

## COMMENT

### The Marriage of Family Law and Private Judging in California

As court officials, legal assistance professionals, and policymakers work to ensure open access to an overwhelmed public judicial system,<sup>1</sup> a new—and some say dangerous—brand of justice has quietly emerged in the United States. Private judging is a hybrid of traditional litigation and alternative dispute resolution. After consent by all parties and an order from the presiding judge of a public court, the parties may appoint a private decision-maker, usually a retired judge, who hears the parties' arguments and then issues a binding opinion. In some jurisdictions—including California, where private judging was born and has principally developed—these private judges are vested with the authority of public judges, are subject to most of the same legal constraints, and issue judgments that are directly appealable.<sup>2</sup> But like arbitrators, private judges promise speedy, confidential decision-making.

Private judging fills a particularly worrisome gap between public adjudication and arbitration in the family law context. Though such cases often demand the privacy and convenience of arbitration, major issues of family law,

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1. See, e.g., JUDICIAL COUNCIL OF CAL., 2005 ANNUAL REPORT: CORNERSTONES OF DEMOCRACY: CALIFORNIA COURTS ENTER A NEW ERA OF JUDICIAL BRANCH INDEPENDENCE 23-28 (2005), <http://www.courtinfo.ca.gov/reference/documents/ar2005.pdf>.
  2. See *In re Marriage of Assemi*, 872 P.2d 1190, 1197 (Cal. 1994) (“Once a temporary judge has taken an oath of office, he or she has the same authority as a regular judge . . . and is empowered to render an appealable judgment in the same manner as a regular judge.” (citation omitted)). Private judges are generally referred to as “temporary judges” in California statutes, but the terms are interchangeable. The California Evidence Code indicates its applicability to judges, but not arbitrators, by stating that it applies to “actions conducted by a referee, court commissioner, or similar officer.” CAL. EVID. CODE § 300 (West 2006).

including divorce and custody disputes, are off-limits to arbitrators.<sup>3</sup> Thus far, only divorces have been sent to private judges in California. As one author has noted, however, other family disputes are similarly well suited to private judging because few parties are involved and the issues are rarely of public significance.<sup>4</sup>

Instead of being viewed as a “best of both worlds” approach, however, private judging has suffered sharp criticism as it has grown in popularity. Its greatest draw—the confidentiality it offers the parties—is also its most fervently disputed characteristic. Private trials inherently afford litigants a greater degree of privacy because of their limited accessibility to the public and the media. Allegations that some private judges abuse the system and shield information that should be made public have made such enhanced privacy all the more contentious.

Despite the controversy surrounding private judges, S.B. 1015, a bill introduced in the California state legislature, would increase the authority of all judges—including private judges—to further conceal the mechanics of legal proceedings that should be publicly accessible.<sup>5</sup> In light of this legislation and the concerns it raises, I propose a unique solution for private judging that harnesses its privacy and efficiency benefits and simultaneously works toward eliminating its ethical difficulties. I call for the regulation and limited expansion of private judging in the family law context, so as to benefit those who can afford private judges and to help alleviate the burden on public judicial resources. Part I discusses the unique role that private judging plays in the family law context. Part II offers an overview of the drawbacks of private judging. Part III then presents a proposal for the private adjudication of family disputes.

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3. See CAL. R. CT. 3.811(b)(5) (stating that “all Family Law Act Proceedings,” with the exception of property division in divorces, are exempt from arbitration eligibility).

4. See Anne S. Kim, Note, *Rent-a-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166, 195 (1994).

5. S.B. 1015 authorizes judges to seal information about the parties, including “financial assets, liabilities, income, or expenses,” or any identifying information that would lead to the discovery of those items. S.B. 1015, 2005-2006 Leg., Reg. Sess. § 1(f) (Cal. 2006). A prior version of the bill was deemed unconstitutional by the California courts because it interfered excessively with public access to the courts. See *In re Marriage of Burkle*, 37 Cal. Rptr. 3d 805 (Ct. App. 2006). Shortly after the California Supreme Court declined to review the case, the bill went on inactive status, but it has been reactivated several times.

