# *Options for Improving Outcomes for Foster Children By Increasing the Effectiveness of Dependency Hearings*

## *An Oversight Hearing of the Assembly Judiciary Committee*

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***9 a.m. – 12 noon***
***State Capitol, Room 4202***

***By Staff of the Assembly Judiciary Committee***

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*"Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the very spur to exertion and the surest of all guards against improbity."*
*Jeremy Bentham, 1790*

When children are removed from their families due to abuse or neglect, the state, through the child welfare agency and the juvenile dependency court, effectively becomes their parent. Nearly 60,000 children in California today are under the supervision of the dependency court. The dependency court has vast power over these children – determining what services they and their families will receive, who will care for them, in both the short- and long-term, and what contact they will have with their families. The court even decides whether to terminate parental rights and begin adoption proceedings. The critical role of the judiciary was made clear by the Judicial Council's Blue Ribbon Commission on Children in Foster Care (Commission):

> The courts are often the unseen partners in child welfare, but every child and parent in the foster-care system knows that the courts are where critical decisions are made, including such life-changing issues as where and with whom a child will live. When dependency court judges and attorneys are not acquainted with "100 percent" of the child, when there is inadequate time or not enough information to make informed decisions, hearings are likely to be rushed or delayed. Children and families suffer.
>
> The courts and their child welfare partners share responsibility for the safety and well-being of children while they are in foster care, in effect, serving as their "parent" until a child either safely returns home, moves to another permanent home, or becomes an adult and leaves the system.[1]

Unfortunately, far too often today dependency courts have neither adequate time, resources, or information on which to base difficult, life changing decisions. As the Commission found, "California's dependency courts are overstressed and underresourced, burdened by crowded

[1] California Blue Ribbon Commission on Children in Foster Care, *Fostering a New Future for California's Children: Ensuring Every Child a Safe, Secure, and Permanent Home: Final Report and Action* 3 (May, 2009).

dockets and inadequate information."[2] And despite significant strides to increase resources and improve information, our dependency courts remain "overstressed and underresourced" today. Given the state's budget situation, it is unlikely that needed resources will be forthcoming in the near term. Thus, lawmakers are tasked with the difficult job of seeking to improve the foster care and dependency court systems without additional resources anytime soon.

This background paper will review the juvenile dependency system and its role in protecting children from harm. Next, the paper will review two recently enacted bills that seek to increase the information available to dependency courts. Finally, the paper will explore the potential pros and cons of a largely cost-free avenue to improve court oversight of the foster care system – presumptively opening dependency hearings to the public.

## I. The Juvenile Dependency Process in California – The Court's Role in Child Protection

The dependency process begins when child abuse or neglect is reported to the local child welfare agency. A social worker with the child welfare agency investigates the allegation to determine if the child requires protection in order to ensure his or her safety. If so, the child welfare agency files a petition with the dependency court to make the child a dependent of the court. If necessary, the social worker will remove the child from his or her home and take the child into protective custody.[3] If the child is taken into custody, the court petition must be filed within 48 hours.[4]

Detention Hearing: If the child is removed from his or her parents, then an initial "detention" hearing is held either on the same day that the petition is filed or on the next court day "to determine whether the minor shall be further detained."[5] The court first hears information about the case at this hearing and determines whether the child should be removed from his or her home during the pendency of the case. The parents are informed of the reasons for the child's detention as well as their right to counsel.[6]

Jurisdictional Hearing: Within 15 days of the dependency court's decision to detain the child, the court must hold a jurisdictional hearing to decide, based on a preponderance of the evidence, whether the child falls within the dependency court's jurisdiction under Welfare & Institutions Code Section 300.[7] A child may come within the jurisdiction of the dependency court if he or she has suffered, or is at risk of suffering, serious physical harm or illness, serious emotional harm or sexual abuse.[8]

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[2] *Id.* at 4.
[3] Cal. Welf. & Inst. Code §§ 300, 315. This summary of the dependency court process is adapted from Judicial Council, Center for Families, Children & the Courts, *Caregivers and the Courts: A Primer on Juvenile Dependency Proceedings for California Foster Parents and Relative Caregivers*.
[4] Cal. Welf. & Inst. Code § 324 (excluding Sundays and "nonjudicial" days).
[5] Cal. Welf & Inst. Code § 315.
[6] Cal. Welf. & Inst. Code § 316.
[7] Cal. Welf. & Inst. Code §§ 334, 355(a).
[8] Cal. Welf. & Inst. Code § 300.

Dispositional Hearing: If the child continues to be detained, a dispositional hearing is held no later than ten days after the jurisdictional hearing.[9] Often, the jurisdictional hearing and the dispositional hearing are held at the same time. Before that hearing, the social worker provides the court with a detailed report about the child.[10] At the dispositional hearing, the court decides what will happen with the child. The court can dismiss the case, order informal services for the family or make the child a dependent of the court.

