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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JASON EVERETT PELLUM,	)	1:09-cv-00494-OWW-SMS
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	APPLICATION TO PROCEED IN FORMA
	)	PAUPERIS (DOC. 2)
v.	)	
	)	ORDER DISMISSING PLAINTIFF'S
FRESNO COUNTY CHILD PROTECTIVE)	)	COMPLAINT WITH LEAVE TO FILE A
SERVICES, et al.,	)	FIRST AMENDED COMPLAINT NO LATER
	)	THAN THIRTY DAYS AFTER THE DATE
Defendants.	)	OF SERVICE OF THIS ORDER (DOC. 1)
	)	
	)	

Plaintiff is proceeding pro se with an action for damages and other relief concerning alleged civil rights violations. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304.

I. Application to Proceed in Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

II. Screening the Complaint

A. Legal Standards

In cases wherein the plaintiff is proceeding in forma pauperis, the Court is required to screen cases and shall dismiss

1 the case at any time if the Court determines that the allegation  
2 of poverty is untrue, or the action or appeal is frivolous or  
3 malicious, fails to state a claim on which relief may be granted,  
4 or seeks monetary relief against a defendant who is immune from  
5 such relief. 28 U.S.C. 1915(e) (2).

6 Fed. R. Civ. P. 8(a) provides:

7 A pleading that states a claim for relief must  
8 contain:

9 (1) a short and plain statement of the grounds  
10 for the court's jurisdiction, unless the court  
11 already has jurisdiction and the claim needs no  
12 new jurisdictional support;

13 (2) a short and plain statement of the claim  
14 showing that the pleader is entitled to relief;  
15 and

16 (3) a demand for the relief sought, which may  
17 include relief in the alternative or different  
18 types of relief.

19 Rule 8(a)'s simplified pleading standard applies to all civil  
20 actions, with limited exceptions," none of which applies to  
21 section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506,  
22 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a  
23 complaint must contain "a short and plain statement of the claim  
24 showing that the pleader is entitled to relief...." Fed. R. Civ.  
25 P. 8(a). "Such a statement must simply give the defendant fair  
26 notice of what the plaintiff's claim is and the grounds upon  
27 which it rests." Swierkiewicz, 534 U.S. at 512. However, "the  
28 liberal pleading standard... applies only to a plaintiff's  
factual allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9  
(1989).

In reviewing a complaint under this standard, the Court must  
accept as true the allegations of the complaint in question,  
Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740

1 (1976), construe the pro se pleadings liberally in the light most  
2 favorable to the Plaintiff, Resnick v. Hayes, 213 F.3d 443, 447  
3 (9<sup>th</sup> Cir. 2000), and resolve all doubts in the Plaintiff's favor,  
4 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

5 Although a complaint attacked by a Rule 12(b)(6) motion to  
6 dismiss does not need detailed factual allegations, a plaintiff  
7 does not meet his or her obligation to provide the grounds of  
8 entitlement to relief by supplying only conclusions, labels, or a  
9 formulaic recitation of the elements of a claim. Bell Atlantic  
10 Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007). Factual  
11 allegations must be sufficient, when viewed in light of common  
12 experience, to raise a right to relief above the speculative  
13 level and to provide plausible grounds to suggest and infer the  
14 element, or to raise a reasonable expectation that discovery will  
15 reveal evidence of the required element. Bell, 127 S.Ct. at 1965.  
16 Once a claim has been stated adequately, it may be supported by  
17 showing any set of facts consistent with the allegations of the  
18 complaint, and it may not be dismissed based on a court's  
19 assessment that the plaintiff will fail to find evidence to  
20 support the allegations or prove the claim to the satisfaction of  
21 the finder of fact. Bell, 127 S.Ct. at 1969.

22 If the Court determines that the complaint fails to state a  
23 claim, leave to amend should be granted to the extent that the  
24 deficiencies of the complaint can be cured by amendment. Lopez v.  
25 Smith, 203 F.3d 1122, 1130 (9<sup>th</sup> Cir. 2000) (en banc). Dismissal  
26 of a pro se complaint for failure to state a claim is proper only  
27 where it is obvious that the Plaintiff cannot prevail on the  
28 facts that he has alleged and that an opportunity to amend would

1 be futile. Lopez v. Smith, 203 F.3d at 1128.

