractice action is to demonstrate a cause which, in natural and continuous sequence, produces the damage and without which the damage would not have occurred. Under Pope the criminal defendant need only prove that his attorney withdrew a possibly meritorious defense; the defendant need not prove that incompetence caused the conviction. However, in Fosselman and in civil malpractice cases, the client must not only demonstrate unreasonable acts or omissions by his attorney, but also must demonstrate that the lawyer's incompetence proximately resulted in conviction or civil damages.

The Pope/Fosselman standard of review is appropriate in dependency and parental severance cases for several reasons. First, all three trials involve fundamental rights. As the United States Supreme Court has noted, the fact finding process in each of those systems is substantially similar. The existing procedures for reviewing errors in the three hearings are identical. In the criminal case, if the grounds for incompetency of counsel do not appear on the face of the trial record, the defendant must file a writ of habeas corpus. Review of errors in dependency actions may be brought by habeas corpus whenever an appeal is an inadequate remedy. If the Pope standard regarding incompetency of presenting defenses is applied to dependency and parental severance cases, parents must demonstrate that counsel's acts or omissions resulted in the "withdrawal of a potentially meritorious defense." However, when allegations of incompetency of counsel involve issues other than possibly meritorious defenses, the parents must demonstrate, as in Fosselman, that the unreasonable representation proximately caused a detrimental result in the dependency or parental severance trial.

Three opinions have recently considered the appropriate standard of review for allegations of incompetency of counsel in dependency and parental severance trials. In re Patricia E. involved a dependency case in which appointed counsel had a conflict of interest with the minor. The court determined that the standard of prejudice for reversal for error is the criminal standard under People v.

attorney representing both a husband and wife in a divorce action was found negligent. The court stated: "[h]ere the attorney is not charged with erroneous advise but with failure to advice, failure to investigate, failure to disclose." Id. at 529, 50 Cal. Rptr. at 597.

95. Pope, 23 Cal. 3d at 428, 590 P.2d at 868, 152 Cal. Rptr. at 741.
97. Pope, 23 Cal. 3d at 415, 590 P.2d at 860, 152 Cal. Rptr. at 733.
reversal is required if the record supports "an informed speculation' that appellant's right to effective representation was prejudicially affected." Patricia E. applied the criminal standard for reversible error because the minor has a statutory right to counsel which "necessarily entails a right to effective assistance of the counsel appointed." In In re Christina P., the court discussed the criminal Fosselman standard in a parental severance trial involving alleged incompetence of counsel. However, the court reversed upon other grounds, stating, "[w]e express no view whether this standard [Fosselman] should be applied to civil cases in which ineffective assistance of counsel is a cognizable claim." Finally, in In re Rico W., the court determined that appellant failed to demonstrate prejudice under the Fosselman standard without holding that Fosselman was the applicable standard regarding incompetence of counsel in parental severance trials. The court stated that:

If, in fact, the Fosselman standard is appropriately applied in evaluating the effectiveness of counsel in proceedings to terminate parental rights, appellant may not succeed with her claim absent a showing that "it is reasonably probable a determination more favorable to [her] would have resulted in the absence of Counsel's failings."

The remedy for parents who are denied effective assistance of counsel must necessarily be the same as the remedy for criminal defendants. Pope stated that "a conviction may not be upheld if the state has furnished an indigent with representation of lower quality than that of a reasonably competent attorney acting as a diligent, conscientious advocate." The only remedy is reversal of the conviction. In civil malpractice cases, the remedy is to make the aggrieved party whole:

Few cases have considered what constitutes the proper measure of damages in a legal malpractice action. The general rule is that a plaintiff is entitled only to be made whole: i.e., when the attorney's negligence lies in his failure to press a meritorious
claim, the measure of damages is the value of the claim lost.\textsuperscript{105}

The legal malpractice remedy is obviously inadequate in dependency and parental severance cases since monetary damages cannot compensate parents for the loss of the fundamental right to rear their child. However, in \textit{Kim v. Orellana}\textsuperscript{106} the court stated reversal is an improper remedy in the ordinary civil legal malpractice case for two reasons. First, there is no state action which implicated the federal or state due process clauses. Second, "[w]ith the exception of a court appointment the relationship of attorney and client is created by contract, express or implied."\textsuperscript{107} But in dependency and parental severance cases, indigent parents are represented by court-appointed attorneys; there is state action and there is no freedom to contract for specific counsel. Reversal will not place children in jeopardy since the prosecution can immediately schedule a new detention hearing to determine the conditions of the child's placement pending retrial.

D. \textit{Jurisdictional Issues Regarding Incompetence of Counsel}

As in the criminal justice system, a majority of litigated dependency cases result in negotiated pleas. This section examines whether a parent's plea, based on subsequently discovered incompetent advice from his attorney, may be set aside.

In criminal cases the issues of ineffective assistance of counsel and ineffective waivers of constitutional rights are reviewable even after a guilty plea.\textsuperscript{108} Further, unlike incompetence of counsel at trial, where a defendant's guilt was determined by his own pleas, it is more difficult to determine whether he would have pled differently in the absence of counsel's failings. Therefore, rather than the \textit{Pope/Fosselman} review standards, a question of the validity of a guilty plea in relation to alleged incompetence of counsel is determined by "whether counsel's acts or omissions adversely affected defendant's ability to knowingly, intelligently and voluntarily decide to enter a plea of guilty."\textsuperscript{109} However, a criminal defendant is barred by the doctrine of laches if the guilty plea is not attacked within a reasonable period of time. But, laches is not applicable where the defendant

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\item \textsuperscript{105} Smith v. Lewis, 13 Cal. 3d 349, 362, 530 P.2d 589, 597, 118 Cal. Rptr. 621, 629 (1975).
\item \textsuperscript{106} 145 Cal. App. 3d 1024, 193 Cal. Rptr. 827 (1983).
\item \textsuperscript{107} Id. at 1028, 193 Cal. Rptr. at 829.
\item \textsuperscript{108} People v. Natividad, 222 Cal. App. 2d 438, 440-41, 35 Cal. Rptr. 237, 239 (1963); People v. Coffey, 67 Cal. 2d 204, 211-12, 430 P.2d 15, 20, 60 Cal. Rptr. 457, 462 (1967); People v. Ribero, 4 Cal. 3d 55, 48 P.2d 308, 92 Cal. Rptr. 692 (1971).
\item \textsuperscript{109} People v. McGary, 166 Cal. App. 3d 1, 10, 212 Cal. Rptr. 114, 118 (1985).
\end{itemize}
"is indigent and does not have the capacity to represent himself."\(^{110}\)

In dependency and parental severance cases, the juvenile court maintains jurisdiction over the custody and control of minors until the parents' appellate remedies have been exhausted.\(^{111}\) In *In re Katherine R.*,\(^{112}\) the court rejected appellant's argument that the juvenile court had no jurisdiction to change its order pending the appeal: "Wardship, or jurisdiction over the person of the minor, is a continuing condition or status for the welfare of the child and changed circumstances must be considered in any proceeding concerning the child's status, even though such changed circumstances may develop during the pendency of the appeal."\(^{113}\) Because of the necessity of continually monitoring dependent minors, California Code of Civil Procedure section 473 does not control dependency actions, and the six-month maximum term for relief from a court judgment or order is inapplicable.\(^{114}\) Instead, California Welfare and

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110. *In re Spears*, 157 Cal. App. 3d 1203, 1208, 204 Cal. Rptr. 333, 335-36 (1984). In *Spears*, there was an 18 month delay between the guilty plea and the habeas petition. The court noted that "18 months is not a significant delay since defendant lacked the capacity to represent himself." *Id.* at 1208, 204 Cal. Rptr. at 336. See also *In re Huddleston*, 71 Cal. 2d 1031, 1034, 458 P.2d 507, 508-09, 80 Cal. Rptr. 595, 596 (1969) (two and a half year delay no laches); *In re Hancock*, 67 Cal. App. 3d 943, 945 n.1, 136 Cal. Rptr. 901, 903 n.1 (1977) (nine month delay not unreasonable).

111. Welfare and Institutions Code section 366.25(f) states that "[w]hen an adoption of the minor has been granted, the court shall terminate its jurisdiction of the minor." CAL. WELF. & INST. CODE § 366.25(f) (West 1984) [superseded by id. at § 366.25 (West Supp. 1987)]. Further, Civil Code section 239(b) directs that "no petition for adoption may be heard until the appellate rights of the natural parents have been exhausted." CAL. CIV. CODE § 239(b) (West 1982).


113. *Id.* at 356, 86 Cal. Rptr. at 282; *In re Steven S.*, 126 Cal. App. 3d 23, 31, 178 Cal. Rptr. 525, 533 (1981). The court maintains jurisdiction during the appeal concerning conditions of visitation also. In *In re Adoption of Pierce*, 5 Cal. App. 3d 316, 320, 85 Cal. Rptr. 104, 108 (1970), the court stated that "if petitioner succeeds on his appeal that relationship [between the child and his parents] will, necessarily, be resumed. But the interruption of that relationship for the unhappily too long period before the appeal here can be decided would . . . involve a serious trauma to the young child." *Id.*

114. A motion for equitable relief from a judgment or order "must be made within a reasonable time, in no case exceeding six months, after such judgment . . . was taken. . . ." CAL. CIV. PROC. CODE § 473 (West 1973). Section 473 cannot limit parent's review of the denial of effective assistance of counsel. Article I, section 11 of the California Constitution provides a constitutional right to the remedy of a writ of habeas corpus to determine whether a person is lawfully being held in custody. Furthermore, under article 6, section 10, the superior courts have "original jurisdiction in habeas corpus proceedings." CAL. CONST. art. VI, § 10. Article I, section 11 states that "[h]abeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion." *Id.* at art. I, § 11. Therefore, any finding that Civil Code section 473 has taken away the constitutional review of the legality of the custody of a parent's child, pursuant to article I, section 11 and article VI, section 10, is unconstitutional as applied. Further, extraordinary relief by writ is the preferred remedy in cases involv-
Institutions Code section 388 controls the modification or setting aside of all court orders in dependency cases. Section 388 permits a dependent child's parent to petition "for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." Further, any child custody conditions ordered pursuant to California Civil Code section 4600 are always subject to modification. Therefore, as long as the parents seek to set aside the nolo contendere plea before their appellate remedies are exhausted, the court has jurisdiction under either California Welfare and Institutions Code section 388 or California Constitution article I, section 11 and article VI, section 10 to set aside the nolo contendere plea.