If the child is made a dependent of the court, the court must decide where the child should live. The court may allow the child to live with a parent on "family maintenance" where the court and a social worker monitor the child.[11] If the court determines that the child should be removed from his or her parents, it must first try to place the child with relatives, but if no appropriate relative placement is found, the child is typically placed in foster care.[12] During this period, "family reunification" services may be offered to the parents. However, if the parents' history indicates that family reunification is not possible, a permanency hearing will be held to determine what will happen to the child.

Review Hearings: The court must review the case of each child who has been removed from his or her parents every six months.[13] At this review hearing, the court assesses the parents' progress towards possible reunification. The court can reunify the family and dismiss the case, reunify the family and continue to monitor the family through family maintenance services, or maintain the case without, at that point, reunification.

Permanency Hearing: Within 12 months after the child is removed from his or her parents (or less for children under three years of age at removal), the court must determine whether the child should be returned home or whether efforts to reunite the family should be terminated.[14] If the child is not returned home, efforts could still continue to reunify the family. If reunification efforts end, the court must determine a different permanency plan for the child. Possibilities include adoption, legal guardianship or some other permanent arrangement.

Selection and Implementation Hearing: If reunification efforts terminate, a selection and implementation hearing must be held within 120 days of the end of reunification services.[15] At this hearing, the court, can, in the following order of preference: (1) terminate parental rights and order the child placed for adoption; (2) in the case of a child under the Indian Child Welfare Act, not terminate parental rights, but still seek tribal adoption; (3) appoint a relative with whom the child lives as the child's guardian; (4) identify adoption as the permanent placement goal and seek an adoptive family; (5) appoint a non-relative as guardian for the child; or (6) place the child in long-term foster care, subject to court review every six months.[16]

Ongoing Review Hearings: For all open cases, the court must hold a review hearing every six months. At these hearings, the social worker provides an updated report and the court assesses

[9] Cal. Welf. & Inst. § 358(a).
[10] Cal. Welf. & Inst. § 358(b).
[11] Cal. Welf. & Inst. § 360(b).
[12] Cal. Welf. & Inst. § 361.3.
[13] Cal. Welf. & Inst. §§ 366, 366.21.
[14] Cal. Welf. & Inst. § 366.21.
[15] *Id.*
[16] Cal. Welf. & Inst. § 366.26(b).

the child's situation until the child is adopted, placed in legal guardianship, or the case is otherwise dismissed.[17]

Appendix 1, courtesy of the Santa Clara dependency court, provides a more visual explanation of the juvenile dependency hearing process.

As is clear from the extensive list of court hearings, the Legislature has provided dependency courts with very significant, on-going oversight responsibilities to ensure that children removed from their families and placed under its jurisdiction are not only protected from further harm, but also thrive.

## II. Recent Legislation Seeks to Encourage Greater Participation in Dependency Hearings

Every session, the Legislature considers dozens of bills to improve California's foster care and juvenile dependency system. As part of that process, the Assembly Judiciary Committee considers all legislation relating to the juvenile dependency court. A list of significant dependency court legislation considered by the committee and passed by the Legislature in the last dozen years is set forth in Appendix 2.

Two bills passed by the Legislature in the last few years seek to improve outcomes for foster children by increasing participation in the dependency court process. A better understanding of these new laws and their implementation will help determine if the laws are working as anticipated and what can be done to increase their potential benefit for children.

Youth Participation in Their Dependency Hearings – AB 3051: AB 3051 (Jones), Chap. 166, Stats. 2008, grew out of an in-depth investigatory series that ran in the San Jose Mercury News.[18] Among other things, that year-long investigation discovered: "Children whose interests are supposed to determine dependency case outcomes are often regularly excluded from the court process. Judicial officers issue life-altering rulings without ever seeing the children whose futures are being decided."[19]

The Mercury News series profiled Zairon Frazier, who lived in eight shelters and group homes while in foster care. Despite being advised not to bother attending his hearings, he wanted to be there, so he traveled by bus and BART to get to court. Unfortunately, there was no consideration of his schedule when his emancipation hearing – the critical hearing that releases youth from foster care system supervision and from dependency court oversight – was set on the same day as his high school final exams. He took his finals and missed that most important hearing.

[17] Cal. Welf. & Inst. § 366(a), 366.21(e).
[18] Karen de Sá, *Broken Families, Broken Courts*, SAN JOSE MERCURY NEWS (Feb. 8-12, 2008). A copy of the series can found in Appendix 3.
[19] Karen de Sá, *Broken Families, Broken Courts Day 1: How rushed justice fails our kids*, SAN JOSE MERCURY NEWS (Feb. 10, 2008).