**I. THE UNIQUE ROLE OF PRIVATE JUDGING IN FAMILY LAW**

Thirty years after the inception of private adjudication in California,<sup>6</sup> private judges hear cases on a variety of issues, but more than half of the cases involve family disputes.<sup>7</sup> Private judges are seen to be useful in family law cases that require the knowledge, expertise, and power of a traditional judge, but in which the parties seek the efficiency and immediacy of an arbitrator. High-profile, wealthy clients such as billionaire Ronald Burkle and celebrities Brad Pitt and Jennifer Aniston have turned to private judges for their divorce settlements.<sup>8</sup>

While many authors use “arbitrator” and “private judge” interchangeably,<sup>9</sup> I draw on the important distinctions between the two under California law. First, private judges must be members of the state bar, while there are no restrictions on who may serve as an arbitrator.<sup>10</sup> Second, whereas parties may submit their dispute to an arbitrator without any approval from the court, a private judge may be appointed only after the case has been filed in court and the presiding judge has agreed to send the case to a private judge.<sup>11</sup> Third, the merits of an arbitrator’s award (on questions of both law and fact) are

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6. Private judging began in 1976, when two Los Angeles lawyers interpreted a statutory provision, CAL. CIV. PROC. CODE §§ 638-645.1 (West 2006), to allow for private judging in a complex commercial dispute. See *Retired Judges Hired To Decide Lawsuits in Private*, N.Y. TIMES, Oct. 26, 1980, at A25.
  7. Gail D. Cox, *The Best Judges Money Can Buy*, NAT’L L.J., Dec. 21, 1987, at 1.
  8. See Michael Hiltzik, *Private Justice Can Be Yours if You’re Rich*, L.A. TIMES, Mar. 16, 2006, at C1; see also Jean Guccione, *System Offers Justice Outside the Spotlight, if You Can Pay*, L.A. TIMES, May 7, 2006, at B1.
  9. E.g., Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1260-62 (2005).
  10. Compare CAL. CONST. art. VI, § 21 (stating that upon stipulation of the parties, the court may order a member of the state bar to adjudicate the controversy), with CAL. CIV. PROC. CODE § 1281.6 (“If the arbitration agreement does not provide a method for appointing an arbitrator, the parties . . . may agree on a method of appointing an arbitrator and that method shall be followed.”), and *Robinson v. Superior Court*, 218 P.2d 10, 16 (Cal. 1950) (“Under the Code of Civil Procedure parties may agree to name a single arbitrator, and there is no restriction as to what parties may act in that capacity.”).
  11. Compare CAL. R. CT. 3.811(a)(4) (stating that cases are subject to arbitration upon stipulation by the parties), with CAL. CONST. art. VI, § 21 (“[T]he court may order a cause to be tried by a temporary judge . . .”), and CAL. CIV. PROC. CODE § 638 (stating that a referee may be appointed upon an agreement of the parties that is filed with the clerk or judge).

unreviewable by a court except in narrow cases as provided by statute.<sup>12</sup> By contrast, the decisions of private judges are directly appealable.<sup>13</sup>

Perhaps the most crucial difference is that in California, as well as in several other states, arbitrators have been barred from adjudicating most family disputes.<sup>14</sup> Case law suggests that arbitrators are excluded from this area because they are not bound by legal precedent and because their decisions are unreviewable. In the New York case of *Glauber v. Glauber*, for instance, the court held that child custody disputes are unsuitable for arbitration due to public policy concerns.<sup>15</sup> Private judging, however, does not raise such concerns. Its hybrid nature bridges the gap between public adjudication and arbitration, offering a better forum for resolving family law disputes.

Unlike arbitrators, private judges bring the accountability and experience of public judging to family law cases. Because private judges are held to the same expectations as public judges,<sup>16</sup> they may be ordered to consider such legal standards as the “best interests of the child,” and their decisions may be reviewed if they fail to do so. In addition, private judges will likely have had years of experience as public judges adjudicating family disputes. Parties can select a mutually agreeable private judge who has specialized knowledge of the relevant area of family law, such as custody, property division, or alimony.<sup>17</sup> This may lead to greater confidence that the end result will be fair to all