2 A claim is frivolous if it lacks an arguable basis either in  
3 law or fact. Neitzke v. Williams, 490 U.S. 319, 324 (1989). A  
4 frivolous claim is based on an inarguable legal conclusion or a  
5 fanciful factual allegation. Id. A federal court may dismiss a  
6 claim as frivolous if it is based on an indisputably meritless  
7 legal theory or if the factual contentions are clearly baseless.  
8 Id.

9 The test for malice is a subjective one that requires the  
10 Court to determine whether the applicant is proceeding in good  
11 faith. Kinney v. Plymouth Rock Squab. Co., 236 U.S. 43, 46  
12 (1915); see Wright v. Newsome, 795 F.2d 964, 968 n. 1 (11<sup>th</sup> Cir.  
13 1986). A lack of good faith is most commonly found in repetitive  
14 suits filed by plaintiffs who have used the advantage of cost-  
15 free filing to file a multiplicity of suits. A complaint may be  
16 inferred to be malicious if it suggests an intent to vex the  
17 defendants or abuse the judicial process by relitigating claims  
18 decided in prior cases, Crisafi v. Holland, 655 F.2d 1305, 1309  
19 (D.C.Cir. 1981); if it threatens violence or contains  
20 disrespectful references to the Court, id.; or if it contains  
21 untrue material allegations of fact or false statements made with  
22 knowledge and an intent to deceive the Court, Horsev v. Asher,  
23 741 F.2d 209, 212 (8<sup>th</sup> Cir. 1984).

#### 24 B. Plaintiff's Complaint

25 Plaintiff complains that for over a year, Children's  
26 Protective Services poorly represented the parental rights of  
27 unnamed parents, refused to adhere to a judge's request for  
28 mental health treatment during court proceedings, and failed to

1 refer a client to sober living treatment when an unnamed client  
2 did meet qualifications therefor. Plaintiff also seeks to hold  
3 liable a foster family, and Plaintiff complains of a questionable  
4 incident in which an unidentified child was injured in the care  
5 of a foster family, causing bruising. (Cmplt. p. 2.)

6 C. Civil Rights Claims

7 The Civil Rights Act under which this action appears to have  
8 been filed provides:

9 Every person who, under color of [state law]...  
10 subjects, or causes to be subjected, any citizen of the  
11 United States... to the deprivation of any rights,  
12 privileges, or immunities secured by the  
13 Constitution... shall be liable to the party injured in  
14 an action at law, suit in equity, or other proper  
15 proceeding for redress.

16 42 U.S.C. § 1983. To state a claim pursuant to § 1983, a  
17 plaintiff must plead that defendants acted under color of state  
18 law at the time the act complained of was committed and that the  
19 defendants deprived the plaintiff of rights, privileges, or  
20 immunities secured by the Constitution or laws of the United  
21 States. Gibson v. United States, 781 F.2d 1334, 1338 (9<sup>th</sup> Cir.  
22 1986). The statute plainly requires that there be an actual  
23 connection or link between the actions of the defendants and the  
24 deprivation alleged to have been suffered by plaintiff. See  
25 Monell v. Department of Social Services, 436 U.S. 658, (1978);  
26 Rizzo v. Goode, 423 U.S. 362 (1976). The Ninth Circuit has held  
27 that "[a] person 'subjects' another to the deprivation of a  
28 constitutional right, within the meaning of section 1983, if he  
does an affirmative act, participates in another's affirmative  
acts or omits to perform an act which he is legally required to  
do that causes the deprivation of which complaint is made."

1 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

2 Here, Plaintiff's allegations are very general, but it  
3 appears he seeks to hold liable agents or employees of a child  
4 protective services agency, including an agency crisis management  
5 supervisor as well as a number of named employees who are not  
6 expressly linked to any specific conduct.

7 1. Uncertainty because of an Absence of Linkage

8 Plaintiff's failure to link any specific Defendant with  
9 specific conduct renders Plaintiff's complaint uncertain.

10 2. Quasi-Judicial Immunity

11 Another fundamental defect is that it appears that at least  
12 some of the Defendants whom Plaintiff seeks to sue are immune  
13 from suit.