Studies have shown that there are many advantages to youth participation at dependency hearings: "Attending court benefits both the youth and the court. Youth have the opportunity to understand the process by seeing firsthand the court proceedings. They also develop a sense of control over the process when they actively participate. The court learns more about children than simply what is presented in reports."[20]

The Pew Commission on Children in Foster Care also found that the quality of justice improves when judges can hear and see the key parties:

> Children, parents, and caregivers all benefit when they have the opportunity to actively participate in court proceedings, as does the quality of decisions when judges can see and hear from key parties. State court leaders should consider the impact of factors such as court room and waiting area accommodations, case scheduling, use of technology in the court room, and translation of written materials. These issues can make the process more accessible and meaningful for all participants, including children.[21]

AB 3051 requires that children who want to participate in their foster care hearings can do so by (1) providing that children in attendance at their dependency hearings can address the court and fully participate in the hearing; and (2) if a youth 10 or older is not present, and has not been properly notified of the hearing or given an opportunity to attend, requiring the court to continue the hearing and make any orders reasonably necessary to allow the child to be present, unless the court finds that it is in the best interest of the child not to do so. The bill strictly limits continuances to ensure hearings are held timely.

While AB 3051 did not specifically address how children are to get to court or how the proceedings can be made more accessible for them, it did set forth important considerations in its statement of legislative intent:

> It is the intent of the Legislature that all children who want to attend their juvenile court hearings be given the means and the opportunity to attend, that these hearings be set to accommodate children's schedules, and that courtrooms and waiting areas help facilitate their attendance and participation. It is also the intent of the Legislature that juvenile courts promote communication with, and the participation of, children in attendance at hearings of which they are the subject, and that children attending these hearings leave the hearing with a clear understanding of what decisions the court made and why, and that the Administrative Office of the Courts help promote these objectives.

There are no studies to date on how AB 3051 has been implemented by the courts and the child welfare agencies, but anecdotal evidence suggests that youth participation in, and satisfaction with, their hearings has increased.

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[20] Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 *ABA CHILD LAW PRACTICE* Vol. 10, p. 150 (Dec. 2006).

[21] Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care*, p. 42 (May, 2004).

Providing a Means for Relative Participation in Dependency Hearings and in Children's Lives – AB 938: Relatives can also provide the court with important information about foster children, as well as significant assistance with their care. As one judge writes:

> Relatives are important to children. When parents fail to provide safe homes for their children, relatives should be the first people the court and the [child welfare] department should turn to for assistance. Families have placed their children with relatives informally for centuries, but state and federal policy and legislation have only recently identified relatives as the first choice for placement. Now that the relative preference placement policy is in place, practitioners, particularly social workers and judges, must implement it effectively. . . . The principal beneficiaries will be the abused and neglected children who appear in court.[22]

AB 938 (Judiciary), Chap. 261, Stats. 2009, provides relatives of children in foster care with information on how to assist these children. The key piece of that legislation implemented a requirement of the federal Fostering Connections to Success and Increasing Adoptions Act that helps ensure that children who have been removed from their parents can still be cared for by loving relatives. Under that requirement, every foster child's social worker must conduct an investigation to locate and notify relatives within 30 days of a child's removal to foster care.

In addition, in order to provide the social worker and the court with the best possible information about the child on which to base critical, life-changing decisions, AB 938 requires that social workers, beginning January 1, 2011, provide all notified relatives with a relative information form that can provide both child welfare and the court with information about the child's needs. The child welfare agency must provide any forms returned by relatives to the court and the parties.

As required by the legislation, the Judicial Council, in consultation with state Department of Social Services and the County Welfare Directors Association, developed the form – "Relative Notification – Form JV-285," a copy of which can be found in Appendix 4. The form allows relatives to provide the social worker and the court with information about the child's physical, emotional and behavioral health, and education, along with any other information that might be useful for the court to consider. The form also allows relatives to specify how they would like to assist the child, ranging the gamut from writing or calling the child to taking the child into their home. Finally, the form provides a mechanism for relatives who wish to address the court to make that request. If the relative makes such a request, the court then has the discretion to decide if allowing the relative's testimony is appropriate in the particular case.

The Legislature's goal is to to allow loving relatives to provide the court with information about the child's needs, thus helping increase the likelihood that the child's rights to safety, permanency and well-being will be met. Given that the legislation was fully implemented only a few months ago, it is likely that there is little data about how it is working. However, it is hoped that this

[22] Leonard Edwards, *Relative Placement in Child Protection Cases: A Judicial Perspective,* 61 JUVENILE AND FAMILY COURT JOURNAL, No. 2, p. 41 (2010).

hearing will provide the committee with some information on the bill's implementation, as well as ideas for best practices in soliciting and using relative information.

## III. Would Foster Children be Better Served if Dependency Hearings Were Presumptively Open to the Public?

Historically, juvenile courts in the United States – both dependency and delinquency – have been closed to the public. However, a growing number of states have opened up access to dependency court proceedings and, in some cases, to dependency court records, in hopes of improving outcomes for foster youth. The remainder of this paper will examine the law on public access to dependency proceedings and the possible advantages and disadvantages of such access.