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12. CAL. CIV. PROC. CODE § 1294.2. There is no statutory indication that parties in arbitration may write a clause allowing for review of their case by a public judge or that, if they did so, such a clause would be upheld. Nationally, courts have held that the Federal Arbitration Act provides for an arbitrator’s decisions to be upheld even if incorrect, with only a few narrow exceptions. See, e.g., *First Options of Chi. v. Kaplan*, 514 U.S. 938, 942 (1995).
  13. See CAL. CIV. PROC. CODE § 904.1(a).
  14. See FLA. STAT. § 44.104(14) (2006) (stating that voluntary binding arbitration may not apply to child custody, visitation, or child support); CAL. R. CT. 3.811(b)(5); *Nashid v. Andrawis*, 847 A.2d 1098, 1101 (Conn. App. Ct. 2004) (holding that a divorcing couple’s arbitration agreement dividing up parental duties was void because only a trial court judge may make “binding decisions regarding substantive parenting issues”).
  15. 600 N.Y.S.2d 740, 743 (App. Div. 1993) (holding that when custody and visitation rights are at issue, “the court’s role as *parens patriae* must not be usurped”).
  16. See Kim, *supra* note 4, at 171 (“[T]emporary judges wield the same panoply of powers as active judges.”); see also Guccione, *supra* note 8 (stating that private judges’ rulings are subject to appeal and to the same public access requirements as those for cases held in courthouses).
  17. See ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., THE REPORT AND RECOMMENDATIONS OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON PRIVATE JUDGES 14-15 (1990). Generally, public judges will allow the parties to choose from an agreed-upon, approved list of private judges. See Guccione, *supra* note 8.

interested parties and may therefore reduce the likelihood of appeals that could further clog up the public judiciary.

Moreover, unlike public judges, private judges bring the convenience, efficiency, and confidentiality of arbitration to family law disputes. Private judging offers litigants a remarkable degree of flexibility: because they need not rely on the availability of public judges and courtrooms, the parties can tailor the proceedings to their own schedules.<sup>18</sup> Private adjudication also promises prompt resolution of disputes, as private judges have lighter caseloads and can devote more time to individual cases.<sup>19</sup> Given that divorce and custody battles can drag on for months to the detriment of all the relationships involved, speed and efficiency are invaluable. In fact, despite the outrageously high fees that some private judges command,<sup>20</sup> private adjudication may result in lower costs to the parties because quick resolution substantially reduces attorneys' fees.<sup>21</sup>

Most importantly, private judging affords family law litigants the confidentiality and privacy that the public court system cannot provide. Observers of the process agree that, together with efficiency, privacy is the most highly valued aspect of private judging because it shields parties' sensitive information, such as financial records and custody arrangements.<sup>22</sup> Private hearings may also be more conducive to reaching satisfactory settlements because they lack the adversarial nature of public trials. This is of particular importance in family law disputes, as a less adversarial environment can foster more constructive family relationships once a case has been decided.

Notably, private judging does not only benefit litigants who are wealthy enough to afford it. As public court administrators and officials struggle to cope with budget cuts, longer trials, and a shortage of well-trained staff,<sup>23</sup> an ever-growing number of litigants are forced to choose between settling a case and waiting perhaps years for their day in court.<sup>24</sup> Private judging helps these

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18. See ADMIN. OFFICE OF THE COURTS, *supra* note 17, at 12-13.

19. See Guccione, *supra* note 8.

20. A recent article estimated some private judges' rates to be as high as \$550 per hour. *Id.*

21. ADMIN. OFFICE OF THE COURTS, *supra* note 17, at 15.

22. See Guccione, *supra* note 8; see also Jane Biondi, Note, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 621-22 (1998) (suggesting that the notion of a right to privacy grew concomitantly with family law jurisprudence).

23. See JUDICIAL COUNCIL OF CAL., *supra* note 1, at 23-28.

24. Because many litigants cannot afford to wait, settlements frequently reflect the bargaining power of the parties rather than a decision on the merits of the case. See Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 OR. L. REV. 909, 930-31 (1995).

less affluent litigants gain access to the courts. In California, for instance, though family cases represented only 7.5% of total filings in 2004-2005, they accounted for nearly a third of the trial courts' workload in terms of time.<sup>25</sup> Shifting some of these cases to private judges would benefit individuals of all economic classes by alleviating the burden on the publicly financed judiciary and allowing greater access to the public legal system.