14 It is established that child services workers with  
15 responsibility for initiating dependency proceedings are social  
16 workers who are entitled to absolute immunity in performing  
17 quasi-prosecutorial functions connected with the initiation and  
18 pursuit of child dependency proceedings. Meyers v. Contra Costa  
19 County Dept. of Social Services, 812 F.2d 1154, 1157 (9<sup>th</sup> Cir.  
20 1987). Further, counselors of a family conciliation court whose  
21 duties were to mediate custody and visitation disputes,  
22 investigate matters pertaining to such disputes, and provide  
23 reports to the courts were held entitled to quasi-judicial  
24 immunity for their actions within the scope of their duties  
25 concerning a pending case to which they were assigned because  
26 they were performing a judicial function at the direction of a  
27 court. Id. at 1159. Mabe v. San Bernardino County, Dept. of  
28 Public Social Services, 237 F.3d 1101, (9<sup>th</sup> Cir. 2001); see also

1 Doe v. Lebbos, 348 F.3d 820, 825-26 (9<sup>th</sup> Cir. 2003); Beltran v.  
2 Santa Clara County, 491 F.3d 1097, 1100-03 (9<sup>th</sup> Cir. 2007);  
3 Santos v. County of Los Angeles Department of Children and Family  
4 Services, 299 F.Supp.2d 1070, 1079 (C.D.Cal. 2004) (holding that  
5 social workers were entitled to absolute quasi-judicial immunity  
6 from a suit by a child's aunt for the social workers' role in  
7 initiating and pursuing the adoption of a child by the child's  
8 grandparents because the functions were critical to the judicial  
9 process itself such as initiation and pursuit of dependency  
10 proceedings).

11 Here, some of the functions complained of include  
12 representation of parental rights, which appears to constitute a  
13 function of advocacy or investigation and pursuit of dependency,  
14 and thus would be subject to absolute immunity. Miller v. Gammie,  
15 335 F.3d 889, 896-97 (9<sup>th</sup> Cir. 2003). Plaintiff's claims in this  
16 regard are subject to dismissal.

17 Further, it is not clear, but it is possible that any  
18 conduct concerning mental health treatment or reference to sober  
19 living treatment was integrally related to the judicial function  
20 and involved the type of judgment for which there is quasi-  
21 judicial immunity. However, given the generality of Plaintiff's  
22 complaints and the lack of detail as to the identity of actors,  
23 their specific conduct, and the factual context, it cannot be  
24 determined.

### 25 3. Federally Protected Right

26 It is established that in order for a plaintiff who proceeds  
27 pursuant to § 1983 to prove that he was deprived of a right  
28 within the coverage of the statute, it must be shown that the

1 injury suffered infringed a right guaranteed by federal law or  
2 the federal Constitution. Baker v. McCollan, 443 U.S. 137, 142  
3 (1979); Shah v. County of Los Angeles, 797 F.2d 743, 746 (9<sup>th</sup>  
4 Cir. 1986).

5 The other conduct referred to by Plaintiff was the refusal  
6 of the agency to adhere to a judge's request during court  
7 proceedings with respect to mental health treatment, and an  
8 unspecified agency crisis management supervisor's refusal to  
9 refer an unnamed client to sober living treatment. No facts are  
10 alleged that would warrant an inference that either type of  
11 treatment is protected by the Constitution or federal law.

12 Likewise, it does not appear that a child's being scratched  
13 or bruised in the care of a foster family, without more factual  
14 context, bears upon a right protected by federal, as distinct  
15 from state, law.<sup>1</sup>

#### 16 4. Respondent Superior Liability

17 Plaintiff refers to a supervisor, and Plaintiff also  
18 purports to sue Fresno County's Children's Protective Services.

19 It is established that in order for a person acting under  
20 color of state law to be liable under § 1983, the person must be  
21 shown to have personally participated in the alleged deprivation  
22 of rights; there is no respondeat superior liability. Bell v.  
23 Clackamas County, 341 F.3d 858, 867 (9<sup>th</sup> Cir. 2003). However, a  
24 supervisor may be held liable for the constitutional violations  
25 of subordinates if the supervisor participated in, or directed,  
26 \_\_\_\_\_

27 <sup>1</sup>The Court at this juncture is screening the complaint for the presence  
28 of a federal claim or a basis for jurisdiction in this Court; the court does  
not address any state claims that would be subject to supplemental  
jurisdiction should a federal claim be stated.

1 the violations, or knew of the violations and failed to act to  
2 prevent them. Hydrick v. Hunter, 500 F.3d 978, 988 (9<sup>th</sup> Cir.  
3 2007).