The best interest of the child since it enables rapid decisions which will place the child in a permanent and stable environment as soon as possible. San Diego County Dept' of Public Welfare v. Superior Court, 7 Cal. 3d 1, 9, 496 P.2d 453, 458, 101 Cal. Rptr. 541, 546-47 (1972); People v. Allgood, 54 Cal. App. 3d 434, 439, 126 Cal. Rptr. 666, 669 (1976); Peyton v. Rowe, 391 U.S. 54, 58-60 (1968).

115. CAL. WELF. & INST. CODE § 388 (West 1984). The current legislative scheme protects the best interests of the child by providing the trial court discretion to modify or set aside a judgment based on new evidence, and provides finality of all dependency court rulings upon the termination of court jurisdiction or upon adoption of the child. Because of the continuing necessity to monitor a child's placement, California courts for years have ruled that decisions regarding the temporary placement of children are not res judicata. Lucachevitch v. Lucachevitch, 69 Cal. App. 2d 478, 485, 159 P.2d 688, 692 (1945).

116. Civil Code section 4600 concerns custody orders regarding children and sets out a public policy favoring placement of the child with its natural parents if possible. Section 4600 governs the placement of children under Welfare and Institutions Code sections 300 and 232 cases. There are numerous occasions under the California statutory scheme for concurrent jurisdiction by different courts over the custody of a minor. See CAL. CIV. CODE §§ 4600, 4601 (West 1983); Dupes v. Superior Court, 176 Cal. 440, 168 P.2d 888 (1917).

117. Since most court-appointed attorneys will be representing indigent parents who have little or no legal training, it is absurd to expect the parents on their own to be able to determine whether they have received ineffective assistance of trial counsel. Therefore, to set an arbitrary cut-off for setting aside the judgment, as in an ordinary civil case pursuant to Civil Code section 473, is unfair. Often, the question of incompetency of counsel does not arise until an appellate attorney has reviewed the record. Therefore, if the doctrine of laches is applicable to Welfare and Institutions Code section 300 and Civil Code section 232 cases, it should not begin to run until after the parents have discovered the incompetence. That would be similar to tort actions where the statute of limitations begins upon discovery of the injury or professional malpractice. Myers v. Stevenson, 125 Cal. App. 2d 399, 402, 270 P.2d 885, 887 (1954); Rawlings v. Harris, 265 Cal. App. 2d 452, 455, 71 Cal. Rptr. 288, 291 (1968); CAL. CIV. PROC. CODE §§ 340.5, 340.6 (West 1982).
III. CURRENT LAWS VIOLATE PARENTS’ PRIVILEGE AGAINST SELF-INCrimINATION, PUNISH PARENTS WHO COOPERATE WITH DEPENDENCY INVESTIGATORS AND FRUSTRATE THE LEGISLATURE’S CENTRAL GOALS OF QUICK RESOLUTION OF FAMILY PROBLEMS AND PERMANENT, STABLE PLACEMENT FOR CHILDREN

Approximately eighty percent of dependency cases result in negotiated settlements.118 Whether the resolution occurs in a formal settlement conference or on the courtroom steps, the settlement usually involves the parents’ nolo contendere plea to an amended petition, thus giving the court jurisdiction over the child.119 The state’s benefit of the bargain is obvious; the expense and uncertainty of trial is avoided, and the court can fashion conditions of custody in the child’s best interests.120

However, the parents’ benefits of the plea bargain may be illusory. The advantages and disadvantages the parents receive for waiving their right to trial, privilege against self-incrimination, right to confront and cross-examine witnesses and right to compulsory court process must be examined.121 If the negotiations fail, the parents’ case may be detrimentally affected.

If the parents engage in formalized negotiation at a pre-trial settlement conference, a stipulation could prevent parents’ statements during that conference from being used at the jurisdictional hearing.122 However, the standard court stipulation form provides, subject to the rules of evidence, that parents’ statements may be used at the disposition hearing, and that “[a]ll other information obtained during the course of the Pre-Adjudication Social Study, including information obtained subsequent to or as a result of interviews with the parent(s) . . . may be used at any juvenile dependency hearing, subject to the rules of evidence, and may be used in any other lawful manner.”123 The plea bargain settlement negotiation hearing is fraught with potential dangers for parents because the stipulation

118. 2 CALIFORNIA JUVENILE COURT PRACTICE § 22.19 (CEB) (1981).
119. In lieu of admitting the allegations of the petition, the parent or guardian may enter no contest concerning the truth of the allegations, subject to the approval of the court. CAL. R. CT. 1364(e) (West 1987).
120. “County counsel [which prosecutes Welfare and Institutions Code section 300 cases in Los Angeles County] does not have the staff to try every case that is filed. . . .” 2 CALIFORNIA JUVENILE COURT PRACTICE, supra note 118, § 22.19, at 196.
121. CAL. R. CT. 1364(a) (West 1987).
122. 2 CALIFORNIA JUVENILE COURT PRACTICE, supra note 118, § 22.19, at 196.
123. Id., § 22.19, at 73.
merely provides parents use immunity at the jurisdiction hearing regarding statements made during the negotiation. The stipulation does not prohibit using the parents’ statements against them in a dispositional hearing, status review hearing, permanency planning hearing, parental severance hearing, or criminal trial based upon the same transactional facts.\textsuperscript{124} Further, the stipulation does not provide derivative or transactional immunity; thus, during the settlement negotiation the parents are providing the prosecutor with informal discovery of data which might be otherwise unobtainable. That is a high price to pay for the mere opportunity to discuss a potential settlement.

A. \textit{Pre-trial Statements}

There is currently no case law regarding the use of evidence gleaned by the prosecutor during dependency settlement negotiations. However, since the California Evidence Code and case law control the admission of evidence in dependency cases, some evidentiary parameters have been charted.\textsuperscript{125} It is clear that an offer to settle or negotiate a civil action is not admissible at trial to prove liability.\textsuperscript{126} Statements made during the negotiation of a civil case are likewise inadmissible to prove liability.\textsuperscript{127} Offers to negotiate, statements and conduct during pre-trial settlements are excluded at trial in order to promote dispute resolution and to “facilitate candid discussion which may lead to settlement of disputes.”\textsuperscript{128} Thus, parents’ statements and

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\item 124. \textit{CAL. WELF. \\ & INST. CODE} §§ 358, 366.2, 366.25 (West 1984); \textit{CAL. CIV. CODE} § 232 (West 1982). The chronology of child dependency trials requires a series of hearings to determine whether the court should continue jurisdiction, dismiss the case, change conditions of custody, or refer the case for parental severance and ultimate adoption or guardianship proceedings.
\item 125. “Except as provided in sections 355.1 through 355.7 [none of these sections are applicable to the instant topic], the admission and exclusion of evidence shall be in accordance with the rules of evidence established by the Evidence Code and by judicial decision.” \textit{CAL. R. CT.} 1365(c) (West 1987).
\item 128. Fieldson Assoc., Inc. v. Whitediff Laboratories, Inc., 276 Cal. App. 2d 770, 773, 81 Cal. Rptr. 332, 334 (1969). The Legislature’s desire to break the litigation log-jam by encouraging voluntary out-of-court settlements is reflected by the extension of inadmissible information to mediations. Evidence Code section 1152.5(a)(1) provides that upon agreement
offers to negotiate in dependency cases should be inadmissible during the jurisdictional hearing to determine whether the allegations of abuse or neglect are true. In addition to the policy of promoting settlement through candid discussion, the exclusion of evidence gathered in settlement negotiations promotes the best interests of the child because a settlement will avoid protracted trials and appeals. The court will be able to readily order services to remedy the problem triggering court jurisdiction and immediately order family reunification measures. The Legislature's primary desire to provide children stable home environments as expeditiously as possible is furthered by applying immunity pursuant to California Evidence Code sections 1152 and 1152.5 to dependency cases.\textsuperscript{129}

However, Evidence Code sections 1152 and 1152.5 do not provide parents sufficient protection from subsequent use of evidence garnered in pre-trial negotiations. Section 1152 merely prohibits the introduction of the evidence for the limited purpose of proving "liability for the loss or damage" claimed in the litigation. Section 1152 appears broad enough to cover the dependency jurisdiction question of whether parents neglected or abused their child. But, does section 1152 extend to statements during negotiation concerning the dispositional issues of appropriate placement and conditions of custody for the children?\textsuperscript{130} In \textit{Fieldson Associates v. Whitecliff Laboratories}\textsuperscript{131} the court noted an exception to section 1152 which prohibits evidence of offers to compromise. The main question before the court was whether letters between the parties written after a purchase order were admissible because they contained offers to compromise. The \textit{Fieldson} court held the letters admissible for the limited purpose of "showing the nonbinding nature of the 'purchase order' in order to defeat the appellee's cross-complaint."\textsuperscript{132} The court held

\textsuperscript{129} If the court orders a child removed from a parent's custody, "the juvenile court shall order the probation officer to provide child welfare services to the minor and the minor's parents or guardians for the purpose of facilitating reunification of the family within a maximum time period not to exceed 12 months." \textsuperscript{129} \textit{CAL. WELF. & INST. CODE} \textsection 361.5(a) (West Supp. 1987).

\textsuperscript{130} Frequently parents are willing to give the court jurisdiction of their child in exchange for an in-home placement, child welfare services, and parenting and counseling services. Thus, the real center of negotiation is focused on placement rather than court jurisdiction. See \textit{2 CALIFORNIA JUVENILE COURT PRACTICE, supra} note 118, \textsection 17.18, at 73.

\textsuperscript{131} 276 Cal. App. 2d 770, 81 Cal. Rptr. 332 (1969).

\textsuperscript{132} \textit{Id.} at 772, 81 Cal. Rptr. at 333-34.
that appellant's cross-complaint for lost profits under the purchase order was never mentioned in the negotiations. The letters were not admitted to prove liability, but merely demonstrated that the parties were in communication. The admissibility of that evidence did not affect the policy of promoting settlement and facilitating candid discussion because the subject of the cross-complaint was never mentioned during the negotiations. But this limited exception to section 1152 should not apply to dependency negotiations involving custody issues or placement conditions. These issues are intimately related to the negotiation, but are not formally litigated until the bifurcated disposition hearing.

