REPLY TO:
Leslie Ellen Shear
(lescfls@me.com)

December 16, 2019

Presiding Justice Arthur Gilbert
Associate Justice Kenneth R. Yegan
Associate Justice Steven Z. Perren
Associate Justice Martin J. Tangeman
Court of Appeal of California
Second District, Division 6
Court Place
200 East Santa Clara Street
Ventura, CA 93001

Re: *Giese v. Superior Court (Giese)* (B302465)

Dear Justices:

The question of whether and how family courts make interim custody orders pending Fam. Code §217 evidentiary hearing or trial is unsettled in California. No published opinion has addressed the practice challenged by the petitioner in this action since 1983, when it was rejected as constitutionally invalid. (*McLaughlin v. Superior Court* (1983) 140 Cal.App.3d 473, 483) Interim custody orders have profound impacts in stabilizing and destabilizing children's lives. They often remain in effect for extended periods of time.

The Association of Certified Family Law Specialists (ACFLS) requests leave to file this preliminary letter brief as amicus curiae, and urges this Court to order full briefing on the important issues raised in the petition. ACFLS would like an opportunity to submit an amicus brief on the merits of these issues.

The petition challenges a recurring pattern in some counties and courtrooms – de facto delegation of judicial authority by "interim"

judicial adoption of the recommendations of a Fam. Code §3183 child custody recommending counselor without considering party and witness declarations, permitting cross-examination, or allowing rebuttal and contrary evidence. The record includes the trial judge's statement that it is his policy to accept all CCRC recommendations in this fashion pending evidentiary hearing or trial in every case.

There is no consistency from county to county or courtroom-to-courtroom about consideration of declarations, reports from child custody evaluators in the absence of a stipulation, recommendations of Fam. Code §3183 child custody recommending counselors, and opportunities for even brief cross-examination and rebuttal testimony.

The practice challenged here is precisely the practice prohibited in *McLaughlin*, shortly after the adoption of former Civ. Code §4607 requiring mandatory mediation of child custody matters and permitting counties to adopt "recommending" mediation models. The *McLaughlin* decision finds consideration of such recommendations "constitutionally invalid" unless the parents' rights to cross-examine the FCS staff member, and present contrary evidence are protected.

Nor is there any consistent practice of rapid setting of evidentiary hearings despite the statutory mandate that child custody matters be given priority for hearings and trials. (Fam. Code §3023) Some courts adopt FCS recommendations, some decline to make any interim orders and leave families without the stability of a court-ordered parenting plan, and some consider declarations, recommendations and brief testimony before making interim orders. In many courts, the FCS counselor drafts a signature-ready order for the judge – rendering the judge's role as a mere formality. Few family courts give child custody evidentiary hearings and trials priority. Santa Clara County and others have developed their own protocols by local rule that can produce interim orders.

Preservation of continuity and stability of a child's established pattern of care is one of the core principles of California child custody law – echoed in almost every appellate decision since *In re Marriage of Carney* (1979) 24 Cal.3d 725, 730-31. In this case the parties had elected to make their stipulated orders "final" within the meaning of *Montenegro v. Diaz* (2001) 26

Cal.4th 249, thereby creating a changed-circumstances finding requirement that was bypassed by interim adoption of FCS recommendations.

An interim change of custody from one parent's de facto custody to the other parent's custody has profound consequences for the entire family. Such an order also establishes a new status quo before the matter can be heard on the merits. That new status quo is likely to shape subsequent orders. An interim order for such a change based solely upon the opinion of a child custody recommending counselor in the absence of the compelling facts (removal from the jurisdiction or imminent harm) that would support ex parte custody orders (Fam. Code §§ 3061-3064) fails to meet fundamental standards of due process.

Such orders can be profoundly destabilizing for children "Children live in the present tense, and 'temporary' relocations may have a severe and pernicious impact on their well-being and sense of security." (*Andrew V. v. Superior Court* (2015) 234 Cal.App.4th 103, 109, as modified (Feb. 9, 2015), as modified (Mar. 3, 2015) (*Andrew V.*). The same is true of a "temporary" change of custody from one parent's care to the other's. The practice challenged here ignores that fundamental principle of California child custody law,

> Another factor that must be considered is the law's recognition of the importance of continuity and stability in a child's living arrangements. (§§ 1601, 1610; Fam. Code, § 3041, subds. (c), (d).) Thus, "the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements." [Citations] This is true regardless of whether the ongoing custody arrangement was established by court order or by the consent of a noncustodial parent. [Citations]"

In re Guardianship of L.V. (2006) 136 Cal.App.4th 481, 495)

It is not uncommon for interim child custody orders to remain in effect for many months (sometimes exceeding a year) pending trial or a Fam. Code §217 evidentiary hearing. Children and their families need the predictability and stability of interim parenting plan orders. But such orders need to be developed using the tools of the adjudicative model to ensure that the

court has sufficient information to make wise rulings, and that the parents have had a full and fair opportunity to present evidence and arguments. Hence the Family Code prohibits ex parte custody orders except in extraordinary circumstances, and provides for rapid setting of a hearing on the merits when such orders are issued.