## II. THE DRAWBACKS OF PRIVATE JUDGING

Confidentiality is not only private judging's greatest benefit, but also its most controversial feature. Although California law requires that the public be allowed to attend all civil proceedings,<sup>26</sup> hearings in front of a private judge are typically more private than traditional court proceedings. The fact that these cases are heard outside of a courtroom and often on private property renders them far less accessible to the public.<sup>27</sup> There also is no statutory requirement that a court reporter transcribe the proceedings. While private adjudication therefore offers a privacy-protective option for family disputes—which can only approximate the confidentiality offered by arbitrators' sealing of records—critics charge that such privacy is in fact excessive and dangerous secrecy.<sup>28</sup>

The introduction of S.B. 1015 has only reignited controversy, as it would allow all judges greater latitude in sealing or redacting portions of court records.<sup>29</sup> The bill has also brought greater media attention to alleged abuses by private judges. Newspaper articles have reported that some documents are never placed in the appropriate court files and that proceedings, held in offices or even in hotel rooms, are hidden from interested observers.<sup>30</sup> As increasing numbers of celebrities seek out private judges precisely because of the secrecy

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25. JUDICIAL COUNCIL OF CAL., 2006 ANNUAL REPORT: PROGRESS THROUGH UNITY: WORKING TOWARD COMMON GOALS 26 (2006), <http://www.courtinfo.ca.gov/reference/documents/ar2006.pdf>.

26. See CAL. CIV. PROC. CODE § 124 (West 2006).

27. See CAL. R. CT. 2.833(b) ("A party who has elected to use the services of a privately compensated judge is deemed to have elected to proceed outside the courtroom."). *But see id.* 3.910 (explaining that a presiding judge may order a private judge to make a hearing more accessible to the public).

28. See, e.g., Hiltzik, *supra* note 8.

29. See *supra* note 5.

30. See Guccione, *supra* note 8; see also Hiltzik, *supra* note 8.

they offer,<sup>31</sup> critics have raised constitutional concerns about expanding private judging.<sup>32</sup>

The secrecy that private adjudication provides is all the more troubling to critics because, as the presiding judge of the Los Angeles Superior Court has noted, it can be difficult to prod private judges into following the rules.<sup>33</sup> For example, private judge Stephen Lachs, who presided over Michael Jackson's divorce, had his decision overturned after he barred a reporter from a hearing and his case files were found to be incomplete.<sup>34</sup> Retired judges cannot be disciplined by California's Commission on Judicial Performance, and private judges therefore operate without public supervision and safeguards.

A final concern is that private adjudication will create a two-tiered system of justice that benefits the wealthy at the expense of others. California Chief Justice Ronald M. George has analogized the potential divide between public and private judging to that between public and private schools, and he has suggested that the large-scale expansion of private judging might lead to the perception of a stratified legal system.<sup>35</sup> Only the poor and the middle class would have a stake in the public courts, while the wealthy would enjoy their own brand of justice.

### III. A NEW MODEL FOR PRIVATE JUDGING

Despite abundant criticism, private judging is only growing in popularity. Rather than reject this institution wholesale, I propose a unique solution for the family law context that harnesses private judging's privacy and efficiency benefits while limiting its drawbacks. My proposal would be enacted in the

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31. See, e.g., CITY NEWS SERVICE (L.A.), Mar. 8, 2006 (describing how, in recent celebrity divorces, parties have sought "reassignment to a private judge conducting proceedings outside the public eye," and noting that in a recent divorce proceeding, the parties claimed bias on the part of two public judges in order to get their case assigned to a private judge).

32. See, e.g., Rex R. Pershbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV 1, 28-32 (2004) (characterizing private judging as an end run around the law); Kim, *supra* note 4, at 180-89; see also Pechter v. Lyons, 441 F. Supp. 115, 118-19 (S.D.N.Y. 1977) (reversing an immigration judge's decision to close a deportation hearing, because "[t]he public should be able to see for itself that justice is being done"); Kleinbart v. United States, 388 A.2d 878, 881 (D.C. 1978) (reversing the defendant's conviction because the trial court judge locked the courtroom for one hour during the proceedings).