Evidence Code sections 1152 and 1152.5 are inadequate protections for parents because they merely prohibit use of data derived from negotiation in the same civil case. The statutes do not insulate parents from having their statements used against them in a parental severance trial or a criminal trial based upon the identical facts. The scope of protection under sections 1152 and 1152.5 is too narrow to truly encourage parents to fully disclose the essential facts necessary to reach a pre-trial settlement and to immediately begin family reunification services.

1. Minor's Statements in Welfare and Institutions Code Section 707 Fitness Hearings

Courts are beginning to admit more frequently that child dependency cases are not just civil trials, but rather are quasi-criminal or criminal in nature. This change mirrors a similar growing recognition that juvenile delinquency proceedings are quasi-criminal. Recently, one court noted that where a father faced loss of custody of

133. Id. at 773, 81 Cal. Rptr. at 334.
134. "After finding that a minor is a person described in Section 300 the court shall hear evidence on the question of the proper disposition to be made of the matter." CAL. WELF. & INST. CODE § 358 (West 1984).
135. The traditional characterization of child dependency cases as civil trials has been derived from analogies to marital child custody disputes where the contest is between parents. In re Robinson, 8 Cal. App. 3d 783, 786, 87 Cal. Rptr. 678, 680 (1970); Kaufman v. Carter, 402 U.S. 964 (1971).
136. Many cases have noted the practical equivalence of adult and juvenile court delinquency proceedings. In addition to the 'quasi-criminal' nature of juvenile delinquency proceedings, and the 'widely held belief' that they are 'in reality criminal proceedings,' it cannot be denied that both adult and juvenile proceedings are designed, at least in part, to protect the public from the consequences of criminal activity.

his daughter, as well as criminal charges arising out of the same facts, the dependency hearing was "more nearly criminal than civil. . .". The effect of concluding that the child dependency trial was criminal was dramatic because the dependency court ruled that California Penal Code section 1112 prevented the father from forcing a psychiatric examination of his daughter regarding sexual abuse allegations. Once the analogy between dependency cases and delinquency and criminal trials is established, it becomes apparent that pre-trial negotiation in dependency cases is, in reality, the equivalent of criminal plea bargaining.

It has long been held that pre-trial statements made by a minor to a probation officer, or to a court in a fitness hearing, cannot be introduced as substantive evidence against the minor at trial. The policy underlying exclusion of the minor's statements is similar to that of Evidence Code sections 1152 and 1152.5, "the law's interest in encouraging complete candor. . .". Inadmissibility of the minor's pre-trial statements is also based upon fundamental fairness. The minor "should not be put to the unfair choice of being considered uncooperative by the juvenile probation officer and juvenile court because of his refusal to discuss his case with the probation officer, or of having his statements to that officer used against him in subsequent criminal proceedings."

Parents in child dependency proceedings face this same dilemma. The parent/probation officer relationship is critical in child

138. Penal Code section 1112 provides that "the trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility." CAL. PENAL CODE § 1112 (West 1985). It is truly ironic after decades of parents arguing that child dependency trials are criminal, so that the full panoply of criminal defendant's rights would enure to dependency parents, that the first court to accept the analogy applied criminal law preventing a parent from exercising a civil discovery device. However, the case of In re Dolly A., 177 Cal. App. 3d 195, 222 Cal. Rptr. 741 (1986), has served a double-decker irony since the criminal process analogy must sweep toward more rights for dependency parents. In the long run, the criminal process analogy will provide parents with greater, not fewer, protections.
139. Bryan v. Superior Court, 7 Cal. 3d 575, 586-87, 498 P.2d 1079, 1087, 102 Cal. Rptr. 831, 839 (1972). A fitness hearing pursuant to Welfare and Institutions Code section 707 determines whether a minor should be tried under the juvenile court law or in an adult criminal court. The probation officer is required to investigate and submit a report determining whether the minor would be amenable to the care, treatment and training program available through the facilities of the juvenile court.
141. Bryan, 7 Cal. 3d at 587-88, 498 P.2d at 1087, 102 Cal. Rptr. at 839.
dependency proceedings. The probation officer initially investigates the facts to determine whether court intervention is necessary, and continues to supervise the case during the twelve-month period of family reunification. There is thus a continuing relationship between the parents and the probation officer. In invoking jurisdiction over the minor, the court sets conditions of custody and defines the program of education and counseling that parents must complete in order to regain custody of their child. If parents fail to participate in court-ordered treatment programs or fail to cooperate or avail themselves of the services provided, this is prima facie evidence that returning the minor to the parents would be detrimental. The court must consider the probation officer's report in determining whether the parents have cooperated with the reunification plan. Therefore, unless the parents have a good, continuing relationship with the probation officer and follow the probation officer's recommendations, a presumption of detriment may arise. This is a result harsher than that imposed upon juveniles in fitness hearings, because the government's case in the child dependency proceeding is aided by prima facie evidence of detriment. Therefore, the parents' dilemma is profound; if they do not speak to the probation officer or therapists, they will be characterized as uncooperative and may never regain custody of their child. However, if they cooperate and candidly disclose their intimate thoughts and discuss facts underlying the alleged abuse or neglect, those statements may be admitted in court against them.

If a parent's silence can support a finding of non-participation or uncooperativeness which triggers a prima facie showing of detriment to the minor, the parent's due process right may be violated. The parent's assertion of his privilege against self-incrimination will

142. The Welfare and Institutions Code provides that "[i]t shall be the duty of the probation officer to prepare for every hearing . . . a social study of the minor, containing such matters as may be relevant to a proper disposition of the case. Such social study shall include a recommendation for the disposition of the case." CAL. WELF. & INST. CODE § 280 (West 1984). See also id. at § 281. "Even with due process safeguards an adverse probation department report can be very difficult to overcome." Comment, Proceedings to Terminate Parental Rights: Too Much or Too Little Protection for Parents 16 SANTA CLARA L. REV. 337, 350 (1976).

143. Welfare and Institutions Code section 362(d) provides the court power to order parents to "participate in child welfare services or services provided by an appropriate agency designated by the court." Section 362(e) gives the court jurisdiction to require parents to "participate in a counseling or education program. . . ." CAL. WELF. & INST. CODE § 362(d)-(e) (West 1984).

144. Id. at § 362(e).

145. Id.
result in continued loss of the fundamental liberty interest in custody of the child. If the therapy is court-ordered, the parent may not prevent data garnered during therapy from being admitted at trial.

In order to promote candor, settlements and the best interests of the child through expedited judicial review, parents should be given the same procedural protections against use of statements made during negotiation and counseling that delinquent minors receive during fitness hearings. Only then may parents fully cooperate in the state's effort quickly to determine the best interests of the children.

2. Adult Plea Bargains in Criminal Cases

In People v. Harvey the defendant was charged with two counts of robbery with use of a firearm and one count of an unre-

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146. California Rules of Court 1335(a)(1) provides parents the privilege against self-incrimination in dependency cases. Some probation officers equate a parent's silence in court-ordered group-counseling sessions as equivalent to nonparticipation or uncooperativeness pursuant to Welfare and Institutions Code section 366.2(e). In one case, the probation officer stated that when the mother attended court-ordered parenting classes, she did not participate, but rather merely “would sit mute during discussions.” The probation officer's conclusion was that the parents “have not fully cooperated with the Department of Public School Services in attending parenting classes, and when they have attended, they have received no apparent benefits, because of their lack of participation.” Clerk's Transcript, at 58-59 (copy on file at WCSL).

147. See Collins v. Superior Court, 74 Cal. App. 3d 47, 52-54, 141 Cal. Rptr. 273, 276-77 (1977). If a court orders a psychotherapist to examine a defendant in order to provide counsel information needed to advise defendant how to plead, the attorney-client privilege will prevent introduction of defendant's statements made during therapy from being introduced at trial. CAL. EVID. CODE § 1017 (West Supp. 1987); People v. Lines, 13 Cal. 3d 500, 507-12, 531 P.2d 793, 797-801, 119 Cal. Rptr. 225, 229-33 (1975). However, if the doctor or psychotherapist is appointed by the court to treat defendant, or to issue a report to the court instead of to assist counsel, there is no attorney-client privilege. Once the defendant tenders his physical or mental condition into evidence, the results of the therapy or examination are no longer protected by the physician-patient privilege or by the psychotherapist-patient privilege. CAL. EVID. CODE § 996 (West 1966); City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 238, 231 P.2d 26, 28 (1951); Lines, 13 Cal. 3d at 511-12, 531 P.2d at 800-01, 119 Cal. Rptr. at 232-33. However, since a parent ordered by the court to undergo therapy must make a choice of invoking his fifth amendment privilege against self-incrimination or of suffering a presumption of parental unfitness pursuant to Welfare and Institutions Code section 366.2(e), several possible constitutional violations are involved. There may be a fifth amendment violation under Estelle v. Smith, 451 U.S. 454, 462-68 (1981) (defendant's fifth amendment privilege violated by admitting in the penalty phase statements made to a court-ordered therapist for the purpose of determining whether defendant was mentally competent to stand trial). Significant due process issues are also involved. Ramona R. v. Superior Court, 37 Cal. 3d 802, 807, 693 P.2d 789, 792, 210 Cal. Rptr. 204, 207 (1985); People v. Coleman, 13 Cal. 3d 867, 874-75, 533 P.2d 1024, 1031-32, 120 Cal. Rptr. 384, 391-92 (1975).

lated robbery. The defendant entered a guilty plea to two counts of robbery with use of a firearm, and the third count was dismissed. At the sentencing hearing, the court found the dismissed robbery count described in the probation report was an aggravating circumstance and sentenced the defendant to the "upper" term of confinement. The California Supreme Court held that the trial court erred in using the dismissed plea bargained count at sentencing, because "[i]mplicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." Harvey "declares an equitable rule applicable to negotiated pleas. The trial court cannot with one hand give a benefit and with the other take it away."