Brief evaluation models "should not include "ultimate issue" recommendations such as legal/physical custody or a comprehensive parenting plan." (Gould-Saltman & Simon (2014) *Abbreviated Parenting Assessments (Part 2): Risks and Rewards,* ACFLS Family Law Specialist, Fall 2014, Vol. 4, 20, 22; see also Gould-Saltman, et al, (2013) *What Are the Constraints on Abbreviated Parenting Assessments?* (Part 1), ACFLS Family Law Specialist, Fall 2013, Vol.3, 12; and Association of Family and Conciliation Courts (2009) *Guidelines for Brief Focused Assessment*). The authors were addressing brief assessment models that involved at least a half-day of interviews, observation and document review – not the much briefer contact with the family used in by the CCRC model. They point to the risks associated with drawing large conclusions from minimal data, and limited assessment methods. Those risks make cross-examination and contrary evidence vital for wise outcomes.

When families experience their children's care dispatched after a brief conference outside the courtroom, the adjudicative process loses legitimacy in their eyes. Without testimony and declarations, cross-examination (of the counselor, other parent and collateral witnesses), the opportunity to present contrary evidence, and the other essential safeguards of the adjudicative process, the court cannot exercise meaningful discretion. Thus the order is a de facto delegation of judicial authority to the FCS counselor. A family court may not delegate any portion of its judicial authority without specific statutory authorization. (*In re Marriage of Matthews* (1980) 101 Cal.App.3d 811, 816- 817; *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197).

> The California Constitution, article VI, section 22, prohibits the delegation of judicial power except for the performance of subordinate judicial duties: "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." (*See Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436, 227 Cal.Rptr. 460 ["Deciding a

> major legal issue in a case … is not a subordinate judicial duty."].) This basic constitutional limitation, barring courts from delegating power, is at the heart of this case.

De Guere v. Universal City Studios, Inc. (1997) 56 Cal.App.4th 482, 496)

Family Code §3183 (recommending mediation by the court's child custody recommending counselor is a statutory exception to the hearsay rule, like other statutory social studies, incuding Fam. Code §§ 3110 et seq, (*Forslund v. Forslund* (1964) 225 Cal. App. 2d 476, 494; *Dahl v. Dahl* (1965) 237 Cal. App. 2d 407, 412–413; *Long v. Long* (1967) 251 Cal. App. 2d 732, 735–736); *In re Marriage of Russo* (1971) 21 Cal.App.3d 72, 78-79; *In re Malinda S.* (1990) 51 Cal.3d 368, at pages 376, 380, and footnote 12).

From the inception of the first domestic relations investigator statutes in 1929 (former Cal. Code Civ. Proc. §261(a)) to the present child custody evaluation and child custody recommending counselor statutes, admission of the hearsay in social study reports, recommendations, and testimony in child custody cases has been conditioned upon key protections for the parties, who must

- receive the report in advance,
- have the opportunity to cross-examine the author of the report and any collateral witnesses, and
- have the right to present witnesses and contrary evidence.

(*Fewel v. Fewel* (1943) 23 Cal. 2d 431, 435; *Moon v. Moon* (1944) 62 Cal. App. 2d 185; *Long v. Long* (1967) 251 Cal. App. 2d 732, 735–736; *Swain v. Swain* (1967) 250 Cal. App. 2d 1, 7–8; *In re Rose G.* (1976) 57 Cal. App. 3d 406, 425 n.5; *Wheeler v. Wheeler* (1973)34 Cal. App. 3d 239, 242; *In re George G.* (1977) 68 Cal. App. 3d 146, 155; *In re Malinda S.*, *supra*; J.*H. v. Superior Court* (2018) 20 Cal. App. 5th 530, 537-538)

The practice of basing temporary orders solely upon recommendations from a FCS staff member can deprive the court of key information necessary for wise decisionmaking –- particularly where the recommended orders will disrupt the child's established pattern of care. For that reason, historically, temporary custody orders have preserved the status quo

parenting arrangements pending trial and appeal to avoid multiple changes of custody. (*Gantner v. Gantner* (1952) 38 Cal.2d 691; *Sanchez v. Sanchez* , *supra*, 178 Cal.App.2d at p. 815; *C.V.C. v. Superior Court* (1973) 29 Cal.App.3d 909, 920) Footnote 12 in *Malinda S.* relies upon family court custody evaluation statutes that were subsequently incorporated into Fam. Code §3110 et seq. Similarly, interim relocation orders pending evidentiary hearing have been prohibited. (*Andrew V.)*

Raye and Pierson observe that interim orders are apt to shape permanent orders,

> The conventional wisdom has been that because of the courts' strong preference for maintaining the status quo (see § 4:69), the temporary custody arrangement is very important because it is likely to become the permanent arrangement, and the hearing on temporary custody may be more determinative of the final result than the hearing on permanent custody. This may still be the case where circumstances at the time of the temporary custody hearing remain essentially unchanged at the time of the hearing on permanent custody especially if the children did well in the temporary custody arrangement and there is no evidence to suggest that another arrangement would better meet their best interests.