4 Here, there are no specific factual allegations concerning  
5 any conduct or knowledge of a supervisor with respect to any  
6 specific date, time, or place. Plaintiff has failed to state a  
7 basis for liability on the part of any supervisor.

8 Further, although a county or division thereof might be a  
9 person to whom § 1983 applies, local governmental units may not  
10 be held responsible financially for the acts of their employees  
11 under a respondeat superior theory of liability. A county may be  
12 financially liable for its own actions in the nature of policy or  
13 customs where an official policy or custom results in a  
14 deprivation of federally protected rights. Thompson v. City of  
15 Los Angeles, 885 F.2d 1439, 1443 (9<sup>th</sup> Cir. 1989); Bd. of County  
16 Commissioners v. Brown, 520 U.S. 397, 403 (1997). However, the  
17 requirement of a policy or custom does not apply to suits for  
18 prospective declaratory or injunctive relief. Los Angeles Police  
19 Protective League v. Gates, 995 F.2d 1469, 1472 (9<sup>th</sup> Cir. 1993);  
20 Chaloux v. Killeen, 886 F.2d 247, 251 (9<sup>th</sup> Cir. 1989).

21 Here, Plaintiff does not state any facts upon which  
22 liability of the county or its division may be based. Further,  
23 Plaintiff has not specified the relief he seeks, so the legal  
24 effect of this defect on Plaintiff's claim or claims cannot be  
25 fully assessed.

#### 26 D. Subject Matter Jurisdiction

27 Federal courts are courts of limited jurisdiction; this  
28 Court has a duty to determine its own subject matter

1 jurisdiction, and lack of subject matter jurisdiction can be  
2 raised on the Court's own motion at any time. Fed. R. Civ. P.  
3 12(h)(3); CSIBI v. Fustos, 670 F.2d 134, 136 n. 3 (9<sup>th</sup> Cir. 1982)  
4 (citing City of Kenosha v. Bruno, 412 U.S. 507, 511-512 (1973)).  
5 A federal court is under a continuing duty to dismiss an action  
6 where it appears that the court lacks jurisdiction. Billingsley  
7 v. C.I.R., 868 F.2d 1081, 1085 (9<sup>th</sup> Cir. 1989). It is Plaintiff's  
8 burden to allege a short and plain statement of the grounds upon  
9 which the Court's jurisdiction depends unless the Court already  
10 has jurisdiction and the claim needs no new grounds of  
11 jurisdiction to support it. Fed. R. Civ. P. 8(a)(1); McNutt v.  
12 Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936).

13 Local Rule 8-204 provides:

14       When an affirmative allegation of jurisdiction is  
15       required pursuant to Fed. R. Civ. P. 8(a)(1), it  
16       (i) shall appear as the first allegation of any  
17       complaint, petition, counterclaim, cross-claim or  
18       third party claim; (ii) shall be styled "Jurisdiction,"  
19       (iii) shall state the claimed statutory or other  
20       basis of federal jurisdiction, and (iv) shall state  
21       the facts supporting such jurisdictional claim.

19       Plaintiff complains of an injury to an unidentified child  
20 who was in the care of a foster family. In addition to the lack  
21 of identity of the parties or specification of the conduct in  
22 question, these allegations appear to constitute conduct subject  
23 to being redressed pursuant to state law. Plaintiff does not  
24 identify any federal statute under which the claim arose, the  
25 federal right in question, or otherwise state facts that would  
26 indicate that the Court has jurisdiction because the action  
27 arises "under the Constitution, laws, or treaties of the United  
28 States" pursuant to 28 U.S.C. § 1331.

1 Further, Plaintiff, whose California address is stated on  
2 his complaint, does not include any allegations regarding the  
3 citizenship of Defendant or of Plaintiff or other facts that  
4 could result in jurisdiction based on diversity of citizenship  
5 pursuant to 28 U.S.C. § 1332.

6 Accordingly, in this respect Plaintiff's complaint does not  
7 contain a short and plain statement of the grounds upon which  
8 jurisdiction depends.

9 E. Younger Abstention from Exercise of Jurisdiction

10 It is not clear whether or not dependency proceedings remain  
11 pending in the state court. However, due to recency of actions  
12 occurring in that proceeding that are described in the complaint,  
13 it is possible and even likely that the proceeding was ongoing at  
14 the time the action was filed here and/or now continues to be  
15 maintained in the state courts.