Constitutional Right of Access to Court Proceedings: The First Amendment right to attend court hearings was first recognized by the U.S. Supreme Court in 1980 in *Richmond Newspapers, Inc. v. Virginia.*[23] In that case, involving a criminal trial, the Supreme Court established a two-part inquiry to determine whether particular court proceedings are constitutionally required to be open to the public. The first part of the test involves a historical analysis of access to similar proceedings, and the second part involves an analysis of the function served by public access to the particular court proceedings. In *Richmond Newspapers*, the Court found that, since the time of America's founding, criminal trials have been presumptively open to the public, and such access is "an indispensable attribute of the Anglo-American trial."[24] The Court went on to find many functional reasons for opening criminal courts. Open trials ensure that court proceedings are conducted fairly, with public attention discouraging perjury, biased court decisions, and misconduct by trial participants.[25] Beyond enhancing the fairness of trial outcomes and the quality of testimony, public trials boost public confidence in the justice system and enhance public satisfaction that justice is being done.[26] The Court concluded that public access to criminal trials could be limited only where there is an "overriding [state] interest articulated in the findings."[27] It is worthwhile noting that the Court's functional reasons for opening criminal courts apply equally well to all other court proceedings.

The Supreme Court reiterated the constitutional right of access to criminal courts in 1982 in *Globe Newspaper Co. v. Superior Court for Norfolk County*, where it struck down a Massachusetts law that banned the press and public from the courtroom during the testimony of an abused child in a sex abuse trial.[28] Although the court determined that the state's interest in safeguarding the psychological and physical welfare of a child was a compelling one, that

[23] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).
[24] *Id.* at 569.
[25] *Id.*
[26] *Id.* at 570-72.
[27] *Id.* at 581.
[28] *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982).

interest was insufficient to justify a blanket public access prohibition.[29] The Supreme Court has continued to recognize and expand the public's right of access to court proceedings.[30]

Public Access to Dependency Hearings in California: Juvenile court proceedings in California have not always been closed to the public. From 1937 to 1961, when juvenile dependency and delinquency proceedings were handled together, California law permitted juveniles to request private proceedings but did not require that all proceedings be closed. A Governor's Study Commission report, issued in 1960, recommended that juvenile court proceedings be made private. However, the Commission wrote that it did not intend to cut off media access to the proceedings:

> [W]e do not intend that this recommendation be used to exclude bonafide representatives of the press from attending juvenile court hearings. In so stating, we are convinced the press will continue to respect their voluntarily adopted code of ethics, whereby the names of juvenile offenders are not identified to the public.
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> We believe the press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures, and unmet needs. We, therefore, urge juvenile courts to actively encourage greater participation by the press. It is the feeling of the Commission that proceedings of the juvenile court should be confidential, not secret.[31]

As a result of the study, in 1961 the Legislature made juvenile courts proceedings presumptively closed to the public.

In 1976, California separated dependency hearings from delinquency hearings, and the procedural aspects of those hearings tracked different sections of the Welfare & Institutions Code. Section 346 now controls public access to dependency hearings and Section 676 controls access to delinquency hearings. Very similarly to delinquency hearings, Section 346 provides that the public may not be admitted to a dependency hearing unless "requested by a parent or guardian and consented to or requested" by the dependent child. However, the court may admit individuals that the court "deems to have a direct and legitimate interest in the particular case or the work of the court."

State Supreme Court Permits But Does Not Mandate Public Access to Juvenile Court Proceedings: In 1979 in *Brian W. v. Superior Court*,[32] the California Supreme Court determined that a court could admit the media to a juvenile delinquency proceeding. The court in that case found that Section 676 of the Welfare & Institutions Code authorizes the court to admit members of the press to delinquency proceedings. The lower court in that case had excluded members of the general public from the delinquency hearing, but allowed the press to attend provided they

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[29] *Id.* at 607-08.
[30] *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (jury selection); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (preliminary hearings).
[31] Governor's Special Study Commission on Juvenile Justice, *Part I – Recommendations for Change in California's Juvenile Court Law*, p. 24 (1960).
[32] 20 Cal.3d 618 (1978).

did not disclose the defendant's name or identity; and the state Supreme Court upheld that decision.[33]

Following *Brian W.*, a court of appeals in *San Bernardino County Department of Social Services v. Superior Court*,[34] concluded that Welfare & Institutions Code Section 346 also authorizes, but does not require, the court to admit members of the press to dependency hearings. The *San Bernardino* court found that the juvenile court "should allow access unless there is a reasonable likelihood that such access will be harmful to the child's or children's best interest in the case."[35] The *San Bernardino* court discussed at length the public policy supporting access to dependency hearings: (1) public proceedings may serve the twin goals of assuring fairness and giving the appearance of fairness; (2) "access may serve to check judicial abuse";[36] (3) public scrutiny may protect the rights of parents at risk of being separated from their children; (4) to the extent that access may reveal "crimes committed against and neglect visited upon" children, public access can provide an outlet for community outrage, concern, and emotion;[37] and (5) public access can serve to enhance the public's understanding of how the system operates and to promote the success of any proposed reform.