Raye & Pierson (2019) *Cal. Civ. Prac. Family Law Litigation* § 4:53

The fact pattern here demonstrates the perfect storm of intersecting policies and procedures that face family law courts in their daily struggles to do the right thing for children and cope with heavy calendars, i.e.:

- the paramount policy of protecting continuity in children's established pattern of care (*In re the Marriage of Carney, supra; Burchard v. Garay (1986)* 42 Cal.3d 531, 535 ; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32–33; *In re Marriage of McLoren* (1988) 202 Cal.App.3d 108, 113, as modified (July 7, 1988) (applying the same principle to legal custody); *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1093; *F.T. v. L.J.* (2011) 194 Cal. App. 4th 1; *Jane J. v. Superior Court* (2015) 237 Cal.App.4th 894, 903, 904; *Anne H. v. Michael B.* (2016) 1 Cal.App.5th 488, 496, as modified (July 12, 2016); *In re Marriage of C.T. & R.B.* (2019) 33 Cal.App.5th 87, 97, reh'g denied (Apr. 4, 2019), review denied (June 12, 2019));

- the constitutional boundaries of delegation of judicial authority (*Marriage of Matthews, supra; Ruisi v. Thieriot, supra; De Guere v. Universal City Studios, Inc. supra*);
- the role of declarations as admissible written testimony at all stages of request for orders proceedings (Fam. Code §217, *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 962; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1271*; In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1127–1129, 1132; *In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 841*; In re Marriage of Pasco* (Cal. Ct. App., Nov. 25, 2019, No. C085721) 2019 WL 6270831, at *3);
- procedural due-process requirements in custody cases (*In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1120)
- admissibility of reports and testimony of child custody evaluators, including case-specific hearsay and whether such social studies are governed by *People v. Sanchez* (2016) 63 Cal.4th 665 or *In re Malinda S.*, *supra* and J.*H. v. Superior Court* (2018) 20 Cal. App. 5th 530, 537-538;
- delegation of judicial authority to family court services recommending counselors (*infra*);
- circumstances under which courts can make interim change-of-custody orders (*Andrew V., supra* 234 Cal.App.4th at p. 105*; In re the Marriage of McGinnis* (1992) 7 Cal.App.4th 473).

These issues require full briefing, and an opinion that gives guidance to California's family law courts faced with requests for interim custody orders in cases where children do not face imminent risk of harm or removal from the jurisdiction.

ACFLS is the Association of Certified Family Law Specialists (acfls.org), an independent non-profit bar association, composed of approximately 728 California certified family law specialists, and dedicated to promoting and preserving the practice of family law since 1980. ACFLS members represent parents, non-parents, child custody evaluators and others in child custody proceedings in California family courts. Our members also serve as court-appointed minors' counsel, mediators, private judges, judges pro tempore, and expert witnesses in child custody proceedings. ACFLS has served as amicus curiae in important California child custody cases including *Montenegro v. Diaz, and In re the Marriage of LaMusga.*

Since its founding at the inception of the certification of family law specialists by the State Bar, ACFLS has played an active public policy role when the Appellate Courts, Legislature and Judicial Council consider matters of significance to family courts, family court populations or the family law bar. ACFLS has appeared as amicus in many family law appellate cases, including cases where the organization's participation was invited by the appellate court.

ACFLS has an active amicus committee that reviews cases, and makes recommendations to the Executive Committee and Board of Directors regarding letters in support of publication or de-publication of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs. ACFLS's active amicus committee includes all four California lawyers who hold dual certification as family law and appellate specialists, and leaders in the family law community including Garrett Dailey and Dawn Gray.

ACFLS's Board of Directors and Amicus committee have no direct ties to or interest in the litigants or their attorneys in this matter. (Amicus committee member Claudia Ribet was recused from participation in ACFLS's deliberations and votes.)

"Arbitrary action or abuse of discretion of the trial court in the interim custody case are weighed in a more delicate and sensitive scale." (*Sanchez v. Sanchez* (1960) 178 Cal.App.2d 810, 813) A court making a best-interests determination "should receive the maximum amount of relevant information" (*Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 956). The CCRC process relies on minimal information and first impressions. It cannot stand alone as a substitute for adjudication.

Almost 20 years ago, the San Diego County Certified Family Law Specialists submitted an amicus brief in *Lammers v. Super. Ct. (Lammers)* (2000) 83 Cal.App.4th 1309, 1319. *Lammers* holds that heavy calendars cannot excuse family courts from performing their duty to consider the evidence on the merits,

> [A] measure implemented for the sake of efficiency cannot jeopardize the constitutional integrity of the judicial process. [Citation]. In other words, court

> congestion and 'the press of business' will not justify depriving parties of fundamental rights and a full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated.

ACFLS asks this Court to order full briefing and to issue a published opinion that addresses the important questions that the practice challenged by the petition presents.

Respectfully submitted,

Leslie Ellen Shear, CFLS, CALS
Co-chair ACFLS Amicus Committee