16 The Younger abstention doctrine is a common law equitable  
17 doctrine articulated in Younger v. Harris, 401 U.S. 37, 49-53  
18 (1971), holding that absent extraordinary circumstances, federal  
19 courts will and generally should refrain from interfering with a  
20 pending state court proceeding. Poulos v. Caesars World, Inc.,  
21 379 F.3d 654, 669 n.4 (9<sup>th</sup> Cir. 2004). Younger abstention is  
22 required if 1) state proceedings are ongoing, 2) the proceedings  
23 implicate important state interests, and 3) the state proceedings  
24 provide an adequate opportunity to raise federal questions.  
25 Wiener v. County of San Diego, 23 F.3d 263, 266 (9<sup>th</sup> Cir. 1994).  
26 Under such circumstances, the correct remedy is to dismiss the  
27 action. Wiener, 23 F.3d at 266. It has been held that issues of  
28 child custody and family relations are important state interests;

1 federal courts have no general jurisdiction in the field of  
2 domestic relations, and the state courts have a special expertise  
3 and experience. H.C. ex rel. Gordon v. Koppel, 203 F.3d 610, 613  
4 (9<sup>th</sup> Cir. 2000).

5 If the state court proceeding is ongoing, then the Court  
6 finds that abstention would be appropriate, and it will  
7 ultimately recommend that the Court abstain from exercising  
8 jurisdiction over the portion of Plaintiff's action relating to  
9 any ongoing state proceedings.

### 10 III. Amendment of the Complaint

11 In summary, Plaintiff has failed to state a claim against  
12 any defendant upon which relief may be granted, and Plaintiff has  
13 failed to state facts demonstrating subject matter jurisdiction  
14 in this Court. Further, it is possible that state proceedings are  
15 ongoing and that in any event, the Court would abstain from  
16 exercising its jurisdiction with respect to the portions of any  
17 claims stated here that involve ongoing state proceedings. The  
18 Court finds it necessary to dismiss the complaint in its  
19 entirety.

20 However, it is possible that Plaintiff can allege a set of  
21 facts, consistent with the allegations, in support of the claim  
22 or claims that would entitle him to relief. Thus, the Court will  
23 grant Plaintiff an opportunity to amend the complaint to cure the  
24 deficiencies of this complaint. Failure to cure the deficiencies  
25 will result in dismissal of this action without leave to amend.

26 A complaint must contain a short and plain statement as  
27 required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules  
28 adopt a flexible pleading policy, a complaint must give fair

1 notice and state the elements of the claim plainly and  
2 succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649  
3 (9th Cir. 1984). Plaintiff must allege with at least some degree  
4 of particularity overt acts which the defendants engaged in that  
5 support Plaintiff's claim. Id.

6 An amended complaint supercedes the original complaint,  
7 Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997);  
8 King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and must be  
9 "complete in itself without reference to the prior or superceded  
10 pleading," Local Rule 15-220. Plaintiff is warned that "[a]ll  
11 causes of action alleged in an original complaint which are not  
12 alleged in an amended complaint are waived." King, 814 F.2d at  
13 567 (citing to London v. Coopers & Lybrand, 644 F.2d 811, 814  
14 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

15 IV. Disposition

16 Accordingly, it IS ORDERED that:

17 1) Plaintiff's application to proceed in forma pauperis IS  
18 GRANTED; and

19 2) Plaintiff's complaint IS DISMISSED with leave to amend;  
20 and

21 3) Plaintiff IS GRANTED thirty days from the date of service  
22 of this order to file an amended complaint that complies with the  
23 requirements of the pertinent substantive law, the Federal Rules  
24 of Civil Procedure, and the Local Rules of Practice; the amended  
25 complaint must bear the docket number assigned this case and must  
26 be labeled "First Amended Complaint"; and

27 4) Plaintiff IS INFORMED that the failure to file an amended  
28 complaint in accordance with this order will be considered to be

1 a failure to comply with an order of the Court pursuant to Local  
2 Rule 11-110 and will result in dismissal of this action. Further,  
3 failure to file an amended complaint that states a claim upon  
4 which relief may be granted will be considered to be grounds for  
5 dismissing the complaint pursuant to 28 U.S.C. § 1915(e)(2) and  
6 will result in dismissal of the action.

7

8 IT IS SO ORDERED.

9 **Dated:** April 10, 2009

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE

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