However, the Harvey rule does not apply to counts dismissed pursuant to a plea bargain which are "transactionally related" to the facts underlying the admitted counts. In People v. Cortez, as part of a plea bargain, the defendant pleaded guilty to robbery; a related robbery count and a dangerous weapon allegation were dismissed. At the sentencing hearing the trial court considered the dismissed weapon use allegation and rendered an aggregated upper-term sentence. The appellate court found no Harvey error because the dismissed weapon use allegation was transactionally related to the sustained robbery count in which defendant used the weapon. Further, in People v. Gaskill, defendant pleaded guilty to unlawful possession of a sawed-off shotgun in exchange for dismissal of an assault with a deadly weapon charge. The trial court's use of the dismissed count in rendering the upper-term sentence was sustained because possession and use of the weapon were transactionally related. In determining whether allegations are "transactionally related," courts have focused upon three variables: (1) the time span between separate acts, (2) whether the separate acts involved dif-

149. Id. at 757, 602 P.2d at 397, 159 Cal. Rptr. at 697-98.
150. Id. at 758, 602 P.2d at 397-98, 159 Cal. Rptr. at 699.
152. Id.
154. Id.
155. Id. at 496-97, 163 Cal. Rptr. at 3-4.
157. Id.
158. Id. at 4, 167 Cal. Rptr. at 550.
frent victims;\(^{160}\) and (3) whether the acts involved "multiple criminal objectives which were independent of and not merely incidental to each other. . . ."\(^{161}\)

Although Harvey has been extended to juveniles alleged to have committed crimes in delinquency cases, Harvey has not been extended to dependency cases.\(^{162}\) Therefore, parents who admit or plead nolo contendere to amended or dismissed petitions of child abuse or neglect receive an illusory benefit.\(^{163}\) There is no law to prevent the juvenile court from considering at the disposition hearing counts dismissed or amended pursuant to a plea bargain at the jurisdiction hearing. Therefore, the result of the parent's plea bargain is that the court gains jurisdiction over the child, but all the data the parents assumed had been dismissed can still be marshalled against them.\(^{164}\) No procedure exists to sanitize modified or dismissed counts or the facts underlying those counts from probation reports which the trial court is required to admit and consider.\(^{165}\)

If the probation officer determines that family reunification will not be possible and refers the case for a parental severance trial, nothing will prevent the social worker from including the stricken factual basis of the amended or dismissed dependency allegations in

\(160.\) Harvey, 25 Cal. 3d at 757-59, 602 P.2d at 397-98, 159 Cal. Rptr. at 698-99.


\(163.\) "In lieu of admitting the allegations of the petition, the parent or guardian may enter a no contest concerning the truth of the allegations, subject to approval of the court." Cal. R. Ct. 1364(e) (West 1987).

\(164.\) One must wonder why almost 80% of dependency cases result in negotiated settlements if the parents do not benefit by amended or dismissed counts. One answer is that parents do not receive competent counseling from their attorney. In four years of litigating dependency cases through the trial advocacy course at UCLA Law School, I never heard a single attorney completely explain the consequences of a nolo contendere plea. Further, although Rules of Court 1364(d) and (e) require court approval of admissions and nolo contendere pleas, and although the court is required to inform parents of the consequences of the admission, I have never heard a court inform parents about the use of modified or dismissed counts at the dispositional hearing.

\(165.\) "[T]he court shall receive in evidence the social study of the minor made by the probation officer . . . and in any judgment and order of disposition, shall state the social study made by the probation officer had been read and considered by the court." Cal. Welf. & Inst. Code § 358 (West 1984). The evidentiary nightmare parents face regarding the consequences of section 358 is discussed infra, section III.
Therefore, the parents' initial plea bargain does not protect them in the parental severance trial. Finally, if criminal charges are filed, there is no law preventing the prosecutor from using the parents' admissions or nolo contendere pleas for impeachment.

Two changes are needed. First, People v. Harvey should be applied to dependency hearings. Any dismissed or amended count not transactionally related to the nolo contendere plea and the facts underlying those charges, should not be admissible at the dispositional hearing, or any subsequent hearing based upon the underlying facts of the sustained abuse or neglect petition. Second, probation officers should not be permitted to include those modified or dismissed counts and underlying facts in probation reports required to be considered by the trial court in any proceeding.

The implementation of Harvey in dependency cases is not difficult. For example, consider the following hypothetical dependency petition:

Paragraph I, Subdivision A and D: Said minor has no parent and/or guardian capable of and actually exercising proper care and control, in that: minors normally reside in the home of parents and:

Count I: On or about January 22, 1986, minor Autumn was hospitalized suffering a detrimental condition of malnutrition and/or failure to thrive while in the custody and control of parents;

Count II: Parents have demonstrated numerous emotional and mental problems, and because of their limitations, are unable to properly care for minors;

Count III: On or about March 10, 1986, minor's father engaged in acts of sexual intercourse with minor Autumn. Four-year-old sibling, Tommy, inadvertently saw the father and Autumn during intercourse. As a result, neither minor has a parent or guardian capable of and actually exercising proper and effective parental care and control;

Count IV: Minor's father was convicted of a felony, robbery, in violation of Penal Code section 211, on May 7, 1978, and is

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166. The probation officer is required to file a report concerning a recommendation for the proper disposition of the Civil Code section 232 parental severance petition. CAL. CIV. CODE § 233 (West 1982). The court "shall receive the report in evidence and shall read and consider the content thereof in rendering its judgment." CAL. CIV. CODE § 233(d) (West 1982). See also In re George G., 68 Cal. App. 3d 146, 137 Cal. Rptr. 201 (1977).

167. Rules of Court 1364(e) merely precludes use of the no contest plea "as an admission in any other action or proceeding." CAL. R. CT. 1364(e) (West 1987).
thus unfit to care for minors.

Suppose that at the jurisdictional hearing the parents plead nolo contendere to Count III, sexual intercourse with Autumn in the presence of Tommy, in exchange for the dismissal of all other counts. What facts underlying the dismissed counts would be admissible under *Harvey* at the disposition hearing?

Count I involves the same victim as Count III, but there was a two-and-a-half-month period between the events which involved completely different elements under the Penal Code definitions of those crimes. Therefore, under *Harvey* the relationship to the admitted count is tenuous, not transactionally related, and that evidence should be excluded.

Count II alleges that the parents' mental and emotional problems prevent proper parenting for the children. In a broad sense, mental and emotional abnormality may be related to the circumstances, state of mind, or intent of the father regarding the admitted Count III, sexual intercourse with Autumn. Further, since mental and emotional status may be a continuing condition, the variable of temporal nexus between the counts may be present. Thus, it appears that Count II may be transactionally related to Count III. However, it is clear that the mother's mental or psychological status has no direct correlation with Count III, and that data should be excluded under *Harvey*. There was no allegation that the mother knew of the father's potential to molest Autumn.

But courts must be very cautious in admitting evidence of parent's mental or emotional problems. An easy generalization is that "only a psychologically sick parent would harm his or her child," and therefore the parents' mental status is always transactionally related to counts of alleged abuse or neglect. However, the Legislature specifically created separate sections covering parents' inability to care for children based upon mental instability. Welfare and Institutions Code section 300(c) provides for court jurisdiction if the parent is "physically dangerous to the public because of mental or physical deficiency, disorder or abnormality."168 Also, Civil Code section 232(a)(6) provides for parental severance if the parents "are mentally disabled and are likely to remain so in the foreseeable future."169 But the Legislature has set rigorous proof requirements for parental severance based upon mental unfitness. The evidence must not only be relevant, the prosecutor must also introduce evidence by

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168. CAL. WELF. & INST. CODE § 300(c) (West Supp. 1987).
two certified medical experts to support a finding of parental mental incompetence.170

Count IV involves a different victim, a different intent, different elements and is extremely remote. There is nothing to support a finding that Count IV is "transactionally related" to the admitted Count III, and therefore, the evidence should be inadmissible at the dispositional hearing.

The Harvey "transactionally related" test is thus easy to apply to child dependency cases. This test promotes settlements which are consistent with the policy of stabilizing the minor's life expeditiously and protects the parents' benefit of the plea bargain by assuring that amended or dismissed counts, and their underlying facts, will not affect the disposition of the dependency action.

B. Dependency Trial Testimony

California courts have struggled for more than a decade with the effects of subsequent or collateral proceedings upon the scope of the privilege against self-incrimination.171 Of cases where the privilege against self-incrimination is surrendered in order to assert a different constitutional right, the least judicial attention and narrow-est constitutional protection involves parents in dependency and parental severance trials. That inattention ironically results from the presence of an applicable statute, Welfare and Institutions Code section 355.7 which provides: "Testimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under subdivision (a) or (d) of Section 300 shall not be admissible as evidence in any other action or proceeding."172 However, several questions immediately arise: (1) does section 355.7 provide use, transactional, or derivative immunity; (2) does the immunity extend to parents' pre-trial statements contained

170. Civil Code section 232(a)(6) requires that:
[The] evidence of any two experts, each of whom shall be either a physician or surgeon, certified either by the American Board of Psychiatry and Neurology or under section 6750 of the Welfare and Institutions Code, or a licensed psycholo-gist who has a doctoral degree in psychology and at least five years of post-graduate experience in the diagnosis and treatment of emotional and mental disorders, shall be required to support a finding [of parental unfitness based upon parental mental disability].
CAL. CIV. CODE § 232(a)(6) (West 1982).

171. People v. Coleman, 13 Cal. 3d 867, 553 P.2d 1024, 120 Cal. Rptr. 384 (1975); In re Wayne H., 24 Cal. 3d 595, 596 P.2d 1, 156 Cal. Rptr. 344 (1979); People v. Weaver, 39 Cal. 3d 654, 703 P.2d 1139, 217 Cal. Rptr. 245 (1985).

in official documents introduced in the dependency trial; (3) may parents' testimony be used as impeachment in subsequent parental severance or criminal proceedings; and (4) does section 355.7 immunity survive the "truth in evidence" provisions of California Constitution article 1, section 28(d)?

Although parents in dependency cases, like other civil litigants facing possible criminal charges, have a privilege against self-incrimination, it has been held that because of the immunity afforded by California Welfare and Institutions Code section 355.7, the court can order the parent to testify without admonishing the parent of her privilege against self-incrimination. At first blush, section 355.7 appears to provide parents minimal protection since it is specifically limited to testimony, not to evidence in general. Testimony in California merely includes "evidence which comes from living witnesses who testify orally" under oath in court. However, section 355.7 provides use immunity of oral testimony. Section 355.7 does not cover pre-trial statements made by the parents to officials such as the

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173. Article I, section 28(d) of the California Constitution provides,

Except as provided by statute hereafter enacted by a two-thirds vote of membership in each house of the legislature, relevant evidence shall not be excluded in any criminal proceeding . . . whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, sections 352, 782, or 1103.

174. The court is only required to "inform the parent or guardian of . . . [t]he right to assert the privilege against self-incrimination." CAL. R. CT. 1335(c)(1) (West 1987).