Prior Legislative Efforts to Open Dependency Courts in California Have Been Unsuccessful: Two previous efforts to provide public access to dependency proceedings in California – SB 1391 (Schiff and Polanco) in 2000 and AB 2627 (Steinberg ) in 2004 – were not successful. SB 1391 passed the Senate and the Assembly Judiciary Committee, but failed passage in the Assembly Appropriations Committee over concerns that California could lose its federal foster care funds for failure to comply with federal confidentiality requirements. Federal requirements have since been clarified to permit public access to dependency hearings.[38] AB 2627 passed the Assembly, but failed passage in the Senate.

California Dependency Courts Remain Presumptively Closed to the Public Today: As a result of legislation and litigation, dependency court hearings have, since 1961, generally been closed to the public, but occasional exceptions have been made. The Mercury News spent a year investigating dependency courts and then produced a 2008 in-depth series on the systemic difficulties of the foster care system.[39] As discussed above, this series resulted in several substantial changes to the dependency court in Santa Clara County and a new statewide statute increasing youth access to their hearings.[40] The series and these changes it helped bring about were only possible because some dependency court judges allowed access to their courtrooms.

Growing Trend Toward Public Access to Dependency Hearings: While most juvenile hearings in the United States – both dependency and delinquency – have historically been closed to the

[33] *Id.* at 620-22.
[34] 232 Cal.App.3d 188 (1991).
[35] *Id.* at 208.
[36] *Id.* at 202.
[37] *Id.* at 203.
[38] U.S. Department of Health & Human Services, Child Welfare Policy Manual, 8.4E Title IV-E, General Title IV-E Requirements, Confidentiality, Questions No. 7.
[39] *See* Appendix 3.
[40] AB 3051, see section II, *supra*.

public, there is a growing movement to open up access. Public access to dependency hearings is set forth in Table 1:

**Table 1: Public Access to Dependency Courts**[41]

| **Open** | **Presumptively Open** | **Presumptively Closed** | **Closed** |
|---|---|---|---|
| Oregon, Pennsylvania (case law allows judges to close proceedings) | Alaska, Colorado, Connecticut (pilot project), Florida, Indiana, Iowa, Kansas (some hearings), Maryland, Michigan, Minnesota, Nebraska, Nevada (some counties), New York, North Carolina, Ohio, Texas, Utah, Washington | Alabama, Arizona, California, Connecticut, Georgia, Hawaii, Illinois (exemptions for the media), Kansas (some hearings), Maine, Nevada (some counties), New Mexico (exemptions for media), Oklahoma, South Dakota, Tennessee, Wisconsin | Arkansas, Delaware, District of Columbia, Idaho, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Jersey, North Dakota, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, Wyoming |

State Evaluations of Public Access Pilots Show No Harm Resulted to Children, But Some Experts Argue That Additional Pilot Projects with More Robust Evaluations May Be Necessary For More Definitive Proof of No Harm: Several states that recently allowed public access to their dependency courts have conducted evaluations to ensure that children are not harmed by the access. The most thorough evaluation to date was done for Minnesota by the National Center for State Courts (NCSC). Minnesota's three-year pilot not only opened up access to court hearings but also to court records. As part of that study, NCSC researchers visited every pilot site in Minnesota, conducted two waves of surveys with child protection professionals, including guardians ad litem, social workers, public defenders, county attorneys and judges, and the media, reviewed court files, compiled data on filings and hearings, and compiled media accounts. The researchers found that there were costs to open hearings and records (particularly records, which require time consuming redaction to protect confidentiality) and that there were risks to parties about losing privacy. However, the report found that "During the course of the data collection, the NCSC project team did not encounter any cases where harm to children or parents irrefutably resulted from open hearings/records although many professionals expressed concern for the potential of such harm."[42] The report concluded:

[41] Dependency court public access status prepared by the National Council of Juvenile and Family Court Judges in 2004, updated in 2011 by staff of the Assembly Judiciary Committee. Since 2004, Alaska, Pennsylvania and Utah have opened public access to their dependency hearings and Connecticut began a pilot project to make its proceedings more open. In that time, no state has moved to limit access to its hearings.

[42] Fred Cheesman II, *Key Findings from the Evaluation of Open Hearings and Court Records in Juvenile Protection Matters*, p. 32 (National Center for State Courts 2001).

> [R]eal and potential benefits result from open hearings/records, including enhanced professional accountability, increased public and media attention to child protection issues, and openness of judicial proceedings in a free society. A critical factor that will influence the balance between the costs and benefits of open hearings/records in child protection proceedings will be the amount and type of attention that the public and the media pay to open hearings/records . . . , given the enhanced public access that results from this policy. To the extent that it is possible, child protection professionals should take the initiative to provide leadership and guidance to the public and the media as they begin to navigate the uncharted waters of open hearings/records. Such an initiative would benefit from a formal plan for public and media education, developed by all stakeholders in the child protection system, including children and parents. Policy makers should carefully judge the balance between the real and potential costs and benefits of open records/hearings in child protection proceedings as they decide the future of this policy, and, to the extent that they can, initiate efforts to ensure that benefits will far outweigh costs.[43]

While the study was not exhaustive and had limitations, and open court critics have questioned the validity of both that study and a subsequent study done in Arizona,[44] no evaluation of which the committee is aware has found any harm caused to children as a result of the opening up dependency proceedings. Following the evaluation, Minnesota expanded the pilot statewide and other states, including Alaska, Arizona, Pennsylvania, have opened up access to their courts. To date, no states have reportedly moved to limit access.