33. See Guccione, *supra* note 8.

34. *Id.*

35. See *id.*; see also Eric Berkowitz, *Is Justice Served?*, L.A. TIMES W. MAG., Oct. 22, 2006, at 20, 22 (quoting a private judge as saying, "[w]e're doing the luxury spa . . . rather than the public swimming pool").

form of a statutory provision, which would include the following central elements.

First, the statute would, at least initially, limit the scope of private judging to family law issues. Restricting the pool of cases that private judges may adjudicate would make it easier to regulate their conduct as well as to prevent potential abuses of the system. Moreover, while much of the debate over private judging has focused on confidentiality, such controversy is diminished in the family law context. The public has less need to know about the intimate details of a couple's divorce proceeding than about other civil matters,<sup>36</sup> and, because children are often involved in family law proceedings, a primary goal of such proceedings must be to safeguard their interests and privacy.<sup>37</sup> The coupling of the sensitive nature of family law cases and the fact that many of these cases do not raise issues of public concern makes family law the perfect "test tube" environment for private judging.

Of course, private judges should not be able to abuse their powers in the name of protecting privacy. Therefore, a second prong of the statute would implement a canon of ethics<sup>38</sup> designed to limit privacy to an appropriate level and to hold judges accountable for their decisions. It would ensure that licensed private judges would, among other things: agree to uphold and apply all relevant legal standards when deciding cases; provide a written judicial opinion for a decision at any party's request; and arrange for a reporter to transcribe the entirety of the proceedings in certain cases, such as those involving custody disputes. To protect the parties' privacy (to a limited degree), the record would omit the names and identifying information of children, as well as confidential financial information.

Third, private judges would hear cases that were time-consuming only because of procedural complications. Public judges would still adjudicate any case that presented novel substantive legal questions. Moreover, it would be within the public judge's discretion to determine whether a particular family

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36. See *Katz v. Katz*, 514 A.2d 1374, 1379 (Pa. Super. Ct. 1986) (holding that a court may close divorce hearings to the public because "no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship").

37. See, e.g., *P.B. v. C.C.*, 647 N.Y.S.2d 732 (App. Div. 1996) (holding that a custody proceeding should be shielded from public access and that the application to close the courtroom should be granted so as to prevent further emotional harm to the children involved).

38. The American Arbitration Association has posted an excellent example of a code of ethics on its website. See Am. Arbitration Ass'n, Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization, <http://www.adr.org/sp.asp?id=22036> (last visited Apr. 12, 2007). Its principles include a commitment to confidentiality, impartiality, and diversity. Unfortunately, enforcement of such principles remains largely discretionary, as it is not currently required by law.



law case that presented no novel issues of law but contained complicated facts should be handled by a public or private judge.

A final prong of the statute would address the fear that private judging might lead to a two-tiered justice system, by requiring each private judge to contribute a percentage of her fees to a government fund. These contributions would primarily cover the administrative costs of the private judging system (such as redacting confidential information from records), but a significant portion would be put back into the public court system to help implement desperately needed improvements.<sup>39</sup> The special costs of private family law proceedings make them specially suited to such a fee structure. For instance, while an average divorce proceeding lasts about one year, with an estimated cost of \$15,000,<sup>40</sup> Michael Jackson's divorce case lasted ten days, and the private judge earned \$73,000.<sup>41</sup> Funds collected from the private judging system could go a long way toward alleviating the state justice system's financial difficulties and increasing access and efficiency for individuals filing in the public courts.

## CONCLUSION

The future of private adjudication in the United States is still taking shape. As the media spotlight shines more intensely on the rich and famous, wealthy clients will go to greater lengths to shield what they consider to be intimate details of their private lives. Meanwhile, the courts must continue to balance these privacy interests with the right of public access to court proceedings. The reforms I propose may improve the state of private *and* public justice, while ensuring that the judicial system continues to comport with basic notions of fairness and equality.

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39. See JUDICIAL COUNCIL OF CAL., *supra* note 1, at 25 (noting that California needs 360 new judicial officers).

40. IRA DISTENFIELD & LINDA DISTENFIELD, *WE THE PEOPLE'S GUIDE TO DIVORCE* 26 (2005); John Campanelli, *Clickety Split*, CLEVELAND PLAIN DEALER, Nov. 13, 2005, at L1.

41. Guccione, *supra* note 8.