175. If the trial court grants immunity to a parent and requires the parent to answer a question, and the parent would have been privileged to remain silent, "any answer given, evidence produced, or any information derived therefrom shall not be used against the witness in any juvenile court or criminal proceeding." CAL. R. CT. 1342(d) (West 1987). The use immunity for dependency proceedings contrasts sharply with the transactional immunity provided witnesses in Welfare and Institutions Code section 602 juvenile delinquency trials pursuant to Rules of Court 1342(e), where the witness "shall not be subject to proceedings under the juvenile court law, to criminal prosecution, or to any penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order [to testify], the witness was required to answer or produce evidence." CAL. R. CT. 1342(c) (West 1987).

176. In In re Amos L., 124 Cal. App. 3d 1031, 177 Cal. Rptr. 783 (1981), the court determined that the trial court did not abuse its discretion in ordering the mother to testify since "testimony by a parent in a section 300 proceeding is specifically prohibited from being admitted as evidence in any other action or proceeding." Id. at 1039, 177 Cal. Rptr. at 387. See also CAL. WELF. & INST. CODE § 355.7 (West 1984).

177. Mann v. Higgins, 83 Cal. 66, 69, 23 P. 206, 207 (1890); People v. Lee, 164 Cal. App. 3d 830, 840-41, 210 Cal. Rptr. 799, 805-06 (1985). "Evidence" is defined as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." CAL. EVID. CODE § 140 (West 1987). "Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law." CAL. EVID. CODE § 710 (West 1966).

178. CAL. WELF. & INST. CODE § 355.7 (West 1984).
probation officer, police or prosecutors which are admitted at trial through the probation officer's reports since those statements are not "testimony."

If section 355.7 is the sole protection for parents ordered by the court to testify, the parents are only partially protected. For example, once the parent is on the witness stand, what is the legal effect of a parent refusing to answer the following question: "Isn't it true, Mr. Smith, that you told the probation officer that you 'just don't have the foggiest idea how to take care of your child?'" Can the juvenile dependency court draw a negative inference from the parent's silence and conclude that Mr. Smith did in fact admit that he did not know how to parent? In a recent Massachusetts case, *Custody of Two Minors*,\(^\text{179}\) the court held that the privilege against self-incrimination in criminal proceedings, which prevents drawing a negative inference from defendant's failure to testify, was not applicable in a child custody case.\(^\text{180}\)

If a parent's refusal to answer a question regarding pre-trial statements can be used against the parent during the dependency trial or in subsequent trials, then section 355.7 does not provide the same scope of protection as California Constitution article I, section 15.\(^\text{181}\) In order to pass constitutional muster, use immunity must provide the "same scope and effect" as the privilege against self-incrimination.\(^\text{182}\) Therefore, under certain circumstances section 355.7 may be unconstitutional as applied, since it does not fully cover the scope of parents' privilege against self-incrimination. Because rules of construction favor interpretation sustaining the constitutionality of statutes, the best analysis supports a finding that section 355.7 is only one protection of parents' self-incrimination rights.\(^\text{183}\)

California Evidence Code section 940 does not define the scope of the privilege against self-incrimination, but rather provides that the privilege is co-extensive with the scope under "the Constitution of the United States or the State of California. . . ." Rule 1365(c) of the California Rules of Court states: "[e]xcept as provided in sections 355.1 through 355.7, the admission and exclusion of evi-


\(^{180}\) Id.

\(^{181}\) CAl. CONST. art. I, § 15. The state privilege against self-incrimination, applies to ordinary civil cases. See also Fross v. Wotton, 3 Cal. 2d 384, 393, 44 P.2d 350, 354 (1935).


\(^{184}\) CAl. EVID. CODE § 940 (West 1966).
idence shall be in accordance with the rules of evidence established by the Evidence Code and by judicial decision.\textsuperscript{185}\textsuperscript{188} Clearly, the Legislature could not have meant that Welfare and Institutions Code section 355.7 supplants Evidence Code section 940 by providing narrower protection under the privilege against self-incrimination than is compelled by the United States or California Constitutions. Therefore, the only logical conclusion is that the Legislature in drafting section 355.7 intended to provide more protection than was currently mandated by the constitution, judicial opinions, or Evidence Code section 940.

That "protection-plus" of Welfare and Institutions Code section 355.7 appears to be a total bar to the introduction of parents' dependency testimony "in any other action or proceeding" even for the purpose of impeachment. That protection exceeds the scope of criminal defendant's privilege against self-incrimination. In \textit{People v. Coleman},\textsuperscript{186} the defendant argued that a probation revocation hearing preceding a criminal trial based upon the same underlying facts, denied him procedural due process by forcing him not to testify at the revocation hearing in order to avoid incriminating himself at the criminal trial.\textsuperscript{187} The California Supreme Court fashioned a judicially declared rule of evidence: upon objection, the defendant's testimony at the probation revocation hearing and any evidence derived therefrom will be inadmissible in the subsequent criminal proceedings, except for "impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination at the criminal proceeding are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony . . . to reveal . . . the probability that the probationer has committed perjury . . . ."\textsuperscript{188} Further, in \textit{Sheila O. v. Superior Court},\textsuperscript{189} it was similarly held that except for purposes of impeachment, testimony by a juvenile at a fitness hearing pursuant to Welfare and Institutions Code section 707(b) is inadmissible at the jurisdictional hearing.\textsuperscript{190}

\textsuperscript{185} Cal. R. Ct. 1365(c) (West 1987).
\textsuperscript{186} 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975).
\textsuperscript{187} \textit{Id.} at 889, 533 P.2d at 1042, 120 Cal. Rptr. at 402.
\textsuperscript{188} \textit{Id.}
\textsuperscript{190} \textit{Id.} at 816-17, 178 Cal. Rptr. at 420. The California Supreme Court in \textit{Ramona R. v. Superior Court} stated, "[w]e do not here reach the question whether the testimony [of a juvenile at a fitness hearing] may be used for purposes of impeachment. This dictum in \textit{Sheila [sic]} O. is thus neither approved nor disapproved." 37 Cal. 3d 802, 807 n.2, 693 P.2d 789, 792 n.2, 210 Cal. Rptr. 204, 207 n.2 (1985).
Thus, a court can only compel parents to testify in dependency hearings, based upon section 355.7 use immunity, by ruling that a parent’s silence or refusal to answer questions regarding pre-trial statements, based upon the privilege against self-incrimination, may not be used against the parent in the dependency trial or any subsequent trial. Statutory rules of construction support the holding that the Legislature intended section 355.7 to supplant the California Evidence Code section 940 privilege against self-incrimination solely in the area of “testimonial” use immunity. All other areas of applicability of the privilege against self-incrimination are covered by the federal and state constitutions.

The remaining question is whether Welfare and Institutions Code section 355.7 survived the “truth in evidence” provision of California Constitution article I, section 28(d). That provision requires introduction of relevant evidence in criminal trials unless excluded by “any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, sections 352, 782, or 1103.” Since section 355.7 expressly prohibits the use of parents’ testimony, and since courts have held that section 355.7 was an equivalent of the privilege against self-incrimination, that statute clearly survived article I, section 28(d).

IV. THE PARAMETERS OF ADMISSIBLE EVIDENCE IN PROBATION REPORTS PREPARED FOR DEPENDENCY AND PARENTAL SEVERANCE TRIALS

The California Rules of Evidence and Rules of Court are ap-

191. In re Amos L., 124 Cal. App. 3d 1031, 1039, 177 Cal. Rptr. 783, 791 (1981). The narrow definition of Welfare and Institutions Code section 355.7 immunity which is limited to “testimony” contrasts sharply with the protection under Evidence Code section 940 which includes pre-trial out-of-court statements as well. In People v. Barrios, the court stated that “[w]e particularly note the court’s conclusion [in Ramona R.] that statements made to a probation officer [by a juvenile charged in a Welfare and Institutions Code section 602 petition] are included within the privilege even though they are not testimonial when made. . . .” 166 Cal. App. 3d 732, 747, 212 Cal. Rptr. 644, 653 (1985).


193. The issue of whether the use immunity under Coleman for probation revocation hearings, and Bryan, In re Wayne H., and Sheila O. for juveniles’ statements to probation officers and at fitness hearings survived article I, section 28(d) of the California Constitution was a bit more complicated since Evidence Code section 940 did not explicitly refer to use immunities. However, the California Supreme Court in Ramona R., 37 Cal. 3d at 808, 693 P.2d at 793, 210 Cal. Rptr. at 208, held that the language of Evidence Code section 940 “is purposefully broad, and is meant to include within its reach judicial decisions relating to the privilege against self-incrimination.” See also People v. Weaver, 39 Cal. 3d 654, 659-60, 703 P.2d 1139, 1142-43, 217 Cal. Rptr. 245, 248-49 (1985).
plicable to dependency and parental severance cases. However, several statutes and cases have specifically defined evidentiary exceptions which permit the court considerably more latitude in considering evidence than in a normal civil case. Clearly, the catch-all evidentiary document in both dependency and parental severance trials is the probation report which the court is required to admit and consider.

A. Welfare and Institutions Code Section 300 Dependency Cases

The probation officer is required to investigate and issue a written report concerning the custody, status and welfare of children involved in dependency court. At the jurisdictional dependency hearing, the court determines whether the minor should be a dependent child under court jurisdiction. California Welfare and Institutions Code section 355 permits the court to consider "any matter or information relevant and material to circumstances or acts which are alleged to bring [the child] within the jurisdiction of the juvenile court. . . ." The scheme is therefore clear. The trial court at the jurisdictional hearing may admit and consider relevant and material evidence contained in the probation report unless judicial decisions have created exceptions.

The Evidence Code defines relevant evidence as that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the . . . action." It is not enough that evidence is merely "of consequence," it further must tend to prove or disprove a disputed fact. If the parties take an issue out of dispute,

195. Both Welfare and Institutions Code section 358 and Civil Code section 233 require the court to admit and consider the probation officer's report.
196. "It shall be the duty of the probation officer to prepare for every hearing on the disposition of a case . . . a social study of the minor, containing such matters as may be relevant to a proper disposition of the case." CAL. WELF. & INST. CODE § 280 (West 1984). Moreover, "[t]he probation officer shall upon order of any court in any matter involving custody, status, or welfare of a minor or minors, make an investigation of appropriate facts and circumstances and prepare and file with the court written reports and written recommendations in reference to such matters." Id. § 281.
197. The Rules of Court provide that "[a] probation or social worker's report, including any social study, containing information relevant and material to the jurisdiction hearing is admissible. . . ." CAL. R. CT. 1365(d) (West 1987).
199. Id. See also People v. Hall, 28 Cal. 3d 143, 616 P.2d 826, 167 Cal. Rptr. 844 (1980).
all evidence on that issue is irrelevant and inadmissible. Further, evidence which is not pertinent to the issues raised by the pleadings is immaterial and should not be introduced. A court has no authority to admit or judicially notice irrelevant evidence.