The most recent evaluation was of a pilot that ran in Connecticut for less than one year. While that study did not find any actual harm to the parties, it did recommend that the pilot not be continued in its current form, but instead be changed to provide a very limited form of expanded access. However, this evaluation pointed out its own limitations, noting that "Options [for gathering information and impressions about the pilot program] were limited because funding was unavailable to conduct a formal evaluation of the program, therefore the methodology and evaluation instruments developed were informal in nature and would not meet strict research guidelines for statistical reliability."[45] Additionally, the evaluators acknowledged that the survey sample, which was used to gather information from participants and the media, "was too small to provide statistically reliable results."[46] It is not yet known what will happen to Connecticut's public access pilot.

While supporters and opponents of public access to dependency courts have divergent perspectives on the issue, they will likely agree that while no study has yet demonstrated harm to actual program participants, a more thorough evaluation and analysis of the impacts of opening up access to dependency courts is desirable.

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[43] *Id.*
[44] *See* William Wesley Patton, *When the Empirical Base Crumbles: The Myth That Open Dependency Proceedings Do Not Psychologically Damage Abused Children*, 33 LAW & PSYCHOL. REV. 29 (2009).
[45] Juvenile Access Pilot Program Advisory Board, *Report to the Connecticut General Assembly* 19 (Dec. 31, 2010).
[46] *Id.* at 23.

A Review of the Arguments in Support and in Opposition to Public Access to Dependency Proceedings: As more and more states have allowed public access to dependency hearings in the last decade, the debate around access has generated significant attention and strong sentiments on the issue. To assist California in evaluating whether to allow for greater access to dependency proceedings, it is helpful to understand the arguments of both proponents of public access and opponents. The remainder of this paper will examine those arguments.

*Arguments in Support of Continuing to Keep Dependency Hearings Closed to the Public:* The following is an effort to summarize some of the main arguments in support of continuing to keep dependency court proceedings closed to the public, as well as key counter-arguments. While this summary is not exhaustive, it does seek to restate the key arguments of public access opponents.

1. *Children are traumatized when they testify before strangers.* One of the strongest arguments in support of excluding the public from hearings is that children are further traumatized when they testify in open court in front of strangers. Opponents of open court cite to studies showing that children have intense discomfort about testifying before strangers and that their courtroom testimony is associated with worse mental health.[47] Proponents counter, however, that in the 17 states that have opened up their dependency court proceedings, although there has been much concern about the difficulty of protecting children in open hearings, no one has demonstrated actual harm to children. The Minnesota evaluation showed that most attendees were not strangers, noting that open hearings led to "a slight but noticeable increase in attendance," but that most of the new attendees were "members of the extended family and foster parents, along with service providers."[48]

2. *Abused children have a right to privacy, but the press will not protect children's confidentiality and will publish their identifying information along with very embarrassing details of their abuse, causing them substantial trauma.* Opponents of open court produce media stories identifying abused or neglected children by name, along with embarrassing details about their abuse. Proponents counter that such stories occur in states with both open and closed court proceedings because if the media want to cover a sensational story, they will do so even in the absence of attending the court proceeding. Moreover, cases involving the most traumatic facts are likely to include not only a dependency case, but also a related criminal case; and public access to criminal proceedings, and to the facts if those cases, is constitutionally required. Finally, proponents argue that legislation can be carefully crafted to comply with First Amendments requirements and still prevent public release of children's and parent's identifying information learned in a court proceeding.

3. *Opening up access to courts will discourage people from reporting abuse.* Opponents of open hearings have raised concerns that fewer families will seek protection from child welfare and the courts if the courts are open to public scrutiny and that therefore children

[47] *See When the Empirical Base Crumbles*, *supra* note 43, at pp.44-48.
[48] Minnesota Evaluation, *supra* note 41, at iii.

are at risk of continued abuse and neglect. The Minnesota evaluation, however, found opening the courts had "minimal impact" on case filings, with nine pilot counties seeing increased filings, while only three counties saw small decreases.[49]

4. *Proceedings are more likely to be adversarial if they are open to the public, with more appeals likely.* Opponents have raised concerns that proceedings could become more adversarial – and take longer – and more appeals made if proceedings are open. The Minnesota evaluation found, however, that "there was little evidence that the duration of hearings was appreciably affected and there is no compelling evidence that the nature of in-court discussions has changed."[50] In addition, the evaluation discovered "little evidence that open hearings/records had a significant effect on the number of appeals."[51]

5. *Rehabilitation and reunification of the family may be compromised if abuse is made public.* Opponents of open proceedings are concerned that the publicity of open hearings could compromise efforts to reunify the family. The *San Bernardino* court, in holding that the media can be excluded from dependent hearings, wrote: "In our view, there can be little doubt that the embarrassment, emotional trauma and additional stress placed on the minor by public proceedings and the publicity engendered by public proceedings may well interfere with the rehabilitation and reunification of the family."[52] However the court provided no evidence to support this assertion and proponents of open courts contend that there is no evidence of this in any of the states that have opened their court proceedings.