Therefore, absent questions concerning the constitutional right to confront hearsay declarants and the proscription against admitting or considering irrelevant evidence, the trial court has broad discretion in considering the probation report. Even though Welfare and Institutions Code section 358 requires the court to receive and consider the probation report, section 355, like sections 210 and 350, limits consideration to relevant and material evidence. However, unless a procedure exists to sanitize the probation report of irrelevant prejudicial data before the trial judge reads the report, the judge must necessarily violate the above code sections. Currently no procedure exists to sanitize probation reports before the trial judge reads them. County counsel and the district attorney who represent the state in dependency trials often argue that there is no right to sanitize the report. In fact, trial judges often read the probation reports before counsel has an opportunity to move to exclude irrelevant and prejudicial information.


203. Pursuant to Welfare and Institutions Code section 351, county counsel or the District Attorney shall represent the child and state. In one case I litigated for the U.C.L.A. clinical program, county counsel argued that "[t]here is no legal authority to 'sanitize' a legally mandated probation report. . . ." Reply Brief for Appellant at 14 (on file at the WCSL Library). The trial court denied the motion to sanitize the report and further stated "I want all possible information I can have on something like that [the child neglect allegations]. This is a very serious matter. If I can get more information, I want more information. . . . I want all the information I can have in a situation of this type." Record at 149-50 (on file at the WCSL Library).

204. In one Los Angeles Superior Court parental severance case under Civil Code section 232, which I supervised at U.C.L.A. Law School, county counsel requested the court to take judicial notice of the entire juvenile court file, containing among numerous other documents, the Welfare and Institutions Code section 300 Probation Report. The court responded, "[y]es, I have read both the files and they will be received into evidence." Record at 20 (on file at the WCSL Library). The court in In re Biggs, 17 Cal. App. 3d 337, 344, 94 Cal. Rptr. 519, 523 (1971), held that it was not error for the court to read the probation report prior to the jurisdiction hearing. See also In re Courtney S., 130 Cal. App. 3d 567, 575, 181 Cal. Rptr. 843, 848 (1982).
B. Civil Code Section 232 Parental Severance Trials

After a child has been declared a dependent child of the superior court for at least one year, a Permanency Planning hearing must be held to determine whether a parental severance trial should be initiated.\textsuperscript{208} As discussed earlier, a probation report is also required in parental severance cases. Civil Code section 233 requires the probation officer to file a written report with a dispositional recommendation, which the court "shall read and consider . . . in rendering its decision."\textsuperscript{208}

Unlike dependency trials, which statutorily limit consideration to relevant evidence, the Civil Code contains no such limitation in parental severance trials.\textsuperscript{207} Therefore, Evidence Code sections 210 and 352 control the scope of admissible evidence in parental severance trials.\textsuperscript{208} However, relevancy has been very broadly construed in relation to data contained in a Civil Code section 232 probation report.\textsuperscript{209}

There are two reasons why California Evidence Code sections 210, 350 and 352 apply to Civil Code section 233 probation reports. First, unless otherwise provided by statute, the Evidence Code applies to all superior court proceedings.\textsuperscript{210} Second, there is no statute which exempts section 232 probation reports from the Evidence Code proscriptions. In \textit{People v. Beagle},\textsuperscript{211} the California Supreme Court was to determine whether Evidence Code section 352 permitted trial court discretion to excuse unduly prejudicial evidence of a defendant's prior felony conviction which was otherwise admissible pursuant to California Evidence Code section 788.\textsuperscript{212} \textit{Beagle} held that section 352 was "one of the 'general provisions' of the Evidence Code . . . which apply to evidence admissible under other provisions thereof."\textsuperscript{212} \textit{Beagle}, therefore, ruled that section 352 permitted the court discretion to exclude evidence of prior felony convictions. In a

\begin{itemize}
\item \textsuperscript{205} \textit{Cal. Welf. & Inst. Code} § 366.25(a), (d) (West Supp. 1987).
\item \textsuperscript{206} \textit{Cal. Civ. Code} § 233 (West 1982).
\item \textsuperscript{208} \textit{Cal. Evid. Code} §§ 210, 350 (West 1966).
\item \textsuperscript{209} \textit{In re Rose Lynn G.} held that Civil Code section 232 does not limit information in the probation report to statements of the probation officer's personal knowledge. 57 Cal. App. 3d 406, 426, 129 Cal. Rptr. 338, 350 (1976).
\item \textsuperscript{210} \textit{Cal. Evid. Code} § 300 (West Supp. 1987).
\item \textsuperscript{211} 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).
\item \textsuperscript{212} \textit{Id.} at 452-53, 492 P.2d at 7-8, 99 Cal. Rptr. at 319-20; \textit{Cal. Evid. Code} § 352 (West 1966).
\item \textsuperscript{213} 6 Cal. 3d at 452, 492 P.2d at 8, 99 Cal. Rptr. at 320.
\end{itemize}
subsequent case, the California Supreme Court clarified its ruling in *Beagle* and stated that if the Legislature had intended an exception to the applicability of the "general provisions" of the Evidence Code, "it would have said so forthrightly."²¹⁴

Civil Code section 233 presents an analogous problem since the Legislature did not expressly state that the "general provisions" of Evidence Code sections 210, 350 and 352 were inapplicable in parental severance trials. Therefore, as in *Woodard*, the Evidence Code definitions of relevance are applicable to section 233 probation reports. Consideration of that irrelevant evidence is error. However, there is a world of procedural difference between harmless error and prejudicial error, and that distinction historically has prevented an adequate remedy for parties in dependency and parental severance court trials. There is a longstanding assumption that trial judges disregard evidence *later* determined irrelevant by an appellate court.²¹⁵ Of course, unless the judge specifically states on the record that she did not consider the inadmissible evidence, conjecture and speculation formulated as a presumption of official duty will prevail; the judge would not have considered evidence which should not have been admitted, and even if she did, it did not prejudice her decision.

California Courts for years have disapproved the presumption of nonprejudicial error in court trials. In *Estate of James*,²¹⁶ the court stated:

> If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of

²¹⁵. In *Gimbel v. Laramie*, 181 Cal. App. 2d 77, 5 Cal. Rptr. 88 (1960), the court stated that:
> From the very nature of the office he occupies and of the judicial processes a judge is required to divorce from his mind many inadmissible matters which are inevitably brought to light during the course of a trial. Improper incidents occur which cannot be guarded against. The law does not assume prejudice on the part of the trial judge. To justify a mistrial, a new trial or a reversal on appeal, an affirmative showing of prejudice . . . is required. *Id.* at 84, 5 Cal. Rptr. at 92-93. See also *People v. Beaumaster*, 17 Cal. App. 3d 996, 1009, 95 Cal. Rptr. 360, 369 (1971). But the remedy of appeal is inadequate in dependency and parental severance cases because the longer the child is separated from its parents, the greater the chances that the family will not be reunited. The court may conclude that the months or years of separation from the natural parents have resulted in a psychological bonding between the minor and his foster parents or adoptive parents. The court may also conclude that the minor should not be returned to the natural parents because it would cause the child too much trauma. *See In re Adoption of Pierce*, 5 Cal. App. 3d at 320, 85 Cal. Rptr. at 104.
fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows it may have been that particular evidence which turned the scale and lost the case for the appellants. This must of necessity be the rule wherever improper evidence has been admitted which upon its face tends in any degree to affect the final conclusion of the court.217

The court has eschewed the distinction between jury and court trials. In addition, the California Supreme Court has disapproved of the notion that: “As the trial was before the court and not before a jury, it is patent that immaterial testimony could do no harm. . . .”218

There is no accurate means of determining the effect of improperly admitted evidence on the trial court’s conclusions.219 In dependency and parental severance cases, absent an express statement by the court on the record, it should be presumed the court considered all evidence in the probation reports as mandated by Welfare and Institutions Code section 358 and Civil Code section 233.

C. Evidence Concerning Uncharged Allegations

In both dependency and parental severance trials, the parents’ due process rights require advance notice of the state’s allegations,220 and they have a statutory right to a copy of the petitions.221 Further, the exclusive grounds for severing parental relationships are listed in Civil Code section 232.222 The state may not rely at trial on a statutory ground for severance not charged in the petition.223

Since the grounds alleged in the petition dictate the contested issues, they also circumscribe the scope of relevant evidence pursuant to California Evidence Code sections 210 and 350.224 Evidence which does not relate to the statutory grounds alleged in the petition is irrelevant because it is not germane to “prove or disprove any disputed fact that is of consequence to the determination of the

217. Id. at 655, 177 Cal. Rptr. at 548.
219. Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 9, 94 P. 94 (1908).
221. CAL. WELF. & INST. CODE §§ 311, 336(d) (West 1984); CAL. CIV. CODE §§ 233.5, 235 (West 1982).
222. CAL. CIV. CODE § 232 (West 1982); In re Dunlap, 62 Cal. App. 3d at 437, 133 Cal. Rptr. at 315.
224. Evidence Code section 210 provides, “relevant evidence [is] evidence . . . having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” CAL. EVID. CODE § 210 (West 1966). Moreover, “no evidence is admissible except relevant evidence.” Id. at § 350.
However, many trial courts currently hold that since probation reports are admissible and must be considered, even facts which are not pertinent to the allegations must be admitted. In one recent trial, the court refused to sanitize hearsay evidence concerning the parents' emotional and mental health even though the state had not alleged the parents' mental and emotional incapacity to care for the child pursuant to California Civil Code section 232(a)(6). The court of appeal, in a startlingly expansive definition of relevance, held that there was no error because "the trial court in a Civil Code section 232 proceeding must act in the best interests of the child. From this we conclude that the information appellants contend is irrelevant — appellant's emotional and mental health — has bearing in a parental rights severance proceeding." The court's analysis and definition of relevance is incorrect for several reasons. First, the Evidence Code defines relevant evidence, not in terms of the best interests of the child, but rather in terms of evidence germane to issues in dispute. Second, Civil Code section 232(a)(6) was not alleged in the petition; the parents were not provided due process notice of the evidence and charges to be used against them. Third, if parents cannot delete evidence of uncharged allegations of mental incompetency from probation reports, the state will indirectly violate Civil Code section 232(a)(6). That section requires the testimony of two board certified doctors or two licensed, statutorily qualified psychologists to support a finding of parental mental incompetence. Further, McLaughlin v. Superior Court held that probation officers and investigators in child custody proceedings must testify "subject to the rules of evidence." Again, the Legislature could not have intended irrelevant prejudicial evidence of parental mental instability to be included in a probation report which would be inadmissible at trial through the probation

226. The documents in the court file contained the following multiple hearsay: (1) the mother was hospitalized for six months at the age of 18 and later spent two weeks at Norwalk Metropolitan State Hospital; and (2) the "parents have a history of mental and emotional problems. . . ." Clerk's Transcript at 54-55, 58 (on file at the WCSL Library).
228. See supra section III, A and B.
232. Id. at 481, 189 Cal. Rptr. at 485.
Finally, the rule of statutory construction that specific provisions control general provisions applies here. Section 233 is a general rule of admissibility of evidence contained in a probation report. However, section 232(a)(6) is a specific evidentiary exception to section 233. Section 232(a)(6) sets special requirements for the introduction of evidence of parental mental incapacity.

In short, the Legislature could not have intended statutorily inadequate evidence concerning parental mental incapacity on uncharged allegations, which could not be admitted through live testimony, to be considered by the trial judge just because the evidence appears in the probation report. The Legislature never intended to give the state a vehicle for introducing evidence insufficient under section 232(a)(6) via the section 233 exception.

D. Prior Arrests and Convictions

Civil Code section 232(a)(4) provides that if the parent is convicted of a felony based on facts which demonstrate the parent's unfitness to care for the child, the trial court may sustain the severance petition. The felony conviction is admissible because it is relevant to proving the contested allegation. However, in addition to prior felony convictions, probation reports routinely contain both substantiated and unsubstantiated arrest report data.

Evidence of arrests, especially when there is no disposition of the case, indicates but a single conclusion: a citizen or police officer subjectively believed both that a crime was committed or was about to be committed, and that the accused was probably connected with the crime. An arrest does not indicate guilt or inability to care for one's child. An arrest has no tendency to prove any of the Civil Code section 232 grounds for parental severance and therefore is irrelevant pursuant to California Evidence Code sections 210 and 350. Since arrests do not have probative value regarding the credibility of a witness, they are not admissible as impeachment evidence pursuant to

233. One of the lynchpins of jurisprudence is that "no man can do indirectly that which he is forbidden to do directly." Bird v. Holbrook, 4 Bing. 628, 130 Eng. Rep. 911 (1825); People v. Bentley, 131 Cal. App. 2d 687, 691, 281 P.2d 1, 3 (1955).

234. Frequently the probation officer attaches doctors' reports and/or police reports to the probation reports prepared pursuant to Welfare and Institutions Code section 281 and Civil Code section 232. See In re James B., 166 Cal. App. 3d 934, 212 Cal. Rptr. 778 (1985). However, nothing in the statutes authorizes the attachment of such reports.

235. CAL. CIV. CODE § 232(a)(4) (West 1982).


California Evidence Code section 788. Additionally, California Evidence Code section 787 expressly precludes attacking a witness' credibility by showing prior arrests.

Even so, the court in In re Rose Lynn G. held that there was no error in admitting an arrest sheet. The court noted that "[e]vidence of a parent's conviction of a crime would appear to have some relevancy in determining the best interests of children of such a parent, while evidence of arrests would appear, at best, to have little or no relevancy."

In re Rose Lynn G. is incorrectly decided. It is inconsistent with Evidence Code sections 210, 350, 787 and 788. Even if prior arrests have "little or no relevancy," the probative value is substantially outweighed by the prejudicial impact, and should be excluded under Evidence Code section 352.

E. The Relationship Between Foster Parents and/or Prospective Adoptive Parents and the Child

It was clear in California for over a quarter of a century that evidence of the minor's adjustment in foster placement was inadmissible in a parental severance trial. The court in In re Zimmerman stated that such testimony "was not relevant or material to the issues before the court below, which was the depravity of the respondent [parent] and whether her conduct towards [the minor] at the time of

241. Id. at 425-26, 129 Cal. Rptr. at 350.
242. In one appeal I filed, the court of appeal relied on In re Rose Lynn G. in holding that admission and consideration of the twenty unsubstantiated arrests was not error. The court further stated, "[i]n light of the fact that the information about the arrests was part of the report, we find no error in its admission." Reporter's Transcripts at 12 (on file at the WCST Library).
the hearing was such as to require the severance of parental ties.”

However, prosecutors argue that In re Zimmerman was preempted by California Civil Code section 232.5, which provides: “[t]he provisions of this chapter shall be liberally construed to serve and protect the interests and welfare of the child.” But, section 232.5 merely states that the best interests of the child should be considered and therefore does not affect the vitality of In re Zimmerman. It does not abrogate the parents’ due process rights and does not state that the Evidence Code’s definition of relevance is inapplicable in a parental severance trial. Further, in Adoption of D.S.C., the court held that the “liberal construction” language of section 232.5 was not intended to affect the fundamental right of parenting: “[t]hus, in determining whether the legal relationship between child and natural parent should be severed, the right of parenting is not to be subordinated to the best interests of the child.” Finally, In re Zimmerman expressly stated that the court must not only consider the fitness of the parent, but must also consider the best interest of the child. Quoting from In re Melkonian, the Zimmerman court stated: “[t]he inquiry under this statute is similar to that under the guardianship statute, the fitness or unfitness of the parent and the best interest of the child.” The Zimmerman court’s decision to exclude evidence of the child/foster parent relationship was based upon the identical factors which must currently be considered under section 232.5 and Adoption of D.S.C. Therefore, Civil Code section 232.5 does not appear to have affected Zimmerman’s vitality.

However, in 1981 the court in In re Christina L. held that a minor in a parental severance trial had a right to a determination of whether taking her from the foster parents and placing her with the natural parents would cause her emotional harm against her best interests. Thus, there is currently a conflict in the California courts as to whether evidence of the child/foster parent relationship is admissible.

The Zimmerman approach is wiser than the Christina L. approach. First, Christina L. erroneously presumes that the child will

244. Id. at 847, 24 Cal. Rptr. at 337.
245. CAL. CIV. CODE § 232.5 (West 1982).
248. 206 Cal. App. 2d at 844, 24 Cal. Rptr. at 335 (quoting In re Melkonian, 152 Cal. App. 2d at 252, 313 P.2d at 53 (1957)).
250. Id. at 748, 173 Cal. Rptr. at 728.
stay with the foster parents and that the foster parents will become the prospective adoptive parents. However, fewer than 25% of the foster parents become adoptive parents after parental severance.251 Further, the question of who will become the adoptive parents can only be determined after parental severance is final.252 If anyone other than the foster parent is to become the adoptive parent, the Christina L. rationale evaporates. The minor will not remain in the foster parents' home, therefore the child/foster parent relationship is irrelevant to the issue of parental severance. The Christina L. decision of relevance is based on a presumption derived from speculation; the court presumes relevance based upon a future likelihood that the child will remain with the foster parents if he or she is not returned to the natural parents. The Christina L. presumption is not only unsound, it violates the express statutory preference for the placement of children with the non-offending parent rather than with a non-parent.253 Further, since the presumption of continued placement with the foster parents is dependent upon the speculative determinations that both natural parents' rights will be severed and that the foster parent will become the adoptive parent, it is impossible for the natural parents to rebut the presumption prior to a trial on the

251. Letter from Bonnie Welch, Special Assistant, Los Angeles County Department of Children’s Services Adoptions Division, to William Patton (Sept. 9, 1986) (on file at the WCSL Library).

252. Some courts are blindly extending the In re Christina L. case in concluding that the trial court must act in the child’s best interest by admitting all evidence which will aid the court in determining the best interest of the child. One court stated that any evidence that can aid the court in “determining how the child’s interests can best be served cannot be irrelevant.” Unpublished opinion filed October 31, 1984, at 12-13 (on file at the WCSL Library). Furthermore, Civil Code section 239 provides that if the court severs parental rights, the court shall either appoint a guardian for the minor or refer the minor to a licensed adoption agency for adoptive placement by the agency; “however, no petition for adoption may be heard until the appellate rights of the natural parents have been exhausted.” CAL. CIV. CODE § 239 (West 1982).

253. Christina L. also neglects to take into account the preference for custody awards expressed in Civil Code section 4600. Under section 4600, if one parent is found to be so unfit as to require a severance of parental ties, the presumption is that the child will remain in the custody of the non-offending parent: “Custody should be awarded in the following order of preference according to the best interest of the child: (1) To both parents jointly pursuant to section 4600.5 or to either parent.” CAL. CIV. CODE § 4600(b)(1) (West 1982). In addition, the Department of Adoptions often argues that foster parents should not be the adoptive parents. “[T]he agency will argue that any petition for adoption by the foster parents which is granted by the court will encourage breakdown of the foster parent system by giving it a permanent placement aspect when it necessarily must remain a temporary care program.” Comment, The Foster Parents Dilemma “Who Can I Turn To When Somebody Needs Me?”, 11 SAN DIEGO L. REV. 376, 378 (1974). Section 396 provides “[i]t is the policy of the Legislature that foster care should be a temporary method of care for the children of this state. . . .” CAL. WELF. & INST. CODE § 396 (West 1984).
Another weakness with the Christina L. approach is that the parental severance trial can degenerate into a custody battle comparing the environment in the natural parents’ home with that in the foster parents’ home rather than addressing the critical question of the parents’ ability to care for the child. In determining which environment is best for the child, the natural parents are almost always at a disadvantage for two reasons. First, a child abuse or neglect petition has already been sustained against the natural parents. Second, the natural parents theoretically represent a cross-section of society; they are merely biological parents. However, the foster parents have been filtered through a state review process to determine whether they are “fit” to care for the child. Therefore, the real spectre of social engineering is present. The question is whether the court should or can sever parental rights simply because there is a better family available who will provide the child a better quality of life, as defined by the state. That question has been answered several times; a pure best interests of the child test is against the Legislature’s intent.

Dozens of articles have chronicled the horror of Painter v. Bannister where the court awarded custody to the grandparent who had a “stable, dependable, conventional, middle-class, middlewest background” compared to the father’s “unstable, unconventional, arty, Bohemian, and probably intellectually stimulating” lifestyle. The Christina L. approach provides the opportunity for a comparative decision regarding the best interest of the child, as in Painter v. Bannister. Therefore, the Zimmerman approach appears wiser. If the court finds that the parents are unfit and that severance is in the best interests of the child, then the question of child placement can be addressed in a subsequent hearing to determine the adoptive parent or appropriate guardian.