6. *Opening up courts will substantially increase costs for an already overly burdened court system.* Opponents of public access argue that changing from the current presumption that hearings are closed to a presumption that they are open will incur substantial costs – both start-up and on-going – as parties bring, and courts must consider, motions to close their cases. However, proponents point to the fact that Minnesota had only the most minimal of start-up costs (no more than $2,000 for the start-up of its pilot[53]) and did not experience an increase in the length of dependency proceedings to support their assertion that public access can be achieved without any cost increase. In addition, when the Appropriations Committees of both the Assembly and the Senate considered the prior public access legislation, both committees determined that any costs would be minor and absorbable.

7. *In states that have opened up their hearings, media stories have not improved and hoped for systemic improvement has not yet occurred.* Opponents argue that while there have not been major problems with opening access to dependency court, neither has there been an improvement in the media coverage of the issue, more resources for courts or systemic reform of the foster care system. Their argument is that since any benefits of an open

[49] *Id.* at 19-22.
[50] *Id.* at 10.
[51] *Id.* at 22.
[52] *San Bernardino*, 232 Cal. App. 3d at 200.
[53] Testimony of Kathleen Blatz, former Chief Justice of the Minnesota Supreme Court (2003).

dependency court system have thus far have been few, if any, it is not worth the risk that children may be harmed. Proponents contend, however, that articles in states that have opened hearings have included investigations of systemic issues with the foster care system, rather than just the sensational stories covered in states with closed courts, and that the process of systemic reform is on-going.[54] Additionally, proponents point to New York, where public access led to reports of unacceptable conditions, which, in turn, led to funding for facility repairs and increased fees for attorneys representing parents.[55]

*Arguments in Support of Presumptively Opening Dependency Hearings to the Public:* The following is a similar effort to summarize the main arguments in support of presumptively opening up dependency court proceedings to the public, as well as key counter-arguments. As with the opponents' arguments, this list is not exhaustive.

1. *If the participants know the public is watching, they can be held accountable for their actions and their performance will improve.* Proponents argue that the single most important reason to open hearings to public scrutiny is to improve the functioning of the child welfare system by holding its participants – judges, lawyers and social workers – accountable for their actions. The Minnesota evaluation found:

> While the survey results suggest professional accountability has changed little as a result of open hearings/records, professionals responding to the second wave of surveys were more likely to feel that accountability had been enhanced than respondents to the first wave, suggesting a movement toward perceptions of greater accountability. In addition, information collected during site visits and in the narrative responses to the surveys show that many professionals felt that professional accountability had been enhanced. Some examples of these narrative responses follow:
>
> From a judge: *The prospect or potential of having more eyes watching and people scrutinizing the legal process of all individuals circled as having increased accountability, results in greater accountability.*
>
> From a county attorney: *The decisions of the court and on occasion the county attorney are under greater scrutiny. Decisions to remove or reunify, in particular, are weighed more carefully.*
>
> From a court administrator: *The county attorney and court administration are more accountable as far as content of the petition and attachments and scheduling of cases timely.*
>
> From public defenders: *All of this works to make a heretofore system that used confidentiality to cloak incompetence or negligence much more*

[54] Media stories during Minnesota's pilot discussed broader system issues including: (1) an overview of how the CPS system works; (2) the child's rights to stability; (3) a shortage of child advocates; (4) systemic information gaps; (5) problems with permanency timeframes. Testimony of Kathleen Blatz, *supra* note 53.

[55] Richard Wexler, *Civil Liberties Without Exceptions: NCCPR's Due Process Agenda for Children and Families*, p. 3 (National Coalition for Child Protection Reform 2008).

*accountable and focused on positive nurturing plans to help families and children with all parties held to an increasing standard of due care.*

*Judges actually read the file before the hearing and the lawyers (for county) for child, for parents are prepared.*[56]

Opponents counter that performance has not noticeably improved in states that have opened their proceedings to the public and, like the proponents, rely on the Minnesota evaluation for support (see, for example, the phrase: "the survey results suggest professional accountability has changed little as a result of open hearings/records" in the above quotation).

2. *An open system safeguards the integrity of the process.* An open system, argue proponents of open courts, safeguards the integrity of the judicial process and without that transparency there can be no assurance that justice is being achieved. In the preeminent case on opening courts to public scrutiny, the Supreme Court, quoting Jeremy Bentham, wrote: "'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.'"[57] Opponents counter, however, that the Supreme Court has not found a constitutional right to attend dependency hearings and that, absent that right, the risk of harm to vulnerable children in particular cases outweighs any possible benefit that may be achieved through increased transparency.