256. 258 Iowa 1390, 140 N.W.2d 152 (1966).

257. Id. at 1393-96, 140 N.W.2d at 154-56.
Another solution is to bifurcate the issues of parental severance and placement of the child, which would mirror the bifurcation of the questions of jurisdiction and placement in dependency cases. That solution is also consistent with bifurcation in criminal trials of the guilt and sentencing phases or the guilt and special circumstances hearing under California Penal Code section 190.1 which requires that "[t]he question of the defendant's guilt shall be first determined."\textsuperscript{258} In criminal trials, if a special circumstance is alleged to support the death penalty, the proceeding will be further bifurcated if the special circumstance alleges that the defendant has been convicted of a prior offense of "murder in the first or second degree." Mere bifurcation of the guilt and punishment phases in death penalty cases is not sufficient to protect the defendant from the prejudicial impact of statutorily relevant evidence on the prior murder alleged as a special circumstance. Further, in \textit{People v. Hall}\textsuperscript{259} the court recognized that introduction of relevant prior felony conviction evidence, as an element of the charged offense, may be prejudicial to a defendant who admits that element. The court suggested a bifurcation of the trial on the elements of the charged offense. The court noted that the verdict forms should reflect that the defendant is or is not guilty as charged in the accusatory pleading of violating Penal Code section 12021 (prior felon in possession of firearms) without referring to the prior conviction.\textsuperscript{260} The California courts and Legislature have recognized that when the fundamental rights of liberty or life are implicated, due process sometimes requires that highly relevant, probative data be excluded from the determination of guilt. That data is later admissible in the bifurcated proceeding if guilt is found.

Similarly, bifurcating the parental severance issue of the parents' fitness to rear the child from the question of placement or best interest of the child, permits the court to consider the minor's current foster home placement only if there has been a prior determination of parental unfitness. The \textit{Painter v. Bannister} normative infection simply would not occur, yet all best interest of the child placement evidence could be later introduced to help the court determine the best future for the child. Thus, the child's right to introduce that evidence pursuant to \textit{Christina L.} would be preserved.

However, the recent decision in \textit{In re Connie M.}\textsuperscript{261} has mud-

\textsuperscript{258} \textit{CAL. PENAL CODE} § 190.1 (West Supp. 1987).
\textsuperscript{259} 28 Cal. 3d 143, 616 P.2d 526, 167 Cal. Rptr. 844 (1980).
\textsuperscript{260} \textit{Id.} at 155 n.7, 616 P.2d at 832 n.7, 167 Cal. Rptr. at 851 n.7.
\textsuperscript{261} 176 Cal. App. 3d 1225, 222 Cal. Rptr. 673 (1986).
died the Zimmerman/Christina L. debate. In Connie M., the court ruled that foster parents had standing in parental severance trials, analogizing to In re B.G. But that analogy is inapt and pernicious. First, in In re B.G. the sole issue at the disposition hearing was the best temporary placement for the minor. The county had already sustained its burden at the jurisdictional hearing demonstrating that the parents had abused and neglected the child. Therefore, there was no threat of a Painter v. Bannister normative bias in the initial determination whether the alleged parental abuse occurred. However, in a parental severance trial, evidence of the relative merits of alternative child placement necessarily affects the judge's view of whether the natural parents are fit to care for their child. Therefore, after In re Connie M., bifurcation of the issues of parental fitness and the best interest of the child placement is even more critical.

In re Connie M. also comes to the erroneous and facile conclusion that granting foster parents standing in parental severance trials promotes "judicial economy." The court's theory is that if both natural parents are determined incapable of rearing the minor, the Legislature has provided a preference that custody be awarded to "the person or persons in whose home the child has been living in a wholesome and stable environment." However, the court's conclusion of judicial economy is illusory. True, a formal petition for

262. Id. at 1232-33, 222 Cal. Rptr. at 677.
263. Id. at 1233, 222 Cal. Rptr. at 677-78; In re B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).
264. The In re B.G. court expressly reserved the question of whether due process and equal protection require that the foster parents receive notice, an opportunity to be heard, and counsel in dependency trials pursuant to Welfare and Institutions Code section 300. 11 Cal. 3d at 693 n.21, 523 P.2d at 253-54 n.21, 114 Cal. Rptr. at 453-54 n.21. Historically, such rights have not existed under the U.S. Constitution because foster parents have no liberty or property interest in the child.

True liberty rights do not flow from state laws, which can be repealed by action of the legislature. . . . The very fact that the relationship before us is a creature of state law . . . demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it. Drummond v. Fulton County Dep't of Family & Children Serv., 563 F.2d 1200, 1207 (5th Cir. 1977); accord Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985). If foster parents have standing and the full panoply of due process trial rights, the central focus of parental severance trials will shift from the natural parents' fitness to a custody battle focusing on the relative placements for the minor. See also In re Christina K., 184 Cal. App. 3d 1463, 229 Cal. Rptr. 247 (1986) (in a Welfare and Institutions Code section 366 status review hearing the appellate court ruled that the trial court erred in not granting foster parents standing. However, the factual determination of parental neglect had already been determined at an earlier jurisdiction hearing).

265. CAL. CIV. CODE § 4600 (West 1983).
guardianship will be avoided if the status of guardian is not required for foster parent standing. However, that hearing will merely be replaced by a parental severance pre-trial hearing to determine whether the foster parents meet the requirements under Civil Code section 4600 which has the conjunctive requirements that: (1) the child has been living with the foster parents; and (2) there has been "a wholesome and stable environment" in the foster parents' home. The *In re Connie M.* court never discussed the need to determine whether the Civil Code section 4600 criteria existed; the court presumed the requirements were met. The natural parents will surely wish to contest the foster parents' standing. However, the natural parents will be forced into a tactical quagmire. If they do not object to the foster parents' standing, the question of the relative merits of alternative custody awards will be litigated together with the issue of the natural parents' fitness. If the natural parents do object to the foster parents' standing, the quality of the foster care placement will greatly influence the court even before the parental severance trial begins. There is, of course, an easy remedy. A different judge should hear all pre-trial motions, in effect, creating a law and motion court for child dependency and parental severance actions. In order to assure just and accurate decisions, the issue of

266. It is unrealistic to assume that the environment in foster placement is "wholesome" merely because sometime in the past the social worker concluded that the foster home met minimal placement standards. Review of foster home placement is almost non-existent. "The catch now is that children's services is stretched so thin that it might not make contact for months with that half of reported cases that it does accept." L. Timnick, *Child Abuse a Growing Tragedy in L.A. County*, L.A. Times, August 21, 1983, at 32, col. ___. It is unrealistic to believe that a children's worker with caseloads sometimes exceeding 100 families can truly monitor each case closely enough to chart changes in the custody environment. *Children's Services*, *supra* note 7, at A3, col. 5. More cases are beginning to question the perfunctory efforts of case workers to monitor and assist families thrust into the dependency system. *See In re Terry E.*, 180 Cal. App. 3d 932, 225 Cal. Rptr. 803 (1986).

267. Under Civil Code section 387, the intervenor has the burden of demonstrating that standing is necessary. *People v. Brophy*, 49 Cal. App. 2d 15, 120 P.2d 946 (1942). Further, objection to the lack of a party's standing to appear in an action may be made by a general demurrer. *Timberidge Enterprises, Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 880, 150 Cal. Rptr. 606, 610 (1978). In contrast, under the Federal Rules of Civil Procedure 24, where a governmental body is suing as *parents patriae*, "a strong affirmative showing that the sovereign is not fairly representing the interests of the [intervening] applicant" must be demonstrated. *U.S. v. Hooker Chemical & Plastics Corp.*, 101 F.R.D. 451 (W.D.N.Y.), aff'd, 749 F.2d 968 (2d Cir. 1984). Since the county is representing the child's interest in a Civil Code section 232 trial, the foster parents should be required to demonstrate that the county will not adequately represent the foster parents' interest, before the court determines that the foster parents have standing. Otherwise, section 232 trials will be needlessly lengthened, and the *In re Connie M.* rationale of judicial economy will be eviscerated. The county can marshal the relevant facts concerning foster parents by calling them as witnesses during its case-in-chief.
parental fitness must be separated from the issue of the relative merits of alternative placements.

V. Conclusion

This article rests upon a few basic assumptions. Foremost is the policy of dependency court intervention into family life only when it is necessary to protect children. That process of court involvement must provide quick, fair and accurate determinations regarding parental fitness and the best interests of children. Under the current law the dependency system provides parents disincentives to cooperate with the court and child protective services. Statements made to social workers, therapists and prosecutors can be used against the parents in subsequent civil and criminal proceedings. The parents' benefits of plea negotiation are illusory since stricken facts and allegations can be considered in future proceedings. The system thus discourages quick resolution of family problems. The article's suggestions of extending parents' privilege against self-incrimination and use and derivative immunity will provide an incentive for parent cooperation. The court will be able to more readily determine whether intervention is necessary and what family reunification services are needed.

In order to assure fair and accurate hearings, a few simple changes need to be made. First, the unmanageable social worker case loads must be reduced in order to assure that probation reports are complete and accurate, and that family reunification progress can be adequately monitored. Further, all parents who cannot afford counsel should be guaranteed a court-appointed attorney as a due process right. It is not in the best interests of children to separate them from their parents based upon trials where critical facts are not marshalled, where inadmissible evidence is not objected to and where the parents lack the professional training to make reasoned choices among the myriad of legal alternatives available.

Finally, the parameters of admissible evidence applicable to criminal and juvenile delinquency trials should be formally applied to child dependency and parental severance cases. The policies of fairness and justice underlying the century of evidentiary developments in criminal and juvenile delinquency trials are equally applicable to child abuse and neglect cases. A law and motion court is needed for parents to raise pre-trial motions concerning the scope of data prior to the trial judge reading the probation report. It is not in the children's, parents', or state's best interest to permit the court to read inadmissible evidence regarding raw arrest data, uncharged
allegations, legally insufficient facts, or to prematurely consider evidence of the minor's adjustment in foster placement. Many of these suggestions do not require new funding for implementation. However, the changes will benefit our children and provide more accuracy and fairness to the process which will decide whether families will forever be torn asunder.