3. *Children are not harmed when proceedings are opened.* This argument is very similar to the counter arguments to opponents' first and second arguments above. Proponents argue that both studies and anecdotal evidence have demonstrated that children have not been harmed in jurisdictions that have opened proceedings to the public. Moreover, a presumptively open court system provides judges with the necessary discretion to close the court when it is not in the best interests of the child to allow for public access. Opponents contend that children either have been harmed or are at risk of being harmed and that the studies that show otherwise are inherently unreliable. Children can be better protected, they argue, in a presumptively closed system.

4. *Dependency court is publically funded and the public has a right to see how important government powers are used.* Proponents argue that few powers of the state are more intrusive to liberty interests than removing a child from his or her parents and terminating parental rights. Yet in California today this power is exercised in a proceeding that is closed to the public. Opponents counter that the child protection trumps the public's right to know.

[56] Minnesota Evaluation, *supra* note 41 at 25.
[57] *Richmond Newspapers*, 448 U.S. at 569 (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)).

5. *Allowing for public access will change the negative child welfare narrative.* One proponent of public access argues that the current closed system creates a "master narrative of child welfare [that] depicts foster care as a haven for 'child-victims' savagely brutalized by 'deviant,' 'monstrous' parents."[58] However, this proponent contends, in reality most foster children have experienced neglect, rather than abuse, and that some children in foster care would be far better off left at home rather than removed to foster care. Closed courts, argues this proponent, help perpetuate the erroneous, but widely accepted narrative, and silence the true story of the child welfare system. Opponents likely counter that opening up dependency court will not change the narrative and could, in fact, add to it with more stories of a failed system that might result in "remedies" based on myths, rather than scientific wisdom that will make the underlying systemic problem worse.

6. *Providing public access will allow for in-depth reporting of both the dependency courts and the foster care system and lead to much needed systemic reform.* Proponents of open courts argue that the foster care system needs systemic reform and that reform, which includes increased resources to reduce caseloads for judges, attorneys and social workers, cannot happen without media coverage of the shortcomings of the system. Without public access, the media will only report on the most sensational cases and, because child death records are accessible, when children in foster care die. With public access, the press will still report on the sensational stories, which they can get information on whether or not they are in the courtroom. However, they will also be able to do the investigative journalism that can lead to systemic reforms. Opponents counter that not only has there not been systemic reform in states with open courts, but that there also has not been a wrath of in-depth media coverage on the foster care system. The press has still focused on the most sensational cases, and public access has just given the press more ability to get the most sordid details of these cases to the general public.

The arguments and possible next steps may be best summed up in the National Council of Juvenile and Family Court Judges' conclusion to its thoughtful technical assistance brief on whether or not to open dependency hearings, attached as Appendix 5:

> The arguments that are raised in support of, and against, the opening of child protection cases to the public are controversial and unlikely to be resolved anytime soon. Child abuse and neglect cases are unique and challenging in and of themselves; once the debate of whether the public should be allowed access to child protection hearings is opened, a myriad of additional concerns are unearthed. Thus, it would be difficult, if not impossible, to create a blanket recommendation that would apply to all jurisdictions. Given the importance of the welfare of children in the child protection system, however, it is imperative that states fully, and carefully, consider all of the issues relating to the decision of whether or not to allow public access before reaching a decision. Included in this decision should be the strategic inclusion of empirical evaluation efforts aimed at determining the impact of changing hearing practice on the child protection system

[58] Matthew Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 MAINE LAW REVIEW 1, 2-3 (2010) (footnotes omitted).

> generally and on children more specifically. And, regardless of what decision is ultimately made about whether child protection proceedings should be open or closed in each state, all decisions should be framed in terms of the best interests of the child and steps should be taken to increase community awareness and education on the issue.[59]

It is worthwhile noting that in 2005 the National Council of Juvenile and Family Court Judges passed a resolution supporting presumptively open dependency courts.[60]

In this sober context of these important issues to children, California policy-makers may conclude that a carefully constructed, time-limited pilot project in California, with a robust and objective evaluation, could help determine whether making dependency hearings presumptively open to the public statewide will increase the accountability – and improve the functioning – of the system's foster care system, without causing harming to the state's abused and neglected children.

[59] Dionne Maxwell, Kim Taitano and Julie Wise, *To Open or Not to Open: The Issue of Public Access in Child Protection* Hearings 14-15 (National Council of Juvenile and Family Court Judges 2004).

[60] "NOW, THEREFORE, BE IT RESOLVED, our nation's juvenile and family courts be open to the public except when the juvenile or family court judge determines that the hearing should be closed in order to serve the best interests of the child and/or family members." National Council of Juvenile and Family Court Judges, *Resolution No. 9* (July 2005).